

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/1. INTRODUCTION/(1) IN GENERAL/1. General meaning of 'company'.

COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS

1. INTRODUCTION

(1) IN GENERAL

1. General meaning of 'company'.

The general sense of the word 'company' denotes an association of individuals formed together for some common purpose¹. The word is defined for the strict purposes of the Companies Act 2006 to mean a company that has been formed and registered under the Act (and, accordingly, is governed by its provisions)², although it may include companies formed and registered under earlier enactments³.

Company law has developed in such a way that it recognises an incorporated company to be an entity with a personality that is distinct from the members (or, where the company has a share capital, the shareholders) who collectively constitute the company⁴.

There are many other bodies corporate⁵ which, although they may largely or partially engage in trading or comparable activities, are not commonly described as companies. These fall broadly into two categories:

- 1 (1) those incorporated pursuant to some general Act of Parliament permitting incorporation to be effected by any body of persons which fulfils specified conditions: of these the chief examples are building societies⁶ and industrial and provident societies⁷; and
- 2 (2) those known as public corporations: these are created to fulfil in each case some special social or economic purpose, and are created either by royal charter⁸ or, more commonly, by statute⁹ which defines the objects, constitution and powers of the corporation: examples include the British Broadcasting Corporation¹⁰; the Office of Communications (OFCOM)¹¹; Transport for London¹²; the Coal Authority¹³; the Independent Police Complaints Commission¹⁴; and the Office of Rail Regulation¹⁵.

1 For present needs, there is an implication in the word 'company' that the purpose for which the individuals have joined together is of a more or less permanent character. Companies, particularly those formed under the Companies Acts, typically provide for investment in trade with a view to generating profits in order to benefit their proprietors: see eg *Re a Company (No 00709 of 1992)*, *O'Neill v Phillips* [1999] 2 All ER 961 at 966, [1999] 1 WLR 1092 at 1098, HL, per Lord Hoffmann ('a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality'). Contrast with the legal definition of a club as a society of persons associated together, not for the principal purposes of trade, but for social reasons, the promotion of politics, sport, art, science or literature, or for any other lawful purpose: see **CLUBS** vol 13 (2009) PARA 201.

In a legal context, it has been said that the word 'company', while having no strictly technical meaning, involves two ideas, namely: (1) that the members of the association are so numerous that it cannot aptly be described as a firm or partnership; and (2) that a member may transfer his interest in the association without the consent of all the other members: *Re Stanley, Tennant v Stanley* [1906] 1 Ch 131 at 134 per Buckley J. As to the meanings of 'firm' and 'partnership' see **PARTNERSHIP** vol 79 (2008) PARA 1; and see *Smith v Anderson* (1880) 15

ChD 247 at 273, CA, per James LJ (discussing ordinary partnerships). However, in contrast to what is stated in head (1) above, a company formed and registered under the Companies Act 2006 may legally consist of only one person (see s 7; and PARA 102); and, in contrast to what is stated in head (2) above, the typical modern form of company is a private company limited by shares where restrictions on the transfer of the member's shares in the company are commonplace (see PARA 392 et seq). Note also that, while companies limited by shares typically are formed for the purposes of trade and profit, many companies limited by guarantee operate on a not-for-profit basis and in the community interest. Community interest companies (which are governed by the provisions of the Companies Acts, subject to the Companies (Audit, Investigations and Community Enterprise) Act 2004 Pt 2 (ss 26-63): see the Companies Act 2006 s 6; and PARA 82) also constitute a form of registered corporate vehicle whose activities are intended to be carried on for the benefit of the community rather than its members. As to the meaning of the 'Companies Acts' see PARA 16; and as to the meanings of 'company limited by shares', 'company limited by guarantee' and 'private company' see PARA 102. As to Community interest companies see PARA 82 et seq.

There is no definitive authority for what constitutes 'trade'. The balance of authority indicates that 'trade' is a wider term than 'business' (see eg *Re a Debtor (No 3 of 1926)* [1927] 1 Ch 97, [1926] All ER Rep 337, CA; *Re a Debtor (No 490 of 1935)* [1936] Ch 237, CA), although it has been equated with 'business' (see *Grainger & Son v Gough* [1896] AC 325 at 343, HL, per Lord Morris). 'Business' is an occupation or duty which requires attention (*Rolls v Miller* (1884) 27 ChD 71 at 88, CA, per Lindley LJ) whether or not this involves economic activity or any profit or gain (*Rael-Brook Ltd v Minister of Housing and Local Government* [1967] 2 QB 65, [1967] 1 All ER 262). 'Gain' is not limited to pecuniary gain or confined to commercial profits only; and a company is formed for the acquisition of gain if it is formed to acquire something, as distinguished from a company formed for spending something: *Re Arthur Average Association for British, Foreign and Colonial Ships, ex p Hargrove & Co* (28 April 1875, unreported) per Jessel MR, cited in *Re Arthur Average Association for British, Foreign and Colonial Ships, ex p Hargrove & Co* (1875) 10 Ch App 542 at 546n, 547n. Business is 'carried on' only where there is a joint relation of persons for the common purpose of performing jointly a succession of acts, and not where the relation exists for a purpose which is to be completed by the performance of one act: *Smith v Anderson* (1880) 15 ChD 247, CA (overruling *Sykes v Beadon* (1879) 11 ChD 170); *Dominion Iron and Steel Co Ltd v Invernairn* [1927] WN 277. See also *IRC v Marine Steam Turbine Co Ltd* [1920] 1 KB 193, 12 TC 174 ('carrying on' business is not merely a question of whether there is business involved in what people are doing; the word 'business' means an active occupation or profession continually carried on). Business can be carried on where a company is still continuing to solicit for a particular type of work and retains the capacity to resume work of that kind were it given the opportunity so to do, even though that type of work is not presently being carried out: *Pamment v Sutton* (1998) Times, 15 December.

A single individual may, if he wishes, carry on business under the style of 'Such and such Company', but he does not thereby become a 'company'. The use of other stylings, which include the forms 'plc' or 'limited' as the last word, is prohibited unless certain conditions are met: see PARA 225. As to structures that might be used as an alternative to the registered company for the conduct of business see PARA 4.

2 As to the meaning of 'company' for the purposes of the Companies Acts see PARA 24. As to companies formed and registered under the Companies Act 2006, and the different forms that a company may take, see PARA 72 et seq. It is possible for a company, whether registered under the Companies Acts or not, to be illegally formed, in which case its existence is not recognised in law: see PARA 106 et seq.

3 The long title of the Companies Act 2006 states that it is an 'Act to reform company law and restate the greater part of the enactments relating to companies'. It is the successor to various earlier statutes which from time to time made general provision for companies to be established with a legal status and personality of their own ('incorporation') by means of registration with the registrar of companies: see PARAS 10-13. As to the meaning of 'registrar of companies' see PARA 131 note 2. Increasingly, incorporation by registration replaced the previous practice which had required the obtaining of a special Act of Parliament or a royal charter (see head (2) in the text): see PARA 10 note 1. As to the development of companies legislation leading up to the Companies Act 1985, and the review of company law which led to the Companies Act 2006 as enacted, see PARAS 14-16.

4 See PARAS 2, 121. The directors owe any fiduciary duties to the company, not to its members (whether treated as individuals or as a class or as a body): see PARA 532 et seq. Statute also imposes a duty on directors to have regard to the interests of the company's employees: see PARA 544.

5 For the purposes of the Companies Acts, 'body corporate' and 'corporation' include a body incorporated outside the United Kingdom, but do not include a corporation sole, or a partnership that, whether or not a legal person, is not regarded as a body corporate under the law by which it is governed: Companies Act 2006 s 1173(1). As to corporations sole see **CORPORATIONS** vol 9(2) (2006 Reissue) PARAS 1111, 1112. As to the legal personality of a partnership or firm generally see **PARTNERSHIP** vol 79 (2008) PARA 2. As to companies and corporations see further PARA 2.

In any Act, unless the contrary intention appears, 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. Neither the Isle of Man nor the Channel Islands are within the United Kingdom: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 3. 'Great Britain' means England,

Scotland and Wales: Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). 'England' means, subject to any alteration of the boundaries of local government areas, the areas consisting of the counties established by the Local Government Act 1972 s 1 (see **LOCAL GOVERNMENT** vol 69 (2009) PARAS 5, 24), and Greater London and the Isles of Scilly: see the Interpretation Act 1978 s 5, Sch 1. As to local government areas in England see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq; and as to boundary changes see **LOCAL GOVERNMENT** vol 69 (2009) PARA 54 et seq. As to Greater London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 29. 'Wales' means the combined areas of the counties created by the Local Government Act 1972 s 20 (as originally enacted) (see **LOCAL GOVERNMENT** vol 69 (2009) PARAS 5, 37), but subject to any alteration made under s 73 (consequential alteration of boundary following alteration of watercourse: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 90): see the Interpretation Act 1978 Sch 1 (definition substituted by the Local Government (Wales) Act 1994 s 1(3), Sch 2 para 9). See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 3, 41.

6 As to the general nature of building societies see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1856.

7 As to the nature of industrial and provident societies see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2394. Such societies are normally described as 'limited': see the Industrial and Provident Societies Act 1965 s 5(2); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2439.

8 Companies created by royal charter fall within the provisions of the Companies Act 2006 that apply to 'unregistered companies': see s 1043; and PARA 1165. See also PARA 3.

9 When a corporation has been incorporated by an Act of Parliament, the Act becomes the charter of the corporation, declaring its rights and powers and prescribing its duties and obligations: see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1145. Incorporation by special Act of Parliament was formerly much used, particularly where the company was intended to provide services of a quasi-public nature. (Most such corporations were dissolved in consequence of the nationalisation of their undertakings, eg by the Transport Act 1947 in the case of railway and canal companies, although some still survive). This method of incorporation is now rare: see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1143 et seq; and see PARA 2 note 9. Companies created by special Act of Parliament are regulated by the Companies Clauses Acts (see PARAS 1667-1823) rather than by the Companies Acts.

10 The British Broadcasting Corporation is a body incorporated by royal charter: see **TELECOMMUNICATIONS AND BROADCASTING** vol 45(1) (2005 Reissue) PARA 306.

11 See the Office of Communications Act 2002 s 1; and **TELECOMMUNICATIONS** vol 97 (2010) PARA 2.

12 See the Greater London Authority Act 1999 s 154; and **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 269 et seq.

13 See the Coal Industry Act 1994 s 1, Sch 1; and **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 52 et seq.

14 See the Police Reform Act 2002 s 9; and **POLICE** vol 36(1) (2007 Reissue) PARA 316 et seq.

15 See the Railways and Transport Safety Act 2003 s 15(1); and **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 47 et seq.

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2. Companies and corporations.

A company may be either incorporated (that is, a body corporate with perpetual succession¹) or unincorporated². An incorporated company is recognised by the law as having a personality which is distinct from the separate personalities of the members of the company in question³. An unincorporated company has no such separate existence and it is not in law an entity distinguishable from its members⁴.

Corporations may be classified according to their method of creation or by their nature and purpose⁵. By number, most corporations are formed for the purpose of securing a profit for their members, either by trading or by the holding of investments or other property, and are incorporated under the Companies Acts or one of the other statutes authorising the creation of corporate status by registration⁶. Although there are still a few privately owned trading corporations incorporated by royal charter⁷, and a number of such corporations incorporated by special Act of Parliament⁸, corporations formed for the profit of their members are no longer formed by these methods⁹. Corporations formed for public purposes are usually incorporated by public general Act of Parliament¹⁰. Incorporation by royal charter is now in practice limited to institutions such as universities and the principal scientific, cultural, professional or charitable organisations. Other organisations of these kinds are incorporated under the Companies Acts if they desire to have corporate status.

1 As to the meaning of 'body corporate' under the Companies Acts see PARA 1 note 5; and as to the meaning of the 'Companies Acts' see PARA 16. As to the creation of corporations generally see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1128 et seq.

2 *Re St James' Club* (1852) 2 De GM & G 383 at 389; *Re Griffith, Carr v Griffith* (1879) 12 ChD 655. However, see PARA 3.

3 See the Companies Act 2006 s 16(2), (3); and PARA 120.

4 A company which is neither a corporation nor a partnership is a thing unknown to the common law: see *Macintyre v Connell* (1851) 1 Sim NS 225 at 233. As to unincorporated companies see PARA 3.

5 See **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1101 et seq.

6 See PARA 1; and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1143.

7 See PARA 1; and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1130.

8 See PARA 1 note 9.

9 A private Act of Parliament may sometimes be obtained to facilitate the merger of existing corporations by constituting one corporation the 'universal successor' (ie successor to the liabilities as well as the assets) of one or more other corporations: see eg the National Westminster Bank Act 1969, passed in connection with the merger of the National Provincial Bank Ltd and the Westminster Bank Ltd into the National Westminster Bank Ltd (which had itself been incorporated under the Companies Act 1948).

10 See PARA 1. In a few cases corporations having public functions of a local nature may be incorporated by local Act of Parliament: see eg the Chichester Harbour Conservancy, incorporated by the Chichester Harbour Conservancy Act 1971.

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3. Unincorporated companies and companies formed by royal charter.

Despite having origins which predate all the Companies Acts legislation, unincorporated companies and companies formed by royal charter remain as lawful company associations.

Notwithstanding the repeal of the Chartered Companies Act 1837 and the Chartered Companies Act 1884¹, the power of Her Majesty to grant a charter of incorporation of limited duration or to extend or renew such a charter or privileges of such a charter is not affected².

However, few, if any, unincorporated companies that were in existence before 2 November 1862³ now remain⁴.

1 le the Chartered Companies Act 1837 and the Chartered Companies Act 1884 (both repealed by the Statute Law (Repeals) Act 1993 s 1(1), Sch 1 Pt V).

2 See the Statute Law (Repeals) Act 1993 s 1(2), Sch 2 para 11.

3 le the date when the Companies Act 1862 (see PARA 10) came into full operation: see s 2 (repealed).

4 Unincorporated companies were usually formed under deeds of settlement setting out the company's objects and constitution. The question sometimes arose as to whether such companies had power to transfer the whole of their undertaking to new companies: see *Re Era Assurance Co, Williams' Case, Anchor Case* (1860) 30 LJ Ch 137; *Kearns v Leaf* (1864) 1 Hem & M 681; *Doman's Case* (1876) 3 ChD 21, CA; *Re Argus Life Assurance Co* (1888) 39 ChD 571.

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4. Alternative structures to the registered company.

The structure of a company registered under the Companies Acts¹ may not be appropriate for the conduct of a particular business². Alternative structures for a business include:

- 3 (1) a sole trader³;
- 4 (2) a firm or partnership⁴;
- 5 (3) a limited partnership⁵; and
- 6 (4) a limited liability partnership⁶.

One significant difference between a partnership and a company is that, in general, apart from the exceptions listed under heads (3) and (4) above, a partnership does not confer limited liability on the partners⁷.

1 As to the meaning of the 'Companies Acts' see PARA 16. As to companies formed and registered under the Companies Acts see PARA 102 et seq.

2 As to the legal effect on a company of incorporation under the Companies Acts see PARA 120.

3 le an individual who is carrying on business and is not in partnership with any other person. As to the meaning of 'carry on business' generally see PARA 1 note 1. The stated policy objectives for the review of company law that led to the passing of the Companies Act 2006 included making the administrative burden for small private companies, which constituted the bulk of the number of companies formed and registered in the United Kingdom, lighter and more appropriate to their needs (the 'Think Small First' approach): see HM Government's White Paper *Modernising Company Law* (Cm 5553) (2002); and White Paper *Company Law Reform* (Cm 6456) (2005). Accordingly, the requirement for private companies to have a company secretary is abolished (see the Companies Act 2006 s 270; and PARA 601) and private companies may take decisions by means of written resolution, the need for Annual General Meetings (AGMs) having become optional (see s 288; and PARA 623). The Companies Act 2006 also provides for a single person to form a public company: see s 7; and PARA 102. As to the meanings of 'public company' and 'private company' see PARA 102.

4 As to the meanings of 'firm' and 'partnership' see **PARTNERSHIP** vol 79 (2008) PARA 1; and as to the legal personality of a partnership or firm generally see **PARTNERSHIP** vol 79 (2008) PARA 2.

5 le a partnership formed under the Limited Partnerships Act 1907 which allows a limited partner's liability to the creditors of the firm to be strictly limited: see **PARTNERSHIP** vol 79 (2008) PARA 218 et seq. See also the Legislative Reform (Limited Partnerships) Order 2009, SI 2009/1940, which clarifies some uncertainties about the application of the Limited Partnerships Act 1907, principally regarding the process for registration of limited partnerships by the registrar of companies.

6 le a body corporate, with legal personality separate from that of its members, which is governed primarily by the Limited Liability Partnerships Act 2000, the Limited Liability Partnerships Regulations 2001, SI 2001/1090, and the Limited Liability Partnerships (No 2) Regulations 2002, SI 2002/913: see **PARTNERSHIP** vol 79 (2008) PARA 234 et seq. As to the application of certain company law provisions to limited liability partnerships see PARA 30.

7 See **PARTNERSHIP** vol 79 (2008) PARA 3.

UPDATE

4 Alternative structures to the registered company

NOTE 6--SI 2002/913 revoked: SI 2009/1804.

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5. European companies.

A small, but increasing, number of EC regulations provides for new forms of trading entity to be formed whose legal personality is recognised by all member states¹. For the purposes of making further provision in relation to these EC regulations, Parliament makes secondary legislation, some of whose provisions typically apply relevant sections of the Companies Acts² to these structures, notably in relation to their formation and registration, but also in relation to other subjects for which provision is required under the parent EC regulation³. The following structures have been provided for under EC Regulations:

- 7 (1) European Economic Interest Grouping⁴;
- 8 (2) European Company (*Societas Europaea*)⁵;

and a proposal for a regulation on the Statute for a European Private Company (*Societas Privata Europaea*) has been made⁶.

1 As to EC regulations that have relevance to company law generally see PARA 22.

2 As to the meaning of the 'Companies Acts' see PARA 16.

3 Subjects such as accounts or employee participation are sometimes specifically provided for in the parent EC regulation. As to formation and registration under the Companies Acts see PARA 102 et seq.

4 See EC Council Regulation 2137/85 of 25 July 1985 (OJ L199, 31.07.1985, p 1) on the European Economic Interest Grouping (EEIG); and PARA 1631. The EEIG provides a vehicle for smaller commercial undertakings to cooperate with others from different member states in the European Union, and to provide common support activities for members with unlimited liability, by pooling resources or skills to the benefit of the group, and by allowing for the development of academic or technical advancements that would not have been achievable by individual concerns acting alone. For the purposes of making further provision in relation to this regulation, the European Economic Interest Grouping Regulations 1989, SI 1989/638, and the Registrar of Companies (Fees) (European Economic Interest Grouping and European Public Limited-Liability Company) Regulations 2009, SI 2009/2403, have been made: see PARA 1632. From the date of registration of an EEIG in the United Kingdom, an EEIG is a body corporate: see the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 3; and PARA 1632. As to the meaning of 'United Kingdom' see PARA 1 note 5.

5 See EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) on the Statute for a European Company; and PARA 1633 et seq. See also EC Council Directive 2001/86 (OJ L294, 10.11.2001, p 22) supplementing the Statute for a European Company with regard to the involvement of employees. For the purposes of

implementing the Directive, and for making further provision in relation to the Regulation, the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009, SI 2009/2401, and the Registrar of Companies (Fees) (European Economic Interest Grouping and European Public Limited-Liability Company) Regulations 2009, SI 2009/2403, have been made: see PARAS 1637, 1639. A European Company is a form of public limited-liability company and it has legal personality: see EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 1; and PARA 1633.

6 The European Private Company Statute (*Societas Privata Europaea*) is intended to provide for a limited liability private company with its own legal personality. Currently, the European Private Company Statute exists as a proposal only (see *Proposal for a Council Regulation on the Statute for a European private company* (Brussels, COM(2008) 396/3)) but with a target implementation date of mid-2010.

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(2) SECRETARY OF STATE

6. The Secretary of State.

In any enactment, 'Secretary of State' means one of Her Majesty's principal Secretaries of State¹. The office of Secretary of State is a unified office, and in law each Secretary of State is capable of performing the functions of all or any of them².

For the purposes of the Companies Acts³, the powers of the Secretary of State are exercised in practice by the Secretary of State for Business, Innovation and Skills⁴. However, provision is made for certain statutory functions of the Secretary of State to be contracted out or formally delegated and this power has been exercised by the Secretary of State in relation to certain of his powers under the Companies Acts⁵.

Except as otherwise provided, or the context otherwise requires, the provisions of the Companies Act 2006 extend to the whole of the United Kingdom⁶.

1 See the Interpretation Act 1978 s 5, Sch 1.

2 See **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355.

3 As to the meaning of the 'Companies Acts' see PARA 16.

4 The Secretary of State for Business, Innovation and Skills Order 2009, SI 2009/2748, came into force on 13 November 2009 (see art 1); and provided for the functions of the Secretary of State for Business, Enterprise and Regulatory Reform, and for the functions of the Secretary of State for Innovation, Universities and Skills, to be transferred to the Secretary of State for Business, Innovation and Skills (see art 4). As to the corresponding transfers of property, rights and liabilities see art 5; as to the incorporation of the Secretary of State for Business, Innovation and Skills see art 3; and as to other supplemental provision see arts 6, 7. The responsibilities entrusted to the Secretary of State for Business, Innovation and Skills were described in a press notice issued by the Prime Minister's Office on 5 June 2009, which was referred to in the Prime Minister's written statement to Parliament: see 494 HC Official Report (6th series), 18 June 2009, written ministerial statements col 452W.

5 See PARA 7.

6 See the Companies Act 2006 s 1299; and PARA 29.

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7. Functions of the Secretary of State subject to contracting out and delegation.

The numerous functions of the Secretary of State¹ in relation to the formation and supervision of companies are considered elsewhere in this title².

Any function of the Secretary of State which is conferred by or under any enactment and which, by virtue of any enactment or rule of law, may be exercised by an officer of his and which is not otherwise excluded³ may, if the Secretary of State by order so provides, be exercised by, or by employees of, such person (if any) as may be authorised in that behalf by the Secretary of State⁴.

Such an order may provide that any function to which it applies may be exercised, and an authorisation given by virtue of such an order may, subject to the provisions of the order, authorise the exercise of such a function⁵:

- 9 (1) either wholly or to such extent as may be specified in the order or authorisation⁶;
- 10 (2) either generally or in such cases or areas as may be so specified⁷; and
- 11 (3) either unconditionally or subject to the fulfilment of such conditions as may be so specified⁸.

An authorisation given by virtue of such an order:

- 12 (a) must be for such period, not exceeding ten years, as is specified in the authorisation⁹;
- 13 (b) may be revoked at any time by the Secretary of State¹⁰; and
- 14 (c) must not prevent the Secretary of State or any other person from exercising the function to which the authorisation relates¹¹.

Where by virtue of such an order a person is authorised to exercise any function of the Secretary of State¹², anything done or omitted to be done by or in relation to the authorised person (or an employee of his) in, or in connection with, the exercise or purported exercise of the function is to be treated for all purposes as done or omitted to be done¹³ by or in relation to the Secretary of State in his capacity as such¹⁴. However, this provision does not apply¹⁵:

- 15 (i) for the purposes of so much of any contract made between an authorised person and the Secretary of State as relates to the exercise of the function¹⁶; or
- 16 (ii) for the purposes of any criminal proceedings brought in respect of anything done or omitted to be done by the authorised person (or any employee of his)¹⁷.

Where by virtue of such an order a person is authorised to exercise any function of the Secretary of State¹⁸ and the order or authorisation is revoked at a time when a relevant contract¹⁹ is subsisting²⁰, the authorised person is entitled to treat the relevant contract as repudiated by the Secretary of State (and not as frustrated by reason of the revocation)²¹.

1 As to the Secretary of State generally see PARA 6.

2 See PARA 24 et seq.

3 Deregulation and Contracting Out Act 1994 s 69(1). The text refers to any function which is not otherwise excluded from s 69 by s 71: see s 69(1). A function is excluded by s 69 if:

- 1 (1) its exercise would constitute the exercise of jurisdiction of any court or of any tribunal which exercises the judicial power of the state (s 71(1)(a)); or
- 2 (2) its exercise, or a failure to exercise it, would necessarily interfere with or otherwise affect the liberty of any individual (s 71(1)(b)); or
- 3 (3) it is a power or right of entry, search or seizure into or of any property (s 71(1)(c)); or
- 4 (4) it is a power or duty to make subordinate legislation (s 71(1)(d)).

The provisions of s 71(1)(b), (c) (see heads (2), (3) above) do not exclude any function of the official receiver attached to any court: s 71(2). As to the official receiver see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 503 et seq.

4 Deregulation and Contracting Out Act 1994 s 69(2). In exercise of the powers so conferred the Secretary of State has made the Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, art 5, Sch 3: see PARA 8. As to contracting out the functions of the registrar of companies see PARAS 133-134. As to the power to contract out functions of the official receiver see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 505-506.

5 Deregulation and Contracting Out Act 1994 s 69(4).

6 Deregulation and Contracting Out Act 1994 s 69(4)(a).

7 Deregulation and Contracting Out Act 1994 s 69(4)(b).

8 Deregulation and Contracting Out Act 1994 s 69(4)(c).

9 Deregulation and Contracting Out Act 1994 s 69(5)(a).

10 Deregulation and Contracting Out Act 1994 s 69(5)(b).

11 Deregulation and Contracting Out Act 1994 s 69(5)(c).

12 Deregulation and Contracting Out Act 1994 s 72(1).

13 Deregulation and Contracting Out Act 1994 s 72(2).

14 Deregulation and Contracting Out Act 1994 s 72(2)(a).

15 Deregulation and Contracting Out Act 1994 s 72(3).

16 Deregulation and Contracting Out Act 1994 s 72(3)(a).

17 Deregulation and Contracting Out Act 1994 s 72(3)(b).

18 Deregulation and Contracting Out Act 1994 s 73(1)(a).

19 For these purposes, 'relevant contract' means so much of any contract made between the authorised person and the Secretary of State as relates to the exercise of the function: Deregulation and Contracting Out Act 1994 s 73(3).

20 Deregulation and Contracting Out Act 1994 s 73(1)(b).

21 Deregulation and Contracting Out Act 1994 s 73(2).

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8. Contracted out functions of the Secretary of State; delegated functions.

Any function of the Secretary of State¹ which is listed in any of heads (1) to (3) below may be exercised by, or by employees of, such person (if any) as may be authorised in that behalf by the Secretary of State²:

- 17 (1) functions conferred by or under the following provisions of the Companies Acts:
 - 1
 1. (a) those³ relating to the prohibition on registration of certain names except with the approval of the Secretary of State⁴;
 2. (b) those⁵ relating to the extension by the Secretary of State of the period allowed for laying and delivering accounts and reports⁶;
 3. (c) those⁷ relating to the extension of the period for delivering accounts and reports of an overseas company⁸;
 - 2
 - 18 (2) functions conferred⁹ relating to the prohibition of use of certain business names¹⁰;
 - 19 (3) functions as conferred under head (2) above¹¹ but as applied¹² to European Economic Interest Groupings¹³.

In addition, most of the functions of the Secretary of State relating to statutory auditors which have been conferred by or under the Companies Act 2006¹⁴ have been transferred to the Professional Oversight Board established under the articles of association of the Financial Reporting Council Limited¹⁵.

1 As to the Secretary of State generally see PARA 6.

2 See the Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, art 5.

3 I.e the Companies Act 2006 ss 54(1)-(3), 55(1) (formerly the Companies Act 1985 s 26(2)) (see PARA 196): see the Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, art 5, Sch 3 para 1(a); and the Interpretation Act 1978 s 17(2)(b).

4 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 3 para 1(a).

5 I.e the Companies Act 2006 s 442(5) (formerly the Companies Act 1985 s 244(5)) (see PARA 870): see the Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 3 para 1(b); and the Interpretation Act 1978 s 17(2)(b).

6 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 3 para 1(b).

7 I.e the Overseas Companies Regulations 2009, SI 2009/1801, reg 40, made under the Companies Act 2006 s 1049 (see PARA 1830): see the Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 3 para 1(c); and the Interpretation Act 1978 s 17(2)(b).

8 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 3 para 1(c). As to the meaning of 'overseas company' see PARA 1824.

9 I.e by or under the Companies Act 2006 ss 1193, 1194 (formerly the Business Names Act 1985 s 2) (see PARA 224): see the Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 3 para 2; and the Interpretation Act 1978 s 17(2)(b).

10 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 3 para 2.

11 I.e by or under the Companies Act 2006 ss 1193, 1194 (formerly the Business Names Act 1985 s 2) (see PARA 224): see the Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 3 para 3; and the Interpretation Act 1978 s 17(2)(b).

12 le by the European Economic Interest Groupings Regulations 1989, SI 1989/638, reg 17 (revoked): see the Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 3 para 3.

13 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 3 para 3. For these purposes, 'European Economic Interest Grouping' means a European Economic Interest Grouping being a grouping formed in pursuance of EC Council Regulation 2137/85 of 25 July 1985 (OJ L199, 31.07.1985, p 1) art 1 (see PARA 1631); European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 2(1) (definition applied by the Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, art 2(1)).

14 le functions conferred by or under the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARA 957 et seq).

15 See the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, arts 1-10; and PARA 961 et seq.

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(3) THE STATUTORY FRAMEWORK

(i) In general

9. The statutory framework.

The main piece of legislation governing company law currently is the Companies Act 2006¹. Although some statutes were repealed as a consequence of this Act, and although most of the provisions of the predecessor Companies Act 1985 are restated therein, the 2006 Act itself was not considered to be properly a consolidating measure², and provision continues to be made under earlier Acts in relation to certain discrete areas of the law, such as company investigations³, orders imposing restrictions on shares following an investigation⁴, and community interest companies⁵. Other measures which are not considered to fall within the strict purview of company law also continue to be relevant and are discussed in this title, most pertinently those surviving provisions of the Companies Act 1989 which confer powers to require information and documents to assist overseas regulatory authorities⁶, and those provisions of the Companies (Audit Investigations and Community Enterprise) Act 2004 which govern the supervision of accounts and reports⁷ and bodies concerned with professional accounting standards⁸.

Other notable pieces of legislation related to company law which are discussed in this title concern the disqualification of persons from being directors of companies or otherwise concerned with a company's affairs⁹, the criminal offence of insider dealing¹⁰, and insolvency matters¹¹.

Since 1986, there has been a growing body of primary and secondary legislation (supplemented by significant non-statutory rules) governing financial markets and securities regulation¹². These matters had previously been dealt with primarily under companies legislation but they now constitute a separate (albeit still related) area of law, which develops along its own path, with boundaries between the two areas continuing to shift¹³.

1 See PARA 24 et seq. As to legislation that applies when a company is not registered under the Companies Act 2006 see PARA 1. The statutory scheme based upon the Companies Act 2006 relies to a certain extent on HM Government's definition of what is and what is not a 'company law' provision: see PARA 16. Only the Companies Act 2006 Pts 1-39 (ss 1-1181), and Pts 45-47 (ss 1284-1300) so far as they apply for the purposes of Pts 1-39, are 'company law' provisions according to this definition. (See also the definition of the 'Companies Acts' in the

Companies Act 2006 s 2 (cited in PARA 16)). It follows that Pts 40-44 (ss 1182-1283) do not constitute 'company law' provisions in these terms, despite lying within the 2006 Act. Parts 40-44 make provision in the following areas:

- 5 (1) company directors subject to foreign disqualification (see Pt 40 (ss 1182-1191); and PARAS 1617-1621);
- 6 (2) business names (see Pt 41 (ss 1192-1208); and PARAS 223-226);
- 7 (3) statutory auditors (see Pt 42 (ss 1209-1264); and PARA 957 et seq);
- 8 (4) transparency obligations (see Pt 43 (ss 1265-1273); PARA 23; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 415 et seq); and
- 9 (5) miscellaneous matters (see Pt 44 (ss 1274-1283), mostly amending provisions).

Conversely, although the provisions mentioned in the text and notes 3-5 lie outside the Companies Act 2006, they continue to constitute 'company law' provisions under the current statutory scheme. Further to head (1) above, the equivalent domestic provisions are contained in the Company Directors Disqualification Act 1986 (see the text and note 9; and PARA 1578 et seq).

2 The long title of the Companies Act 2006 states that it is an 'Act to reform company law and restate the greater part of the enactments relating to companies'. See also PARA 16.

3 Ie the Companies Act 1985 Pt XIV (ss 431-453D): see PARA 1541 et seq. Although these provisions can apply to bodies other than companies, they are still regarded as company law provisions under the statutory scheme mentioned in note 1. As to the meaning of 'company law provisions' for these purposes see PARA 16 note 6.

4 Ie the Companies Act 1985 Pt XV (ss 454-457): see PARAS 1548-1550. The Companies Act 2006 ss 797-802 impose similar restrictions to those set out in the Companies Act 1985 ss 454-457: see PARAS 446-449.

5 Ie the Companies (Audit Investigations and Community Enterprise) Act 2004 Pt 2 (ss 26-63): see PARA 82 et seq. Note that, although the provisions which govern community interest companies are still regarded as company law provisions under the statutory scheme mentioned in note 1, they are, however, regarded under that scheme as forming a distinct body of regulation which is additional to, and sits alongside, company law rather than forming part of it. The provisions of the Companies Acts, apart from the Companies Act 2006 s 6 (see PARA 82), have effect subject to the Companies (Audit Investigations and Community Enterprise) Act 2004 Pt 2: see the Companies Act 2006 s 6(2); and PARA 82.

6 Ie the Companies Act 1989 Pt III (ss 55-91) (overseas regulation): see PARA 1568 et seq. The provisions contained in Pt VII (ss 154-191) (Financial Markets and Insolvency) also are not regarded as company law provisions under the statutory scheme mentioned in note 1 and have not been repealed by the Companies Act 2006: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 509 et seq.

7 Ie the Companies (Audit Investigations and Community Enterprise) Act 2004 ss 14, 15, which allows for the appointment of a body, the Financial Reporting Review Panel (FRRP), to review the accounts of all listed companies, whether Companies Act companies or otherwise, and to review compliance with the accounting requirements of the Listing Rules (as to which see PARA 697 et seq). These provisions are considered to relate more to financial services law than to company law under the statutory scheme mentioned in note 1. As to the Financial Services Authority's Listing Rules see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385.

8 Ie the Companies (Audit Investigations and Community Enterprise) Act 2004 ss 16, 17: see PARA 699. Because these provisions govern the operation and funding of the Financial Reporting Council (FRC), Accounting Standards Board (ASB), and the Financial Reporting Review Panel (FRRP), rather than the conduct of companies generally, they are not regarded as company law provisions under the statutory scheme mentioned in note 1.

9 Ie the Company Directors Disqualification Act 1986: see PARA 1578 et seq.

10 Ie the Criminal Justice Act 1993 Pt V (ss 52-64): see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

11 Ie matters governed by the Insolvency Act 1986: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 reissue) PARA 1 et seq.

12 The parallel development of financial markets and securities law led to the enactment of the Financial Services Act 1986 (repealed) (see now the Financial Services and Markets Act 2000, especially Pt VI (ss 72-103) (Official Listing); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385 et seq).

13 See PARA 1066 et seq. The provisions about the FRRP (see the text and notes 7-8) are regarded as relating more to financial services law than to company law under the statutory scheme mentioned in note 1 but are discussed in this title: see PARA 697 et seq. Many developments in company law and in financial services and securities regulation have their origin in EC legislative programmes: see PARA 19 et seq.

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(ii) Historical Development of Companies Legislation prior to 1985

10. The Companies Act 1862.

Such of the earlier statutes as were then in force were repealed by the Companies Act 1862¹, but this repeal did not affect the incorporation of any company registered under any Act so repealed².

The Companies Act 1862 governed all companies registered after 2 November 1862³, until 1 April 1909⁴, and its provisions (except Table A) also applied to companies formed and registered, or registered but not formed, under the Joint Stock Companies Acts⁵, or any of them, as if they had been formed and registered under that Act (as companies limited by shares or unlimited as the case might be) with the necessary qualifications as to reference to the date of registration, and as to the power of altering Table B of the Joint Stock Companies Act 1856⁶.

The Companies Act 1862 permitted registration under the Act of every then existing company (including those registered under the Joint Stock Companies Acts) consisting of seven or more members, and any company thereafter formed in pursuance of any Act (except the Companies Act 1862) or letters patent, or being a company working mines within and subject to the stannaries jurisdiction, or being otherwise duly constituted by law, and consisting of seven or more members⁷. The registration might be with unlimited liability, or with liability limited by shares or by guarantee; and the registration might take place with a view to the company being wound up⁸. This enactment was subject to certain exceptions and regulations⁹ practically identical with the exceptions and regulations in regard to the power for existing companies to register under the Companies Act 2006¹⁰.

Restrictions on the formation of new companies, associations or partnerships for the purpose of carrying on business for gain without being registered under the Act were imposed by the Companies Act 1862¹¹. Similar provisions imposed by the Companies Act 1985 have since been repealed¹².

1 Companies Act 1862 s 205, Sch 3 (repealed). The earlier Acts include: (1) An Act to Regulate Joint Stock Companies (1844); (2) An Act to Regulate Joint Stock Banks in England (1844); (3) the Limited Liability Act 1855; (4) the Joint Stock Companies Act 1856; (5) the Joint Stock Companies Act 1857; (6) the Joint Stock Banking Companies Act 1857; (7) the Joint Stock Companies Amendment Act 1858; (8) An Act to enable Joint Stock Banking Companies to be formed on the principle of Limited Liability (1858) (all repealed). The Joint Stock Companies Act of 1844 (see head (1) above) introduced the concept that all new businesses of a certain size were to be set up as companies with a legal status and personality of their own (rather than as conventional partnerships), ie to be 'incorporated', and that incorporation was to be accomplished by means of registration (rather than by Act of Parliament or royal charter) with the Registrar of Companies. The Limited Liability Act of 1855 (see head (3) above) introduced the concept of limited liability for shareholders. Other statutes (collectively referred to as the Companies Clauses Acts) contain provisions that remain generally applicable to companies incorporated by special statutes for public purposes and these are considered in PARA 1667 et seq.

2 Companies Act 1862 s 206 (repealed).

3 Companies Act 1862 s 2 (repealed).

- 4 Companies (Consolidation) Act 1908 s 296 (repealed).
- 5 As to the meaning of the 'Joint Stock Companies Acts' in the Companies Act 1862 see s 175 (repealed).
- 6 See the Companies Act 1862 ss 176, 177 (repealed).
- 7 Companies Act 1862 s 180 (repealed).
- 8 Companies Act 1862 s 180 (repealed).
- 9 See the Companies Act 1862 s 179 (repealed).
- 10 See PARA 24 et seq. As to the meanings of 'carry on', 'business' and 'gain' generally see PARA 1 note 1.
- 11 See the Companies Act 1862 s 4 (repealed).
- 12 In the Companies Act 1985 ss 716, 717 (repealed).

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11. Legislation between 1908 and 1929.

The Companies Act 1862 was amended by subsequent statutes, and was, with those statutes, repealed by the Companies (Consolidation) Act 1908, which incorporated most of their provisions. That Act was amended by the Companies Act 1913, the Companies (Particulars as to Directors) Act 1917 and the Companies Act 1928, and on 1 November 1929 those Acts were in their turn repealed and consolidated, together with certain other enactments, by the Companies Act 1929¹. The Companies Act 1929, and all subsequent companies legislation until the advent of the Companies Act 2006, extended to Great Britain only².

1 The provisions of various enactments, including the Companies Act 1929, were later consolidated by the Companies Act 1948: see PARA 12.

2 As to the geographical extent of the Companies Acts see PARA 29. As to the meaning of 'Great Britain' see PARA 1 note 5.

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12. Legislation of 1947.

The Companies Act 1929 was itself substantially amended by the Companies Act 1947¹, a few sections of which were brought into force on 1 December 1947². The remainder of the Companies Act 1947 came into force on 1 July 1948³, only to be almost wholly repealed and replaced by the Companies Act 1948⁴, which came into operation on the same day⁵. The Companies Act 1948 consolidated many of the earlier provisions.

- 1 This Act followed the *Report of the Committee on Company Law Amendment* (Cmd 6659) (1945), presided over by Lord Cohen (then Cohen J).
- 2 Companies Act 1947 s 123(2) (repealed); Companies Act (Commencement) Order 1947, SR & O 1947/2503, art 1 (revoked).
- 3 Companies Act 1947 (Commencement) Order 1948, SI 1948/439, art 1 (revoked).
- 4 See the Companies Act 1948 s 459(1), Sch 17 (repealed).
- 5 Companies Act 1948 s 462(2) (repealed).

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13. Legislation between 1948 and 1985.

The Companies Act 1948 was substantially amended by Part I of the Companies Act 1967¹, which came into force at various dates between 27 October 1967 and 27 July 1968². Meanwhile, the concept of a floating charge was for the first time introduced into the law of Scotland by the Companies (Floating Charges) (Scotland) Act 1961³. The 1948 and 1961 Acts and Part I of and Schedules 1 to 4 to the 1967 Act were collectively referred to as the Companies Acts 1948 to 1967⁴. The Companies (Floating Charges) (Scotland) Act 1961 was repealed and replaced by the Companies (Floating Charges and Receivers) (Scotland) Act 1972. The European Communities Act 1972⁵ contained provisions implementing the First EC Council Directive on company law⁶. The Stock Exchange (Completion of Bargains) Act 1976, which was passed mainly to facilitate the adoption of a computerised settlement and stock transfer system, affected the procedures relating to the issue of certificates and the maintenance of registers and other records. The Insolvency Act 1976 provided for the disqualification of directors in certain circumstances from the management of companies⁷. The general law of companies was again amended, principally in relation to accounts, disclosure of interests in shares and disqualification orders, by the Companies Act 1976 which came into force at various dates between 24 January 1977 and 1 January 1985⁸. The Companies Act 1948, Parts I and III of the Companies Act 1967, the Companies (Floating Charges and Receivers) (Scotland) Act 1972, the European Communities Act 1972⁹, the Stock Exchange (Completion of Bargains) Act 1976¹⁰, the Insolvency Act 1976¹¹, and the Companies Act 1976 were collectively referred to as the Companies Acts 1948 to 1976¹².

The Companies Act 1980 was intended mainly to implement the Second EC Council Directive on company law¹³, in so far as not previously enacted. The 1980 Act regulated the formation of public companies, and provided for the maintenance of their capitals. It also dealt with the duties of directors and conflicts of interest, and made insider dealing a criminal offence. It came into force at various dates between 23 June 1980 and 1 October 1983¹⁴. The Companies Acts 1948 to 1980 comprised the Acts cited as the Companies Acts 1948 to 1976 together with the 1980 Act¹⁵.

The Companies Act 1981 was intended mainly to implement the Fourth EC Council Directive on company law¹⁶. It dealt with the form and content of company accounts. It also dealt with company and business names, share capital and the disclosure of interests in voting shares in public companies. It came into force at various dates between 1 January 1984 and 1 January 1985¹⁷. The Acts cited as the Companies Acts 1948 to 1980 together with the 1981 Act¹⁸ were known as the Companies Acts 1948 to 1981¹⁹. With a view to facilitating the consolidation of the Companies Acts, the Companies Act 1981²⁰ contained novel provisions offering an

alternative to the normal parliamentary procedure applicable to consolidation bills²¹. It was provided that Her Majesty might, by Order in Council, make such amendments of the Companies Acts²² and of any other enactment relating to companies, whenever passed, as might be jointly recommended by the Law Commission and the Scottish Law Commission as desirable to enable a satisfactory consolidation of the whole or the greater part of the Companies Acts to be produced²³. Such an Order in Council could not be made unless a draft of the Order had been laid before and approved by a resolution of each House of Parliament²⁴; nor would it come into force unless there was passed either a single Act consolidating the whole or the greater part of the Companies Acts (with or without other enactments relating to companies) or a group of two or more Acts which between them consolidated the whole or the greater part of those Acts (with or without other enactments so relating)²⁵. If such an Act or group of Acts was passed, the Order would come into force on the day on which that Act or group of Acts came into force²⁶. Pursuant to the consolidation provisions, two Orders in Council were made²⁷ amending the Companies Acts 1948 to 1983²⁸, thus paving the way for their consolidation²⁹.

The Stock Transfer Act 1982 contained minor amendments of the Companies Act 1948 relating to transfers³⁰; and the Employment Act 1982 amended the Companies Act 1967³¹ in relation to the contents of the directors' report concerning the involvement of employees in the affairs of the company³².

The Companies (Beneficial Interests) Act 1983, which came into force on 26 July 1983³³, dealt with the beneficial interest of companies in shares. That Act, and the Companies Acts 1948 to 1981, were cited together as the Companies Acts 1948 to 1983³⁴.

1 Ie the Companies Act 1967 Pt I (ss 1-57) (now repealed). As to Pt III (ss 109-118) (now repealed) see the text to note 12. The enactment of the Companies Act 1967 followed the *Report of the Committee on Company Law Amendment* (Cmd 1749) (1962) presided over by Lord Jenkins.

2 The Companies Act 1967 ss 25-34 (all now repealed) came into force on 27 October 1967 (three months after the Act was passed); ss 2-16, 18-24 and Schs 1 and 2 (all now repealed) came into force on 27 January 1968 (six months after the Act was passed); and s 27 (now repealed) came into force on 27 July 1968 (12 months after the Act was passed): s 57(1) (repealed).

3 As to floating charges generally see PARA 1269 et seq.

4 Companies Act 1967 s 130(2) (repealed).

5 Ie the European Communities Act 1972 s 9 (repealed).

6 Ie EC Council Directive 68/151 of 9 March 1968 (OJ L65, 14.03.68, p 8) on co-ordination of safeguards which, for the protection of the interests of members and others, are required by member states of companies, with a view to making such safeguards equivalent throughout the Community: see PARA 23.

7 See the Insolvency Act 1976 s 9 (repealed).

8 See the Companies Act 1976 s 45(3) (repealed), and the various commencement orders made under it.

9 See note 5.

10 Ie the Stock Exchange (Completion of Bargains) Act 1976 ss 1-4 (repealed).

11 See note 7.

12 Companies Act 1976 s 45(2) (repealed).

13 Ie EC Council Directive 77/91 (OJ L26, 31.01.77, p 1) of 13 December 1976 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by member states of companies, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent throughout the Community: see PARA 23.

14 See the Companies Act 1980 s 90(3) (repealed), and the various commencement orders made under it.

- 15 See the Companies Act 1980 s 90(2) (repealed).
- 16 Ie EC Council Directive 78/660 of 25 July 1978 (OJ L222, 14.8.78, p 11) relating to annual accounts of certain types of companies: see PARA 23.
- 17 See the Companies Act 1981 s 119(3) (repealed), and the various commencement orders made under it.
- 18 Ie except the Companies Act 1981 ss 28, 29 (repealed).
- 19 Companies Act 1981 s 119(2) (repealed).
- 20 Ie the Companies Act 1981 s 116 (repealed).
- 21 As to the normal parliamentary procedure applicable to consolidation bills see **PARLIAMENT** vol 34 (Reissue) PARA 843.
- 22 For these purposes, the 'Companies Acts' meant the Companies Acts 1948 to 1981 and any enactments passed after the Companies Act 1981 for the citation of which together with those Acts provision was made by any enactment so passed: see the Companies Act 1981 s 116(4) (repealed).
- 23 See the Companies Act 1981 s 116(1) (repealed). In exercise of this power, the following Orders were made: the Companies Acts (Pre-Consolidation Amendments) Order 1984, SI 1984/134; and the Companies Acts (Pre-Consolidation Amendments) (No 2) Order 1984, SI 1984/1169 (both now lapsed). See further PARA 14.
- 24 Companies Act 1981 s 116(2)(a) (repealed).
- 25 Companies Act 1981 s 116(2)(b) (repealed).
- 26 Companies Act 1981 s 116(2)(c) (repealed). The date is 1 July 1985 (ie the date on which the consolidating legislation of 1985 came into force): see the Companies Act 1985 s 746 (prospectively repealed). No Order in Council might be made subsequently: Companies Act 1981 s 116(3) (repealed).
- 27 Ie the Companies Acts (Pre-Consolidation Amendments) Order 1984, SI 1984/134; and the Companies Acts (Pre-Consolidation Amendments) (No 2) Order 1984, SI 1984/1169 (both now lapsed).
- 28 As to the meaning of 'Companies Acts 1948 to 1983' see the text and note 34.
- 29 See PARA 14 et seq.
- 30 See the Stock Transfer Act 1982 Sch 2 (now largely repealed).
- 31 Ie the Companies Act 1967 s 16 (repealed).
- 32 See the Employment Act 1982 s 1 (repealed).
- 33 Ie the date of the Royal Assent.
- 34 Companies (Beneficial Interests) Act 1983 s 7(2) (repealed).

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(iii) The Consolidating Legislation of 1985

14. The consolidating legislation of 1985.

The consolidating legislation of 1985¹ consisted of four Acts, which all came into force on 1 July 1985²:

- 20 (1) the Companies Act 1985, which consolidated the main provisions of earlier companies legislation³;
- 21 (2) the Company Securities (Insider Dealing) Act 1985⁴;
- 22 (3) the Business Names Act 1985⁵; and
- 23 (4) the Companies Consolidation (Consequential Provisions) Act 1985, which made provision for transitional matters and savings, repeals (including, in accordance with the recommendations of the Law Commission⁶, the repeal of certain provisions of the Companies Act 1948 which were no longer of practical utility)⁷ and consequential amendment of other Acts.

No repeal brought about by this consolidation affected the incorporation of any company registered or re-registered under the former Companies Acts⁸. Most such companies, as well as any company formed and registered under the Companies Act 2006, are now regulated by that Act⁹.

1 As to preparations made for the consolidation of the Companies Acts see PARA 13.

2 See the Companies Act 1985 s 746 (prospectively repealed); the Company Securities (Insider Dealing) Act 1985 s 18 (repealed) (see note 4); the Business Names Act 1985 s 10 (repealed) (see note 5); and the Companies Consolidation (Consequential Provisions) Act 1985 s 34.

3 The Companies Act 1985 was passed to consolidate the Companies Acts 1948 to 1983 (see PARA 13) other than the provisions dealing with insider dealing (see head (2) in the text) and business names (see head (3) in the text). As to the effect of the consolidation on the incorporation of any company registered or re-registered under any repealed enactment see the text and notes 8-9. As to the Acts which may be cited as the 'Companies Acts 1948 to 1983' see PARA 13.

4 The Company Securities (Insider Dealing) Act 1985 has been repealed and replaced by the Criminal Justice Act 1993 Pt V (ss 52-64) (see PARA 15; and see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**): see the Criminal Justice Act 1993 s 79(14), Sch 6 Pt I.

5 See the Business Names Act 1985 (repealed): see now the Companies Act 2006 Pt 5 (ss 53-85), Pt 41 (ss 1192-1208); and PARA 196 et seq.

6 See *Statute Law Revision: Eleventh Report: Obsolete Provisions in the Companies Act 1948* (Law Com no 135) (Cm 9236) (1984).

7 See the Companies Consolidation (Consequential Provisions) Act 1985 ss 28, 29, Sch 1 (s 28 repealed). So much of the Companies Act 1967 Pt II (ss 58-108) (insurance companies) as was then unrepealed was left outstanding: see the Companies Consolidation (Consequential Provisions) Act 1985 Sch 1.

8 See the Companies Consolidation (Consequential Provisions) Act 1985 s 31(8)(a); and PARA 17. For these purposes, the 'former Companies Acts' means the Joint Stock Companies Acts, the Companies Act 1862, the Companies (Consolidation) Act 1908, the Companies Act 1929 and the Companies Acts 1948 to 1983: see the Companies Act 1985 s 735(1)(c) (repealed); Companies Consolidation (Consequential Provisions) Act 1985 s 32. 'Joint Stock Companies Acts' means the Joint Stock Companies Act 1856, the Joint Stock Companies Acts 1856, 1857, the Joint Stock Banking Companies Act 1857 and the Act to enable Joint Stock Banking Companies to be formed on the principle of limited liability, or any one or more of those Acts (as the case may require), but does not include the Joint Stock Companies Act 1844: Companies Act 1985 s 735(3) (repealed).

9 See the Companies Act 2006 s 1; and PARA 24. See also the Companies Consolidation (Consequential Provisions) Act 1985 s 31; and PARAS 17-18.

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15. Legislation subsequent to the 1985 consolidation.

Subsequent to the consolidation of company law effected in 1985¹, there was much further legislation of major importance in company law.

The Insolvency Act 1985 was passed on 30 October 1985. Part II of that Act dealt with company insolvency, and substantially altered the provisions of the Companies Act 1985 in relation to winding up, besides introducing an entirely new procedure in the shape of the making of an administration order², and facilitating the making of voluntary arrangements³. It also altered the law relating to receivers, whether appointed in or out of court⁴, and introduced the new concept of an 'administrative receiver'⁵. The Act was directed to be brought into force on such a day as the Secretary of State might, by order made by statutory instrument, appoint, with power for different days to be appointed for different purposes and for different provisions⁶. The Act was brought into effect piecemeal between 1 February and 29 December 1986⁷. It was itself largely repealed by the Insolvency Act 1986⁸, which consolidated the winding-up provisions of the Companies Act 1985 and of the Insolvency Act 1985, and related matters. The Insolvency Act 1986 was directed to come into force on the day appointed for the coming into force of Part III of the Insolvency Act 1985, immediately after that Part of that Act came into force for England and Wales, which proved to be 29 December 1986⁹. The remainder of the Insolvency Act 1985, in so far as it dealt with companies, was concerned with the disqualification of company directors, and the provisions for this were consolidated with the like provisions of the Companies Act 1985 by the Company Directors Disqualification Act 1986, which was directed to come into force simultaneously with the Insolvency Act 1986¹⁰.

The Financial Services Act 1986, whose main concern is indicated in its title¹¹, had considerable effect in relation to prospectuses¹², takeover offers¹³, and insider dealing¹⁴. The Act was brought into effect piecemeal from 15 November 1986¹⁵. It has been wholly repealed and replaced by the Financial Services and Markets Act 2000¹⁶, which shares the same focus as its predecessor while introducing some new elements; the provisions most of note for present purposes being those dealing with the official listing of companies¹⁷, the powers to impose penalties for market abuse¹⁸ and powers of enforcement and investigation¹⁹. While some provisions of this Act came into force immediately²⁰, it was provided that the rest should come into force on such day as the Treasury might by order appoint, and that different days might be appointed for different purposes²¹. The Act was brought into effect piecemeal from 25 February 2001²².

The Companies Act 1989 was passed to amend (inter alia) the law relating to company accounts; to make new provision with respect to the persons eligible for appointment as company auditors; to amend the provisions of the Companies Act 1985 and certain other enactments with respect to investigations and powers to obtain information and to confer new powers exercisable to assist overseas regulatory authorities; and to make new provision with respect to the registration of company charges (although these latter provisions were never brought into force)²³. The Act was brought into effect piecemeal from 16 November 1989²⁴.

The Foreign Corporations Act 1991 was passed to make provision about the status in the United Kingdom of bodies incorporated or formerly incorporated under the laws of certain territories outside the United Kingdom²⁵, and came into force on 25 September 1991²⁶; and the Oversea Companies and Credit and Financial Institutions (Branch Disclosure) Regulations 1992²⁷ introduced new provisions relating to the disclosure requirements in respect of branches opened by certain companies in a member state and the publication of annual accounting documents by credit and financial institutions with effect from 1 January 1993²⁸.

Part V of the Criminal Justice Act 1993²⁹ repealed the Company Securities (Insider Dealing) Act 1985 and introduced new provisions relating to insider dealing with effect from 1 March 1994³⁰.

The Insolvency Act 1994 was passed to amend the law relating to contracts of employment adopted by administrators, administrative receivers and certain other receivers³¹ in respect of contracts of employment adopted on or after 15 March 1994³²; and the Insolvency (No 2) Act

1994 was passed to amend the law relating to corporate insolvency and winding up, so far as it concerns the adjustment of certain prior transactions³³, with effect from 26 July 1994³⁴.

The Deregulation and Contracting Out Act 1994 contains (inter alia) provisions to reduce certain of the burdens affecting the Secretary of State, the registrar of companies and the official receiver³⁵.

The Political Parties, Elections and Referendums Act 2000 made provision for the control of political donations made by companies and for the disclosure of political donations and expenditure in directors' reports³⁶ with effect from 16 February 2001³⁷.

The Insolvency Act 2000 introduced the concept of a company voluntary arrangement with a moratorium³⁸; and it also amended the Company Directors Disqualification Act 1986 in order to allow the Secretary of State to accept disqualification undertakings³⁹. Most of the provisions of this Act were brought into effect piecemeal from 2 April 2001⁴⁰.

The Enterprise Act 2002 introduced a new regime for administration (replacing Part II of the Insolvency Act 1986⁴¹) as well as making provision in relation to preferential debts and unsecured creditors⁴². Most of the provisions of this Act were brought into effect piecemeal from 18 March 2003⁴³.

1 As to which see PARA 14.

2 See the Insolvency Act 1985 ss 27-44 (repealed).

3 See the Insolvency Act 1985 ss 20-26 (repealed).

4 See the Insolvency Act 1985 ss 45-55 (repealed); and see PARA 1361 et seq.

5 See the Insolvency Act 1985 ss 48-54 (repealed).

6 See the Insolvency Act 1985 s 236(2) (repealed). As to the Secretary of State see PARA 6.

7 See the various commencement orders made under the Insolvency Act 1985 s 236(2), the last of which still left two provisions of the Insolvency Act 1985 not yet brought into force, namely Sch 6 para 45 (subsequently repealed by the Companies Act 1989 s 212, Sch 24) (extension of the period from two to 12 years from dissolution during which the court might declare such dissolution void), and the Insolvency Act 1985 Sch 10 (subsequently repealed by the Insolvency Act 1986 s 438, Sch 12) in so far as it provided for the repeal of the Companies Act 1985 s 467(3)-(5) (relating to the disqualifications for appointment of a person as a receiver in Scotland): see the Insolvency Act 1985 (Commencement No 5) Order 1986, SI 1986/1924, art 4.

8 See the Insolvency Act 1986 s 438, Sch 12.

9 See the Insolvency Act 1986 s 443; and the Insolvency Act 1985 (Commencement No 5) Order 1986. As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

10 See the Company Directors Disqualification Act 1986 s 25.

11 See the Financial Services Act 1986 preamble (repealed).

12 See the Financial Services Act 1986 Pt IV (ss 142-156B) (repealed), Pt V (ss 158-171) (repealed). As to the requirement for a prospectus see now the Financial Services and Markets Act 2000 s 85; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 397.

13 See the Financial Services Act 1986 Pt VI (s 172), Sch 12 (repealed).

14 See the Financial Services Act 1986 Pt VII (ss 173-178) (repealed).

15 See the various commencement orders made under the Financial Services Act 1986 s 211(1).

16 See the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649; and **FINANCIAL SERVICES AND INSTITUTIONS**.

17 See the Financial Services and Markets Act 2000 Pt VI (ss 72-103); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385 et seq.

18 See the Financial Services and Markets Act 2000 Pt VIII (ss 118-131A); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 437 et seq. These powers supplement the provisions relating to insider dealing: see the Criminal Justice Act 1993 Pt V (ss 52-64); and see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

19 See eg the Financial Services and Markets Act 2000 Pt XI (ss 165-177); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 447 et seq.

20 See the Financial Services and Markets Act 2000 s 431(1). The Act received Royal Assent on 14 June 2000.

21 See the Financial Services and Markets Act 2000 s 431(2). As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517.

22 See the various commencement orders made under the Financial Services and Markets Act 2000 s 431(2).

23 See the Companies Act 1989 preamble.

24 See the Companies Act 1989 s 215(1), and the various commencement orders made under s 215(2), (3).

25 See the Foreign Corporations Act 1991 preamble; and PARA 1841. As to the meaning of 'United Kingdom' see PARA 1 note 5.

26 See the Foreign Corporations Act 1991 s 2(3).

27 See the Oversea Companies and Credit and Financial Institutions (Branch Disclosure) Regulations 1992, SI 1992/3179: see PARA 1824 et seq. These regulations implement EC Council Directive 89/666 (OJ L395, 30.12.89, p 36) of 21 December 1989, concerning disclosure requirements in respect of branches opened in a member state by certain types of company governed by the law of another state (the 'Eleventh Company Law Directive'): see PARA 23.

28 See the Oversea Companies and Credit and Financial Institutions (Branch Disclosure) Regulations 1992, SI 1992/3179, reg 1(3).

29 See the Criminal Justice Act 1993 Pt V (ss 52-64): see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

30 See the Criminal Justice Act 1993 (Commencement No 5) Order 1994, SI 1994/242, art 2, Schedule.

31 See the Insolvency Act 1994 preamble.

32 See the Insolvency Act 1994 s 1(7).

33 See the Insolvency (No 2) Act 1994 preamble.

34 See the Insolvency (No 2) Act 1994 s 6(2).

35 See the Deregulation and Contracting Out Act 1994 preamble; and see PARA 7.

36 The Political Parties, Elections and Referendums Act 2000 added new provisions to the Companies Act 1985 (see ss 347A-347K (repealed)) (see now the Companies Act 2006 Pt 14 (ss 362-379); and PARAS 688-692).

37 See the Political Parties, Elections and Referendums Act 2000 (Commencement No 1 and Transitional Provisions) Order 2001, SI 2001/222, made under the Political Parties, Elections and Referendums Act 2000 s 163(2).

38 See the Insolvency Act 2000 s 1, Sch 1.

39 See the Insolvency Act 2000 ss 5, 6.

40 See the Insolvency Act 2000 s 16, and the various commencement orders made thereunder.

41 See the Enterprise Act 2002 s 248.

42 See the Enterprise Act 2002 ss 251, 252.

43 See the Enterprise Act 2002 s 279, and the various commencement orders made thereunder.

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(iv) The Reform of Company Law and the Companies Act 2006

16. The Company Law Review and the Companies Act 2006.

Much of the policy that informed what became the Companies Act 2006 had its origins in the Company Law Review, a fundamental review of domestic company law which was conducted under the auspices of the then Department of Trade and Industry between 1998 and 2001¹. Subsequently, proposals for reform were set out in two white papers². The Bill that was introduced in late 2005 to effect these reforms was originally cast as an amending provision³. However, the huge scope of the proposed legislation tested the usual legislative procedures to breaking point and the Companies Act 2006 emerged as a comprehensive (albeit not a definitive) restatement of company law⁴. Although the 2006 Act is not properly a consolidating measure, some statutes are repealed as a consequence and most of the provisions that were previously contained in the Companies Act 1985 are restated in the 2006 Act⁵. Accordingly, for the purposes of the Companies Act 2006, the 'Companies Acts' means: the company law provisions of that Act⁶; Part 2 of the Companies (Audit, Investigations and Community Enterprise) Act 2004⁷; and the provisions of the Companies Act 1985 and of the Companies Consolidation (Consequential Provisions) Act 1985 that remain in force⁸.

The Companies Act 2006 also made statutory provision for the first time in some new areas: it codifies directors' duties (many of which were previously contained in diffuse case law)⁹ and also provides a statutory basis for derivative actions in some areas¹⁰; it allows auditors to limit their liability¹¹, introduces new reporting requirements to be included in the business review in annual reports¹², recalibrates criminal liability (primarily in respect of how such liability may fall with regard to the company and its officers) and brings in protections for directors and auditors¹³; and facilitates where possible the use of electronic communications¹⁴.

1 The starting point of the Company Law Review (CLR) was the publication of a Consultation Paper called *Modern Company Law for a Competitive Economy* (March 1998). Its stated aim was to modernise company law in order to provide a simple, efficient and cost-effective framework for British business: see paras 1.1-1.6. The CLR was conducted by a Steering Group (CLRSG) comprising an independent group of experts and practitioners from business, law, commerce, accountancy and academia, with the support of a broadly based Consultative Group. The CLRSG issued various interim recommendations and consultation documents (each covering particular areas of interest) and presented its Final Report on 26 July 2001 (see *Modern Company Law: For A Competitive Economy - Final Report* (2001) (URN 01/943)).

2 See HM Government's White Paper *Modernising Company Law* (Cm 5553) (2002), which formed the government's response to the recommendations of the CLRSG (see note 1); and White Paper *Company Law Reform* (Cm 6456) (2005). Further consultations followed the publication of each of these papers. Some of the Review's recommendations were given legislative effect in the mean time by the Companies (Audit Investigations and Community Enterprise) Act 2004 which sought not only to establish a new business form (the community interest company) but also to re-establish confidence in corporate governance and the auditing process in the wake of contemporary corporate scandals (see PARA 82 et seq).

3 The bill had a remarkable legislative history, starting in the House of Lords, where alone there were over 1,400 amendments in Committee and nearly 500 on Report.

4 The long title of the Companies Act 2006 states that it is an 'Act to reform company law and restate the greater part of the enactments relating to companies'.

5 The revised statutory scheme relies to a certain extent on HMG's definition of what is and what is not a pure 'company law' provision. See 686 HL Official Report (5th series), 2 November 2006, col 431 per Lord

Sainsbury ('All the company law provisions of the 1985, 1989 and 2004 Acts have been brought into the Bill, other than the self-standing provisions on community enterprise companies and the provisions on investigations which go wider than companies'). As to the general statutory scheme which is set up thereby see PARA 9. As to the provisions of earlier enactments that are still regarded as company law provisions under this statutory scheme and which have not been repealed see the Companies Act 1985 Pt XIV (ss 431-453D) (cited in PARA 1541 et seq); Pt XV (ss 454-457) (cited in PARAS 1548-1550); and the Companies (Audit Investigations and Community Enterprise) Act 2004 Pt 2 (ss 26-63) (cited in PARA 82 et seq), although it should be noted that those provisions of the 2004 Act are regarded as forming a distinct body of regulation which is additional to, and sits alongside, company law rather than forming part of it. The following provisions are not regarded as company law provisions under the statutory scheme and have not been repealed by the Companies Act 2006: the Companies Act 1989 Pt III (ss 55-91) (overseas regulation) (see PARA 1568 et seq); Pt VII (ss 154-191) (Financial Markets and Insolvency) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 509 et seq); and the Companies (Audit Investigations and Community Enterprise) Act 2004 ss 14-17 (cited in PARA 697 et seq). As to the continuity of the law following the enactment of the Companies Act 2006 see PARA 17.

6 Companies Act 2006 s 2(1)(a). The company law provisions of the Companies Act 2006 are the provisions of Pts 1-39 (ss 1-1181), and the provisions of Pts 45-47 (ss 1284-1300) so far as they apply for the purposes of Pts 1-39: s 2(2). See also PARA 9.

7 Companies Act 2006 s 2(1)(b). The text refers to the provisions of the Companies (Audit Investigations and Community Enterprise) Act 2004 Pt 2 (ss 26-63) (cited in PARA 82 et seq); and see note 5.

8 Companies Act 2006 s 2(1)(c). The text refers to the provisions of the Companies Act 1985 Pt XIV (ss 431-453D) (cited in PARA 1541 et seq); Pt XV (ss 454-457) (cited in PARAS 1548-1550); and the Companies Consolidation (Consequential Provisions) Act 1985, except ss 7, 14, 15, 20, 21, 25, 27, 28 (see PARA 291 et seq); and see note 5.

9 See PARA 532 et seq.

10 See PARA 455 et seq.

11 See PARA 951 et seq.

12 See PARA 1421 et seq.

13 See PARA 1622 et seq. The general principle adopted as to whether a company should be liable for a breach of requirements of the Companies Acts is that where the only victims of the offence are the company or its members, the company should not be liable for the offence; on the other hand, where other persons may be victims of the offence, then the company should be potentially liable for a breach, whether or not the offence may also harm the company or its members: see PARA 315.

14 See eg PARAS 679, 682.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/1. INTRODUCTION/(3) THE STATUTORY FRAMEWORK/(iv) The Reform of Company Law and the Companies Act 2006/17. Continuity of the law.

17. Continuity of the law.

Subject to any specific transitional provision or saving contained in the Companies Act 2006¹, where any provision of that Act re-enacts (with or without modification) an enactment repealed by that Act², the repeal and re-enactment does not affect the continuity of the law³. Anything done (including subordinate legislation made), or having effect as if done, under or for the purposes of the repealed provision that could have been done under or for the purposes of the corresponding provision of the Companies Act 2006, if in force or effective immediately before the commencement of that corresponding provision, has effect thereafter as if done under or for the purposes of that corresponding provision⁴.

Any reference (express or implied) in the Companies Act 2006 or any other enactment, instrument or document to a provision of the Companies Act 2006 must be construed (so far as

the context permits) as including, as respects times, circumstances or purposes in relation to which the corresponding repealed provision had effect, a reference to that corresponding provision⁵. Any reference (express or implied) in any enactment, instrument or document to a repealed provision must be construed (so far as the context permits), as respects times, circumstances and purposes in relation to which the corresponding provision of the Companies Act 2006 has effect, as being or (according to the context) including a reference to the corresponding provision of the Companies Act 2006⁶.

The following provision for continuity in the law was made for the purposes of consolidating legislation of 1985 and it still has effect⁷.

So far as anything done or treated as done under or for the purposes of any provision of the old Acts⁸ could have been done under or for the purposes of the corresponding provision of the consolidating legislation (the 'new Acts'), it is not invalidated by the repeal of that provision but has effect as if done under or for the purposes of the corresponding provision of the new Acts⁹. Any order, regulation or other instrument made or having effect under any provision of the old Acts is, in so far as its effect is preserved by these provisions, to be treated for all purposes as made and having effect under the corresponding provision of the new Acts¹⁰.

Where any period of time specified in a provision of the old Acts was current immediately before 1 July 1985, the new Acts have effect as if the corresponding provision had been in force when the period began to run¹¹. Without prejudice to the above, any period of time so specified and current is deemed for the purposes of the new Acts to run from the date or event from which it was running immediately before 1 July 1985, and to expire (subject to any provision of the new Acts for its extension) whenever it would have expired if the new Acts had not been passed¹². Any rights, priorities, liabilities, reliefs, obligations, requirements, powers, duties or exemptions dependent on the beginning, duration or end of such a period as mentioned above are to be under the new Acts as they were or would have been under the old Acts¹³.

Where in any provision of the new Acts there is a reference to another provision of those Acts, and the first-mentioned provision operates, or is capable of operating, in relation to things done or omitted, or events occurring or not occurring, in the past (including in particular past acts of compliance with any enactment, failures of compliance, contraventions, offences and convictions of offences), the reference to that other provision is to be read as including a reference to the corresponding provision of the old Acts¹⁴.

Where an offence for the continuance of which a penalty was provided has been committed under any provision of the old Acts, proceedings may be taken under the new Acts in respect of the continuance of the offence after 1 July 1985 in the like manner as if the offence had been committed under the corresponding provisions of the new Acts¹⁵; and the repeal of any transitory provision of the old Acts (not replaced by any corresponding provision of the new Acts) requiring a thing to be done within a certain time does not affect a person's continued liability to be prosecuted and punished in respect of the failure, or continued failure, to do that thing¹⁶.

A reference in any enactment, instrument or document (whether express or implied, and in whatever phraseology) to a provision which is replaced by a corresponding provision of the new Acts is to be read, where necessary to retain for the enactment, instrument or document the same force and effect as it would have had but for the passing of the new Acts, as, or as including, a reference to that corresponding provision¹⁷.

Nothing in the new Acts affects: (1) the registration or re-registration of any company under the former Companies Acts¹⁸, or the continued existence of any company by virtue of such registration or re-registration¹⁹; or (2) the operation of any enactment providing for any partnership, association or company being wound up, or being wound up as a company or as an unregistered company under any of the former Companies Acts²⁰.

Where any provision of the new Acts was, immediately before 1 July 1985, contained in or given effect by a statutory instrument (whether or not made under a power in any of the old Acts), then the above provisions have effect as if that provision was contained in the old Acts, and in so far as the provision was, immediately before 1 July 1985, subject to a power (whether or not under the old Acts) of variation or revocation, nothing in the new Acts is to be taken as prejudicing any future exercise of the power²¹.

All the above provisions are without prejudice to the operation of the Interpretation Act 1978²² which provides for savings from, and the effect of, repeals²³.

1 See the Companies Act 2006 s 1297(6). References in s 1297 to the Companies Act 2006 include subordinate legislation made under that Act: s 1297(7). For these purposes, 'subordinate legislation' has the same meaning as in the Interpretation Act 1978 (see **STATUTES** vol 44(1) (Reissue) PARA 1232): Companies Act 2006 s 1297(8).

Although certain provisions of the Companies Act 2006 came into force on 8 November 2006 (ie the day the Act was passed), most of its provisions came into force on such days as could be appointed by order of the Secretary of State or the Treasury: see s 1300. The Secretary of State or the Treasury may by order make such transitional provision and savings as they consider necessary or expedient in connection with the commencement of any provision made by or under the Companies Act 2006: s 1296(1). Such orders are subject to negative resolution procedure (ie the statutory instrument containing the order is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1289, 1296(4). As to the making of orders under the 2006 Act generally see ss 1288-1292. An order may, in particular, make such adaptations of provisions brought into force as appear to be necessary or expedient in consequence of other provisions of that Act not yet having come into force: s 1296(2). Transitional provision and savings that are so made are additional, and without prejudice, to those made by or under any other provision of the 2006 Act: s 1296(3). The following orders have been made under the powers so conferred: the Companies Act 2006 (Commencement No 1, Transitional Provisions and Savings) Order 2006, SI 2006/3428; the Companies Act 2006 (Commencement No 2, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/1093; the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194; the Companies Act 2006 (Commencement No 4 and Commencement No 3 (Amendment)) Order 2007, SI 2007/2607; the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495; the Companies Act 2006 (Commencement No 6, Saving and Commencement Nos 3 and 5 (Amendment)) Order 2008, SI 2008/674; the Companies Act 2006 (Consequential Amendments etc) Order 2008, SI 2008/948; the Companies Act 2006 (Consequential Amendments) (Taxes and National Insurance) Order 2008, SI 2008/954; the Companies Act 2006 (Commencement No 7, Transitional Provisions and Savings) Order 2008, SI 2008/1886; the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860; the Companies Act 2006 (Part 35) (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1802; the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009/1804; the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941; and the Registrar of Companies (Fees) (Limited Partnerships and Newspaper Proprietors) Regulations 2009, SI 2009/2392.

Accordingly, all the provisions of the Companies Act 2006 that affect the law in England and Wales had come into force by 1 October 2009, although the following four provisions not have been commenced, namely: s 327(2)(c) and s 330(6)(c) (both of which will be repealed due to drafting errors); s 1175 as it applies in Northern Ireland; and s 1175, Sch 9 Pt 2 (relating to the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6)). Where transitional provisions that are contained in the orders still have effect at the date at which this volume states the law, those provisions are mentioned in the text where they so have effect. As to the Secretary of State see PARA 6. As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517.

2 See the Companies Act 2006 s 1297(1). As to repeals made by the Companies Act 2006 see s 1295, Sch 16. In the Companies Act 2006, unless the context otherwise requires, 'enactment' includes an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978 (see **STATUTES** vol 44(1) (Reissue) PARA 1232), an enactment contained in, or in an instrument made under, an Act of the Scottish Parliament, and an enactment contained in, or in an instrument made under, Northern Ireland legislation within the meaning of the Interpretation Act 1978: Companies Act 2006 s 1293.

3 See the Companies Act 2006 s 1297(2). Without prejudice to s 1297(2), where a provision creating an offence is repealed and re-enacted without modification by or under the Companies Act 2006, an offence committed before the commencement of the new law is to be charged under the old law; an offence committed after the commencement of the new law is to be charged under the new law; and an offence committed partly before and partly after the commencement of the new law is to be charged under the new law and not under the old: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 7(1), (4). For this purpose, an offence is committed partly before and partly after the

commencement of the new law if a relevant event occurs before commencement and another relevant event occurs after commencement, where 'relevant event' means an act, omission or other event (including any result of one or more acts or omissions) proof of which is required for conviction of the offence: art 7(2), (3).

4 Companies Act 2006 s 1297(3). This provision applies:

- 10 (1) in relation to a company to which the Companies Act 1985 s 675(1) (repealed) (companies formed and registered under earlier companies legislation) applied as if the company had been formed and registered under Pt 1 (ss 1-42) (repealed) (Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 1(2)(a));
- 11 (2) in relation to a company to which the Companies Act 1985 s 676(1) (repealed) (companies registered but not formed under earlier companies legislation) applied as if the company had been registered under Pt 22 Ch 2 (ss 680-690) (repealed) (Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 1(2)(b));
- 12 (3) in relation to a company to which the Companies Act 1985 s 677(1) (repealed) (companies re-registered under earlier companies legislation) applied as if the company had been re-registered under Pt 2 (ss 43-55) (repealed) (Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 1(2)(c)).

A reference in any enactment to a company formed and registered under the Companies Act 2006, to a company registered but not formed under that Act, or to a company re-registered under that Act, includes a company treated as so formed and registered, registered or re-registered by virtue of s 1297(3), including that provision as applied by the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 1(2): see the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 3.

Nothing in the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 1 or in the Companies Act 2006 s 1297(3) is to be read as affecting any reference to the date on which a company was registered or re-registered: Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 1(3). For the purposes of the Companies Act 2006 s 1297(3) as it applies to treat a company formed and registered under the Companies Act 1985 Pt 1 (see head (1) above) as if formed and registered under the corresponding provisions of the Companies Act 2006, the registration of a company on an application to which the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 2(3) applies (see PARA 24) is to be regarded as in force and effective immediately before the commencement of the Companies Act 2006 Pt 1 (ss 1-6): Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 2(5). For the purposes of the Companies Act 2006 s 1297(3) as it applies to treat the registration of a company under the Companies Act 1985 Pt 22 Ch 2 (see head (2) above) as if done under the corresponding provisions of the Companies Act 2006, the registration of a company on an application to which the Companies Act 1985 Pt 22 Ch 2 continues to apply is to be regarded as in force and effective immediately before the commencement of the Companies Act 2006 Pt 33 Ch 1 (ss 1040-1042): see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 93(6). For the purposes of the Companies Act 2006 s 1297(3) as it applies to treat a company re-registered under the Companies Act 1985 (see head (3) above) as if re-registered under the corresponding provisions of the Companies Act 2006, the re-registration of a company on an application to which the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 22(3) applies is to be regarded as in force and effective immediately before the commencement of the Companies Act 2006 Pt 7 (ss 89-111): Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 22(6). A company that is formed and registered, or re-registered, under the Companies Act 1985 on or after 1 October 2009 by virtue of the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 2(3) or Sch 2 para 22(3) is known as a 'transitional company': see art 2. See also PARA 18.

5 Companies Act 2006 s 1297(4).

6 Companies Act 2006 s 1297(5).

7 The consolidating legislation of 1985 came into force on 1 July 1985: see the Companies Consolidation (Consequential Provisions) Act 1985 s 34. As to the consolidating legislation of 1985 see PARA 14.

8 For these purposes, 'old Acts' means the Companies Acts 1948 to 1983 and any other enactment which is repealed by the Companies Consolidation (Consequential Provisions) Act 1985 and replaced by a corresponding provision in the new Acts: Companies Consolidation (Consequential Provisions) Act 1985 s 31(1)(b). For these purposes, 'new Acts', means the Companies Act 1985, the Business Names Act 1985, the Companies Consolidation (Consequential Provisions) Act 1985 and the Company Securities (Insider Dealing) Act 1985: Companies Consolidation (Consequential Provisions) Act 1985 ss 31(1)(a), 32. The Company Securities (Insider Dealing) Act 1985 has been repealed (see PARA 14 note 4): see now the Criminal Justice Act 1993 Pt V (ss 52-

64); PARA 15; and see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**. The Business Names Act 1985 has been repealed by, and replaced by, the Companies Act 2006: see now Pt 5 (ss 53-85), Pt 41 (ss 1192-1208); and PARA 196 et seq. As to the Acts which may be cited as the 'Companies Acts 1948 to 1983' see PARA 13.

9 Companies Consolidation (Consequential Provisions) Act 1985 s 31(2).

10 Companies Consolidation (Consequential Provisions) Act 1985 s 31(2).

11 Companies Consolidation (Consequential Provisions) Act 1985 s 31(1)(c), (3).

12 Companies Consolidation (Consequential Provisions) Act 1985 s 31(1)(c), (3).

13 Companies Consolidation (Consequential Provisions) Act 1985 s 31(3).

14 Companies Consolidation (Consequential Provisions) Act 1985 s 31(4).

15 Companies Consolidation (Consequential Provisions) Act 1985 s 31(1)(c), (5)(a).

16 Companies Consolidation (Consequential Provisions) Act 1985 s 31(5)(b).

17 Companies Consolidation (Consequential Provisions) Act 1985 s 31(6). The generality of this provision is not affected by any specific conversion of references made by the Companies Consolidation (Consequential Provisions) Act 1985, nor by the inclusion in any provision of the new Acts of a reference (whether express or implied, and in whatever phraseology) to the provision of the old Acts corresponding to that provision, or to a provision of the old Acts which is replaced by a corresponding provision of the new Acts: Companies Consolidation (Consequential Provisions) Act 1985 s 31(7).

18 As to the meaning of 'former Companies Acts' see the Companies Act 1985 s 735(1)(c) (repealed); and PARA 14 note 8 (definition applied by virtue of the Companies Consolidation (Consequential Provisions) Act 1985 s 32).

19 Companies Consolidation (Consequential Provisions) Act 1985 s 31(8)(a).

20 Companies Consolidation (Consequential Provisions) Act 1985 s 31(8)(c). As to the continuation of former Table A provisions see PARA 18.

21 Companies Consolidation (Consequential Provisions) Act 1985 s 31(1)(c), (10).

22 In the Interpretation Act 1978 ss 16, 17 (see **STATUTES** vol 44(1) (Reissue) PARAS 1303, 1306): see the Companies Consolidation (Consequential Provisions) Act 1985 s 31(11). For the purposes of the Interpretation Act 1978 s 17(2) (construction of references to enactments repealed and replaced; continuity of powers preserved in repealing enactment), any provision of the old Acts which is replaced by a provision of the Companies Act 1985, the Company Securities (Insider Dealing) Act 1985 (repealed) (see now the Criminal Justice Act 1993 Pt V (ss 52-64); and see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**) or the Business Names Act 1985 (repealed) (see now the Companies Act 2006 Pt 5 (ss 53-85), Pt 41 (ss 1192-1208); and PARA 196 et seq) is deemed to have been repealed and re-enacted by that one of the new Acts and not by the Companies Consolidation (Consequential Provisions) Act 1985: s 31(11). Anything saved from repeal by the Companies Act 1948 s 459, and still in force immediately before 1 July 1985, remains in force notwithstanding the repeal of the whole of that Act: Companies Consolidation (Consequential Provisions) Act 1985 s 31(1)(c), (9).

23 Companies Consolidation (Consequential Provisions) Act 1985 s 31(11).

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18. General savings for existing companies under the Companies Act 2006.

Nothing in the Companies Act 2006 affects:

- 24 (1) the registration or re-registration of a company under the former Companies Acts, or the continued existence of a company by virtue of such registration or re-registration¹; or
- 25 (2) the application in relation to an existing company of²:
- 3
- 4. (a) Table B in the Joint Stock Companies Act 1856³; or
- 5. (b) Table A in the former Companies Acts⁴;
- 6. (c) the Companies (Tables A to F) Regulations 1985⁵.
- 4

In relation to companies registered on or after 1 October 2009, new model articles have been made in place of those tables mentioned under head (2) above⁶.

1 Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 1(1)(a). Nothing in Sch 2 para 1 or in the Companies Act 2006 s 1297(3) (see PARA 17) is to be read as affecting any reference to the date on which a company was registered or re-registered: Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 1(3).

In the Companies Acts, the 'former Companies Acts' means the Joint Stock Companies Acts, the Companies Act 1862, the Companies (Consolidation) Act 1908, the Companies Act 1929, the Companies Acts 1948 to 1983, and the provisions of the Companies Act 1985 and the Companies Consolidation (Consequential Provisions) Act 1985 that are no longer in force: see the Companies Act 2006 s 1171. The 'Joint Stock Companies Acts' means the Joint Stock Companies Act 1856, the Joint Stock Companies Acts 1856, 1857, the Joint Stock Banking Companies Act 1857, and the Act to enable Joint Stock Banking Companies to be formed on the principle of limited liability (1858), but does not include the Joint Stock Companies Act 1844: see the Companies Act 2006 s 1171. As to the meaning of the 'Companies Acts' see PARA 16. As to the Acts which may be cited as the 'Companies Acts 1948 to 1983' see PARA 13; and as to the provisions of the Companies Act 1985 and the Companies Consolidation (Consequential Provisions) Act 1985 that are no longer in force see PARA 16.

2 Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 1(1)(b). For these purposes, 'existing company' means a company that immediately before 1 October 2009 was formed and registered under the Companies Act 1985 or was an existing company for the purposes of that Act (as to which see PARA 24 note 5): Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 2.

3 Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 1(1)(b)(i). As to the preservation of such a company's power under the Joint Stock Companies Act 1856 to make contracts in writing signed by its agents see *Prince v Prince* (1866) LR 1 Eq 490.

4 Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 1(1)(b)(ii). The Companies Act 1948 Sch 1, Table A was divided into two parts, Part II applying to private companies as then defined. Part II was repealed by the Companies Act 1980 s 88, Sch 4, which also made minor changes in various articles in Table A Part 1. A new Table A intended to come into force 'on the day on which there comes into force an Act to consolidate the greater part of the Companies Acts' was proposed to be introduced by the Companies (Alteration of Table A etc) Regulations 1984, SI 1984/1717, but those regulations were revoked before they could come into effect by the Companies (Tables A to F) Regulations 1985, SI 1985/805, made on 22 May 1985. These latter regulations themselves came into effect on 1 July 1985: Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 1. As they were made before 1 July 1985 (ie the date on which the Companies Act 1985 came into force), they were made in exercise of the powers conferred on the Secretary of State by the Companies Act 1948 s 454(2) (repealed), as well as under the powers conferred by the Companies Act 1985 s 3 (repealed) and s 8 (repealed). As to the effect of this see PARA 17. As to the treatment under the Companies Act 2006 of articles made pursuant to the Companies (Tables A to F) Regulations 1985, SI 1985/805, see PARA 230.

5 Ie the Companies (Tables A to F) Regulations 1985, SI 1985/805 (see note 4): Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 1(1)(b)(iii).

6 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, which came into force on 1 October 2009 (see reg 1); and see PARAS 228-230.

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(4) REQUIREMENTS OF EC LAW

(i) Requirements of the EC Treaty

19. EC Treaty requirements in general.

Companies or firms¹ formed in accordance with the law of a member state of the European Community² and having their registered office, central administration or principal place of business within the Community must, for the purpose of applying the provisions of the EC Treaty dealing with the right of establishment³, be treated in the same way as natural persons who are nationals of member states⁴.

Member states of the European Community must, so far as is necessary, engage in negotiations with each other with a view to ensuring for the benefit of their nationals⁵:

- 26 (1) the mutual recognition of companies or firms⁶;
- 27 (2) the retention of their legal personality in the event of transfer of their seat from one country to another⁷; and
- 28 (3) the possibility of mergers between companies or firms governed by the laws of different countries⁸.

Member states of the European Community must accord nationals of other member states the same treatment as their own nationals as regards participation in the capital of companies or firms⁹.

1 For these purposes, 'companies or firms' means companies or firms constituted under civil or commercial law, including co-operative societies and other legal persons governed by public or private law, save for those which are not profit-making: Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) (the 'EC Treaty') art 48 para 2 (art 48 formerly art 58; renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ). Legislation which predates the Treaty of Amsterdam may refer to 'companies within the meaning of the second paragraph of Article 58 of the Treaty'.

2 'European Community' means the community established among the member states by the EC Treaty: see art 1.

3 I.e. the EC Treaty Title III Ch 2 (arts 43-48) (formerly arts 52-58; renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ). As to the right of establishment see also PARA 20.

4 EC Treaty art 48 para 1 (as renumbered: see note 1).

5 EC Treaty art 293 (formerly art 220; renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ).

6 EC Treaty art 293, 3rd tiret (as renumbered: see note 5).

7 EC Treaty art 293, 3rd tiret (as renumbered: see note 5).

8 EC Treaty art 293, 3rd tiret (as renumbered: see note 5).

9 EC Treaty art 294 (formerly art 221; renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ). This is without prejudice to the application of the other provisions of the EC Treaty: art 294 (as so renumbered). See also PARA 21.

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20. Freedom of establishment.

The EC Treaty¹ prohibits restrictions on the freedom of establishment of nationals of a member state of the European Community² in the territory of another member state³. This prohibition also applies to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any member state established in the territory of any member state⁴. Freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings and companies under the conditions laid down by the law of the country of establishment for its own nationals and prohibits the member state of origin from hindering the establishment in another member state of one of its nationals or a company incorporated under its legislation and having its registered office, central administration or principal place of business within the European Community⁵.

However, the problems associated with transferring a company's registered office, central administration or principal place of business from one member state to another, whilst retaining their status as companies incorporated under the law of the first member state, is not resolved by the Treaty provisions governing freedom of establishment⁶.

¹ The Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) (the 'EC Treaty').

² 'European Community' means the community established among the member states by the EC Treaty: see art 1.

³ EC Treaty art 43 para 1 (art 43 formerly art 52; renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ). The prohibition mentioned in the text applies within the framework of the provisions set out in the EC Treaty Title III Ch 2 arts 43-48 (formerly arts 52-58; renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ): see the EC Treaty art 43 para 1 (as so renumbered). See also PARA 19.

A company may exercise its right of establishment where national legislation, under which the company is incorporated, hinders its establishment in another member state: Case C-200/98 *X AB and Y AB v Riksskatteverket* [2000] 3 CMLR 1337, [1999] ECR I-8261, ECJ (refusal of tax relief for intra-group transfers, on ground that two or more subsidiaries involved in the transfers had seats in different member states, contravened EC Treaty art 177 (now art 234)). The same principle applies where a member state hinders the establishment in another member state of one of its own nationals: Case C-251/98 *Baars v Inspecteur der Belastingdienst Particulieren/Ondernemingen (Gorinchem)* [2000] ECR I-2787, [2002] 1 CMLR 1437, ECJ (freedom of establishment includes the right of individuals to set up and manage companies in another member state). See also Case C-168/01 *Bosal Holdings BV v Staatssecretaris van Financien* [2003] All ER (EC) 959, [2003] 3 CMLR 674, ECJ (deductibility of costs arising from a parent company's holding in the capital of a subsidiary established in another member state).

⁴ EC Treaty art 43 para 1 (as renumbered: see note 3).

In addition to setting up agencies, branches, or subsidiaries, a company may also exercise its right of establishment by taking part in the incorporation of a company in another member state: see Case 81/87 *R v HM Treasury, ex p Daily Mail and General Trust plc* [1989] QB 446, [1989] 1 All ER 328, ECJ.

⁵ EC Treaty art 43 para 2 (as renumbered: see note 3); Case 81/87 *R v HM Treasury, ex p Daily Mail and General Trust plc* [1989] QB 446, [1989] 1 All ER 328, ECJ. The right of establishment is subject to the provisions of the EC Treaty relating to capital (arts 56-60): art 43 para 2 (as so renumbered).

The right of establishment cannot be interpreted as conferring on companies incorporated under a law of a member state the right to transfer their central management and control and their central administration to another member state while retaining their status as companies incorporated under the legislation of the first member state: *R v HM Treasury, ex p Daily Mail and General Trust plc* (although the EC Treaty placed, as

connecting factors, the registered office, central administration and principal place of business on the same footing, national legislation differs too widely in regard to the connecting factors required for incorporation and in how the connecting factor subsequently may be modified). In Case C-208/00 *Überseering BV v Nordic Construction Co Baumanagement GmbH* [2002] ECR I-9919, [2005] 1 WLR 315, ECJ, it was inferred that the question whether a company formed in accordance with the legislation of one member state could transfer its registered office or de facto centre of administration to another member state without losing its personality under the law of the member state of incorporation, and in some circumstances the rules relating to that transfer, were determined by the national law in accordance with which the company was incorporated. Accordingly, a member state is able, in the case of a company incorporated under its national law, to make the company's right to retain its legal personality under that law subject to restrictions on the transfer to a foreign country of the country's actual centre of administration: *Überseering BV v Nordic Construction Co Baumanagement GmbH*.

6 Case 81/87 *R v HM Treasury, ex p Daily Mail and General Trust plc* [1989] QB 446, [1989] 1 All ER 328, ECJ; Case C-208/00 *Überseering BV v Nordic Construction Co Baumanagement GmbH* [2002] ECR I-9919, [2005] 1 WLR 315, ECJ; and see PARA 23 note 23.

In Case C-210/06 *Cartesio Oktató és Szolgáltató bt* [2009] All ER (EC) 269, [2009] 1 CMLR 1394, ECJ, it was confirmed that a member state had the power to define both the connecting factor required of a company if it was to be regarded as incorporated under the law of that state (and, as such, capable of enjoying the right of establishment) and the connecting factor required if the company was to be able subsequently to maintain that status (eg following a cross-border merger). Accordingly, as Community law stood, EC Treaty art 43 was to be interpreted as not precluding legislation of a member state under which a company incorporated under the law of that member state might not transfer its seat to another member state whilst retaining its status as a company governed by the law of the member state of incorporation: Case C-210/06 *CARTESIO Oktató és Szolgáltató bt*. See also Case C-212/97 *Centros Ltd v Erhvervs-og Selskabsstyrelsen* [2000] Ch 446, [1999] ECR I-1459, ECJ (the fact that a company was formed in a particular member state for the sole purpose of enjoying more favourable legislation did not in itself constitute an abuse, even if that company conducted its activities entirely or mainly in a second state); and Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155, ECJ. The issue raised in Case C-411/03 *Re SEVIC Systems AG* [2006] All ER (EC) 363, [2005] ECR I-10805, [2006] 2 BCLC 510, ECJ (national law which refuses registration of a merger proposed across member states constitutes a restriction within the meaning of EC Treaty art 43 if a merger within the member state would be registered) has been resolved by European Parliament and EC Council Directive 2005/56 of 26 October 2005 (OJ L310, 25.11.2005, p 1) on cross-border mergers of limited liability companies (see PARA 23).

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21. Free movement of capital.

The EC Treaty¹ prohibits all restrictions on the movement of capital between member states of the European Community² and between member states and third countries³. All restrictions on payments between member states and between member states and third countries are also prohibited⁴.

These provisions are without prejudice to the right of member states⁵:

- 29 (1) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested⁶;
- 30 (2) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security⁷.

The provisions relating to capital and payments⁸ are without prejudice to the applicability of restrictions on the right of establishment⁹ which are compatible with the EC Treaty¹⁰. Such

measures and procedures¹¹ must not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments¹².

1 Ie the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) (the 'EC Treaty').

2 'European Community' means the community established among the member states by the EC Treaty: see art 1.

3 See the EC Treaty art 56 para 1 (art 56 formerly art 73b; renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ). The prohibition mentioned in the text applies within the framework of the provisions set out in the EC Treaty Title III Ch 4 arts 56-60 (formerly arts 73b-73d, 73f, 73g; renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ): see the EC Treaty art 56 para 1 (as so renumbered). The provisions of EC Treaty art 56 have direct effect: Cases C-163/94, 165/94, 250/94 *Criminal Proceedings against Locas Emilio Sanz de Lera* [1995] ECR I-4821, [1996] 1 CMLR 631, ECJ.

4 See the EC Treaty art 56 para 2 (as renumbered: see note 3). The prohibition mentioned in the text applies within the framework of the provisions set out in the EC Treaty Title III Ch 4 arts 56-60: see the EC Treaty art 56 para 2 (as so renumbered).

5 EC Treaty art 58 para 1 (art 58 formerly art 73d; renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ).

6 EC Treaty art 58 para 1(a) (as renumbered: see note 5).

7 EC Treaty art 58 para 1(b) (as renumbered: see note 5). The retention of a degree of influence within privatised undertakings (by the use of 'golden shares') by the governments of member states has been declared liable to impede the acquisition of shares in those undertakings and to dissuade investors in other member states from investing in their capital so as to constitute a restriction on the freedom of movement of capital. Such a restriction may be implemented only by national rules justified by reasons referred to in EC Treaty art 58 para 1 or by overriding requirements of the general interest and, in order to be so justified, the national legislation must accord with the principle of proportionality: see Case C-367/98 *EC Commission v Portugal*, Case C-483/99 *EC Commission v France*, Case C-503/99 *EC Commission v Belgium* [2003] QB 233, [2002] 2 CMLR 1265, ECJ (national measures granted the state prerogatives ('golden shares') to intervene in the share structure and management of privatised undertakings in strategically important areas of the economy); Case C-463/00 *EC Commission v Spain* [2003] All ER (EC) 878, [2003] 2 CMLR 557, ECJ (disposal of certain shareholdings in some strategically important industries subject to a system of prior administrative approval); Case C-98/01 *EC Commission v United Kingdom* [2003] All ER (EC) 878, [2003] 2 CMLR 598, ECJ (special share held by the United Kingdom government made some of the company's operations subject to prior administrative approval and prevented the substantial acquisition of the voting capital by any person); C-463/04 and C-464/04 *Federconsumatori v Comune di Milano* [2007] ECR I-10419, [2008] 1 CMLR 1187, ECJ (by giving public shareholders an instrument enabling them to restrict the possibility of the other shareholders participating in the company with a view to establishing or maintaining lasting and direct economic links with it such as to enable them to participate effectively in the management of that company or in its control, a national provision such as the one at issue was liable to deter direct investors from other member states from investing in the company's capital).

8 Ie the provisions set out in the EC Treaty Title III Ch 4 arts 56-60: see the EC Treaty art 58 para 2 (as renumbered: see note 5).

9 See PARAS 19, 20.

10 EC Treaty art 58 para 2 (as renumbered: see note 5).

11 Ie the measures and procedures referred to in EC Treaty art 58 paras 1-2 (see the text and notes 5-10): see EC Treaty art 58 para 3 (as renumbered: see note 5).

12 EC Treaty art 58 para 3 (as renumbered: see note 5).

UPDATE

21 Free movement of capital

NOTE 6--See Case C-128/08 *Damseaux v Etat Belge* [2009] 3 CMLR 1447, [2009] All ER (D) 205 (Aug) (bilateral tax convention under which dividends distributed by company established in one member state to shareholder residing in another liable to be taxed in both member states, not precluded by EC Treaty art 56).

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(ii) EC Regulations relating to Company Law

22. EC Regulations.

In addition to the EC Directives that relate to company law and related areas¹, EC Regulations make further provision, for example, by applying International Accounting Standards (IAS) to the consolidated accounts of companies which trade on regulated markets² or by providing for certain types of cross-border insolvency proceedings³.

EC Regulations have also made provision for new forms of trading entity whose legal personality is recognised by all member states, namely the European Economic Interest Grouping (EEIG)⁴ and the European Company (*Societas Europaea*)⁵; and a proposal for a regulation on the Statute for a European Private Company (*Societas Privata Europaea*) has been made⁶. Other forms have been provided for by means of EC Regulation but the focus for these are of less significance for the United Kingdom⁷.

1 See PARA 23.

2 Ie European Parliament and EC Council Regulation 1606/2002 (OJ L243, 11.9.2002, p 1) on the application of international accounting standards. See also EC Commission Regulation 1725/2003 (OJ L261, 13.10.2003, p 1) adopting certain international accounting standards in accordance with Regulation 1606/2002 art 3. See also PARA 693 et seq.

European Parliament and EC Council Regulation 1606/2002 (OJ L243, 11.9.2002, p 1) provides a framework for the adoption of international accounting standards (IAS) to the consolidated accounts of all companies whose securities are admitted for trading on a regulated market (mandatory) and to other types of company (permissive). The IAS are published by the International Accounting Standards Board (IASB) and the IAS provisions themselves may be modified by the EC before they are adopted by means of EC Regulation. (The IAS are now known as the International Financial Reporting Standards (IFRS)). For the IAS as they apply to building societies see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1991 et seq; and as they apply to mutual societies see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2323 et seq.

3 Ie EC Council Regulation 1346/2000 (OJ L160, 30.6.2000, p 1) on insolvency proceedings. See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 46 et seq; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 474 et seq.

4 Ie EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) on the European Economic Interest Grouping (EEIG); and see PARA 1631. For the purposes of making further provision in relation to this regulation, the European Economic Interest Grouping Regulations 1989, SI 1989/638, and the Registrar of Companies (Fees) (European Economic Interest Grouping and European Public Limited-Liability Company) Regulations 2009, SI 2009/2403, have been made: see PARA 1632. From the date of registration of an EEIG in the United Kingdom, an EEIG is a body corporate: see the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 3; and PARA 1632. As to the meaning of 'United Kingdom' see PARA 1 note 5.

5 Ie EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) on the Statute for a European Company (*Societas Europaea*) (SE). See also EC Council Directive 2001/86 (OJ L294, 10.11.2001, p 22) supplementing the Statute for a European Company with regard to the involvement of employees; and PARA 1633 et seq. For the purposes of implementing the Directive, and for making further provision in relation to the Regulation, the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009, SI 2009/2401, and the Registrar of

Companies (Fees) (European Economic Interest Grouping and European Public Limited-Liability Company) Regulations 2009, SI 2009/2403, have been made: see PARAS 1637, 1639. A European Company is a form of public limited-liability company and it has legal personality: see EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 1; and PARA 1633.

6 See *Proposal for a Council Regulation on the Statute for a European private company* (Brussels, COM(2008) 396/3); and PARA 1664.

7 See EC Council Regulation 1435/2003 (OJ L207, 18.8.2003, p 1) on the Statute for a European Cooperative Society (SCE) (corrected in OJ L49, 17.2.2007 p 35). For the purposes of making further provision in relation to the Regulation, the European Co-operative Society Regulations 2006, SI 2006/2078, have been made. The rules on the involvement of employees in such a society are laid down in EC Council Directive 2003/72 (OJ L207, 18.8.2003, p 25); and for the purposes of implementing this Directive, the European Co-operative Society (Involvement of Employees) Regulations 2006, SI 2006/2059, have been made. See also European Parliament and EC Council Regulation 1082/2006 (OJ L210, 31.7.2006, p 19) on a European grouping of territorial cooperation (EGTC), in relation to the implementation of which the European Grouping of Territorial Cooperation Regulations 2007, SI 2007/1949, have been made.

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(iii) EC Directives relating to Company Law

23. EC Directives.

The EC Council is required to issue Directives¹ in order to attain freedom of establishment², in particular by co-ordinating to the necessary extent the safeguards which, for the protection of interests of members and others, are required by member states of companies³ with a view to making such safeguards equivalent throughout the European Community⁴. The following Directives have been issued or proposed:

- 31 (1) the First Company Law Directive of 9 March 1968, which governs the co-ordination of national provisions concerning disclosure of basic documents and other information, the validity of obligations entered into by limited liability companies, and the 'nullity' of such companies⁵;
- 32 (2) the Second Company Law Directive of 13 December 1976, which applies to public companies (including those limited by guarantee) having a share capital and which governs the formation and capital of such companies⁶;
- 33 (3) the Third Company Law Directive of 9 October 1978, relating to particular types of mergers of public limited liability companies⁷;
- 34 (4) the Fourth Company Law Directive of 25 July 1978, relating to annual accounts of certain types of companies (known as one of the 'Accounting Directives', together with the Seventh Company Law Directive)⁸;
- 35 (5) a draft Fifth Company Law Directive relating to the structure of public limited liability companies and the powers and obligations of their organs; but this has been withdrawn⁹;
- 36 (6) the Sixth Company Law Directive of 17 December 1982, relating to the division of public limited liability companies¹⁰;
- 37 (7) the Seventh Company Law Directive of 13 June 1983, relating to consolidated accounts (known as one of the 'Accounting Directives', together with the Fourth Company Law Directive)¹¹;
- 38 (8) Directives have been issued amending the Fourth and Seventh Company Law Directives (the 'Accounting Directives'):

7. (a) to provide for accounting exemptions for small and medium-sized companies¹²;
 8. (b) to extend the scope of the Directives to accounts of certain partnerships and unlimited companies¹³;
 9. (c) to allow for fair value accounting for certain financial instruments¹⁴;
 10. (d) to update and modernise the Accounting Directives so as to ensure consistency and transparency¹⁵;
 11. (e) to confirm the collective responsibility of board members, increase transparency in transactions with related parties and off-balance-sheet arrangements, and improve disclosure about corporate governance practices applied in a company¹⁶; and
 12. (f) to provide for certain disclosure requirements for medium-sized companies and the obligation to draw up consolidated accounts¹⁷;
- 6
- 39 (9) the Eighth Company Law Directive on the approval of persons responsible for carrying out the statutory audits of accounting documents, originally adopted on 10 April 1984, but now repealed and replaced by the 'Audit Directive' of 17 May 2006¹⁸;
 - 40 (10) a draft Ninth Company Law Directive on group relations; but this has been withdrawn¹⁹;
 - 41 (11) a Company Law Directive of 26 October 2005 on cross-border mergers of limited liability companies (commonly referred to as the 'Tenth Company Law Directive')²⁰;
 - 42 (12) the Eleventh Company Law Directive of 21 December 1989, concerning disclosure requirements in respect of branches opened in a member state by certain types of company governed by the law of another state²¹;
 - 43 (13) the Twelfth Company Law Directive of 30 December 1989, on single-member private limited liability companies²²;
 - 44 (14) the Thirteenth Company Law Directive of 21 April 2004, on takeover bids (the 'Takeovers Directive')²³;
 - 45 (15) a proposed Fourteenth Company Law Directive, on the transfer of a company's seat from one member state to another²⁴.

A further Directive governs the exercise of certain shareholder rights attached to voting shares in relation to general meetings of companies incorporated in a member state and admitted to trading on a regulated market in a member state²⁵. A number of other Directives that are more closely related to the regulation of financial markets and securities have some relevance to company law²⁶. Among the latter category are those Directives which govern: the admission of securities to official stock exchange listing and on information to be published on those securities (the 'Consolidated Admissions and Reporting Directive' or 'CARD')²⁷; the prospectus to be published when transferable securities are offered to the public or admitted to trading²⁸; the harmonisation of transparency requirements with regard to information about issuers whose securities are admitted to trading on a regulated market (the 'Transparency Directive')²⁹; and insider dealing and market manipulation (market abuse)³⁰.

Other Directives of note in a more general context are those which govern the safeguarding of employees' rights in the event of transfers of undertakings or businesses or parts of them (the 'Acquired Rights Directive')³¹, and the establishment of a general framework for informing and consulting employees in the European Community³².

1 As to the effect of such Directives in English law see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 24.

2 Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) (the 'EC Treaty') art 44 para 1 (formerly art 54 para 1; renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ). As to freedom of establishment see PARAS 19, 20.

3 As to the meaning of 'companies' for these purposes see PARA 19 note 1.

4 EC Treaty art 44 para 2(g) (formerly art 54 para 3(g); renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ). For these purposes, 'European Community' means the community established among the member states by the EC Treaty: see art 1.

5 Ie EC Council Directive 68/151 (OJ L65, 14.3.68, p 8) on co-ordination of safeguards which, for the protection of the interests of members and others, are required by member states of companies, with a view to making such safeguards equivalent throughout the Community (amended by European Parliament and EC Council Directive 2003/58 (OJ L221, 4.9.2003, p 13) as regards disclosure requirements in respect of certain types of companies). For the purposes of implementing this Directive, the European Communities Act 1972 s 9 (repealed) was made (re-enacted in the Companies Act 1985 ss 35, 35A (repealed): see now the Companies Act 2006 ss 40-42; and PARA 263). EC Council Directive 68/151 protects innocent parties dealing with the company and does not prevent national laws being applied in relation to conflicts of interests, etc: *Co-öperatieve Rabobank 'Vecht en Plassengebied' BA v Minderhoud*: C-104/96 [1998] 1 WLR 1025, [1998] 2 BCLC 507, ECJ.

6 Ie EC Council Directive 77/91 (OJ L26, 31.1.77, p 1) on co-ordination of safeguards, which for the protection of the interests of members and others, are required by member states of companies, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent throughout the Community (amended by EC Council Directive 92/101 (OJ L347, 28.11.92, p 64); European Parliament and EC Council Directive 2006/68 (OJ L264, 25.09.2006, p 32)).

7 Ie EC Council Directive 78/855 (OJ L295, 20.10.78, p 36) (amended by European Parliament and EC Council Directive 2007/63 (OJ L300, 17.11.2007, p 47)). See the Companies Act 2006 Pt 27 (ss 902-941) (mergers and divisions of public companies); and PARA 1449 et seq. See also PARA 144.

8 Ie EC Council Directive 78/660 (OJ L222, 14.8.78, p 11) (amended by EC Council Directive 84/569 (OJ L314, 4.12.84, p 28); EC Council Directive 89/666 (OJ L395, 30.12.89, p 36); EC Council Directive 90/604 (OJ L317, 16.11.90, p 57); EC Council Directive 90/605 (OJ L317, 16.11.90, p 60); EC Council Directive 94/8 (OJ L82, 25.3.94, p 33); EC Council Directive 99/60 (OJ L162, 26.6.99, p 65); EC Council Directive 2001/65 (OJ L283, 27.10.2001, p 28); EC Council Directive 2003/38 (OJ L120, 15.5.2003, p 22); EC Council Directive 2003/51 (OJ L178, 17.7.2003, p 16); European Parliament and EC Council Directive 2006/43 of 17 May 2006 (OJ L157, 09.06.2006, p 87); European Parliament and EC Council Directive 2006/46 of 14 June 2006 (OJ L224, 16.08.2006, p 1); EC Council Directive 2006/99 of 20 November 2006 (OJ L363, 20.12.2006, p 137); European Parliament and EC Council Directive 2009/49 of 18 June 2009 (OJ L164, 26.6.2009, p 42)). As to the amendments which have been made to this Directive see further head (8) in the text.

9 A Fifth Directive was first proposed in 1972 (see OJ C131, 13.12.72, p 49) and the proposal was amended at various times thereafter but agreement among member states could not be achieved. Proposals for reform have been made in related areas of corporate governance, including directors' duties and shareholder rights.

10 Ie EC Council Directive 82/891 (OJ L378, 31.12.82, p 47) (amended by European Parliament and EC Council Directive 2007/63 (OJ L300, 17.11.2007, p 47)). See the Companies Act 2006 Pt 27 (ss 902-941) (mergers and divisions of public companies); and PARA 1449 et seq. See also PARA 144.

11 Ie EC Council Directive 83/349 (OJ L193, 18.7.83, p 1) (amended by EC Council Directive 89/666 (OJ L395, 30.12.89, p 36); EC Council Directive 90/604 (OJ L317, 16.11.90, p 57); EC Council Directive 90/605 (OJ L317, 16.11.90, p 60); EC Council Directive 2001/65 (OJ L283, 27.10.2001, p 28); EC Council Directive 2003/51 (OJ L178, 17.7.2003, p 16); European Parliament and EC Council Directive 2006/43 of 17 May 2006 (OJ L157, 09.06.2006, p 87); European Parliament and EC Council Directive 2006/46 of 14 June 2006 (OJ L224, 16.08.2006, p 1); EC Council Directive 2006/99 of 20 November 2006 (OJ L363, 20.12.2006, p 137); European Parliament and EC Council Directive 2009/49 of 18 June 2009 (OJ L164, 26.6.2009, p 42)). See PARA 708 et seq. As to the amendments which have been made to this Directive see further head (8) in the text.

12 Ie EC Council Directive 90/604 (OJ L317, 16.11.90, p 57) (amended so as to raise the financial ceilings for small and medium-sized companies by EC Council Directive 94/8 (OJ L82, 25.3.94, p 33) and EC Council Directive 2003/38 (OJ L120, 15.5.2003, p 22)). See PARA 693 et seq.

13 Ie EC Council Directive 90/605 (OJ L317, 16.11.90, p 60). See PARA 705 et seq.

14 Ie EC Council Directive 2001/65 (OJ L283, 27.10.2001, p 28) regarding the valuation rules for the annual and consolidated accounts of certain types of companies as well as of banks and other financial institutions (the 'Fair Value Directive'). As to the measures that are intended to implement this Directive see PARA 693 et seq.

15 Ie EC Council Directive 2003/51 (OJ L178, 17.7.2003, p 16) amending Directives 78/660, 83/349, 86/635 and 91/674 on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings (the 'Modernisation Directive').

16 Ie European Parliament and EC Council Directive 2006/46 of 14 June 2006 (OJ L224, 16.8.2006, p 1) (amending EC Council Directive 78/660 on the annual accounts of certain types of companies, EC Council Directive 83/349 on consolidated accounts, EC Council Directive 86/635 (OJ L60, 03.03.1987, p 17) on the annual accounts and consolidated accounts of banks and other financial institutions and EC Council Directive 91/674 (OJ L374, 31.12.1991, p 7) on the annual accounts and consolidated accounts of insurance undertakings). For the purposes of implementing Directive 2006/46, the Companies Act 2006 (Amendment) (Accounts and Reports) Regulations 2008, SI 2008/393, the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, and the Companies Act 2006 (Accounts, Reports and Audit) Regulations 2009, SI 2009/1581, have been made: see PARA 693 et seq.

17 Ie European Parliament and EC Council Directive 2009/49 of 18 June 2009 (OJ L164, 26.6.2009, p 42) amending EC Council Directive 78/660 (OJ L222, 14.8.78, p 11) (see head (4) in the text) and EC Council Directive 83/349 (OJ L193, 18.7.83, p 1) (see head (7) in the text) as regards certain disclosure requirements for medium-sized companies and the obligation to draw up consolidated accounts.

18 See European Parliament and EC Council Directive 2006/43 (OJ L157, 09.06.2006, p 87) on statutory audits of annual accounts and consolidated accounts (the 'Audit Directive') (amended by European Parliament and EC Council Directive 2008/30 of 11 March 2008 (OJ L81, 20.03.2008, p 53)). Head (9) in the text refers also to the predecessor Eighth Company Law Directive, ie EC Council Directive 84/253 (OJ L126, 12.5.84, p 20), which was repealed by European Parliament and EC Council Directive 2006/43 (OJ L157, 09.06.2006, p 87).

19 See *Modernising Company Law and Enhancing Corporate Governance in the European Union--A Plan to Move Forward* (Com (2003) 284 final, 21.5.2003) para 3.3. A draft Ninth Company Law Directive on the conduct of groups containing a public limited company as a subsidiary, which would have introduced parent liability for subsidiaries, as well as adding further disclosure obligations, was circulated by the EC Commission in December 1984 for consultation. Particular issues associated with groups have been addressed by specific reforms.

20 Ie European Parliament and EC Council Directive 2005/56 of 26 October 2005 (OJ L310, 25.11.2005, p 1) on cross-border mergers of limited liability companies (commonly referred to as the 'Tenth Company Law Directive'). For the purposes of implementing Directive 2005/56, the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974, have been made: see PARA 1451.

21 Ie EC Council Directive 89/666 (OJ L395, 30.12.89, p 36). This Directive essentially extends the First, Fourth, Seventh and Eighth Company Law Directives (see heads (1), (4), (7)-(9) in the text) to branches (ie rather than to subsidiaries) in other member states. For the purposes of implementing Directive 89/666, the Overseas Companies Regulations 2009, SI 2009/1801, have been made: see PARA 1824 et seq.

22 Ie EC Council Directive 89/667 (OJ L395, 30.12.89, p 40). Accordingly, a company is formed under the Companies Act 2006 by one or more persons: see s 7; and PARA 102.

23 Ie EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12). For the purposes of implementing Directive 2004/25, the Companies Act 2006 Pt 28 (ss 942-992) has been made: see PARA 1480 et seq.

24 A Fourteenth Company Law Directive has been under discussion for many years because the problems associated with transferring a company's registered office (or de facto head office) from one member state to another are not resolved by the Treaty provisions governing the right of establishment: see PARAS 19, 20.

In the absence of a harmonizing directive, a fundamental problem arises where a company wishes to re-establish itself in another member state because it has to wind up in the home state then follow local law in re-establishing its presence elsewhere (and the applicable national laws either make such an operation impossible or at least contingent on complicated legal arrangements): see *Modernising Company Law and Enhancing Corporate Governance in the European Union--A Plan to Move Forward* (Com (2003) 284 final, 21.5.2003) p 20. In order to address this problem, the original member states of the European Community had negotiated the Convention on the Mutual Recognition of Companies and Bodies Corporate (Brussels, 29 February 1968; EC Bulletin (Supp) 2/69), but this Convention was never ratified by the Netherlands and it did not come into force.

25 Ie European Parliament and EC Council Directive 2007/36 (OJ L184, 14.07.2007, p17) on the exercise of certain rights of shareholders in listed companies. For the purposes of implementing the Directive, the Companies (Shareholders' Rights) Regulations 2009, SI 2009/1632, have been made, amending the Companies Act 2006 Pt 13 (ss 281-361) (see PARA 617 et seq).

26 Although public issues and offers of securities used to be governed domestically by company law legislation (see PARA 9), EC law has had an impact that has seen the development of financial markets and securities regulation as a separate (albeit related) strand of law (see EC Council Directive 79/279 of 5 March 1979 (OJ L66, 16.03.1979, p 21) coordinating the conditions for the admission of securities to official stock exchange listing (repealed); EC Council Directive 80/390 of 17 March 1980 (OJ L100, 17.04.1980, p 1) coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be

published for the admission of securities to official stock exchange listing (repealed); and EC Council Directive 82/121 of 15 February 1982 (OJ L48, 20.02.1982, p 26) on information to be published on a regular basis by companies the shares of which have been admitted to official stock-exchange listing (repealed); and see now European Parliament and EC Council Directive 2001/34 (OJ L184, 6.7.2001, p 1) on the admission of securities to official stock exchange listing and on information to be published on those securities (the 'Consolidated Admissions and Reporting Directive') (cited in the text and note 27). The pre-eminent principle of current EC regulation of the public issue of securities is to ensure that disclosures are made regarding the issuing company and the shares on offer: see eg European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectus to be published when securities are offered to the public or admitted to trading (cited in the text and note 28). The concept of regulated markets has also overtaken 'official listing' as one of the guiding principles: see European Parliament and EC Council Directive 2004/39 (OJ L145, 30.04.2004, p 1) of 21 April 2004 on markets in financial instruments (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385 et seq); European Parliament and EC Council Directive 2004/109 of 15 December 2004 (OJ L390, 31.12.2004, p 38) on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (cited in the text and note 29); and EC Council Directive 2003/6 (OJ L96, 12.4.2003, p 16) on insider dealing and market manipulation (market abuse) (cited in the text and note 30).

27 Ie European Parliament and EC Council Directive 2001/34 (OJ L184, 6.7.2001, p 1) on the admission of securities to official stock exchange listing and on information to be published on those securities (amended by European Parliament and EC Council Directive 2003/6 (OJ L96, 12.4.2003 p16); European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64); European Parliament and EC Council Directive 2004/109 of 15 December 2004 (OJ L390, 31.12.2004, p 38); European Parliament and EC Council Directive 2005/1 of 9 March 2005 (OJ L79, 24.03.2005, p 9)). Provision has also been made by way of amendment to the Financial Services and Markets Act 2000 and the Financial Services Authority's Listing Rules (see PARA 1066 et seq) for the purposes of implementing Directive 2001/34: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 391 et seq.

28 Ie European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34 (see note 27). For the purposes of implementing this directive, the Financial Services and Markets Act 2000 ss 84-87R have been made, and the Prospectus Regulations 2005, SI 2005/1433, made thereunder: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 395 et seq.

29 Ie European Parliament and EC Council Directive 2004/109 of 15 December 2004 (OJ L390, 31.12.2004, p 38) on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (amended by European Parliament and EC Council Directive 2008/22 of 11 March 2008 (OJ L76, 19.03.2008, p 50)). See also the related EC Commission Directive 2007/14 of 8 March 2007 (OJ L69, 09.03.2007, p 27) laying down detailed rules for the implementation of certain provisions of European Parliament and EC Council Directive 2004/109.

For the purposes of implementing these measures, the Companies Act 2006 Pt 43 (ss 1265-1273) has been made, largely by means of making amendments to the Financial Services and Markets Act 2000 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 415 et seq) and by making provision in the Financial Services Authority's Disclosure and Transparency Rules using powers under the Financial Services and Markets Act 2000: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 415 et seq. Accordingly, the Financial Services and Markets Act 2000 s 890 (added by the Companies Act 2006 s 1269) enables rules to be made for the purposes of European Community obligations relating to corporate governance, as defined in the Financial Services and Markets Act 2000 s 890: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 425 et seq. This power goes wider than the Transparency Obligations Directive. In addition, the Secretary of State may make regulations: (1) for the purpose of implementing, enabling the implementation of or dealing with matters arising out of or related to, any Community obligation relating to the corporate governance of issuers who have requested or approved admission of their securities to trading on a regulated market (Companies Act 2006 s 1273(1)(a)); (2) about corporate governance in relation to such issuers for the purpose of implementing, or dealing with matters arising out of or related to, any Community obligation (s 1273(1)(b)). As to the Secretary of State see PARA 6. For these purposes, 'corporate governance', in relation to an issuer, includes: (a) the nature, constitution or functions of the organs of the issuer (s 1273(2)(a)); (b) the manner in which organs of the issuer conduct themselves (s 1273(2)(b)); (c) the requirements imposed on organs of the issuer (s 1273(2)(c)); (d) the relationship between different organs of the issuer (s 1273(2)(d)); (e) the relationship between the organs of the issuer and the members of the issuer or holders of the issuer's securities (s 1273(2)(e)). For these purposes, 'issuer', 'securities' and 'regulated market' have the same meaning as in the Financial Services and Markets Act 2000 Pt VI (ss 72-103) (Official Listing) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 387 et seq): Companies Act 2006 s 1273(6). The regulations may make provision by reference to any specified code on corporate governance that may be issued from time to time by a specified body, may create new criminal offences (subject to s 1273(4)) and may make provision excluding liability in damages in respect of things done or omitted for the purposes of, or in connection with, the carrying on, or purported carrying on, of any specified activities: s 1273(3). For these purposes, 'specified' means specified in the regulations: s 1273(3). The regulations may not create a criminal offence punishable by a greater penalty than (on indictment) a fine or (on summary conviction) a fine not exceeding the statutory maximum or (if calculated on a daily basis) £100 a day:

s 1273(4). As to the meaning of the 'statutory maximum' see PARA 1622. Regulations under s 1273 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1273(5), 1289. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. At the date at which this volume states the law, no such regulations have been made in exercise of the power conferred by s 1273.

30 Ie EC Council Directive 2003/6 (OJ L96, 12.4.2003, p 16) on insider dealing and market manipulation (market abuse). Several implementing measures have been adopted by the EC Commission pursuant to Directive 2003/6:

- 13 (1) EC Commission Regulation 2273/2003 of 22 December 2003 (OJ L336, 23.12.2003, p 33) implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments;
- 14 (2) EC Commission Directive 2003/124 of 22 December 2003 (OJ L339, 24.12.2003, p 70) implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation;
- 15 (3) EC Commission Directive 2003/125 of 22 December 2003 (OJ L339, 24.12.2003, p 73) implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest;
- 16 (4) EC Commission Directive 2004/72 (OJ L162, 30.4.2004, p 70) implementing Directive 2003/6 as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions.

EC Council Directive 2003/6 (OJ L96, 12.4.2003, p 16) replaced EC Council Directive 89/592 (OJ L334, 11.11.89, p 30), for the purpose of implementing which the Criminal Justice Act 1993 Pt V (ss 52-64) was made (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**).

31 Ie EC Council Directive 2001/23 (OJ L82, 22.3.2001, p 16) on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. This Directive replaced EC Council Directive 77/187 (OJ L61, 5.3.77, p 26) (amended by EC Council Directive 98/50 (OJ L201, 17.7.98, p 88)), for the purpose of implementing which the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246 have been made (see **EMPLOYMENT** vol 39 (2009) PARA 111 et seq).

32 Ie European Parliament and EC Council Directive 2002/14 (OJ L80, 23.2.2002, p 29) of 11 March 2002.

See also European Parliament and EC Council Directive 2009/38 (OJ L122, 16.5.2009, p 28) of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, which repealed EC Council Directive 94/45 (OJ L254, 30.9.94, p 64) (repealed) on the establishment of a European Works Council and EC Council Directive 97/74 (OJ L10, 16.1.98, p 22) (repealed) which extended EC Council Directive 94/45 to the United Kingdom, and for the purpose of implementing which the Transnational Information and Consultation of Employees Regulations 1999, SI 1999/3323, were made (see **EMPLOYMENT** vol 41 (2009) PARA 1205 et seq).

UPDATE

23 EC Directives

NOTE 5--Directive 68/151 replaced: European Parliament and EC Council Directive 2009/101 (OJ L258, 1.10.2009, p 11).

NOTES 6, 7, 10, 20--Directive 77/91, Directive 78/855, Directive 82/891, and Directive 2005/56 amended: European Parliament and EC Council Directive 2009/109 (OJ L259, 2.10.2009, p 14).

NOTE 22--Directive 89/667 replaced: European Parliament and EC Council Directive 2009/102 (OJ L258, 1.10.2009, p 20).

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(1) IN GENERAL/(i) Application of the Present Statute Law/24. Meanings of 'company' and 'UK-registered company' in the Companies Acts.

2. COMPANIES REGULATED BY THE COMPANIES ACTS

(1) IN GENERAL

(i) Application of the Present Statute Law

24. Meanings of 'company' and 'UK-registered company' in the Companies Acts.

In the Companies Acts¹, unless the context otherwise requires, 'company' means a company formed and registered under the Companies Act 2006², that is:

- 46 (1) a company so formed and registered after the commencement of Part 1 of the 2006 Act³; or
- 47 (2) a company that, immediately before the commencement of Part 1 of the 2006 Act, either: (a) was formed and registered under the Companies Act 1985⁴; or (b) was an existing company for the purposes of the 1985 Act⁵, which is to be treated on commencement as if formed and registered under the Companies Act 2006⁶.

In the Companies Acts, 'UK-registered company' means a company registered under the Companies Act 2006, but does not include an overseas company⁷ that has complied with the statutory duty to register particulars in specified circumstances⁸.

1 As to the meaning of the 'Companies Acts' for these purposes see PARA 16.

2 Companies Act 2006 s 1(1). As to company formation and registration under the Companies Act 2006, and the different forms that such a company may take, see PARA 72 et seq. As to companies not registered, or registered but not formed, under the Companies Act 2006, and as to overseas companies, see PARA 32. As to the meaning of 'company' more generally see PARA 1.

3 Companies Act 2006 s 1(1)(a). The date of commencement for Pt 1 (ss 1, 3-6) was 1 October 2009: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3(a). The dates of commencement for the Companies Act 2006 Pt 1 (s 2) were 1 January 2007 and 20 January 2007 for certain purposes (see the Companies Act 2006 (Commencement No 1, Transitional Provisions and Savings) Order 2006, SI 2006/3428, arts 2(2)(a), 3(2)(a)) and 6 April 2007 for remaining purposes (see the Companies Act 2006 (Commencement No 2, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/1093, art 2(1)(a)).

In the definition of 'company' in the Companies Act 2006 s 1, the reference to a company formed and registered after the commencement of Pt 1 (ss 1-6) must be read as a reference to a company formed and registered on an application received by the registrar on or after 1 October 2009 and made in accordance with ss 7-16 (see PARA 102 et seq): see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 2(1), (6)(a).

4 Companies Act 2006 s 1(1)(b)(i). Head (2)(a) in the text applies equally to a company that was formed and registered under the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6): see the Companies Act 2006 s 1(1)(b)(i).

In the definition of 'company' in s 1, the reference to a company formed and registered under the Companies Act 1985 immediately before the commencement of the Companies Act 2006 Pt 1 includes a company formed and registered on an application for registration if it is received by the registrar, and if the requirements as to registration that are set out in the corresponding provisions of the Companies Act 1985 are met in relation to it, before 1 October 2009: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 2(3), (6)(b). See PARA 17 note 4.

5 Companies Act 2006 s 1(1)(b)(ii). Head (2)(b) in the text applies equally to a company that was an existing company for the purposes of the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6): see the Companies Act 2006 s 1(1)(b)(ii). As to general savings for existing companies etc under the Companies Act 2006 see PARA 18.

For the purposes of the Companies Act 1985, 'existing company' was defined as a company formed and registered under the former Companies Acts, but did not include a company registered under the Joint Stock Companies Acts, the Companies Act 1862 or the Companies (Consolidation) Act 1908 in what was then Ireland: Companies Act 1985 s 735(1)(b) (repealed). The 'former Companies Acts' were defined as the Joint Stock Companies Acts, the Companies Act 1862, the Companies (Consolidation) Act 1908, the Companies Act 1929 and the Companies Acts 1948 to 1983: Companies Act 1985 s 735(1)(c) (repealed). The 'Joint Stock Companies Acts' were defined as the Joint Stock Companies Act 1856, the Joint Stock Companies Acts 1856, 1857, the Joint Stock Banking Companies Act 1857 and the Act to enable Joint Stock Banking Companies to be formed on the principle of limited liability, or any one or more of those Acts (as the case may require), but did not include the Joint Stock Companies Act 1844: Companies Act 1985 s 735(3) (repealed). As to the meaning of the 'former Companies Acts' for the purposes of the Companies Acts, which restates the definition of the 'Joint Stock Companies Acts' given above, see PARA 18 note 1. As to the Acts which may be cited as 'the Companies Acts 1948 to 1983' see PARA 13.

6 Companies Act 2006 s 1(1)(b).

7 As to the meaning of 'overseas company' see PARA 1824.

8 Companies Act 2006 s 1158. The text refers to an overseas company that has registered particulars under s 1046 (see PARA 1826): see s 1158.

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25. Meanings of 'subsidiary', 'holding company' and 'wholly-owned subsidiary'.

A company¹ is a 'subsidiary' of another company, its 'holding company', if that other company:

- 48 (1) holds a majority of the voting rights in it²; or
- 49 (2) is a member of it and has the right to appoint or remove a majority of its board of directors³; or
- 50 (3) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it⁴,

or if it is a subsidiary of a company which is itself a subsidiary of that other company⁵.

A company is a 'wholly-owned subsidiary' of another company if it has no members except that other and that other's wholly-owned subsidiaries or persons acting on behalf of that other or its wholly-owned subsidiaries⁶.

Rights which are exercisable only in certain circumstances are taken into account only when the circumstances have arisen, and for so long as they continue to obtain, or when the circumstances are within the control of the person having the rights⁷. Rights which are normally exercisable but are temporarily incapable of exercise must continue to be taken into account⁸.

Rights held by a person⁹ in a fiduciary capacity are treated as not held by him¹⁰.

Rights held by a person as nominee for another are treated as held by the other¹¹.

Rights attached to shares held by way of security are treated as held by the person providing the security¹²:

- 51 (a) where apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in accordance with his instructions¹³;
- 52 (b) where the shares are held in connection with the granting of loans as part of normal business activities and apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in his interests¹⁴.

Rights are treated as held by a company if they are held by any of its subsidiary companies¹⁵. However, nothing in the provisions relating to rights held by one person as nominee for another¹⁶, or in the provisions relating to rights attached to shares held by way of security¹⁷ is to be construed as requiring rights held by a company to be treated as held by any of its subsidiaries¹⁸.

The voting rights in a company are to be reduced by any rights held by the company itself¹⁹.

The Secretary of State²⁰ may by regulations²¹ amend the provisions which relate to the meanings of 'subsidiary', 'holding company' and 'wholly-owned subsidiary'²² so as to alter the meanings of those expressions²³.

1 For the purposes of the Companies Act 2006 s 1159 and s 1159(3), Sch 6, 'company' includes any body corporate: s 1159(4). As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5; and as to the meaning of 'company' under the Companies Acts see PARA 24. As to the meaning of the 'Companies Acts' for these purposes see PARA 16.

2 Companies Act 2006 s 1159(1)(a). For the purposes of s 1159(1)(a), (c) (see heads (1) and (3) in the text), the references to the voting rights in a company are references to the rights conferred on shareholders in respect of their shares or, in the case of a company not having a share capital, on members, to vote at general meetings of the company on all, or substantially all, matters: Sch 6 paras 1, 2. As to the meaning of 'member' see PARA 321; and as to the meaning of 'share' and 'company having a share capital' see PARA 1042. As to share capital, including the allotment of shares, see PARA 1042 et seq; and as to shareholders and membership of companies generally see PARA 321 et seq. As to company meetings see PARA 629 et seq.

3 Companies Act 2006 s 1159(1)(b). For the purposes of s 1159(1)(b), the reference to the right to appoint or remove a majority of the board of directors is a reference to the right to appoint or remove directors holding a majority of the voting rights at meetings of the board on all, or substantially all, matters: Sch 6 paras 1, 3(1). For these purposes: (1) a company is treated as having the right to appoint to a directorship if a person's appointment to it follows necessarily from his appointment as director of the company or if the directorship is held by the company itself (Sch 6 paras 1, 3(2)); and (2) a right to appoint or remove which is exercisable only with the consent or concurrence of another person must be left out of account unless no other person has a right to appoint or, as the case may be, remove in relation to that directorship (Sch 6 paras 1, 3(3)). As to the meaning of 'director' see PARA 478. As to meetings of directors, and the rights of appointment etc, see PARA 528 et seq.

4 Companies Act 2006 s 1159(1)(c). See note 2.

5 Companies Act 2006 s 1159(1). See *Enviroco Ltd v Farstad Supply A/S* [2009] EWHC 906 (Ch), [2009] 2 BCLC 225 (meaning of 'subsidiary' in context of charterparty whose wording used cross-reference to statutory definition).

6 Companies Act 2006 s 1159(2).

7 Companies Act 2006 Sch 6 paras 1, 4(1).

8 Companies Act 2006 Sch 6 paras 1, 4(2).

9 For these purposes, references in any provision of the Companies Act 2006 Sch 6 paras 5-9 (see the text and notes 10-19) to rights held by a person include rights falling to be treated as held by him by virtue of any other provision of Sch 6 paras 5-9 but not rights which by virtue of any such provision are to be treated as not held by him: Sch 6 paras 1, 10.

10 Companies Act 2006 Sch 6 paras 1, 5. For these purposes, where a registered shareholder is the vendor under an uncompleted but specifically enforceable contract for the sale of his shares, he acts as a fiduciary: *Michaels v Harley House (Marylebone) Ltd* [2000] Ch 104, [1999] 1 All ER 356, CA.

11 Companies Act 2006 Sch 6 paras 1, 6(1). Rights are regarded as held as nominee for another if they are exercisable only on his instructions or with his consent or concurrence: Sch 6 paras 1, 6(2). See note 9.

12 Companies Act 2006 Sch 6 paras 1, 7. See note 9.

13 Companies Act 2006 Sch 6 paras 1, 7(a). For these purposes, rights are treated as being exercisable in accordance with the instructions or in the interests of a company if they are exercisable in accordance with the instructions of or, as the case may be, in the interests of any subsidiary or holding company of that company or any subsidiary of a holding company of that company: Sch 6 paras 1, 8(3).

14 Companies Act 2006 Sch 6 paras 1, 7(b).

15 Companies Act 2006 Sch 6 paras 1, 8(1). See note 9.

16 In the Companies Act 2006 Sch 6 paras 1, 6 (see the text and note 11): see Sch 6 paras 1, 8(2).

17 In the Companies Act 2006 Sch 6 paras 1, 7 (see the text and notes 12-14): see Sch 6 paras 1, 8(2).

18 Companies Act 2006 Sch 6 paras 1, 8(2). See note 9.

19 Companies Act 2006 Sch 6 paras 1, 9. See note 9.

20 As to the Secretary of State see PARA 6.

21 As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292.

22 In the Companies Act 2006 s 1159 and Sch 6 (see the text and notes 1-19): see s 1160(1).

23 See the Companies Act 2006 s 1160(1). Such regulations are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1160(2), 1289. At the date at which this volume states the law, no such regulations have been made in exercise of the power conferred by s 1160. Any amendment made by such regulations does not apply for the purposes of enactments outside the Companies Acts unless the regulations so provide: Companies Act 2006 s 1160(3). So much of the Interpretation Act 1978 s 23(3) as applies s 17(2)(a) (effect of repeal and re-enactment) (see **STATUTES** vol 44(1) (Reissue) PARA 1303) to deeds, instruments and documents other than enactments does not apply in relation to any repeal and re-enactment effected by regulations under the Companies Act 2006 s 1160: s 1160(4). As to the meaning of 'enactment' see PARA 17 note 2.

UPDATE

25 Meanings of 'subsidiary', 'holding company' and 'wholly-owned subsidiary'

NOTE 5--*Enviroco*, cited, reversed: [2009] EWCA Civ 1399, [2009] All ER (D) 206 (Dec).

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26. Meanings of 'parent undertaking', 'subsidiary undertaking' etc in the Companies Acts.

For the purposes of the Companies Acts¹, the expressions 'parent undertaking' and 'subsidiary undertaking' are to be construed as follows².

An undertaking is a 'parent undertaking' in relation to another undertaking, a 'subsidiary undertaking', if:

- 53 (1) it holds a majority of the voting rights³ in the undertaking⁴;
- 54 (2) it is a member of the undertaking and has the right to appoint or remove a majority of its board of directors⁵;
- 55 (3) it has the right to exercise a dominant influence over the undertaking⁶ by virtue of provisions contained in the undertaking's articles⁷ or by virtue of a control contract⁸; or
- 56 (4) it is a member of the undertaking and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights⁹ in the undertaking¹⁰.

For these purposes, an undertaking is treated as a member of another undertaking if any of its subsidiary undertakings is a member of that undertaking or if any shares in that other undertaking are held by a person acting on behalf of the undertaking or any of its subsidiary undertakings¹¹.

An undertaking is also a parent undertaking in relation to another undertaking, a 'subsidiary undertaking', if it has the power to exercise, or actually exercises, dominant influence¹² or control over it¹³, or if it and the subsidiary undertaking are managed on a unified basis¹⁴.

A parent undertaking is treated as the parent undertaking of undertakings in relation to which any of its subsidiary undertakings are, or are to be treated as, parent undertakings; and references to its subsidiary undertakings must be construed accordingly¹⁵.

References in the Companies Acts to 'fellow subsidiary undertakings' are to undertakings which are subsidiary undertakings of the same parent undertaking but are not parent undertakings or subsidiary undertakings of each other¹⁶.

1 As to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 1162(1). The expressions 'parent undertaking' and 'subsidiary undertaking' are defined by s 1162 and s 1162(6), Sch 7 for the purposes mentioned in the text: see s 1162(1). See also PARA 27. In the Companies Acts, 'undertaking' means either a body corporate or partnership, or an unincorporated association carrying on a trade or business, with or without a view to profit (s 1161(1)); and 'parent company' means a company that is a parent undertaking (as defined by s 1162, Sch 7) (s 1173(1)). Other expressions appropriate to companies are to be construed, in relation to an undertaking which is not a company, as references to the corresponding persons, officers, documents or organs, as the case may be, appropriate to undertakings of that description: s 1161(3). This is subject to provision in any specific context providing for the translation of such expressions: s 1161(3). As to the meanings of 'carry on', 'business' and 'gain' generally see PARA 1 note 1. As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5; and as to the meaning of 'company' under the Companies Acts see PARA 24. As to the meaning of 'officer' generally under the Companies Act 2006 see PARA 607. As to companies and corporations and partnerships etc see PARAS 2-4.

3 For the purposes of the Companies Act 2006 s 1162(2)(a), (d) (see heads (1) and (4) in the text), the references to the voting rights in an undertaking are references to the rights conferred on shareholders in respect of their shares or, in the case of an undertaking not having a share capital, on members, to vote at general meetings of the undertaking on all, or substantially all, matters: Sch 7 paras 1, 2(1). In relation to an undertaking which does not have general meetings at which matters are decided by the exercise of voting rights, the references to the holding of a majority of the voting rights in the undertaking are to be construed as references to having the right under the constitution of the undertaking to direct the overall policy of the undertaking or to alter the terms of its constitution: Sch 7 paras 1, 2(2). As to the meaning of 'member' see PARA 321; and as to the meanings of 'share' and 'company having a share capital' see PARA 1042. As to share capital, including the allotment of shares, see PARA 1042 et seq; and as to shareholders and membership of companies generally see PARA 321 et seq. As to company meetings see PARA 629 et seq.

In s 1162 and Sch 7, references to shares, in relation to an undertaking, are to allotted shares: s 1162(7). In the Companies Acts, references to shares: (1) in relation to an undertaking with capital but no share capital, are references to rights to share in the capital of the undertaking (Companies Act 2006 s 1161(2)(a)); and (2) in

relation to an undertaking without capital, are references to interests conferring any right to share in the profits or liability to contribute to the losses of the undertaking, or to interests giving rise to an obligation to contribute to the debts or expenses of the undertaking in the event of a winding up (s 1161(2)(b)). As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

4 Companies Act 2006 s 1162(2)(a).

5 Companies Act 2006 s 1162(2)(b). For these purposes, the reference to the right to appoint or remove a majority of the board of directors is a reference to the right to appoint or remove directors holding a majority of the voting rights at meetings of the board on all, or substantially all, matters: Sch 7 paras 1, 3(1). An undertaking is treated as having the right to appoint to a directorship if a person's appointment to it follows necessarily from his appointment as director of the undertaking, or if the directorship is held by the undertaking itself: Sch 7 paras 1, 3(2). A right to appoint or remove which is exercisable only with the consent or concurrence of another person must be left out of account unless no other person has a right to appoint or, as the case may be, remove in relation to that directorship: Sch 7 paras 1, 3(3). As to the meaning of 'director' see PARA 478. As to meetings of directors, and the rights of appointment etc, see PARA 528 et seq.

6 For these purposes, an undertaking is not to be regarded as having the right to exercise a dominant influence over another undertaking unless it has a right to give directions with respect to the operating and financial policies of that other undertaking which its directors are obliged to comply with whether or not they are for the benefit of that other undertaking: Companies Act 2006 Sch 7 paras 1, 4(1). However, Sch 7 para 4 is not to be read as affecting the construction of the expression 'actually exercises a dominant influence' in s 1162(4)(a) (see the text and notes 12-13): Sch 7 paras 1, 4(3).

7 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

8 Companies Act 2006 s 1162(2)(c). For these purposes, a 'control contract' means a contract in writing conferring such a right which is of a kind authorised by the articles of the undertaking in relation to which the right is exercisable, and which is permitted by the law under which that undertaking is established: Sch 7 paras 1, 4(2). See also note 6.

9 See note 3.

10 Companies Act 2006 s 1162(2)(d).

11 Companies Act 2006 s 1162(3).

12 See note 6.

13 Companies Act 2006 s 1162(4)(a).

14 Companies Act 2006 s 1162(4)(b).

15 Companies Act 2006 s 1162(5).

16 Companies Act 2006 s 1161(4).

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27. Rights in relation to parent and subsidiary undertakings.

In relation to parent and subsidiary undertakings¹, rights which are exercisable only in certain circumstances are to be taken into account only when the circumstances have arisen (and only for so long as they continue to obtain), or when the circumstances are within the control of the person having the rights². Rights which are normally exercisable but are temporarily incapable of exercise must continue to be taken into account³.

Rights held by a person⁴ in a fiduciary capacity are to be treated as not held by him⁵.

Rights held by a person as nominee for another are to be treated as held by the other⁶.

Rights attached to shares⁷ held by way of security are to be treated as held by the person providing the security⁸:

- 57 (1) where, apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in accordance with his instructions⁹; and
- 58 (2) where the shares are held in connection with the granting of loans as part of normal business activities and apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in his interests¹⁰.

Rights are to be treated as held by a parent undertaking if they are held by any of its subsidiary undertakings¹¹. However, nothing in the provisions relating to rights held by a person as nominee for another¹², or in the provisions relating to rights attached to shares held by way of security¹³ is to be construed as requiring rights held by a parent undertaking to be treated as held by any of its subsidiary undertakings¹⁴.

The voting rights in an undertaking must be reduced by any rights held by the undertaking itself¹⁵.

1 As to the meanings of 'parent undertaking' and 'subsidiary undertaking' in the Companies Acts see PARA 26.

2 Companies Act 2006 s 1162(6), Sch 7 paras 1, 5(1).

3 Companies Act 2006 Sch 7 paras 1, 5(2).

4 References in any provision of the Companies Act 2006 Sch 7 paras 6-10 (see the text and notes 5-15) to rights held by a person include rights falling to be treated as held by him by virtue of any other provision of Sch 7 paras 6-10 but not rights which by virtue of any such provision are to be treated as not held by him: Sch 7 paras 1, 11.

5 Companies Act 2006 Sch 7 paras 1, 6. See note 4. See *Michaels v Harley House (Marylebone) Ltd* [2000] Ch 104, [1999] 1 All ER 356, CA.

6 Companies Act 2006 Sch 7 paras 1, 7(1). Rights are to be regarded as held by a nominee for another if they are exercisable only on his instructions or with his consent or concurrence: Sch 7 paras 1, 7(2). See note 4.

7 As to the meaning of 'shares' for these purposes see PARA 26 note 3.

8 Companies Act 2006 Sch 7 paras 1, 8. See note 4.

9 Companies Act 2006 Sch 7 paras 1, 8(a). For these purposes, rights are to be treated as being exercisable in accordance with the instructions or in the interests of an undertaking if they are exercisable in accordance with the instructions of or, as the case may be, in the interests of any group undertaking: Sch 7 paras 1, 9(3). In the Companies Acts, 'group undertaking', in relation to an undertaking, means an undertaking which is either a parent undertaking or subsidiary undertaking of that undertaking, or a subsidiary undertaking of any parent undertaking of that undertaking: s 1161(5).

10 Companies Act 2006 Sch 7 paras 1, 8(b). See note 9.

11 Companies Act 2006 Sch 7 paras 1, 9(1). See note 4.

12 In the Companies Act 2006 Sch 7 paras 1, 7 (see the text and note 6): see Sch 7 paras 1, 9(2).

13 In the Companies Act 2006 Sch 7 paras 1, 8 (see the text and notes 7-10): see Sch 7 paras 1, 9(2).

14 Companies Act 2006 Sch 7 paras 1, 9(2). See note 4.

15 Companies Act 2006 Sch 7 paras 1, 10. See note 4.

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28. Meaning of 'dormant company'.

For the purposes of the Companies Acts¹, a company² is 'dormant' during any period in which it has no significant accounting transaction³.

In determining whether or when a company is dormant, there must be disregarded⁴:

- 59 (1) any transaction arising from the taking of shares⁵ in the company by a subscriber to the memorandum⁶ as a result of an undertaking of his in connection with the formation of the company⁷;
- 60 (2) any transaction consisting of the payment of: (a) a fee to the registrar⁸ on a change of the company's name⁹; (b) a fee to the registrar on the re-registration of the company¹⁰; (c) a penalty¹¹ for failure to file accounts¹²; or (d) a fee to the registrar for the registration of an annual return¹³.

Any reference in the Companies Acts to a body corporate¹⁴ other than a company being dormant has a corresponding meaning¹⁵.

1 As to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 Companies Act 2006 s 1169(1). For these purposes, a 'significant accounting transaction' means a transaction that is required by s 386 (see PARA 708) to be entered in the company's accounting records: s 1169(2).

4 Companies Act 2006 s 1169(3).

5 As to the meaning of 'share' see PARA 1042. As to share capital generally see PARA 1042 et seq.

6 As to subscribers to the memorandum see PARA 104.

7 Companies Act 2006 s 1169(3)(a). As to company formation under the Companies Act 2006 see PARA 102 et seq.

8 As to the meaning of 'registrar of companies' see PARA 131 note 2.

9 Companies Act 2006 s 1169(3)(b)(i). As to change of a company's name see PARAS 217-219.

10 Companies Act 2006 s 1169(3)(b)(ii). As to re-registration and its effects see PARA 167 et seq.

11 I.e. a civil penalty under the Companies Act 2006 s 453 (see PARA 884): see the Companies Act 2006 s 1169(3)(b)(iii).

12 Companies Act 2006 s 1169(3)(b)(iii).

13 Companies Act 2006 s 1169(3)(b)(iv). As to registration of an annual return see PARAS 1421-1424.

14 As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5.

15 Companies Act 2006 s 1169(4).

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29. Geographical extent of the Companies Acts.

Except as otherwise provided (or the context otherwise requires), the provisions of the Companies Act 2006 extend to the whole of the United Kingdom¹.

Specific provision is made also to extend the Companies Acts² and related legislation to Northern Ireland³.

In the Companies Acts, 'EEA company' and 'EEA undertaking' mean a company⁴ or undertaking governed by the law of an EEA State⁵.

1 Companies Act 2006 s 1299. Since 1929, and before the advent of the Companies Act 2006, Companies Acts legislation had extended to Great Britain only: see PARA 11. As to the meanings of 'Great Britain' and 'United Kingdom' see PARA 1 note 5. One of the main aims of the Company Law Review Steering Group (CLRSG) (as to which see PARA 16 note 1) was to make company law a less devolved matter than previously: see *Modern Company Law: For A Competitive Economy - Final Report* (2001) (URN 01/943) paras 11.21-11.33. Nevertheless, certain provisions of the Companies Act 2006 do not extend to Scotland (see eg s 42 (constitutional limitations: companies that are charities) (see PARA 265); s 45 (common seal) (see PARA 283); s 49(3) (the official seal when duly affixed to a document has the same effect as the company's common seal) (see PARA 290); s 181 (modification of provisions in relation to charitable companies) (see PARA 533); s 508 (guidance for regulatory and prosecuting authorities: England, Wales and Northern Ireland) (see PARA 937); s 1084 (records relating to companies that have been dissolved etc) (see PARA 146)); and other provisions of the 2006 Act either have particular application to Scotland or form part of the law of Scotland only (see eg s 48 (formalities of doing business under the law of Scotland); Pt 11 Ch 2 (ss 265-269) (derivative proceedings in Scotland); s 483 (Scottish public sector companies: audit by Auditor General for Scotland); s 509 (guidance for regulatory authorities: Scotland); s 742 (debentures to bearer (Scotland)); s 781 (offences in connection with share warrants (Scotland)); Pt 25 Ch 2 (ss 878-892) (company charges: companies registered in Scotland); and ss 1020-1022 (effect of Crown disclaimer: Scotland)).

Despite the main geographical extent of the Companies Act 2006, registration must remain separate for England and Wales, for Scotland and for Northern Ireland due to differences in other aspects of the law that affect companies; also, language provisions may allow a company to elect to locate its registered office in Wales: see PARAS 129, 130.

2 As to the meaning of the 'Companies Acts' see PARA 16.

3 See the Companies Act 2006 Pt 45 (ss 1284-1287). This extension may have definitional consequences because, under the Companies Act 2006, companies fall under the umbrella of 'UK companies' rather than 'GB companies' or 'Northern Ireland companies': see PARA 24. However, this extension does not affect the legislative competence of Northern Ireland: formally, company law remains a transferred matter (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**), and a future Northern Ireland Assembly could separately amend or repeal the Companies Act 2006 in Northern Ireland if that were so desired: see Explanatory Notes to the Companies Act 2006 paras 12, 1706.

4 As to the meaning of 'company' under the Companies Acts see PARA 24.

5 Companies Act 2006 s 1170. For these purposes, 'EEA state', in relation to any time, means a state which at that time is a member state or any other state which at that time is a party to the EEA agreement, where 'EEA Agreement' means the Agreement on the European Economic Area (Oporto, 2 May 1992; EC 7 (1992); Cm 2183) as adjusted by the Protocol (Brussels, 17 March 1993; EC 2 (1993); Cm 2183), as modified or supplemented from time to time: see the Interpretation Act 1978 s 5, Sch 1 (definitions added by the Legislative and Regulatory Reform Act 2006 s 26(1)); definition of 'EEA state' applied by the Companies Act 2006 s 1170 (definition substituted by SI 2007/732). As to the meaning of 'member state' see the European Communities Act 1972 s 1(2), Sch 1 Pt II; and the Interpretation Act 1978 s 5, Sch 1.

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30. Application of the statute law to other forms of business organisation.

Certain provisions of the existing statute law which relate to companies are applied with modifications to limited liability partnerships¹ and to open-ended investment companies².

The application of the existing statute law to various forms of European Company is discussed elsewhere³.

1 See the Limited Liability Partnerships Regulations 2001, SI 2001/1090; the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009/1804; and **PARTNERSHIP** vol 79 (2008) PARA 243 et seq. As to limited liability partnerships generally see **PARTNERSHIP** vol 79 (2008) PARA 234 et seq.

See also the Limited Liability Partnerships (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008, SI 2008/1911; the Small Limited Liability Partnerships (Accounts) Regulations 2008, SI 2008/1912; and the Large and Medium-sized Limited Liability Partnerships (Accounts) Regulations 2008, SI 2008/1913 (all made under the Limited Liability Partnerships Act 2000), which apply provisions of the Companies Act 2006 Pts 15, 16 (ss 380-539) (accounts and audit) (see PARA 693 et seq) to limited liability partnerships.

2 See the Open-Ended Investment Companies Regulations 2001, SI 2001/1228 (made under the Financial Services and Markets Act 2000 s 262); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 621 et seq.

3 See PARA 5.

UPDATE

30 Application of the statute law to other forms of business organisation

NOTE 1--SI 2008/1911 amended: SI 2009/1804.

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31. Companies and associations incapable of registration.

The companies or associations which may not be registered under the Companies Act 2006 are:

- 61 (1) trade unions and other organisations of workers¹;
- 62 (2) one or more persons associated together for any unlawful purpose²; and
- 63 (3) companies not formed under the companies legislation and prohibited in express terms by the Companies Act 2006 from registering thereunder³.

1 A trade union, other than a special register body, may not be registered as a company under the Companies Act 2006; and any such registration of a trade union, whenever effected, is void: see the Trade Union and Labour Relations (Consolidation) Act 1992 ss 10(3)(a), 117(3)(a)(ii); and **EMPLOYMENT** vol 40 (2009)

PARA 852. As to the meaning of 'special register body' for these purposes see **EMPLOYMENT** vol 40 (2009) PARA 854.

2 See the Companies Act 2006 s 7(1), (2), which specifies that a company duly formed under the Act by one or more persons may not be so formed for an unlawful purpose; and see PARAS 102, 106.

3 See the Companies Act 2006 s 1040; and PARA 33.

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32. Companies not registered, or registered but not formed, under the Companies Act 2006; overseas companies.

Certain specified provisions of the Companies Acts¹ apply to: (1) companies² registered, but not formed, under the Companies Act 2006³; (2) bodies incorporated in the United Kingdom⁴ but not registered under the 2006 Act⁵; (3) companies incorporated outside the United Kingdom (overseas companies)⁶.

1 As to the meaning of the 'Companies Acts' for these purposes see PARA 16.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 Companies Act 2006 s 1(2)(a). See further Pt 33 Ch 1 (ss 1040-1042), and the regulations made thereunder (cited in PARAS 31, 33 et seq).

4 As to the meaning of 'United Kingdom' see PARA 1 note 5.

5 Companies Act 2006 s 1(2)(b). See further Pt 33 Ch 2 (s 1043), and the regulations made thereunder (cited in PARA 1665 et seq).

6 Companies Act 2006 s 1(3). See further Pt 34 (ss 1044-1059), and the regulations made thereunder (cited in PARA 1824 et seq). As to the meaning of 'overseas company' see PARA 1824.

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(ii) Companies not Formed under Companies Legislation but Authorised to Register

A. IN GENERAL

33. Classes of company not formed under companies legislation but authorised to register.

Any of the following companies¹ may on making application register² under the Companies Act 2006³:

- 64 (1) any company that was in existence on 2 November 1862⁴, including any company registered under the Joint Stock Companies Acts⁵;
- 65 (2) any company formed after 2 November 1862, whether before or after 1 October 2009⁶, either in pursuance of an Act of Parliament (other than the Companies Act 2006 or any of the former Companies Acts)⁷ or in pursuance of letters patent⁸, or any such company that is otherwise duly constituted according to law⁹.

Such a company may¹⁰ register as an unlimited company¹¹, as a company limited by shares¹², or as a company limited by guarantee¹³.

However, a company having the liability of its members¹⁴ limited by Act of Parliament or letters patent:

- 66 (a) may not so register¹⁵ unless it is a joint stock company¹⁶; and
- 67 (b) may not so register¹⁷ as an unlimited company or a company limited by guarantee¹⁸.

A company that is not a joint stock company may not so register¹⁹ as a company limited by shares²⁰.

The registration of a company in this way²¹ is not invalid by reason that it has taken place with a view to the company being wound up²². However, registration after the commencement of a winding up is a nullity²³.

A company governed by a deed of settlement may register under the Companies Acts with a view to going into voluntary liquidation, and then selling its assets to another company under the statutory provisions relating to winding up²⁴. However, by registering in this way, a company may lose powers which it possessed under its former constitution²⁵.

The Secretary of State²⁶ may make provision by regulations²⁷:

- 68 (i) for and in connection with the registration of companies so authorised to register²⁸ under the Companies Act 2006²⁹; and
- 69 (ii) as to the application to companies so registered of the provisions of the Companies Acts³⁰.

Without prejudice to the generality of that power, such regulations may make provision corresponding to any provision formerly made by those sections of the Companies Act 1985³¹ that governed companies not formed under companies legislation but authorised to register³².

Accordingly, provisions have been made in regulations³³ which apply in relation to the registration of a company³⁴ under the Companies Act 2006³⁵ in cases where companies have not been formed under companies legislation but are authorised to register thereunder³⁶.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the provision that may be made for registration see the text and notes 26-32. As to registration under the Companies Act 2006 generally see PARA 111 et seq.

3 Companies Act 2006 s 1040(2). As to fees payable for the registration of a company under Pt 33 Ch 1 (ss 1040-1042) see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(aa) (added by SI 2009/2439). Industrial and provident societies and friendly societies are by other statutes empowered to register as companies under the Companies Acts: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 2223, 2359, 2564.

- 4 le the date on which the Companies Act 1862 came into force: see PARA 10.
 - 5 Companies Act 2006 s 1040(1)(a). As to the meaning of the 'Joint Stock Companies Acts' under the Companies Acts see PARA 18 note 1.
 - 6 le the date by which all the provisions of the Companies Act 2006 that affect the law in England and Wales had come into force: see PARA 17 note 1.
 - 7 Companies Act 2006 s 1040(1)(b)(i). As to the meaning of the 'former Companies Acts' see PARA 18 note 1.
 - 8 Companies Act 2006 s 1040(1)(b)(ii).
 - 9 Companies Act 2006 s 1040(1)(b)(iii). A company duly constituted according to law is one which is constituted by registration under some Act of Parliament or in pursuance of an Act of Parliament (eg a company incorporated by a special Act: see PARAS 1, 1667 et seq) or under letters patent or under some constitution *eiusdem generis*: *Re Cussons Ltd* (1904) 73 LJ Ch 296.
 - 10 le subject to the Companies Act 2006 s 1040(4)-(6) (see the text and notes 14-22): see the Companies Act 2006 s 1040(3).
 - 11 As to the meaning of 'unlimited company' see PARA 102. See also PARA 81. As to the re-registration of an unlimited company as limited under the Companies Act 2006 see PARAS 168-175. As to the meaning of 'limited company' see PARA 102.
 - 12 As to the meaning of 'company limited by shares' see PARA 102. See also PARA 78 et seq. As to the meaning of 'share' see PARA 1042. As to share capital generally see PARA 1042 et seq.
 - 13 Companies Act 2006 s 1040(3). As to the meaning of 'company limited by guarantee' see PARA 102. See also PARA 79.
 - 14 As to the meaning of 'member' see PARA 321. As to shareholders and the membership of companies generally see PARA 321 et seq.
 - 15 le under the Companies Act 2006 s 1040 (see the text and notes 1-13, 21-22): see the Companies Act 2006 s 1040(4)(a).
 - 16 Companies Act 2006 s 1040(4)(a). For these purposes, 'joint stock company' means a company:
 - 17 (1) having a permanent paid-up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other (s 1041(1)(a)); and
 - 18 (2) formed on the principle of having for its members the holders of those shares or that stock, and no other persons (s 1041(1)(b)).
- Such a company when registered with limited liability under the Companies Act 2006 is deemed a company limited by shares: s 1041(2). As to classes of share capital see PARA 1042 et seq. As to the registration of a joint stock company not formed (but authorised to register) under the Companies Acts see PARA 34. As to an application for a joint stock company to be registered as a public company when applying to be registered as a company limited by shares see PARA 35.
- 17 le under the Companies Act 2006 s 1040 (see the text and notes 1-13, 21-22): see the Companies Act 2006 s 1040(4)(b).
 - 18 Companies Act 2006 s 1040(4)(b).
 - 19 le under the Companies Act 2006 s 1040 (see the text and notes 1-13, 21-22): see the Companies Act 2006 s 1040(5).
 - 20 Companies Act 2006 s 1040(5).
 - 21 le under the Companies Act 2006 s 1040 (see the text and notes 1-13, 22): see the Companies Act 2006 s 1040(6).
 - 22 Companies Act 2006 s 1040(6). As to the liability of contributories of companies that have been registered, but not formed, under the Companies Act 2006 and are being wound up, in respect of the company's debts and liabilities contracted before registration, see PARA 47. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

- 23 *Re Hercules Insurance Co* (1871) LR 11 Eq 321 at 323. As to the effect of commencement of winding up generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 489-490.
- 24 *Southall v British Mutual Life Assurance Society* (1871) 6 Ch App 614.
- 25 *Droitwich Patent Salt Co Ltd v Curzon* (1867) LR 3 Exch 35.
- 26 As to the Secretary of State see PARA 6.
- 27 Companies Act 2006 s 1042(1). Regulations under s 1042 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1042(3), 1289. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. In exercise of the powers conferred by s 1042, the Secretary of State has made the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437 (see PARAS 34-46).
- 28 Ie for and in connection with registration under the Companies Act 2006 s 1040 (see the text and notes 1-13, 20-21): see the Companies Act 2006 s 1042(1)(a).
- 29 Companies Act 2006 s 1042(1)(a).
- 30 Companies Act 2006 s 1042(1)(b).
- 31 Ie the Companies Act 1985 Pt XXII Ch II (ss 680-690) (repealed): see the Companies Act 2006 s 1042(2).
- 32 Companies Act 2006 s 1042(2). The Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437 (see note 27) replace the provision formerly made by the Companies Act 1985 ss 681-682, 684-690, Sch 21.
- 33 Ie the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, Pt 2 (regs 2-12) (see also PARAS 34-37, 40): see reg 2(1). The Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, have been made by the Secretary of State in exercise of the powers conferred by the European Communities Act 1972 s 2(2) and by the Companies Act 2006 s 1042 (as to which see the text and notes 26-32).
- 34 In the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, Pt 2 (see also PARAS 34-37, 40), references to a company are to a company authorised to register under the Companies Act 2006 s 1040 (see s 1040(1), (4), (5); and the text and notes 1-9, 14-20); and references to registration are to registration under s 1040: Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 2(2).
- 35 Ie in pursuance of the Companies Act 2006 s 1040 (the text and notes 1-22): see the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 2(1).
- 36 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 2(1).

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B. REQUIREMENTS FOR REGISTRATION

34. Requirement for assent before registration of companies authorised to register.

A company must not register¹ without the assent of a majority of such of its members² as are present in person or by proxy (in cases where proxies are allowed) at a general meeting summoned for the purpose³. Where a company not having the liability of its members limited by an enactment or letters patent wishes to register as a limited company⁴, the majority

required to assent that is required⁵ is not less than 75 per cent of the members present in person or by proxy at the meeting⁶.

1 le in pursuance of the Companies Act 2006 s 1040 (see PARA 33). The provisions of the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, Pt 2 (regs 2-12) (see also PARAS 35-37, 40) apply in relation to the registration of a company under the Companies Act 2006 in pursuance of the Companies Act 2006 s 1040 (companies not formed under companies legislation but authorised to register): see the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 2(1); and PARA 33. As to the meaning of references to a company and to registration for these purposes see PARA 33 note 34.

2 As to membership of companies generally see PARA 321 et seq.

3 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 3(1). Where the company proposes to register as a company limited by guarantee, the members' assent to its being registered must be accompanied by a resolution containing a statement of guarantee: see reg 6(1); and PARA 35. As to company meetings see PARA 629 et seq. As to the meanings of 'company limited by shares', 'company limited by guarantee' and 'limited company' see PARA 102.

4 As to the meaning of 'limited company' under the Companies Acts see PARA 102.

5 le as required by the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 3(1) (see the text and notes 1-3): see reg 3(2).

6 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 3(2). In computing any majority under reg 3 when a poll is demanded, regard is to be had to the number of votes to which each member is entitled according to the company's regulations: reg 3(3).

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35. Application for registration where a company is authorised to register.

An application for the registration of a company which has been authorised to register under the Companies Act 2006¹ must be delivered to the registrar of companies together with the documents that are required² and a statement of compliance³. The application for registration must state:

- 70 (1) the name with which the company is proposed to be registered⁴;
- 71 (2) whether the company's registered office⁵ is to be situated in England and Wales⁶ (or in Wales), in Scotland or in Northern Ireland⁷;
- 72 (3) whether the liability of the members of the company is to be limited, and if so whether it is to be limited by shares or by guarantee⁸; and
- 73 (4) whether the company is to be a private or a public company⁹.

The application must contain (in the case of a joint stock company¹⁰) a statement of capital and initial shareholdings¹¹, (in the case of a company that is to be limited by guarantee) a statement of guarantee¹², and a statement of the company's proposed officers¹³. The application also must contain a statement of the intended address of the company's registered office¹⁴, and a copy of any enactment, royal charter, letters patent, deed of settlement, contract of partnership or other instrument constituting or regulating the company¹⁵. The application must be delivered to the registrar of companies for England and Wales, if the registered office of the company is to be situated in England and Wales (or in Wales)¹⁶.

1 le in pursuance of the Companies Act 2006 s 1040 (see PARA 33). The provisions of the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, Pt 2 (regs 2-12) (see also PARAS 33-34, 36-37, 40) apply in relation to the registration of a company under the Companies Act 2006 in pursuance of the Companies Act 2006 s 1040 (companies not formed under companies legislation but authorised to register): see the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 2(1); and PARA 33. As to the meaning of references to a company and to registration for these purposes see PARA 33 note 34.

2 le required by the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 4 (see the text and notes 10-15): see reg 4(1).

3 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 4(1). The statement of compliance required to be delivered to the registrar is a statement that the requirements of Pt 2 (see also PARAS 33-34, 36-37, 40) as to registration have been complied with: reg 8(1). The registrar may accept the statement of compliance as sufficient evidence of compliance: reg 8(2). As to the registrar of companies see PARA 131 et seq. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

4 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 4(2)(a). As to the company's name see PARA 37. As to restrictions on the use of company names and trading names generally see PARA 196 et seq.

5 As to the company's registered office see PARA 129.

6 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

7 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 4(2)(b).

8 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 4(2)(c). As to the meanings of 'company limited by shares', 'company limited by guarantee' and 'limited company' under the Companies Acts see PARA 102. As to membership of companies generally see PARA 321 et seq.

9 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 4(2)(d). As to the meanings of 'private company' and 'public company' see PARA 102.

10 As to the meaning of 'joint stock company' for these purposes see PARA 33 note 16.

11 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 4(3)(a). As to the statement of capital and initial shareholdings required in the case of a joint stock company see reg 5: see reg 4(3)(a). Accordingly, the statement of capital and initial shareholdings that is required to be delivered in the case of a joint stock company must comply with reg 5: reg 5(1). It must state:

- 19 (1) the total number of shares of the company that on a date specified in the statement (the 'reference date') are held by members of the company (reg 5(2)(a));
- 20 (2) the aggregate nominal value of those shares (reg 5(2)(b));
- 21 (3) for each class of shares: (a) the particulars specified in heads (i) to (iv) below of the rights attached to the shares (reg 5(2)(c)(i)); (b) the total number of shares of that class (reg 5(2)(c)(ii)); and (c) the aggregate nominal value of shares of that class (reg 5(2)(c)(iii)); and
- 22 (4) the amount to be paid up and the amount (if any) to be unpaid on each share (whether on account of the nominal value of the share or by way of premium) (reg 5(2)(c)(iv)).

For these purposes, the reference date must be not more than 28 days before the date of the application for registration: reg 5(3). The particulars referred to in head (3)(a) above are: (i) particulars of any voting rights attached to the shares, including rights that arise only in certain circumstances (reg 5(4)(a)); (ii) particulars of any rights attached to the shares, as respects dividends, to participate in a distribution (reg 5(4)(b)); (iii) particulars of any rights attached to the shares, as respects capital, to participate in a distribution (including on winding up) (reg 5(4)(c)); and (iv) whether the shares are to be redeemed or are liable to be redeemed at the option of the company or the shareholder (reg 5(4)(d)). As to the nominal value of shares, and as to paid up and unpaid shares, see PARA 1042 et seq. As to classes of shares, and rights attached to classes of shares generally, see PARA 1057 et seq; as to redeemable shares see PARAS 1052, 1229 et seq; and as to distributions and dividends see PARA 1389 et seq. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

The statement of capital and initial shareholdings must also state the names and service addresses of all persons who on the reference date were members of the company (reg 5(5)(a)), and, with respect to each member of the company, the number, nominal value (of each share) and class of shares held by that member

on that date (reg 5(5)(b)(i)), and the amount to be paid up and the amount (if any) to be unpaid on each share (whether on account of the nominal value of the share or by way of premium) (reg 5(5)(b)(ii)). For the purposes of reg 5(5)(a), a person's 'name' means his Christian name (or other forename) and surname, except that in the case of a peer, or an individual usually known by a title, the title may be stated instead of his Christian name (or other forename) and surname or in addition to either or both of them: reg 5(6). Where a member of the company holds shares of more than one class, the information required under reg 5(5)(b)(i) is required for each class: reg 5(7).

12 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 4(3)(b). As to the statement of guarantee required in the case of a company that is to be limited by guarantee see reg 6: see reg 4(3)(b). Where the company proposes to register as a company limited by guarantee, the members' assent to its being registered (see reg 3; and PARA 34) must be accompanied by a resolution containing a statement of guarantee: reg 6(1). The statement of guarantee required is a statement that each member undertakes that, if the company is wound up while he is a member, or within one year after he ceases to be a member, he will contribute to the assets of the company such amount as may be required for (reg 6(2)):

- 23 (1) payment of the debts and liabilities of the company contracted before he ceases to be a member (reg 6(2)(a));
- 24 (2) payment of the costs, charges and expenses of winding up (reg 6(2)(b)); and
- 25 (3) adjustment of the rights of the contributories among themselves (reg 6(2)(c)),

not exceeding a specified amount (reg 6(2)). The statement of guarantee required to be delivered to the registrar in the case of a company that is to be limited by guarantee is a copy of the resolution containing the statement of guarantee: reg 6(3).

13 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 4(3)(c). The text refers to the statement of the company's proposed officers whose required particulars are specified in reg 7: see reg 4(3)(c). Accordingly, the statement of the company's proposed officers required to be delivered to the registrar must contain the required particulars of:

- 26 (1) the person who is, or persons who are, to be the first director or directors of the company on registration (reg 7(1)(a));
- 27 (2) in the case of a company that is to be a private company, any person who is (or any persons who are) to be the first secretary (or joint secretaries) of the company on registration (reg 7(1)(b));
- 28 (3) in the case of a company that is to be a public company, the person who is (or the persons who are) to be the first secretary (or joint secretaries) of the company on registration (reg 7(1)(c));
- 29 (4) a consent by each of the persons named as a director, as secretary or as one of joint secretaries, to act in the relevant capacity (reg 7(1)(d)).

The required particulars are the particulars that will be required to be stated:

- 30 (a) in the case of a director, in the company's register of directors and register of directors' residential addresses (see the Companies Act 2006 ss 162-165; and PARAS 499-500) (Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 7(2)(a));
- 31 (b) in the case of a secretary, in the company's register of secretaries (see the Companies Act 2006 ss 277-279; and PARA 605) (Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 7(2)(b)).

As to a company's directors see PARA 483 et seq; and as to the company secretary see PARA 601 et seq.

The Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 7 (application on behalf of proposed directors to withhold protected information) (see PARA 508) applies as if references to a subscriber to the memorandum of association were to any member of the company, and as if references to the proposed company were to the company proposing to register: Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 7(3).

14 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 4(4)(a).

15 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 4(4)(b). As to companies formed under any other enactment, royal charter, letters patent etc see further PARA 1.

16 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 4(5)(a). As to where the registered office of the company is to be situated in Scotland or in Northern Ireland see reg 4(5)(b), (c).

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36. Registration of a joint stock company as a public company.

A joint stock company¹ may be registered² as a public company limited by shares³ if⁴:

- 74 (1) the following conditions are met⁵, namely: (a) that the requirements of the Companies Act 2006⁶ are met as regards its share capital⁷; (b) the requirements of the Companies Act 2006⁸ are met as regards its net assets⁹; and (c) if the provisions of the Companies Act 2006 governing the recent allotment of shares for non-cash consideration apply¹⁰, that the requirements of those provisions are met¹¹; and
- 75 (2) the application for registration is accompanied by the documents specified as follows¹², namely: (a) a copy of the resolution that the company be a public company¹³; (b) a copy of the balance sheet¹⁴ prepared as at a date not more than seven months before the date on which the application to re-register is delivered to the registrar of companies¹⁵, an unqualified report¹⁶ by the company's auditor on that balance sheet¹⁷, and a written statement by the company's auditor that in his opinion at the balance sheet date the amount of the company's net assets was not less than the aggregate of its called-up share capital and undistributable reserves¹⁸; and (c) if the provisions of the Companies Act 2006 governing the recent allotment of shares for non-cash consideration apply¹⁹, a copy of the valuation report²⁰ (if any)²¹.

The statement of compliance required to be delivered with the application is a statement that the requirements as to registration²² as a public company have been complied with²³. The registrar may accept the statement of compliance as sufficient evidence that the company is entitled to be registered as a public company²⁴.

1 As to the meaning of 'joint stock company' for these purposes see PARA 33 note 16.

2 I.e. in pursuance of the Companies Act 2006 s 1040 (see PARA 33). The provisions of the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, Pt 2 (regs 2-12) (see also PARAS 33-35, 37, 40) apply in relation to the registration of a company under the Companies Act 2006 in pursuance of the Companies Act 2006 s 1040 (companies not formed under companies legislation but authorised to register): see the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 2(1); and PARA 33. As to the meaning of references to a company and to registration for these purposes see PARA 33 note 34.

3 As to the meanings of 'company limited by shares' and 'public company' under the Companies Acts see PARA 102.

4 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(1).

5 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(1)(a).

6 I.e. the requirements of the Companies Act 2006 s 91 (see PARA 169): see the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(2)(a). The Companies Act 2006 ss 91-93 (see PARAS 169-171) apply for this purpose as in the case of a private company applying to be re-registered under s

90 (re-registration of private company as public) (see PARA 168), but as if any reference to the special resolution required by s 90 were to the joint stock company's resolution that it be a public company: reg 9(3). As to the meaning of 'private company' see PARA 102. As to the meaning of 'joint stock company' for these purposes see PARA 33 note 16. As to special resolutions see PARA 614.

7 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(2)(a). As to the meanings of 'share' and 'share capital' see PARA 1042.

8 le the requirements of the Companies Act 2006 s 92 (see PARA 170): see the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(2)(b). See note 6.

9 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(2)(b). As to the meaning of 'net assets' for these purposes see PARA 170 note 5.

10 le if the Companies Act 2006 s 93 (see PARA 171) applies: see the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(2)(c). See note 6. As to the meanings of 'allotted', 'cash' and consideration 'other than cash' in relation to the allotment or payment up of shares in a company see PARA 1091.

11 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(2)(c).

12 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(1)(b). The documents specified in heads (2)(a) to (2)(c) in the text must be delivered to the registrar with the application for registration as well as those required by reg 4 (see PARA 35): reg 9(4). As to the registrar of companies see PARA 131 et seq. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

13 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(4)(a).

14 Head (2)(b) in the text refers to the balance sheet and other documents referred to in the Companies Act 2006 s 92(1) (see PARA 170): see the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(4)(b). See note 6.

15 See the Companies Act 2006 s 92(1)(a); Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(4)(b). See note 6.

16 As to the meaning of 'unqualified report' for these purposes see PARA 170 note 5.

17 See the Companies Act 2006 s 92(1)(b); Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(4)(b). See note 6. As to eligibility for appointment as a company's auditor see PARA 958 et seq.

18 See the Companies Act 2006 s 92(1)(c); Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(4)(b). See note 6. As to the meaning of 'undistributable reserves' for these purposes see PARA 170 note 5. As to the meaning of 'called-up share capital' see PARA 1048.

19 le if the Companies Act 2006 s 93 (see PARA 171) applies: see the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(4)(c).

20 le under the Companies Act 2006 s 93(2)(a) (see PARA 171): see the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(4)(c).

21 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(4)(c).

22 le the requirements of the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, Pt 2 (see also PARAS 33-35, 37, 40): see the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(5).

23 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(5).

24 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 9(6).

Authorised to Register/B. REQUIREMENTS FOR REGISTRATION/37. Name of company on registration.

37. Name of company on registration.

Where the name of a company, which has been authorised to register under the Companies Act 2006 and is seeking registration¹, is a name by which it is precluded from being registered by any provision of the Companies Acts², either:

- 76 (1) because it is directly prohibited from being registered with that name³; or
- 77 (2) because the Secretary of State⁴ would not approve the company being registered with that name⁵,

the company may change its name with effect from the date on which it is registered⁶.

Any such change of name⁷ requires the like assent of the company's members as is required⁸ for registration⁹.

1 Ie in pursuance of the Companies Act 2006 s 1040 (see PARA 33). The provisions of the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, Pt 2 (regs 2-12) (see also PARAS 33-36, 40) apply in relation to the registration of a company under the Companies Act 2006 in pursuance of the Companies Act 2006 s 1040 (companies not formed under companies legislation but authorised to register): see the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 2(1); and PARA 33. As to the meaning of references to a company and to registration for these purposes see PARA 33 note 34.

2 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 10(1). As to the meaning of the 'Companies Acts' generally see PARA 16. As to the naming of a company and changes of name generally see PARA 200 et seq.

3 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 10(1)(a).

4 As to the Secretary of State see PARA 6 et seq.

5 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 10(1)(b).

6 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 10(1).

7 Ie under the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 10: see reg 10(2).

8 Ie by the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 3 (see PARA 34): see reg 10(2). As to membership of a company see PARA 321 et seq.

9 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 10(2).

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C. REGISTRATION AND ITS EFFECT

38. Application of the Companies Acts.

The provisions of the Companies Acts¹ apply to a registered company², and to its members³ and contributories⁴, in the same manner as if it had been formed and registered under the Companies Act 2006⁵.

1 References in the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, regs 18-22 (see also PARAS 39, 44, 45) to the Companies Acts include the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974 (see PARA 1451), and do not include the Companies (Audit, Investigations and Community Enterprise) Act 2004 Pt 2 (ss 26-63) (see PARA 82 et seq): Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 18(2). As to the meaning of the 'Companies Acts' generally see PARA 16.

2 I.e. a company registered in pursuance of the Companies Act 2006 s 1040 (see PARA 33). In the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, Pt 3 (regs 13-23) (see also PARAS 39, 41 et seq), 'registration' means registration under the Companies Act 2006 in pursuance of s 1040: Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 13.

3 As to membership of a company generally see PARA 321 et seq.

4 As to the meaning of 'contributory' see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 703. As to the meaning of 'contributory' under the Companies Acts see PARA 115 note 10.

5 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 18(1). This is subject to regs 19-22 (see PARAS 39, 44, 45): see reg 18(1). As to formation and registration under the Companies Act 2006 see PARA 102 et seq.

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39. Provisions which do not apply.

The model articles of association¹ do not apply to a registered company² unless adopted by special resolution³.

The provisions relating to the numbering of shares⁴ do not apply to any joint stock company⁵ whose shares are not numbered⁶.

1 I.e. the model articles of association prescribed by the Secretary of State under the Companies Act 2006 s 19 (see PARA 228): see the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 19(1). As to the Secretary of State see PARA 6 et seq.

2 I.e. a company registered in pursuance of the Companies Act 2006 s 1040 (see PARA 33). See also PARA 38 note 2.

3 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 19(1). As to special resolutions see PARA 614.

4 See PARA 1050.

5 As to the meaning of 'joint stock company' for these purposes see PARA 33 note 16.

6 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 19(2).

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COMPANIES ACTS/(1) IN GENERAL/(ii) Companies not Formed under Companies Legislation but Authorised to Register/C. REGISTRATION AND ITS EFFECT/40. Formal registration and issue of the certificate of registration.

40. Formal registration and issue of the certificate of registration.

If the registrar of companies¹ is satisfied that the statutory requirements as to registration² are complied with, he must register the documents delivered to him³.

On the registration of a company, the registrar must give a certificate that the company is incorporated⁴. The certificate must state:

- 78 (1) the name and registered number of the company⁵;
- 79 (2) the date of its incorporation⁶;
- 80 (3) whether it is a limited or unlimited company⁷, and if it is limited whether it is limited by shares or limited by guarantee⁸;
- 81 (4) whether it is a private or a public company⁹; and
- 82 (5) whether the company's registered office¹⁰ is situated in England and Wales¹¹ (or in Wales), in Scotland or in Northern Ireland¹².

The certificate must be signed by the registrar or authenticated by the registrar's official seal¹³. It is conclusive evidence that the requirements¹⁴ as to registration have been complied with and that the company is duly registered under the Companies Act 2006¹⁵.

The registrar is also required to cause notice of the issue of the certificate to be published¹⁶.

1 As to the registrar of companies see PARA 131 et seq.

2 I.e. the requirements of the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, Pt 2 (regs 2-12) (see also PARAS 33-37): see reg 11. The provisions of Pt 2 apply in relation to the registration of a company under the Companies Act 2006 in pursuance of the Companies Act 2006 s 1040 (companies not formed under companies legislation but authorised to register): see the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 2(1); and PARA 33. As to the meaning of references to a company and to registration for these purposes see PARA 33 note 34.

3 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 11. As to the documents that are required as mentioned in the text see PARAS 34-36. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

4 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 12(1).

5 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 12(2)(a). As to company names and trading names generally see PARA 196 et seq. As to a company's registered number see PARAS 139, 140.

6 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 12(2)(b). The company is incorporated from the beginning of the date mentioned in the certificate of incorporation: see PARA 119 note 7.

7 As to the meanings of 'limited company' and 'unlimited company' see PARA 102.

8 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 12(2)(c). As to the meanings of 'company limited by shares' and 'company limited by guarantee' see PARA 102.

9 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 12(2)(d). As to the meanings of 'private company' and 'public company' see PARA 102.

10 As to the company's registered office see PARA 129.

11 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

12 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 12(2)(e).

13 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 12(3). As to the registrar's official seal see PARA 131.

14 Ie the requirements of the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, Pt 2 (see also PARAS 33-37): see reg 12(4).

15 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 12(4).

16 The Companies Act 2006 s 1064 (public notice of certificate of incorporation) (see PARA 138) applies to a certificate of incorporation issued under the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 12: reg 12(5).

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41. Vesting of property.

All property belonging to or vested in a company¹ at the date of its registration² passes to and vests in the company on registration for all the estate and interest of the company in the property³.

Registration does not affect the company's rights or liabilities in respect of any debt or obligation incurred, or contract entered into, by, to, with or on behalf of the company before registration⁴.

1 Ie a company registered in pursuance of the Companies Act 2006 s 1040 (see PARA 33).

2 As to the meaning of 'registration' for these purposes see PARA 38 note 2. As to formal registration and issue of the certificate of registration for these purposes see PARA 40.

3 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 14(1). As to whether the property of partners so passes to the company where the partnership is wrongfully registered see *Re Cussons Ltd* (1904) 73 LJ Ch 296; *Hammond v Prentice Bros Ltd* [1920] 1 Ch 201.

4 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 14(2).

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42. Creditors.

If an unregistered company¹ registers with unlimited liability², the shareholders are, in a winding up³, liable beyond the amount unpaid on their shares⁴ for the expenses of the winding up, but not beyond that amount for any breach of contract under the terms of which there was only a limited liability⁵.

Where a member of an unregistered company who is personally liable to be sued for the debts of the company has parted with his shares before registration, and so has not become a

member of the registered company, he is not, by reason only of the registration, released from his pre-existing liability⁶.

- 1 As to the meaning of 'unregistered company' see PARA 1666 note 10.
- 2 As to the meaning of 'unlimited company' see PARA 102.
- 3 As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.
- 4 As to shares generally see PARA 1055.
- 5 *Lethbridge v Adams, ex p Liquidator of the International Life Assurance Society* (1872) LR 13 Eq 547.
- 6 *Lanyon v Smith* (1863) 3 B & S 938; *Harvey v Clough* (1863) 8 LT 324.

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43. Pending actions and execution.

All actions and other legal proceedings which at the time of a company's registration¹ are pending by or against a company, or the public officer or any member² of it, may be continued in the same manner as if registration had not taken place³. However, execution of any judgment, decree or order obtained in such an action or proceeding must not issue against the effects of any individual member of the company⁴; but, in the event of the property and effects of the company being insufficient to satisfy the judgment, decree or order, an order may be obtained for winding up the company⁵.

- 1 As to the meaning of 'registration' for these purposes see PARA 38 note 2.
- 2 As to membership of a company see PARA 321 et seq.
- 3 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 15(1).
- 4 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 15(2).
- 5 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 15(2).

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44. Certain provisions to have continuing effect.

All provisions contained in any enactment or other instrument¹ constituting or regulating the company² are deemed to be conditions and regulations of the company, in the same manner and with the same incidents as if so much of them as would, if the company had been formed and registered under the Companies Act 2006³, be contained in registered articles of

association⁴. The provisions so brought in⁵ include, in the case of a company registered as a company limited by guarantee⁶, those of the resolution declaring the amount of the guarantee⁷.

The provisions with respect to:

- 83 (1) the re-registration of an unlimited company as limited⁸;
- 84 (2) the powers of an unlimited company on re-registration as a limited company to provide that a portion of its share capital is not capable of being called up except in the event of winding up⁹; and
- 85 (3) the power of a limited company to determine that a portion of its share capital is not capable of being called up except in that event¹⁰,

apply notwithstanding any provisions contained in any enactment, royal charter or other instrument constituting or regulating the company¹¹.

1 In the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, Pt 3 (regs 13-23) (see also PARAS 39, 41 et seq, 45, 46), 'instrument' includes a deed of settlement, a contract of partnership or letters patent: reg 13.

2 I.e. a company registered in pursuance of the Companies Act 2006 s 1040 (see PARA 33). See also PARA 38 note 2.

3 As to formation and registration under the Companies Act 2006 see PARA 102 et seq.

4 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 16(1). As to a company's articles of association generally see PARA 228 et seq.

5 I.e. by the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 16(1): see reg 16(2).

6 As to the meanings of 'company limited by guarantee' and 'limited company' see PARA 102.

7 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 16(2).

8 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 21(a). As to the re-registration of an unlimited company as limited under the Companies Act 2006 see PARAS 178-180. As to the meanings of 'limited company' and 'unlimited company' see PARA 102.

9 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 21(b). As to the meaning of 'called up share capital' see PARA 1048. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

10 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 21(c).

11 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 21.

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45. Power to alter company's constitution.

Except for the power of court to regulate the conduct of the company's affairs¹, none of the statutory companies provisions² affects any power of altering the company's constitution³ or

regulations vested in the company by virtue of any enactment or other instrument⁴ constituting or regulating it⁵.

However, subject to the provisions which govern the effect of registration⁶, the company does not have power to alter any provision contained in an enactment relating to the company⁷ or, without the consent of the Secretary of State⁸, to alter any provision contained in letters patent relating to the company⁹. The company does not have power to alter any provision contained in a royal charter or letters patent with respect to the company's objects¹⁰. Where, in this way¹¹, a company does not have power to alter a provision, it does not have power to ratify acts of the directors in contravention of the provision¹².

1 The Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 22(1) does not apply to the power of the court under the Companies Act 2006 s 996(2) (protection of members against unfair prejudice) (see PARA 475): Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 22(2).

2 I.e. none of the provisions of the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, Pt 3 (regs 13-23) (see also PARAS 39 et seq, 46) or of the Companies Acts: see reg 22(1). As to the meaning of references to the 'Companies Acts' for these purposes see PARA 38 note 1.

3 As to the meaning of references to a company's constitution under the Companies Act 2006 see PARA 227. The text refers to a company registered in pursuance of the Companies Act 2006 s 1040 (see PARA 33). See also PARA 38 note 2.

4 As to the meaning of 'instrument' for these purposes see PARA 44 note 1.

5 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 22(1). See *Droitwich Patent Salt Co v Curzon* (1867) LR 3 Exch 35; *Holmes v Newcastle-upon-Tyne Freehold Abattoir Co* (1875) 1 ChD 682.

6 I.e. subject to the provisions of the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, Pt 3 (see also PARAS 39 et seq, 46): see the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 20(1).

7 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 20(1)(a). See also *Re Salisbury Railway and Market House Co Ltd* [1969] 1 Ch 349, [1967] 1 All ER 813.

8 As to the Secretary of State see PARA 6 et seq.

9 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 20(1)(b).

10 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 20(2). As to the statement of a company's objects see PARA 240.

11 I.e. by virtue of the Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 20(1), (2) (see the text and notes 6-10): see reg 20(3).

12 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 20(3). As to the ratification by a company of conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company, see the Companies Act 2006 s 239; and PARA 593.

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46. Power to substitute articles of association.

A registered company¹ may by special resolution² alter the form of its constitution³ by substituting articles of association⁴ for any instrument⁵ constituting or regulating the company, other than an enactment, a royal charter or letters patent⁶.

1 le a company registered in pursuance of the Companies Act 2006 s 1040 (see PARA 33). See also PARA 38 note 2.

2 As to special resolutions see PARA 614.

3 As to the meaning of references to a company's constitution under the Companies Act 2006 see PARA 227.

4 As to a company's articles of association generally see PARA 228 et seq.

5 As to the meaning of 'instrument' for these purposes see PARA 44 note 1.

6 Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437, reg 17. See further PARA 1.

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47. Liability of contributories of companies not formed, but authorised to register, under the Companies Act 2006.

In the event of a company being wound up¹ which has been registered, but not formed², under the Companies Act 2006³, every person is a contributory⁴, in respect of the company's debts and liabilities contracted before registration, who is liable⁵:

- 86 (1) to pay, or contribute to the payment of, any debt or liability so contracted⁶; or
- 87 (2) to pay, or contribute to the payment of, any sum for the adjustment of the rights of the members among themselves in respect of any such debt or liability⁷;
- or
- 88 (3) to pay, or contribute to the amount of, the expenses of winding up the company, so far as relates to the debts or liabilities mentioned above⁸.

Every such contributory is liable to contribute to the assets of the company, in the course of the winding up, all sums due from him in respect of any such liability⁹.

1 As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

2 As to registration under the Companies Act 2006 generally see PARA 111 et seq. As to companies formed under previous legislation see PARA 10 et seq.

3 See the Insolvency Act 1986 s 83(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 714.

4 As to the meaning of 'contributory' see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 703. As to the meaning of 'contributory' under the Companies Acts see PARA 115 note 10.

5 See the Insolvency Act 1986 s 83(2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 714.

6 See the Insolvency Act 1986 s 83(2)(a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 714.

7 See the Insolvency Act 1986 s 83(2)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 714.

8 See the Insolvency Act 1986 s 83(2)(c); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 714.

9 See the Insolvency Act 1986 s 83(3); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 714. In the event of the death, bankruptcy or insolvency of any such contributory, the provisions of the Insolvency Act 1986 with respect to the personal representatives of deceased contributories (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 711) and to the trustees of bankrupt or insolvent contributories (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 709) apply; see s 83(4); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 714. As to the meaning of 'personal representative' see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 4.

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48. Winding up of companies not formed, but authorised to register, under the Companies Act 2006; stay of actions.

The provisions of the Insolvency Act 1986 with respect to staying and restraining actions or proceedings against a company at any time after the presentation of a winding-up petition and before the making of a winding-up order¹, where the application to stay or restrain is by a creditor, extend to actions or proceedings against any contributory² of a company which has been registered but not formed³ under the Companies Act 2006⁴.

When an order has been made for winding up a company registered but not formed under the Companies Act 2006, no action or proceeding may be commenced or proceeded with against the company or its property or any contributory of the company, in respect of any debt of the company, except with the permission of the court, and subject to such terms as the court may impose⁵.

1 The provisions of the Insolvency Act 1986 s 126(1) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 887); see the Insolvency Act 1986 s 126(2). As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

2 As to the meaning of 'contributory' see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 703. As to the meaning of 'contributory' under the Companies Acts see PARA 115 note 10.

3 As to registration under the Companies Act 2006 generally see PARA 111 et seq. As to companies formed under previous legislation see PARA 10 et seq.

4 Insolvency Act 1986 s 126(2) (amended by SI 2009/1941).

5 See the Insolvency Act 1986 s 130(3); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 893.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE

COMPANIES ACTS/(2) PROMOTION OF COMPANIES/(i) Nature of Promoters/49. Meaning of 'promoter'.

(2) PROMOTION OF COMPANIES

(i) Nature of Promoters

49. Meaning of 'promoter'.

The term 'promoter' is not now defined by statute¹. The meaning of the term has, however, been dealt with in numerous cases².

The term 'promoter' is not a term of law, but of business³. It is a short and convenient way of designating those who set in motion the machinery by which companies legislation enables them to create an incorporated company⁴. It involves the idea of exertion for the purpose of getting up and starting a company⁵, and also the idea of some duty towards the company imposed by, or arising from, the position which the so-called promoter assumes towards it⁶.

The question whether a person is or is not a promoter is a question of fact depending upon what the so-called promoter really did⁷, and a judge in summing up to a jury is not bound to define the term⁸.

A person who as principal procures or aids in procuring the incorporation of a company is generally a promoter of it, and he does not escape from liability by acting through agents⁹. However, persons who act in a promotion only in a professionally capacity (such as counsel, solicitors, accountants, printers of offer documents, and the like) are not promoters¹⁰.

1 In the Joint Stock Companies Act 1844 s 3 (repealed), the term was defined as meaning 'every person acting by whatever name in the forming and establishing of a company at any period prior to the company obtaining complete registration'. 'Promoter' was later defined, in connection with liability for statements in a prospectus or offer for sale, to mean a promoter who was a party to the prospectus or offer for sale, or the portion of it containing the untrue statement, other than a person acting in a professional capacity: see the Companies Act 1948 s 43(5); and the Companies Act 1985 s 67(3) (both repealed). References to promoters of companies occur in the Companies Act 2006 s 553 (permitted commission) (see PARA 1152) and s 762 (procedure for public company obtaining trading certificate) (see PARA 74).

2 See the text and notes 3-10; and PARA 50 et seq.

3 *Whaley Bridge Calico Printing Co v Green* (1879) 5 QBD 109 at 111 per Bowen J. As to the meaning of 'business' generally see PARA 1 note 1.

4 *Erlanger v New Sombrero Phosphate Co* (1879) 3 App Cas 1218 at 1268, HL, per Lord Blackburn. See *Twycross v Grant* (1877) 2 CPD 469 at 541, CA, per Cockburn CJ. Persons working together to form a company are not necessarily to be regarded as partners: *Keith Spicer Ltd v Mansell* [1970] 1 All ER 462, [1970] 1 WLR 333, CA.

5 *Official Receiver and Liquidator of Jubilee Cotton Mills Ltd v Lewis* [1924] AC 958 at 968, HL, per Lord Dunedin.

6 *Emma Silver Mining Co v Lewis & Son* (1879) 4 CPD 396 at 407 per Lindley J; *Re Great Wheal Polgooth Co Ltd* (1883) 53 LJ Ch 42.

7 *Lydney and Wigpool Iron Ore Co v Bird* (1886) 33 ChD 85 at 93, CA, per Lindley LJ; *Twycross v Grant* (1877) 2 CPD 469 at 476, CA, per Lord Coleridge CJ, and at 541 per Lindley J; *Emma Silver Mining Co v Lewis & Son* (1879) 4 CPD 396.

8 *Emma Silver Mining Co v Lewis & Son* (1879) 4 CPD 396 at 407 per Lindley J.

9 *Phosphate Sewage Co v Hartmont* (1877) 5 ChD 394, CA; *Official Receiver and Liquidator of Jubilee Cotton Mills Ltd v Lewis* [1924] AC 958, HL.

10 See *Re Great Wheal Polgooth Co Ltd* (1883) 53 LJ Ch 42 (solicitors).

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50. Examples showing persons found to be promoters.

Where a person wishing to sell property agrees with others that they are to form a company, and that he is to sell the property to it, the others receiving part of the purchase money, then, when the agreement is performed, the others are promoters¹; and the owner of the property is also a promoter². A person who joins with other persons in agreeing to purchase property with the view of selling it to a company which they intend to form, and subsequently do form, is a promoter³. Where a person takes in hand the formation of a company to buy the property of a third person, he is a promoter; and he incurs the liabilities of a promoter, even though the company is substantially different in character from the one he had anticipated, if he stands by and allows his agent to alter the plan of promotion⁴.

Where the owner of a concession agrees with a financial agent that the concession is to be sold to contractors with a view to its being sold by them to a company to be formed forthwith for the purpose, the contractors finding funds necessary for such formation, the owner, the agent and the contractors are all promoters⁵. Similarly, where the agent of a syndicate, or trustee for a company, purchases property and sells it to a new company formed forthwith by the syndicate or company for the purpose, the members of the syndicate (or the company, as the case may be) are promoters⁶.

Where the owners of property agree with two persons that they are to form a company to purchase it, and one of such persons agrees with a third person to carry out the scheme, and all three take part in procuring a board for the company, and in the preparation and issue of a prospectus, all three are promoters⁷. Brokers who, in consideration of being paid part of the purchase money, assist a person in selling property to a proposed company and allow their names to appear on the company's prospectus as being ready to answer any inquiries relating to the property, and answer such inquiries, are promoters⁸.

Where a person purchases property with the view of selling it to a company which he subsequently forms, and another person enters into a sham contract with him for the purchase of the property, to be used in negotiating the sale to the company, and the company subsequently buys on terms which give a profit, they are both promoters⁹. Where a person agrees with the owners of property to form a company to purchase it at cost price, the company agreeing to pay a commission to him, and he thereupon forms the company, and is a party to the preparation and issue of the prospectus and the procuring of a board of directors, he is a promoter¹⁰.

Directors of a promoting company are promoters where the promoting company is an alias for themselves, they being the only directors and entitled to share all the profits¹¹.

1 *Hichens v Congreve* (1831) 4 Sim 420.

2 *Beck v Kantorowicz* (1857) 3 K & J 230; *Bagnall v Carlton* (1877) 6 ChD 371 at 382, CA, per Bacon V-C.

3 *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221; *Gluckstein v Barnes* [1900] AC 240, HL.

- 4 See *Official Receiver and Liquidator of Jubilee Cotton Mills Ltd v Lewis* [1924] AC 958 at 965, HL, per Viscount Finlay (where the defendant had intended the company to be a private company having as its shareholders only two others who knew the facts of the promotion).
- 5 *Twycross v Grant* (1877) 2 CPD 469, CA.
- 6 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, HL.
- 7 *Bagnall v Carlton* (1877) 6 ChD 371, CA. Cf *Re Leeds and Hanley Theatres of Varieties Ltd* [1902] 2 Ch 809, CA (where a company was held to be a promoter).
- 8 *Emma Silver Mining Co v Lewis & Son* (1879) 4 CPD 396.
- 9 *Whaley Bridge Calico Printing Co v Green* (1879) 5 QBD 109.
- 10 *Emma Silver Mining Co v Grant* (1879) 11 ChD 918.
- 11 *Re Darby, ex p Brougham* [1911] 1 KB 95.

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51. When persons are not promoters.

Persons do not become promoters on purchasing a property and shortly afterwards selling it at a profit to a company subsequently formed to buy it, if at the time of the contract they have taken no step to form the company¹, and even though the price is agreed to be paid partly in shares of a company which the purchasers propose to form². If, however, the whole essence of the scheme from the first is that a number of persons are to purchase property and form a company to purchase it from them, they must disclose to the company, when formed, the whole of the profits made by them on the transaction³.

- 1 *Ladywell Mining Co v Brookes* (1887) 35 ChD 400 at 409, CA, per Cotton LJ; *Re Cape Breton Co* (1885) 29 ChD 795, CA (affd sub nom *Cavendish Bentinck v Fenn* (1887) 12 App Cas 652, HL); *Gluckstein v Barnes* [1900] AC 240, HL; *Re Lady Forrest (Murchison) Gold Mine Ltd* [1901] 1 Ch 582.
- 2 *Re Coal Economising Gas Co, Gover's Case* (1875) 1 ChD 182, CA.
- 3 *Gluckstein v Barnes* [1900] AC 240, HL.

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52. When promotion begins and ends.

It is a question of fact in each case at what time a person begins¹ or ceases to be a promoter of a company.

A person may become a promoter of a company either before or after its incorporation². A person, although not a director, may be a promoter of a company which is already incorporated

but the capital of which has not been taken up, and which is not yet in a position to perform the obligations imposed upon it by its creators³.

A promoter does not cease to be such by reason only of the formation of the company and the appointment of its directors, but only when the directors take into their own hands what remains to be done in the way of forming the company⁴, and when there is no question open between the promoter and the company⁵.

1 *Ladywell Mining Co v Brookes* (1887) 35 ChD 400, CA; *Re Olympia Ltd* [1898] 2 Ch 153 at 181-182, CA, per Collins LJ (affd sub nom *Gluckstein v Barnes* [1900] AC 240, HL); *Tyrrell v Bank of London* (1862) 10 HL Cas 26 at 40, HL, per Lord Westbury LC; *Albion Steel and Wire Co v Martin* (1875) 1 ChD 580.

2 *Twycross v Grant* (1877) 2 CPD 469 at 503, CA, per Bramwell LJ. See also *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 at 428, CA, per Lindley MR.

3 *Emma Silver Mining Co v Lewis & Son* (1879) 4 CPD 396 at 407 per Lindley J.

4 *Twycross v Grant* (1877) 2 CPD 469 at 541, CA, per Lindley J.

5 *Eden v Ridsdales Rly Lamp and Lighting Co Ltd* (1889) 23 QBD 368, CA.

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(ii) Fiduciary Relation of Promoters to the Company

53. Promoter not trustee or agent of company.

A promoter stands in a fiduciary position with respect to the company which he promotes from the time when he first becomes until he ceases to be a promoter of it¹; but his relation to the company is not that of trustee and beneficiary, or agent and principal². A promoter may acquire assets as a trustee for a company. Whether he does so or not is a question of fact and, where the plan of promotion is that he should sell assets to an intended company at a profit, the presumption is that as regards those assets he is not a trustee in the ordinary sense, but may, as vendor or agent to the vendors, make a profit on the sale to the company, even if he is also its director or one of its directors, provided that he makes full disclosure to the company³. The onus, however, lies upon the promoter to prove that he has made full disclosure⁴.

1 *Twycross v Grant* (1877) 2 CPD 469 at 538, CA, per Cockburn CJ; *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at 1236, HL, per Lord Cairns LC, and at 1269 per Lord Blackburn; *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 at 422, CA, per Lindley MR; *Gluckstein v Barnes* [1900] AC 240, HL.

2 *Lydney and Wigpool Iron Ore Co v Bird* (1886) 33 ChD 85, CA; *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 at 426, CA, per Lindley MR. A promoter was held not to be a 'trustee or person acting in a fiduciary capacity' within the meaning of the Debtors Act 1869 s 4(3): see *Phosphate Sewage Co v Hartmont* (1877) 25 WR 743.

3 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at 1236, HL, per Lord Cairns LC; *Salomon v A Salomon & Co Ltd* [1897] AC 22 at 33, HL, per Lord Halsbury LC; *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 at 422, CA, per Lindley MR; *A-G for Canada v Standard Trust Co of New York* [1911] AC 498, PC; *Omnium Electric Palaces Ltd v Baines* [1914] 1 Ch 332 at 347 per Sargant J. See also *Jacobus Marler Estates Ltd v Marler* (1913) 85 LJPC 167n. As a director with an interest in a proposed transaction with the company, the director must comply with the Companies Act 2006 s 177 (duty to declare interest in proposed transaction or arrangement with the company) (see PARA 555) and such other of the general duties, especially s 171(b) (director of company must only exercise powers for the purposes for which they are conferred) (see PARA 540)

and s 172 (duty to promote the success of the company) (see PARA 544), as are applicable (see s 179 (except as otherwise provided, more than one of the general duties may apply in any given case); and PARA 532).

In the limited circumstances prescribed by the Companies Act 2006 s 598 (agreement for transfer to public company of non-cash asset in initial period by a person who is a subscriber to the company's memorandum), independent valuation and approval of the transfer by members are both required: see PARA 1125. In the event of a contravention, any consideration given by the company under the agreement, or an amount equal to the value of the consideration at the time of the agreement, is recoverable; and the agreement, so far as it is not carried out, is void: see s 604(2); and PARA 1129.

4 *Cavendish Bentinck v Fenn* (1887) 12 App Cas 652 at 661, HL, per Lord Herschell; *Re Darby, ex p Brougham* [1911] 1 KB 95; *Re Jubilee Cotton Mills Ltd* [1922] 1 Ch 100 at 117 per Astbury J (revsd [1923] 1 Ch 1, CA; revsd sub nom *Official Receiver and Liquidator of Jubilee Cotton Mills Ltd v Lewis* [1924] AC 958, HL). See also *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1998] Ch 1 at 18, [1996] 4 All ER 698 at 712 per Millett LJ. See further PARAS 60-61.

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54. Claiming account of secret profits made by promoter.

A promoter may not, without full disclosure, retain any profit made out of a transaction to which the company is a party¹. Where disclosure has not been made, the company may affirm the contract and sue him for an account and payment of profits². The claim of the company may also be enforced by proceedings for misfeasance in the winding up of the company³, and is provable in bankruptcy⁴.

Interest may be recovered as from the time when the promoter received the profits⁵. The burden of proving that profit has in fact been made by a promoter lies on the company⁶.

If the vendors to a company are the same persons as its shareholders, and the consideration is shares of the company, the profit (if any) is not secret and the company cannot recover it⁷.

1 See PARAS 60-61.

2 *Lydney and Wigpool Iron Ore Co v Bird* (1886) 33 ChD 85, CA; *Beck v Kantorowicz* (1857) 3 K & J 230; *Hitchens v Congreve* (1831) 4 Sim 420; *Fawcett v Whitehouse* (1829) 1 Russ & M 132; *Whaley Bridge Calico Printing Co v Green* (1879) 5 QBD 109; *Bagnall v Carlton* (1877) 6 ChD 371, CA; *Emma Silver Mining Co v Grant* (1879) 11 ChD 918; *Mann and Beattie v Edinburgh Northern Tramways Co* [1893] AC 69, HL; *Gluckstein v Barnes* [1900] AC 240. See also *Re Sale Hotel and Botanical Gardens Co Ltd, ex p Hesketh* (1898) 78 LT 368, CA.

3 *Re Caerphilly Colliery Co, Pearson's Case* (1877) 5 ChD 336, CA; *Nant-y-Glo and Blaina Ironworks Co v Grave* (1878) 12 ChD 738; *Official Receiver and Liquidator of Jubilee Cotton Mills Ltd v Lewis* [1924] AC 958, HL; *Gluckstein v Barnes* [1900] AC 240, HL. The promoters taking fully paid up shares, although they may have to pay the nominal value of them, are not contributories in respect of them: *Re Western of Canada Oil, Lands and Works Co, Carling, Hespeler, and Walsh's Cases* (1875) 1 ChD 115, CA; *Re British Provident Life and Guarantee Association, De Ruvigne's Case* (1877) 5 ChD 306, CA. See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 732. As to proceedings for misfeasance see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688 et seq.

4 See PARA 69; and the cases cited there.

5 *Gluckstein v Barnes* [1900] AC 240 at 255, HL, per Lord Macnaghten; *Nant-y-Glo and Blaina Ironworks Co v Grave* (1878) 12 ChD 738.

6 *Cavendish Bentinck v Fenn* (1887) 12 App Cas 652 at 659, HL, per Lord Herschell.

7 *Re Ambrose Lake Tin and Copper Mining Co, ex p Taylor, ex p Moss* (1880) 14 ChD 390, CA.

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55. Amount of secret profit for which promoter is liable.

In estimating the amount of secret profit for which a promoter is liable, deductions are made for legitimate expenses incurred in forming and bringing out the company (such as fees for reports of surveyors, charges of solicitors and brokers, sums expended in good faith in securing the services of directors, and payments to officers of the company and the press in relation to the company)¹. However, deductions cannot be claimed for sums paid to the company by the vendors to compromise the company's proceedings against them to rescind the purchase², nor for the difference (arranged under a compromise to which the company is not a party) between what was to be paid by the promoter to the agent of the company and what was actually paid³, nor for the value of the services in respect of which the profit is paid to him⁴. Deductions have been disallowed in the case of sums paid in obtaining from another person a guarantee for the taking of shares⁵.

1 *Emma Silver Mining Co v Grant* (1879) 11 ChD 918; *Bagnall v Carlton* (1877) 6 ChD 371, CA; *Lydney and Wigpool Iron Ore Co v Bird* (1886) 33 ChD 85, CA; *Benson v Heathorn* (1842) 1 Y & C Ch Cas 326 at 340 per Shadwell V-C; *Re Darby, ex p Brougham* [1911] 1 KB 95 at 101 per Phillimore J; *Official Receiver and Liquidator of Jubilee Cotton Mills Ltd v Lewis* [1924] AC 958, HL.

2 *Bagnall v Carlton* (1877) 6 ChD 371, CA.

3 *Grant v Gold Exploration and Development Syndicate Ltd* [1900] 1 QB 233, CA.

4 *Re Sale Hotel and Botanical Gardens Co Ltd, Hesketh's Case* (1897) 77 LT 681 at 682 per Wright J (revsd on other grounds (1898) 78 LT 368, CA).

5 *Lydney and Wigpool Iron Ore Co v Bird* (1886) 33 ChD 85, CA. It would appear that the ground for the decision in that case was that the whole transaction was improper and not that the payment of such a sum would in itself have been illegal even if made by the company: see *Metropolitan Coal Consumers' Association v Scrimgeour* [1895] 2 QB 604 at 607-608, CA, per Lindley LJ. The latter question cannot now arise: see PARA 1151 et seq.

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56. Joint and several liability of promoters in respect of secret profits.

Promoters are jointly and severally liable in respect of secret profits, and, if one pays the whole of the joint liability, he may recover the proper proportion from his co-promoters¹.

1 *Gluckstein v Barnes* [1900] AC 240 at 247, 255, HL, per Lord Macnaghten. See also *Gerson v Simpson* [1903] 2 KB 197, CA.

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57. Rescission of contract in place of claiming account of secret profits.

Instead of claiming an account of the secret profits, the company may bring a claim for rescission of the contract for sale and return of the consideration and payment of dividends and interest paid on shares and debentures forming part of the consideration; and, if the shares have been sold, the company may claim payment of the proceeds with interest¹. Where part of the consideration is exchanged for shares in another company, the amount repayable is the actual value of those shares and not the value for purposes of the exchange². As a general rule, rescission of a voidable contract may be obtained against a vendor only where the property can be restored to him; but this rule has no application where the property has been reduced by his fault, and, moreover, if compensation can be made for any deterioration, rescission with compensation may be awarded³. A company cannot be deprived of its remedy of rescission or other remedies by any provisions in its articles⁴.

The remedy by rescission may be the only remedy where the promoter has bought and paid for the property before he sells it to the company, and was not at the time of his purchase in a fiduciary relation to the company⁵.

1 This is implied in the judgments in *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, HL; *Phosphate Sewage Co v Hartmont* (1877) 5 ChD 394, CA; *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392, CA; *Official Receiver and Liquidator of Jubilee Cotton Mills Ltd v Lewis* [1924] AC 958, HL.

2 *Official Receiver and Liquidator of Jubilee Cotton Mills Ltd v Lewis* [1924] AC 958 at 967, HL, per Viscount Finlay.

3 *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 at 456, CA, per Rigby LJ. As to the remedy of rescission see **CONTRACT** vol 9(1) (Reissue) PARA 986 et seq; **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 812 et seq.

4 *Omnium Electric Palaces Ltd v Baines* [1914] 1 Ch 332 at 347, CA, per Sargant J. As to a company's articles of association see PARA 228 et seq.

5 *Ladywell Mining Co v Brookes* (1887) 35 ChD 400, CA; *Re Cape Breton Co* (1885) 29 ChD 795, CA (affd sub nom *Cavendish Bentinck v Fenn* (1887) 12 App Cas 652, HL); *Burland v Earle* [1902] AC 83, PC.

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58. Other remedies of company for breach of duty by promoter.

If the remedy by rescission is not open, or if the company elects to affirm the contract, the company may have a good cause of action for deceit or fraud, negligent misrepresentation¹ or breach of duty². Where there has been a breach of duty, nominal damages, or if the breach has resulted in loss to the funds and assets of the company, substantial damages, may be recovered³. The liability for breach of duty cannot be enforced by a contributory in a winding up by means of proceedings for misfeasance unless the breach of duty has resulted in a loss to the assets of the company⁴. Where a vendor has agreed to give to a promoter a profit undisclosed

by the promoter, the company may recover from the vendor any part of such profit which has not been paid over⁵.

1 Lie under the Misrepresentation Act 1967 s 2 (see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 762).

2 See eg *Ellis v Colman, Bates and Husler* (1858) 25 Beav 662 (specific performance of ultra vires contract refused on the ground that the court could neither enforce the contract nor compel the defendants to make good their representations; the remedy of the plaintiffs lay in action at law for damages); and see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 701 et seq; **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 813 et seq.

3 *Cavendish Bentinck v Fenn* (1887) 12 App Cas 652 at 658, 662, 664, HL, per Lord Herschell; *Re Leeds and Hanley Theatres of Varieties Ltd* [1902] 2 Ch 809 at 826, CA, per Vaughan Williams LJ, and at 830 per Romer LJ. See also *Jacobus Marler Estates Ltd v Marler* (1913) 85 LJC 167n.

4 *Cavendish Bentinck v Fenn* (1887) 12 App Cas 652, HL (affg *Re Cape Breton Co* (1885) 29 ChD 795, CA). As to proceedings for misfeasance see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688 et seq.

5 *Whaley Bridge Calico Printing Co v Green* (1879) 5 QBD 109. Cf *Grant v Gold Exploration and Development Syndicate* [1900] 1 QB 233, CA.

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59. Remedies of shareholders and debenture holders against promoter.

Where a shareholder or debenture or debenture stock holder who has been injured makes a claim, a promoter may be liable in respect of a false or misleading prospectus or listing particulars either for compensation under the statutory liability¹ or for damages for deceit² or for misrepresentation³.

1 See PARA 1070 et seq.

2 See PARA 1081 et seq. As to criminal liability of a promoter generally see PARA 70.

3 See PARA 1087.

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(iii) Disclosure by Promoters

60. Promoter's duty of full disclosure.

In order to be in a position to retain any profit made by him, or to resist a claim for rescission or damages, a promoter, before completion of the transaction out of which the profit is made,

must have made full disclosure to the company of the fact that he is interested in the transaction, of the nature of his interest, and of all other material facts¹.

It is not clear whether the exact amount of profit is required to be stated². However, in making an application for a trading certificate³, without which a public company⁴ cannot do business⁵ or exercise any borrowing powers⁶, the company must specify any amount or benefit paid or given (or intended to be paid or given) to any promoter of the company, and the consideration for the payment or benefit⁷.

1 *Re Darby, ex p Brougham* [1911] 1 KB 95; *A-G for Canada v Standard Trust Co of New York* [1911] AC 498, PC. See also the cases cited in PARA 55 note 1.

2 See *Chesterfield and Boythorpe Colliery Co v Black* (1877) 37 LT 740; *Re Lady Forrest (Murchison) Gold Mine Ltd* [1901] 1 Ch 582; *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392, CA; *Gluckstein v Barnes* [1900] AC 240 at 258, HL, per Lord Robertson. Cf *Gwembe Valley Development Co Ltd (in receivership) v Koshy (No 3)* [2003] EWCA Civ 1048 at [64]-[68], [2004] 1 BCLC 131 at [64]-[68] (director had not proved full disclosure to all of the other directors and shareholders of either his intended personal interest in a company that was involved in the transactions at issue or the source and scale of his intended profit).

A person may buy a property at one price and sell it to a company at a higher price without disclosing even the fact that he is getting a profit, provided that he is not a promoter: *Re Coal Economising Gas Co, Gover's Case* (1875) 1 ChD 182, CA.

3 A 'trading certificate' is a certificate issued by the registrar of companies under the Companies Act 2006 s 761; and an application for such a certificate must be made in accordance with s 762: see PARA 74.

4 I.e. a company that is registered as a public company on its original incorporation rather than by virtue of its re-registration as a public company: see the Companies Act 2006 s 761(1); and PARA 74. As to the meanings of 'private company' and 'public company' see PARA 102.

5 As to the meaning of 'business' generally see PARA 1 note 1.

6 As to a company's borrowing powers see PARA 1256 et seq.

7 See the Companies Act 2006 ss 761, 762; and PARA 74.

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61. What amounts to disclosure by promoter.

Disclosure may be made in any one of several ways, as, for example, by the articles of association of the company¹, or by communication to such shareholders of the company as become such by applying for shares on the footing of a prospectus or an offer for sale which makes due disclosure², or by communication to a board of directors of the company which is independent of the promoters³, or by communication in any way to the original shareholders, at any rate if no future shareholders are contemplated⁴.

Even if disclosure is made to the original shareholders or if for other reasons they cannot complain of the want of it, there may, in some cases, exist a fiduciary relation between the promoters and future shareholders if the admission of the latter to membership of the company formed part of the plan of promotion⁵.

1 *Re British Seamless Paper Box Co* (1881) 17 ChD 467 at 475, CA, per Jessel MR. Disclosure is made in this way because of the notice which every member and outsider dealing with the company has of the contents of the articles (see *Re Bank of Hindustan, China and Japan, Campbell's Case, Hippisley's Case, Alison's Case*

(1873) 9 Ch App 1 at 22 per Lord Selborne LC; *Griffith v Paget* (1877) 6 ChD 511 at 517 per Jessel MR; *Mahony v East Holyford Mining Co* (1875) LR 7 HL 869 at 893 per Lord Hatherley; and PARA 248), and possibly because of the statutory effect of the articles (see the Companies Act 2006 s 33; *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 at 424, CA, per Lindley MR; and PARA 243). See, however, *Gluckstein v Barnes* [1900] AC 240, HL.

2 *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 at 428, CA, per Lindley MR; *Gluckstein v Barnes* [1900] AC 240 at 249, HL, per Lord Macnaghten; *Omnium Electric Palaces Ltd v Baines* [1914] 1 Ch 332 at 347, CA, per Sargant J, and at 351 per Cozens-Hardy MR.

3 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at 1236, HL, per Lord Cairns LC; *Re Fitzroy Bessemer Steel Co Ltd* (1884) 50 LT 144; *Gluckstein v Barnes* [1900] AC 240, HL. See further PARA 62.

4 *Salomon v A Salomon & Co Ltd* [1897] AC 22, HL. See also *Re Ambrose Lake Tin and Copper Mining Co, ex p Taylor, ex p Moss* (1880) 14 ChD 390, CA; *Re British Seamless Paper Box Co* (1881) 17 ChD 467, CA; *A-G for Canada v Standard Trust Co of New York* [1911] AC 498, PC.

5 See *Re British Seamless Paper Box Co* (1881) 17 ChD 467, CA; *Re Postage Stamp Automatic Delivery Co* [1892] 3 Ch 566; *Re Westmoreland Green and Blue Slate Co, Bland's Case* [1893] 2 Ch 612, CA; *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 at 428, CA, per Lindley MR; *Re Leeds and Hanley Theatres of Varieties Ltd* [1902] 2 Ch 809 at 827, CA, per Vaughan Williams LJ; *Re Darby, ex p Brougham* [1911] 1 KB 95.

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62. What is an independent executive.

A board of directors, whether provided by the promoters or otherwise, is an independent executive when its members are aware that the property which the company is asked to buy is the property of the promoters, and when they are competent and intelligent judges as to whether the purchase ought or ought not to be made, and capable of exercising an intelligent, independent and impartial judgment on the transaction¹. Directors appointed by the vendors do not generally constitute an independent board; in such a case the only effective way of making disclosure by a promoter is by the articles, and, if a prospectus is issued, in the prospectus also². Where promoters appoint themselves, or some of their number, to be sole guardians and protectors of their creature, the company, they are not an independent board, and the fact that the articles purport to protect them from the liability to account as persons standing in a fiduciary relation to the company will not help them³. If a company is avowedly formed with a board of directors who are not independent, but who are stated to be the intended vendors of property to the company, or their agents, the company cannot set aside the purchase agreement merely on the ground that the directors are not independent⁴.

Where a company is one which does not invite the public to subscribe for its shares (and every shareholder is aware of all the circumstances attending the formation of the company), the absence of an independent board of directors is immaterial⁵.

1 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, HL.

2 *Re Olympia Ltd* [1898] 2 Ch 153, CA; affd sub nom *Gluckstein v Barnes* [1900] AC 240, HL. See also *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073, [1968] 1 WLR 1555 (persons nominated as directors to do what they are told by an outsider are fixed with his knowledge).

3 *Gluckstein v Barnes* [1900] AC 240 at 248, HL, per Lord Macnaghten; *Re Westmoreland Green and Blue Slate Co, Bland's Case* [1893] 2 Ch 612, CA.

4 *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 at 425, CA, per Lindley MR. Cf *Re Olympia Ltd* [1898] 2 Ch 153 at 168, CA, per Lindley MR; affd sub nom *Gluckstein v Barnes* [1900] AC 240, HL (where a clause in the articles, declaring that the validity of the agreement for sale should not be impeached on the ground that the vendors as promoters or otherwise stood in a fiduciary relation to the company, was held nugatory).

Directors in this situation remain subject to the general duties imposed by the Companies Act 2006 Pt 10 Ch 2 (ss 170-181) (see PARA 532 et seq), whose effect is cumulative (see s 179 (except as otherwise provided, more than one of the general duties may apply in any given case); and PARA 532).

5 *Salomon v A Salomon & Co Ltd* [1897] AC 22 at 36, HL, per Lord Watson, and at 57 per Lord Davey; *Larocque v Beauchemin* [1897] AC 358 at 364, PC; *Felix Hadley & Co Ltd v Hadley* (1897) 77 LT 131; *Re Innes & Co Ltd* [1903] 2 Ch 254 at 260, CA, per Vaughan Williams LJ.

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(iv) Payment by Company of Promoter's Expenses

63. Company's liability to promoter.

A promoter has no right of indemnity against the company which he promotes in respect of any obligation undertaken on its behalf before its incorporation¹, and may not sue it upon a contract, made by him with an agent or trustee on its behalf before its incorporation, stipulating that it shall pay the promoters a certain sum for preliminary expenses, even where the articles of association provide that the company shall defray the preliminary expenses². Thus, in spite of such a provision, the solicitor who prepares the memorandum and articles cannot sue the company for his costs of doing so, and the promoter, or his solicitor, who has paid the fees on registering the company, cannot recover them from the company³; nor is the promoter, or a person employed by him, entitled to sue the company in respect of any payment for services rendered or expenses incurred before its incorporation in promoting it, unless after its incorporation it expressly agrees with him to make such payment, or, from other facts, the court can infer a new contract to reimburse him⁴. The company cannot ratify an agreement purporting to be made on its behalf before its incorporation⁵; and its acts cannot be evidence of a new agreement to reimburse the promoter if they can be shown to have been made with reference to the obligations of the company to indemnify a third person⁶. A company is not bound in equity to pay the preliminary expenses because it has adopted and derived benefit from services performed before its incorporation⁷. Where a promoter procures a company to be formed by fraudulent means and by fraud induces shareholders to join it, he cannot recover expenses which he otherwise might have recovered⁸.

Whether there is a fresh contract between the company and the promoters after incorporation is a question of fact⁹.

1 *Melhado v Porto Alegre Rly Co* (1874) LR 9 CP 503. As to pre-incorporation contracts see also PARA 280.

2 *Melhado v Porto Alegre Rly Co* (1874) LR 9 CP 503. As to the personal liability of a person purporting to contract on behalf of a company at a time when the company is not formed see PARA 66. As to a company's articles of association see PARA 228 et seq.

3 See PARA 279 note 1.

4 See the cases cited in PARA 280 notes 1, 2.

5 See the cases cited in PARA 279 note 2.

6 *Re Rotherham Alum and Chemical Co* (1883) 25 ChD 103, CA.

7 *Re English and Colonial Produce Co Ltd* [1906] 2 Ch 435, CA, overruling the dictum in *Re Hereford and South Wales Waggon and Engineering Co* (1876) 2 ChD 621 at 624, CA, per Mellish LJ (which had been cited as authority for the proposition that a company, because it has taken the benefit of work done under a contract entered into before the formation of the company, can be made liable in equity under that contract), and probably some similar observations in *Re Empress Engineering Co* (1880) 16 ChD 125, CA. See also *Re National Motor Mail-Coach Co Ltd, Clinton's Claim* [1908] 2 Ch 515, CA.

8 *Re Hereford and South Wales Waggon and Engineering Co* (1876) 2 ChD 621, CA.

9 *Browning v Great Central Mining Co* (1860) 5 H & N 856; *Howard v Patent Ivory Manufacturing Co, Re Patent Ivory Manufacturing Co* (1888) 38 ChD 156 at 165 per Kay J. Cf *Re English and Colonial Produce Co Ltd* [1906] 2 Ch 435, CA.

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64. Power of company to pay registration etc expenses to promoters.

Generally, a company, and its directors by its articles of association¹, are expressly empowered to pay all expenses of and incidental to its incorporation and flotation². Even where there is express general power to pay preliminary expenses to a promoter, payment should not be made without vouchers or investigation³; but, if the directors are empowered without further authority to pay a specific sum for the costs and expenses of promoters, payment may be made without a bill of costs being required⁴. The expenses which may be properly paid include registration fees, a sum charged for a report on the value of property to be purchased by it, legal costs, advertisements, printing and brokers' fees⁵. Directors may be made personally liable for sums improperly paid to promoters⁶. Where the articles state the amounts to be paid to promoters for procuring concessions and for preliminary expenses, shareholders may not complain that the amounts are excessive⁷ unless the promoter has acted fraudulently⁸. If, however, the money is paid and proceedings to recover it are compromised with knowledge of the facts, the money cannot afterwards be recovered⁹.

1 As to a company's articles of association see PARA 228 et seq.

2 The Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 Pt 4 (art 44) expressly provides for a public company to pay any person a commission in consideration for that person subscribing, or agreeing to subscribe, for shares, or procuring, or agreeing to procure, subscriptions for shares: see PARA 1152. See also the Companies Act 2006 s 553 (permitted commission) (see PARA 1152); and note the requirement, where a public company applies for a trading certificate, without which it cannot do business or exercise any borrowing powers, for the company to specify, in making such an application, the amount, or estimated amount, of the company's preliminary expenses (see s 762; and PARA 74). No express provision for the payment of commission appears in the model articles of association provided for use by a private company, which merely provide that the directors may exercise all the powers of the company: see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 2 (arts 3, 4) (private company limited by shares); the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 70; and PARA 541. As to the model articles and Table A generally see PARAS 229, 230.

3 *Re Englefield Colliery Co* (1878) 8 ChD 388 at 401, CA, per Baggallay LJ (where directors' calls were paid out of payments to promoters).

4 *Croskey v Bank of Wales* (1863) 4 Giff 314 at 332 per Sir John Stuart V-C.

5 *Lydney and Wigpool Iron Ore Co v Bird* (1886) 33 ChD 85, CA. See also PARA 55. Reasonable sums may be paid to brokers for placing a company's shares: see *Metropolitan Coal Consumers' Association v Scrimgeour*

[1895] 2 QB 604, CA, distinguishing *Re Faure Electric Accumulator Co* (1888) 40 ChD 141, and overruling that case in so far as it held that payment of brokerage by a company was in itself illegal. See also the Companies Act 2006 s 552(3); and PARA 1151. See also PARA 1158.

6 *Re Anglo-French Co-operative Society, ex p Pelly* (1882) 21 ChD 492, CA; *Re London and Provincial Starch Co* (1869) 20 LT 390; *Re Brighton Brewery Co, Hunt's Case* (1868) 37 LJ Ch 278.

7 *Re Anglo-Greek Steam Co* (1866) LR 2 Eq 1.

8 *Re Madrid Bank, ex p Williams* (1866) LR 2 Eq 216.

9 *Re General Exchange Bank, ex p Preston* (1868) 37 LJ Ch 618.

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65. Acceptance of presents from promoters.

Directors or other officers of the company or its agents at the time of promotion accepting gifts from promoters are liable to account to the company for the money or shares or other property received¹, and, in the case of fully paid shares which have diminished in value, the nominal amount of the shares must be accounted for². An article authorising a promoter to give shares to the directors has been rejected as fraudulent³, but full disclosure may prevent liability⁴. Where several directors receive presents with mutual knowledge, they are jointly and severally liable for the whole amount⁵.

The acceptance of gifts by an agent of the company is a ground for the company rescinding the purchase contract⁶ if the transaction is not revealed to the company⁷, whether or not the gift influences the conduct of the agent⁸. If the promised gift is not handed over, the agent cannot recover it⁹.

1 *Re Caerphilly Colliery Co, Pearson's Case* (1877) 5 ChD 336, CA; *Re British Provident Life and Guarantee Association, De Ruvigne's Case* (1877) 5 ChD 306, CA; *Nant-y-Glo and Blaina Ironworks Co v Grave* (1878) 12 ChD 738; *Re Diamond Fuel Co, Mitcalfe's Case* (1879) 13 ChD 169, CA; *Re Carriage Co-operative Supply Association* (1884) 27 ChD 322; *Eden v Ridsdales Rly Lamp and Lighting Co Ltd* (1889) 23 QBD 368, CA; *Re Morvah Consols Tin Mining Co, McKay's Case* (1875) 2 ChD 1, CA; *Re Howatson Patent Furnace Co* (1887) 4 TLR 152; *Re North Australian Territory Co, Archer's Case* [1892] 1 Ch 322, CA (agreement by promoters to buy directors' shares at par); *Re London and South Western Canal Ltd* [1911] 1 Ch 346 (directors had promoters' shares transferred to them as their qualification and held them on trust for the promoters). See further **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 694.

A director, and any person who ceases to be a director, continues to be subject to the duty not to accept a benefit from a third party conferred by reason of either his being a director, or his doing (or not doing) anything as director: see the Companies Act 2006 s 170 (see PARA 533), s 176 (see PARA 553).

2 See the cases cited in note 1; and see *Re Canadian Oil Works Corp'n, Hay's Case* (1875) 10 Ch App 593; *Weston's Case* (1879) 10 ChD 579, CA; *Re Westmoreland Green and Blue Slate Co, Bland's Case* [1893] 2 Ch 612, CA (directors inaccurately stated in the contract with the company to be part vendors).

3 *Re Eskern and Slate Slab Quarries Co Ltd, Clarke and Helden's Cases* (1877) 37 LT 222. Cf *Re Australian Direct Steam Navigation Co, Miller's Case* (1877) 5 ChD 70, CA.

4 *Re Postage Stamp Automatic Delivery Co* [1892] 3 Ch 566 (disclosure in a contract registered with the registrar); *Re Olympia Ltd* [1898] 2 Ch 153 at 169, CA, per Lindley MR, and at 174 per Collins LJ (affd sub nom *Gluckstein v Barnes* [1900] AC 240, HL); *Re Innes & Co Ltd* [1903] 2 Ch 254 at 265-266, CA, per Cozens-Hardy LJ. As to the law relating to disclosure by promoters see PARAS 60-62.

5 *Re Carriage Co-operative Supply Association* (1884) 27 ChD 322.

6 *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha, and Telegraph Works Co* (1875) 10 Ch App 515, CA; *Smith v Sorby* (1875) 3 QBD 552n.

7 *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha, and Telegraph Works Co* (1875) 10 Ch App 515, CA; *Smith v Sorby* (1875) 3 QBD 552n.

8 *Industries and General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573. See also **AGENCY** vol 1 (2008) PARA 93.

9 *Harrington v Victoria Graving Dock Co* (1878) 3 QBD 549.

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(v) Promoter's Liability

66. Promoter's liability under contract that purports to be made by or on behalf of unformed company.

Under the Companies Act 2006, a contract that purports to be made by or on behalf of a company¹ at a time when the company has not been formed² has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as agent for it³, and he is personally liable on the contract accordingly⁴. The person purporting to act for, or as agent of, the unformed company is also entitled to enforce the contract against the other party unless such enforcement is otherwise precluded by the ordinary common law principles governing contractual arrangements⁵. No exclusion of personal liability will be implied merely by the manner of signature of the contract⁶. Personal liability under the contract comes to an end once it has been performed, or rescinded by either party under some power in the contract, or by consent of all parties, or when the company has, with the consent of the other contracting party, undertaken the liability of the promoter under the contract⁷. Where, however, there is a contract to pay out of a specific fund, the personal liability exists only to the extent of the fund, if any⁸.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 This does not cover the situation where a company has been formed but changes its name; contracts made at that time are not pre-incorporation contracts since a change of name is not a re-formation or re-incorporation of the company (*Oshkosh B'Gosh Inc v Dan Marbel Inc Ltd* [1989] 1 CMLR 94, [1989] BCLC 507, CA); nor does it cover contracts entered into by a company which has been formed but which was trading under an incorrect name (*Badgerhill Properties Ltd v Cottrell* [1991] BCLC 805, CA). As to pre-incorporation contracts see also PARAS 279, 280.

3 For these purposes, a contract can purport to be made on behalf of a company or by a company even though both parties know that the company is not formed and that it is only about to be formed: *Phonogram Ltd v Lane* [1982] QB 938 at 943, [1981] 3 All ER 182 at 186, CA, per Lord Denning MR. A contract cannot, however, purport to be made on behalf of a company not yet formed if no one had thought of the new company at the time of contracting: *Cotronic (UK) Ltd v Dezonie* [1991] BCLC 721, CA (parties contracted with first company which in fact had been struck off the register and dissolved; when this was discovered years later, a second company was incorporated; it was impossible to say that the contract purported to be made by or on behalf of the second company).

4 Companies Act 2006 s 51(1). This provision applies to the making of a deed under the law of England and Wales as it applies to the making of a contract: s 51(2). As to the meanings of 'England' and 'Wales' see PARA 1 note 5. The provisions of s 51 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 3: see PARA 1666. As to the meaning of 'unregistered

company' see PARA 1665. The Secretary of State has made provision by regulations (see the Companies Act 2006 s 1045; and PARA 1825) applying s 51 also to overseas companies, but with modifications: see the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, SI 2009/1917, reg 6. As to the meaning of 'overseas company' see PARA 1824.

The Companies Act 2006 s 51(1) re-enacts the Companies Act 1985 s 36C(1) (itself re-enacting in substantially the same terms the Companies Act 1985 s 36(4) (as originally enacted), which re-enacted the European Communities Act 1972 s 9(2), (9) (repealed)), and negatives the decisions in *Hollman v Pullin* (1884) Cab & El 254 and *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 QB 45, [1953] 1 All ER 708, CA. For the law prior to this provision see *Nockels v Crosby* (1825) 3 B & C 814; *Re Rotherham Alum and Chemical Co* (1883) 25 ChD 103, CA; *Mant v Smith* (1859) 4 H & N 324; *Lake v Duke of Argyll* (1844) 6 QB 477. See further PARA 279. See also *Rover International Ltd v Cannon Film Sales Ltd* [1987] BCLC 540; revsd on other grounds sub nom *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA.

5 *Braymist Ltd v Wise Finance Co Ltd* [2002] EWCA Civ 127, [2002] Ch 273, [2002] 2 All ER 333.

6 *Phonogram Ltd v Lane* [1982] QB 938, [1981] 3 All ER 182, CA. Much had seemed to turn in the older cases on the manner in which contracts had been signed, although they might more accurately have been stated as turning on issues of the parties' intentions: *Phonogram Ltd v Lane* at 945 and 188 per Oliver LJ. It was argued in *Phonogram Ltd v Lane* that questions as to the manner of signature were still relevant to what is now the Companies Act 2006 s 51 (see the text and notes 1-5) in view of the words 'subject to any agreement to the contrary'. This view was rejected, since to interpret the statutory provision in that way would defeat the whole purpose of that provision: *Phonogram Ltd v Lane* at 946 and 182 per Oliver LJ. Unless there is a clear exclusion of personal liability, the promoter is personally liable however he expresses his signature: *Phonogram Ltd v Lane* at 944 and 187 per Lord Denning MR.

7 *Re English and Colonial Produce Co Ltd* [1906] 2 Ch 435, CA; *Kelner v Baxter* (1866) LR 2 CP 174; *Re Northumberland Avenue Hotel Co* (1886) 33 ChD 16, CA; *Scott v Lord Ebury* (1867) LR 2 CP 255. A company cannot adopt or ratify a pre-incorporation contract but must contract again on identical terms: *Natal Land and Colonization Co Ltd v Pauline Colliery and Development Syndicate Ltd* [1904] AC 120, PC. See also PARAS 279-280. The issue is not addressed by the statutory provisions.

8 *Giles v Smith* (1847) 11 Jur 334; *Andrews v Ellison* (1821) 6 Moore CP 199; *Gurney v Rawlins* (1836) 2 M & W 87 at 90; *Re Athenaeum Society and Prince of Wales Society, Durham's Case* (1858) 4 K & J 517.

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67. Promoters as partners.

Promoters associated only to form a company are not in partnership¹. However, where they incur joint liability, each is liable to make contribution to the extent of his share²; and they may be partners if they join together in buying property in order to sell it at a profit to a company which they form to purchase it³.

1 *Wood v Duke of Argyll* (1844) 6 Man & G 928; *Bright v Hutton, Hutton v Bright* (1852) 3 HL Cas 341 at 368; *Keith Spicer Ltd v Mansell* [1970] 1 All ER 462, [1970] 1 WLR 333, CA. As to the essential characteristics of a partnership see **PARTNERSHIP** vol 79 (2008) PARA 1.

2 *Boulter v Peplow* (1850) 9 CB 493; *Batard v Hawes* (1853) 2 E & B 287 at 290 (provisional committee members of projected company are not partners, but liable to contribute as co-contractors); *Edger v Knapp* (1843) 5 Man & G 753 (joint contractors; one having paid debt was entitled to contribution from others; contractors had acted as directors of proposed company); *Mant v Smith* (1859) 4 H & N 324 (taxation by one partner of the bill of a solicitor employed by the partnership).

3 If they carry on the business of acquiring the property and reselling it with a view of profit: see the Partnership Act 1890 s 1; and **PARTNERSHIP** vol 79 (2008) PARA 1.

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68. Liability of several promoters to and for each other.

In the absence of an express contract, one of several promoters may not sue another for remuneration for services in connection with the promotion¹; but a person assisting promoters may sue for remuneration for his services if there is a contract express or implied to pay for them².

Promoters are not as such agents for each other, or liable for the other's acts; but an authority to act for each other may be inferred from the terms of a public prospectus or from conduct³.

1 *Holmes v Higgins* (1822) 1 B & C 74.

2 *Mant v Smith* (1859) 4 H & N 324; *Lucas v Beach* (1840) 1 Man & G 417.

3 *Reynell v Lewis*, *Wyld v Hopkins* (1846) 15 M & W 517; *McEwan v Campbell* (1857) 2 Macq 499, HL.

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69. Circumstances in which promoter's liability terminated.

After the dissolution of the company no proceedings may be taken against the promoter on behalf of the company unless the dissolution is set aside¹.

Where a promoter is adjudged bankrupt, a company may prove in his bankruptcy for any secret profits obtained by him². Under the Insolvency Act 1986, his order of discharge releases him from any debt or liability to the company which is provable in the bankruptcy, unless it was a debt he incurred in respect of, or forbearance in respect of which was secured by means of, any fraud or fraudulent breach of trust to which he was a party³.

Where a promoter has received a secret profit, he cannot, in proceedings by the company or its liquidator to recover the profit, set up the provisions of the Limitation Act 1980 by way of defence⁴.

In general, the liability of a promoter has always been enforceable against his estate after his death⁵; since 25 July 1934 all causes of action subsisting against a deceased at his death survive against his estate⁶.

1 See *Coxon v Gorst* [1891] 2 Ch 73. See also **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 932.

2 *Re Darby, ex p Brougham* [1911] 1 KB 95. See further *Re Kent County Gas Light and Coke Co Ltd* [1913] 1 Ch 92 (where it was held that the liquidator of a company having proved in the bankruptcy of a promoter for a sum as damages for breach of trust in relation to the company could not, after so electing to prove against the promoter, prove against the joint estate of a firm of which that promoter and another promoter were the partners).

3 See the Insolvency Act 1986 s 281(3); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 643.

4 See the Limitation Act 1980 s 32(1) (period of limitation postponed in relation to claim by a beneficiary under a trust in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy or to recover from the trustee trust property or its proceeds in his possession or previously received by him and converted to his use); and **LIMITATION PERIODS** vol 68 (2008) PARA 1220 et seq. See also *Re Sale Hotel and Botanical Gardens Co Ltd, Hesketh's Case* (1897) 77 LT 681 (revsd on other grounds (1898) 78 LT 368, CA); *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co v Sharpe* [1892] 1 Ch 154 at 172, CA, per Fry LJ. Cf *Tintin Exploration Syndicate Ltd v Sandys* (1947) 177 LT 412. Before the passing of the Trustee Act 1888 s 8 (repealed) (now replaced by the Limitation Act 1980 s 32), where a director had received money from a third party in such circumstances as to amount to a fraud on the company, the court applied the Statute of Limitations by analogy as from the date when the beneficiary knew the facts: *Metropolitan Bank v Heiron* (1880) 5 ExD 319, CA. See also *Re Sale Hotel and Botanical Gardens Co Ltd, Hesketh's Case* at 682 per Wright J.

As to defences founded on laches see *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 at 239; *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, HL; *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co v Sharpe* at 168 per Lindley LJ; *Concha v Murrieta* (1889) 40 ChD 543 at 553, CA, per Cotton LJ (varied on the facts [1892] AC 670, HL).

5 For analogous cases against directors see PARA 586 note 16.

6 See the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 815.

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70. Criminal liability of promoters.

Promoters of a company may incur criminal liability in connection with:

- 89 (1) an offer to the public of certain transferable securities unless an approved prospectus has been made available to the public before the offer is made¹;
- 90 (2) a request to admit certain transferable securities to trading on a regulated market unless an approved prospectus has been made available to the public before the request is made²; or
- 91 (3) misleading statements or practices with regard to investments³.

In certain cases, promoters may be indicted for conspiracy⁴.

1 See the Financial Services and Markets Act 2000 s 85; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 397.

2 See the Financial Services and Markets Act 2000 s 85; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 397.

3 See the Financial Services and Markets Act 2000 s 397; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 568.

4 *R v Aspinall* (1876) 2 QBD 48, CA.

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71. Disqualification of promoters from managing companies.

The court¹ may make a disqualification order² against a person where he is convicted of an indictable offence (whether on indictment or summarily) in connection with the promotion, formation, management, liquidation or striking off of a company³, with the receivership of a company's property, or with his being an administrative receiver of a company⁴.

The maximum period of disqualification which may be imposed for these purposes is five years (where the disqualification order is made by a court of summary jurisdiction) or (in any other case) 15 years⁵.

An application for such an order may be made by the Secretary of State⁶, the official receiver or the liquidator or any past or present member or creditor of the company in relation to which the person in question has committed or is alleged to have committed an offence or other default⁷.

1 As to the meaning of 'court' for these purposes see PARA 1580 note 1.

2 As to the meaning of 'disqualification order' see PARA 1578.

3 For these purposes, unless the context otherwise requires, 'company' means a company registered under the Companies Act 2006 in Great Britain, or a company that may be wound up under the Insolvency Act 1986 Pt V (ss 220-229) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1147 et seq); Company Directors Disqualification Act 1986 s 22(1), (2) (s 22(2) substituted by SI 2009/1941). As to the meaning of 'Great Britain' see PARA 1 note 5. As to registration under the Companies Act 2006 see PARA 111 et seq. As to the appointment of a liquidator see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 950.

4 See the Company Directors Disqualification Act 1986 s 2(1); and PARA 1580. As to administrative receivers see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 380 et seq.

5 See the Company Directors Disqualification Act 1986 s 2(3); and PARA 1580.

6 As to the Secretary of State see PARA 6.

7 See the Company Directors Disqualification Act 1986 s 16(2); and PARA 1602.

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(3) COMPANY FORMATION AND REGISTRATION

(i) Categories of Company

A. PRIVATE COMPANY

72. Private companies and the restrictions on their powers.

A 'private company' within the meaning of the Companies Act 2006 is a company¹ that is not a public company².

Under the Companies Act 2006, a private company that is limited by shares³, or is limited by guarantee and having a share capital⁴, is prohibited both from making any offer to the public⁵ of any securities⁶ of the company, and from allotting (or agreeing to allot) any securities of the company with a view to their being offered to the public⁷. Any contravention, or proposed contravention, of this prohibition may be remedied by order⁸.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 See the Companies Act 2006 s 4(1); and PARA 102. For the two major differences between private and public companies see Pt 20 Ch 1 (ss 755-760) (prohibition of public offers by private companies) (see PARA 1066) and Pt 20 Ch 2 (ss 761-767) (minimum share requirement for public companies) (see PARA 74 et seq); see s 4(4); and PARA 102. As to the meaning of 'public company' see PARA 102. As to the required indications in the name of a private limited company see PARA 200 et seq.

3 As to the meanings of 'company limited by shares' and 'private company' see PARA 102; and as to the meaning of 'share' see PARA 1042. See also PARA 78.

4 As to the meaning of 'company limited by guarantee' see PARA 102; and as to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. See also PARA 79.

5 As to the meaning of 'offer to the public' for these purposes see the Companies Act 2006 s 756; and PARA 1066.

6 For these purposes, 'securities' means shares or debentures: see the Companies Act 2006 s 755(5); and PARA 1066. As to the meaning of 'debenture' see PARA 1299.

7 See the Companies Act 2006 ss 755, 760; and PARA 1066.

8 See the Companies Act 2006 ss 757-759; and PARA 1066.

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B. PUBLIC COMPANY

(A) IN GENERAL

73. Nature and powers of public company.

A 'public company' within the meaning of the Companies Act 2006 is a company¹ limited by shares², or limited by guarantee and having a share capital³, being a company⁴:

- 92 (1) whose certificate of incorporation⁵ states that it is a public company⁶; and
- 93 (2) in relation to which the requirements of the Companies Act 2006⁷, or the former Companies Acts⁸, as to the registration⁹ or re-registration of a company as a public company¹⁰ have been complied with on or after 22 December 1980¹¹.

With effect from 22 December 1980¹², a public company limited by guarantee may not be formed¹³.

A company that is registered as a public company on its original incorporation¹⁴ may not do business or exercise any borrowing powers unless the registrar of companies¹⁵ has issued it with a certificate (a 'trading certificate')¹⁶ indicating that he is satisfied that the nominal value¹⁷

of the company's allotted share capital¹⁸ is not less than the authorised minimum¹⁹. Such a certificate is conclusive evidence that the company is entitled to do business and exercise any borrowing powers²⁰.

- 1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.
- 2 As to the meaning of 'company limited by shares' see PARA 102; and as to the meaning of 'share' see PARA 1042. See also see PARA 78.
- 3 As to the meaning of 'company limited by guarantee' see PARA 102; and as to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. See also PARA 79.
- 4 See the Companies Act 2006 s 4(2); and PARA 102. For the two major differences between private and public companies see Pt 20 Ch 1 (ss 755-760) (prohibition of public offers by private companies) (see PARA 1066) and Pt 20 Ch 2 (ss 761-767) (minimum share requirement for public companies) (see PARA 74 et seq): see s 4(4); and PARA 102. As to the meaning of 'private company' see PARA 102.
- 5 As to a company's certificate of incorporation see PARA 119.
- 6 See the Companies Act 2006 s 4(2)(a); and PARA 102. As to the required indications in the name of a public limited company see PARA 200.
- 7 References in the company law provisions of the Companies Act 2006 to the requirements of that Act include the requirements of regulations and orders made under it: s 1172. As to the meaning of the 'company law provisions' of the Companies Act 2006 see PARA 16 note 6.
- 8 As to the meaning of the 'former Companies Acts' see PARA 18 note 1.
- 9 As to the requirements for company registration under the Companies Act 2006 see PARA 111 et seq.
- 10 As to the re-registration of a private company as a public company under the Companies Act 2006 see PARAS 168-172.
- 11 See the Companies Act 2006 s 4(2)(b), (3); and PARA 102. The date of 22 December 1980 referred to in the text is the date on which the corresponding provisions of the Companies Act 1980 (now repealed) came into force. As to the Companies Act 1980 generally see PARA 13.
- 12 See note 11.
- 13 This is the effect of the Companies Act 2006 s 5(1), (2) (see PARAS 79, 102) when combined with the definition of a public company as having a share capital: see s 4(2); and PARA 102.
- 14 It is registered in accordance with the Companies Act 2006 s 9: see PARA 111.
- 15 As to the meaning of 'registrar of companies' see PARA 131 note 2.
- 16 See the Companies Act 2006 s 761(1); and PARA 74.
- 17 As to the nominal value of shares see PARA 1044.
- 18 As to the meaning of 'allotted share capital' see PARA 1045.
- 19 See the Companies Act 2006 s 761(1)-(3); and PARA 74. As to the meaning of 'authorised minimum' see PARA 75.
- 20 See the Companies Act 2006 s 761(4); and PARA 74.

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(B) SHARE CAPITAL REQUIREMENTS FOR PUBLIC COMPANIES

74. Minimum share capital requirement for public companies.

A company¹ that is a public company² must not do business³ or exercise any borrowing powers⁴ unless the registrar of companies⁵ has issued it with a certificate (a 'trading certificate')⁶. The registrar must issue a trading certificate if, on an application made to him in accordance with the statutory requirements⁷, he is satisfied that the nominal value of the company's allotted share capital⁸ is not less than the authorised minimum⁹. An application for such a certificate must:

- 94 (1) state that the nominal value of the company's allotted share capital is not less than the authorised minimum¹⁰;
- 95 (2) specify the amount, or estimated amount, of the company's preliminary expenses¹¹;
- 96 (3) specify any amount or benefit paid or given (or intended to be paid or given) to any promoter¹² of the company, and the consideration for the payment or benefit¹³; and
- 97 (4) be accompanied by a statement of compliance¹⁴, being a statement that the company meets the requirements for the issue of a trading certificate¹⁵.

The registrar may accept the statutory statement of compliance as sufficient evidence of the matters stated in it¹⁶.

A trading certificate has effect from the date on which it is issued and is conclusive evidence that the company is entitled to do business and exercise any borrowing powers¹⁷. Evidence cannot be received to show that the facts did not warrant the issuing of the certificate¹⁸.

If a company does business or exercises borrowing powers in contravention of the prohibition on doing so without a trading certificate¹⁹, an offence is committed by the company, and by any officer of it who is in default²⁰, and every person guilty of such an offence is liable (on conviction on indictment) to a fine or (on summary conviction) to a fine not exceeding the statutory maximum²¹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 I.e. a company that is registered as a public company on its original incorporation rather than by virtue of its re-registration as a public company: see the Companies Act 2006 s 761(1). As to incorporation by registration under the Companies Act 2006 see PARA 111 et seq; and as to the re-registration of a private company as a public company under the Companies Act 2006 see PARAS 168-172. As to the meanings of 'private company' and 'public company' see PARA 102. See also PARAS 72, 73.

3 As to the meaning of 'business' generally see PARA 1 note 1.

4 As to a company's borrowing powers see PARA 1256 et seq.

5 As to the meaning of 'registrar of companies' see PARA 131 note 2.

6 Companies Act 2006 s 761(1). A 'trading certificate' is a certificate issued by the registrar of companies under s 761: see s 761(1).

7 I.e. in accordance with the Companies Act 2006 s 762 (see the text and notes 10-16): see s 761(2).

8 As to the meaning of 'allotted share capital' see PARA 1045. As to the meaning of 'allotted' see PARA 1091; and as to the meaning of 'share capital' see PARA 1042. A share allotted in pursuance of an employees' share scheme may not be taken into account for these purposes (i.e. in determining the nominal value of the

company's allotted share capital) unless it is paid up as to at least one-quarter of the nominal value of the share, and as to the whole of any premium on the share: Companies Act 2006 s 761(3). As to the meaning of 'share' see PARA 1042. As to the meaning of 'employees' share scheme' see PARA 169 note 20. As to the meaning of 'premium' see PARA 1146. As to the nominal value of shares, and as to paid up shares, see PARA 1044 et seq.

9 Companies Act 2006 s 761(2). As to the 'authorised minimum' in relation to the nominal value of a public company's allotted share capital see PARA 75. At the time that a special resolution is passed, that a private company should be re-registered as a public company, the nominal value of the company's allotted share capital also must be not less than the authorised minimum: see s 91(1)(a); and PARA 169. As to the procedure on application to re-register a private company as a public company see PARA 168.

10 Companies Act 2006 s 762(1)(a).

11 Companies Act 2006 s 762(1)(b).

12 As to promoters see PARA 49 et seq.

13 Companies Act 2006 s 762(1)(c).

14 Companies Act 2006 s 762(1)(d). A statement of compliance delivered under s 762 is subject to the disclosure requirements in s 1078: see s 1078(3); and PARA 144.

15 Companies Act 2006 s 762(2).

16 Companies Act 2006 s 762(3).

17 Companies Act 2006 s 761(4). As to the conclusiveness of the registrar's certificate see *Re Yolland, Husson and Birkett Ltd, Leicester v Yolland, Husson and Birkett Ltd* [1908] 1 Ch 152, CA. As to the validity of transactions entered into before a company is entitled to commence business or exercise borrowing powers see PARA 76.

18 *Re Yolland, Husson & Birkett Ltd, Leicester v Yolland, Husson & Birkett Ltd* [1908] 1 Ch 152, CA.

19 In contravention of the Companies Act 2006 s 761 (see the text and notes 1-9,17): see s 767(1).

20 Companies Act 2006 s 767(1). As to the meaning of 'officer' generally under the Companies Act 2006 see PARA 607; and as to the meaning of 'officer in default' see PARA 315.

21 Companies Act 2006 s 767(2). As to the statutory maximum see PARA 1622.

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75. The 'authorised minimum' in relation to the nominal value of a public company's allotted share capital.

Subject to any exercise of the power to alter the authorised minimum¹, the 'authorised minimum', in relation to the nominal value of a public company's allotted share capital², is £50,000 or the prescribed Euro equivalent³. The Secretary of State may by order⁴ alter the sterling amount of the authorised minimum, and make a corresponding alteration of the prescribed Euro equivalent⁵.

The initial requirement for a public company to have allotted share capital of a nominal value not less than the authorised minimum⁶ must be met either by reference to allotted share capital denominated in sterling or by reference to allotted share capital denominated in Euros (but not partly in one and partly in the other)⁷. Whether the requirement is met is determined in the first case by reference to the sterling amount and in the second case by reference to the prescribed Euro equivalent⁸. No account is to be taken of any allotted share capital of the

company denominated in a currency other than sterling or, as the case may be, Euros⁹. If the company could meet the requirement either by reference to share capital denominated in sterling or by reference to share capital denominated in Euros, it must elect in its application for a trading certificate or, as the case may be, for re-registration as a public company which is to be the currency by reference to which the matter is determined¹⁰.

The Secretary of State may make provision by regulations as to the application of the authorised minimum in relation to a public company¹¹ that has shares denominated in more than one currency¹², that redenominates the whole or part of its allotted share capital¹³, or allots new shares¹⁴.

1 le subject to any exercise of the power conferred by the Companies Act 2006 s 764 (see the text and notes 4-5): see s 763(6).

2 As to the nominal value of shares see PARA 1044. As to the meaning of 'allotted share capital' see PARA 1045. As to the meaning of 'allotted' see PARA 1091; and as to the meaning of 'share capital' see PARA 1042. See also PARA 74 note 8. As to the meaning of 'public company' see PARA 102; as to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to public companies see also PARA 73.

3 Companies Act 2006 s 763(1). The Secretary of State may by order, subject to negative resolution procedure (ie the statutory instrument containing the order being subject to annulment in pursuance of a resolution of either House of Parliament), prescribe the amount in Euros that is for the time being to be treated as equivalent to the sterling amount of the authorised minimum: see ss 763(2), (5), 1289. This power may be exercised from time to time as appears to the Secretary of State to be appropriate: s 763(3). The amount prescribed is to be determined by applying an appropriate spot rate of exchange to the sterling amount and rounding to the nearest 100 Euros: s 763(4). In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6. In exercise of the powers conferred by s 763(2), the Secretary of State has made the Companies (Authorised Minimum) Regulations 2009, SI 2009/2425. Accordingly, for the purposes of the definition of the 'authorised minimum' in the Companies Act 2006 s 763(1), the amount in Euros that is to be treated as equivalent to the sterling amount is EUR 57,100: Companies (Authorised Minimum) Regulations 2009, SI 2009/2425, reg 2. This is subject to the transitional provisions and savings in reg 9: see reg 2.

4 Such an order is subject to affirmative resolution procedure (ie the order must not be made unless a draft of the statutory instrument containing it has been laid before Parliament and approved by a resolution of each House of Parliament): see the Companies Act 2006 ss 764(4), 1290.

5 Companies Act 2006 s 764(1). The amount of the prescribed Euro equivalent is to be determined by applying an appropriate spot rate of exchange to the sterling amount and rounding to the nearest 100 Euros: s 764(2). Such an order that increases the authorised minimum may:

- 32 (1) require a public company having an allotted share capital of which the nominal value is less than the amount specified in the order to increase that value to not less than that amount, or to re-register as a private company (s 764(3)(a));
- 33 (2) make provision in connection with any such requirement for any of the matters for which provision is made by the Companies Act 2006 relating to a company's registration, re-registration or change of name, to payment for shares comprised in a company's share capital, and to offers to the public of shares in or debentures of a company, including provision as to the consequences (in criminal law or otherwise) of a failure to comply with any requirement of the order (s 764(3)(b));
- 34 (3) provide for any provision of the order to come into force on different days for different purposes (s 764(3)(c)).

As to the meaning of 'debenture' see PARA 1299; as to the meaning of 'private company' see PARA 102; and as to the meaning of 'share' see PARA 1042. As to the requirements for company registration under the Companies Act 2006 see PARA 111 et seq; as to re-registration as a private company under the Companies Act 2006 see PARA 173 et seq; and as to re-registration and its effects generally see PARA 167 et seq. As to change of a company's name see PARAS 217-219. As to payment for shares comprised in a company's share capital see PARA 1113 et seq. As to public offers of a company's securities see PARA 1066 et seq.

6 le the requirement in the Companies Act 2006 s 761(2) (see PARA 74) for the issue of a trading certificate, or the requirement in s 91(1)(a) (see PARA 169) for re-registration as a public company: see s 765(1). As to the meaning of 'trading certificate' see PARA 74.

7 Companies Act 2006 s 765(1).

8 Companies Act 2006 s 765(2).

9 Companies Act 2006 s 765(3). See *Re Scandinavian Bank Group plc* [1988] Ch 87 at 104, [1987] 2 All ER 70 at 77 per Harman J (company must have an authorised minimum in prescribed currencies (in 1987, sterling; now, sterling and/or Euros) whatever other capital it may have in other currencies).

10 Companies Act 2006 s 765(4).

11 Companies Act 2006 s 766(1). The regulations may make provision as to the currencies, exchange rates and dates by reference to which it is to be determined whether the nominal value of the company's allotted share capital is less than the authorised minimum: s 766(2). Any regulations made under s 766 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 766(6), 1289. Any such regulations have effect subject to s 765 (see the text and notes 6-10): s 766(5). In exercise of the powers conferred by s 766(1)(a) (see the text and note 12) and by s 766(2), the Secretary of State has made the Companies (Authorised Minimum) Regulations 2008, SI 2009/2425: see regs 3-7, providing for the application of the authorised minimum requirement for the purposes of the Companies Act 2006 s 650 (see PARA 1194), s 662(2) (see PARA 1200), s 667 (see PARA 1204), ss 757, 758 (see PARA 1066), and Pt 30 (ss 994-999) (protection of members against unfair prejudice) (see PARA 466 et seq). See also the Companies (Authorised Minimum) Regulations 2008, SI 2008/729: see regs 3-5, 7, providing for the application of the authorised minimum requirement for the purposes of the Companies Act 1985 ss 137-139, 146, 147(3), (4), 149(2) (all now repealed).

12 Companies Act 2006 s 766(1)(a).

13 Companies Act 2006 s 766(1)(b). The regulations may provide that, where a company has redenominated the whole or part of its allotted share capital, and the effect of the redenomination is that the nominal value of the company's allotted share capital is less than the authorised minimum, the company must re-register as a private company: s 766(3). Regulations under s 766(3) may make provision corresponding to any provision made by ss 664-667 (re-registration as private company in consequence of cancellation of shares) (see PARAS 1203-1204): s 766(3). As to the redenomination of share capital see PARA 1167 et seq.

14 Companies Act 2006 s 766(1)(c).

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76. Transactions entered into without a trading certificate.

If a company¹ does business² or exercises borrowing powers³ in contravention of the prohibition on doing so without a trading certificate⁴, any such contravention does not affect the validity of a transaction entered into by the company⁵. However, if a company: (1) enters into a transaction in contravention of that prohibition⁶; and (2) fails to comply with its obligations in connection with the transaction within 21 days from being called on to do so⁷, the directors of the company⁸ are jointly and severally liable to indemnify any other party to the transaction in respect of any loss or damage suffered by him by reason of the company's failure to comply with its obligations⁹.

1 le a company that is registered as a public company on its original incorporation rather than by virtue of its re-registration as a public company: see the Companies Act 2006 s 761(1); and PARA 74. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to incorporation by registration under the Companies Act 2006 see PARA 111 et seq; and as to the re-

registration of a private company as a public company under the Companies Act 2006 see PARAS 168-172. As to the meanings of 'private company' and 'public company' see PARA 102. See also PARAS 72, 73.

2 As to the meaning of 'business' generally see PARA 1 note 1.

3 As to a company's borrowing powers see PARA 1256 et seq.

4 In contravention of the Companies Act 2006 s 761 (see PARA 74): see s 767(1), (3); and PARA 74. As to the meaning of 'trading certificate' see PARA 74.

5 See the Companies Act 2006 s 767(3).

6 Companies Act 2006 s 767(3)(a). Head (1) in the text refers to a transaction entered into in contravention of s 761 (see PARA 74): see s 767(3)(a).

7 Companies Act 2006 s 767(3)(b).

8 As to the meaning of 'director' see PARA 478.

9 Companies Act 2006 s 767(3). The directors who are so liable are those who were directors at the time the company entered into the transaction: s 767(4).

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(C) QUOTED, UNQUOTED AND TRADED COMPANIES

77. Meanings of 'quoted company', 'unquoted company' and 'traded company' in the Companies Act 2006.

The terms 'quoted company' and 'unquoted company' are defined in the Companies Act 2006 for the purposes of the provisions relating to accounts and reports¹; and the term 'quoted company' (as so defined) is applied for the purposes of the provisions relating to resolutions and meetings of the company².

Accordingly, a 'quoted company' means a company³ whose equity share capital⁴ either has been included in the official list in accordance with the provisions of Part VI of the Financial Services and Markets Act 2000⁵ or is officially listed in an EEA State⁶, or is admitted to dealing on either the New York Stock Exchange or the exchange known as Nasdaq⁷.

An 'unquoted company' means a company that is not a quoted company⁸.

If a company is to obtain admission to the official list, it must undertake to observe certain obligations once its securities have been admitted to listing⁹.

For the purposes of the provisions of the Companies Act 2006 which govern resolutions and meetings of the company¹⁰, a 'traded company' is defined to mean a company any shares of which carry rights to vote at general meetings and are admitted to trading on a regulated market in an EEA State by or with the consent of the company¹¹.

1 In virtue of the Companies Act 2006 s 385, which defines 'quoted company' and 'unquoted company' for the purposes of Pt 15 (ss 380-474) (see PARA 693 et seq): see PARA 697.

2 In virtue of the Companies Act 2006 s 361, which applies the meaning of 'quoted company' in Pt 15 for the purposes of Pt 13 (ss 281-361) (see PARA 617 et seq): see PARA 612.

3 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 As to the meaning of 'equity share capital' see PARA 1047.

5 In accordance with the Financial Services and Markets Act 2000 Pt VI (ss 72-103) (Official Listing): see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 387 et seq. For these purposes, 'official list' has the meaning given by the Financial Services and Markets Act 2000 s 103(1) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 387); see the Companies Act 2006 s 385(2); and PARA 696. As to the meaning of the 'official list' also see PARA 1069 note 8; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 387 et seq.

6 As to the meaning of 'EEA State' see PARA 29 note 5.

7 See the Companies Act 2006 s 385(2); and PARA 696.

8 See the Companies Act 2006 s 385(3); and PARA 696.

9 See PARA 1066 et seq.

10 In the Companies Act 2006 Pt 13 (see PARA 617 et seq).

11 See the Companies Act 2006 s 360C; and PARA 630. As to the meaning of 'share' see PARA 1042. As to the meaning of 'regulated market' see PARA 334 note 11. As to rights attached to classes of shares generally see PARA 1057 et seq.

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C. COMPANY LIMITED BY SHARES

78. Meaning of a company limited by shares.

A company¹ is a 'limited company' if the liability of its members² is limited by its constitution³.

The memorandum of association⁴ of a company limited by shares⁵ is a memorandum stating that the subscribers⁶ wish to form a company under the Companies Act 2006, and that they agree to become members of the company and to take at least one share each⁷.

The memorandum must be authenticated by each subscriber and must be in the prescribed form⁸.

There is no provision in the Companies Act 2006 for the memorandum of association to be amended⁹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'member' see PARA 321. As to membership of a company generally see PARA 321 et seq.

3 See the Companies Act 2006 s 3(1); and PARA 102. As to the meaning of references to a company's constitution see PARA 227.

4 As to the meaning of 'memorandum of association' see PARA 104.

5 In being a company that is to have a share capital: see the Companies Act 2006 s 8(1); and PARA 104. As to the meaning of 'company limited by shares' see PARA 102; and as to the meanings of 'company having a share

capital', 'share capital' and 'share' see PARA 1042. As to the required indications in the name of a limited company see PARA 200 et seq.

6 As to subscribers to the memorandum see PARA 104.

7 See the Companies Act 2006 s 8(1); and PARA 104. As to shareholders generally see PARA 321 et seq. If no number is written after his name, a subscriber is liable to pay for one share at least: *Portal v Emmens* (1876) 1 CPD 664 at 667, CA, per Jessel MR. As to the other requirements that must be met before a company is duly formed (including delivery of the memorandum) see PARA 102 et seq.

8 See the Companies Act 2006 s 8(2); and PARA 104. In relation to the authentication of a document under the Companies Act 2006 see s 1146; and PARA 678 et seq.

In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6. In exercise of the powers conferred by s 8(2), the Secretary of State has made the Companies (Registration) Regulations 2008, SI 2008/3014. Accordingly, for the purposes of the Companies Act 2006 s 8, the memorandum of association of a company having a share capital must be in the form set out in the Companies (Registration) Regulations 2008, SI 2008/3014, reg 2(a), Sch 1. For existing companies, the prescribed form of memorandum for a company limited by shares is given in the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule Table B (private company limited by shares) and in Schedule Table F (public company limited by shares). As to the meanings of 'private company' and 'public company' see PARA 102.

9 Cf the articles of association which can be so amended: see PARA 232 et seq. The effect of this is that the memorandum of association becomes an historical document and all provisions concerning the day-to-day management of the company come to be included in the articles of association.

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D. COMPANY LIMITED BY GUARANTEE

79. Meaning of a company limited by guarantee.

A company¹ is a 'limited company' if the liability of its members² is limited by its constitution³.

The memorandum of association⁴ of a company limited by guarantee⁵ is a memorandum stating that the subscribers⁶ wish to form a company under the Companies Act 2006, and that they agree to become members of the company⁷.

The memorandum must be authenticated by each subscriber and must be in the prescribed form⁸. There is no provision in the Companies Act 2006 for the memorandum of association to be amended⁹.

With effect from 22 December 1980¹⁰, a company cannot be formed as, or become, a company limited by guarantee with a share capital¹¹. Nor may a public company limited by guarantee be formed as from that date¹².

Under the Companies Act 2006, a private company that is limited by guarantee and having a share capital is prohibited both from making any offer to the public¹³ of any securities of the company, and from allotting (or agreeing to allot) any securities of the company with a view to their being offered to the public¹⁴.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'member' see PARA 321. As to membership of a company generally see PARA 321 et seq.

3 See the Companies Act 2006 s 3(1); and PARA 102. As to the meaning of references to a company's constitution see PARA 227.

4 As to the meaning of 'memorandum of association' see PARA 104.

5 As to the meaning of 'company limited by guarantee' see PARA 102.

6 As to subscribers to the memorandum see PARA 104.

7 See the Companies Act 2006 s 8(1); and PARA 104. As to the other requirements that must be met before a company is duly formed (including delivery of the memorandum) see PARA 102 et seq. As to shareholders generally see PARA 321 et seq. Companies that are limited by guarantee and have a share capital are historical entities (see the text and notes 10-11) and accordingly the requirements of s 8 regarding companies having a share capital have no application to companies limited by guarantee that are formed under the Companies Act 2006. Previously, under the Companies Act 1948 s 2(4) (repealed), if the company had a share capital, the memorandum had also to state the amount of the share capital with which the company proposed to be registered and the division thereof into shares of a fixed amount, and each subscriber had to write opposite his name the number of shares he took, not being less than one share. As to the meanings of 'company having a share capital', 'share capital' and 'share' see PARA 1042.

A 'commonhold association' is a private company limited by guarantee the memorandum of which states that an object of the company is to exercise the functions of a commonhold association in relation to specified commonhold land: see **COMMONHOLD** vol 13 (2009) PARA 305.

8 See the Companies Act 2006 s 8(2); and PARA 104. In relation to the authentication of a document under the Companies Act 2006 see s 1146; and PARA 678 et seq.

In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6. In exercise of the powers conferred by s 8(2), the Secretary of State has made the Companies (Registration) Regulations 2008, SI 2008/3014. Accordingly, for the purposes of the Companies Act 2006 s 8, the memorandum of association of a company not having a share capital must be in the form set out in the Companies (Registration) Regulations 2008, SI 2008/3014, reg 2(b), Sch 2. For existing companies (see PARA 230), the prescribed form of memorandum for a company limited by guarantee is given in the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule Table C (company limited by guarantee and not having a share capital), in Schedule Table D Pt I (public company limited by guarantee and having a share capital) and in Schedule Table D Pt II (private company limited by guarantee and having a share capital). As to the meanings of 'private company' and 'public company' see PARA 102.

9 Cf the articles of association which can be so amended: see PARA 232 et seq. The effect of this is that the memorandum of association becomes an historical document and all provisions concerning the day-to-day management of the company come to be included in the articles of association.

10 Ie the date on which the corresponding provisions of the Companies Act 1980 (now repealed) came into force. As to the Companies Act 1980 generally see PARA 13.

11 Companies Act 2006 s 5(1), (2)(a).

12 This is the effect of the Companies Act 2006 s 5(1), (2) when combined with the definition of a public company as having a share capital: see s 4(2); and PARA 73.

13 As to the meaning of 'offer to the public' for these purposes see the Companies Act 2006 s 756; and PARA 1066.

14 See the Companies Act 2006 ss 755, 760; and PARA 1066.

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80. Effect of dividing undertaking of company limited by guarantee into shares or interests.

For the purpose of the provisions of the Companies Act 2006 relating to a company limited by guarantee¹ that has been registered on or after 1 January 1901², any provision in the constitution³ of such a company that purports to divide the undertaking of the company into shares⁴ or interests is to be treated as a provision for a share capital⁵, and this applies whether or not the nominal value⁶ or number of the shares or interests is specified by the provision⁷.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'company limited by guarantee' see PARA 102. See also PARA 79.

2 The date on which the Companies Act 1900 (repealed) came into force: see the Companies Consolidation (Consequential Provisions) Act 1985 s 10; Interpretation Act 1978 s 17(2)(b). See note 7.

3 As to the meaning of references to a company's constitution see PARA 227.

4 As to the meaning of 'share' see PARA 1042.

5 As to the meaning of 'share capital' see PARA 1042.

6 As to the nominal value of shares see PARA 1044.

7 Companies Act 2006 s 5(3). A company limited by guarantee and not having a share capital, registered before 1 January 1901, could, by special resolution, divide its undertaking into a specified number of shares or interests of no defined or fixed monetary amount, each share or interest being merely a certain proportion of the whole undertaking: *Malleson v General Mineral Patents Syndicate Ltd* [1894] 3 Ch 538.

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E. UNLIMITED COMPANY

81. Meaning of 'unlimited company'.

A company¹ is an 'unlimited company' if there is no limit on the liability of its members².

The memorandum of association³ of an unlimited company is a memorandum stating that the subscribers⁴ wish to form a company under the Companies Act 2006, that they agree to become members of the company and, in the case of a company that is to have a share capital⁵, that they agree to take at least one share each⁶.

The memorandum must be authenticated by each subscriber and must be in the prescribed form⁷.

There is no provision in the Companies Act 2006 for the memorandum of association to be amended⁸.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 See the Companies Act 2006 s 3(4); and PARA 102. As to the meaning of 'member' see PARA 321. As to membership of a company generally see PARA 321 et seq.

3 As to the meaning of 'memorandum of association' see PARA 104.

4 As to subscribers to the memorandum see PARA 104.

5 As to the meanings of 'company having a share capital', 'share capital' and 'share' see PARA 1042.

6 See the Companies Act 2006 s 8(1); and PARA 104. As to the other requirements that must be met before a company is duly formed (including delivery of the memorandum) see PARA 102 et seq.

7 See the Companies Act 2006 s 8(2); and PARA 104. In relation to the authentication of a document under the Companies Act 2006 see s 1146; and PARA 678 et seq.

In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6. In exercise of the powers conferred by s 8(2), the Secretary of State has made the Companies (Registration) Regulations 2008, SI 2008/3014. Accordingly, for the purposes of the Companies Act 2006 s 8, the memorandum of association of a company having a share capital must be in the form set out in the Companies (Registration) Regulations 2008, SI 2008/3014, reg 2(a), Sch 1, and the memorandum of association of a company not having a share capital must be in the form set out in reg 2(b), Sch 2. For existing companies (see PARA 230), the prescribed form of memorandum for an unlimited company having a share capital is given in the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule Table E (an unlimited company having a share capital).

8 Cf the articles of association which can be so amended: see PARA 232 et seq. The effect of this is that the memorandum of association becomes an historical document and all provisions concerning the day-to-day management of the company come to be included in the articles of association.

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F. COMMUNITY INTEREST COMPANIES

(A) INTRODUCTION

82. Becoming a community interest company.

In accordance with Part 2 of the Companies (Audit, Investigations and Community Enterprise) Act 2004¹:

98 (1) a company limited by shares² or a company limited by guarantee and not having a share capital³ may be formed as or become a community interest company⁴; and

99 (2) a company limited by guarantee and having a share capital may become a community interest company⁵.

However, a community interest company established for charitable purposes is to be treated as not being so established⁶.

The other provisions of the Companies Acts⁷ have effect subject to Part 2 of the 2004 Act⁸.

1 le in accordance with the Companies (Audit Investigations and Community Enterprise) Act 2004 Pt 2 (ss 26-63) (community interest companies): see s 26(2); Companies Act 2006 s 6(1).

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'company limited by shares' see PARA 102; and as to the meaning of 'share' see PARA 1042. See also PARA 78.

3 As to the meaning of 'company limited by guarantee' see PARA 102; and as to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. See also PARA 79.

4 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 26(2)(a); Companies Act 2006 s 6(1)(a). The community interest company was a new type of company introduced by the Companies (Audit, Investigations and Community Enterprise) Act 2004: see s 26(1).

5 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 26(2)(b); Companies Act 2006 s 6(1)(b).

6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 26(3). Accordingly, such a company is not an English charity: s 26(3)(a) (amended by SI 2007/1093). For these purposes, 'English charity' means a charity within the meaning of the Charities Act 1993 (see s 96; and **CHARITIES** vol 8 (2010) PARA 1): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 63(1) (definition added by SI 2007/1093).

7 le apart from the Companies Act 2006 s 6: see s 6(2).

8 Companies Act 2006 s 6(2).

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83. Regulator of Community Interest Companies.

The Secretary of State¹ must appoint a person to be the Regulator², who has such functions relating to community interest companies as are conferred or imposed by or by virtue of the Companies (Audit, Investigations and Community Enterprise) Act 2004 or any other enactment³.

The Regulator must adopt an approach to the discharge of those functions which is based on good regulatory practice⁴, that is an approach adopted having regard to:

- 100 (1) the likely impact on those who may be affected by the discharge of those functions⁵;
- 101 (2) the outcome of consultations with, and with organisations representing, community interest companies and others with relevant experience⁶; and
- 102 (3) the desirability of using the Regulator's resources in the most efficient and economic way⁷.

The Regulator may issue guidance, or otherwise provide assistance, about any matter relating to community interest companies⁸; and the Secretary of State may require the Regulator to issue guidance or otherwise provide assistance about any matter relating to community interest companies which is specified by the Secretary of State⁹. Any guidance so issued must be such that it is readily accessible to, and capable of being easily understood by, those at whom it is aimed¹⁰; and any other assistance so provided must be provided in the manner which the Regulator considers is most likely to be helpful to those to whom it is provided¹¹.

A public authority¹² may disclose to the Regulator, for any purpose connected with the exercise of the Regulator's functions, information received by the authority in connection with its functions¹³; and the Regulator may disclose to a public authority any information received by the Regulator in connection with the functions of the Regulator, either for a purpose connected with the exercise of those functions¹⁴, or for a purpose connected with the exercise by the authority of its functions¹⁵. In deciding whether to disclose information to a public authority in a country or territory outside the United Kingdom¹⁶, the Regulator must have regard to the considerations listed in the Enterprise Act 2002¹⁷ regarding overseas disclosures¹⁸.

The powers to disclose information conferred in this way on a public authority¹⁹ and on the Regulator²⁰ are subject to any restriction on disclosure imposed by or by virtue of an enactment²¹, and any express restriction on disclosure subject to which information was supplied²². Information also may be disclosed in this way²³ subject to a restriction on its further disclosure²⁴. A person who discloses information in contravention of any restriction so imposed²⁵ is guilty of an offence²⁶, and liable on summary conviction to a fine not exceeding level 3 on the standard scale²⁷. However, a prosecution for such an offence may be instituted in England and Wales²⁸ only with the consent of the Regulator or the Director of Public Prosecutions²⁹. If any relevant offence under the Companies (Audit Investigations and Community Enterprise) Act 2004³⁰ committed by a body corporate is proved³¹ either to have been committed with the consent or connivance of an officer³², or to be attributable to any neglect on the part of an officer³³, the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly³⁴.

1 As to the Secretary of State see PARA 6.

2 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 27(2). The officer known as the Regulator of Community Interest Companies is referred to in Pt 2 (ss 26-63) as the 'Regulator': see ss 27(1), 63(1). Further provision about the Regulator is made (see s 27(8)) in relation to: (1) the Regulator's terms of appointment (Sch 3 para 1); (2) remuneration and pensions (Sch 3 para 2); (3) staff (Sch 3 paras 3-4 (Sch 3 para 4 amended by the Charities Act 2006 s 75(1), Sch 8 paras 200, 204)); (4) delegation of functions (Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 3 para 5); (5) finance (Sch 3 para 6); and (6) reports and other information (Sch 3 para 7).

3 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 27(3). As to community interest companies see PARA 82.

4 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 27(4).

5 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 27(4)(a).

6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 27(4)(b).

7 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 27(4)(c).

8 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 27(5).

9 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 27(6).

10 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 27(7).

11 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 27(7).

12 For these purposes, 'public authority' means a person or body having functions of a public nature: Companies (Audit, Investigations and Community Enterprise) Act 2004 s 59(11).

13 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 59(4).

14 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 59(5)(a).

15 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 59(5)(b).

16 As to the meaning of 'United Kingdom' see PARA 1 note 5.

- 17 le in the Enterprise Act 2002 s 243(6), but as if the reference to information of a kind to which s 237 of that Act applies were to information of the kind the Regulator is considering disclosing: see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 59(6).
- 18 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 59(6).
- 19 le in the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 59(4) (see the text and notes 12-13): see s 59(7).
- 20 le in the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 59(5) (see the text and notes 14-15): see s 59(7).
- 21 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 59(7)(a).
- 22 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 59(7)(b).
- 23 le under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 59(4), (5) (see the text and notes 12-15): see s 59(8).
- 24 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 59(8).
- 25 le imposed under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 59(8) (see the text and notes 23-24): see s 59(9).
- 26 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 59(9).
- 27 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 59(10). As to the standard scale see PARA 1622.
- 28 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.
- 29 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 59(9)(a) (substituted by SI 2007/1093). As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1066, 1079 et seq.
- 30 le an offence under the Companies (Audit Investigations and Community Enterprise) Act 2004 s 48 (see PARA 98), s 59 (see the text and notes 12-29) or s 42(3), Sch 7 para 5 (see PARA 92): see s 60(1) (amended by SI 2009/1941).
- 31 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 60(1) (as amended: see note 30).
- 32 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 60(1)(a). For these purposes, 'officer' means a director, manager, secretary or other similar officer of the body corporate, or a person purporting to act in any such capacity (s 60(2)); and 'director' includes a shadow director and, if the affairs of a body corporate are managed by its members, means a member of the body (s 60(3)). As to shadow directors see PARA 479.
- 33 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 60(1)(b).
- 34 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 60(1).

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84. Appeal Officer for community interest companies.

The Secretary of State¹ must appoint a person to be the Appeal Officer², who has the function of determining appeals against decisions and orders of the Regulator³ which under or by virtue of

the Companies (Audit, Investigations and Community Enterprise) Act 2004 or any other enactment lie to the Appeal Officer⁴.

An appeal to the Appeal Officer against a decision or order of the Regulator may be brought on the ground that the Regulator made a material error of law or fact⁵.

On such an appeal, the Appeal Officer must dismiss the appeal⁶, allow the appeal⁷, or remit the case to the Regulator⁸.

Where a case is remitted, the Regulator must reconsider it in accordance with any rulings of law and findings of fact made by the Appeal Officer⁹.

1 As to the Secretary of State see PARA 6.

2 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 28(2). The officer known as the Appeal Officer for Community Interest Companies is referred to in Pt 2 (ss 26-63) as the 'Appeal Officer': see ss 28(1), 63(1). Further provision about the Appeal Officer is made (see s 28(7)) in relation to: (1) the Appeal Officer's terms of appointment (Sch 4 para 1); (2) remuneration and pensions (Sch 4 para 2); and (3) finance (Sch 4 para 3). Regulations may make provision about the practice and procedure to be followed by the Appeal Officer; and such regulations may in particular impose time limits for bringing appeals: Sch 4 para 4. In exercise of the powers conferred by Sch 4 para 4, the Secretary of State has made the Community Interest Company Regulations 2005, SI 2005/1788: see regs 37-42 (reg 38 amended by SI 2007/1093).

3 As to the Regulator see PARA 83.

4 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 28(3).

5 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 28(4).

6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 28(5)(a).

7 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 28(5)(b).

8 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 28(5)(c).

9 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 28(6).

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85. Official property holder for community interest companies.

The Regulator¹ must appoint a member of his staff² to be the Official Property Holder³, who has such functions relating to property of community interest companies⁴ as are conferred or imposed by or by virtue of the Companies (Audit, Investigations and Community Enterprise) Act 2004 or any other enactment⁵.

1 As to the Regulator see PARA 83.

2 As to the Regulator's staff see the Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 3 paras 3-4; and PARA 83.

3 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 29(2). The officer known as the Official Property Holder for Community Interest Companies is referred to in Pt 2 (ss 26-63) as the 'Official Property Holder': see ss 29(1), 63(1). Further provision about the Official Property Holder is made (see s 29(4))

in relation to: (1) status (Sch 5 para 1); (2) relationship with the Regulator (Sch 5 para 2); (3) the effect of a vacancy (Sch 5 para 3); (4) property (Sch 5 para 4); (5) finance (Sch 5 para 5); and (6) reports (Sch 5 para 6).

4 As to community interest companies see PARA 82.

5 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 29(3).

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(B) REQUIREMENTS

86. Eligibility to form a community interest company.

A company is eligible to be formed as a community interest company¹ if: (1) its articles² comply with the statutory requirements that are so imposed³; (2) its proposed name complies with the relevant statutory requirements⁴; and (3) the Regulator⁵, having regard to the application and accompanying documents and any other relevant considerations, considers that the company will satisfy the community interest test and is not an excluded company⁶.

1 As to community interest companies see PARA 82.

2 As to a community interest company's articles of association see PARA 105; and as to a company's articles of association generally see PARA 228 et seq.

3 Companies (Audit Investigations and Community Enterprise) Act 2004 s 36A(2)(a) (s 36A added by SI 2009/1941). Head (1) in the text refers to the requirements imposed by and by virtue of the Companies (Audit Investigations and Community Enterprise) Act 2004 s 32 (see PARA 105): see s 36A(2)(a) (as so added).

4 Companies (Audit Investigations and Community Enterprise) Act 2004 s 36A(2)(b) (as added: see note 3). Head (2) in the text refers to the requirements of s 33 (see PARA 203): see s 36A(2)(b) (as so added).

5 As to the Regulator see PARA 83.

6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 36A(2)(c) (as added: see note 3). As to the community interest test and excluded companies see PARA 87.

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87. Community interest test and excluded companies.

For the purposes of the statutory provisions which govern community interest companies¹, a company satisfies the community interest test if a reasonable person might consider that its activities are being carried on for the benefit of the community². An object stated in the articles of association³ of the company is a community interest object of the company if a reasonable

person might consider that the carrying on of activities by the company in furtherance of the object is for the benefit of the community⁴.

Regulations may provide that activities of a description prescribed by the regulations are to be treated as being, or as not being, activities which a reasonable person might consider are activities carried on for the benefit of the community⁵.

A company is an excluded company if it is a company of a description prescribed by regulations⁶.

1 le for the purposes of the Companies (Audit Investigations and Community Enterprise) Act 2004 Pt 2 (ss 26-63) (community interest companies): see s 35(1). As to community interest companies see PARA 82.

2 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 35(2). Accordingly, the term 'community interest test' is to be construed in accordance with s 35(2): see s 63(1).

For these purposes, 'community' includes a section of the community (whether in the United Kingdom or anywhere else); and regulations may make provision about what does, does not or may constitute a section of the community: s 35(5) (amended by SI 2007/1093). As to the making of regulations under the Companies (Audit, Investigations and Community Enterprise) Act 2004 generally see s 62 (amended by SI 2009/1941). In exercise of the powers conferred by s 35(4)-(6), the Secretary of State has made the Community Interest Company Regulations 2005, SI 2005/1788: see regs 3-5 (reg 3 amended by SI 2007/1093; the Community Interest Company Regulations 2005, SI 2005/1788, reg 5 substituted by SI 2009/1942). See also note 6. As to the Secretary of State see PARA 6. As to the meaning of 'United Kingdom' see PARA 1 note 5.

3 As to a community interest company's articles of association see PARA 105; and as to a company's articles of association generally see PARA 228 et seq.

4 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 35(3) (amended by SI 2009/1941). Accordingly, the term 'community interest object' is to be construed in accordance with the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 35(3): see s 63(1).

5 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 35(4). See note 2.

6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 35(6). Accordingly, the term 'excluded company' is to be construed in accordance with s 35(6): see s 63(1). For the purposes of s 35(6), the following are excluded companies: (1) a company which is (or when formed would be) a political party; (2) a company which is (or when formed would be) a political campaigning organisation; or (3) a company which is (or when formed would be) a subsidiary of a political party or of a political campaigning organisation: Community Interest Company Regulations 2005, SI 2005/1788, reg 6.

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88. Cap on distributions and interest.

Community interest companies¹ must not distribute assets to their members unless regulations make provision authorising them to do so²; and if regulations authorise community interest companies to distribute assets to their members, the regulations may impose limits on the extent to which they may do so³. Regulations also may impose limits on the payment of interest on debentures issued by, or debts of, community interest companies⁴.

Such regulations may make provision for limits to be set by the Regulator⁵, and he: (1) may set a limit by reference to a rate determined by any other person (as it has effect from time to time)⁶; and (2) may set different limits for different descriptions of community interest companies⁷. However, the Regulator must⁸: (a) undertake appropriate consultation before setting a limit⁹; and (b) in setting a limit, have regard to its likely impact on community interest

companies¹⁰. Such regulations may include power for the Secretary of State to require the Regulator to review a limit or limits¹¹.

Where the Regulator sets a limit, he must publish notice of it in the Gazette¹².

1 As to community interest companies see PARA 82.

2 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 30(1). As to the making of regulations under the Companies (Audit, Investigations and Community Enterprise) Act 2004 generally see s 62 (amended by SI 2009/1941). In exercise of the powers conferred by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 30(1)-(4), (7), the Secretary of State has made the Community Interest Company Regulations 2005, SI 2005/1788: see regs 17-22, 24, 25, Sch 4 (reg 17 amended by SI 2009/1942; the Community Interest Company Regulations 2005, SI 2005/1788, regs 18, 21 amended by SI 2007/1093). As to the Secretary of State see PARA 6.

3 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 30(2). See note 2.

4 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 30(3). See note 2.

5 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 30(4). See note 2. As to the Regulator see PARA 83.

6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 30(5)(a).

7 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 30(5)(b).

8 Ie in accordance with the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 27 (see PARA 83): see s 30(6).

9 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 30(6)(a).

10 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 30(6)(b).

11 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 30(7). See note 2.

12 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 30(8).

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89. Distribution of assets on winding up.

Regulations may make provision for and in connection with the distribution, on the winding up of a community interest company¹, of any assets of the company which remain after satisfaction of the company's liabilities². Such regulations may, in particular, amend or modify the operation of any enactment or instrument³.

1 As to community interest companies see PARA 82.

2 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 31(1). As to the making of regulations under the Companies (Audit, Investigations and Community Enterprise) Act 2004 generally see s 62 (amended by SI 2009/1941). In exercise of the powers conferred by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 31, the Secretary of State has made the Community Interest Company Regulations 2005, SI 2005/1788: see reg 23 (amended by SI 2007/1093; SI 2009/1942). As to the Secretary of State see PARA 6.

3 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 31(2). See note 2.

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90. Community interest company reports.

The directors of a community interest company¹ must prepare in respect of each financial year a report about the company's activities during the financial year (a 'community interest company report')²; and regulations must make provision requiring the directors of a community interest company to deliver to the registrar of companies³ a copy of the community interest company report⁴.

Regulations also:

- 103 (1) must make provision requiring community interest company reports to include information about the remuneration of directors⁵;
- 104 (2) may make provision as to the form of, and other information to be included in, community interest company reports⁶; and
- 105 (3) may apply provisions of the Companies Act 2006 relating to directors' reports to community interest company reports (with any appropriate modifications)⁷.

The registrar of companies must forward to the Regulator⁸ a copy of each community interest company report so delivered⁹ to the registrar¹⁰.

1 As to community interest companies see PARA 82.

2 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 34(1).

3 As to the registrar of companies see PARA 131 et seq. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

4 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 34(2) (amended by SI 2008/948). As to the making of regulations under the Companies (Audit, Investigations and Community Enterprise) Act 2004 generally see s 62 (amended by SI 2009/1941). In exercise of the powers conferred by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 34(2), the Secretary of State has made the Community Interest Company Regulations 2005, SI 2005/1788: see reg 29 (substituted by SI 2008/948). As to the Secretary of State see PARA 6.

5 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 34(3)(a). In exercise of the powers conferred by s 34(3), the Secretary of State has made the Community Interest Company Regulations 2005, SI 2005/1788: see regs 26-29 (reg 26 amended by SI 2007/1093; SI 2008/948; SI 2009/1942; reg 29 (as substituted: see note 4)). As to the Secretary of State see PARA 6.

6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 34(3)(b). See note 5.

7 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 34(3)(c) (amended by SI 2008/948). See note 5.

8 As to the Regulator see PARA 83.

9 Ie by virtue of the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 34: see s 34(4).

10 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 34(4).

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(C) SUPERVISION BY REGULATOR

91. Conditions for exercise of supervisory powers.

In deciding whether and how to exercise his supervisory powers¹, the Regulator² must adopt an approach which is based on the principle that those powers should be exercised only to the extent necessary to maintain confidence in community interest companies³.

No power so conferred on the Regulator in relation to the appointment of a director⁴, the removal of a director⁵, the appointment of a manager⁶, or dealing with property⁷, is exercisable in relation to a community interest company unless the company default condition is satisfied in relation to the power and the company⁸. The company default condition is satisfied in relation to a power and a company if it appears to the Regulator necessary to exercise the power in relation to the company because⁹:

- 106 (1) there has been misconduct or mismanagement in the administration of the company¹⁰;
- 107 (2) there is a need to protect the company's property or to secure the proper application of that property¹¹;
- 108 (3) the company is not satisfying the community interest test¹²; or
- 109 (4) if the company has community interest objects¹³, the company is not carrying on any activities in pursuit of those objects¹⁴.

The power conferred on the Regulator in relation to the transfer of shares etc¹⁵ is not exercisable in relation to a community interest company unless it appears to the Regulator that the company is an excluded company¹⁶.

¹ ie the powers conferred by the Companies (Audit, Investigations and Community Enterprise) Act 2004 ss 42-51 (see PARA 92 et seq): see s 41(1).

² As to the Regulator see PARA 83.

³ Companies (Audit, Investigations and Community Enterprise) Act 2004 s 41(1). As to community interest companies see PARA 82.

⁴ Companies (Audit, Investigations and Community Enterprise) Act 2004 s 41(2)(a). The text refers to the power conferred by s 45 (see PARA 95): see s 41(2)(a).

⁵ Companies (Audit, Investigations and Community Enterprise) Act 2004 s 41(2)(b). The text refers to the power conferred by s 46 (see PARA 96): see s 41(2)(b).

⁶ Companies (Audit, Investigations and Community Enterprise) Act 2004 s 41(2)(c). The text refers to the power conferred by s 47 (see PARA 97): see s 41(2)(c).

⁷ Companies (Audit, Investigations and Community Enterprise) Act 2004 s 41(2)(d). The text refers to the power conferred by s 48 (see PARA 98): see s 41(2)(d).

⁸ Companies (Audit, Investigations and Community Enterprise) Act 2004 s 41(2).

⁹ Companies (Audit, Investigations and Community Enterprise) Act 2004 s 41(3).

- 10 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 41(3)(a).
- 11 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 41(3)(b).
- 12 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 41(3)(c). As to the community interest test see PARA 87.
- 13 As to community interest objects see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 35(3); and PARA 87.
- 14 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 41(3)(d).
- 15 As to the power conferred by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 49 (see PARA 99): see s 41(4).
- 16 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 41(4). As to excluded companies see PARA 87.

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92. Investigation by Regulator.

The Regulator¹ may either: (1) investigate the affairs of a community interest company²; or (2) appoint any person (other than a member of the Regulator's staff³) to investigate the affairs of a community interest company on behalf of the Regulator⁴.

The investigator of a community interest company⁵ may require the company or any other person to produce such documents⁶ (or documents of such description) as the investigator may specify⁷, and to provide such information (or information of such description) as the investigator may specify⁸. Such a requirement must be complied with at such time and place as may be specified by the investigator⁹; but a person on whom such a requirement is imposed may require the investigator to produce evidence of his authority¹⁰. The production of a document in pursuance of this power does not affect any lien which a person has on the document¹¹; but the investigator may take copies of or extracts from a document so produced¹². The power to require the production of documents and the provision of information does not, however, require¹³: (a) a person to produce a document or provide information in respect of which a claim could be maintained, in an action in the High Court, to legal professional privilege¹⁴, although a person who is a lawyer may be required to provide the name and address of his client¹⁵; or (b) a person carrying on the business of banking to produce a document, or provide information, relating to the affairs of a customer unless a requirement to produce the document, or provide the information, has been so imposed¹⁶ on the customer¹⁷.

A statement made by a person in compliance with a requirement so imposed to provide information¹⁸ may be used in evidence against the person¹⁹; but, in criminal proceedings, no evidence relating to the statement may be adduced by or on behalf of the prosecution²⁰, and no question relating to it may be asked by or on behalf of the prosecution²¹, unless evidence relating to it is adduced or a question relating to it is asked in the proceedings by or on behalf of that person²².

If a person fails to comply with a requirement so imposed to produce documents or to provide information²³, the investigator may certify that fact in writing to the court²⁴; and, if, after hearing any witnesses who may be produced against or on behalf of the alleged offender²⁵, and

any statement which may be offered in defence²⁶, the court is satisfied that the offender failed without reasonable excuse to comply with the requirement, it may deal with him as if he had been guilty of contempt of the court²⁷.

A person commits an offence if, in purported compliance with a requirement so imposed to provide information²⁸, the person provides information which the person knows to be false in a material particular, or recklessly provides information which is false in a material particular²⁹; and a person guilty of such an offence is liable (on conviction on indictment) to imprisonment for a term not exceeding two years or a fine or to both, and (on summary conviction) to imprisonment for a term not exceeding 12 months³⁰ or a fine of an amount not exceeding the statutory maximum or to both³¹. A prosecution for such an offence may be instituted in England and Wales³² only with the consent of the Director of Public Prosecutions³³.

1 As to the Regulator see PARA 83; and as to the conditions he must observe in the exercise of his supervisory powers see PARA 91.

2 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 42(1)(a). As to community interest companies see PARA 82.

3 As to the Regulator's staff see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 27(8), Sch 3 paras 3-4; and PARA 83.

4 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 42(1)(b). This power in head (2) in the text is in addition to Sch 3 para 5 (powers of Regulator exercisable by authorised members of staff) (see PARA 83) and does not affect the application of Sch 3 para 5 to the Regulator's power under s 42(1)(a) (see head (1) in the text): s 42(2).

5 For these purposes, the 'investigator of a community interest company' means a person investigating the company's affairs under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 42 (see the text and notes 1-4): see s 42(3), Sch 7 para 1(7).

6 For these purposes, 'document' includes information recorded in any form: see the Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 1(7). In relation to information recorded otherwise than in legible form, the power to require production of it includes power to require the production of a copy of it in legible form or in a form from which it can readily be produced in visible and legible form: Sch 7 para 1(6).

7 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 1(1)(a). See note 6.

8 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 1(1)(b). See note 6.

9 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 1(3).

10 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 1(2).

11 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 1(4).

12 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 1(5).

13 Ie nothing in the Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 1 (see the text and notes 5-12) requires the actions set out in heads (a) and (b) in the text: see Sch 7 para 2(1).

14 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 2(1)(a). As to legal professional privilege see **CIVIL PROCEDURE** vol 11 (2009) PARA 558 et seq; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1479.

15 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 2(1).

16 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 1 (see the text and notes 5-12): see Sch 7 para 2(2).

17 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 2(2).

18 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 1 (see the text and notes 5-12): see Sch 7 para 3(1).

- 19 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 3(1).
- 20 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 3(2)(a).
- 21 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 3(2)(b).
- 22 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 3(2). However, Sch 7 para 3(2) does not apply to proceedings in which a person is charged either with an offence under Sch 7 para 5 (false information) (see the text and notes 28-33), or with an offence under the Perjury Act 1911 s 5 (false statutory declarations and other false statements without oath) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 717): Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 3(3) (amended by SI 2007/1093).
- 23 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 1 (see the text and notes 5-12): see Sch 7 para 4(1).
- 24 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 4(1), (2).
- 25 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 4(1), (3)(a).
- 26 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 4(1), (3)(b).
- 27 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 4(1), (3).
- 28 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 1 (see the text and notes 5-12): see Sch 7 para 5(1) (amended by SI 2007/1093).
- 29 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 5(1) (as amended: see note 28). As to the liability of directors and other officers of a body corporate for offences committed under the Companies (Audit Investigations and Community Enterprise) Act 2004 Pt 2 (ss 26-63) see PARA 83.
- 30 In relation to an offence committed after the commencement of the Companies Act 2006 s 1131 (summary proceedings) (see PARA 1625), but before a day is appointed in relation to the commencement of the Criminal Justice Act 2003 s 154(1) (general limit on magistrates' courts' power to impose imprisonment), the reference in the Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 5(2) to '12 months' must be read as a reference to 'six months': see the Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 5(3); Companies Act 2006 ss 1131, 1133; and see PARA 1625.
- 31 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 5(2). As to the statutory maximum see PARA 1622.
- 32 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.
- 33 Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 7 para 5(1A) (added by SI 2007/1093). As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1066, 1079 et seq.

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93. Audit ordered by Regulator.

The Regulator¹ may by order² require a community interest company³ to allow the annual accounts of the company to be audited by a qualified auditor appointed by the Regulator⁴. The provisions which govern the auditor's rights to information under the Companies Act 2006⁵ apply in relation to an auditor so appointed⁶.

An audit ordered by the Regulator in this way⁷ is in addition to, and does not affect, any audit required by or by virtue of any other enactment⁸.

On completion of the audit, the auditor must make a report to the Regulator on such matters and in such form as the Regulator specifies⁹.

The expenses of the audit, including the remuneration of the auditor, are to be paid by the Regulator¹⁰.

1 As to the Regulator see PARA 83; and as to the conditions he must observe in the exercise of his supervisory powers see PARA 91.

2 As to orders made by the Regulator under the Companies (Audit Investigations and Community Enterprise) Act 2004 Pt 2 (ss 26-63) (community interest companies) see s 61.

3 As to community interest companies see PARA 82.

4 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 43(1). For these purposes, a person is a qualified auditor if he is eligible for appointment as a statutory auditor under the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARA 1016 et seq): Companies (Audit, Investigations and Community Enterprise) Act 2004 s 43(2) (amended by SI 2008/948).

5 I.e. the Companies Act 2006 ss 499-501 (see PARA 931): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 43(3) (amended by SI 2007/2194; SI 2008/948).

6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 43(3) (as amended: see note 5).

7 I.e. under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 43: see s 43(6).

8 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 43(6). As to the general requirement for company accounts to be audited see PARA 905 et seq.

9 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 43(4).

10 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 43(5).

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94. Institution of civil proceedings by Regulator.

The Regulator¹ may bring civil proceedings in the name and on behalf of a community interest company². Before instituting such proceedings, the Regulator must give written notice to the company³, stating: (1) the cause of action⁴; (2) the remedy sought⁵; and (3) a summary of the facts on which the proceedings are to be based⁶. Any director of the company may apply to the court for an order: (a) that proposed proceedings are not to be instituted in this way⁷; or (b) that proceedings instituted in this way are to be discontinued⁸. On such an application, the court may make such order as it thinks fit⁹; and, in particular, the court may, as an alternative to making an order to the effect of head (a) or head (b) above, order¹⁰:

110 (i) that the proposed proceedings may be instituted¹¹, or the proceedings that have been instituted¹² may be continued, on such terms and conditions as the court thinks fit¹³;

111 (ii) that any proceedings instituted by the company are to be discontinued¹⁴; or

- 112 (iii) that any proceedings instituted by the company may be continued on such terms and conditions as the court thinks fit¹⁵.

The Regulator must indemnify the company against any costs incurred by it in connection with proceedings so brought by him¹⁶. Any costs either awarded to the company in connection with such proceedings¹⁷, or incurred by the company in connection with the proceedings and which it is agreed should be paid by a defendant¹⁸, are to be paid to the Regulator¹⁹.

1 As to the Regulator see PARA 83; and as to the conditions he must observe in the exercise of his supervisory powers see PARA 91.

2 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 44(1). As to community interest companies see PARA 82.

3 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 44(2).

4 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 44(2)(a).

5 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 44(2)(b).

6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 44(2)(c).

7 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 44(3)(a).

8 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 44(3)(b).

9 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 44(4).

10 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 44(5).

11 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 44: see s 44(5)(a).

12 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 44: see s 44(5)(a).

13 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 44(5)(a).

14 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 44(5)(b).

15 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 44(5)(c).

16 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 44(6).

17 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 44(7)(a).

18 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 44(7)(b).

19 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 44(7).

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95. Appointment of director by Regulator.

The Regulator¹ may by order² appoint a director of a community interest company³.

The person appointed may be anyone whom the Regulator thinks appropriate, other than a member of the Regulator's staff⁴, and a person may be so appointed whether or not the person is a member of the company⁵, and irrespective of any provision made by the articles of the company⁶ or a resolution of the company⁷.

An order appointing a person to be a director of a company in this way must specify the terms on which the director is to hold office⁸. Those terms have effect as if contained in a contract between the director and the company⁹; and the terms specified must include the period for which the director is to hold office, and may include terms as to the remuneration of the director by the company¹⁰.

A director so appointed¹¹ has all the powers of the directors appointed by the company (including powers exercisable only by a particular director or class of directors)¹²; and such a director may not be removed by the company, although he may be removed by the Regulator at any time¹³.

Where a person is appointed to be a director of the company in this way, or where a person so appointed ceases to be a director of the company, the obligation which would otherwise be imposed on the company¹⁴ to notify any change among directors to the registrar¹⁵ is instead an obligation of the Regulator¹⁶. Where a person appointed to be a director of the company under these provisions¹⁷ ceases to be a director of the company¹⁸, the company must give notification of that fact to the Regulator in a form approved by the Regulator before the end of the period of 14 days beginning with the date on which the person ceases to be a director¹⁹. If default is made in complying with this requirement to notify²⁰, an offence is committed by the company and by every officer of the company who is in default²¹; and a person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 5 on the standard scale²² and (for continued contravention) a daily default fine²³ not exceeding one-tenth of level 5 on the standard scale²⁴.

The company may appeal to the Appeal Officer²⁵ against an order made by the Regulator appointing a director of a community interest company²⁶.

1 As to the Regulator see PARA 83; and as to the conditions he must observe in the exercise of his supervisory powers see PARA 91.

2 As to orders made by the Regulator under the Companies (Audit Investigations and Community Enterprise) Act 2004 Pt 2 (ss 26-63) (community interest companies) see s 61.

3 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45(1). As to community interest companies see PARA 82.

4 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45(2). As to the Regulator's staff see s 27(8), Sch 3 paras 3-4; and PARA 83.

5 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45(3)(a). As to membership of companies generally see PARA 321 et seq.

6 As to a community interest company's articles of association see PARA 105; and as to a company's articles of association generally see PARA 228 et seq.

7 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45(3)(b) (amended by SI 2008/948; SI 2009/1941). As to company resolutions generally see PARA 612 et seq.

8 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45(4).

9 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45(4).

10 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45(5).

11 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45: see s 45(6).

12 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45(6).

- 13 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45(7).
- 14 Ie under the Companies Act 2006 s 167(1)(a) (see PARA 514): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45(8) (amended by SI 2009/1941). See note 16.
- 15 As to the registrar of companies see PARA 131 et seq. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.
- 16 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45(8) (as amended: see note 14).
- 17 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45: see s 45(10).
- 18 Ie otherwise than by removal under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45(7) (see the text and note 13): see s 45(10). As to removal of a director by the Regulator generally see PARA 96.
- 19 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45(10). If s 45(10) applies, the Companies Act 2006 s 167(1)(a) (see PARA 514) applies as if the period within which the Regulator must send a notification to the registrar of companies is 14 days from the date on which the Regulator receives notification under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45(10): s 45(9) (amended by SI 2009/1941). See also note 14.
- 20 Ie in complying with the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45(10) (see the text and notes 17-19): see s 45(11) (s 45(11), (12) substituted by SI 2009/1941).
- 21 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45(11) (as substituted: see note 20). For these purposes, a shadow director is treated as an officer of the company: s 45(11) (as so substituted). As to shadow directors see PARA 479. As to the liability of directors and other officers of a body corporate for offences committed under the Companies (Audit Investigations and Community Enterprise) Act 2004 Pt 2 see PARA 83.
- 22 As to the standard scale see PARA 1622.
- 23 As to the meaning of 'daily default fine' see PARA 1622.
- 24 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45(12) (as substituted: see note 20).
- 25 As to the Appeal Officer for community interest companies see PARA 84.
- 26 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45(13).

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96. Removal or suspension of director by Regulator.

The Regulator¹ may by order²:

- 113 (1) remove a director of a community interest company³; or
- 114 (2) suspend a director of the company pending a decision whether to remove him⁴, up to a maximum period of one year⁵.

Before making an order under either head (1) or head (2) above in relation to a director, the Regulator must give at least 14 days' notice to the director, and to the company⁶; and, where

an order is made in relation to a director under either head (1) or head (2) above, the director may appeal against the order to the High Court⁷.

If a person has been removed under head (1) above, the company may not subsequently appoint him a director of the company⁸, and any assignment to the person of the office of director of the company is of no effect (even if approved by special resolution of the company)⁹.

If the Regulator suspends a director under head (2) above, the Regulator may give directions in relation to the performance of the director's functions¹⁰.

The Regulator may discharge an order made under head (1) above¹¹, but such a discharge does not reinstate the person removed by the order as a director of the company¹².

The Regulator must also from time to time review any order made under head (2) above and, if it is appropriate to do so, discharge the order¹³.

The Regulator must, before the end of the period of 14 days beginning with the date on which:

- 115 (a) an order under head (1) above is made or discharged¹⁴; or
- 116 (b) an order under head (2) above is made or discharged or expires¹⁵; or
- 117 (c) an order under head (1) or head (2) above is quashed on appeal¹⁶,

give notification of that event to the registrar of companies¹⁷ in a form approved by the registrar¹⁸.

1 As to the Regulator see PARA 83; and as to the conditions he must observe in the exercise of his supervisory powers see PARA 91.

2 As to orders made by the Regulator under the Companies (Audit Investigations and Community Enterprise) Act 2004 Pt 2 (ss 26-63) (community interest companies) see s 61.

3 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 46(1). As to community interest companies see PARA 82.

4 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 46(3).

5 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 46(4).

6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 46(9).

7 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 46(10).

8 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 46(2)(a).

9 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 46(2)(b). As to special resolutions see PARA 614.

10 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 46(5).

11 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 46(6).

12 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 46(7). Rather, on the discharge of the order under head (1) in the text, s 46(2) (see the text and notes 8-9) ceases to apply to the person: see s 46(7).

13 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 46(8).

14 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 46(11)(a).

15 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 46(11)(b).

16 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 46(11)(c).

17 As to the registrar of companies see PARA 131 et seq. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

18 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 46(11). However, where s 45(11) imposes an obligation to notify the registrar of companies of an event, the Companies Act 2006 s 167(1)(a) (requirement that company notify change among directors to registrar) (see PARA 514) does not apply in respect of the event: Companies (Audit, Investigations and Community Enterprise) Act 2004 s 46(12) (amended by SI 2009/1941).

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97. Appointment of manager by Regulator.

The Regulator¹ may by order² appoint a manager in respect of the property and affairs of a community interest company³. The person appointed may be anyone whom the Regulator thinks appropriate, other than a member of the Regulator's staff⁴.

Such an order of appointment⁵ may make provision as to the functions to be exercised by, and the powers of, the manager⁶; and such an order may in particular provide for the manager to have such of the functions of the company's directors as are specified in the order⁷, and for the company's directors to be prevented from exercising any of those functions⁸.

In carrying out his functions, the manager acts as the company's agent⁹; and a person dealing with the manager in good faith and for value need not inquire whether the manager is acting within his powers¹⁰.

The appointment of the manager does not affect any right of any person to appoint a receiver or manager of the company's property¹¹, or the rights of a receiver or manager appointed by a person other than the Regulator¹².

The manager's functions are to be discharged by him under the supervision of the Regulator¹³; and the Regulator must from time to time review the order by which the manager is appointed and, if it is appropriate to do so, discharge it in whole or in part¹⁴. In particular, the Regulator must discharge the order on the appointment of a person to act as administrative receiver, administrator, provisional liquidator or liquidator of the company¹⁵.

The Regulator may apply to the court for directions in relation to any matter arising in connection with the manager's functions or powers¹⁶; and on such an application the court may give such directions or make such orders as it thinks fit¹⁷.

Regulations¹⁸ may authorise the Regulator to require a manager to make reports¹⁹, to require a manager to give security for the due exercise of the manager's functions²⁰, and to remove a manager in circumstances prescribed by the regulations²¹. Regulations also may provide for a manager's remuneration to be payable from the property of the company²², and may authorise the Regulator to determine the amount of a manager's remuneration and to disallow any amount of remuneration in circumstances prescribed by the regulations²³.

The company may appeal to the Appeal Officer²⁴ against an order of the Regulator appointing a manager in respect of the property and affairs of a community interest company²⁵.

1 As to the Regulator see PARA 83; and as to the conditions he must observe in the exercise of his supervisory powers see PARA 91.

2 As to orders made by the Regulator under the Companies (Audit Investigations and Community Enterprise) Act 2004 Pt 2 (ss 26-63) (community interest companies) see s 61.

3 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(1). As to community interest companies see PARA 82.

Notice must be given to the registrar of companies of the appointment in relation to a company of a manager appointed under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47: Companies Act 2006 s 1154(1)(c). Such notice must be given by the Regulator of Community Interest Companies (s 1154(2)(c)); and it must specify an address at which service of documents (including legal process) may be effected on the person appointed (s 1154(3)). Notice of a change in the address for service may be given to the registrar by the person appointed: s 1154(3). Where notice has been given under s 1154 of the appointment of a person, notice must also be given by the Regulator to the registrar of the termination of the appointment: s 1154(2)(c), (4). As to the registrar of companies see PARA 131 et seq. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

4 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(2). As to the Regulator's staff see s 27(8), Sch 3 paras 3-4; and PARA 83.

5 le under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(1) (see the text and notes 1-3): see s 47(3).

6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(3).

7 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(4)(a).

8 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(4)(b).

9 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(5).

10 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(5).

11 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(6)(a).

12 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(6)(b).

13 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(7).

14 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(7).

15 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(8). As to administrators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 158 et seq; as to administrative receivers see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 380 et seq; and as to the appointment of a liquidator see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 950.

16 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(9). The costs of any application under s 47(9) are to be paid by the company: s 47(11).

17 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(10).

18 As to the making of regulations under the Companies (Audit, Investigations and Community Enterprise) Act 2004 generally see s 62 (amended by SI 2009/1941). In exercise of the powers conferred by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(12), (13) (see the text and notes 19-23), the Secretary of State has made the Community Interest Company Regulations 2005, SI 2005/1788: see regs 30-33. As to the Secretary of State see PARA 6.

19 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(12)(a). See note 18.

20 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(12)(b). See note 18.

21 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(12)(c). See note 18.

22 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(13)(a). See note 18.

23 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(13)(b). See note 18.

24 As to the Appeal Officer for community interest companies see PARA 84.

25 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47(14).

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98. Regulator's power to deal in company property.

The Regulator¹ may by order²: (1) vest in the Official Property Holder³ any property held by or in trust for a community interest company⁴; or (2) require persons in whom such property is vested to transfer it to the Official Property Holder⁵.

The Regulator may order: (a) a person who holds property on behalf of a community interest company, or on behalf of a trustee of a community interest company, not to part with the property without the Regulator's consent⁶; and (b) any debtor of a community interest company not to make any payment in respect of the debtor's liability to the company without the Regulator's consent⁷.

The Regulator may by order restrict: (i) the transactions which may be entered into by a community interest company⁸; or (ii) the nature or amount of the payments that a community interest company may make⁹, and the order may in particular provide that transactions may not be entered into or payments made without the Regulator's consent¹⁰.

The Regulator must from time to time review any such order¹¹ and, if it is appropriate to do so, discharge the order in whole or in part¹². On discharging such an order, the Regulator may make any order as to the vesting or transfer of the property, and give any directions, which he considers appropriate¹³.

If a person fails to comply with an order under head (2) above, the Regulator may certify that fact in writing to the court¹⁴. If, after hearing any witnesses who may be produced against or on behalf of the alleged offender¹⁵, and any statement which may be offered in defence¹⁶, the court is satisfied that the offender failed without reasonable excuse to comply with the order, it may deal with him as if he had been guilty of contempt of the court¹⁷.

A person who contravenes an order under head (a), head (b), head (i) or head (ii) above commits an offence¹⁸; and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale¹⁹. A prosecution for such an offence may be instituted, in England and Wales²⁰, only with the consent of the Regulator or of the Director of Public Prosecutions²¹. These provisions regarding criminal offences²² do not prevent the bringing of civil proceedings in respect of a contravention of an order under head (2) above, or under head (a), head (b), head (i) or head(ii) above²³.

The company and any person to whom the order is directed may appeal to the Appeal Officer²⁴ against an order under head (1), head (2), head (a) or head (b) above²⁵; and the company may appeal to the Appeal Officer against an order under head (i) or head (ii) above²⁶.

1 As to the Regulator see PARA 83; and as to the conditions he must observe in the exercise of his supervisory powers see PARA 91.

2 As to orders made by the Regulator under the Companies (Audit Investigations and Community Enterprise) Act 2004 Pt 2 (ss 26-63) (community interest companies) see s 61.

3 As to the Official Property Holder for community interest companies see PARA 85.

4 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(1)(a). As to community interest companies see PARA 82. The vesting of property under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(1) does not constitute a breach of a covenant or condition against alienation, and no right listed in heads (1) to (7) below operates or becomes exercisable as a result of the vesting (s 48(4)), namely:

- 35 (1) a right of reverter (s 48(5)(a));
- 36 (2) a right of pre-emption (s 48(5)(b));
- 37 (3) a right of forfeiture (s 48(5)(c));
- 38 (4) a right of re-entry (s 48(5)(d));
- 39 (5) a right of irritancy (s 48(5)(e));
- 40 (6) an option (s 48(5)(f)); and
- 41 (7) any right similar to those listed in heads (1) to (6) above (s 48(5)(g)).

5 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(1)(b). The transfer of property under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(1) does not constitute a breach of a covenant or condition against alienation, and no right listed in heads (1) to (7) below operates or becomes exercisable as a result of the transfer (s 48(4)), namely:

- 42 (1) a right of reverter (s 48(5)(a));
- 43 (2) a right of pre-emption (s 48(5)(b));
- 44 (3) a right of forfeiture (s 48(5)(c));
- 45 (4) a right of re-entry (s 48(5)(d));
- 46 (5) a right of irritancy (s 48(5)(e));
- 47 (6) an option (s 48(5)(f)); and
- 48 (7) any right similar to those listed in heads (1) to (6) above (s 48(5)(g)).

6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(2)(a).

7 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(2)(b).

8 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(3)(a).

9 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(3)(b).

10 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(3).

11 In any order under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48: s 48(6).

12 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(6).

13 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(7).

14 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(8).

15 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(9)(a).

16 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(9)(b).

17 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(9).

18 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(10). As to the liability of directors and other officers of a body corporate for offences committed under the Companies (Audit Investigations and Community Enterprise) Act 2004 Pt 2 see PARA 83.

19 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(11). As to the standard scale see PARA 1622.

20 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

21 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(10)(a) (substituted by SI 2007/1093). As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1066, 1079 et seq.

22 Ie the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(8)-(10) (see the text and notes 14-18, 20-21): see s 48(12).

23 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(12).

24 As to the Appeal Officer for community interest companies see PARA 84.

25 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(13).

26 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(14).

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99. Regulator's power to transfer shares etc.

If a community interest company¹ has a share capital², the Regulator³ may by order⁴ transfer specified shares in the company to specified persons⁵. However, such an order may not transfer any shares in respect of which a dividend may be paid⁶, or in respect of which a distribution of the company's assets may be made if the company is wound up⁷.

If a community interest company is a company limited by guarantee⁸, the Regulator may by order extinguish the interests in the company of specified members of the company (otherwise than as shareholders)⁹, and appoint a new member in place of each member whose interest has been extinguished¹⁰.

Any order made pursuant to the power to transfer shares or to replace members¹¹ in relation to a company may only transfer shares to, and appoint as new members, persons who have consented to the transfer or appointment¹², and may be made irrespective of any provision made by the articles of the company¹³ or a resolution of the company¹⁴.

The company and any person from whom shares are transferred by an order¹⁵ may appeal to the Appeal Officer¹⁶ against the order¹⁷; and the company and any person whose interest is extinguished by the order¹⁸ may appeal to the Appeal Officer against that order¹⁹.

1 As to community interest companies see PARA 82.

2 As to share capital and shares generally see PARA 1042 et seq.

3 As to the Regulator see PARA 83; and as to the conditions he must observe in the exercise of his supervisory powers see PARA 91.

4 As to orders made by the Regulator under the Companies (Audit Investigations and Community Enterprise) Act 2004 Pt 2 (ss 26-63) (community interest companies) see s 61.

- 5 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 49(1). For these purposes, 'specified', in relation to an order, means specified in the order: s 49(7).
- 6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 49(3)(a). As to the declaration and payment of dividends see PARA 1408 et seq.
- 7 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 49(3)(b). As to the Regulator's power to petition for the winding up of a community interest company see PARA 100. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.
- 8 As to companies limited by guarantee see PARAS 79, 102.
- 9 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 49(2)(a). As to shareholders and the membership of companies generally see PARA 321 et seq.
- 10 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 49(2)(b).
- 11 Ie an order under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 49: see s 49(4).
- 12 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 49(4)(a).
- 13 As to a community interest company's articles of association see PARA 105; and as to a company's articles of association generally see PARA 228 et seq.
- 14 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 49(4)(b) (amended by SI 2009/1941). As to resolutions of the company see PARA 612 et seq.
- 15 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 49(1) (see the text and notes 1-5): see s 49(5).
- 16 As to the Appeal Officer for community interest companies see PARA 84.
- 17 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 49(5).
- 18 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 49(1) (see the text and notes 1-5): see s 49(6).
- 19 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 49(6).

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100. Petition for winding up; dissolution and striking off.

The Regulator¹ may present a petition for a community interest company² to be wound up³ if the court is of the opinion that it is just and equitable that the company should be wound up⁴. However, this provision does not apply if the company is already being wound up by the court⁵.

If a community interest company has been dissolved⁶, or has been struck off the register either as a defunct company⁷ or because the company is in liquidation⁸, the Regulator may apply to the court⁹ for an order restoring the company's name to the register¹⁰.

If an application¹¹ by a company to strike itself off the register is made on behalf of a community interest company, the provisions governing the persons to be notified of such an application¹² are to be treated as also requiring a copy of the application to be given to the Regulator¹³.

- 1 As to the Regulator see PARA 83; and as to the conditions he must observe in the exercise of his supervisory powers see PARA 91.
- 2 As to community interest companies see PARA 82.
- 3 As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.
- 4 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 50(1).
- 5 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 50(2).
- 6 As to the dissolution of a company generally see PARA 1521 et seq.
- 7 Ie under the Companies Act 2006 s 1000 (see PARA 1521): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 51(1): see the text and note 10.
- 8 Ie under the Companies Act 2006 s 1001 (see PARA 1522): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 51(1) (as substituted: see note 10).
- 9 Ie under the Companies Act 2006 s 1029 (see PARA 1535): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 51(1) (as substituted: see note 10).
- 10 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 51(1) (substituted by SI 2009/1941).
- 11 Ie under the Companies Act 2006 s 1003 (striking off on application by company) (see PARA 1525): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 51(3) (as amended: see note 13).
- 12 Ie the Companies Act 2006 s 1006 (see PARA 1528): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 51(3) (as amended: see note 13).
- 13 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 51(3) (amended by SI 2009/1941).

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(D) FEES PAYABLE IN RELATION TO COMMUNITY INTEREST COMPANIES

101. Fees payable to the Regulator etc.

Regulations made under the Companies (Audit, Investigations and Community Enterprise) Act 2004¹ may require the payment of such fees in connection with the Regulator's functions² as may be specified in the regulations³. However, the regulations may provide for fees to be paid to the registrar of companies⁴ rather than to the Regulator⁵.

The Regulator may charge a fee for any service which is provided otherwise than in pursuance of an obligation imposed by law, other than the provision of guidance which the Regulator considers to be of general interest⁶.

Fees paid in this way⁷ are to be paid into the Consolidated Fund⁸.

1 As to the making of regulations under the Companies (Audit, Investigations and Community Enterprise) Act 2004 generally see s 62 (amended by SI 2009/1941). In exercise of the powers conferred by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 57(1), (2) (see the text and notes 2-5), the

Secretary of State has made the Community Interest Company Regulations 2005, SI 2005/1788: see reg 36, Sch 5 (Sch 5 substituted by SI 2009/1942). As to the Secretary of State see PARA 6.

2 As to the Regulator and his functions see PARA 83.

3 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 57(1). See note 1.

4 As to the registrar of companies see PARA 131 et seq.

5 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 57(2). See note 1.

6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 57(3).

7 le by virtue of the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 57: see s 57(4).

8 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 57(4). As to the Consolidated Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARAS 1028-1031.

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(ii) Formation

A. FORMATION OF COMPANY

102. Formation of new company under the Companies Act 2006.

A company¹ is formed under the Companies Act 2006 by one or more persons²: (1) subscribing their names to a memorandum of association³; and (2) complying with the requirements of the Companies Act 2006 as to registration⁴. A company may not be so formed for an unlawful purpose⁵.

A company is a 'limited company' if the liability of its members is limited by its constitution⁶. It may be limited by shares⁷ or limited by guarantee⁸: if the liability of its members is limited to the amount, if any, unpaid on the shares held by them, the company is 'limited by shares'⁹; if their liability is limited to such amount as the members undertake to contribute to the assets of the company in the event of its being wound up¹⁰, the company is 'limited by guarantee'¹¹. If there is no limit on the liability of its members, the company is an 'unlimited company'¹².

A 'public company' within the meaning of the Companies Act 2006 is a company limited by shares, or limited by guarantee and having a share capital¹³, being a company¹⁴:

118 (a) whose certificate of incorporation¹⁵ states that it is a public company¹⁶; and

119 (b) in relation to which the requirements of the Companies Act 2006, or the former Companies Acts¹⁷, as to the registration or re-registration of a company as a public company¹⁸ have been complied with on or after 22 December 1980¹⁹.

A 'private company' within the meaning of the Companies Act 2006 is a company that is not a public company²⁰.

With effect from 22 December 1980²¹, a company cannot be formed as, or become, a company limited by guarantee with a share capital²². Nor may a public company limited by guarantee and not having a share capital be formed as from that date²³.

Any contract, so far as it relates to the formation of a company²⁴ or to its constitution, or the rights or obligations of its corporators or members, is exempt from the prohibitions on the exclusion of liability imposed by the Unfair Contract Terms Act 1977²⁵.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'person' for these purposes see PARA 103; and as to the meaning of 'person' generally see PARA 311 note 2. Any enactment or rule of law applicable to companies formed by two or more persons or having two or more members applies with any necessary modification in relation to a company formed by one person or having only one person as a member: Companies Act 2006 s 38. This provision implements EC Council Directive 89/667 (OJ L395, 30.12.89, p 40) (the 'Twelfth Company Law Directive') on single-member private limited liability companies: see PARA 23. As to the meaning of 'enactment' see PARA 17 note 2. As to the meaning of 'member' see PARA 321. As to membership of a company generally see PARA 321 et seq.

3 Companies Act 2006 s 7(1)(a). As to the meaning of 'memorandum of association' see PARA 104. As to subscribers to the memorandum of association see s 8; and PARA 104. As to subscribers as members of the company see PARA 321; and as to restrictions on agreements for the transfer to subscribers of non-cash assets in the 'initial period' see PARA 1125.

4 Companies Act 2006 s 7(1)(b). References in the company law provisions of the Companies Act 2006 to the requirements of that Act include the requirements of regulations and orders made under it: s 1172. As to the meaning of the 'company law provisions' of the Companies Act 2006 see PARA 16 note 6. As to the registration requirements mentioned in head (2) in the text see ss 9-13; and PARA 111 (application to registrar for registration), PARA 112 (requisite particulars of directors and secretaries), PARA 113 (statement of capital and initial shareholdings required in the case of a company limited by shares), PARA 115 (statement of guarantee required in the case of a company that is to be limited by guarantee).

As to the registration requirements for companies formed under the Companies (Audit, Investigations and Community Enterprise) Act 2004 see PARA 118. The provisions which govern community interest companies (ie the Companies (Audit Investigations and Community Enterprise) Act 2004 Pt 2 (ss 26-63): see PARA 82 et seq) are still regarded as company law provisions under the statutory framework established by the Companies Act 2006, but they are regarded as forming a distinct body of regulation which is additional to, and sits alongside, company law rather than forming part of it. The provisions of the Companies Acts, apart from the Companies Act 2006 s 6 (see PARA 82), have effect subject to the Companies (Audit Investigations and Community Enterprise) Act 2004 Pt 2: see the Companies Act 2006 s 6(2); and PARA 82.

5 Companies Act 2006 s 7(2). The registrar of companies has a duty not to register an unlawful association: *R v Registrar of Companies, ex p Bowen* [1914] 3 KB 1161 at 1167. See also *R v Registrar of Companies, ex p A-G* [1991] BCLC 476 (where the registration of a company whose main object was the organising of the services of a prostitute was quashed as the purpose was contrary to public policy and unlawful). As to companies which are formed for an illegal purpose see PARA 106 et seq. As to the registrar of companies see PARA 131 et seq.

6 Companies Act 2006 s 3(1). As to the meaning of references to a company's constitution see PARA 227.

7 As to companies limited by shares see also PARA 78.

8 Companies Act 2006 s 3(1). As to companies limited by guarantee see also PARA 79.

9 Companies Act 2006 s 3(2).

10 As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

11 Companies Act 2006 s 3(3).

12 Companies Act 2006 s 3(4). As to unlimited companies see PARA 81.

13 As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. With the coming into effect of the Companies Act 1980, and in accordance with all subsequent Companies Acts, it has not been possible to form a company which is limited by guarantee and having a share capital, although such companies that had existed up to that point have not been extinguished by any act of law and they may continue to exist, legally, as historical entities: see the text and notes 22-23.

14 Companies Act 2006 s 4(2). As to public companies and their powers generally see PARA 73. As to the share capital requirements that are imposed on public companies see PARA 74 et seq. In the case of an unregistered company (see PARA 1665 et seq), any reference to a public company must be read as referring to a

company that has power under its constitution to offer its shares or debentures to the public: see the Unregistered Companies Regulations 2009, SI 2009/2436, reg 5(1)(a); and PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

Before the enactment of the Companies Act 1907, the term 'public company' was understood to mean a company which invited the public to subscribe for its shares, and companies which did not do so were often called private companies and are so described in many judgments (see *Re British Seamless Paper Box Co* (1881) 17 ChD 467 at 473, CA; *Re George Newman & Co* [1895] 1 Ch 674 at 685, CA; *Salomon v A Salomon & Co Ltd* [1897] AC 22 at 43, HL; *Re Wragg Ltd* [1897] 1 Ch 796 at 807, CA), although the legal status of such a company is that of a public company (*Re Sharp, Rickett v Sharp* (1890) 45 ChD 286 at 290, CA; *Re Lysaght, Lysaght v Lysaght* [1898] 1 Ch 115 at 122, CA; *Trevor v Whitworth* (1887) 12 App Cas 409 at 434, HL). Thereafter the term 'public company', which was not defined, was used in contradistinction to 'private company', which was defined as a company which by its articles restricted the right to transfer its shares, limited the number of its members (excluding persons in or formerly in the employment of the company) to 50, and prohibited any invitation to the public to subscribe for its shares and debentures: see the Companies Act 1948 ss 28, 455(1) (repealed). In other Acts, the term 'public company', although not expressly defined, may include a private company: see eg *Re White, Theobald v White* [1913] 1 Ch 231 at 238 (decided under the Apportionment Act 1870). As to private companies under the Companies Act 2006 see the text and note 22; and see PARA 72.

15 As to a company's certificate of incorporation see PARA 119.

16 Companies Act 2006 s 4(2)(a). As to the required indications in the name of a public limited company see PARA 200 et seq.

17 As to the meaning of the 'former Companies Acts' see PARA 18 note 1.

18 As to the re-registration of a private company as a public company under the Companies Act 2006 see PARAS 168-172.

19 Companies Act 2006 s 4(2)(b), (3)(a). The date of 22 December 1980 referred to in the text is the date on which the corresponding provisions of the Companies Act 1980 (now repealed) came into force: see the Companies Act 1980 (Commencement No 2) Order 1980, SI 1980/1785. As to the Companies Act 1980 generally see PARA 13.

20 Companies Act 2006 s 4(1). For the two major differences between private and public companies see Pt 20 Ch 1 (ss 755-760) (prohibition of public offers by private companies) (as to which see PARA 1066) and Pt 20 Ch 2 (ss 761-767) (minimum share requirement for public companies) (as to which see PARA 74 et seq); s 4(4). See also note 14. As to private companies and the restrictions on their powers see also PARA 72.

In the case of an unregistered company (see PARA 1665 et seq), any reference to a private company must be read as referring to a company that does not have power to offer its shares or debentures to the public: see the Unregistered Companies Regulations 2009, SI 2009/2436, reg 5(1)(b); and PARA 1666.

21 See note 19.

22 See the Companies Act 2006 s 5(1), (2)(a); and PARA 79.

23 This is the effect of the Companies Act 2006 s 5(1), (2) (see the text and note 22) when combined with the definition of a public company given in s 4(2) (see the text and note 14).

24 For these purposes, 'company' means any body corporate or unincorporated association and includes a partnership: Unfair Contract Terms Act 1977 s 1(2), Sch 1 para 1(d). As to the meaning of 'body corporate' see PARA 1 note 5. As to the meaning of 'partnership' see PARA 4.

25 Unfair Contract Terms Act 1977 Sch 1 para 1(d). As to the exemptions from liability arising in contract referred to in the text generally see **CONTRACT** vol 9(1) (Reissue) PARA 828.

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103. Meaning of 'person' as subscriber to the memorandum of association.

For the purpose of subscribing to the memorandum of association¹, 'person' includes a foreigner although residing abroad², a person who is a trustee for another subscriber³, and a person who signs by an agent, although only orally appointed⁴. It also includes a corporation and limited company⁵, and it may perhaps also include a minor⁶.

If a firm name is, with the authority of the firm, subscribed to a memorandum, the partners are joint holders of the shares subscribed for⁷. If an individual subscribes in his own name as agent for a firm, and the firm takes up the shares subscribed for, he is absolved from liability⁸.

1 As to a company's memorandum of association see PARA 104 et seq.

2 *Princess Reuss v Bos* (1871) LR 5 HL 176.

3 *Salomon v A Salomon & Co Ltd* [1897] AC 22 at 46, HL, per Lord Herschell.

4 *Re Whitley Partners Ltd* (1886) 32 ChD 337, CA.

5 See the Interpretation Act 1978 ss 5, 22(1), 23(1), Sch 1, Sch 2 para 4(1)(a) (meaning of 'person') (see **STATUTES** vol 44(1) (Reissue) PARA 1382); and the Companies Act 2006 s 323 (see PARA 661). See also PARA 311 note 2. See also *Re Barned's Banking Co, ex p Contract Corp* (1867) 3 Ch App 105; *Pharmaceutical Society v London and Provincial Supply Association* (1880) 5 App Cas 857, HL; *Union Steamship Co of New Zealand Ltd v Melbourne Harbour Trust Comrs* (1884) 9 App Cas 365, PC.

6 See *Re Laxon & Co (No 2)* [1892] 3 Ch 555; *Re Nassau Phosphate Co* (1876) 2 ChD 610. On attaining full age a minor may repudiate the contract which arises on his signature (*Re Hertfordshire Brewery Co* (1874) 43 LJ Ch 358; *Re Laxon & Co (No 2)* at 561-562 per Vaughan Williams J); but such repudiation does not invalidate the incorporation of the company (*Re Hertfordshire Brewery Co*). See also PARA 330.

7 *Re Land Credit Co of Ireland, Weikersheim's Case* (1873) 8 Ch App 831. See also *Niemann v Niemann* (1889) 43 ChD 198, CA. As to the meaning of 'share' generally see PARA 1042.

8 *Re Glory Paper Mills Co, Dunster's Case* [1894] 3 Ch 473, CA.

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104. Requirements of memorandum under the Companies Act 2006.

A 'memorandum of association' is a memorandum stating that the subscribers¹:

- 120 (1) wish to form a company² under the Companies Act 2006³; and
- 121 (2) agree to become members of the company⁴ and, in the case of a company that is to have a share capital⁵, to take at least one share each⁶.

The memorandum must be in the prescribed form⁷ and must be authenticated by each subscriber⁸.

A company must have articles of association⁹ prescribing regulations for the company¹⁰.

1 Companies Act 2006 s 8(1). As to subscribers of the memorandum see also PARA 321 et seq.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 Companies Act 2006 s 8(1)(a). As to formation of a company under the Companies Act 2006 see PARA 102. As to restrictions on agreements for the transfer by subscribers to the company of non-cash assets in the 'initial period' see PARA 1125. As to the memorandum and articles of association of a community interest company see PARA 105.

4 As to the meaning of 'member' see PARA 321. As to membership of a company see PARA 321 et seq.

5 As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

6 Companies Act 2006 s 8(1)(b). As to the meaning of 'share' see PARA 1042.

7 In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6. In exercise of the powers conferred by s 8(2), the Secretary of State has made the Companies (Registration) Regulations 2008, SI 2008/3014. Accordingly, for the purposes of the Companies Act 2006 s 8, the memorandum of association of a company having a share capital must be in the form set out in the Companies (Registration) Regulations 2008, SI 2008/3014, reg 2(a), Sch 1 (see PARA 78 note 8); and the memorandum of association of a company not having a share capital must be in the form set out in reg 2(b), Sch 2 (see PARAS 79 note 8, 81 note 7).

For existing companies (see PARA 230), the prescribed form of memorandum for a company limited by shares is given in the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule Table B (private company limited by shares) and in Schedule Table F (public company limited by shares) (see PARA 78 note 8); the prescribed form of memorandum for a company limited by guarantee is given in Schedule Table C (company limited by guarantee and not having a share capital), in Schedule Table D Pt I (public company limited by guarantee and having a share capital) and in Schedule Table D Pt II (private company limited by guarantee and having a share capital) (see PARA 79 note 8); and the prescribed form of memorandum for an unlimited company having a share capital is given in the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule Table E (an unlimited company having a share capital) (see PARA 81 note 7). As to the meanings of 'company limited by shares', 'company limited by guarantee', 'limited company', 'private company', 'public company' and 'unlimited company' see PARA 102.

Provisions that immediately before 1 October 2009 were contained in a company's memorandum but are not provisions of the kind mentioned in the Companies Act 2006 s 8 are to be treated after that date as provisions of the company's articles: see s 28(1); and PARA 228. 1 October 2009 is the date by which s 8 had come fully into force: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3(b).

8 Companies Act 2006 s 8(2). In relation to the authentication of a document under the Companies Act 2006 see s 1146; and PARAS 678-679. As to the requirement to deliver the memorandum to the registrar of companies see PARA 111. A company's memorandum is subject to the disclosure requirements in s 1078: see s 1078(2); and PARA 144.

9 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq. See also note 7.

10 See the Companies Act 2006 s 18; and PARA 228.

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105. Requirements relating to a community interest company.

The articles of association¹ of a community interest company² must state that the company is to be a community interest company³.

The articles of a community interest company of any description⁴:

- 122 (1) must at all times include such provisions as regulations require to be included in the articles of every community interest company or a community interest company of that description⁵; and
- 123 (2) must not include such provisions as regulations require not to be so included⁶.

The articles of a community interest company are of no effect to the extent that they⁷:

- 124 (a) are inconsistent with provisions required⁸ to be included in the articles of the company⁹; or
- 125 (b) include provisions required¹⁰ not to be included¹¹.

Regulations may make provision for and in connection with restricting the ability of a community interest company to amend its articles so as to add, remove or alter a statement of the company's objects¹².

1 As to a company's articles of association generally see PARA 228 et seq.

2 As to community interest companies see PARA 82 et seq. As to a community interest company's articles of association see the text and notes 3-12.

3 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 32(1) (amended by SI 2009/1941).

4 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 32(3) (amended by SI 2009/1941).

5 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 32(3)(a) (amended by SI 2009/1941). The provisions required by regulations under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 32(3)(a) to be included in the articles of a community interest company may (in particular) include s 32(4) (amended by SI 2009/1941):

49 (1) provisions about the transfer and distribution of the company's assets (including their distribution on a winding up) (Companies (Audit, Investigations and Community Enterprise) Act 2004 s 32(4)(a));

50 (2) provisions about the payment of interest on debentures issued by the company or debts of the company (s 32(4)(b));

51 (3) provisions about membership of the company (s 32(4)(c));

52 (4) provisions about the voting rights of members of the company (s 32(4)(d));

53 (5) provisions about the appointment and removal of directors of the company (s 32(4)(e)); and

54 (6) provisions about voting at meetings of directors of the company (s 32(4)(f)).

As to the making of regulations under the Companies (Audit, Investigations and Community Enterprise) Act 2004 generally see s 62 (amended by SI 2009/1941). In exercise of the powers conferred by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 32(3), (4), (6), the Secretary of State has made the Community Interest Company Regulations 2005, SI 2005/1788: see regs 7-10, 13-16, Sch 1-3 (regs 7, 8 substituted by, and regs 10, 13-16 amended by, SI 2009/1942; the Community Interest Company Regulations 2005, SI 2005/1788, regs 9, 14-16 amended by SI 2007/1093; the Community Interest Company Regulations 2005, SI 2005/1788, Schs 1-3 amended by SI 2007/1093; SI 2008/948; SI 2009/1942). As to the Secretary of State see PARA 6. As to meetings of directors see PARA 527 et seq.

6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 32(3)(b). See note 5.

7 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 32(5) (amended by SI 2009/1941).

8 le by regulations under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 32(3) (a) (see head (1) in the text): see s 32(5)(a) (as amended: see note 9).

9 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 32(5)(a) (amended by SI 2009/1941).

10 le by regulations under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 32(3) (b) (see head (2) in the text): see s 32(5)(b).

11 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 32(5)(b).

12 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 32(6) (amended by SI 2009/1941). See note 5.

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106. Companies formed for an illegal purpose.

A company of a dangerous and mischievous character or formed for a fraudulent purpose is probably illegal at common law¹; and a company, the proposed constitution of which involves an offence against the general law, cannot properly be registered². In the event of such a company being registered³, that act in itself would not render its objects legal⁴. Thus a company formed to set up a lottery in England⁵ (other than a company authorised by the National Lottery Commission by licence to run the National Lottery or to promote lotteries as part of the National Lottery⁶) or to sell tickets in England in a lottery in a foreign state where lotteries are legal, would, if registered under the Companies Act 2006, be an illegal company⁷; but a company formed to set up a lottery in a foreign state where such lotteries are legal would not be illegal⁸.

The fact that some only of the provisions of a company's constitution are illegal does not necessarily make the company an illegal one, or prevent the court from giving effect to such of the rules as are legal⁹; but, where the objects of a company include an illegal object, and other objects of the company, although in themselves legal, are mere applications of the governing principle stated in the illegal object, the company is an illegal company¹⁰. If a company is formed for legal purposes, the commission by it of illegal acts does not make it an illegal company¹¹.

1 An Act of 1719 (6 Geo 1 c 18) ss 18, 19 (repealed; popularly known as the 'Bubble Act') declared to be illegal and void dangerous and mischievous undertakings and attempts tending to the common grievance, prejudice and inconvenience of the King's subjects, or great numbers of them, and more particularly by unincorporated companies presuming to act as if they were corporate bodies, and pretending to make their shares or stocks transferable, without any legal authority by Act of Parliament or charter; but, even before that Act was repealed, there were conflicting decisions as to whether acting, by an unincorporated company, as a corporation, without the authority of a statute or charter, and pretending to be possessed of transferable stock, was illegal: *Duvergier v Fellows* (1828) 5 Bing 248 at 267; *Blundell v Winsor* (1837) 8 Sim 601; *Walburn v Ingilby* (1883) 1 My & K 61 at 76. After that Act had been partly repealed in 1825 (by 6 Geo 4 c 91), notwithstanding the recital in the repealing Act that the several undertakings, attempts, practices, acts, matters and things referred to in the repealed Act should be adjudged and dealt with in like manner as they might have been adjudged and dealt with 'according to the common law, notwithstanding the Act', the mere raising and transfer of stock in an unincorporated company was not an offence at common law: *Garrard v Hardey* (1843) 5 Man & G 471; *Harrison v Heathorn* (1843) 6 Man & G 81.

2 *R v Registrar of Joint Stock Companies, ex p More* [1931] 2 KB 197 at 201, CA; *R v Registrar of Companies, ex p Bowen* [1914] 3 KB 1161; *Bowman v Secular Society Ltd* [1917] AC 406, HL. As to registration under the Companies Act 2006 see PARA 111.

3 Because the Companies Act 2006 is not expressed to bind the Crown, it would appear that, in the event of such a company being incorporated by registration under that Act (see PARA 119), the Attorney General could institute proceedings by way of a quashing order to cancel the registration: *Bowman v Secular Society Ltd* [1917] AC 406 at 439-440, HL, per Lord Parker of Waddington; and see the cases cited in note 2. As to quashing orders see **JUDICIAL REVIEW** vol 61 (2010) PARA 693. In practice, the registrar can be relied upon to refuse to register such a company, and consequently the question of what is the status of such a company has never been decided: see PARA 119. As to the meaning of 'registrar' see PARA 131 note 2.

4 However, the effect of the Companies Act 2006 s 15(4) (conclusiveness of the certificate of incorporation: see PARA 119) appears to be that the courts will recognise the corporate existence of a company all of whose objects are transparently illegal, while the certificate remains unrevoked: *Bowman v Secular Society Ltd* [1917] AC 406 at 439, HL, per Lord Parker of Waddington.

5 As to lotteries see **LICENSING AND GAMBLING** vol 68 (2008) PARA 686 et seq. As to the meaning of 'England' see PARA 1 note 5.

6 See the National Lottery etc Act 1993 ss 5(1), 6(1) (prospectively substituted); and **LICENSING AND GAMBLING** vol 68 (2008) PARAS 691, 692.

7 *R v Registrar of Joint Stock Companies, ex p More* [1931] 2 KB 197, CA. A company (not being an unregistered company) carrying on an illegal business may be wound up in the public interest on a petition by the Secretary of State under the Insolvency Act 1986 s 124A: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 444. See also *Re Alpha Club (UK) Ltd* [2002] EWHC 884 (Ch), [2002] 2 BCLC 612; *Re Delfin International SA Ltd, Re Delfin Marketing (UK) Ltd* [2000] 1 BCLC 71 (both cases involving illegal lottery and trading schemes); *Re Millennium Advanced Technology Ltd* [2004] EWHC 711 (Ch), [2004] 4 All ER 465, [2004] 1 WLR 2177; *Re UK-Euro Group plc* [2006] EWHC 2102 (Ch), [2007] 1 BCLC 812. Cf *Re Portfolios of Distinction Ltd* [2006] EWHC 782 (Ch), [2006] 2 BCLC 261. See also *Re Inertia Partnership LLP* [2007] EWHC 539 (Ch), [2007] 1 BCLC 739. As to the grounds on which an unregistered company may be wound up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1151.

8 *Macnee v Persian Investment Corp* (1890) 44 ChD 306 (company held not to be an illegal company in the proper sense of the term, as no illegality was shown in the memorandum of association of the company). See note 11. Provisions that immediately before 1 October 2009 were contained in a company's memorandum but are not provisions of the kind mentioned in the Companies Act 2006 s 8 (which substantially altered the purpose of the memorandum of association) (see PARA 104) are to be treated after that date as provisions of the company's articles: see s 28(1); and PARA 228. Under the Companies Act 2006, unless a company's articles of association specifically restrict the objects of the company, its objects are unrestricted: see PARA 240.

9 *Strick v Swansea Tin-Plate Co* (1887) 36 ChD 558; *Swaine v Wilson* (1889) 24 QBD 252, CA. See also *Re General Co for the Promotion of Land Credit* (1870) 5 Ch App 363 (affd sub nom *Princess Reuss v Bos* (1871) LR 5 HL 176); *McGlade v Royal London Mutual Insurance Society Ltd* [1910] 2 Ch 169, CA.

10 *Bowman v Secular Society Ltd* [1917] AC 406 at 421, HL.

11 *Macnee v Persian Investment Corp* (1890) 44 ChD 306 at 311. Thus it would appear that a money-lending company which failed to comply with the then statutory requirements as to moneylenders was not an illegal company but was merely liable to the penalties imposed by those requirements: see further *Lodge v National Union Investment Co Ltd* [1907] 1 Ch 300. The same would appear to apply to a company which carries on the business of dentistry without complying with the requirements of the Dentists Act 1984 s 43 (see **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARA 406), or which carries on business under the style or title of 'architect' without complying with the requirements of the Architects Act 1997 ss 1(1), 4, 20(1) (see **BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS** vol 4(3) (Reissue) PARA 223). See also Lindley's Law of Companies (6th Edn) p 186, where it is questioned whether the failure of bankers to make the return required under penalties by the Bank Charter Act 1844 s 21 (repealed) made a banking partnership or company composed in part of members whose names had not been returned in accordance with that Act illegal.

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107. Proceedings by or against illegal companies.

An illegal company (that is, one formed for an illegal purpose) cannot sustain a claim to recover a debt incurred for money lent, either to members or outsiders¹, or on any contract made directly for the purpose of carrying on its business². A trustee for the illegal company is in no better position³.

Money lent to an illegal company for the purpose of carrying out its objects cannot be recovered⁴, and persons making other contracts with an illegal company may not be able to enforce them against it⁵. Persons subscribing to the formation of a company, the agreement to form which is illegal, may, however, recover the money before it is actually applied to the illegal purpose⁶, and the court will order any persons who have received the money subscribed to render an account⁷; but the question, even now, seems open whether the courts will assist members of illegal companies to recover their subscriptions from the persons who have been the recipients of them, and, if so, by what means⁸.

The members of an illegal company may be beneficial owners of property, and, if an officer of the company embezzles funds entrusted to him, he may be indicted for theft⁹.

1 *Jennings v Hammond* (1882) 9 QBD 225.

2 *Jennings v Hammond* (1882) 9 QBD 225. See, however, *Hill v Secretary of State for the Environment, Food and Rural Affairs* [2005] EWHC 696 (Ch), [2006] 1 BCLC 601 (claimant company formed to carry on farming business for the benefit of person disqualified under the Company Directors Disqualification Act 1986 s 11 (see PARA 1590) could enforce contracts entered into by it in the course of its being unlawfully managed; defence of illegality rejected on public policy grounds). As to void and illegal contracts see generally **CONTRACT** vol 9(1) (Reissue) PARA 836 et seq.

3 *Shaw v Benson* (1883) 11 QBD 563, CA.

4 *Phillips v Davies* (1888) 5 TLR 98.

5 *Re Padstow Total Loss and Collision Assurance Association* (1882) 20 ChD 137, CA.

6 *Strachan v Universal Stock Exchange (No 2)* [1895] 2 QB 697, CA; *Burge v Ashley and Smith Ltd* [1900] 1 QB 744, CA. As to the formation of a company under the Companies Act 2006 see PARA 102 et seq.

7 *Greenberg v Cooperstein* [1926] Ch 657.

8 See *Greenberg v Cooperstein* [1926] Ch 657 at 666 per Tomlin J; *Hume v Record Reign Jubilee Syndicate* (1899) 80 LT 404; *Sheppard v Oxenford* (1855) 1 K & J 491; *Marrs v Thompson* (1902) 86 LT 759, DC; *Re One and All Sickness and Accident Assurance Association* (1909) 25 TLR 674.

9 *R v Tankard* [1894] 1 QB 548; *R v Stainer* (1870) LR 1 CCR 230.

The offence of embezzlement as such has been abolished and the Larceny Act 1916 repealed (see the Theft Act 1968 ss 32(1), 33, Sch 3). See now the offence of theft (see the Theft Act 1968; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 282 et seq). See also the Fraud Act 2006 s 4 (fraud by abuse of position); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

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108. Winding up of illegal company.

An illegal company cannot be wound up by the court under the Insolvency Act 1986 on its own petition or that of a member¹, or on the petition of a creditor, at any rate if the petitioner had notice of the illegality². If a winding-up order is made, it is effective unless and until discharged

on appeal and, while it exists, the illegality of the company is not a bar to proceedings in the winding up³.

1 *Re Mexican and South American Mining Co, Barclay's Case* (1858) 26 Beav 177 at 179-180 (court will not sanction or notice an illegal association nor exercise its powers in favour of it); *Re London and Eastern Banking Corp'n, Longworth's Case* (1859) 1 De GF & J 17 at 30-31, CA. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

2 *Re Padstow Total Loss and Collision Assurance Association* (1882) 20 ChD 137, CA; *Re South Wales Atlantic Steamship Co* (1876) 2 ChD 763, CA; *Re Arthur Average Association for British, Foreign and Colonial Ships, ex p Hargrove & Co* (1875) 10 Ch App 542 at 545n; *Re Ilfracombe Permanent Mutual Benefit Building Society* [1901] 1 Ch 102. The court may, however, administer a trust where the beneficiaries exceed 20, even though the trust involves the carrying on of some business, provided the business is carried on by trustees who are less than 20 in number: *Smith v Anderson* (1880) 15 ChD 247, CA.

3 *Re Padstow Total Loss and Collision Assurance Association* (1882) 20 ChD 137, CA; *Re Arthur Average Association for British, Foreign and Colonial Ships, ex p Hargrove & Co* (1875) 10 Ch App 542; *Re Arthur Average Association* (1876) 3 ChD 522; *Re Queen's Average Association, ex p Lynes* (1878) 38 LT 90; *Re London Marine Insurance Association, Andrews and Alexander's Case, Chatt's Case, Cook's Case, Crew's Case* (1869) LR 8 Eq 176. See also **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 443.

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109. Company's right to set up illegality.

An illegal company may set up its own illegality in answer to proceedings against it¹; but, where effect is given to the defence, the company may not be allowed costs².

1 *Phillips v Davies* (1888) 5 TLR 98; *Re Ilfracombe Permanent Mutual Benefit Building Society* [1901] 1 Ch 102. Cf *Re Padstow Total Loss and Collision Assurance Association* (1882) 20 ChD 137, CA; *Doolan v Midland Rly Co* (1877) 2 App Cas 792 at 806, HL.

2 *Phillips v Davies* (1888) 5 TLR 98; *Re Ilfracombe Permanent Mutual Benefit Building Society* [1901] 1 Ch 102.

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110. Sale of shares in an illegal company.

The sale of shares or scrip in an illegal company or intended company is illegal¹; and a broker who is employed to sell or purchase them cannot recover from his principal any commission or any sums expended on his behalf². The buyer cannot recover any purchase money paid to the broker³.

1 *Josephs v Pebrer* (1825) 3 B & C 639; *Buck v Buck* (1808) 1 Camp 547.

2 *Josephs v Pebrer* (1825) 3 B & C 639. Cf *Re Edmond, ex p Neilson* (1863) 3 De GM & G 556.

3 *Buck v Buck* (1808) 1 Camp 547.

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B. REGISTRATION REQUIREMENTS

111. Application to registrar for registration.

The memorandum of association¹ must be delivered to the registrar² together with an application for registration of the company³, the other documents required⁴ for registration and a statement of compliance⁵.

The application for registration must state⁶:

- 126 (1) the company's proposed name⁷;
- 127 (2) whether the company's registered office is to be situated in England and Wales (or in Wales), in Scotland or in Northern Ireland⁸;
- 128 (3) whether the liability of the members of the company⁹ is to be limited, and if so whether it is to be limited by shares¹⁰ or by guarantee¹¹; and
- 129 (4) whether the company is to be a private¹² or a public company¹³.

The application must contain¹⁴:

- 130 (a) in the case of a company that is to have a share capital¹⁵, a statement of capital and initial shareholdings¹⁶;
- 131 (b) in the case of a company that is to be limited by guarantee, a statement of guarantee¹⁷;
- 132 (c) a statement of the company's proposed officers¹⁸;

and the application must also contain¹⁹: (i) a statement of the intended address of the company's registered office²⁰; and (ii) a copy of any proposed articles of association²¹ (to the extent that these are not supplied by the default application of model articles)²².

The statement of compliance required to be delivered to the registrar is a statement that the requirements of the Companies Act 2006 as to registration have been complied with²³. The registrar may accept the statement of compliance as sufficient evidence of compliance²⁴.

If the registrar is satisfied that the requirements of the Companies Act 2006 as to registration are complied with, he must register the documents delivered to him²⁵. The duty of the registrar as to registration has never been purely ministerial²⁶. He should consider whether the requirements of the Companies Acts have been complied with and refuse registration if he conceives that they have not²⁷. The court will not interfere²⁸ with the decision of the registrar unless it is shown that the registrar had not in fact exercised his discretion, or that he had exercised it upon some wrong principle of law, or that he had been influenced by extraneous considerations which he ought not to have taken into account²⁹.

1 As to the meaning of 'memorandum of association' see PARA 104.

2 le to the registrar of companies for England and Wales, if the registered office of the company is to be situated in England and Wales (or in Wales): Companies Act 2006 s 9(6)(a). As to where the registered office of the company is to be situated in Scotland or in Northern Ireland see s 9(6)(b), (c). As to the meaning of 'registrar of companies' see PARA 131 note 2; and as to the meanings of 'England' and 'Wales' see PARA 1 note 5. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to the company's registered office see PARA 129.

3 If the application is delivered by a person as agent for the subscribers to the memorandum of association, it must state his name and address: Companies Act 2006 s 9(3). Any obligation under the Companies Acts to give a person's address is, unless otherwise expressly provided, to give a service address for that person: Companies Act 2006 s 1142. As to service of documents on a company generally see PARA 671. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to subscribers to the memorandum see PARA 104.

4 le required by the Companies Act 2006 s 9: see s 9(1).

5 Companies Act 2006 s 9(1). As to the statement of compliance see the text and notes 23-24.

6 Companies Act 2006 s 9(2).

7 Companies Act 2006 s 9(2)(a). As to restrictions on the use of company names and trading names generally see PARA 196 et seq.

8 Companies Act 2006 s 9(2)(b). See note 2.

9 As to the meaning of 'member' see PARA 321. As to membership of a company generally see PARA 321 et seq.

10 As to the meaning of 'company limited by shares' see PARA 102; and as to the meaning of 'share' see PARA 1042. See also PARA 78.

11 Companies Act 2006 s 9(2)(c). As to the meaning of 'company limited by guarantee' see PARA 102. See also PARA 79.

12 As to the meaning of 'private company' see PARA 102.

13 Companies Act 2006 s 9(2)(d). As to the meaning of 'public company' see PARA 102.

14 Companies Act 2006 s 9(4).

15 As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

16 Companies Act 2006 s 9(4)(a). As to the statement of capital and initial shareholdings required in the case of a company limited by shares see s 10; and PARA 113.

17 Companies Act 2006 s 9(4)(b). As to the statement of guarantee required in the case of a company that is to be limited by guarantee see s 11; and PARA 115.

18 Companies Act 2006 s 9(4)(c). As to the meaning of 'officer' generally under the Companies Act 2006 see PARA 607. As to the statement of the company's proposed officers see s 12; and PARA 112.

19 Companies Act 2006 s 9(5).

20 Companies Act 2006 s 9(5)(a).

21 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

22 Companies Act 2006 s 9(5)(b). A limited company need not register its articles: see PARA 104. As to the default application of the model articles see s 20; and PARA 228.

23 Companies Act 2006 s 13(1). The statement of compliance need not be witnessed. References in the company law provisions of the Companies Act 2006 to the requirements of that Act include the requirements of regulations and orders made under it: s 1172. As to the meaning of the 'company law provisions' of the Companies Act 2006 see PARA 16 note 6.

24 Companies Act 2006 s 13(2).

25 Companies Act 2006 s 14. As to fees payable under s 14 see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(a). As to incorporation and its effects see PARA 119 et seq.

26 *R v Registrar of Companies* [1912] 3 KB 23 at 34, DC, per Avery J; *Bowman v Secular Society Ltd* [1917] AC 406 at 439, HL, per Lord Parker of Waddington.

27 *Codman v Brougham* [1918] AC 514 at 523, HL, per Lord Wrenbury; *R v Registrar of Joint Stock Companies, ex p More* [1931] 2 KB 197, CA (refusal to register company with unlawful objects). As to the refusal of registration where the name of the company is undesirable see PARA 196.

28 le by way of a mandatory order (formerly an order of mandamus). As to mandatory orders see **JUDICIAL REVIEW** vol 61 (2010) PARA 703 et seq.

29 *R v Registrar of Companies* [1912] 3 KB 23 at 34, DC, per Avery J. See also *R v Registrar of Companies, ex p Bowen* [1914] 3 KB 1161; *R v Registrar of Companies, ex p A-G* [1991] BCLC 476; and see the cases cited in PARA 119 note 26.

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112. The statement of proposed officers.

The statement of proposed officers¹ required to be delivered² to the registrar³ must contain the required particulars of⁴:

- 133 (1) the person who is, or persons who are, to be the first director or directors of the company⁵;
- 134 (2) in the case of a company that is to be a private company⁶, any person who is (or any persons who are) to be the first secretary (or joint secretaries) of the company⁷;
- 135 (3) in the case of a company that is to be a public company⁸, the person who is (or the persons who are) to be the first secretary (or joint secretaries) of the company⁹.

The required particulars are the particulars that will be required to be stated¹⁰:

- 136 (a) in the case of a director, in the company's register of directors¹¹ and register of directors' residential addresses¹²;
- 137 (b) in the case of a secretary, in the company's register of secretaries¹³.

The statement must also contain a consent by each of the persons named as a director, as secretary or as one of joint secretaries, to act in the relevant capacity¹⁴.

1 As to the meaning of 'officer' generally under the Companies Act 2006 see PARA 607. As to the company secretary and other officers see PARA 603.

2 le in accordance with the Companies Act 2006 s 9(1), (4): see PARA 111. Such a statement is subject to the disclosure requirements in s 1078: see s 1078(2); and PARA 144. As to the effect of the statement of proposed officers upon the registration of a company under the Companies Act 2006 see s 16(1), (6); and PARA 120.

The Secretary of State may make provision by regulations requiring a statement sent under s 12 that relates (wholly or partly) to a person who is a person disqualified under Pt 40 (ss 1182-1191) (foreign disqualification etc), or is subject to a disqualification order or disqualification undertaking under the Company Directors

Disqualification Act 1986, to be accompanied by an additional statement: see s 1189; and PARA 1621. As to the Secretary of State see PARA 6.

3 As to the registrar of companies for England and Wales, if the registered office of the company is to be situated in England and Wales (or in Wales): see the Companies Act 2006 s 9(6)(a); and PARA 111. As to where the registered office of the company is to be situated in Scotland or in Northern Ireland see s 9(6)(b), (c); and PARA 111. As to the meaning of 'company' under the Companies Acts see PARA 24; as to the meaning of the 'Companies Acts' see PARA 16; as to the meaning of 'registrar of companies' see PARA 131 note 2; and as to the meanings of 'England' and 'Wales' see PARA 1 note 5. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to the company's registered office see PARA 129.

4 Companies Act 2006 s 12(1).

5 Companies Act 2006 s 12(1)(a). As to the meaning of 'director' see PARA 478.

6 As to the meaning of 'private company' see PARA 102.

7 Companies Act 2006 s 12(1)(b). Private companies are not required to have a secretary: see PARA 601.

8 As to the meaning of 'public company' see PARA 102.

9 Companies Act 2006 s 12(1)(c).

10 Companies Act 2006 s 12(2).

11 As to the register of directors see the Companies Act 2006 ss 162-164, 166; and PARA 499.

12 Companies Act 2006 s 12(2)(a). As to the register of directors' residential addresses see ss 165-166; and PARA 500.

13 Companies Act 2006 s 12(2)(b). As to the register of secretaries see ss 277-279; and PARA 605.

14 Companies Act 2006 s 12(3). If all the partners in a firm are to be joint secretaries, consent may be given by one partner on behalf of all of them: s 12(3). In the Companies Acts, 'firm' means any entity, whether or not a legal person, that is not an individual and includes a body corporate, a corporation sole and a partnership or other unincorporated association: s 1173(1). As to firms and partnerships generally see **PARTNERSHIP** vol 79 (2008) PARA 1. As to corporations sole see **CORPORATIONS** vol 9(2) (2006 Reissue) PARAS 1111-1112.

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113. Statement of capital and initial shareholdings.

The statement of capital and initial shareholdings that is required to be delivered¹ in the case of a company limited by shares² must comply with the following provisions³, namely:

138 (1) it must state:

7

13. (a) the total number of shares of the company to be taken on formation by the subscribers to the memorandum of association⁴;
14. (b) the aggregate nominal value of those shares⁵;
15. (c) for each class of shares⁶: (i) prescribed particulars of the rights attached to the shares⁷; (ii) the total number of shares of that class⁸; and (iii) the aggregate nominal value of shares of that class⁹; and
16. (d) the amount to be paid up and the amount (if any) to be unpaid on each share (whether on account of the nominal value of the share or by way of premium)¹⁰;

8

139 (2) it must contain such information as may be prescribed for the purpose of identifying the subscribers to the memorandum of association¹¹; and

140

(3) it must state, with respect to each subscriber to the memorandum:

9

17. (a) the number, nominal value (of each share) and class of shares to be taken by him on formation¹²; and

18. (b) the amount to be paid up and the amount (if any) to be unpaid on each share (whether on account of the nominal value of the share or by way of premium)¹³.

10

1. In accordance with the Companies Act 2006 s 9(1), (4): see PARA 111. Such a statement is subject to the disclosure requirements in s 1078: see s 1078(3); and PARA 144.

2. In being a company that is to have a share capital: see the Companies Act 2006 s 10(1). As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'company limited by shares' see PARA 102; and as to the meanings of 'company having a share capital', 'share capital' and 'share' see PARA 1042. As to the requirements that must be met before a company is duly formed see PARA 102 et seq; and as to the required indications in the name of a limited company see PARA 200 et seq.

3. Companies Act 2006 s 10(1).

4. Companies Act 2006 s 10(2)(a). As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 104.

5. Companies Act 2006 s 10(2)(b). As to the nominal value of shares see PARA 1044.

6. Companies Act 2006 s 10(2)(c). As to classes of shares generally see PARA 1057 et seq.

7. Companies Act 2006 s 10(2)(c)(i). In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the meaning of the 'Companies Acts' see PARA 16. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6. In exercise of the powers conferred by s 10(2)(c)(i), the Secretary of State has made the Companies (Shares and Share Capital) Order 2009, SI 2009/388. Accordingly, the following particulars of the rights attached to shares are prescribed for the purposes of the Companies Act 2006 s 10(2)(c)(i) (see the Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 2(1), (2)(a)):

55 (1) particulars of any voting rights attached to the shares, including rights that arise only in certain circumstances (art 2(3)(a));

56 (2) particulars of any rights attached to the shares, as respects dividends, to participate in a distribution (art 2(3)(b));

57 (3) particulars of any rights attached to the shares, as respects capital, to participate in a distribution (including on winding up) (art 2(3)(c)); and

58 (4) whether the shares are to be redeemed or are liable to be redeemed at the option of the company or the shareholder (art 2(3)(d)).

As to rights attached to classes of shares generally see PARA 1057 et seq; as to redeemable shares see PARAS 1052, 1229 et seq; and as to distributions and dividends see PARA 1389 et seq. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

8. Companies Act 2006 s 10(2)(c)(ii).

9. Companies Act 2006 s 10(2)(c)(iii).

10. Companies Act 2006 s 10(2)(d). As to paid up and unpaid shares see PARA 1042 et seq.

11. Companies Act 2006 s 10(3). In exercise of the powers conferred by s 10(3), the Secretary of State has made the Companies (Registration) Regulations 2008, SI 2008/3014. Accordingly, for the purposes of the Companies Act 2006 s 10(3), the statement of capital and initial shareholdings must contain the name and

address of each subscriber to the memorandum of association: Companies (Registration) Regulations 2008, SI 2008/3014, reg 3. Any obligation under the Companies Acts to give a person's address is, unless otherwise expressly provided, to give a service address for that person: Companies Act 2006 s 1142.

12 Companies Act 2006 s 10(4)(a). Where a subscriber to the memorandum is to take shares of more than one class, the information required under s (4)(a) is required for each class: s 10(5).

13 Companies Act 2006 s 10(4)(b).

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114. Articles of association of a company limited by shares.

A company limited by shares¹ need not register its articles of association².

However, on the formation of a limited company³:

- 141 (1) if articles of association are not registered⁴; or
- 142 (2) if articles are registered (in so far as they do not exclude or modify the model articles⁵ prescribed for a company of that description as in force at the date on which the company is registered)⁶,

the model articles (so far as applicable) form part of the company's articles in the same manner and to the same extent as if articles in the form of those articles had been duly registered⁷.

1 A company that is to have a share capital. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'company limited by shares' see PARA 102; and as to the meanings of 'company having a share capital', 'share capital' and 'share' see PARA 1042. See also PARA 78. As to the required indications in the name of a limited company see PARA 200 et seq.

2 See the Companies Act 2006 ss 18(1), (2), 20; and PARA 228. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

3 As to the meaning of 'limited company' see PARA 102. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.

4 See the Companies Act 2006 s 20(1)(a); and PARA 228.

5 As to the power to prescribe model articles, and their application, see PARA 228. As to the model articles, and the legacy articles that still may have application, see PARAS 229, 230. Provided that he follows the general form of the relevant model articles, the draftsman is free to add, subtract or vary the articles as circumstances require: *Gaiman v National Association for Mental Health* [1971] Ch 317, [1970] 2 All ER 362.

6 See the Companies Act 2006 s 20(1)(b), (2); and PARA 228. As to the importance of using words clearly excluding the default articles see *Fisher v Black and White Publishing Co* [1901] 1 Ch 174, CA.

7 See the Companies Act 2006 s 20(1); and PARA 228.

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REGISTRATION REQUIREMENTS/115. Statement of guarantee.

115. Statement of guarantee.

The statement of guarantee required to be delivered¹ in the case of a company that is to be limited by guarantee² must comply with the following requirements³, namely:

- 143 (1) it must contain such information as may be prescribed for the purpose of identifying the subscribers to the memorandum of association⁴;
- 144 (2) it must state that each member⁵ undertakes that, if the company is wound up⁶ while he is a member, or within one year after he ceases to be a member, he will contribute to the assets of the company such amount as may be required for:
 - 11 19. (a) payment of the debts and liabilities of the company contracted before he ceases to be a member⁷;
 20. (b) payment of the costs, charges and expenses of winding up⁸; and
 21. (c) adjustment of the rights of the contributories among themselves⁹,
 - 12 145 not exceeding a specified amount¹⁰.

1 In accordance with the Companies Act 2006 s 9(1), (4): see PARA 111.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'company limited by guarantee' see PARA 102. See also PARA 79. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.

3 Companies Act 2006 s 11(1).

4 Companies Act 2006 s 11(2). In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: s 1167. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6. In exercise of the powers conferred by s 11(2), the Secretary of State has made the Companies (Registration) Regulations 2008, SI 2008/3014. Accordingly, for the purposes of the Companies Act 2006 s 11(2), the statement of guarantee must contain the name and address of each subscriber to the memorandum of association: Companies (Registration) Regulations 2008, SI 2008/3014, reg 4. As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of a company limited by guarantee see PARA 79; and as to subscribers to a company's memorandum of association see PARA 104.

5 As to the meaning of 'member' see PARA 321. As to membership of a company generally see PARA 321 et seq.

6 As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

7 Companies Act 2006 s 11(3)(a).

8 Companies Act 2006 s 11(3)(b).

9 Companies Act 2006 s 11(3)(c).

10 Companies Act 2006 s 11(3). In the Companies Acts, 'contributory' means every person liable to contribute to the assets of a company in the event of its being wound up: s 1170B(1) (s 1170B added by SI 2009/1941). For the purposes of all proceedings for determining, and all proceedings prior to the final determination of, the persons who are to be deemed contributories, the expression includes any person alleged to be a contributory: Companies Act 2006 s 1170B(2) (as so added). The reference in s 1170B(1) to persons liable to contribute to the assets does not include a person so liable by virtue of a declaration by the court under the Insolvency Act 1986 s 213 (fraudulent trading) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 911) or under s 214 (wrongful trading) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 914): Companies Act 2006 s 1170B(3) (as so added).

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116. Articles of association of a company limited by guarantee.

A company limited by guarantee¹ need not register² its articles of association³.

However, on the formation of a limited company⁴:

- 146 (1) if articles of association are not registered⁵; or
- 147 (2) if articles are registered (in so far as they do not exclude or modify the model articles⁶ prescribed for a company of that description as in force at the date on which the company is registered)⁷,

the model articles (so far as applicable) form part of the company's articles in the same manner and to the same extent as if articles in the form of those articles had been duly registered⁸.

In the case of a company that is limited by guarantee and has no share capital⁹, and is registered on or after 1 January 1901¹⁰, any provision in the company's articles, or in any resolution of the company¹¹, purporting to give any person¹² a right to participate in the divisible profits of the company, otherwise than as a member¹³, is void¹⁴.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'company limited by guarantee' see PARA 102. See also PARA 79.

2 Ie in accordance with the Companies Act 2006 s 9(1), (4): see PARA 111.

3 See the Companies Act 2006 ss 18(1), (2), 20; and PARA 228. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

4 As to the meaning of 'limited company' see PARA 102. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.

5 See the Companies Act 2006 s 20(1)(a); and PARA 228.

6 As to the power to prescribe model articles, and their application, see PARA 228. As to the model articles, and the legacy articles that still may have application, see PARAS 229, 230. Provided that he follows the general form of the relevant model articles, the draftsman is free to add, subtract or vary the articles as circumstances require: *Gaiman v National Association for Mental Health* [1971] Ch 317, [1970] 2 All ER 362.

7 See the Companies Act 2006 s 20(1)(b), (2); and PARA 228. As to the importance of using words clearly excluding the default articles see *Fisher v Black and White Publishing Co* [1901] 1 Ch 174, CA.

8 See the Companies Act 2006 s 20(1); and PARA 228.

9 As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

10 Ie the date on which the Companies Act 1900 (repealed) came into force: see the Companies Consolidation (Consequential Provisions) Act 1985 s 10; Interpretation Act 1978 s 17(2)(b). See note 7.

11 As to company resolutions generally see PARA 612 et seq.

12 As to the meaning of 'person' see PARA 103.

13 As to the meaning of 'member' see PARA 321. As to membership of a company generally see PARA 321 et seq.

14 Companies Act 2006 s 37. This provision prevents a person from sharing in the profits of a guarantee company registered on or after 1 January 1901, unless he is a member, and as such is under a liability to contribute to the assets of the company in the event of its being wound up (see PARA 115).

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117. Articles of association of an unlimited company.

In the case of an unlimited company¹, there must be registered² with the memorandum³, articles of association⁴ prescribing regulations for the company⁵. These articles may adopt all or any of the model articles that have been prescribed⁶.

A company registered as unlimited may re-register itself as a limited company⁷.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'unlimited company' see PARA 102.

2 In accordance with the Companies Act 2006 s 9(1), (4): see PARA 111.

3 As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of an unlimited company see PARA 81.

4 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

5 See the Companies Act 2006 ss 18(1), (2), 20; and PARA 228.

6 See the Companies Act 2006 s 19; and PARA 228. As to the power to prescribe model articles, and their application, see PARA 228. As to the model articles, and the legacy articles that still may have application, see PARAS 229, 230.

7 See PARAS 178-180.

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118. Registration of new company formed as a community interest company.

If a company is to be formed as a community interest company¹, the documents delivered to the registrar of companies² must be accompanied by the prescribed formation documents³.

On receiving the documents so delivered and the prescribed formation documents, the registrar of companies must, instead of registering the documents, forward a copy of each of the documents to the Regulator⁴, and retain the documents pending the Regulator's decision⁵.

The Regulator must decide whether the company is eligible to be formed as a community interest company⁶. A company is eligible to be formed as a community interest company if:

- 148 (1) its articles⁷ comply with the statutory requirements that are so imposed⁸;
- 149 (2) its proposed name complies with the relevant statutory requirements⁹; and
- 150 (3) the Regulator, having regard to the application and accompanying documents and any other relevant considerations, considers that the company will satisfy the community interest test and is not an excluded company¹⁰.

The Regulator must give notice of the decision to the registrar of companies, but the registrar is not required to record it¹¹.

If the Regulator decides that the company is eligible to be formed as a community interest company, the registrar of companies must proceed in accordance with the statutory requirements which govern the registration of the documents delivered to him¹² and the issue of certificates of incorporation¹³; and if the company is entered on the register¹⁴, he must also retain and record the prescribed formation documents¹⁵.

The certificate of incorporation must state that the company is a community interest company¹⁶; and the fact that the certificate of incorporation contains such a statement is conclusive evidence that the company is a community interest company¹⁷.

If the Regulator decides that the company is not eligible to be formed as a community interest company, any subscriber to the memorandum of association¹⁸ may appeal to the Appeal Officer¹⁹ against the decision²⁰.

1 As to community interest companies see PARA 82.

2 See under the Companies Act 2006 s 9 (registration documents) (see PARA 111): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 36(1) (s 36 substituted by SI 2009/1941). As to the registrar of companies see PARA 131 et seq.

3 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 36(1) (as substituted: see note 2). For these purposes, the 'prescribed formation documents' means such declarations or statements as are required by regulations to accompany the application, in such form as may be approved in accordance with the regulations: s 36(2) (as so substituted). As to the making of regulations under the Companies (Audit, Investigations and Community Enterprise) Act 2004 generally see s 62 (amended by SI 2009/1941). In exercise of the powers conferred by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 36(2), the Secretary of State has made the Community Interest Company Regulations 2005, SI 2005/1788: see reg 11. As to the Secretary of State see PARA 6.

4 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 36(3)(a) (as substituted: see note 2). As to the Regulator see PARA 83.

5 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 36(3)(b) (as substituted: see note 2). The material so retained is not available for public inspection: see the Companies Act 2006 s 1087(1)(j); and PARA 150.

6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 36A(1) (s 36A added by SI 2009/1941).

7 As to a community interest company's articles of association see PARA 105; and as to a company's articles of association generally see PARA 228 et seq.

8 See the Companies (Audit Investigations and Community Enterprise) Act 2004 s 36A(2)(a) (as added: see note 6). Head (1) in the text refers to the requirements imposed by and by virtue of s 32 (see PARA 105): see s 36A(2)(a) (as so added).

9 Companies (Audit Investigations and Community Enterprise) Act 2004 s 36A(2)(b) (as added: see note 6). Head (2) in the text refers to the requirements of s 33 (see PARA 203): see s 36A(2)(b); and PARA 118.

- 10 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 36A(2)(c) (as added: see note 6). As to the community interest test and excluded companies see PARA 87.
- 11 Companies (Audit Investigations and Community Enterprise) Act 2004 s 36A(3) (as added: see note 6).
- 12 He must proceed in accordance with the Companies Act 2006 s 14 (see PARA 111): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 36B(1)(a) (s 36B added by SI 2009/1941).
- 13 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 36B(1)(a) (as added: see note 12). The text refers to the requirement that the registrar proceed in accordance with the Companies Act 2006 s 15 (see PARA 119): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 36B(1)(a) (as so added).
- 14 As to the register see PARA 146.
- 15 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 36B(1)(b) (as added: see note 12).
- 16 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 36B(2) (as added: see note 12).
- 17 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 36B(2) (as added: see note 12).
- 18 As to subscribers to the memorandum see PARA 104.
- 19 As to the Appeal Officer for community interest companies see PARA 84.
- 20 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 36B(3) (as added: see note 12).

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C. INCORPORATION AND ITS EFFECTS

119. Certificate of incorporation.

On the registration of a company¹, the registrar of companies² must give a certificate that the company is incorporated³. The certificate must state⁴:

- 151 (1) the name⁵ and registered number of the company⁶;
- 152 (2) the date of its incorporation⁷;
- 153 (3) whether it is a limited⁸ or unlimited company⁹, and if it is limited whether it is limited by shares¹⁰ or limited by guarantee¹¹;
- 154 (4) whether it is a private¹² or a public company¹³;
- 155 (5) whether the company is a community interest company¹⁴;
- 156 (6) whether the company's registered office¹⁵ is situated in England and Wales¹⁶ (or in Wales), in Scotland or in Northern Ireland¹⁷.

The certificate must be signed by the registrar or authenticated by the registrar's official seal¹⁸. The registrar's duty to certify may be enforced by a mandatory order¹⁹. The registrar is also required to cause notice of the issue of the certificate to be published²⁰.

The certificate is conclusive evidence that the requirements of the Companies Act 2006²¹ as to registration have been complied with and that the company is duly registered under that Act²².

If a company is registered with illegal objects²³, the existence of a certificate precludes its corporate status being challenged without, however, making those objects legal²⁴; but the

registration provision²⁵ is not expressed to bind the Crown, and the Attorney General, on behalf of the Crown, may institute proceedings by way of a quashing order²⁶ to cancel a registration improperly or erroneously allowed²⁷.

A copy of the certificate certified in writing by the registrar is admissible in evidence in legal proceedings²⁸, and, as against the company itself, registration may be evidenced by other means, for example by producing its sealed share certificate²⁹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to company registration see PARA 111 et seq.

2 As to the meaning of 'registrar of companies' see PARA 131 note 2.

3 Companies Act 2006 s 15(1). As to the effect of incorporation see PARA 120.

4 Companies Act 2006 s 15(2).

5 As to company names and trading names generally see PARA 196 et seq.

6 Companies Act 2006 s 15(2)(a). As to a company's registered number see ss 1066, 1067; and PARAS 139, 140.

7 Companies Act 2006 s 15(2)(b). The company is incorporated from the beginning of the date mentioned in the certificate of incorporation: *Official Receiver and Liquidator of Jubilee Cotton Mills Ltd v Lewis* [1924] AC 958, HL. The statute does not authorise the day to be ante-dated: *Official Receiver and Liquidator of Jubilee Cotton Mills Ltd v Lewis* at 974.

8 As to the meaning of 'limited company' see PARA 102.

9 As to the meaning of 'unlimited company' see PARA 102.

10 As to the meaning of 'company limited by shares' see PARA 102; and as to the meaning of 'share' see PARA 1042.

11 Companies Act 2006 s 15(2)(c). As to the meaning of 'company limited by guarantee' see PARA 102. See also PARA 79.

12 As to the meaning of 'private company' see PARA 102.

13 Companies Act 2006 s 15(2)(d). As to the meaning of 'public company' see PARA 102.

14 See the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 36B(2); and PARA 118. As to community interest companies see PARA 82.

15 As to the company's registered office see PARA 129.

16 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

17 Companies Act 2006 s 15(2)(e).

18 Companies Act 2006 s 15(3). As to the registrar's official seal see PARA 131.

19 This was the procedure adopted in *R v Whitmarsh* (1850) 15 QB 600; *R v Registrar of Joint Stock Companies* (1847) 10 QB 839. As to mandatory orders see **JUDICIAL REVIEW** vol 61 (2010) PARA 703 et seq.

20 As to public notice of the issue of certificates of incorporation see the Companies Act 2006 s 1064; and PARA 138.

21 References in the company law provisions of the Companies Act 2006 to the requirements of that Act include the requirements of regulations and orders made under it: s 1172. As to the meaning of the 'company law provisions' of the Companies Act 2006 see PARA 16 note 6.

22 Companies Act 2006 s 15(4). Before the Companies Act 1900, there was some doubt as to the meaning of 'conclusive': see *Re National Debenture and Assets Corp'n* [1891] 2 Ch 505, CA. See also *Ladies' Dress Association Ltd v Pulbrook* [1900] 2 QB 376, CA. The extended wording of the Companies Act 1900 s 1 (repealed) (see now the Companies Act 2006 s 15) shows that 'conclusive' means what it says: *Hammond v*

Prentice Bros Ltd [1920] 1 Ch 201. As to the possibility of proceedings in the nature of a scire facias see *Salomon v A Salomon & Co Ltd* [1897] AC 22 at 30, HL. As to scire facias see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 264; and see also **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1301; **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 107.

23 As to companies formed for an illegal purpose see PARA 106.

24 *Bowman v Secular Society Ltd* [1917] AC 406 at 438-439, HL, per Lord Parker of Waddington.

25 Ie the Companies Act 2006 s 15 (see the text and notes 1-20).

26 As to quashing orders see **JUDICIAL REVIEW** vol 61 (2010) PARA 693.

27 *Bowman v Secular Society Ltd* [1917] AC 406 at 439-440, HL, per Lord Parker of Waddington. See also *Cotman v Brougham* [1918] AC 514 at 519, HL, per Lord Parker of Waddington. Cf *R v Registrar of Joint Stock Companies, ex p More* [1931] 2 KB 197, CA (refusal of the registrar to register a company formed to deal in tickets in the Irish Hospitals Sweepstake upheld). See also note 19.

Since the Companies Act 2006 is not expressed to bind the Crown, the issue of a certificate of incorporation may be challenged by the Attorney General (but by nobody else) by way of judicial review: see *R v Registrar of Companies, ex p Central Bank of India* [1986] QB 1114 at 1169-1171, [1986] 1 All ER 105 at 117-118, CA, per Lawton LJ, at 1175-1178 and 122-124 per Slade LJ, and at 1178-1180, 1182-1183 and 124-125, 127-128 per Dillon LJ; *R v Registrar of Companies, ex p A-G* [1991] BCLC 476.

28 See the Companies Act 2006 ss 1086, 1091(3); and PARA 149.

29 *Mostyn v Calcott Hall Mining Co* (1858) 1 F & F 334.

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120. Effect of incorporation.

As from the date of incorporation¹, the subscribers of the memorandum of association², together with such other persons as may from time to time become members of the company³, are a body corporate⁴ by the name stated in the certificate of incorporation⁵. That body corporate is then capable forthwith of exercising all the functions of an incorporated company⁶, except that, if the company is registered as a public company⁷, it must not do business⁸ or exercise any borrowing power⁹ unless the registrar¹⁰ has issued it with a further certificate (a 'trading certificate')¹¹ to the effect that he is satisfied that its allotted share capital¹² is not less than the authorised minimum¹³. In the case of a company having a share capital¹⁴, the subscribers to the memorandum become holders of the shares specified in the statement of capital and initial shareholdings¹⁵.

The body corporate, as a legal entity, is separate from, and distinct from, the individual members of the company¹⁶. Its status and registered office¹⁷ are as stated in, or in connection with, the application for registration¹⁸.

The persons named in the statement of proposed officers¹⁹ as director²⁰, or as secretary²¹ or joint secretary of the company, are, as from the date of the company's incorporation, deemed to have been appointed to that office²².

1 Ie the date mentioned in the certificate of incorporation, following the registration of a company: see PARA 119 note 7. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to incorporation by registration under the Companies Act 2006 see PARA 111 et seq.

- 2 As to the meaning of 'memorandum of association' see PARA 104. As to subscribers of the memorandum see PARA 104.
- 3 As to the meaning of 'member' see PARA 321. As to membership of a company generally see PARA 321 et seq.
- 4 As to the meaning of 'body corporate' see PARA 1 note 5.
- 5 Companies Act 2006 s 16(1), (2). As to the company's name see PARA 200 et seq. A company or other corporation may be represented at trial by an employee if the employee has been authorised by the company or corporation to appear at trial on its behalf, and if the court gives permission: see CPR 39.6; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1126. Permission is not normally granted in jury trials or in contempt proceedings: see *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 5.6; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1126. In relation to the small-claims track, a corporate party may be represented by any of its officers or employees: see *Practice Direction--Small Claims Track* PD 27 para 3.2(4); and **CIVIL PROCEDURE** vol 11 (2009) PARA 279. See also PARA 306.
- 6 Companies Act 2006 s 16(1), (3). As to the capacity of a company that is incorporated by registration see PARA 252 et seq.
- 7 Is a company that is registered as a public company on its original incorporation rather than by virtue of its re-registration as a public company: see the Companies Act 2006 s 761(1); and PARA 74. As to the meanings of 'private company' and 'public company' see PARA 102. As to the re-registration of a private company as a public company under the Companies Act 2006 see PARA 168 et seq.
- 8 As to the meaning of 'business' generally see PARA 1 note 1.
- 9 As to a company's borrowing powers see PARA 1256 et seq.
- 10 As to the meaning of 'registrar of companies' see PARA 131 note 2.
- 11 Is in accordance with the Companies Act 2006 s 762 (see PARA 74): see s 761(2); and PARA 74. A 'trading certificate' is a certificate issued by the registrar of companies under s 761: see PARA 74.
- 12 As to the meaning of 'allotted share capital' see PARA 1045. As to the meaning of 'allotted' see PARA 1091; and as to the meanings of 'share' and 'share capital' see PARA 1042.
- 13 See the Companies Act 2006 s 761; and PARA 74. As to the 'authorised minimum' in relation to the nominal value of a public company's allotted share capital see PARA 75.
- 14 As to the meaning of 'company having a share capital' see PARA 1042.
- 15 Companies Act 2006 s 16(1), (5). As to the statement of capital and initial shareholdings required in the case of a company limited by shares see s 10; and PARA 113. As to the meaning of 'company limited by shares' see PARA 102; and as to the meaning of 'share' see PARA 1042.
- 16 See PARA 121; and see *John Foster & Sons v IRC* [1894] 1 QB 516 at 528, CA, per Lindley LJ, and at 530 per Kay LJ; *Salomon v A Salomon & Co Ltd* [1897] AC 22 at 42, HL, per Lord Herschell, and at 51 per Lord Macnaughten; *Booth v Helliwell* [1914] 3 KB 252; *R v Grubb* [1915] 2 KB 683, CCA; *IRC v Sansom* [1921] 2 KB 492, CA; *Rainham Chemical Works Ltd (in liquidation) v Belvedere Fish Guano Co* [1921] 2 AC 465 at 475, HL, per Lord Buckmaster; *Re Fasey, ex p Trustees* [1923] 2 Ch 1 at 18, CA, per Atkin LJ; *Gramophone and Typewriter Ltd v Stanley* [1908] 2 KB 89 at 99, CA, per Fletcher Moulton LJ; *Ebbw Vale UDC v South Wales Traffic Area Licensing Authority* [1951] 2 KB 366 (sub nom *R v South Wales Traffic Licensing Authority, ex p Ebbw Vale UDC*) [1951] 1 All ER 806; *Lee v Lee's Air Farming Ltd* [1961] AC 12, [1960] 3 All ER 420, PC; *Tunstall v Steigmann* [1962] 2 QB 593, [1962] 2 All ER 417, CA; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 482, HL, per Lord Templeman (sub nom *MacLaine Watson & Co Ltd v Department of Trade and Industry*) [1989] 3 All ER 523 at 531, HL, per Lord Templeman, and at 505-506 and 549 per Lord Oliver of Aylmerton). See also *Coleg Elidyr (Camphill Communities Wales) Ltd v Koeller* [2005] EWCA Civ 856, [2005] 2 BCLC 379 (company formed to establish and maintain centres for the development of working communities for handicapped persons was an entirely separate entity from the communities themselves, which were not legal entities).

The principle, that a company is a legal entity separate from, and distinct from, its members, has the consequence that even if one shareholder controls a company through his shareholding, the court may still apply that principle so that he is treated as an employee for certain purposes, so long as the facts of the case can establish an employer-employee relationship: see *Lee's v Lee's Air Farming Ltd* (widow of the controlling shareholder and governing director of a company qualified for payments under worker's compensation legislation); *Secretary of State for Trade and Industry v Bottrill* [2000] 1 All ER 915, [1999] ICR 592, CA (facts of the case allowed the managing director and sole shareholder of a company to claim redundancy payments,

pursuant to statute) (cf *Buchan v Secretary of State for Employment*, *Ivey v Secretary of State for Employment* [1997] IRLR 80, EAT (a person who, by reason of a controlling interest in the shares of the company, is able to prevent his own dismissal from his position in the company is outside the class of persons intended to be protected by employment protection legislation), which was not followed in *Secretary of State for Trade and Industry v Bottrill*; *Ultraframe (UK) Ltd v Fielding* [2003] EWCA Civ 1805, [2004] RPC 479, [2003] All ER (D) 232 (Dec) (ownership of design rights); *Clark v Clark Construction Initiatives* [2008] ICR 635, [2008] IRLR 364, EAT (contract of employment not found where the controlling shareholder of a company was dismissed from that company following the transfer of his shareholding to a third party). *Clark v Clark Construction Initiatives* at [61]-[98] reviewed the authorities on this point and the EAT in that case suggested principles for determining: (1) the circumstances where it may be legitimate not to give effect to what is alleged to be a binding contract of employment; and (2) the factors that a tribunal should consider in deciding whether effect should be given to a contract of employment between a controlling shareholder and his company. This guidance was approved on appeal (where the decision was upheld on other grounds) ([2008] EWCA Civ 1446, [2009] ICR 718, [2008] All ER (D) 191 (Dec)) and has been further approved (and expanded upon) in *Neufeld v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] EWCA Civ 280 at [79]-[90], [2009] 3 All ER 790 at [79]-[90]. See further **EMPLOYMENT** vol 39 (2009) PARA 10.

As to the circumstances in which an individual or individuals may be considered the directing mind of the company see PARA 312.

17 As to the company's registered office see PARA 129.

18 Companies Act 2006 s 16(1), (4). As to the application for registration see PARA 111.

19 As to the statement of proposed officers see PARA 112. As to the meaning of 'officer' generally under the Companies Act 2006 see PARA 607.

20 As to the meaning of 'director' see PARA 478.

21 As to the company secretary and other officers see PARA 603.

22 Companies Act 2006 s 16(1), (6).

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121. Piercing the corporate veil.

A company is a legal entity that is separate from, and distinct from, the individual members of the company¹. This is also the position within a group of companies where the fundamental principle is that each company in a group (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities². There may, however, be cases where the wording of a particular statute³ or contract justifies the treatment of parent and subsidiary as one company, at least for some purposes⁴; or where the court will 'pierce (or lift) the corporate veil', not because it considers it just to do so⁵ but because special circumstances exist indicating that it is a mere facade concealing the true facts⁶. In identifying what is a mere facade, the motive of those behind the company will be relevant⁷. The court will go behind the status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company⁸. The device of a corporate structure will often have been used to evade limitations imposed on conduct by law⁹ and rights of relief which third parties already possess¹⁰ against a defendant¹¹, so justifying the court's 'piercing' (or 'lifting') the veil.

Where, however, this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced¹². Nor is the court entitled to lift the veil as against a company which is a member of a corporate group merely because the corporate structure has been used

so as to ensure that the legal liability (if any) in respect of particular future activities of the company will fall on another member of the group rather than the defendant company¹³.

It may be that liabilities or obligations will arise without piercing the corporate veil because there is an agency relationship between a parent company and a subsidiary¹⁴, or between a company and its shareholders¹⁵, but this may not be inferred merely from control of the company or ownership of its shares¹⁶ or from the level of paid up capital¹⁷. It will depend on an investigation of all aspects of the relationship between the parties and there is no presumption of such agency¹⁸.

For the purpose of taxation, there are numerous statutory provisions which in effect require the corporate veil to be pierced¹⁹; and the courts have shown a tendency for such purposes to look at the economic consequences of transactions rather than their strict format, thus in effect bypassing the question of corporate identity²⁰.

1 Having chosen to incorporate, the court will be reluctant to allow an individual to claim that he, rather than the company, should be treated as the party to a transaction or dealing, as the case may be: see *JP Morgan Chase Bank v Pollux Holding Ltd*, *Diamantides v JP Morgan Chase Bank* [2005] EWCA Civ 1612, [2005] All ER (D) 323 (Dec) (affirming *Diamantides v JP Morgan Chase Bank* [2005] EWHC 263 (Comm), [2005] All ER (D) 404 (Feb)) (any advisory duties owed by the bank were owed to company rather than to the claimant); cf *Conway v Ratiu* [2005] EWCA Civ 1302 at [78], [2006] 1 All ER 571n at [78], [2006] 1 EGLR 125 at [78] per Auld LJ (where it was accepted that, in some circumstances where a third party owes a fiduciary duty to the company, that fiduciary duty may extend to persons in or behind the company).

If a company is so under the unfettered control of one particular individual as to be in effect his alter ego, it may be concluded that documents belonging to the company are within the 'power' of the individual for the purpose of discovery: *Dallas v Dallas* (1960) 24 DLR (2d) 746, BC CA. Cf *B v B* [1978] Fam 181, [1979] 1 All ER 801; but compare with *Re Tecnion Investments Ltd* [1985] BCLC 434, CA (where a contrary conclusion was reached).

2 *Albacruz v Albazero*, *The Albazero* [1977] AC 774 at 807, [1975] 3 All ER 21 at 28, CA, per Roskill LJ; *Bank of Tokyo Ltd v Karoon* [1987] AC 45n at 64n, [1986] 3 All ER 468 at 486, CA, per Goff LJ; *Adams v Cape Industries plc* [1990] Ch 433 at 532, [1991] 1 All ER 929 at 1016, CA, per Slade LJ; *Acatos & Hutcheson plc v Watson* [1995] 1 BCLC 218; *Ord v Belhaven Pubs Ltd* [1998] 2 BCLC 447 at 458, [1998] BCC 607 at 615, CA, per Hobhouse LJ. Dicta by Lord Denning MR to the effect that the courts should look at the whole group of companies as an economic entity (see *Littlewoods Mail Order Stores Ltd v McGregor (Inspector of Taxes)*, *Littlewoods Mail Order Stores Ltd v IRC* [1969] 3 All ER 855 at 860, [1969] 1 WLR 1241 at 1254, CA; *Wallersteiner v Moir* [1974] 3 All ER 217 at 238, [1974] 1 WLR 991 at 1013, CA; *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 3 All ER 462, sub nom *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852, CA) have been disapproved subsequently: *Woollson v Strathclyde Regional Council* 1978 SLT 159, HL. See also *Bank of Tokyo v Karoon* [1987] AC 45n at 64, [1986] 3 All ER 468 at 485, CA, per Goff LJ (distinction between parent and subsidiary company a matter of law not economics); *Ord v Belhaven Pubs Ltd* at 457 and 614 per Hobhouse LJ; *Adams v Cape Industries plc*; *Re Polly Peck International (No 3)* [1996] 2 All ER 433 at 448, [1996] 1 BCLC 428 at 444 per Robert Walker J (it was not open to the court to disregard the principle of separate corporate personality and to treat a closely-integrated group of companies as a single economic unit on the basis merely of perceived injustice). For certain purposes, statute may address the relationship between individual companies in a group: see eg the Companies Act 2006 s 192 (transactions with directors requiring members' approval) (see PARAS 564-565), s 399 (duty to prepare group accounts) (see PARA 775), s 679 (public company giving financial assistance for acquisition of shares in a private holding company) (see PARA 1225) and ss 1159-1162 (meaning of 'subsidiary', 'undertaking' and related expressions) (see PARAS 25-26).

3 In *Dimbleby & Sons Ltd v National Union of Journalists* [1984] 1 All ER 751 at 758, [1984] 1 WLR 427 at 435, HL, Lord Diplock noted that, if the veil is to be pierced by a statutory provision, one would expect that parliamentary intention to be expressed in clear and unequivocal language. See note 2.

4 *Adams v Cape Industries plc* [1990] Ch 433 at 536, [1991] 1 All ER 929 at 1019, CA, per Slade LJ, where the Court of Appeal would have categorised the following cases in this way: *Harold Holdsworth & Co (Wakefield) Ltd v Caddies* [1955] 1 All ER 725, [1955] 1 WLR 352 (contract governing management obligations of director of parent company could make provision for management of subsidiary); *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, [1958] 3 All ER 66, HL (parent company activities inseparable from those of subsidiary for the purposes of the Companies Act 1948 s 210 (repealed: minority remedy in case of oppression) (and see *Nicholas v Soundcraft Electronics Ltd* [1993] BCLC 360, CA, on similar facts); *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 3 All ER 462, sub nom *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852, CA (companies without separate business activities treated as one

for the purposes of a statute governing compensation payable for compulsory purchase order made by local council); *Revlon Inc v Cripps and Lee Ltd* [1980] FSR 85, CA (companies in a group treated as one for the purposes of the meaning of 'proprietor' of a trade mark in the Trade Marks Act 1938 (repealed)); Cases 6-7/73 *Instituto Chemioterapico Italiano SpA and Commercial Solvents Corp v EC Commission* [1974] ECR 223, [1974] 1 CMLR 309, ECJ (parent and subsidiary to be treated as one undertaking for the purposes of what are now EC Treaty arts 81, 82 (formerly arts 85, 86) regulating competition). As to the competition rules that exist within the framework of the EC Treaty (ie the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see **COMPETITION** vol 18 (2009) PARA 24 et seq. See also Case C-73/95P *Viho Europe BV v EC Commission (supported by Parker Pen Ltd, intervener)* [1996] ECR I-5457, [1997] 4 CMLR 419, ECJ (where subsidiaries had no freedom to act independently, the parent company and its subsidiaries constituted one economic unit, and a distribution policy pursued by a single economic unit fell outside what is now EC Treaty art 81 (formerly art 85)). Cf *Adams v Cape Industries plc* at 536, 1019, CA, per Slade LJ.

5 See *Adams v Cape Industries plc* [1990] Ch 433 at 537, [1991] 1 All ER 929 at 1020, CA, per Slade LJ; *Ord v Belhaven Pubs Ltd* [1998] 2 BCLC 447 at 457, [1998] BCC 607 at 614-615, CA, per Hobhouse LJ; *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177 at 1185, [2001] 2 BCLC 436 at 444-445 per Morritt V-C.

6 *Woolfson v Strathclyde Regional Council* 1978 SLT 159, HL; *National Dock Labour Board v Pinn & Wheeler Ltd* [1989] BCLC 647; *Adams v Cape Industries plc* [1990] Ch 433 at 543, [1991] 1 All ER 929 at 987, CA, per Slade LJ; *Acatos & Hutcheson plc v Watson* [1995] 1 BCLC 218; *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177, [2001] 2 BCLC 436. See also *Kensington International Ltd v Republic of Congo* [2005] EWHC 2684 (Comm), [2006] 2 BCLC 296 (relevant companies used, and pieces of paper created, to convey the impression of real contracts between substantial and independent companies but which were purely a sham and a façade and had no legal substance having been set up with the intention of defeating claims of creditors).

7 *Jones v Lipman* [1962] 1 All ER 442, [1962] 1 WLR 832; *Adams v Cape Industries plc* [1990] Ch 433 at 540, [1991] 1 All ER 929 at 1023, CA, per Slade LJ; *Re Polly Peck International (No 3)* [1996] 2 All ER 433 at 447, [1996] 1 BCLC 428 at 443 per Robert Walker J.

8 See *Merchandise Transport Ltd v British Transport Commission* [1962] 2 QB 173 at 206-207, [1961] 3 All ER 495 at 517-518, CA, per Danckwerts LJ.

9 *Re Darby, ex p Brougham* [1911] 1 KB 95 (company formed by fraudulent company promoters treated as a mere alias for them); *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307, HL (company formed in England but controlled by German shareholders regarded as an enemy alien); *Jones v Lipman* [1962] 1 All ER 442, [1962] 1 WLR 832 (specific performance ordered against company to which defendant had transferred property to avoid such an action against himself; the company was a device and a sham); *Gilford Motor Co Ltd v Horne* [1933] Ch 935 (company used deliberately as a vehicle for conduct of activities which it was unlawful for the defendant to conduct); *Re Bugle Press Ltd, Re Houses and Estates Ltd* [1961] Ch 270, [1960] 3 All ER 791, CA (company incorporated to facilitate the expropriation of minority shareholders in another company by majority); *Aveling Barford Ltd v Perion Ltd* [1989] BCLC 626 (sale of assets at gross undervalue by company to another controlled by the same shareholder in an attempt to disguise an unauthorised return of capital to that shareholder); *Re H* [1996] 2 All ER 391, [1996] 2 BCLC 500, CA; *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734, [2000] All ER (D) 1067. There is a degree of overlap between this category of cases and the cases cited in note 10.

10 *Re a Company* [1985] BCLC 333, CA (chain of companies used to dispose of assets otherwise susceptible to a Mareva injunction (so called following *Mareva Cia Naviera SA v International Bulkcarriers SA, The Mareva* [1980] 1 All ER 213n, CA; now known as an asset-freezing order) treated in same way as owner would have been); *Bank of Credit and Commerce International SA v BRS Kumar Bros Ltd* [1994] 1 BCLC 211 (company shifted assets to another company to avoid reach of charges granted to creditors of first company; receiver appointed over assets of second company); *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177, [2001] 2 BCLC 436. See also *Ord v Belhaven Pubs Ltd* [1998] 2 BCLC 447, CA (restructuring of company explained as a response to prevailing market conditions rather than as an attempt to evade liability). See also *Kensington International Ltd v Republic of Congo* [2005] EWHC 2684 (Comm), [2006] 2 BCLC 296 (cited in note 6).

11 See *Adams v Cape Industries plc* [1990] Ch 433 at 544, [1991] 1 All ER 929 at 1026, CA, per Slade LJ; and the text and note 13.

12 See *Farrar v Farrars Ltd* (1888) 40 ChD 395 at 406, CA, per Chitty J (sale by mortgagee to company in which he held shares). 'A sale by a person to a corporation of which he is a member is not, either in form or in substance, a sale by a person to himself': *Farrar v Farrars Ltd* at 409 per Lindley LJ. See also *Salomon v A Salomon & Co Ltd* [1897] AC 22, HL. The power to lift the corporate veil is less clear in the Family Division than in the commercial sphere: *Mubarak v Mubarak* [2001] 1 FLR 673 (court can only make orders directly or indirectly regarding company's assets where a spouse is the owner and controller of the company concerned and there are no adverse third parties whose position or interests are likely to be prejudiced).

13 *Adams v Cape Industries plc* [1990] Ch 433 at 544, [1991] 1 All ER 929 at 1026, CA, per Slade LJ.

14 *Firestone Tyre and Rubber Co Ltd v Llewellyn (Inspector of Taxes)* [1957] 1 All ER 561, [1957] 1 WLR 464, HL (an assessment of tax upheld where the business of both the parent company and the subsidiary were carried on by the subsidiary as agent for the parent company); *Smith, Stone and Knight Ltd v Birmingham Corp* [1939] 4 All ER 116 (compensation for compulsory purchase payable by local authority where subsidiary carried on business as agent for the parent company); *Re FG (Films) Ltd* [1953] 1 All ER 615, [1953] 1 WLR 483 (British subsidiary brought into existence for sole purpose of obtaining British classification for film made in reality by American parent company).

15 *Rainham Chemical Works Ltd (in liquidation) v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465, HL.

16 *Salomon v A Salomon & Co Ltd* [1897] AC 22, HL; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72 at 188, sub nom *MacLaine Watson & Co Ltd v Department of Trade and Industry* [1988] 3 All ER 257 at 310, CA, per Kerr LJ. As to the meaning of 'share' see PARA 1042.

17 *Re Polly Peck International (No 3)* [1996] 2 All ER 433 at 445, [1996] 1 BCLC 428 at 441 per Robert Walker J (subsidiary company had small paid up capital because it existed solely as the vehicle for a particular financing transaction). As to paid up capital see PARA 1048.

18 *Adams v Cape Industries plc* [1990] Ch 433 at 536, [1991] 1 All ER 929 at 1020, CA, per Slade LJ.

19 See eg the Inheritance Tax Act 1984 s 94 (see **INHERITANCE TAXATION** vol 24 (Reissue) PARA 433 et seq); the Income and Corporation Taxes Act 1988 Pt XI (ss 414-422) (see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1296 et seq); and the Taxation of Chargeable Gains Act 1992 ss 29, 30 (see **CAPITAL GAINS TAXATION** vol 5(1) (2004 Reissue) PARAS 21, 32).

20 See eg *Furniss (Inspector of Taxes) v Dawson* [1984] AC 474, [1984] 1 All ER 530, HL; *Craven (Inspector of Taxes) v White* [1989] AC 398, [1988] 3 All ER 495, HL; *Fitzwilliam v IRC* [1993] 3 All ER 184, [1993] 1 WLR 1189, HL. The Inland Revenue will look at the real transaction carried out by the taxpayer: see **INCOME TAXATION** vol 23(1) (Reissue) PARA 22. As to tax avoidance see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1569 et seq. See also *Re H (restraint order: realisable property)* [1996] 2 All ER 391, [1996] 2 BCLC 500, CA (although the court had no jurisdiction to appoint a receiver to sell the realisable property of companies that were owned by defendants in criminal proceedings where the companies themselves had not been charged with any offences, the corporate veil could be lifted where the defendants controlled companies that were seemingly cloaks for fraudulent activity, so that the assets of the companies could be treated as being held for the defendants).

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NOTE 20--See *Revenue and Customs Prosecutions Office v May* [2009] EWHC 1826 (QB), [2009] WTLR 1365, [2009] All ER (D) 229 (Jul).

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122. Nationality, domicile and residence.

When incorporated, the company is a legal entity or persona distinct from its members¹, and its property is not the property of the members². The nationality³ and domicile⁴ of a company are determined by its place of registration. A company incorporated in the United Kingdom⁵ will normally have both British nationality and English or Scottish domicile, depending upon its place of registration, and it will be unable to change that domicile⁶. A company incorporated in the United Kingdom will nevertheless be regarded as having an enemy character if the persons in de facto control of its affairs are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies⁷.

The residence of a company is of great importance in revenue law⁸, and at common law the test of company residence is where its real business is carried on, that is to say where its central control and management is located⁹. A company which is incorporated in the United Kingdom is, however, regarded for the purposes of the Taxes Acts as resident there and, accordingly, if a different place of residence is given by any rule of law, that place is no longer to be taken into account for those purposes¹⁰. A company incorporated outside the United Kingdom is resident in the United Kingdom if its central management and control is in the United Kingdom¹¹. It follows that, if such central control is divided, the company, provided that it is not incorporated in the United Kingdom, may have more than one residence¹².

The centre of a company's main interest is of increasing significance in the context of insolvency, especially where the EC Council Regulation on insolvency proceedings¹³ applies; that EC Council Regulation sets up, in the case of companies and legal persons, a rebuttable presumption that the centre of a debtor's main interests is the place of the registered office¹⁴.

Issues as to title to shares¹⁵ in a company are to be decided by the law of the place where the shares are situated, the *lex situs*, which in the ordinary way will be the law of the place where the company is incorporated¹⁶. The head office of a company is not necessarily the registered office of the company, but is the place where the substantial business of the company is carried on and its negotiations conducted¹⁷. Like an individual or a firm, a company may, for the purposes of civil procedure rules, carry on business in more places than one¹⁸.

1 See PARA 120.

2 *Re George Newman & Co* [1895] 1 Ch 674 at 685, CA.

3 *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484, HL.

4 *Gasque v IRC* [1940] 2 KB 80.

5 As to the meaning of 'United Kingdom' see PARA 1 note 5.

6 *Gasque v IRC* [1940] 2 KB 80. As to company registration see PARA 111 et seq.

7 *Daimler Co Ltd v Continental Tyre Rubber Co (Great Britain) Ltd* [1916] 2 AC 307, HL. Such a company is still an English, or Scottish, company and subject to the common law prohibition against trading with the enemy: *Kuenigl v Donnersmarck* [1955] 1 QB 515, [1955] 1 All ER 46. As to the meaning of 'enemy' see **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 577. As to incorporation by registration under the Companies Act 2006 see PARA 119 et seq.

8 As to residence for the purposes of corporation tax see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1320. As to the locality of assets for the purposes of inheritance tax see **INHERITANCE TAXATION** vol 24 (Reissue) PARA 599 et seq. As to service on foreign companies, for which purpose considerations of residence are relevant, see the Companies Act 2006 s 1056; the Overseas Companies Regulations 2009, SI 2009/1801, regs 6, 75; and PARAS 672, 1826 et seq.

9 See *De Beers Consolidated Mines Ltd v Howe* [1906] AC 455, HL; *Egyptian Delta Land and Investment Co Ltd v Todd (Inspector of Taxes)* [1929] AC 1, 14 TC 119, HL; *Unit Construction Co Ltd v Bullock (Inspector of Taxes)* [1960] AC 351, [1959] 3 All ER 831, HL. As to the meaning of 'carry on business' generally see PARA 1 note 1. In determining whether a company is ordinarily resident out of the jurisdiction for the purpose of making an order for security for costs against a company, the test is that applied in tax cases for assessing a company's place of residence (ie where the central control and management of the company actually abides): *Re Little Olympian Each Ways Ltd (No 2)* [1994] 4 All ER 561, [1995] 1 BCLC 48.

10 See the Finance Act 1988 s 66(1); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1262. A company which would otherwise be resident in the United Kingdom for these purposes may be treated as resident outside the United Kingdom as a result of an arrangement for double taxation relief: see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1085 et seq.

11 See the cases cited in note 9. See also *Swedish Central Rly Co Ltd v Thompson* [1925] AC 495, HL. Cf *The Polzeath* [1916] P 241, CA; *Re Hilton, Gibbes v Hale-Hinton* [1909] 2 Ch 548. In seeking to determine where 'central management and control' of a company incorporated outside the United Kingdom lay, it is essential to recognise the distinction between cases where management and control of the company were exercised

through its own constitutional organs (the board of directors or the general meeting) and cases where the functions of those constitutional organs were 'usurped', in the sense that management and control were exercised independently of, or without regard to, those constitutional organs; and, in cases which fell within the former class, it is essential to recognise the distinction (in concept, at least) between the role of an 'outsider' in proposing, advising and influencing the decisions which the constitutional organs took in fulfilling their functions and the role of an outsider who dictated the decisions which were to be taken: *Wood v Holden (Inspector of Taxes)* [2006] EWCA Civ 26, [2006] 1 WLR 1393, [2006] 2 BCLC 210. As to companies incorporated outside the United Kingdom ('overseas companies') see PARA 1824 et seq.

12 *Union Corp'n Ltd v IRC* [1952] 1 All ER 646, CA; affd without reference to this point [1953] AC 482, [1953] 1 All ER 729, HL. See further **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1125.

13 *le EC Council Regulation 1346/2000* (OJ L160, 30.6.2000, p 1) on insolvency proceedings (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 46 et seq).

14 See EC Council Regulation 1346/2000 (OJ L160, 30.6.2000, p 1) art 3; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 48.

15 As to the meaning of 'share' see PARA 1042.

16 *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 All ER 585, [1996] 1 WLR 387, CA. As to the *lex situs* generally see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 380. As to the assignment of negotiable instruments and documents of title see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 409. The locality of the shares of a company is that of the register of shares which is usually, but not always, kept in the country of incorporation: *Baelz v Public Trustee* [1926] Ch 863; *A-G v Higgins* (1857) 2 H & N 339; *Brassard v Smith* [1925] AC 371, PC; *Erie Beach Co Ltd v A-G for Ontario* [1930] AC 161, PC; *International Credit and Investment Co (Overseas) Ltd v Adham* [1994] 1 BCLC 66.

17 *Keynsham Blue Lias Lime Co Ltd v Baker* (1863) 2 H & C 729; and see *Aberystwyth Promenade Pier Co Ltd v Cooper* (1865) 35 LJQB 44 (a pier erected and maintained by the company was at Aberystwyth but the registered office was at Westminster, where the company's business was carried on and service should be effected). As to the company's registered office see PARA 129.

18 *Davies v British Geon Ltd* [1957] 1 QB 1, [1956] 3 All ER 389, CA.

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123. Change of residence.

There is no longer any requirement for a company to obtain Treasury consent where that company wishes to transfer its residence from the United Kingdom¹. All transactions of the following classes are, however, unlawful, unless carried out with the consent of the Treasury, that is to say²:

- 157 (1) for a body corporate resident in the United Kingdom to cause or permit a body corporate not resident in the United Kingdom over which it has control to create or issue any shares or debentures³;
- 158 (2) except for the purpose of enabling a person to be qualified to act as a director, for a body corporate so resident to transfer to any person, or cause or permit to be transferred to any person, any shares or debentures of a body corporate not so resident over which it has control, being shares or debentures which it owns or in which it has an interest⁴.

1 *le the Income and Corporation Taxes Act 1988 s 765(1)(a), (b) was repealed by the Finance Act 1988 ss 105(6), (7), 148, Sch 14 Pt IV with effect from 15 March 1988 (although the repeal does not affect an application for Treasury consent made before that date or a consent already granted). See also Case 81/87 R v HM*

Treasury, ex p Dail Mail and General Trust plc [1989] QB 446, [1989] 1 All ER 328, ECJ; and PARAS 19, 20. As to the meaning of 'United Kingdom' see PARA 1 note 5. As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517.

2 See the Income and Corporation Taxes Act 1988 s 765(1); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1616. The Income and Corporation Taxes Act 1988 s 765(1) does not apply, however, to a transaction which is a movement of capital to which EC Council Directive 88/361 (OJ L178, 8.7.88, p 5) art 1 applies: see the Income and Corporation Taxes Act 1988 s 765A(1); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1622.

3 See the Income and Corporation Taxes Act 1988 s 765(1)(c); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1616. As to shares see PARA 1042; and as to debentures see PARA 1299.

4 See the Income and Corporation Taxes Act 1988 s 765(1)(d); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1616.

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124. Company trading in more than one state.

The domicile of a trading company is not changed by its doing business in another country; but, if it carries on business¹ in several states, it resides, for the purposes of legal proceedings, in as many places as it carries on business².

A company may have localised its obligation to a creditor by the course of its business³, or by the terms of the contract as to where the debt should be recoverable⁴.

1 As to the meaning of 'to carry on business' generally see PARA 1 note 1.

2 *Carron Iron Co v Maclaren* (1855) 5 HL Cas 416 at 450 per Lord St Leonards; *New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101 at 120, CA, per Atkin LJ. Cf PARA 122.

3 *R v Lovitt* [1912] AC 212, PC.

4 *New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101, CA. See further **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 386.

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125. Powers of the company.

As from the date of a company's incorporation by registration under the Companies Acts, it becomes a statutory corporation¹, and therefore does not have, as a corporation at common law has, prima facie the power to deal with its property and to bind itself by contract as freely as an ordinary individual². The statute must not be taken to have created a corporation at common law and then scrutinised to see how far any of the incidents of a corporation at common law have been thereby excluded. The statute or the constitution of the company is, as it were, its charter, and defines its powers³. The company has no powers other than those which are expressly conferred upon it by the statute or by its constitution or are incidental to

the objects therein defined or enumerated⁴; but this restriction is of less significance now in view of the statutory protection given to third parties dealing with a company against limitations arising under the company's constitution⁵.

A company, if it is registered as a public company⁶, cannot exercise all its functions immediately upon incorporation, inasmuch as it has to comply with certain statutory requirements before it can commence business or exercise its borrowing powers⁷.

1 See PARA 120; and see *Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653 at 693 per Lord Selborne.

2 *Baroness Wenlock v River Dee Co* (1883) 36 ChD 675n at 685n, CA, per Bowen LJ (affd (1885) 10 App Cas 354, HL); and see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1230. As to the capacity generally of a company that is incorporated by registration see PARA 252 et seq.

3 *Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653 at 667-668 per Lord Cairns LC. As to a company's memorandum of association generally see PARA 104 et seq.

4 *Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653; and see *Blackburn Building Society v Cunliffe, Brooks & Co* (1882) 22 ChD 61 at 70, CA, per Lord Selborne LC (affd sub nom *Cunliffe, Brooks & Co v Blackburn and District Benefit Building Society* (1884) 9 App Cas 857, HL); *Cotman v Brougham* [1918] AC 514, HL. Under the Companies Act 2006, unless a company's articles of association specifically restrict the objects of the company, its objects are unrestricted: see PARA 240.

5 See the Companies Act 2006 ss 39-42; and PARAS 263-265.

6 As to the meaning of 'public company' see PARA 102.

7 See PARAS 74 et seq, 120.

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126. Companies subject to constructive notice rule.

A company is subject to the rule that, where the conduct of a party charged with notice shows that he had suspicions of a state of facts the knowledge of which would affect his legal rights, but that he deliberately refrained from making inquiries, he will be treated as having had notice¹, though he is not entitled to claim for his own advantage to be treated as having knowledge of the facts which inquiry would have disclosed².

1 *Jones v Smith* (1841) 1 Hare 43. As to the application of this doctrine to allow notice of a company's constitution to be assumed see PARA 266.

2 *Houghton & Co v Nothard, Lowe and Wills Ltd* [1927] 1 KB 246, CA; affd [1928] AC 1, HL.

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127. Notice to officers.

In order that notice to a company may be effectual it should either be given to the company through its proper officers¹ or received by it in the course of its business². Notice to a director or other officer of the company in that character is sufficient³, but not a notice received by him in the course of a transaction in which he is not concerned as such director or officer⁴ or as a director of another company⁵, or if it relates to a matter which he is not bound to⁶, and does not⁷, disclose, or in which he is acting fraudulently or, possibly⁸, in breach of duty falling short of fraud⁹. Oral notice to a sitting board will suffice¹⁰.

An oral notice given to a clerk of the company at its registered office, in office hours, and during the absence of the secretary¹¹, is good notice to the company itself¹², as is an oral notice given to a managing director or the secretary in the course of his duties as such¹³.

The notice which a company receives through its officers or other agents is not properly called constructive notice, but is actual notice¹⁴.

Notice or knowledge of facts possessed by an agent of a company does not of necessity preclude the recovery by the company of money paid under a mistake of fact, where the agent had no idea that the matter to which his knowledge was relevant was being acted upon¹⁵.

1 *Re Eyles, ex p Stright* (1832) Mont 502; *Alletson v Chichester* (1875) LR 10 CP 319.

2 As to notice of assignments see **CHOSER IN ACTION** vol 13 (2009) PARA 72. As to the meaning of 'business' generally see PARA 1 note 1.

3 *Re Carew's Estate Act (No 2)* (1862) 31 Beav 39 at 46 per Romilly MR; *Gale v Lewis* (1846) 9 QB 730; *Bank of Ireland v Cogry Spinning Co* [1900] 1 IR 219; *Re European Bank, ex p Oriental Commercial Bank* (1870) 5 Ch App 358.

4 *Société Générale de Paris v Tramways Union Co* (1884) 14 QBD 424, CA (affd sub nom *Société Générale de Paris v Walker* (1885) 11 App Cas 20, HL, where it was suggested that a director might be personally liable in disregarding a notice); *Peruvian Rlys Co v Thames and Mersey Marine Insurance Co, Re Peruvian Rlys Co* (1867) 2 Ch App 617; *North British Insurance Co v Hallett* (1861) 7 Jur NS 1263; *Powles v Page* (1846) 3 CB 16.

5 *Re Marseilles Extension Rly Co, ex p Crédit Foncier and Mobilier of England* (1871) 7 Ch App 161.

6 *Re David Payne & Co Ltd, Young v David Payne & Co Ltd* [1904] 2 Ch 608, CA (where the same person was director of both contracting companies); *Re Fenwick Stobart & Co, Deep Sea Fishery Co's (Ltd) Claim* [1902] 1 Ch 507; *Re Hampshire Land Co* [1896] 2 Ch 743.

7 *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 at 431-432, CA, per Lindley MR.

8 See *Stone & Rolls Ltd (in liq) v Moore Stephens (a firm)* [2009] UKHL 39 at [198], [2009] 3 WLR 455 at [198] per Lord Brown.

9 *Re Hampshire Land Co* [1896] 2 Ch 743. The application of the principle in *Re Hampshire Land Co*, otherwise described as the adverse interest rule, was considered in *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] UKHL 39, [2009] 3 WLR 455. By a 3-2 majority (Lords Scott and Mance dissenting), their Lordships ruled that the adverse interest rule had no application where the director and sole shareholder of the company was one and the same person, whose knowledge was logically that of the company: *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)*. However, the 'extreme' facts of this case were acknowledged: see *Stone & Rolls Ltd (in liq) v Moore Stephens (a firm)* at [18] per Lord Phillips.

See also *Re European Bank, ex p Oriental Commercial Bank* (1870) 5 Ch App 358; *Re Hirth, ex p Trustee* [1899] 1 QB 612 at 625, CA, per Vaughan Williams LJ. Cf *Cave v Cave* (1880) 15 ChD 639; *Ruben v Great Fingall Consolidated* [1906] AC 439, HL; *Gluckstein v Barnes* [1900] AC 240 at 247, HL, per Halsbury LC; *Houghton & Co v Nothard, Lowe and Wills Ltd* [1928] AC 1, HL; *Kwei Tek Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd* [1954] 2 QB 459, [1954] 1 All ER 779; *Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] Ch 250, [1979] 1 All ER 118, CA.

10 *Re Worcester, ex p Agra Bank* (1868) 3 Ch App 555.

11 As to the company secretary see PARA 601.

12 *Re Brewery Assets Corpn, Truman's Case* [1894] 3 Ch 272. See also *Re Natal Investment Co Ltd, Wilson's Case* (1869) 20 LT 962.

13 *Jaeger's Sanitary Woollen System Co Ltd v Walker & Sons* (1897) 77 LT 180, CA; *Alletson v Chichester* (1875) LR 10 CP 319.

14 *Espin v Pemberton* (1859) 3 De G & J 547. As to constructive notice see PARA 126.

15 *Anglo-Scottish Beet Sugar Corpn Ltd v Spalding UDC* [1937] 2 KB 607, [1937] 3 All ER 335; *Turvey v Dentons (1923) Ltd* [1953] 1 QB 218, [1952] 1 All ER 1025. As to when notice to an agent is regarded also as notice to his principal see **AGENCY** vol 1 (2008) PARA 137. As to mistake of fact see **MISTAKE** vol 77 (2010) PARA 12 et seq.

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128. Examples of statutory duties placed on companies.

A company¹ has certain statutory duties, attaching to it from the time of its incorporation under the Companies Acts², for example³:

- 159 (1) to have a registered office⁴ and to give notice of any change in its situation to the registrar of companies⁵;
- 160 (2) to disclose its name in specified locations, in specified documents and on request to those it deals with in the course of business⁶;
- 161 (3) if it has a common seal⁷, to have its name engraved in legible characters on the seal⁸;
- 162 (4) to keep, and to allow the inspection of, such registers as are required by the Companies Act 2006⁹;
- 163 (5) to issue, on request by any member¹⁰, an up-to-date copy of the company's articles¹¹, a copy of any document, resolution or agreement which affects a company's constitution¹², a copy of any court order sanctioning a compromise or arrangement or facilitating a reconstruction or amalgamation¹³, a copy of any court order that alters the company's constitution and is issued under the court's powers to protect members against unfair prejudice¹⁴, a copy of the company's current certificate of incorporation (and of any past certificates of incorporation)¹⁵, a current statement of capital (if applicable)¹⁶ and a copy of the statement of guarantee (if applicable)¹⁷;
- 164 (6) to issue share certificates¹⁸ and debentures¹⁹ within the statutory period²⁰;
- 165 (7) to register transfers of shares on request by the transferor in the same manner and subject to the same conditions as if the request were made by the transferee, and to provide the transferee with such further information about the reasons for any refusal as the transferee may reasonably request²¹;
- 166 (8) to make the required returns of allotments²² and annual returns²³;
- 167 (9) to keep proper accounting records²⁴ and (if a public company) to lay before the members in general meeting copies of the company's annual accounts and reports²⁵;
- 168 (10) (if a public company) to hold the annual general meetings required by the Companies Act 2006²⁶.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

- 2 As to the time and effect of incorporation by registration under the Companies Act 2006 see PARA 120.
- 3 The list given here is not exhaustive.
- 4 As to a company's registered office see PARA 129.
- 5 See the Companies Act 2006 ss 86, 87; and PARA 129. As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to the meanings of 'document' and of references to delivering a document for these purposes see PARA 141 note 2.
- 6 See the Companies Act 2006 s 82; the Companies (Trading Disclosures) Regulations 2008, SI 2008/495; and PARAS 220-221. As to the meanings of 'business' and related expressions generally see PARA 1 note 1.
- 7 A company may have a common seal, but need not have one: see the Companies Act 2006 s 45; and PARA 283.
- 8 See the Companies Act 2006 s 45; and PARA 283.
- 9 As to the registers etc to be kept at a company's registered office subject to inspection see PARA 130.
- 10 As to membership of companies generally see PARA 321 et seq. As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.
- 11 See the Companies Act 2006 s 32(1)(a); and PARA 242. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.
- 12 See the Companies Act 2006 s 32(1)(b), (c); and PARA 242. As to resolutions and agreements of the company to which Pt 3 Ch 3 (ss 29-30) applies (resolutions and agreements affecting a company's constitution) see PARA 231. As to the notices required to be sent to the registrar where a company's constitution has been altered by enactment or by order of court or other authority see PARA 236. As to the meaning of references to a company's constitution see PARA 227.
- 13 See the Companies Act 2006 s 32(1)(d); and PARA 242. As to court orders sanctioning a compromise or arrangement see PARA 1431; and as to court orders facilitating a reconstruction or amalgamation see PARA 1434.
- 14 See the Companies Act 2006 s 32(1)(e); and PARA 242. As to the court's powers to protect members against unfair prejudice see PARA 475.
- 15 See the Companies Act 2006 s 32(1)(f); and PARA 242. As to the issue of a company's certificate of incorporation upon successful completion of registration see PARA 119; and as to certificates issued by the registrar after a company's status has been altered following re-registration see PARA 167 et seq.
- 16 See the Companies Act 2006 s 32(1)(g); and PARA 242. As to the statement of capital required by s 32(1)(g) see PARA 242 note 18. As to the initial statement of capital and initial shareholdings required in the case of a company limited by shares see PARA 113. As to the meaning of 'company limited by shares' see PARA 102.
- 17 See the Companies Act 2006 s 32(1)(h); and PARA 242. As to the statement of guarantee required of a company limited by guarantee see PARA 115. As to the meaning of 'company limited by guarantee' see PARA 102.
- 18 As to the issue of share certificates see PARA 383 et seq.
- 19 As to the meaning of 'debenture' see PARA 1299.
- 20 See the Companies Act 2006 s 769; and PARAS 383, 410.
- 21 See the Companies Act 2006 ss 771, 772; and PARAS 393,399, 414-415.
- 22 See the Companies Act 2006 s 555(2); and PARA 1108.
- 23 See the Companies Act 2006 s 855; and PARA 1421 et seq.
- 24 See the Companies Act 2006 s 386; and PARA 708.

25 See the Companies Act 2006 s 437; and PARA 865. A private company must send a copy of its annual accounts and reports for each financial year to every member: see s 423; and PARA 850.

26 See the Companies Act 2006 s 336; and PARA 630.

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D. REGISTERED OFFICE

129. A company's registered office.

A company¹ must at all times have a registered office to which all communications and notices may be addressed². The intended address of the company's registered office must be stated in the application for registration delivered to the registrar of companies³ and, upon the company's incorporation⁴, the registered office becomes as stated in, or in connection with, that application⁵. The address of the registered office fixes the domicile of the company⁶.

A company may, however, change the address of its registered office by giving notice to the registrar⁷. The change takes effect upon the notice being registered by the registrar⁸; but, until the end of the period of 14 days beginning with the date on which it is registered, a person may validly serve any document on the company at the address previously registered⁹.

For the purpose of any duty of a company¹⁰:

- 169 (1) to keep available for inspection at its registered office any register, index or other document¹¹; or
- 170 (2) to mention the address of its registered office in any document¹²,

a company that has given notice to the registrar of a change in the address of its registered office may act on the change as from such date, not more than 14 days after the notice is given, as it may determine¹³. Where a company unavoidably ceases to perform at its registered office any such duty as is mentioned in head (1) above in circumstances in which it was not practicable to give prior notice to the registrar of a change in the address of its registered office¹⁴, but:

- 171 (a) resumes performance of that duty at other premises as soon as practicable¹⁵; and
- 172 (b) gives notice accordingly to the registrar of a change in the situation of its registered office within 14 days of doing so¹⁶,

it is not to be treated as having failed to comply with that duty¹⁷.

The problems associated with transferring a company's registered office (or central administration or principal place of business) from one member state to another, whilst remaining incorporated in the first member state, are not resolved by the EC Treaty provisions governing the right of establishment¹⁸.

¹ As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 86. As to the service of documents on a company generally see PARA 671 et seq; and as to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

The provisions of the Companies Act 2006 ss 86, 87 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 5, but as modified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 In accordance with the Companies Act 2006 s 9: see PARA 111. As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. A company registered in England and Wales ought never to have a registered office in Scotland: *Re Baby Moon (UK) Ltd* (1985) 1 BCC 99, 298.

A company whose registered office is in Wales, and as to which it is stated in the register that its registered office is to be situated in England and Wales, may by special resolution require the register to be amended so that it states that the company's registered office is to be situated in Wales: Companies Act 2006 s 88(2). Similarly, a company whose registered office is in Wales, and as to which it is stated in the register that its registered office is to be situated in Wales, may by special resolution require the register to be amended so that it states that the company's registered office is to be situated in England and Wales: s 88(3). Where a company passes a resolution under s 88 it must give notice to the registrar, who must amend the register accordingly, and issue a new certificate of incorporation altered to meet the circumstances of the case: s 88(4). In the Companies Acts, a 'Welsh company' means a company as to which it is stated in the register that its registered office is to be situated in Wales: s 88(1). As to the meanings of 'England' and 'Wales' see PARA 1 note 5; and as to the meaning of 'special resolution' see PARA 614. As to the register generally see PARA 146. As to a company's certificate of incorporation issued on its formation see PARA 119. As to the possible effect on the company's name if the registered office is situated in Wales see PARA 200; and as to documents relating to Welsh companies see PARA 165.

4 As to incorporation by registration under the Companies Act 2006 see PARA 111 et seq.

5 See the Companies Act 2006 s 16(1), (4); and PARA 120. As to the requirement to disclose specified company details in specified locations see PARA 220.

6 *Gasque v IRC* [1940] 2 KB 80. See also PARA 122.

7 Companies Act 2006 s 87(1). Notification of any change of the company's registered office is subject to the disclosure requirements in s 1078: see s 1078(2); and PARA 144.

8 Companies Act 2006 s 87(2). This ensures that the situation of the registered office is always as indicated by the registrar of companies and resolves earlier confusion as to the date on which the change of situation takes effect: see eg *Re Garton (Western) Ltd* [1989] BCLC 304 (where the date of the passing of the resolution to change the registered office was suggested as the effective date).

9 Companies Act 2006 s 87(2).

10 Companies Act 2006 s 87(3).

11 Companies Act 2006 s 87(3)(a). As to the registers etc to be kept at a company's registered office see PARA 130.

12 Companies Act 2006 s 87(3)(b).

13 Companies Act 2006 s 87(3).

14 See the Companies Act 2006 s 87(4).

15 Companies Act 2006 s 87(4)(a).

16 Companies Act 2006 s 87(4)(b).

17 Companies Act 2006 s 87(4).

18 See PARAS 19, 20, 23.

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130. Registers etc to be kept at registered office.

A company¹ has a duty to keep the following at its registered office² or at another specified place (except where registers are kept otherwise than in a legible form³):

- 173 (1) the register of members⁴ and the register of debenture⁵ holders⁶;
- 174 (2) the index of members' names⁷ (unless the register of members is in such a form as to constitute in itself an index) and the overseas branch register⁸ (or a duplicate of it), which must be kept at the place where the register of members is kept available for inspection⁹;
- 175 (3) the register of directors¹⁰ and the register of secretaries¹¹, the register of charges¹² of a limited company¹³ and a copy of every instrument creating a charge requiring registration¹⁴ must be kept at the registered office, but in the case of a series of uniform debentures a copy of one debenture of the series is sufficient¹⁵;
- 176 (4) a record of all directors' service contracts (or, if the contract is not in writing, a written memorandum setting out its terms)¹⁶ and a copy of any qualifying indemnity provision made for a director (or, if the provision is not in writing, a written memorandum setting out its terms)¹⁷;
- 177 (5) the register of directors' interests in shares in the company or associated companies¹⁸;
- 178 (6) records comprising copies of all resolutions of members passed otherwise than at general meetings, minutes of all proceedings of general meetings, and details provided to the company regarding the decisions of a sole member¹⁹.

The duty of a company to keep its registers at the registered office ceases when the company is in liquidation and possession of the registers has been taken by the liquidator²⁰.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to a company's registered office see PARA 129.

3 See PARA 1324.

4 See the Companies Act 2006 s 114; and PARA 347. As to the register of members see PARA 335 et seq.

5 As to the meaning of 'debenture' see PARA 1299.

6 See the Companies Act 2006 s 743; and PARA 1321.

7 As to the index of members' names see PARA 339.

8 As to how the overseas branch register is kept see PARA 359.

9 See the Companies Act 2006 ss 115(1), (4), 132(1); and PARAS 339, 359.

10 See the Companies Act 2006 s 162; and PARA 499. As to the meaning of 'director' see PARA 478.

11 See the Companies Act 2006 s 275; and PARA 605. As to the company secretary see PARA 601 et seq.

12 As to the registration of charges see PARA 1277 et seq.

13 See the Companies Act 2006 ss 876, 877; and PARAS 1296-1297.

- 14 See the Companies Act 2006 ss 875(1), 877; and PARA 1295, 1297.
- 15 See the Companies Act 2006 ss 875(2), 877; and PARA 1295, 1297.
- 16 See the Companies Act 2006 s 228; and PARA 525.
- 17 See the Companies Act 2006 s 237; and PARA 598.
- 18 See the Companies Act 2006 s 809; and PARA 453.
- 19 See the Companies Act 2006 ss 355, 358; and PARAS 668-669.
- 20 *Re Kent Coalfields Syndicate* [1898] 1 QB 754, CA; and see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 569.

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(iii) The Registrar of Companies

A. THE REGISTRAR

131. Appointment and functions of registrar of companies.

For the purposes of the registration of companies under the Companies Acts¹, there is a registrar of companies for England and Wales², who is appointed by the Secretary of State³.

The registrar must perform the functions conferred on the registrar by or under the Companies Acts or any other enactment⁴, and must perform such functions on behalf of the Secretary of State, in relation to the registration of companies or other matters, as the Secretary of State may from time to time direct⁵.

The registrar must have an official seal for the authentication of documents in connection with the performance of the registrar's functions⁶.

In so far as the registrar of companies does not already have power to do so, he may authorise an officer of his to exercise any function of his which is conferred by or under any enactment⁷. Anything done or omitted to be done by an officer so authorised in, or in connection with, the exercise or purported exercise of the function is to be treated for all purposes as done or omitted to be done by the registrar of companies in his capacity as such⁸, although this provision does not apply for the purposes of any criminal proceedings brought in respect of anything so done or omitted to be so done⁹.

Where, by virtue of an order made under the Deregulation and Contracting Out Act 1994¹⁰, a person is authorised by the registrar of companies to accept delivery of any class of documents that are under any enactment to be delivered to the registrar¹¹, then:

- 179 (1) the registrar may direct that documents of that class are to be delivered to a specified address of the authorised person¹²; and
- 180 (2) any such direction must be printed and made available to the public (with or without payment)¹³.

Any document of that class which is delivered to an address other than the specified address is treated for these purposes as not having been delivered¹⁴.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

The scheme of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARA 135 et seq) is as follows (s 1059A(1) (s 1059A added by SI 2009/1802)):

- 59 (1) the following provisions apply generally (to the registrar, to any functions of the registrar, or to documents delivered to or issued by the registrar under any enactment, as the case may be): the Companies Act 2006 s 1060(1), (2) (see the text and notes 2, 3), ss 1061-1063 (see the text and notes 4-6; and PARA 135), ss 1068-1071 (see PARA 141), ss 1072-1076 (see PARAS 142-143), s 1080(1), (4), (5) (see PARA 146), s 1083 (see PARA 146), s 1092 (see PARA 149), ss 1108-1110 (see PARA 164), s 1111 (see PARA 141) and s 1114 (interpretation), s 1115 (see PARA 136), s 1116 (see PARA 138), s 1117 (see PARA 136), s 1118 (see PARA 135), s 1119 (see PARAS 131, 133) (s 1059A(2) (as so added));
- 60 (2) the following provisions apply in relation to companies (to companies or for the purposes of the Companies Acts, as the case may be): the Companies Act 2006 s 1060(3), (4) (see note 2), ss 1064, 1065 (see PARA 138), s 1066 (see PARA 139), ss 1077-1078 (see PARA 144), s 1079 (see PARA 145), s 1080(2), (3) (see PARA 146), s 1081 (see PARA 147), s 1082 (see PARA 148) and s 1084 (see PARA 146), ss 1085, 1086 (see PARA 149), s 1087 (see PARA 150), s 1088 (see PARA 151), ss 1089-1091 (see PARA 149), ss 1093, 1094 (see PARA 158), s 1095 (see PARA 159), ss 1096, 1097 (see PARA 161), s 1098 (see PARA 162), s 1106 (see PARA 164), s 1112 (see PARA 137) and s 1113 (see PARA 166) (s 1059A(3) (as so added));
- 61 (3) the following provisions apply as indicated in the provisions concerned: s 1067 (see PARA 140), ss 1099-1101 (see PARA 163), ss 1102, 1103 (see PARA 164), s 1104 (see PARA 165), s 1105 (see PARA 164) and s 1107 (see PARA 164) (s 1059A(4) (as so added)); and
- 62 (4) unless the context otherwise requires, the provisions of Pt 35 apply to an overseas company as they apply to a company as defined in s 1 (see PARA 24) (s 1059A(5) (as so added)).

As to the meaning of 'overseas company' see PARA 1824. As to incorporation by registration under the Companies Act 2006 see PARA 111 et seq. As to the application of provisions of the Companies Act 2006 to unregistered companies see the Unregistered Companies Regulations 2009, SI 2009/2436; and PARA 1666. See also notes 2, 11. As to the meaning of 'unregistered company' see PARA 1665.

2 Companies Act 2006 s 1060(1)(a). As to Scotland and Northern Ireland see s 1060(1)(b), (c). In the Companies Acts, the 'registrar of companies' and the 'registrar' mean the registrar of companies for England and Wales, Scotland or Northern Ireland, as the case may require (s 1060(3)); and references in the Companies Acts to registration in a particular part of the United Kingdom are to registration by the registrar for that part of the United Kingdom (s 1060(4)). As to the meanings of 'England', 'Wales' and 'United Kingdom' see PARA 1 note 5. The local situation of the registered office (ie whether the company's registered office is to be situated in England and Wales (or in Wales), in Scotland or in Northern Ireland) must be stated in the company's application for registration: see PARA 111.

The provisions of the Companies Act 2006 ss 1060(1),(2), 1061, 1062 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 17: see PARA 1666.

3 Companies Act 2006 s 1060(2). As to the Secretary of State see PARA 6 et seq.

4 Companies Act 2006 s 1061(1)(a) (substituted by SI 2009/1802). As to the meaning of 'enactment' see PARA 17 note 2. References in the Companies Act 2006 to the functions of the registrar are to functions within s 1061(1)(a) or s 1061(1)(b): s 1061(3).

5 Companies Act 2006 s 1061(1)(b). See note 4.

6 Companies Act 2006 s 1062. As to the meaning of 'document' for these purposes see PARA 141 note 2. A document that is required to be authenticated by the registrar's seal must, if sent by electronic means, be authenticated in such manner as may be specified by registrar's rules: see PARA 138. As to the authentication of documents by the registrar generally see PARA 149.

7 Deregulation and Contracting Out Act 1994 s 74(1), (4)(a) (s 74(4)(a) amended by SI 2009/1941). As to the delegation of the registrar's functions see also PARA 133.

8 Deregulation and Contracting Out Act 1994 s 74(2), (4)(a) (s 74(4)(a) as amended: see note 7).

9 Deregulation and Contracting Out Act 1994 s 74(3), (4)(a) (s 74(4)(a) as amended: see note 7).

10 le under the Deregulation and Contracting Out Act 1994 s 69 (see PARA 133): see the Companies Act 2006 s 1119(1).

11 Companies Act 2006 s 1119(1). As to the meaning of references to delivering a document for these purposes see PARA 141 note 2.

The provisions of the Companies Act 2006 s 1119 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 17: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

12 Companies Act 2006 s 1119(1).

13 Companies Act 2006 s 1119(1).

14 Companies Act 2006 s 1119(2).

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132. Provision for liaison between the registrar and the Regulator of Community Interest Companies.

Regulations¹ may require the registrar of companies² to notify the Regulator of Community Interest Companies³ of matters specified in the regulations⁴, and to provide the Regulator with copies of documents specified in the regulations⁵.

1 As to the making of regulations under the Companies (Audit, Investigations and Community Enterprise) Act 2004 generally see s 62 (amended by SI 2009/1941). See also note 5.

2 As to the registrar of companies see PARAS 131, 133 et seq.

3 As to the Regulator see PARA 83.

4 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 59(1)(a).

5 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 59(1)(b). In exercise of the powers conferred by s 59(1), the Secretary of State has made the Community Interest Company Regulations 2005, SI 2005/1788, regs 34, 35 (reg 34 amended by SI 2007/1093; SI 2009/1942; the Community Interest Company Regulations 2005, SI 2005/1788, reg 35 amended by SI 2007/1093). By virtue of the Community Interest Company Regulations 2005, SI 2005/1788, reg 35 (as so amended), the registrar of companies must, on receiving any notice under the Insolvency Act 1986 s 109(1) (notice by liquidator of his appointment: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 957) in relation to a community interest company, provide a copy of that notice to the Regulator: Community Interest Company Regulations 2005, SI 2005/1788, reg 35(1) (as so amended). The registrar of companies must also, on receiving any copy of a winding-up order forwarded under the Insolvency Act 1986 s 130(1) (consequences of a winding-up order: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 486) in relation to a community interest company, provide the Regulator with a copy of that winding-up order: Community Interest Company Regulations 2005, SI 2005/1788, reg 35(2) (as so amended). As to reg 34 (notice published of documents received) see also PARA 144.

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133. Functions of the registrar of companies subject to contracting out.

Any function of the registrar of companies¹ which is conferred by or under any enactment and which, by virtue of any enactment or rule of law, may be exercised by an officer of his and which is not otherwise excluded² may be exercised, if the Secretary of State by order so provides³, by, or by employees of, such person (if any) as may be authorised in that behalf by the registrar⁴.

Such an order may provide that any function to which it applies may be exercised, and an authorisation given by virtue of such an order may, subject to the provisions of the order, authorise the exercise of such a function⁵:

- 181 (1) either wholly or to such extent as may be specified in the order or authorisation⁶;
- 182 (2) either generally or in such cases or areas as may be so specified⁷; and
- 183 (3) either unconditionally or subject to the fulfilment of such conditions as may be so specified⁸.

An authorisation given by virtue of such an order:

- 184 (a) must be for such period, not exceeding ten years, as is specified in the authorisation⁹;
- 185 (b) may be revoked at any time by the registrar¹⁰; and
- 186 (c) must not prevent the registrar or any other person from exercising the function to which the authorisation relates¹¹.

Where by virtue of such an order a person is authorised to exercise any function of the registrar¹², anything done or omitted to be done by or in relation to the authorised person (or an employee of his) in, or in connection with, the exercise or purported exercise of the function is to be treated for all purposes as done or omitted to be done¹³ by or in relation to the registrar in his capacity as such¹⁴. However, this provision does not apply¹⁵:

- 187 (i) for the purposes of so much of any contract made between an authorised person and the registrar as relates to the exercise of the function¹⁶; or
- 188 (ii) for the purposes of any criminal proceedings brought in respect of anything done or omitted to be done by the authorised person (or any employee of his)¹⁷.

Where by virtue of such an order a person is authorised to exercise any function of the registrar¹⁸ and the order or authorisation is revoked at a time when a relevant contract¹⁹ is subsisting²⁰, the authorised person is entitled to treat the relevant contract as repudiated by the registrar (and not as frustrated by reason of the revocation)²¹.

1 As to the registrar of companies, and his functions generally, see PARA 131.

2 Deregulation and Contracting Out Act 1994 ss 69(1), 79(1). This provision currently applies only to the registrar of companies for England and Wales and to the registrar of companies for Scotland: see s 79(1) (para (c) of definition of 'office-holder').

The text refers to any function which is not otherwise excluded from s 69 by s 71: see s 69(1). A function is excluded by s 69 if:

- 63 (1) its exercise would constitute the exercise of jurisdiction of any court or of any tribunal which exercises the judicial power of the state (s 71(1)(a)); or
- 64 (2) its exercise, or a failure to exercise it, would necessarily interfere with or otherwise affect the liberty of any individual (s 71(1)(b)); or
- 65 (3) it is a power or right of entry, search or seizure into or of any property (s 71(1)(c)); or
- 66 (4) it is a power or duty to make subordinate legislation (s 71(1)(d)).

The provisions of s 71(1)(b), (c) (see heads (2), (3) above) do not exclude any function of the official receiver attached to any court (s 71(2)); and registrar's rules made under the Companies Act 2006 (see s 1117; and PARA 136) are not subordinate legislation for the purposes of the Deregulation and Contracting Out Act 1994 s 71 (see head (4) above) (Companies Act 2006 s 1119(3)). See also PARA 131 note 11. As to the official receiver see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 503 et seq. As to the power to contract out functions of the official receiver see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 505-506.

3 The Secretary of State may not make such an order in relation to the registrar of companies without first consulting the registrar: Deregulation and Contracting Out Act 1994 ss 69(3), 79(1). As to the Secretary of State see PARA 6 et seq. As to the order that has been made see the Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, art 3, Sch 1; and PARA 134.

- 4 Deregulation and Contracting Out Act 1994 s 69(2).
- 5 Deregulation and Contracting Out Act 1994 s 69(4).
- 6 Deregulation and Contracting Out Act 1994 s 69(4)(a).
- 7 Deregulation and Contracting Out Act 1994 s 69(4)(b).
- 8 Deregulation and Contracting Out Act 1994 s 69(4)(c).
- 9 Deregulation and Contracting Out Act 1994 s 69(5)(a).
- 10 Deregulation and Contracting Out Act 1994 ss 69(5)(b), 79(1).
- 11 Deregulation and Contracting Out Act 1994 ss 69(5)(c), 79(1).
- 12 Deregulation and Contracting Out Act 1994 ss 72(1), 79(1).
- 13 Deregulation and Contracting Out Act 1994 s 72(2).
- 14 Deregulation and Contracting Out Act 1994 ss 72(2)(a), 79(1).
- 15 Deregulation and Contracting Out Act 1994 s 72(3).
- 16 Deregulation and Contracting Out Act 1994 ss 72(3)(a), 79(1).
- 17 Deregulation and Contracting Out Act 1994 s 72(3)(b).
- 18 Deregulation and Contracting Out Act 1994 ss 73(1)(a), 79(1).

19 For these purposes, 'relevant contract' means so much of any contract made between the authorised person and the registrar of companies as relates to the exercise of the function: Deregulation and Contracting Out Act 1994 ss 73(3), 79(1).

- 20 Deregulation and Contracting Out Act 1994 ss 73(1)(b), 79(1).
- 21 Deregulation and Contracting Out Act 1994 ss 73(2), 79(1).

COMPANIES ACTS/(3) COMPANY FORMATION AND REGISTRATION/(iii) The Registrar of Companies/A. THE REGISTRAR/134. Contracted out functions of the registrar of companies.

134. Contracted out functions of the registrar of companies.

Any function of the registrar of companies for England and Wales¹ which is listed in heads (1) to (7) below may be exercised by, or by employees of, such person (if any) as may be authorised in that behalf by the registrar², namely:

- 189 (1) any function of receiving any return, account or other document required to be filed with, delivered or sent to the registrar³, or receiving notice of any matter required to be given to him, which is conferred by or under any enactment⁴;
 - 190 (2) any functions in relation to: (a) the incorporation of companies⁵ and the change of name of companies⁶; (b) the re-registration and change of status of companies⁷, the registration of an order and statement of reduction of share capital⁸, and the re-registration of public companies⁹ on reduction of capital¹⁰;
 - 191 (3) functions conferred by or under the following provisions of the Companies Act 2006:
- 13
- 22. (a) those relating to companies' registered numbers¹¹ and the registration of branches of overseas companies¹², except in so far as they relate respectively to the determination of the form of companies' registered numbers and branches' registered numbers¹³;
 - 23. (b) those relating to the delivery to the registrar of documents in legible form¹⁴, except in so far as they relate to specification of requirements for the purpose of enabling the copying of documents delivered to the registrar¹⁵;
 - 24. (c) those relating to the delivery to the registrar of documents other than in legible form¹⁶, except in so far as they relate to the approval of the non-legible form in which information may be conveyed to the registrar¹⁷;
 - 25. (d) those relating to inspection etc of records kept by the registrar¹⁸, except in so far as they relate to the determination of the means of facilitating the exercise of the right of persons to inspect records kept by the registrar, or the form in which copies of the information contained in those records may be made available¹⁹;
 - 26. (e) those relating to certificates of incorporation²⁰;
 - 27. (f) those relating to the provision and authentication by the registrar of documents in non-legible form²¹, except in so far as they relate to the approval of the means of communication to the registrar of information in non-legible form²²;
- 14
- 192 (4) functions conferred by or under the Newspaper Libel and Registration Act 1881²³ relating to the registrar's duty to enter returns on the register²⁴;
 - 193 (5) functions conferred by or under the Limited Partnerships Act 1907²⁵ relating to the inspection of documents registered²⁶;
 - 194 (6) functions conferred by or under the European Economic Interest Grouping Regulations 1989²⁷ relating to the inspection of documents²⁸;
 - 195 (7) functions conferred by or under any provision of the Companies Act 2006 listed in heads (2) and (3) above (to the extent specified in heads (2) and (3) above) where any such provision is applied²⁹ to European Economic Interest Groupings³⁰.

1 As to the registrar of companies, and his functions generally, see PARA 131. As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

2 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, art 3. As to the contracting out of functions of the registrar of companies for Scotland see art 4, Sch 2.

- 3 As to delivery to the registrar of documents see PARA 141 et seq.
- 4 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, art 3, Sch 1 para 1.
- 5 Ie by or under the Companies Act 2006 Pt 2 (ss 7-16): see PARA 102 et seq.
- 6 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 1 para 2(a); Interpretation Act 1978 s 17(2)(b). Companies change their names under the Companies Act 2006 Pt 5 Ch 5 (ss 77-81): see PARAS 217-219.
- 7 Ie by or under the Companies Act 2006 Pt 7 (ss 89-111): see PARA 167 et seq.
- 8 Ie by or under the Companies Act 2006 s 649: see PARA 1193. As to the meaning of 'share capital' see PARA 1042.
- 9 Ie by or under the Companies Act 2006 s 650 (see PARA 1194) or s 664 (see PARA 1203).
- 10 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 1 para 2(b); Interpretation Act 1978 s 17(2)(b).
- 11 Ie the Companies Act 2006 s 1066 (formerly the Companies Act 1985 s 705): see PARA 139.
- 12 Ie the Companies Act 2006 s 1067 (formerly the Companies Act 1985 s 705A): see PARA 140. As to the meaning of 'overseas company' see PARA 1824.
- 13 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 1 para 3(a); Interpretation Act 1978 s 17(2)(b).
- 14 Ie the Companies Act 1985 s 706 (repealed).
- 15 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 1 para 3(b).
- 16 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 1 para 3(c) refers to the Companies Act 1985 s 707 (repealed), but as to delivery to the registrar using electronic communications see s 707B (repealed).
- 17 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 1 para 3(c).
- 18 Ie the Companies Act 2006 s 1085: see PARA 149.
- 19 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 1 para 3(d); Interpretation Act 1978 s 17(2)(b).
- 20 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 1 para 3(e). See PARA 138.
- 21 Ie the Companies Act 2006 s 1115: see PARA 136.
- 22 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 1 para 3(f); Interpretation Act 1978 s 17(2)(b).
- 23 Ie by or under the Newspaper Libel and Registration Act 1881 s 13 (see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 231).
- 24 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 1 para 4.
- 25 Ie by or under the Limited Partnerships Act 1907 s 16 (see **PARTNERSHIP** vol 79 (2008) PARA 221).
- 26 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 1 para 5.
- 27 Ie by or under the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 14 (see PARA 1632).

28 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, art 2(1), Sch 1 para 7.

29 le by the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 18 (see PARA 1632).

30 Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 1 para 8. For these purposes, 'European Economic Interest Grouping' means a European Economic Interest Grouping being a grouping formed in pursuance of EC Council Regulation 2137/85 of 25 July 1985 (OJ L199, 31.07.1985, p 1) art 1 (see PARA 1631); European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 2(1) (definition applied by the Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, art 2(1)).

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135. Fees payable to registrar.

The Secretary of State¹ may make provision by regulations² requiring the payment to the registrar of companies³ of fees in respect of:

- 196 (1) the performance of any of the registrar's functions⁴; or
- 197 (2) the provision by the registrar of services or facilities for purposes incidental to, or otherwise connected with, the performance of any of the registrar's functions⁵.

The matters for which fees may be charged include:

- 198 (a) the performance of a duty imposed on the registrar or the Secretary of State⁶;
- 199 (b) the receipt of documents delivered to the registrar⁷; and
- 200 (c) the inspection, or provision of copies, of documents kept by the registrar⁸.

The regulations may:

- 201 (i) provide for the amount of the fees to be fixed by or determined under the regulations⁹;
- 202 (ii) provide for different fees to be payable in respect of the same matter in different circumstances¹⁰;
- 203 (iii) specify the person by whom any fee payable under the regulations is to be paid¹¹;
- 204 (iv) specify when and how fees are to be paid¹².

In respect of the performance of functions or the provision of services or facilities:

- 205 (A) for which fees are not provided for by regulations¹³; or
- 206 (B) in circumstances other than those for which fees are provided for by regulations¹⁴,

the registrar may determine from time to time what fees (if any) are chargeable¹⁵.

Fees received by the registrar are to be paid into the Consolidated Fund¹⁶.

1 As to the Secretary of State see PARA 6 et seq.

2 As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 1063 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 1063(4), 1289. The provisions of s 1063 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 17: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

In exercise of the powers conferred by the Companies Act 2006 s 1063(1)-(3), the Secretary of State has made the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101. In these Regulations, any reference to a 'company' includes, where appropriate, a reference to a company to which the Companies Act 2006 s 1040 (see PARA 33) or s 1043 (see PARA 1665) applies: Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 2A (added by SI 2009/2439). See also **PARTNERSHIP** vol 79 (2008) PARAS 235, 237, 245. Any regulations made under the Companies Act 1985 s 708 (repealed) that were in force immediately before 1 October 2009 have effect on or after that date as if made under the Companies Act 2006 s 1063: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 94. Accordingly, the following regulations have effect as if made under the Companies Act 2006 s 1063: the Open-Ended Investment Companies (Investment Companies with Variable Capital) (Fees) Regulations 1998, SI 1998/3087 (amended by SI 2000/3324).

3 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16.

Regulations made under the Companies (Audit, Investigations and Community Enterprise) Act 2004 may require the payment of such fees as are payable in connection with the Regulator's functions to be paid to the registrar of companies rather than to the Regulator: see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 57; and PARA 101. As to Community Interest Companies generally see PARA 82 et seq; and as to the Regulator and his functions see PARA 83.

4 Companies Act 2006 s 1063(1)(a). See note 2. As to the registrar's functions generally see PARA 131; and as to the application of Pt 35 (ss 1059A-1120) (see also PARAS 131, 136 et seq) see PARA 131 note 1.

5 Companies Act 2006 s 1063(1)(b). See note 2.

6 Companies Act 2006 s 1063(2)(a). See note 2.

7 Companies Act 2006 s 1063(2)(b). See note 2. As to the meanings of 'document' and of references to delivering a document for these purposes see PARA 141 note 2. Where, in relation to any matter in respect of which a fee is payable under the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1: (1) the means of delivery to the registrar of the documents required to be delivered in relation to that matter, or the form of those documents are not specified, that fee is payable only in respect of documents that are delivered in hard copy form (Sch 1 para 5); and (2) no provision is made for same day registration of the documents required to be delivered to the registrar in relation to that matter, that fee is only payable in respect of the delivery of documents other than for same day registration (Sch 1 para 6). For these purposes, documents are delivered for 'same day registration' if: (a) a request for same day registration and all documents required to be delivered to the registrar in connection with that registration are received by the registrar before 3.00 in the afternoon on the day in question (Sch 1 para 4(a)); and (b) the registration is completed on that day (Sch 1 para 4(b)). As to documents or information sent or supplied in hard copy form see PARA 678.

8 Companies Act 2006 s 1063(2)(c). See note 2.

9 Companies Act 2006 s 1063(3)(a). See note 2.

10 Companies Act 2006 s 1063(3)(b). See note 2.

11 Companies Act 2006 s 1063(3)(c). See note 2.

12 Companies Act 2006 s 1063(3)(d). See note 2.

13 Companies Act 2006 s 1063(5)(a).

14 Companies Act 2006 s 1063(5)(b).

15 Companies Act 2006 s 1063(5).

16 Companies Act 2006 s 1063(6). All fees payable to the registrar of companies in his capacity as registrar of companies (except fees in respect of proceedings in the winding-up of companies the method of collection of which is directed by the Companies (Board of Trade) Fees Order 1929, SR & O 1929/831 (revoked), or any Order amending or replacing the same), all fees payable to the registrar of companies under the Limited Partnerships Act 1907 (see **PARTNERSHIP** vol 79 (2008) PARA 221), and all fees payable to the Registrar of Companies in England under the Newspaper Libel and Registration Act 1881 (see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 231), must be collected in money: Companies Registration Office (Fees) Order 1963, SI 1963/511, arts 1-2; Companies Registration Office (Fees) (No 2) Order 1963, SI 1963/596, arts 1-2.

Nothing in the Companies Acts or any other enactment as to the payment of receipts into the Consolidated Fund is to be read as affecting the operation in relation to the registrar of the Government Trading Funds Act 1973 s 3(1) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 748): Companies Act 2006 s 1118. As to the meaning of 'enactment' see PARA 17 note 2. As to the Consolidated Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARAS 1028-1031. The provisions of the Companies Act 2006 s 1118 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 17: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

UPDATE

135 Fees payable to registrar

NOTE 2--See also the Registrar of Companies (Fees) (Limited Partnerships and Newspaper Proprietors) Regulations 2009, SI 2009/2392.

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136. Registrar's rules.

Where any provision of Part 35 of the Companies Act 2006¹ enables the registrar of companies² to make provision, or impose requirements, as to any matter, the registrar may make such provision or impose such requirements by means of rules ('registrar's rules')³. This is without prejudice to the making of such provision or the imposing of such requirements by other means⁴.

Registrar's rules may require a company (or other body) to give any necessary consents to the use of electronic means for communications by the registrar to the company (or other body) as a condition of making use of any facility to deliver material to the registrar by electronic means⁵; and a document⁶ that is required to be signed by the registrar or authenticated by the registrar's seal⁷ must, if sent by electronic means, be authenticated in such manner as may be specified by registrar's rules⁸.

The registrar must both publicise the rules in a manner appropriate to bring them to the notice of persons affected by them⁹, and make copies of the rules available to the public (in hard copy or electronic form)¹⁰.

¹ ie any provision of the Companies Act 2006 Pt 35 (ss 1059A-1120) (registrar of companies) (see PARAS 131, 135, 137 et seq): see s 1117(1). As to the application of Pt 35 see PARA 131 note 1.

² As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16.

3 Companies Act 2006 s 1117(1). The text refers to rules ('registrar's rules') made under s 1117: see s 1117(1). Because such rules are not made under statutory instrument they are not recorded in this work. Registrar's rules may make different provision for different cases, and may allow the registrar to disapply or modify any of the rules: s 1117(2). Such rules made under s 1117 are not subordinate legislation for the purposes of the Deregulation and Contracting Out Act 1994 s 71: see the Companies Act 2006 s 1119(3); and PARA 133.

The provisions of the Companies Act 2006 ss 1115, 1117 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 17: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 2006 s 1117(1).

5 Companies Act 2006 s 1115(1) (amended by SI 2009/1802). As to the meaning of references to sending documents by electronic means see PARA 679 note 3.

6 As to the meaning of 'document' for these purposes see PARA 141 note 2.

7 As to the registrar's official seal see PARA 131.

8 Companies Act 2006 s 1115(2).

9 Companies Act 2006 s 1117(3)(a).

10 Companies Act 2006 s 1117(3)(b). As to documents or information sent or supplied in hard copy form under the Companies Acts see PARA 678 note 4; and as to documents or information sent or supplied in electronic form see PARA 679 note 3.

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137. Offence of making false statements to registrar.

It is an offence for a person knowingly or recklessly:

- 207 (1) to deliver or cause to be delivered to the registrar of companies¹, for any purpose of the Companies Acts, a document²; or
- 208 (2) to make to the registrar, for any such purpose, a statement³,

that is misleading, false or deceptive in a material particular⁴. A person guilty of such an offence is liable (on conviction on indictment) to imprisonment for a term not exceeding two years or a fine (or both)⁵ or (on summary conviction) to imprisonment for a term not exceeding 12 months⁶ or to a fine not exceeding the statutory maximum (or both)⁷.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 1112(1)(a). As to the meaning of 'document', and as to the meaning of references to delivering a document, for these purposes see PARA 141 note 2. As to the application of Pt 35 (ss 1059A-1120) (see also PARAS 131, 135-136, 138 et seq) see PARA 131 note 1.

3 Companies Act 2006 s 1112(1)(b).

4 Companies Act 2006 s 1112(1).

5 Companies Act 2006 s 1112(2)(a).

6 In relation to an offence committed after the commencement of the Companies Act 2006 s 1131 (summary proceedings) (see PARA 1625), but before a day is appointed in relation to the commencement of the Criminal Justice Act 2003 s 154(1) (general limit on magistrates' courts' power to impose imprisonment), the reference in the Companies Act 2006 s 1112(2)(b) to '12 months' must be read as a reference to 'six months': see ss 1112(2)(b), 1131, 1133; and see PARA 1625.

7 Companies Act 2006 s 1112(2)(b). As to the statutory maximum see PARA 1622.

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B. PUBLIC NOTICE OF ISSUE OF CERTIFICATES OF INCORPORATION

138. Public notice of issue of certificates of incorporation.

The registrar of companies¹ must cause to be published in the Gazette², or in accordance with the provisions governing alternative means of giving public notice³, notice of the issue by the registrar of any certificate of incorporation of a company⁴. The notice must state the name⁵ and registered number⁶ of the company and the date of issue of the certificate⁷.

Notices that would otherwise need to be published by the registrar in the Gazette may instead be published by such means as may from time to time be approved by the registrar in accordance with regulations made by the Secretary of State⁸. The Secretary of State may make provision by regulations as to what alternative means may be approved⁹. The regulations may, in particular: (1) require the use of electronic means¹⁰; (2) require the same means to be used for all notices or for all notices of specified descriptions, and whether the company (or other body) to which the notice relates is registered in England and Wales, Scotland or Northern Ireland¹¹; and (3) impose conditions as to the manner in which access to the notices is to be made available¹². Before starting to publish notices by means approved in this way¹³ the registrar must publish at least one notice to that effect in the Gazette¹⁴. However, nothing¹⁵ prevents the registrar from giving public notice both in the Gazette and by any alternative means that have been so approved¹⁶.

Any person may require the registrar to provide him with a copy of any certificate of incorporation of a company, either signed by the registrar or authenticated by the registrar's seal¹⁷.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 1064(1)(a). In the Companies Acts, the 'Gazette' means, as respects companies registered in England and Wales, the London Gazette: s 1173(1). As to the meanings of 'England' and 'Wales' see PARA 1 note 5. As to the registration of companies under the Companies Act 2006 see PARA 111 et seq. As to the application of Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 139 et seq) see PARA 131 note 1.

3 Companies Act 2006 s 1064(1)(b). The text refers to the giving of public notice in accordance with the alternative means provided by s 1116 (see the text and notes 8-16): see s 1064(1)(b).

4 Companies Act 2006 s 1064(1). The provisions of s 1064 apply to a certificate of incorporation issued under s 80 (change of name) (see PARA 219), s 88 (Welsh companies) (see PARA 129), or any provision of Pt 7 (ss 89-111) (re-registration) (see PARA 167 et seq), as well as to the certificate issued on a company's formation: s

1064(3). The provisions of s 1064 apply equally to certificates of incorporation issued under the Companies Act 2006, and to certificates of incorporation issued under the Companies Act 1985 on or after 1 October 2009: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 95. 1 October 2009 is the date by which all the provisions of the Companies Act 2006 that affect the law in England and Wales had come into force: see PARA 17 note 1. As to a company's certificate of incorporation issued on its formation see PARA 119. As to the Companies Act 1985, and the provision that has been made generally for continuity in the law, see PARAS 14-17.

5 As to the company's name see PARA 200 et seq.

6 As to a company's registered number see the Companies Act 2006 ss 1066, 1067; and PARAS 139, 140.

7 Companies Act 2006 s 1064(2). A company is incorporated from the beginning of the date mentioned in the certificate of incorporation: see PARA 119.

8 Companies Act 2006 s 1116(1). As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6 et seq. Regulations under s 1116 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 1116(4), 1289. At the date at which this volume states the law, no such regulations have been made in exercise of the power conferred by s 1116.

The provisions of the Companies Act 2006 s 1116 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 17: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

9 Companies Act 2006 s 1116(2). See note 8.

10 Companies Act 2006 s 1116(3)(a). As to the meaning of references to electronic means in the Companies Acts see PARA 679 note 3.

11 Companies Act 2006 s 1116(3)(b) (amended by SI 2009/1802).

12 Companies Act 2006 s 1116(3)(c).

13 Ie approved under the Companies Act 2006 s 1116: see s 1116(5).

14 Companies Act 2006 s 1116(5).

15 Ie nothing in the Companies Act 2006 s 1116: see s 1116(6).

16 Companies Act 2006 s 1116(6). In the case mentioned in the text, the requirement of public notice is met when notice is first given by either means: see s 1116(6).

17 Companies Act 2006 s 1065. The provisions of s 1065 apply to certificates of incorporation whenever issued: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 96. As to the registrar's official seal see PARA 131; and as to the authentication of documents by the registrar generally see PARA 149.

As to fees payable in respect of the performance of the registrar's functions in relation to the provision of a copy certificate of incorporation under the Companies Act 2006 s 1065 see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 4, Sch 2. The fees prescribed in relation to Sch 2 paras 7(a), 8(a) and 10(a) are not payable in respect of any month for which the applicant pays a fee to the registrar for subscription to Companies House Direct, Extranet or XML (those terms are defined in Sch 2 para 1) under regulations providing for the payment of fees in respect of the functions of the registrar in relation to the inspection, or provision of copies, of documents kept by the registrar relating to European Economic Interest Groupings and limited partnerships: reg 4A (added by SI 2009/2439).

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C. REGISTERED NUMBERS

139. Companies' registered numbers.

The registrar of companies¹ must allocate to every company² a number, which is to be known as the company's registered number³. Companies' registered numbers must be in such form, consisting of one or more sequences of figures or letters, as the registrar may from time to time determine⁴; and, upon adopting a new form of registered number, the registrar may make such changes of existing registered numbers as appear necessary⁵.

A change of a company's registered number has effect from the date on which the company is notified by the registrar of the change⁶. However, for a period of three years beginning with the date on which such notification is sent by the registrar, any requirement to disclose the company's registered number that is imposed by regulations⁷ is satisfied by the use of either the old number or the new⁸.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2. Any function of the registrar of companies for England and Wales conferred by or under the Companies Act 2006 s 1066 (formerly the Companies Act 1985 s 705) may be exercised by, or by employees of, such person (if any) as may be authorised in that behalf by the registrar of companies for England and Wales, except in so far as it relates to the determination of the form of companies' registered numbers: see the Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, art 3, Sch 1 para 3(a); and the Interpretation Act 1978 s 17(2)(b); and PARAS 133-134. As to the application of Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 140 et seq) see PARA 131 note 1.

2 For these purposes, 'company' includes an overseas company whose particulars have been registered under the Companies Act 2006 s 1046 (see PARA 1826), other than a company that appears to the registrar not to be required to register particulars under that provision: s 1066(6). As to the meaning of 'company' under the Companies Acts generally see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'overseas company' see PARA 1824. As to the registered numbers of UK establishments of an overseas company see PARA 140.

The provisions of the Companies Act 2006 s 1066 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 18, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Companies Act 2006 s 1066(1). See note 1.

4 Companies Act 2006 s 1066(2). See note 1.

5 Companies Act 2006 s 1066(3). See note 1.

6 Companies Act 2006 s 1066(4). See note 1.

7 ie under the Companies Act 2006 s 82 (see PARA 220): see s 1066(5).

8 Companies Act 2006 s 1066(5). See note 1.

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140. Registered numbers of UK establishments of overseas company.

The registrar of companies¹ must allocate to every UK establishment of an overseas company² whose particulars are registered³ a number, which is to be known as the UK establishment's registered number⁴.

The registered numbers of UK establishments of overseas companies must be in such form, consisting of one or more sequences of figures or letters, as the registrar may determine⁵; and, upon adopting a new form of registered number, the registrar may make such changes of existing registered numbers as appear necessary⁶.

A change of the registered number of a UK establishment has effect from the date on which the company is notified by the registrar of the change⁷. However, for a period of three years beginning with the date on which such notification is sent by the registrar, any requirement to disclose the UK establishment's registered number that is imposed by regulations⁸ is satisfied by the use of either the old number or the new⁹.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16. Any function of the registrar of companies for England and Wales conferred by or under the Companies Act 2006 s 1067 (formerly the Companies Act 1985 s 705A) may be exercised by, or by employees of, such person (if any) as may be authorised in that behalf by the registrar of companies for England and Wales, except in so far as it relates to the determination of the form of companies' registered numbers: see the Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, art 3, Sch 1 para 3(a); and the Interpretation Act 1978 s 17(2)(b); and PARAS 133-134. As to the application of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 141 et seq) see PARA 131 note 1.

2 In the Companies Act 2006 Pt 35 (see also PARAS 131, 135 et seq, 141 et seq), 'establishment', in relation to an overseas company, means a branch within the meaning of the Eleventh Company Law Directive (ie EC Council Directive 89/666 (OJ L395, 30.12.89, p 36) of 21 December 1989, concerning disclosure requirements in respect of branches opened in a member state by certain types of company governed by the law of another state), or a place of business that is not such a branch; and 'UK establishment' means an establishment in the United Kingdom: Companies Act 2006 s 1067(6) (added by SI 2009/1802). As to the meaning of 'overseas company' see PARA 1824. As to the meaning of 'United Kingdom' see PARA 1 note 5. As to the Eleventh Company Law Directive see PARA 23.

3 It is registered under the Companies Act 2006 s 1046 (see PARA 1826): see s 1067(1) (as amended: see note 4).

4 Companies Act 2006 s 1067(1) (amended by SI 2009/1802). See note 1. As to the registered numbers of an overseas company see PARA 139.

5 Companies Act 2006 s 1067(2) (amended by SI 2009/1802). See note 1.

6 Companies Act 2006 s 1067(3). See note 1.

7 Companies Act 2006 s 1067(4) (amended by SI 2009/1802). See note 1.

8 It is under the Companies Act 2006 s 1051 (see PARA 1832): see s 1067(5) (as amended: see note 9).

9 Companies Act 2006 s 1067(5) (amended by SI 2009/1802). See note 1.

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D. DELIVERY OF DOCUMENTS

141. Delivery of documents to the registrar.

The registrar of companies¹ may impose requirements as to the form, authentication and manner of delivery of documents² required or authorised to be delivered to the registrar under any enactment³.

As regards the form of the document, the registrar may require the contents of the document to be in a standard form⁴, and he may impose requirements for the purpose of enabling the document to be scanned or copied⁵.

As regards authentication, the registrar may:

- 209 (1) require the document to be authenticated by a particular person or a person of a particular description⁶;
- 210 (2) specify the means of authentication⁷;
- 211 (3) require the document to contain or be accompanied by the name⁸ or registered number⁹ (or both) of the company (or other body) to which it relates¹⁰.

As regards the manner of delivery, the registrar may specify requirements as to:

- 212 (a) the physical form of the document (for example, hard copy or electronic form)¹¹;
- 213 (b) the means to be used for delivering the document (for example, by post or electronic means)¹²;
- 214 (c) the address to which the document is to be sent¹³;
- 215 (d) in the case of a document to be delivered by electronic means, the hardware and software to be used, and technical specifications (for example, matters relating to protocol, security, anti-virus protection or encryption)¹⁴.

The registrar must secure that¹⁵ all documents subject to the Directive disclosure requirements¹⁶ may be delivered to the registrar by electronic means¹⁷.

However, the requirements imposed in this way in relation to form, authentication and manner of delivery¹⁸ must not be inconsistent with requirements imposed by any enactment with respect to the form, authentication or manner of delivery of the document concerned¹⁹.

Where a document required or authorised to be delivered to the registrar under any enactment is required²⁰: (i) to be certified as an accurate translation or transliteration²¹; or (ii) to be certified as a correct copy or verified²², the registrar may impose requirements as to the person, or description of person, by whom the certificate or verification is to be given²³. The power conferred in relation to the registrar's requirements as to form, authentication and manner of delivery²⁴ is exercisable in relation to the certificate or verification as if it were a separate document²⁵. However, the requirements imposed in relation to certification or verification²⁶ must not be inconsistent with requirements imposed by any enactment with respect to the certification or verification of the document concerned²⁷.

A document is not delivered to the registrar until it is received by the registrar²⁸; and provision may be made by registrar's rules as to when a document is to be regarded as received²⁹.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16.

2 For the purposes of the Companies Act 2006 Pt 35 (ss 1059A-1120) (registrar of companies) (see PARAS 131, 135 et seq, 142 et seq), 'document' means information recorded in any form (s 1114(1)(a)); and references to delivering a document include forwarding, lodging, registering, sending, producing or submitting it or (in the case of a notice) giving it (s 1114(1)(b)). Except as otherwise provided, Pt 35 applies in relation to the supply to the registrar of information otherwise than in documentary form as it applies in relation to the delivery of a document: s 1114(2). As to the application of Pt 35 see PARA 131 note 1.

3 Companies Act 2006 s 1068(1). As to the meaning of 'enactment' see PARA 17 note 2.

The provisions of the Companies Act 2006 ss 1068-1071, 1111, 1114 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 17: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 2006 s 1068(2)(a).

5 Companies Act 2006 s 1068(2)(b).

6 Companies Act 2006 s 1068(3)(a).

7 Companies Act 2006 s 1068(3)(b).

8 As to company names generally see PARA 196 et seq.

9 As to a company's registered number see PARAS 139, 140.

10 Companies Act 2006 s 1068(3)(c) (substituted by SI 2009/1802).

11 Companies Act 2006 s 1068(4)(a). As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form see PARA 679.

The power conferred by s 1068 does not authorise the registrar to require documents to be delivered by electronic means: s 1068(6). However, the Secretary of State may make regulations requiring documents that are authorised or required to be delivered to the registrar to be delivered by electronic means: s 1069(1). Such regulations are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 1069(3), 1290. Any such requirement to deliver documents by electronic means is effective only if registrar's rules have been published with respect to the detailed requirements for such delivery: s 1069(2). As to the Secretary of State see PARA 6 et seq; and as to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. At the date at which this volume states the law, no such regulations have been made in exercise of the power conferred by s 1069. As to the meaning of 'registrar's rules' see PARA 136. As to the meaning of references to documents or information sent or supplied by electronic means see PARA 679 note 3. Registrar's rules may require a company to give any necessary consents to the use of electronic means for communications by the registrar to the company as a condition of making use of any facility to deliver material to the registrar by electronic means: see s 1115; and PARA 136.

Notwithstanding the Secretary of State's power to make regulations under s 1069, the registrar may agree with a company (or other body) that documents relating to the company (or other body) that are required or authorised to be delivered to the registrar (s 1070(1) (amended by SI 2009/1802)):

67 (1) will be delivered by electronic means, except as provided for in the agreement (Companies Act 2006 s 1070(1)(a)); and

68 (2) will conform to such requirements as may be specified in the agreement or specified by the registrar in accordance with the agreement (s 1070(1)(b)).

An agreement under s 1070 may relate to all or any description of documents to be delivered to the registrar (s 1070(2)); and documents in relation to which an agreement is in force under s 1070 must be delivered in accordance with the agreement (s 1070(3)).

12 Companies Act 2006 s 1068(4)(b).

13 Companies Act 2006 s 1068(4)(c).

14 Companies Act 2006 s 1068(4)(d).

15 Ie as from 1 January 2007: see the Companies Act 2006 s 1068(5). See note 16.

16 As to documents subject to the Directive disclosure requirements see the Companies Act 2006 s 1078; and PARA 144. The requirements are those referred to in EC Council Directive 68/151 of 9 March 1968 (OJ L65, 14.03.68, p 8) art 3 (amended by European Parliament and EC Council Directive 2003/58 of 15 July 2003 (OJ L221, 04.09.2003, p 13)) which (amongst other things) requires member states to ensure that, by 1 January 2007, the filing by companies, as well as by other persons and bodies required to make or assist in making notifications, of all documents and particulars which must be disclosed pursuant to EC Council Directive 68/151 of 9 March 1968 (OJ L65, 14.03.68, p 8) art 2 will be possible by electronic means: see PARA 144.

17 Companies Act 2006 s 1068(5).

18 Ie the requirements imposed under the Companies Act 2006 s 1068: see s 1068(7).

- 19 Companies Act 2006 s 1068(7).
- 20 Companies Act 2006 s 1111(1).
- 21 Companies Act 2006 s 1111(1)(a). As to language requirements in relation to documents that are required to be delivered to the registrar see PARAS 164-165.
- 22 Companies Act 2006 s 1111(1)(b).
- 23 Companies Act 2006 s 1111(1).
- 24 Ie under the Companies Act 2006 s 1068 (see the text and notes 1-19): see s 1111(2).
- 25 Companies Act 2006 s 1111(2).
- 26 Ie under the Companies Act 2006 s 1111: see s 1111(3).
- 27 Companies Act 2006 s 1111(3).
- 28 Companies Act 2006 s 1071(1).
- 29 Companies Act 2006 s 1071(2).

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142. Requirements for proper delivery to the registrar.

A document¹ delivered to the registrar of companies² is not properly delivered unless all the following requirements are met³, namely:

- 216 (1) the requirements of the provision under which the document is to be delivered to the registrar as regards both the contents of the document⁴, and its form, authentication and manner of delivery⁵;
- 217 (2) any applicable requirements under the provisions which govern the registrar's requirements as to form, authentication and manner of delivery⁶, the Secretary of State's⁷ power to require delivery by electronic means⁸, or agreements between the registrar and a company for delivery by electronic means⁹;
- 218 (3) any requirements of Part 35 of the Companies Act 2006¹⁰ as to the language in which the document is drawn up and delivered or as to its being accompanied on delivery by a certified translation into English¹¹;
- 219 (4) in so far as it consists of or includes names and addresses, any requirements of Part 35 of the Companies Act 2006 as to permitted characters, letters or symbols or as to its being accompanied on delivery by a certificate as to the transliteration of any element¹²;
- 220 (5) any applicable requirements under the provisions that govern the registrar's requirements as to certification or verification¹³;
- 221 (6) any requirement of regulations under the provisions that govern the use of unique identifiers¹⁴;
- 222 (7) any requirements as regards payment of a fee in respect of its receipt by the registrar¹⁵.

A document that is not properly delivered is treated for the purposes of the provision requiring or authorising it to be delivered as not having been delivered, subject to the registrar's power to accept documents not meeting requirements for proper delivery¹⁶.

1 As to the meaning of 'document' for these purposes see PARA 141 note 2.

2 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of references to delivering a document for these purposes see PARA 141 note 2. As to the application of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 143 et seq) see PARA 131 note 1.

3 Companies Act 2006 s 1072(1).

The provisions of the Companies Act 2006 s 1072 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 17: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 2006 s 1072(1)(a)(i). If unnecessary material cannot readily be separated from the rest of the document, the document is treated as not meeting the requirements for proper delivery: see s 1074(4); and PARA 143.

5 Companies Act 2006 s 1072(1)(a)(ii). As to the power of the registrar of companies to impose requirements as to the form, authentication and manner of delivery of documents that are required or authorised to be delivered to him under any enactment see PARA 141.

6 Ie under the Companies Act 2006 s 1068 (see PARA 141): see s 1072(1)(b).

7 As to the Secretary of State see PARA 6 et seq.

8 Ie under the Companies Act 2006 s 1069 (see PARA 141): see s 1072(1)(b). As to the meaning of references to sending documents by electronic means see PARA 679 note 3.

9 Companies Act 2006 s 1072(1)(b). The text refers to the provisions governing agreements between the registrar and a company for delivery by electronic means under s 1070 (see PARA 141): see s 1072(1)(b).

10 Ie the Companies Act 2006 Pt 35 (ss 1059A-1120) (registrar of companies) (see PARAS 131, 135 et seq, 143 et seq): see s 1072(1)(c).

11 Companies Act 2006 s 1072(1)(c). As to the meaning of 'certified translation' see PARA 164 note 8. As to language requirements in relation to documents that are required to be delivered to the registrar see PARAS 164-165.

12 Companies Act 2006 s 1072(1)(d). As to permitted characters etc in relation to documents that are required to be delivered to the registrar see PARA 164.

13 Companies Act 2006 s 1072(1)(e). The text refers to the provisions governing the registrar's requirements as to certification or verification under s 1111 (see PARA 141): see s 1072(1)(e).

14 Companies Act 2006 s 1072(1)(f). The text refers to the provisions governing the use of unique identifiers under s 1082 (see PARA 148): see s 1072(1)(f).

15 Companies Act 2006 s 1072(1)(g). As to provision made for fees to be payable to the registrar see PARA 135.

16 Companies Act 2006 s 1072(2). The text refers to the registrar's power to accept documents not meeting requirements for proper delivery that is contained in s 1073 (see PARA 143): see s 1072(2). In the case of a document that by virtue of s 1072(2) is treated as not having been delivered, the registrar is not required to annotate the register: see s 1081(3); and PARA 147.

Companies/D. DELIVERY OF DOCUMENTS/143. Documents not meeting requirements for proper delivery to the registrar.

143. Documents not meeting requirements for proper delivery to the registrar.

The registrar of companies¹ may accept (and register) a document² that does not comply with the requirements for proper delivery³. A document accepted by the registrar in this way⁴ is treated as received by the registrar for the purpose of the provisions that require him to give public notice of the receipt of certain documents⁵.

No objection may be taken to the legal consequences of a document's being accepted (or registered) by the registrar in this way⁶ on the ground that the requirements for proper delivery were not met⁷. The acceptance of a document by the registrar in this way⁸ does not affect⁹:

- 223 (1) the continuing obligation to comply with the requirements for proper delivery¹⁰; or
- 224 (2) any liability for failure to comply with those requirements¹¹.

Head (2) above is subject to the proviso that, for the purposes of the provisions that impose a civil penalty for a failure to file accounts and reports¹², and for the purposes of any enactment¹³ imposing a daily default fine¹⁴ for failure to deliver the document¹⁵, the period after the document is accepted does not count as a period during which there is default in complying with the requirements for proper delivery¹⁶. However, if, subsequently, the registrar issues a notice of administrative removal from the register¹⁷ in respect of the document¹⁸, and the requirements for proper delivery are not complied with before the end of the period of 14 days after the issue of that notice¹⁹, any subsequent period of default does count for the purposes of those provisions²⁰.

Where a document delivered to the registrar contains unnecessary material²¹, and if the unnecessary material cannot readily be separated from the rest of the document, the document is treated as not meeting the requirements for proper delivery²². However, if the unnecessary material can readily be separated from the rest of the document, the registrar may register the document either with the omission of the unnecessary material, or as delivered²³.

The registrar may accept a replacement for a document previously delivered²⁴ that either did not comply with the requirements for proper delivery²⁵, or contained unnecessary material²⁶. However, a replacement document must not be accepted unless the registrar is satisfied that it is delivered by either the person by whom the original document was delivered²⁷, or the company (or other body) to which the original document relates²⁸, and that it complies with the requirements for proper delivery²⁹. The power of the registrar to impose requirements as to the form and manner of delivery³⁰ includes power to impose requirements as to the identification of the original document and the delivery of the replacement in a form and manner enabling it to be associated with the original³¹.

A document delivered to the registrar³² may be corrected by the registrar if it appears to the registrar to be incomplete or internally inconsistent³³. However, this power is exercisable only on instructions³⁴, and only if the company (or other body to which the document relates) has given (and has not withdrawn) its consent to such instructions being given³⁵. A document that is corrected in this way³⁶ is treated, for the purposes of any enactment relating to its delivery, as having been delivered when the correction is made³⁷.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA

16. As to the application of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 144 et seq) see PARA 131 note 1.

2 As to the meaning of 'document' for these purposes see PARA 141 note 2.

3 Companies Act 2006 s 1073(1). See note 33. As to the requirements for the proper delivery of documents to the registrar see PARA 142. As to the meaning of references to delivering a document for these purposes see PARA 141 note 2.

The provisions of the Companies Act 2006 ss 1073-1076 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 17: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 le under the Companies Act 2006 s 1073: see s 1073(2).

5 Companies Act 2006 s 1073(2). The text refers to the provisions that govern the registrar's duty to give public notice of the receipt of certain documents under s 1077 (see PARA 144): see s 1073(2).

6 le under the Companies Act 2006 s 1073: see s 1073(3).

7 Companies Act 2006 s 1073(3).

8 le under the Companies Act 2006 s 1073: see s 1073(4).

9 Companies Act 2006 s 1073(4).

10 Companies Act 2006 s 1073(4)(a).

11 Companies Act 2006 s 1073(4)(b). Head (2) in the text is subject to s 1073(5), (6) (see the text and notes 12-20): see s 1073(4)(b).

12 Companies Act 2006 s 1073(5)(a). The text refers to the purposes of s 453 (see PARA 884): see s 1073(5)(a).

13 As to the meaning of 'enactment' see PARA 17 note 2.

14 As to the meaning of 'daily default fine' see PARA 1622.

15 Companies Act 2006 s 1073(5)(b).

16 Companies Act 2006 s 1073(5).

17 le under the Companies Act 2006 s 1094(4) (see PARA 158): see s 1073(6)(a).

18 Companies Act 2006 s 1073(6)(a).

19 Companies Act 2006 s 1073(6)(b).

20 Companies Act 2006 s 1073(6).

21 Companies Act 2006 s 1074(1). For these purposes, 'unnecessary material' means material that is not necessary in order to comply with an obligation under any enactment, and is not specifically authorised to be delivered to the registrar: s 1074(2). For this purpose, an obligation to deliver a document of a particular description, or conforming to certain requirements, is regarded as not extending to anything that is not needed for a document of that description or, as the case may be, conforming to those requirements: s 1074(3).

22 Companies Act 2006 s 1074(4). As to other requirements for proper delivery to the registrar see PARA 142.

23 Companies Act 2006 s 1074(5).

24 The Companies Act 2006 s 1076 does not apply where the original document was delivered under Pt 25 (ss 860-894) (company charges) (see PARA 1277 et seq) (but see s 873 (order by court for rectification of register of charges); and PARA 1287): s 1076(4). Section 1076 applies to documents to which s 1072 (see PARA 142), ss 1073-1074 (see the text and notes 1-23) apply: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 102 (substituted by SI 2009/1802).

25 Companies Act 2006 s 1076(1)(a).

26 Companies Act 2006 s 1076(1)(b). The text refers to unnecessary material within the meaning of s 1074 (see note 21): see s 1076(1)(b).

27 Companies Act 2006 s 1076(2)(a).

28 Companies Act 2006 s 1076(2)(b) (amended by SI 2009/1802).

29 Companies Act 2006 s 1076(2).

30 As to the power of the registrar of companies to impose requirements as to the form, authentication and manner of delivery of documents that are required or authorised to be delivered to him under any enactment see PARA 141.

31 Companies Act 2006 s 1076(3).

32 The Companies Act 2006 s 1075 applies in relation to documents delivered under Pt 25 (company charges) (see PARA 1277 et seq) by a person other than the company (or other body) as if the references to the company (or other body) were to the company (or other body) or the person by whom the document was delivered: s 1075(5) (amended by SI 2009/1802).

33 Companies Act 2006 s 1075(1). However, the power conferred by s 1075 is not exercisable if the document has been registered under s 1073 (power to accept documents not meeting requirements for proper delivery) (see the text and notes 1-20): s 1075(7).

34 Companies Act 2006 s 1075(2)(a). The following requirements must be met as regards the instructions:

69 (1) the instructions must be given in response to an inquiry by the registrar (s 1075(3)(a));

70 (2) the registrar must be satisfied that the person giving the instructions is authorised to do so either by the person by whom the document was delivered, or by the company (or other body) to which the document relates (s 1075(3)(b) (amended by SI 2009/1802));

71 (3) the instructions must meet any requirements of registrar's rules as to both the form and manner in which they are given, and authentication (Companies Act 2006 s 1075(3)(c)).

As to the meaning of 'registrar's rules' see PARA 136.

35 Companies Act 2006 s 1075(2)(b) (amended by SI 2009/1802). The consent of the company (or other body) to instructions being given under the Companies Act 2006 s 1075 (and any withdrawal of such consent) may be in hard copy or electronic form, and must be notified to the registrar: s 1075(4) (amended by SI 2009/1802). However, any document received by the registrar in connection with the giving or withdrawal of consent under the Companies Act 2006 s 1075 must not be made available by the registrar for public inspection: see s 1087(1); and PARA 150. As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form see PARA 679.

36 Ie under the Companies Act 2006 s 1075: see s 1075(6).

37 Companies Act 2006 s 1075(6). A document that has been corrected under s 1075 must have details relating to the nature and date of the correction noted by the registrar in the register: see s 1081(1); and PARA 147.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(3) COMPANY FORMATION AND REGISTRATION/(iii) The Registrar of Companies/D. DELIVERY OF DOCUMENTS/144. Public notice of receipt of documents subject to the Directive disclosure requirements.

144. Public notice of receipt of documents subject to the Directive disclosure requirements.

The registrar of companies¹ must cause to be published in the Gazette², or in accordance with the provisions governing alternative means of giving public notice³, notice of the receipt by him of any document⁴ that, on receipt, is subject to the Directive disclosure requirements⁵. The

notice must state the name⁶ and registered number⁷ of the company, the description of the document and the date of receipt⁸.

The documents subject to the 'Directive disclosure requirements' are as follows⁹:

- 225 (1) in the case of every company¹⁰:
- 15
28. (a) the following constitutional documents¹¹, being: (i) the company's memorandum and articles¹²; (ii) any amendment of the company's articles (including every resolution or agreement required to be embodied in or annexed to copies of the company's articles issued by the company)¹³; (iii) after any amendment of the company's articles, the text of the articles as amended¹⁴; (iv) any notice of a change of the company's name¹⁵;
 29. (b) in relation to its directors¹⁶: (i) the statement of proposed officers required on formation of the company¹⁷; (ii) notification of any change among the company's directors¹⁸; (iii) notification of any change in the particulars of directors required to be delivered to the registrar¹⁹;
 30. (c) in relation to its accounts, reports and returns: (i) all documents required to be delivered to the registrar under the provisions that govern the duty to file accounts and reports²⁰; and (ii) the company's annual return²¹;
 31. (d) in relation to its registered office²², notification of any change of the company's registered office²³;
 32. (e) in relation to winding up²⁴: (i) a copy of any winding-up order in respect of the company²⁵; (ii) any notice of the appointment of liquidators²⁶; (iii) any order for the dissolution of a company on a winding up²⁷; (iv) any return by a liquidator of the final meeting of a company on a winding up²⁸;
- 16
- 226 (2) in the case of a public company²⁹:
- 17
33. (a) in relation to its share capital³⁰: (i) any statement of capital and initial shareholdings³¹; (ii) any return of allotments and the statement of capital accompanying it³²; (iii) a copy of any resolution³³ disapplying pre-emption rights³⁴; (iv) a copy of any report³⁵ as to the value of a non-cash asset³⁶; (v) any statement of capital accompanying notice given³⁷ of the redenomination of shares³⁸; (vi) any statement of capital accompanying notice given³⁹ of a reduction of capital in connection with the redenomination of shares⁴⁰; (vii) any notice delivered under the provisions governing the requirement to give notice of any new name of a class of shares⁴¹ or under the provisions governing the requirement to give notice of any variation of the rights attached to shares⁴²; (viii) any statement of capital accompanying a court order delivered under the provisions that allow for a reduction of capital to be confirmed⁴³; (ix) notification⁴⁴ of the redemption of shares and the statement of capital accompanying it⁴⁵; (x) any statement of capital accompanying a return delivered under the requirement to give notice of the cancellation of shares on the purchase by a company of its own shares⁴⁶ or under the requirement to give notice of any cancellation of shares held as treasury shares⁴⁷; (xi) any statement of compliance delivered⁴⁸ confirming that the company meets the conditions for issue of a trading certificate⁴⁹;
 34. (b) in relation to mergers and divisions⁵⁰: (i) a copy of any draft of the terms of a scheme required to be delivered to the registrar in relation either to a merger⁵¹ or a division⁵²; (ii) a copy of any order⁵³ in respect of a compromise or arrangement to which Part 27 of the Companies Act 2006⁵⁴ applies⁵⁵;
- 18
- 227 (3) in the case of an overseas company⁵⁶, such particulars, returns and other documents required to be delivered under Part 34 of the Companies Act 2006⁵⁷ as may be specified by the Secretary of State by regulations⁵⁸.

Where a private company⁵⁹ re-registers as a public company⁶⁰, the last statement of capital relating to the company received by the registrar under any provision of the Companies Acts becomes subject to the Directive disclosure requirements⁶¹, and the provisions that require the registrar to give public notice of the receipt of certain documents⁶² apply as if the statement had been received by the registrar when the re-registration takes effect⁶³.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16. As to the application of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 145 et seq) see PARA 131 note 1.

2 As to the meaning of the 'Gazette' see PARA 138 note 2.

3 In accordance with the alternative means provided by the Companies Act 2006 s 1116 (see PARA 138): see s 1077(1).

4 As to the meanings of 'document' and of references to the delivery of documents for these purposes see PARA 141 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements for the proper delivery of documents to the registrar see PARA 142. A document accepted by the registrar under the Companies Act 2006 s 1073, despite not meeting the requirements for proper delivery to the registrar, is treated as received by him for the purpose of s 1077: see s 1073(2); and PARA 143.

5 Companies Act 2006 s 1077(1). However, the registrar is not required to cause notice of the receipt of a document to be published before the date of incorporation of the company to which the document relates: s 1077(3). The date of incorporation of a company is the date mentioned in the company's certificate of incorporation: see PARA 119 note 7. As to the Directive disclosure requirements see the text and notes 9-63. As to the effect of a failure to give the required public notice of the receipt of documents see PARA 145. The registrar of companies must not cause to be published in the Gazette notice pursuant to s 1077 of the receipt of documents under the Companies (Audit Investigations and Community Enterprise) Act 2004 s 37C(3) (see PARA 191) or s 54C(4) (see PARA 194) unless the registrar records those documents pursuant to s 38A(1)(b) (see PARA 191) or s 55A(1)(b) (see PARA 194) respectively: Community Interest Company Regulations 2005, SI 2005/1788, reg 34(1) (substituted by SI 2009/1942).

The provisions of the Companies Act 2006 ss 1077, 1078 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 19, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

6 As to company names generally see PARA 196 et seq.

7 As to a company's registered number see PARAS 139, 140.

8 Companies Act 2006 s 1077(2).

9 Companies Act 2006 s 1078(1). The requirements referred to are those of EC Council Directive 68/151 of 9 March 1968 (OJ L65, 14.03.68, p 8) art 3 (amended by European Parliament and EC Council Directive 2003/58 of 15 July 2003 (OJ L221, 04.09.2003, p 13)) (as extended and applied): see the Companies Act 2006 s 1078(1). As to EC Council Directive 68/151 of 9 March 1968 (OJ L65, 14.03.68, p 8) (the 'First Company Law Directive') see PARA 23; and see PARA 141 note 16.

10 Companies Act 2006 s 1078(2).

11 As to the meaning of references to a company's constitution see PARA 227.

12 Companies Act 2006 s 1078(2) ('Constitutional Documents' heading) para 1. As to the meaning of 'memorandum of association' see PARA 104. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

13 Companies Act 2006 s 1078(2) ('Constitutional Documents' heading) para 2. As to the amendment of articles of association see PARA 232 et seq. As to company resolutions generally see PARA 612 et seq.

14 Companies Act 2006 s 1078(2) ('Constitutional Documents' heading) para 3.

15 Companies Act 2006 s 1078(2) ('Constitutional Documents' heading) para 4. As to the change of a company's name see PARAS 218-219.

- 16 As to the meaning of 'director' see PARA 478.
- 17 Companies Act 2006 s 1078(2) ('Directors' heading) para 1. As to the meaning of 'officer' generally under the Companies Act 2006 see PARA 607. As to the statement of the company's proposed officers see s 12; and PARA 112.
- 18 Companies Act 2006 s 1078(2) ('Directors' heading) para 2. As to notification of a change among the directors see PARA 514.
- 19 Companies Act 2006 s 1078(2) ('Directors' heading) para 3. As to the requisite particulars of directors see PARA 112.
- 20 Companies Act 2006 s 1078(2) ('Accounts, Reports and Returns' heading) para 1. Head (1)(c)(i) in the text refers to documents required to be delivered to the registrar under s 441 (see PARA 869): see s 1078(2) ('Accounts, Reports and Returns' heading) para 1.
- 21 Companies Act 2006 s 1078(2) ('Accounts, Reports and Returns' heading) para 2. As to the duty on a company to deliver annual returns see PARA 1421 et seq.
- 22 As to the registered office of a company see PARA 129.
- 23 Companies Act 2006 s 1078(2) ('registered office' heading). As to changes in the situation of a company's registered office see PARA 129.
- 24 As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.
- 25 Companies Act 2006 s 1078(2) ('Winding Up' heading) para 1. A copy of a winding-up order is forwarded under the Insolvency Act 1986 s 130(1): see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 486.
- 26 Companies Act 2006 s 1078(2) ('Winding Up' heading) para 2. As to the appointment of a liquidator see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 950.
- 27 Companies Act 2006 s 1078(2) ('Winding Up' heading) para 3. As to the power of the court to make a winding-up order see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1263.
- 28 Companies Act 2006 s 1078(2) ('Winding Up' heading) para 4. A return by a liquidator of the final meeting is made under the Insolvency Act 1986 s 94(3): see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1021.
- 29 Companies Act 2006 s 1078(3). As to the meaning of 'public company' see PARA 102.
- 30 As to the meanings of 'share' and 'share capital' see PARA 1042.
- 31 Companies Act 2006 s 1078(3) ('Share Capital' heading) para 1. As to the statement of capital and initial shareholdings required in the case of a company limited by shares see PARA 113. As to the meaning of 'company limited by shares' see PARA 102.
- 32 Companies Act 2006 s 1078(3) ('Share Capital' heading) para 2. As to the return of allotments etc to the registrar see PARA 1108.
- 33 Ie under the Companies Act 2006 s 570 or s 571 (see PARA 1103): see s 1078(3) ('Share Capital' heading) para 3.
- 34 Companies Act 2006 s 1078(3) ('Share Capital' heading) para 3. As to the disapplication of pre-emption rights by special resolution see PARA 1101 et seq.
- 35 Ie under the Companies Act 2006 s 593 (see PARA 1120) or s 599 (see PARA 1125): see s 1078(3) ('Share Capital' heading) para 4.
- 36 Companies Act 2006 s 1078(3) ('Share Capital' heading) para 4.
- 37 Ie under the Companies Act 2006 s 625 (see PARA 1169): see s 1078(3) ('Share Capital' heading) para 5.
- 38 Companies Act 2006 s 1078(3) ('Share Capital' heading) para 5.

- 39 Ie under the Companies Act 2006 s 627 (see PARA 1171): see s 1078(3) ('Share Capital' heading) para 6.
- 40 Companies Act 2006 s 1078(3) ('Share Capital' heading) para 6.
- 41 Ie under the Companies Act 2006 s 636 (see PARA 1064): see s 1078(3) ('Share Capital' heading) para 7.
- 42 Companies Act 2006 s 1078(3) ('Share Capital' heading) para 7. The reference in the text to the provisions governing the requirement to give notice of any variation of the rights attached to shares is to s 637 (see PARA 1064): see s 1078(3) ('Share Capital' heading) para 7.
- 43 Companies Act 2006 s 1078(3) ('Share Capital' heading) para 8. Head (2)(a)(viii) in the text refers to any statement of capital accompanying an order delivered under s 649 (see PARA 1193): see s 1078(3) ('Share Capital' heading) para 8.
- 44 Ie under the Companies Act 2006 s 689 (see PARA 1233): see s 1078(3) ('Share Capital' heading) para 9.
- 45 Companies Act 2006 s 1078(3) ('Share Capital' heading) para 9.
- 46 Ie under the Companies Act 2006 s 708 (notice of cancellation of shares on purchase of own shares) (see PARA 1239): see s 1078(3) ('Share Capital' heading) para 10.
- 47 Companies Act 2006 s 1078(3) ('Share Capital' heading) para 10. The text refers to the requirement to give notice under s 730 (see PARA 1253): see s 1078(3) ('Share Capital' heading) para 10. As to the meaning of 'treasury share' see PARA 1251.
- 48 Ie under the Companies Act 2006 s 762 (see PARA 74): see s 1078(3) ('Share Capital' heading) para 11.
- 49 Companies Act 2006 s 1078(3) ('Share Capital' heading) para 11. As to the meaning of 'trading certificate' see PARA 74.
- 50 See the Companies Act 2006 Pt 27 (ss 902-941) (mergers and divisions of public companies); and PARA 1449 et seq.
- 51 Ie a copy of any draft of the terms of a scheme required to be delivered to the registrar under the Companies Act 2006 s 906 (see PARA 1453) (merger): see s 1078(3) ('Mergers and Divisions' heading) para 1.
- 52 Companies Act 2006 s 1078(3) ('Mergers and Divisions' heading) para 1. The text refers to a copy of any draft of the terms of a scheme of division required to be delivered to the registrar under s 921 (see PARA 1465): see s 1078(3) ('Mergers and Divisions' heading) para 1.
- 53 Ie a copy of any order under the Companies Act 2006 s 899 (see PARA 1433) (order sanctioning scheme of arrangement) or s 900 (see PARA 1434) (making of order to facilitate reconstruction and amalgamation) in respect of a compromise or arrangement to which Pt 27 (mergers and divisions of public companies) (see PARA 1449 et seq) applies: see s 1078(3) ('Mergers and Divisions' heading) para 2.
- 54 Ie the Companies Act 2006 Pt 27 (see PARA 1449 et seq): see s 1078(3) ('Mergers and Divisions' heading) para 2.
- 55 Companies Act 2006 s 1078(3) ('Mergers and Divisions' heading) para 2.
- 56 As to the meaning of 'overseas company' see PARA 1824.
- 57 Ie the Companies Act 2006 Pt 34 (ss 1044-1059) (see PARA 1824 et seq): see s 1078(5).
- 58 Companies Act 2006 s 1078(5). Regulations made under s 1078(5) are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1078(6), 1289. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6. In exercise of the power conferred under s 1078(5), the Secretary of State has made the Overseas Companies Regulations 2009, SI 2009/1801. Accordingly, the particulars, returns and other documents specified for the purposes of the Companies Act 2006 s 1078(5) (overseas companies: documents subject to Directive disclosure requirements) are any return or document delivered under the Overseas Companies Regulations 2009, SI 2009/1801, Pt 2 (regs 3-11) (initial registration of particulars) (see PARA 1826); any return or document delivered under Pt 3 (regs 12-17) (alterations in registered particulars) (see PARA 1826); any document delivered under Pt 5 (regs 30-42) (delivery of accounting documents: general) (see PARA 1830); any document delivered under Pt 6 (regs 43-57) (delivery of accounting documents: credit or financial institutions) (see PARA 1831); any return delivered under reg 69 (return in case of winding up) or reg 70 (returns to be made by liquidator) (see PARA 1834); and any notice under reg 77 (duty to give notice of closure of UK establishment) (see PARA 1829): see reg 76.

- 59 As to the meaning of 'private company' see PARA 102.
- 60 le under the Companies Act 2006 s 96 (see PARA 172): see s 1078(4).
- 61 Companies Act 2006 s 1078(4)(a).
- 62 le the Companies Act 2006 s 1077 (see the text and notes 1-8): see s 1078(4)(b).
- 63 Companies Act 2006 s 1078(4)(b).

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145. Effect of failure to give notification.

The purpose of the statutory provisions which require the registrar of companies¹ to give public notice of the receipt of certain documents² is not to ensure constructive notice of the relevant events to persons dealing with the company³, but rather to ensure that such persons have an opportunity, if they wish to avail themselves of it, to find out information about these events⁴. Further, a company is not entitled to rely against other persons on the happening of any of the following events⁵, namely:

- 228 (1) an amendment of the company's articles of association⁶; or
- 229 (2) a change among the company's directors⁷; or
- 230 (3) (as regards service of any document on the company⁸) a change of the company's registered office⁹,
- 231 (4) the making of a winding-up order in respect of the company¹⁰; or
- 232 (5) the appointment of a liquidator in a voluntary winding up of the company¹¹,

unless the event has been officially notified¹² at the material time¹³, or unless the company shows that the person concerned knew of the event at the material time¹⁴. If the material time falls on or before the fifteenth day after the date of official notification¹⁵ (or, where the fifteenth day was not a working day¹⁶, on or before the next day that was)¹⁷ the company is not entitled to rely on the happening of the event as against a person who shows that he was unavoidably prevented from knowing of the event at that time¹⁸.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16. As to the application of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 146 et seq) see PARA 131 note 1.

2 le the Companies Act 2006 s 1077: see PARA 144. As to the meanings of 'document' and of references to delivering a document for these purposes see PARA 141 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements for the proper delivery of documents to the registrar see PARA 142.

3 As to notice of the constitution of a company see PARA 266.

4 *Official Custodian of Charities v Parway Estates Developments Ltd* [1985] Ch 151, [1984] 3 All ER 679, CA.

5 Companies Act 2006 s 1079(1).

The provisions of the Companies Act 2006 s 1079 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 19, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

6 Companies Act 2006 s 1079(2)(a). As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq; and as to the amendment of articles of association see PARA 232 et seq.

7 Companies Act 2006 s 1079(2)(b). As to the meaning of 'director' see PARA 478. As to notification of a change among the directors see PARA 514.

8 As to the service of documents on a company generally see PARA 671 et seq; and as to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 677 et seq.

9 Companies Act 2006 s 1079(2)(c). As to changes in the situation of a company's registered office see PARA 129.

10 Companies Act 2006 s 1079(2)(d). See *Re Peek, Winch and Tod Ltd* (1979) 130 NLJ 116, CA. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq. As to the power of the court to make a winding-up order see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1263.

11 Companies Act 2006 s 1079(2)(e). See *Re Peek, Winch and Tod Ltd* (1979) 130 NLJ 116, CA. As to the appointment of a liquidator where a company goes into voluntary liquidation see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 950.

12 For these purposes, 'official notification' means:

72 (1) in relation to an amendment of the company's articles, notification in accordance with the Companies Act 2006 s 1077 (public notice of receipt by registrar of certain documents) (see PARA 144) of the amendment and the amended text of the articles (s 1079(4)(a));

73 (2) in relation to anything else stated in a document subject to the Directive disclosure requirements (see PARA 144), notification of that document in accordance with s 1077 (s 1079(4)(b));

74 (3) in relation to the appointment of a liquidator in a voluntary winding up, notification of that event in accordance with the Insolvency Act 1986 s 109 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 957) (Companies Act 2006 s 1079(4)(c)).

13 Companies Act 2006 s 1079(1)(a).

14 Companies Act 2006 s 1079(1)(b).

15 Companies Act 2006 s 1079(3)(a).

16 In the Companies Acts, 'working day', in relation to a company, means a day that is not a Saturday or Sunday, Christmas Day, Good Friday and any day that is a bank holiday under the Banking and Financial Dealings Act 1971 (see **TIME** vol 97 (2010) PARA 321) in the part of United Kingdom where the company is registered: Companies Act 2006 s 1173(1). As to the meaning of 'United Kingdom' see PARA 1 note 5. As to company registration under the Companies Act 2006 see PARA 111 et seq.

17 Companies Act 2006 s 1079(3)(b).

18 Companies Act 2006 s 1079(3).

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E. THE REGISTER

(A) RECORDS KEPT BY THE REGISTRAR

146. Keeping of company records (the 'register') by the registrar.

The registrar of companies¹ must keep records of:

- 233 (1) the information contained in documents² delivered to the registrar³ under any enactment⁴; and
- 234 (2) certificates issued by the registrar under any enactment⁵.

The records relating to companies are referred to collectively in the Companies Acts as the 'register'⁶, and the records kept by the registrar must be such that information relating to a company or other registered body is associated with that body, in such manner as the registrar may determine, so as to enable all the information relating to the body to be retrieved⁷.

Information deriving from documents subject to the Directive disclosure requirements⁸ that are delivered to the registrar⁹ must be kept by the registrar in electronic form¹⁰. Subject to that, information contained in documents delivered to the registrar may be recorded and kept by him in any form he thinks fit, provided that it is possible to inspect the information and to produce a copy of it¹¹. This is sufficient compliance with any duty of his to keep, file or register the document or to record the information contained in it¹².

The originals of documents delivered to the registrar in hard copy form¹³ must be kept for three years after they are received by the registrar, after which they may be destroyed provided the information contained in them has been recorded¹⁴. However, this is subject to the proviso that material which is not made available by the registrar for public inspection¹⁵ need not be retained by him for longer than appears to him reasonably necessary for the purposes for which the material was delivered to the registrar¹⁶.

Where a company is dissolved¹⁷, or where an overseas company¹⁸ ceases to have any connection with the United Kingdom¹⁹ by virtue of which it is required to register particulars²⁰, or where a credit²¹ or financial institution²² ceases to be required²³ to file accounts with the registrar²⁴, and, at any time after two years from the date on which it appears to the registrar that such an event has occurred²⁵, the registrar may direct that any records relating to the company or institution may be removed to the Public Record Office²⁶; and records in respect of which such a direction is given must be disposed of under the enactments relating to the Public Record Office and the rules made under them²⁷.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16. As to the application of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 147 et seq) see PARA 131 note 1.

2 As to the meaning of 'document' for these purposes see PARA 141 note 2.

3 As to the meaning of references to delivering a document for these purposes see PARA 141 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements for the proper delivery of documents to the registrar see PARA 142.

4 Companies Act 2006 s 1080(1)(a). As to the meaning of 'enactment' see PARA 17 note 2.

The provisions of the Companies Act 2006 ss 1080(1)-(5), 1083 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 paras 17, 20: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 Companies Act 2006 s 1080(1)(b) (substituted by SI 2009/1802). As to the issuing of a company's certificate of incorporation see PARAS 119, 138; and as to certificates of registration of a charge issued by the registrar under the Companies Act 2006 s 869(5) see PARA 1290.

6 Companies Act 2006 s 1080(2). Regulations made under s 1188 or s 1189 (statements relating to company directors who are subject to foreign restrictions) (see PARA 1621) may provide that a statement sent to the registrar of companies under the regulations is to be treated as a record relating to a company for the purposes of s 1080: see s 1190(1); and PARA 1621.

7 Companies Act 2006 s 1080(5) (amended by SI 2009/1802).

8 As to the Directive disclosure requirements see the Companies Act 2006 s 1078; and PARA 144.

9 Ie on or after 1 January 2007: see the Companies Act 2006 s 1080(3). As to the significance of this date see PARA 141 note 16.

10 Companies Act 2006 s 1080(3). As to the meaning of references to documents or information sent or supplied in electronic form see PARA 679 note 3.

11 Companies Act 2006 s 1080(4).

12 Companies Act 2006 s 1080(4).

13 The registrar is under no obligation to keep the originals of documents delivered in electronic form, provided the information contained in them has been recorded: Companies Act 2006 s 1083(2) (amended by SI 2009/1802). As to documents or information sent or supplied in hard copy form see PARA 678.

14 Companies Act 2006 s 1083(1) (amended by SI 2009/1802).

The Companies Act 2006 s 1083 applies to documents held by the registrar on 1 October 2009 (ie when that section came into force: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3(r)) as well as to documents subsequently received: Companies Act 2006 s 1083(3).

15 Ie under the Companies Act 2006 s 1087 (see PARA 150): see s 1083(1).

16 Companies Act 2006 ss 1083(1), 1087(3). See PARA 150.

17 Companies Act 2006 s 1084(1)(a). In s 1084(1)(a), 'company' includes a company provisionally or completely registered under the Joint Stock Companies Act 1844 (repealed): Companies Act 2006 s 1084(4). As to the dissolution of a company see PARA 1521 et seq.

18 As to the meaning of 'overseas company' see PARA 1824.

19 As to the meaning of 'United Kingdom' see PARA 1 note 5.

20 Companies Act 2006 s 1084(1)(b). The text refers to the requirement placed on an overseas company to register particulars under s 1046 (see PARA 1826): see s 1084(1)(b).

21 In the Companies Acts, 'credit institution' means an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account: see the European Parliament and EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) art 4.1(a); definition applied by the Companies Act 2006 s 1173(1).

22 In the Companies Acts, 'financial institution' means an undertaking other than a credit institution, the principal activity of which is to acquire holdings or to carry on one or more of the following activities, namely: lending (including, *inter alia*, consumer credit, mortgage credit, factoring, with or without recourse, financing of commercial transactions (including forfeiting)); financial leasing; money transmission services; issuing and administering means of payment (eg credit cards, travellers' cheques and bankers' drafts); guarantees and commitments; trading for own account or for account of customers in money market instruments (cheques, bills, certificates of deposit, etc), foreign exchange, financial futures and options, exchange and interest-rate instruments, or transferable securities; participation in securities issues and the provision of services related to such issues; advice to undertakings on capital structure, industrial strategy and related questions and advice as well as services relating to mergers and the purchase of undertakings; money broking; portfolio management and advice; and safekeeping and administration of securities: see the European Parliament and EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) art 4(5), Annex I (list of activities subject to mutual recognition) points 2-12; definition applied by the Companies Act 2006 s 1173(1).

23 Ie ceases to be within the Companies Act 2006 s 1050 (see PARA 1831): see s 1084(1)(c).

24 Companies Act 2006 s 1084(1)(c).

25 Ie at any time after two years from the date on which it appears to the registrar that:

- 75 (1) the company has been dissolved (s 1084(2)(a));
- 76 (2) the overseas company has ceased to have any connection with the United Kingdom by virtue of which it is required to register particulars under s 1046 (see PARA 1826) (s 1084(2)(b)); or
- 77 (3) the credit or financial institution has ceased to be within s 1050 (see PARA 1831) (s 1084(2)(c)).

26 Companies Act 2006 s 1084(2). As to the Public Record Office see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 835 et seq.

27 Companies Act 2006 s 1084(3).

UPDATE

146 Keeping of company records (the 'register') by the registrar

NOTES 21, 22--Definitions of 'credit institution' and 'financial institution' in Directive 2006/48 art 4(1), (5) amended, Annex I point 15 (issuing electronic money) added: European Parliament and EC Council Directive 2009/110 (OJ L267, 10.10.2009, p 7).

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147. Annotation of the register.

The registrar of companies¹ must place a note in the register² recording:

- 235 (1) the date on which a document³ is delivered to the registrar⁴;
- 236 (2) if a document is corrected informally by the registrar⁵, the nature and date of the correction⁶;
- 237 (3) if a document is replaced (whether or not material derived from it is removed)⁷, the fact that it has been replaced and the date of delivery of the replacement⁸;
- 238 (4) if material is removed⁹, what was removed (giving a general description of its contents)¹⁰, under what power¹¹, and the date on which that was done¹².

The Secretary of State¹³ may make provision by regulations¹⁴ authorising or requiring the registrar to annotate the register in such other circumstances as may be specified in the regulations¹⁵, and as to the contents of any such annotation¹⁶.

Notes placed in the register in this way¹⁷ are part of the register for all purposes of the Companies Acts¹⁸.

A note may be removed if it no longer serves any useful purpose¹⁹. In any case, any duty or power of the registrar with respect to annotation of the register is subject to the court's power²⁰ to direct: (a) that a note be removed from the register²¹; or (b) that no note is to be made of the removal of material that is the subject of the court's order²².

1 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16. As to the application of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 148 et seq) see PARA 131 note 1.

2 As to the meaning of the 'register' see PARA 146.

3 As to the meaning of 'document' for these purposes see PARA 141 note 2.

4 Companies Act 2006 s 1081(1)(a). No annotation is required in the case of a document that by virtue of s 1072(2) (documents not meeting requirements for proper delivery) (see PARA 142) is treated as not having been delivered: s 1081(3). As to the meaning of references to delivering a document for these purposes see PARA 141 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

5 Ie under the Companies Act 2006 s 1075 (see PARA 143): see s 1081(1)(b). A document delivered to the registrar may be corrected by the registrar, subject to certain conditions, if it appears to the registrar to be incomplete or internally inconsistent: see s 1075; and PARA 143.

6 Companies Act 2006 s 1081(1)(b).

7 The registrar may accept a replacement for a document previously delivered that either did not comply with the requirements for proper delivery, or contained unnecessary material: see the Companies Act 2006 s 1076; and PARA 143. As to the meaning of 'unnecessary material' for these purposes see PARA 143 note 21.

8 Companies Act 2006 s 1081(1)(c).

9 Companies Act 2006 s 1081(1)(d). Regulations made under s 1188 or s 1189 (statements relating to company directors who are subject to foreign restrictions) (see PARA 1621) may provide that s 1081 (note of removal of material from the register) does not apply, or applies with such modifications as may be specified, in the case of material removed from the register under the regulations: see s 1190(4); and PARA 1621.

10 Companies Act 2006 s 1081(1)(d)(i).

11 Companies Act 2006 s 1081(1)(d)(ii).

12 Companies Act 2006 s 1081(1)(d)(iii).

13 As to the Secretary of State see PARA 6.

14 As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations made under s 1081 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 1081(7), 1289. In exercise of the powers conferred by 1081(2), the Secretary of State has made the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 3. Accordingly, where it appears to the registrar that material on the register is misleading or confusing, the registrar may place a note in the register containing such information as appears to the registrar to be necessary to remedy, as far as possible, the misleading or confusing nature of the material: reg 3.

15 Companies Act 2006 s 1081(2)(a). See note 14.

16 Companies Act 2006 s 1081(2)(b). See note 14.

17 Ie in accordance with the Companies Act 2006 s 1081(1) (see the text and notes 1-12), or in pursuance of regulations under s 1081(2) (see the text and notes 13-16): see s 1081(6).

18 Companies Act 2006 s 1081(6).

19 Companies Act 2006 s 1081(4).

20 Ie under the Companies Act 2006 s 1097 (powers of court on ordering removal of material from the register) (see PARA 161): see s 1081(5).

21 Companies Act 2006 s 1081(5)(a).

22 Companies Act 2006 s 1081(5)(b).

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148. Allocation of unique identifiers.

The Secretary of State¹ may make provision² for the use, in connection with the register³, of reference numbers ('unique identifiers') to identify each person who⁴:

- 239 (1) is a director of a company⁵;
- 240 (2) is secretary (or a joint secretary) of a company⁶; or
- 241 (3) in the case of an overseas company⁷ whose particulars are registered⁸, holds any such position as may be specified for these purposes by regulations made in relation to overseas companies generally⁹.

The regulations may:

- 242 (a) provide that a unique identifier may be in such form, consisting of one or more sequences of letters or numbers, as the registrar may from time to time determine¹⁰;
- 243 (b) make provision for the allocation of unique identifiers by the registrar¹¹;
- 244 (c) require there to be included, in any specified description of documents delivered to the registrar, as well as a statement of the person's name¹²: (i) a statement of the person's unique identifier¹³; or (ii) a statement that the person has not been allocated a unique identifier¹⁴;
- 245 (d) enable the registrar to take steps, where a person appears to have more than one unique identifier, to discontinue the use of all but one of them¹⁵.

1 As to the Secretary of State see PARA 6.

2 The wording of the Companies Act 2006 s 1082 that follows on from 'provision' suggests that 'provision by regulations' is meant. Regulations made under s 1082 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 1082(5), 1290. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. The regulations may make different provision for different descriptions of person and different descriptions of document (s 1082(4)); and the regulations may contain provision for the application of the scheme in relation to persons appointed, and documents registered, before the commencement of the Companies Act 2006 (s 1082(3)). As to the meaning of 'document' for these purposes see PARA 141 note 2. As to the commencement of the Companies Act 2006 see PARA 17. At the date at which this volume states the law, no such regulations have been made in exercise of the power conferred by s 1082. As to the application of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 149 et seq) see PARA 131 note 1.

3 As to the meaning of the 'register' see PARA 146.

4 Companies Act 2006 s 1082(1).

5 Companies Act 2006 s 1082(1)(a). As to the meaning of 'director' see PARA 478.

6 Companies Act 2006 s 1082(1)(b). As to the company secretary and other officers see PARA 603.

7 As to the meaning of 'overseas company' see PARA 1824.

8 ie registered under the Companies Act 2006 s 1046 (see PARA 1826): see s 1082(1)(c).

9 Companies Act 2006 s 1082(1)(c). The text refers to any such position as may be specified for the purposes of s 1082 by regulations under s 1046 (see PARA 1826): see s 1082(1)(c). However, at the date at which this volume states the law, the regulations that have been made thereunder, ie the Overseas Companies Regulations 2009, SI 2009/1801, make no such provision.

10 Companies Act 2006 s 1082(2)(a).

11 Companies Act 2006 s 1082(2)(b).

12 Companies Act 2006 s 1082(2)(c).

13 Companies Act 2006 s 1082(2)(c)(i).

14 Companies Act 2006 s 1082(2)(c)(ii).

15 Companies Act 2006 s 1082(2)(d).

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(B) INSPECTION OF RECORDS KEPT BY THE REGISTRAR

149. Inspection etc of records kept by the registrar.

Subject to the statutory provisions which govern material that is not available for public inspection¹:

- 246 (1) any person may inspect the register²; and
- 247 (2) any person may require a copy of any material on the register³.

The right of inspection under head (1) above extends to the originals of documents⁴ delivered to the registrar of companies⁵ in hard copy form if, and only if, the record kept by the registrar of the contents of the document is illegible or unavailable⁶.

The registrar may specify the form and manner in which application is to be made for inspection under head (1) above, or for provision of a copy under head (2) above⁷.

As regards the form and manner in which copies are to be provided under head (2) above⁸, copies of documents subject to the Directive disclosure requirements must⁹ be provided in hard copy or electronic form, as the applicant chooses¹⁰. This is subject to the proviso¹¹, that the registrar is not obliged¹² to provide copies in electronic form of a document that was delivered to the registrar in hard copy form, if¹³: (a) the document was delivered to the registrar on or before 31 December 1996¹⁴; or (b) the document was delivered to the registrar on or before 31 December 2006 and ten years or more elapsed between the date of delivery and the date of receipt of the first application for a copy on or after 1 January 2007¹⁵. Subject to these provisions¹⁶, the registrar may determine the form and manner in which copies are to be provided¹⁷.

Copies provided under head (2) above in hard copy form must be certified as true copies unless the applicant dispenses with such certification¹⁸; and copies so provided in electronic form must not be certified as true copies unless the applicant expressly requests such certification¹⁹. A copy provided under head (2) above, certified by the registrar (whose official position it is unnecessary to prove) to be an accurate record of the contents of the original document, is in

all legal proceedings admissible in evidence²⁰; (i) as of equal validity with the original document²¹; and (ii) as evidence of any fact stated in the original document of which direct oral evidence would be admissible²². Except in the case of documents that are subject to the Directive disclosure requirements²³, copies provided by the registrar may, instead of being certified in writing to be an accurate record, be sealed with the registrar's official seal²⁴.

No process for compelling the production of a record kept by the registrar may issue from any court except with the permission of the court²⁵; and any such process must bear on it a statement that it is issued with the permission of the court²⁶.

1 The subject to the Companies Act 2006 s 1087 (see PARA 150): see ss 1085(3), 1086(3). As to the application of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 150 et seq) see PARA 131 note 1.

The provisions of the Companies Act 2006 ss 1085, 1086, 1089-1091 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 20, but with the modifications to the Companies Act 2006 s 1091 as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

2 Companies Act 2006 s 1085(1). As to the meaning of the 'register' see PARA 146. As to the categories of material that must not be made available by the registrar of companies for public inspection see PARA 150 et seq.

3 Companies Act 2006 s 1086(1). The fee for any such copy of material derived from a document subject to the Directive disclosure requirements (see s 1078; and PARA 144), whether in hard copy or electronic form, must not exceed the administrative cost of providing it: s 1086(2). As to fees payable to the registrar see PARA 135. As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form see PARA 679.

4 The period for which such originals are to be kept is limited by the Companies Act 2006 s 1083(1) (see PARA 146): s 1085(2). As to the meaning of 'document' for these purposes see PARA 141 note 2.

5 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of references to delivering a document for these purposes see PARA 141 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements for the proper delivery of documents to the registrar see PARA 142.

Any function of the registrar of companies for England and Wales conferred by or under the Companies Act 2006 s 1085 may be exercised by, or by employees of, such person (if any) as may be authorised in that behalf by the registrar of companies for England and Wales, except in so far as it relates to the determination of the means of facilitating the exercise of the right of persons to inspect records kept by the registrar, or the form in which copies of the information contained in those records may be made available: see the Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, art 3, Sch 1 para 3(d); and the Interpretation Act 1978 s 17(2)(b); and PARA 134. As to the meanings of 'England' and 'Wales' see PARA 1 note 5. As to the contracting out of the registrar of companies' functions generally see PARAS 133-134.

6 Companies Act 2006 s 1085(2).

7 Companies Act 2006 s 1089(1). As from 1 January 2007, applications in respect of documents subject to the Directive disclosure requirements (as to which see PARA 144) may be submitted to the registrar in hard copy or electronic form, as the applicant chooses; this does not affect the registrar's power under s 1089(1) to impose requirements in respect of other matters: s 1089(2). As to the significance of the date of 1 January 2007 in this context see PARA 141 note 16.

As to fees payable in respect of the performance of the registrar's functions in relation to the inspection of the register and the provision of copies of material on the register see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 4, Sch 2. The fees prescribed in relation to Sch 2 paras 7(a), 8(a) and 10(a) are not payable in respect of any month for which the applicant pays a fee to the registrar for subscription to Companies House Direct, Extranet or XML (those terms are defined in Sch 2 para 1) under regulations providing for the payment of fees in respect of the functions of the registrar in relation to the inspection, or provision of copies, of documents kept by the registrar relating to European Economic Interest Groupings and limited partnerships: reg 4A (added by SI 2009/2439).

8 Companies Act 2006 s 1090(1).

- 9 le as from 1 January 2007: see the Companies Act 2006 s 1090(2). As to the significance of this date see PARA 141 note 16.
- 10 Companies Act 2006 s 1090(2).
- 11 Companies Act 2006 s 1090(2).
- 12 le not obliged by the Companies Act 2006 s 1090(2) (see the text and notes 9-11): see s 1090(3).
- 13 Companies Act 2006 s 1090(3).
- 14 Companies Act 2006 s 1090(3)(a).
- 15 Companies Act 2006 s 1090(3)(b).
- 16 le subject to the Companies Act 2006 s 1090(1)-(3) (see the text and notes 8-15): see s 1090(4).
- 17 Companies Act 2006 s 1090(4).
- 18 Companies Act 2006 s 1091(1).
- 19 Companies Act 2006 s 1091(2). The Secretary of State may make provision by regulations as to the manner in which such a certificate is to be provided in a case where the copy is provided in electronic form: s 1091(4). As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6. In exercise of the powers conferred by s 1091(4), the Secretary of State has made the Companies (Registrar, Languages and Trading Disclosures) Regulations 2006, SI 2006/3429. Accordingly, where a person requires a copy of material on the register under the Companies Act 2006 s 1086 (see head (2) in the text), and where that person expressly requests that the copy be certified as a true copy, and where the registrar provides the copy in electronic form, then the registrar's certificate that the copy is an accurate record of the contents of the original document must be authenticated by means of an electronic signature that is uniquely linked to the registrar, that indicates that the registrar has caused it to be applied, that is created using means that the registrar can maintain under his sole control, and that is linked both to the certificate and to the copy provided under s 1086, in such a manner that any subsequent change of the data comprised in either is detectable: Companies (Registrar, Languages and Trading Disclosures) Regulations 2006, SI 2006/3429, reg 2(1), (2). For these purposes, an 'electronic signature' means data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication: reg 2(3).
- 20 Companies Act 2006 s 1091(3).
- 21 Companies Act 2006 s 1091(3)(a).
- 22 Companies Act 2006 s 1091(3)(b).
- 23 As to the Directive disclosure requirements see the Companies Act 2006 s 1078; and PARA 144.
- 24 Companies Act 2006 s 1091(5). As to the registrar's official seal see PARA 131. A document that is required to be signed by the registrar or authenticated by the registrar's seal must, if sent by electronic means, be authenticated in such manner as may be specified by registrar's rules: see s 1115(2); and PARA 136.
- 25 Companies Act 2006 s 1092(1).
- The provisions of the Companies Act 2006 s 1092 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 17: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.
- 26 Companies Act 2006 s 1092(2).

UPDATE

149 Inspection etc of records kept by the registrar

NOTE 19--See also the Registrar of Companies (Fees) (Limited Partnerships and Newspaper Proprietors) Regulations 2009, SI 2009/2392.

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150. Material not to be made available by the registrar for public inspection.

The following material must not be made available by the registrar of companies¹ for public inspection²:

- 248 (1) the contents of any document³ sent to the registrar⁴ containing views expressed⁵ by a specified government department or other body in relation to company names that either suggest some connection with a government or public authority or contain other sensitive words or expressions⁶;
- 249 (2) protected information⁷ regarding directors' residential addresses or any corresponding provision of the regulations⁸ that govern overseas companies⁹;
- 250 (3) representations received by the registrar in response to a notice¹⁰ of a proposal to put a director's usual residential address on the public record¹¹, or any corresponding provision of regulations¹² made in relation to overseas companies¹³;
- 251 (4) any application to the registrar¹⁴ for administrative restoration to the register that has not yet been determined or was not successful¹⁵;
- 252 (5) any document received by the registrar in connection with the giving or withdrawal of consent by a company¹⁶ with regard to the registrar's power to make informal corrections to documents received¹⁷;
- 253 (6) any application or other document delivered to the registrar¹⁸ under the provisions that allow addresses to be made unavailable for public inspection, and any address in respect of which such an application is successful¹⁹;
- 254 (7) any application or other document delivered to the registrar²⁰ in relation to any rectification of the register²¹;
- 255 (8) any court order²² made in relation to any rectification of the register that the court has directed²³ is not to be made available for public inspection²⁴;
- 256 (9) the contents of any instrument creating or evidencing a charge²⁵, or any certified or verified copy of an instrument creating or evidencing a charge²⁶, delivered to the registrar under the provisions²⁷ which govern the registration of company charges²⁸;
- 257 (10) any e-mail address, identification code or password deriving from a document delivered for the purpose of authorising or facilitating electronic filing procedures or providing information by telephone²⁹;
- 258 (11) the contents of any documents held by the registrar pending a decision of the Regulator of Community Interest Companies³⁰ on a company's eligibility for registration as, conversion to, or conversion from, a community interest company³¹, and that the registrar is not later required to record³²;
- 259 (12) any other material excluded from public inspection by or under any other enactment³³.

A restriction applying by reference to material deriving from a particular description of document does not affect the availability for public inspection of the same information contained in material derived from another description of document in relation to which no such restriction applies³⁴.

Any such material that is not to be made available by the registrar of companies for public inspection³⁵ need not be retained by the registrar for longer than appears to him reasonably necessary for the purposes for which the material was delivered to the registrar³⁶.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16. As to the application of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 151 et seq) see PARA 131 note 1.

2 Companies Act 2006 s 1087(1). As to the inspection and copying of records kept by the registrar generally see PARA 149.

The provisions of the Companies Act 2006 s 1087 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 20, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 As to the meaning of 'document' for these purposes see PARA 141 note 2.

4 As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to the meaning of references to delivering a document for these purposes see PARA 141 note 2.

5 Ie pursuant to the Companies Act 2006 s 56 (see PARA 196): see s 1087(1)(a).

6 Companies Act 2006 s 1087(1)(a).

7 Ie within the Companies Act 2006 s 242(1) (see PARA 502): see s 1087(1)(b).

8 Ie made under the Companies Act 2006 s 1046 (see PARA 1826): see s 1087(1)(b). See further the Overseas Companies Regulations 2009, SI 2009/1801, Pt 4 (regs 18-29, Schs 1-3); and PARA 1826.

9 Companies Act 2006 s 1087(1)(b). As to the meaning of 'overseas company' see PARA 1824. The Secretary of State may make provision by regulations requiring the registrar, on application, to make any other address on the register unavailable for public inspection: see PARA 151. As to the Secretary of State see PARA 6.

10 Ie under the Companies Act 2006 s 245(2)(a) (see PARA 513): see s 1087(1)(ba)(i) (s 1087(1)(ba) added by SI 2009/1802).

11 Companies Act 2006 s 1087(1)(ba)(i) (as added: see note 10).

12 Ie made under the Companies Act 2006 s 1046 (see PARA 1826): see s 1087(1)(ba)(ii) (as added: see note 10).

13 Companies Act 2006 s 1087(1)(ba)(ii) (as added: see note 10).

14 Ie under the Companies Act 2006 s 1024 (see PARA 1532): see s 1087(1)(c).

15 Companies Act 2006 s 1087(1)(c).

16 Ie under the Companies Act 2006 s 1075 (see PARA 143): see s 1087(1)(d).

17 Companies Act 2006 s 1087(1)(d).

18 Ie under the Companies Act 2006 s 1088 (see PARA 151): see s 1087(1)(e).

19 Companies Act 2006 s 1087(1)(e).

20 Ie under the Companies Act 2006 s 1095 (see PARA 159): see s 1087(1)(f).

21 Companies Act 2006 s 1087(1)(f).

22 Ie under the Companies Act 2006 s 1096 (see PARA 161): see s 1087(1)(g).

23 Ie under the Companies Act 2006 s 1097 (powers of court on ordering the removal of material from the register) (see PARA 161): see s 1087(1)(g).

24 Companies Act 2006 s 1087(1)(g).

- 25 Companies Act 2006 s 1087(1)(h)(i) (s 1087(1)(h) substituted by SI 2009/1802).
- 26 Companies Act 2006 s 1087(1)(h)(ii) (as substituted: see note 25).
- 27 Ie under the Companies Act 2006 Pt 25 (ss 860-894) (company charges) (see PARA 1277 et seq) or regulations made under s 1052 (overseas companies) (see PARA 1833): see s 1087(1)(h) (as substituted: see note 25).
- 28 Companies Act 2006 s 1087(1)(h) (as substituted: see note 25).
- 29 Companies Act 2006 s 1087(1)(i).
- 30 As to the Regulator of Community Interest Companies see PARA 83.
- 31 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 36A (eligibility for registration as community interest company) (see PARA 118) or under s 38 (eligibility for conversion to community interest company) (see PARA 191) or under s 55 (eligibility for conversion from community interest company to charity) (see PARA 194): see the Companies Act 2006 s 1087(1)(j) (as substituted: see note 32).
- 32 Companies Act 2006 s 1087(1)(j) (substituted by SI 2009/1941).
- 33 Companies Act 2006 s 1087(1)(k). As to the meaning of 'enactment' see PARA 17 note 2.
- 34 Companies Act 2006 s 1087(2).
- 35 Ie any material to which the Companies Act 2006 s 1087 applies (see the text and notes 1-33): see s 1087(3).
- 36 Companies Act 2006 s 1087(3). The provisions which govern the retention of original documents by the registrar generally (ie s 1083) are made subject to s 1087(3): see PARA 146.

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151. Addresses on the register not to be made available by the registrar for public inspection.

The Secretary of State¹ may make provision by regulations² requiring the registrar of companies³, on application, to make an address on the register⁴ unavailable for public inspection⁵. The regulations may make provision as to:

- 260 (1) who may make an application⁶;
- 261 (2) the grounds on which an application may be made⁷;
- 262 (3) the information to be included in and documents to accompany an application⁸;
- 263 (4) the notice to be given of an application and of its outcome⁹; and
- 264 (5) how an application is to be determined¹⁰.

An application must specify the address to be removed from the register and indicate where on the register it is¹¹. The regulations may provide: (a) that an address is not to be made unavailable for public inspection in this way¹² unless replaced by a service address¹³; and (b) that, in such a case, the application must specify a service address¹⁴.

1 As to the Secretary of State see PARA 6.

2 Regulations made under the Companies Act 2006 s 1088 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 1088(6), 1290. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. In exercise of the power conferred by s 1088(1), (2), (3) and (5), the Secretary of State has made the Companies (Disclosure of Address) Regulations 2009, SI 2009/214 (as to which see PARA 152 et seq). As to the application of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 158 et seq) see PARA 131 note 1.

The provisions of the Companies Act 2006 s 1088 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 20, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16.

4 As to the meaning of the 'register' see PARA 146.

5 Companies Act 2006 s 1088(1). See note 2. As to the inspection and copying of records kept by the registrar generally see PARA 149; and as to the general categories of material that must not be made available by the registrar of companies for public inspection see PARA 150.

6 Companies Act 2006 s 1088(2)(a). See note 2.

7 Companies Act 2006 s 1088(2)(b). See note 2.

8 Companies Act 2006 s 1088(2)(c). See note 2.

9 Companies Act 2006 s 1088(2)(d). See note 2.

10 Companies Act 2006 s 1088(2)(e). Provision under s 1088(2)(e) may in particular: (1) confer a discretion on the registrar (s 1088(3)(a)); and (2) provide for a question to be referred to a person other than the registrar for the purposes of determining the application (s 1088(3)(b)). See note 2.

11 Companies Act 2006 s 1088(4). Any application or other document delivered to the registrar under s 1088, and any address in respect of which such an application is successful, is not to be made available by the registrar of companies for public inspection: see s 1087(1)(e); and PARA 150.

12 Ie under the Companies Act 2006 s 1088: see s 1088(5)(a).

13 Companies Act 2006 s 1088(5)(a). See note 2. As to the meaning of 'service address' see PARA 673.

14 Companies Act 2006 s 1088(5)(b). See note 2.

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152. Application by individual to withhold address placed on the register.

An application¹ for the purpose of requiring the registrar of companies² to make an address on the register³ unavailable for public inspection (a 'section 1088 application')⁴ may be made to the registrar by an individual whose usual residential address was placed on the register⁵, in respect of that usual residential address where it was placed on the register on or after 1 January 2003⁶. The grounds on which such an application may be made are that the individual making the application⁷:

- 265 (1) considers that there is a serious risk that he, or a person who lives with him, will be subjected to violence or intimidation as a result of the activities of at least one of the companies of which⁸: (a) he is, or proposes to become, a director⁹; or (b) he is not a director but of which he has been at any time a director, secretary¹⁰ or permanent representative¹¹;
- 266 (2) is or has been employed by a relevant organisation¹²;
- 267 (3) is a 'section 243 beneficiary'¹³, being an individual:
- 19 35. (a) who has made an application¹⁴ for the purpose of requiring the registrar to refrain from disclosing protected information relating to a director to a credit reference agency (a 'section 243 application') in respect of which a determination by the registrar on such an application in favour of the applicant (a 'section 243 decision') has been made¹⁵; or
36. (b) on whose behalf a company or a subscriber to a memorandum of association¹⁶ has made a section 243 application in respect of which a section 243 decision has been made¹⁷; or
37. (c) in relation to whom a confidentiality order¹⁸ was in force immediately before 1 October 2009 and who¹⁹ is treated as having made a section 243 application in respect of which a section 243 decision has been made²⁰.

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The application must contain²¹:

- 268 (i) a statement of the grounds on which the application is made²²;
- 269 (ii) the name²³ and any former name²⁴ of the applicant²⁵;
- 270 (iii) the usual residential address of the applicant that is to be made unavailable for public inspection²⁶;
- 271 (iv) an address for correspondence in respect of the application²⁷;
- 272 (v) the name and registered number of each company of which the applicant is or has been at any time since 1 January 2003 a director, secretary or permanent representative²⁸;
- 273 (vi) the service address which is to replace that usual residential address on the register²⁹; and
- 274 (vii) except where the application is delivered to the registrar on the same day as the applicant delivers a section 243 application³⁰, the date of birth of the applicant³¹, the name of each company of which the applicant proposes to become a director³² and, where the registrar has allotted a unique identifier to the applicant, that unique identifier³³.

The application must be accompanied by evidence which³⁴:

- 275 (A) where the grounds of the application are those described in head (1) above, supports the applicant's assertion that his application falls within the grounds stated in his application³⁵;
- 276 (B) where the grounds of the application are those described in head (2) above, establishes that the applicant is or has been employed by a relevant organisation³⁶;
- 277 (C) where the grounds of the application are those described in head (3) above, establishes that he is a section 243 beneficiary³⁷.

For these purposes, the registrar may direct that additional information or evidence should be delivered to him, what such information or evidence should be and how it should be verified³⁸.

The registrar may refer to a relevant body³⁹ any question relating to an assessment of⁴⁰: (aa) the nature and extent of any risk of violence or intimidation considered by the applicant to arise in relation to himself, or a person who lives with him, as a result of the activities of any company of which he is or proposes to become a director or has been at any time a director, secretary or permanent representative⁴¹; or (bb) whether the applicant is or has been employed by a relevant organisation⁴². For the purpose of determining any section 1088 application, the registrar may accept any answer to a question which is referred in this way⁴³ as providing sufficient evidence (where the grounds of the application are those described in head (1) above) of the nature and extent of any risk relevant to the applicant, or to persons who live with the applicant⁴⁴, or as providing sufficient evidence of whether an applicant is or has been employed by a relevant organisation⁴⁵.

The registrar must determine the application and send the applicant to the address for correspondence stated in his application, notice of his determination on the section 1088 application within five working days of that determination being made⁴⁶.

1 le under the Companies Act 2006 s 1088 (application to registrar to make address unavailable for public inspection) (see PARA 151): see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 1(2).

2 As to the registrar of companies see PARA 131 et seq. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

3 As to the register generally see PARA 146.

4 See the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 1(2).

5 le under the Companies Act 1985 s 10 (documents to be sent to registrar) (repealed), s 288 (register of directors and secretaries) (repealed), s 363 (duty to deliver annual returns) (repealed), s 691 (documents to be delivered to registrar by overseas company) (repealed), s 692 (registration of altered particulars by overseas company) (repealed) or s 690A(2), or Sch 21A para 2 (registration of overseas companies with branch in Great Britain) (repealed), as a service address under the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 80C (duty to notify registrar of changes of particulars of members of an SE's supervisory organ) (see PARA 1657), or under reg 79 (as originally enacted), or as a service address under the Companies Act 2006 s 12 (statement of proposed officers) (see PARA 112), s 167 (duty to notify registrar of changes of director's particulars) (see PARA 514) or s 855 (contents of annual return) (see PARA 1422), or under regulations made under s 1046 (see PARA 1826): see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(1) (amended by SI 2009/1941; SI 2009/2400).

6 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(1) (as amended: see note 5).

7 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(2).

8 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(2)(a).

9 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(2)(a)(i). As to the appointment and duties etc of directors see PARA 478 et seq.

10 As to the company secretary and other officers see PARA 603.

11 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(2)(a)(ii). For these purposes, 'permanent representative' means an individual who was a permanent representative for the purposes of the Companies Act 1985 s 723B and s 723C (both repealed) (effect of confidentiality orders): see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 1(2).

12 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(2)(b). For these purposes, 'relevant organisation' means the Government Communications Headquarters, the Secret Intelligence Service, the Security Service or a police force, where 'police force' means a police force within the meaning of the Police Act 1996 s 101(1) (ie a force maintained by a police authority) (see **POLICE** vol 36(1) (2007 Reissue) PARA 102), the Police (Scotland) Act 1967 s 50 (meaning of police area, etc) or the Police (Northern Ireland) Act 2000 s 1 (name of the police in Northern Ireland): see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 1(2). As to the Government Communications Headquarters see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 473; as to the Secret Intelligence Service see **CONSTITUTIONAL LAW AND HUMAN**

RIGHTS vol 8(2) (Reissue) PARA 472; and as to the Security Service see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 471.

13 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(2)(c).

14 Ie under the Companies Act 2006 s 243(4) (permitted use or disclosure by the registrar) (see PARA 503): see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 1(2).

15 See the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 1(2).

16 As to subscribers to a company's memorandum of association see PARA 104.

17 See the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 1(2).

18 For these purposes, 'confidentiality order' means an order under the Companies Act 1985 s 723B (repealed) (confidentiality orders): see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 1(2).

19 Ie by the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 37: see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 1(2). Accordingly, a director in relation to whom a confidentiality order under the Companies Act 1985 s 723B (repealed) was in force immediately before 1 October 2009 is treated on and after that date as if they had made an application under the Companies Act 2006 s 243(4) (permitted use or disclosure by the registrar) (see PARA 503), and as if that application had been determined by the registrar in their favour: Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 37(1). The provisions of regulations under the Companies Act 2006 s 243(4) relating to decisions of the registrar in favour of an applicant (in particular, as to the duration and revocation of such a decision) apply accordingly (Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 37(2)); and as those regulations apply in accordance with Sch 2 para 37 any reference to an offence under the Companies Act 2006 s 1112 (false statements made to registrar) (see PARA 137) must be read as a reference to an offence under regulations under the Companies Act 1985 s 723E(1)(a) (repealed) in relation to the application for the confidentiality order (Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 37(3)). The date of 1 October 2009 was the date by which all the provisions of the Companies Act 2006 that affect the law in England and Wales had come into force: see PARA 17 note 1.

20 See the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 1(2).

21 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(3)(a).

22 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(3)(a)(i).

23 For these purposes, 'name' means a person's Christian name (or other forename) and surname, except that in the case of a peer, or an individual usually known by a title, the title may be stated instead of his Christian name (or other forename) and surname or in addition to either or both of them: Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 1(2).

24 For these purposes, 'former name' means a name by which an individual was formerly known and which has been notified to the registrar under the Companies Act 1985 s 10 (documents to be sent to registrar) (repealed) or s 288 (register of directors and secretaries) (repealed), or under the Companies Act 2006 s 12 (statement of proposed officers) (see PARA 112) or s 167 (duty to notify registrar of changes of director's particulars) (see PARA 514): Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 1(2).

25 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(3)(a)(ii).

26 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(3)(a)(iii).

27 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(3)(a)(iv).

28 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(3)(a)(v). As to company names and trading names generally see PARA 196 et seq. As to a company's registered number see PARAS 139, 140.

29 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(3)(a)(vi).

30 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(4).

31 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(3)(a)(vii)(aa).

- 32 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(3)(a)(vii)(bb).
- 33 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(3)(a)(vii)(cc).
- 34 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(3)(b).
- 35 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(3)(b)(i).
- 36 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(3)(b)(ii).
- 37 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(3)(b)(iii).
- 38 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 12(1).
- 39 For these purposes, 'relevant body' means any police force and any other person whom the registrar considers may be able to assist in answering a question referred to that person by the registrar under the Companies (Disclosure of Address) Regulations 2009, SI 2009/214: reg 1(2).
- 40 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(5).
- 41 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(5)(a).
- 42 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(5)(b).
- 43 It is referred in accordance with the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(5) (see the text and notes 39-42): see reg 12(2).
- 44 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 12(2)(a).
- 45 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 12(2)(b).
- 46 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(6). For these purposes, 'working day' means a day that is not a Saturday or Sunday, Christmas Day, Good Friday or any day that is a bank holiday under the Banking and Financial Dealings Act 1971 (see **TIME** vol 97 (2010) PARA 321) in England and Wales: reg 1(2). As to the meanings of 'England' and 'Wales' see PARA 1 note 5. As to the effect of a successful application to withhold an address placed on the register see PARA 155; and as to provision made to appeal an unsuccessful application to withhold an address placed on the register see PARA 156.

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153. Application by company to withhold address placed on the register.

A section 1088 application¹ may be made to the registrar of companies² by a company in respect of the addresses of³:

- 278 (1) all of its members⁴ and former members whose addresses were contained in an annual return⁵, or in a return of allotment of shares⁶, delivered to the registrar on or after 1 January 2003⁷; or
- 279 (2) the subscribers to its memorandum of association⁸ where that memorandum was delivered to the registrar on or after 1 January 2003⁹.

The grounds on which such an application may be made are that the company making the application considers that, as a result of its activities, the availability to members of the public of the addresses described in heads (1) and (2) above creates a serious risk that its members

or former members or subscribers, or persons who live at those addresses, will be subjected to violence or intimidation¹⁰.

The application must contain the name of the applicant company and its registered number¹¹, and a statement of the grounds on which the application is made¹². The application must be accompanied by evidence which supports the applicant's assertion that its application falls within the grounds stated in its application¹³ or, where the court has made an order¹⁴ directing the applicant not to comply with a request¹⁵ for inspection of, or for copies of, the register¹⁶ or the index of members' names¹⁷, a copy of that order¹⁸.

For these purposes, the registrar may direct that additional information or evidence should be delivered to him, what such information or evidence should be and how it should be verified¹⁹.

The registrar may refer to a relevant body²⁰ any question relating to the assessment of the nature and extent of any risk of violence or intimidation considered by the applicant company to arise in relation to any of its members or former members or subscribers, or persons who live at the addresses described in heads (1) and (2) above, as a result of its activities by virtue of the availability to members of the public of particulars of the addresses of such members or former members or subscribers²¹. For the purpose of determining any section 1088 application, the registrar may accept any answer to a question which is referred in this way²² as providing sufficient evidence (where the grounds of the application relate to the addresses described in heads (1) and (2) above²³) of the nature and extent of any risk relevant to the subscribers or members or former members of an applicant company or to persons who live with them or (in the case of members, former members or subscribers) to persons who live at their addresses²⁴.

The registrar must determine the application and send the applicant company to its registered office notice of his determination on the section 1088 application within five working days of that determination being made²⁵.

1 As to the meaning of 'section 1088 application' see PARA 152.

2 As to the registrar of companies see PARA 131 et seq. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

3 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 10(1).

4 As to membership of a company generally see PARA 321 et seq.

5 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 10(1)(a)(i). As to the duty on a company to deliver annual returns see PARA 1421 et seq.

6 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 10(1)(a)(ii). As to a return of allotment of shares see PARA 1108.

7 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 10(1)(a).

8 As to subscribers to a company's memorandum of association see PARA 104.

9 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 10(1)(b).

10 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 10(2).

11 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 10(3)(a)(i). As to company names and trading names generally see PARA 196 et seq. As to a company's registered number see PARAS 139, 140.

12 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 10(3)(a)(ii).

13 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 10(3)(b)(i).

14 Ie under the Companies Act 2006 s 117(3) (register of members: response to request for inspection or copy) (see PARA 349): see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 10(3)(b)(ii).

15 le under the Companies Act 2006 s 116 (rights to inspect and require copies) (see PARA 349): see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 10(3)(b)(ii).

16 As to the register generally see PARA 146.

17 As to the index of members' names see PARA 339.

18 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 10(3)(b)(ii).

19 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 12(1).

20 As to the meaning of 'relevant body' for these purposes see PARA 152 note 39.

21 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 10(4).

22 le referred in accordance with the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 10(4) (see the text and notes 20-21): see reg 12(2).

23 le where the grounds of the application are those described in the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 10(2) (see the text and note 10): see reg 12(2).

24 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 12(2)(a).

25 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 10(5). As to the meaning of 'working day' for these purposes see PARA 152 note 46. As to the effect of a successful application to withhold an address placed on the register see PARA 155; and as to provision made to appeal an unsuccessful application to withhold an address placed on the register see PARA 156.

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154. Application by person registering a charge to withhold address placed on the register.

A section 1088 application¹ may be made to the registrar of companies² by a person who has registered a charge³, and who is not the company which created the charge or acquired the property subject to a charge⁴, in respect of his address delivered to the registrar for the purposes of that registration⁵.

The grounds on which such an application may be made are that the person making the application considers that there is a serious risk that he (or, if applicable, his employees) or persons who live with him or his employees, will be subjected to violence or intimidation as a result of the activities of the company which is, or was, subject to the charge⁶.

The application must contain⁷:

- 280 (1) a statement of the grounds on which the application is made⁸;
- 281 (2) the name of the applicant⁹ and, where the applicant is a company, its registered number¹⁰;
- 282 (3) the address of the applicant that is to be made unavailable for public inspection¹¹;
- 283 (4) the name and registered number of the company which is or was subject to the charge¹²;
- 284 (5) an address for correspondence with the registrar in respect of the application¹³; and

285 (6) where the applicant is the chargee, the service address which is to replace the address of the applicant on the register¹⁴.

The application must be accompanied by evidence which supports the applicant's assertion that there is a serious risk that he (or, if applicable, his employees) or persons who live with him or his employees, will be subjected to violence or intimidation as a result of the activities of the company which is or was subject to the charge¹⁵.

For these purposes, the registrar may direct that additional information or evidence should be delivered to him, what such information or evidence should be and how it should be verified¹⁶.

The registrar may refer to a relevant body¹⁷ any question relating to the assessment of the nature and extent of any risk of violence or intimidation considered by the applicant to arise in relation to himself (or, if applicable, his employees), or persons who live with him or his employees, as a result of the activities of the company which is or was subject to the charge¹⁸. For the purpose of determining any section 1088 application, the registrar may accept any answer to a question which is referred in this way¹⁹ as providing sufficient evidence (where the grounds of the application relate to the activities of a company which is, or was, subject to a registered charge²⁰) of the nature and extent of any risk relevant to (where the applicant is an individual) the applicant, or to any employees of an applicant, or to persons who live with them²¹.

The registrar must determine the application and send the applicant to the address stated in the application in accordance with head (5) above notice of his determination on the section 1088 application within five working days of that determination being made²².

1 As to the meaning of 'section 1088 application' see PARA 152.

2 As to the registrar of companies see PARA 131 et seq. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

3 le by a person who has registered a charge, on or after 1 January 2003, under the Companies Act 1985 Pt XII (ss 395-409) (registration of charges (England)) (repealed) or under the Companies Act 2006 Pt 25 (ss 860-894) (company charges) (see PARA 1277 et seq), or under regulations made under s 1052 (overseas companies) (see PARA 1833): see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 11(1)(a) (amended by SI 2009/1941).

4 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 11(1)(b).

5 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 11(1).

6 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 11(2).

7 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 11(3)(a).

8 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 11(3)(a)(i).

9 As to the meaning of 'name', in relation to an individual, for these purposes see PARA 152 note 23.

10 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 11(3)(a)(ii). As to company names and trading names generally see PARA 196 et seq. As to a company's registered number see PARAS 139, 140.

11 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 11(3)(a)(iii).

12 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 11(3)(a)(iv).

13 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 11(3)(a)(v).

14 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 11(3)(a)(vi).

15 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 11(3)(b).

- 16 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 12(1).
- 17 As to the meaning of 'relevant body' for these purposes see PARA 152 note 39.
- 18 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 11(4).
- 19 Ie referred in accordance with the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 11(4) (see the text and notes 17-18): see reg 12(2).
- 20 Ie where the grounds of the application are those described in the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 11(2) (see the text and note 6): see reg 12(2).
- 21 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 12(2).
- 22 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 11(5). As to the meaning of 'working day' for these purposes see PARA 152 note 46. As to the effect of a successful application to withhold an address placed on the register see PARA 155; and as to provision made to appeal an unsuccessful application to withhold an address placed on the register see PARA 156.

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155. Effect of successful application to withhold address placed on the register.

Where a section 1088 application¹ has been determined in favour of the applicant, the registrar of companies² must: (1) in the case of an application made by an individual³ or by a person who registers or has registered a charge⁴, make the specified address⁵ unavailable for public inspection⁶; (2) in the case of an application by a company⁷, make all of the addresses of the members⁸, former members or subscribers to the memorandum of association⁹ unavailable for public inspection¹⁰; (3) in the case of a director¹¹ or secretary¹² in relation to whom a confidentiality order¹³ was in force immediately before 1 October 2009¹⁴, make unavailable for public inspection any address that immediately before that date was contained in confidential records¹⁵.

A section 1088 decision¹⁶ continues to have effect until the registrar has made a revocation decision¹⁷ in relation to the section 1088 beneficiary¹⁸.

- 1 As to the meaning of 'section 1088 application' see PARA 152.
- 2 As to the registrar of companies see PARA 131 et seq.
- 3 Ie under the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(1) (see PARA 152): see reg 13(1)(a).
- 4 Ie under the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 11(1) (see PARA 154): see reg 13(1)(a).
- 5 For these purposes, 'specified address' means the address specified in the application as being the one to be made unavailable for public inspection: Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 13(2).
- 6 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 13(1)(a).
- 7 Ie under the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 10(1) (see PARA 153): see reg 13(1)(b).

- 8 As to membership of a company generally see PARA 321 et seq.
- 9 As to subscribers to a company's memorandum of association see PARA 104.
- 10 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 13(1)(b).
- 11 As to directors of a company see PARA 478 et seq.
- 12 As to the company secretary and other officers see PARA 603.
- 13 As to the meaning of 'confidentiality order' see PARA 152 note 18.
- 14 In the case of a person to whom the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 36 applies: see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 13(1)(c). Accordingly, a director or secretary in relation to whom a confidentiality order under the Companies Act 1985 s 723B (repealed) was in force immediately before 1 October 2009 is treated on and after that date as if they had made an application under the Companies Act 2006 s 1088 (application to make address unavailable for public inspection) (see PARA 151) in respect of any address that immediately before that date was contained in 'confidential records' as defined in the Companies Act 1985 s 723D(3) (repealed), and as if that application had been determined by the registrar in their favour: Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 36(1). The provisions of regulations under the Companies Act 2006 s 1088 relating to decisions of the registrar in favour of an applicant (in particular, as to the duration and revocation of such a decision) apply accordingly (Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 36(2)); and as those regulations apply in accordance with Sch 2 para 36 any reference to an offence under the Companies Act 2006 s 1112 (false statements made to registrar) (see PARA 137) must be read as a reference to an offence under regulations under the Companies Act 1985 s 723E(1)(a) (repealed) in relation to the application for the confidentiality order (Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 36(3)). The date of 1 October 2009 was the date by which all the provisions of the Companies Act 2006 that affect the law in England and Wales had come into force: see PARA 17 note 1.
- 15 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 13(1)(c). The text refers to 'confidential records' as defined in the Companies Act 1985 s 723D(3) (repealed) (see note 14): see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 36(1); Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 13(1)(c).
- 16 For these purposes, 'section 1088 decision' means a determination by the registrar on a section 1088 application in favour of the applicant: Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 1(2).
- 17 For these purposes, 'revocation decision' in relation to a section 1088 decision means a determination by the registrar to revoke that decision in accordance with the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16 (see PARA 157): see reg 15(3).
- 18 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 15(2). For these purposes, 'section 1088 beneficiary' means a person who has made a section 1088 application in respect of which a section 1088 decision has been made: Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 1(2).

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156. Appeal of unsuccessful application to withhold address placed on the register.

An applicant who has received notice¹ that his section 1088 application² has been unsuccessful may appeal to the High Court on the grounds that the decision is unlawful³, is irrational or unreasonable⁴, or has been made on the basis of a procedural impropriety or otherwise contravenes the rules of natural justice⁵. However, no such appeal may be brought unless the permission of the court has been obtained⁶.

An applicant must bring an appeal within 21 days of the date of the notice or, with the court's permission, after the end of such period, but only if the court is satisfied (where permission is sought before the end of that period) that there is good reason for the applicant being unable to bring the appeal in time⁷ or (where permission is sought after that time) that there was a good reason for the applicant's failure to bring the appeal in time and for any delay in applying for permission⁸.

The court determining an appeal may either dismiss the appeal⁹ or quash the decision¹⁰. Where the court quashes a decision, it may refer the matter to the registrar of companies¹¹ with a direction to reconsider it and make a determination in accordance with the findings of the court¹².

1 le under the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 9(6) (see PARA 152), reg 10(5) (see PARA 153) or reg 11(5) (see PARA 154): see reg 14(1).

2 As to the meaning of 'section 1088 application' see PARA 152.

3 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 14(1)(a).

4 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 14(1)(b).

5 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 14(1)(c). As to procedural fairness and the rules of natural justice see **JUDICIAL REVIEW** vol 61 (2010) PARAS 625 et seq, 629 et seq.

6 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 14(2).

7 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 14(3)(a).

8 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 14(3)(b).

9 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 14(4)(a).

10 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 14(4)(b).

11 As to the registrar of companies see PARA 131 et seq.

12 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 14(4).

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157. Revocation of decision to withhold address placed on the register.

The registrar of companies¹ may revoke a section 1088 decision² at any time if he is satisfied that the section 1088 beneficiary³ or any other person, in purported compliance with any provision of the Disclosure of Address Regulations⁴, is found guilty of an offence of making false statements to the registrar⁵ (a 'revocation decision')⁶.

If the registrar proposes to make a revocation decision, he must send the beneficiary notice of his intention⁷. The notice must: (1) inform the beneficiary that he may, within the period of 28 days beginning with the date of the notice, deliver representations in writing to the registrar⁸; and (2) state that, if representations are not received by the registrar within that period, the revocation decision will be made at the expiry of that period⁹. If, within the period so specified¹⁰, the beneficiary delivers representations as to why the revocation decision should not be made,

the registrar must have regard to the representations in determining whether to make the revocation decision, and must, within five working days of making his decision, send notice of it to the beneficiary¹¹.

Any communication by the registrar in respect of a revocation decision or proposed revocation decision must be sent to the beneficiary¹²: (a) in the case of an individual, to his usual residential address¹³; (b) in the case of a company, to its registered office¹⁴; or (c) in the case of a partnership¹⁵, to the address specified in its section 1088 application¹⁶.

1 As to the registrar of companies see PARA 131 et seq.

2 As to the meaning of 'section 1088 decision' see PARA 155 note 16.

3 As to the meaning of 'section 1088 beneficiary' see PARA 155 note 18.

4 Ie in purported compliance with any provision of the Companies (Disclosure of Address) Regulations 2009, SI 2009/214 (as to which see PARA 152 et seq): see reg 16(1).

5 Ie under the Companies Act 2006 s 1112 (false statements made to registrar) (see PARA 137): see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(1).

6 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(1).

7 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(2).

8 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(3)(a).

9 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(3)(b).

10 Ie within the period specified in the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(3) (see the text and notes 8-9): see reg 16(4).

11 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(4). As to the meaning of 'working day' for these purposes see PARA 152 note 46.

12 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(5).

13 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(5)(a).

14 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(5)(b). As to a company's registered office see PARA 129.

15 For these purposes, 'partnership' includes a limited liability partnership (Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(6)), where 'limited liability partnership' means a limited liability partnership incorporated under the Limited Liability Partnerships Act 2000 (as to which see **PARTNERSHIP** vol 79 (2008) PARA 234 et seq) (Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 1(2)).

16 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(5)(c). As to the meaning of 'section 1088 application' see PARA 152.

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F. CORRECTION OF MATERIAL KEPT ON THE REGISTER

158. Removal or rationalisation of material on the register.

Where it appears to the registrar of companies¹ that the information contained in a document² delivered to the registrar³ is inconsistent with other information on the register⁴, the registrar may give notice to the company to which the document relates⁵, stating in what respects the information contained in it appears to be inconsistent with other information on the register⁶, and requiring the company to take steps to resolve the inconsistency⁷. The notice must state the date on which it is issued⁸, and require the delivery to the registrar, within 14 days after that date, of such replacement or additional documents as may be required to resolve the inconsistency⁹. If the necessary documents are not delivered within the period specified, an offence is committed by the company, and by every officer of the company who is in default¹⁰. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 5 on the standard scale¹¹ and (for continued contravention) a daily default fine¹² not exceeding one-tenth of level 5 on the standard scale¹³.

The registrar may remove from the register anything that there was power, but no duty, to include¹⁴. This power is exercisable, in particular, so as to remove unnecessary material¹⁵, and to remove material derived from a document that has been replaced, either because it did not meet the requirements for proper delivery¹⁶, or pursuant to a notice to remedy an inconsistency on the register¹⁷. However, this power does not authorise the removal from the register of:

- 286 (1) anything whose registration has had legal consequences in relation to the company, as regards: (a) its formation¹⁸; (b) a change of name¹⁹; (c) its re-registration²⁰; (d) its becoming or ceasing to be a community interest company²¹; (e) a reduction of capital²²; (f) a change of registered office²³; (g) the registration of a charge²⁴; or (h) its dissolution²⁵;
- 287 (2) an address that is a person's registered address for the purposes of the service of documents on directors, secretaries and others²⁶.

On or before removing any material in this way²⁷ (otherwise than at the request of the company) the registrar must give notice²⁸: (i) to the person by whom the material was delivered (if the identity, and name and address of that person are known)²⁹; or (ii) to the company to which the material relates (if notice cannot be given under head (i) above and the identity of that company is known)³⁰. The notice must state what material the registrar proposes to remove (or has removed) and on what grounds³¹, and it must state the date on which it is issued³².

1 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16. As to the application of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 159 et seq) see PARA 131 note 1.

2 As to the meaning of 'document' for these purposes see PARA 141 note 2.

3 As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to the meaning of references to delivering a document for these purposes see PARA 141 note 2.

4 As to the meaning of the 'register' see PARA 146.

5 Companies Act 2006 s 1093(1).

6 Companies Act 2006 s 1093(1)(a).

7 Companies Act 2006 s 1093(1)(b).

8 Companies Act 2006 s 1093(2)(a).

9 Companies Act 2006 s 1093(2)(b).

- 10 Companies Act 2006 s 1093(3). As to the meaning of 'officer' generally under the Companies Act 2006 see PARA 607; and as to the meaning of 'officer in default' see PARA 315.
- 11 As to the standard scale see PARA 1622.
- 12 As to the meaning of 'daily default fine' see PARA 1622.
- 13 Companies Act 2006 s 1093(4).
- 14 Companies Act 2006 s 1094(1). The registrar is required to give public notice of the removal from the register of any document which is subject to the Directive disclosure requirements (as to which see s 1078; and PARA 144) or of any material derived from such a document: see PARA 144.
- 15 Ie within the meaning of the Companies Act 2006 s 1074 (see PARA 143 note 21): see s 1094(2).
- 16 Ie under the Companies Act 2006 s 1076 (see PARA 143): see s 1094(2).
- 17 Companies Act 2006 s 1094(2). The text refers to a notice to remedy an inconsistency on the register under s 1093 (see the text and notes 1-13): see s 1094(2).
- 18 Companies Act 2006 s 1094(3)(a)(i). As to company formation under the Companies Act 2006 see PARA 102 et seq.
- 19 Companies Act 2006 s 1094(3)(a)(ii). As to change of a company's name see PARAS 217-219.
- 20 Companies Act 2006 s 1094(3)(a)(iii). As to company re-registration and its effects generally see PARA 167 et seq.
- 21 Companies Act 2006 s 1094(3)(a)(iv). As to becoming a community interest company see PARA 82; and as to ceasing to be a community interest company see PARA 193.
- 22 Companies Act 2006 s 1094(3)(a)(v). As to reduction of share capital generally see PARA 1173 et seq. As to the meaning of 'share capital' see PARA 1042.
- 23 Companies Act 2006 s 1094(3)(a)(vi). As to changes in the situation of a company's registered office see PARA 129.
- 24 Companies Act 2006 s 1094(3)(a)(vii). As to the registration of charges see PARA 1277 et seq.
- 25 Companies Act 2006 s 1094(3)(a)(viii). As to the dissolution of a company see PARA 1521 et seq.
- 26 Companies Act 2006 s 1094(3)(b). Head (2) in the text refers to the purposes of s 1140 (see PARA 672): see s 1094(3)(b). As to the meaning of 'director' see PARA 478. As to the company secretary and other officers see PARA 603.
- 27 Ie under the Companies Act 2006 s 1094: see s 1094(4).
- 28 Companies Act 2006 s 1094(4).
- 29 Companies Act 2006 s 1094(4)(a).
- 30 Companies Act 2006 s 1094(4)(b).
- 31 Companies Act 2006 s 1094(5)(a).
- 32 Companies Act 2006 s 1094(5)(b).

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159. Provision made for rectification of the register on application to the registrar.

The Secretary of State¹ may make provision by regulations² requiring the registrar of companies³, on application, to remove from the register⁴ material of a description specified in the regulations that⁵:

- 288 (1) derives from anything invalid or ineffective or that was done without the authority of the company⁶; or
- 289 (2) is factually inaccurate, or is derived from something that is factually inaccurate or forged⁷.

The regulations may make provision as to:

- 290 (a) who may make an application⁸;
- 291 (b) the information to be included in and documents to accompany an application⁹;
- 292 (c) the notice to be given of an application and of its outcome¹⁰;
- 293 (d) a period in which objections to an application may be made¹¹; and
- 294 (e) how an application is to be determined¹².

An application must specify what is to be removed from the register and indicate where on the register it is¹³, and must be accompanied by a statement that the material specified in the application complies with the statutory requirements¹⁴ and with the regulations¹⁵. If no objections are made to the application, the registrar may accept the statement as sufficient evidence that the material specified in the application should be removed from the register¹⁶.

Where anything is removed from the register in this way¹⁷, the registration of which has had legal consequences in relation to the company, as regards: (i) its formation¹⁸; (ii) a change of name¹⁹; (iii) its re-registration²⁰; (iv) its becoming or ceasing to be a community interest company²¹; (v) a reduction of capital²²; (vi) a change of registered office²³; (vii) the registration of a charge²⁴; or (viii) its dissolution²⁵, any person appearing to the court to have a sufficient interest may apply to the court for such consequential orders as appear just with respect to the legal effect (if any) to be accorded to the material by virtue of its having appeared on the register²⁶.

1 As to the Secretary of State see PARA 6.

2 Regulations made under the Companies Act 2006 s 1095 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 1095(6), 1290. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. In exercise of the power conferred by s 1095(1), (2), the Secretary of State has made the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803: see regs 4, 5; and PARA 160.

As to the application of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 161 et seq) see PARA 131 note 1.

3 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16.

4 As to the meaning of the 'register' see PARA 146.

5 Companies Act 2006 s 1095(1).

6 Companies Act 2006 s 1095(1)(a).

7 Companies Act 2006 s 1095(1)(b).

- 8 Companies Act 2006 s 1095(2)(a).
- 9 Companies Act 2006 s 1095(2)(b). As to the meaning of 'document' for these purposes see PARA 141 note 2.
- 10 Companies Act 2006 s 1095(2)(c).
- 11 Companies Act 2006 s 1095(2)(d).
- 12 Companies Act 2006 s 1095(2)(e).
- 13 Companies Act 2006 s 1095(3)(a).
- 14 It complies with the Companies Act 2006 s 1095: see s 1095(3)(b).
- 15 Companies Act 2006 s 1095(3)(b). Any application or other document delivered to the registrar under s 1095 is not to be made available by the registrar of companies for public inspection: see s 1087(1)(f); and PARA 150.
- 16 Companies Act 2006 s 1095(4). The registrar is required to give public notice of the removal from the register of any document which is subject to the Directive disclosure requirements (as to which see s 1078; and PARA 144) or of any material derived from such a document: see PARA 144.
- 17 It is under the Companies Act 2006 s 1095: see s 1095(5).
- 18 Companies Act 2006 ss 1094(3)(a)(i), 1095(5). As to company formation under the Companies Act 2006 see PARA 102 et seq.
- 19 Companies Act 2006 ss 1094(3)(a)(ii), 1095(5). As to change of a company's name see PARAS 217-219.
- 20 Companies Act 2006 ss 1094(3)(a)(iii), 1095(5). As to company re-registration and its effects generally see PARA 167 et seq.
- 21 Companies Act 2006 ss 1094(3)(a)(iv), 1095(5). As to becoming a community interest company see PARA 82; and as to ceasing to be a community interest company see PARA 193.
- 22 Companies Act 2006 ss 1094(3)(a)(v), 1095(5). As to reduction of share capital generally see PARA 1173 et seq. As to the meaning of 'share capital' see PARA 1042.
- 23 Companies Act 2006 ss 1094(3)(a)(vi), 1095(5). As to changes in the situation of a company's registered office see PARA 129.
- 24 Companies Act 2006 ss 1094(3)(a)(vii), 1095(5). As to the registration of charges see PARA 1277 et seq.
- 25 Companies Act 2006 ss 1094(3)(a)(viii), 1095(5). As to the dissolution of a company see PARA 1521 et seq.
- 26 Companies Act 2006 s 1095(6).

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160. Rectification of the register on application to the registrar.

On application¹ (but not if there is a valid objection to the application²) the registrar must remove from the register any relevant material³ that either derives from anything invalid or ineffective or that was done without the authority of the company or overseas company to which the material relates⁴, or that is factually inaccurate, or is derived from something that is factually inaccurate or forged⁵. An application to the registrar for the removal from the register, on such a ground⁶, of:

- 295 (1) material that was included in a standard form required for giving notice⁷ of a change of address of the registered office, or of material that is derived from material that was included in such a form, may be made by (and only by) the company to which the material relates⁸;
- 296 (2) material that was included in, or is derived from material that was included in, so much of a standard form required for delivering a return in relation to an overseas company⁹ as is required for details of the alteration of particulars¹⁰ may be made by (and only by) the overseas company to which the material relates¹¹; and
- 297 (3) other relevant material¹² may be made by (and only by) the person by whom the relevant company form or relevant overseas company form (as the case may be) was delivered to the registrar¹³, by the company or overseas company to which the material relates¹⁴, or by any other person to whom the material relates¹⁵.

Such an application to the registrar¹⁶ must, in addition to satisfying the relevant requirements of the Companies Act 2006¹⁷:

- 298 (a) state the applicant's name and address¹⁸;
- 299 (b) where the application is an application referred to in head (1) or head (2) above, confirm that the applicant is the company or (as the case may be) the overseas company to which the relevant material which is the subject of the application relates¹⁹;
- 300 (c) in any other case, state whether the applicant is a person by whom the relevant company form or relevant overseas company form (as the case may be) was delivered to the registrar, or is the company or overseas company to which the material relates or is any other person to whom the material relates²⁰; and
- 301 (d) state whether the relevant material which is the subject of the application derives from anything invalid or ineffective²¹, derives from anything that was done without the authority of the company or overseas company to which the material relates²², is factually inaccurate or is derived from something that is factually inaccurate²³, or is derived from something that is forged²⁴.

Where the application is an application referred to in head (1) above, the registrar must give notice of the application to the person who delivered the standard form mentioned in that regulation to the registrar (but only if the registrar knows the identity and name and address of that person)²⁵, to every person who (to the registrar's knowledge) was a director or secretary of the company at the time when the application was delivered to the registrar²⁶, and to the company at the address of its registered office²⁷. Where the material which is the subject of the application relates to a company (rather than an overseas company), but the application is not an application referred to in head (1) above, the registrar must give notice of the application to every person mentioned in head (3) above whose identity and name and address the registrar knows (other than the applicant)²⁸, and every person who (to the registrar's knowledge) was a director or secretary of the company at the time when the application was delivered to the registrar²⁹.

Where the application is an application referred to in head (2) above, the registrar must give notice of the application to the person who delivered the standard form³⁰ to the registrar (but only if the registrar knows the identity and name and address of that person)³¹, to every person duly registered³², at the time when the application was delivered to the registrar, as a director or secretary of the overseas company³³, to every person duly registered³⁴ (at the time when the application was delivered to the registrar) as a person authorised to accept service of documents on behalf of the overseas company in respect of a UK establishment of the company³⁵, and to every person duly registered³⁶ (at the time when the application was delivered to the registrar) as a permanent representative of the overseas company in respect

of a UK establishment of the company³⁷, and to the overseas company³⁸. Where the material which is the subject of the application relates to an overseas company, but the application is not an application referred to in head (2) above, the registrar must give notice of the application to every person mentioned in head (3) above whose identity and name and address the registrar knows (other than the applicant)³⁹, to every person duly registered⁴⁰, at the time when the application was delivered to the registrar, as a director or secretary of the overseas company⁴¹, and to every person duly registered⁴² (at the time when the application was delivered to the registrar) as a person authorised to accept service of documents on behalf of the overseas company in respect of a UK establishment of the company⁴³, and to every person duly registered⁴⁴ (at the time when the application was delivered to the registrar) as a permanent representative of the overseas company in respect of a UK establishment of the company⁴⁵.

Where the material which is the subject of the application is material that was included in, or is derived from material that was included in, a relevant overseas company form⁴⁶, the notice which the registrar is required⁴⁷ to give to the overseas company must be given to the company at the address which was, at the time when the application was delivered to the registrar, duly registered⁴⁸ as the address of the company's UK establishment to which the material relates (and notice need not be given to the company at any other address)⁴⁹.

The notice of the application so given by the registrar⁵⁰ must:

- 302 (i) where the material which is the subject of the application relates to a company (rather than an overseas company), state the name and registered number of the company to which the material relates⁵¹;
- 303 (ii) where the material which is the subject of the application relates to an overseas company, state the overseas company's name as duly registered⁵² and its registered number as duly allocated⁵³;
- 304 (iii) where the material which is the subject of the application is material that was included in, or is derived from material that was included in, a relevant overseas company form⁵⁴ state the registered number duly allocated⁵⁵ to the UK establishment to which the material relates⁵⁶;
- 305 (iv) specify what is to be removed from the register and indicate where on the register it is⁵⁷;
- 306 (v) state the information provided to the registrar under head (d) above⁵⁸;
- 307 (vi) state the date on which the notice is issued⁵⁹;
- 308 (vii) give particulars of the recipient's right to object to the application and the requirements applying to that right⁶⁰;
- 309 (viii) explain the effect of a valid objection being made⁶¹; and
- 310 (ix) explain the effect of the provisions which govern rectification of the register by the registrar⁶².

An objection to an application⁶³ may be made to the registrar by any person⁶⁴; and such an objection must be made by giving notice in writing to the registrar, and the notice must state the name and address of the person making the objection and identify the application to which the objection relates⁶⁵. A person to whom notice of an application was duly given⁶⁶ and who wishes to object to the application must do so before the end of the period of 28 days beginning with the date on which that notice was issued (as stated in the notice)⁶⁷. However, the registrar must not take account of an objection made by any other person after the end of the period of 28 days beginning with the date on which the notices⁶⁸ were issued⁶⁹. If a valid objection is made to the application, the registrar must reject the application⁷⁰. When a valid objection is made, the registrar must also send an acknowledgment of receipt to the person who made the objection⁷¹, notify the applicant of the fact that an objection has been made⁷², and notify every other person to whom the registrar gave due notice⁷³ (but not the person who

made the objection or any other person who has made an objection)⁷⁴. If no valid objection is made, the registrar must notify the applicant of that fact⁷⁵.

1 le under the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 4: see reg 4(1).

2 For these purposes, a 'valid objection' is either an objection made in accordance with the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(10) (see the text and note 65) and reg 5(11) (see the text and notes 66-67) by a person to whom notice of the application was given under reg 5(2), (3), (4) or (5) (see the text and notes 25-45), or an objection made in accordance with reg 5(10) by any other person which is not an objection that the registrar is prevented from taking into account under reg 5(12) (see the text and notes 68-69): regs 1(2), 4(8).

3 For these purposes, 'relevant material' means material on the register that was included in, or is derived from material that was included in, a relevant company form or a relevant overseas company form delivered to the registrar by any person: Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, regs 1(2), 4(2). A 'relevant company form' is either a standard form required for giving notice under the Companies Act 2006 s 87 (change of address of registered office) (see PARA 129), s 167 (changes relating to directors) (see PARA 514) or s 276 (changes relating to secretaries) (see PARA 606), or so much of a standard form required for delivering an application under s 9 (application for registration of a company) (see PARA 111) as is required for the statement of a company's proposed officers referred to in s 9(4)(c): Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, regs 1(2), 4(3). A 'relevant overseas company form' is either so much of a standard form required for delivering a return under the Overseas Companies Regulations 2009, SI 2009/1801, reg 4 (see PARA 1826) as is required for the list referred to in reg 6(1)(d) (list of directors and secretary of an overseas company) (see PARA 1826), for the names and service addresses referred to in reg 7(1)(e) (names and service addresses of persons authorised to accept service of documents on behalf of an overseas company in respect of a UK establishment) (see PARA 1826) or for the list referred to in reg 7(1)(f) (list of permanent representatives of an overseas company in respect of a UK establishment) (see PARA 1826), or so much of a standard form required for delivering a return under reg 13 as is required for details of the alteration of particulars delivered under reg 6(1)(d), reg 7(1)(a) (address of UK establishment) (see PARA 1826), reg 7(1)(e) or reg 7(1)(f): see the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, regs 1(2), 4(4). For these purposes, 'required' means required by rules made by the registrar under the Companies Act 2006 s 1117 (see PARA 136): see the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 4(9). As to the meaning of 'overseas company' see PARA 1824.

4 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 4(1)(a).

5 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 4(1)(b).

6 le on the grounds in the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 4(1) (see the text and notes 1-5): see reg 4(5)-(7).

7 le under the Companies Act 2006 s 87 (see PARA 129): see the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 4(5).

8 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 4(5).

9 le under the Overseas Companies Regulations 2009, SI 2009/1801, reg 13 (see PARA 1826): see the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 4(6).

10 le under the Overseas Companies Regulations 2009, SI 2009/1801, reg 7(1)(a) (address of UK establishment) (see PARA 1826): see the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 4(6).

11 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 4(6).

12 le relevant material other than material referred to in the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 4(5), (6) (see the text and notes 6-11): see reg 4(7).

13 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 4(7)(a).

14 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 4(7)(b).

15 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 4(7)(c).

- 16 Ie under the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 4 (see the text and notes 1-15): see reg 5(1).
- 17 Ie in addition to satisfying the requirements of the Companies Act 2006 s 1095(3) (see PARA 159): see the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(1).
- 18 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(1)(a).
- 19 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(1)(b).
- 20 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, regs 4(7), 5(1)(c). Head (c) in the text requires the application to state whether the applicant is a person mentioned in reg 4(7)(a) (see the text and note 13), a person mentioned in reg 4(7)(b) (see the text and note 14) or a person mentioned in reg 4(7)(c) (see the text and note 15): see reg 5(1)(c).
- 21 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(1)(d)(i).
- 22 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(1)(d)(ii).
- 23 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(1)(d)(iii).
- 24 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(1)(d)(iv).
- 25 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(2)(a). As to the notice that is required to be so given see the text and notes 50-62.
- 26 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(2)(b). As to the notice that is required to be so given see the text and notes 50-62.
- 27 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(2)(c). As to the notice that is required to be so given see the text and notes 50-62. As to a company's registered office see PARA 129.
- 28 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(3)(a). As to the notice that is required to be so given see the text and notes 50-62.
- 29 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(3)(b). As to the notice that is required to be so given see the text and notes 50-62.
- 30 Ie the standard form mentioned in the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 4(6) (see the text and notes 9-11): see reg 5(4)(a).
- 31 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(4)(a). As to the notice that is required to be so given see the text and notes 50-62.
- 32 Ie under the Overseas Companies Regulations 2009, SI 2009/1801, reg 4 or reg 13 (see PARA 1826): see the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(4)(b).
- 33 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(4)(b). As to the notice that is required to be so given see the text and notes 50-62.
- 34 Ie under the Overseas Companies Regulations 2009, SI 2009/1801, reg 4 or reg 13 (see PARA 1826): see the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(4)(c), (6)(a).
- 35 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(4)(c), (6)(a). As to the notice that is required to be so given see the text and notes 50-62. For these purposes, 'UK establishment' has the meaning given in the Companies Act 2006 s 1067(6) (see PARA 140): see the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(16).
- 36 Ie under the Overseas Companies Regulations 2009, SI 2009/1801, reg 4 or reg 13 (see PARA 1826): see the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(4)(c), (6)(b).
- 37 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(4)(c), (6)(b). As to the notice that is required to be so given see the text and notes 50-62.
- 38 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(4)(d). As to the notice that is required to be so given see the text and notes 50-62.

- 39 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(5)(a). As to the notice that is required to be so given see the text and notes 50-62.
- 40 Ie under the Overseas Companies Regulations 2009, SI 2009/1801, reg 4 or reg 13 (see PARA 1826): see the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(5)(b).
- 41 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(5)(b). As to the notice that is required to be so given see the text and notes 50-62.
- 42 Ie under the Overseas Companies Regulations 2009, SI 2009/1801, reg 4 or reg 13 (see PARA 1826): see the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(5)(c), (6)(a).
- 43 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(5)(c), (6)(a). As to the notice that is required to be so given see the text and notes 50-62.
- 44 Ie under the Overseas Companies Regulations 2009, SI 2009/1801, reg 4 or reg 13 (see PARA 1826): see the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(5)(c), (6)(b).
- 45 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(5)(c), (6)(b). As to the notice that is required to be so given see the text and notes 50-62.
- 46 Ie as described in the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 4(4), except in relation to references made therein to the list that is referred to in reg 6(1)(d) (see note 3): see reg 5(7).
- 47 Ie by the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(4) (see the text and notes 30-38) or reg 5(5) (see the text and notes 39-45): see reg 5(7).
- 48 Ie under the Overseas Companies Regulations 2009, SI 2009/1801, reg 4 or reg 13 (see PARA 1826): see the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(7).
- 49 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(7).
- 50 Ie under the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(2) (see the text and notes 25-27), reg 5(3) (see the text and notes 28-29), reg 5(4) (see the text and notes 30-38), or reg 5(5) (see the text and notes 39-45): see reg 5(8).
- 51 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(8)(a).
- 52 Ie under the Overseas Companies Regulations 2009, SI 2009/1801, reg 4 or reg 13 (see PARA 1826) or under the Companies Act 2006 s 1048 (see PARA 1827): see the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(8)(b).
- 53 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(8)(b). The text refers to a registered number allocated under the Companies Act 2006 s 1066 (see PARA 139): see the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(8)(b).
- 54 Ie as described in the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 4(4), except in relation to references made therein to the list that is referred to in reg 6(1)(d) (see note 3): see reg 5(8)(c).
- 55 Ie allocated under the Companies Act 2006 s 1067 (see PARA 140): see the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(8)(c).
- 56 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(8)(c).
- 57 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(8)(d).
- 58 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(8)(e).
- 59 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(8)(f).
- 60 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(8)(g). Head (vii) in the text refers to the requirements applying to the right to object under reg 5(10) (see the text and note 65) and reg 5(11) (see the text and notes 66-67): see reg 5(8)(g).
- 61 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(8)(h). Head (viii) in the text refers to the effect of reg 5(13) (see the text and note 70): see reg 5(8)(h).

62 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(8)(i). Head (ix) in the text refers to the effect of reg 4(1) (see the text and notes 1-5) and the Companies Act 2006 s 1095(4) (see PARA 159): see the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(8)(i).

63 le under the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 4 (see the text and notes 1-15): see reg 5(9).

64 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(9).

65 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(10).

66 le under the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(2) (see the text and notes 25-27), reg 5(3) (see the text and notes 28-29), reg 5(4) (see the text and notes 30-38), or reg 5(5) (see the text and notes 39-45): see reg 5(11).

67 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(11).

68 le under the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(2) (see the text and notes 25-27), reg 5(3) (see the text and notes 28-29), reg 5(4) (see the text and notes 30-38), or reg 5(5) (see the text and notes 39-45): see reg 5(12).

69 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(12).

70 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(13).

71 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(14)(a).

72 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(14)(b).

73 le under the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(2) (see the text and notes 25-27), reg 5(3) (see the text and notes 28-29), reg 5(4) (see the text and notes 30-38), or reg 5(5) (see the text and notes 39-45): see reg 5(14)(c).

74 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(14)(c).

75 Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 5(15).

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161. Rectification of the register under court order.

The registrar of companies¹ must remove from the register² any material³:

- 311 (1) that derives from anything that the court has declared to be invalid or ineffective, or to have been done without the authority of the company⁴; or
- 312 (2) that a court declares to be factually inaccurate, or to be derived from something that is factually inaccurate, or forged⁵,

and that the court directs should be removed from the register⁶.

The court order must specify what is to be removed from the register and indicate where on the register it is⁷. However, the court must not make an order for the removal from the register of anything the registration of which has had legal consequences in relation to the company⁸, as regards: (a) its formation⁹; (b) a change of name¹⁰; (c) its re-registration¹¹; (d) its becoming or

ceasing to be a community interest company¹²; (e) a reduction of capital¹³; (f) a change of registered office¹⁴; (g) the registration of a charge¹⁵; or (h) its dissolution¹⁶, unless satisfied¹⁷ both that the presence of the material on the register has caused (or may cause) damage to the company¹⁸, and that the company's interest in removing the material outweighs any interest of other persons in the material continuing to appear on the register¹⁹.

Where in such a case the court does make an order for removal, it may make such consequential orders as appear just with respect to the legal effect (if any) to be accorded to the material by virtue of its having appeared on the register²⁰. A copy of the court's order must be sent to the registrar for registration²¹.

Where the court makes an order for the removal of anything from the register in this way²², it may give the following directions²³:

- 313 (i) it may direct that any note on the register²⁴ that is related to the material that is the subject of the court's order is to be removed from the register²⁵;
- 314 (ii) it may direct that its order must not be available for public inspection as part of the register²⁶;
- 315 (iii) it may direct that no note is to be made on the register as a result of its order²⁷, or that any such note must be restricted to such matters as may be specified by the court²⁸.

However, the court must not give any such direction²⁹ unless it is satisfied³⁰: (A) that either the presence on the register of the note (or, as the case may be, of an unrestricted note)³¹ or the availability for public inspection of the court's order³², may cause damage to the company³³; and (B) that the company's interest in non-disclosure outweighs any interest of other persons in disclosure³⁴.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16. As to the application of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 162 et seq) see PARA 131 note 1.

2 As to the meaning of the 'register' see PARA 146.

3 Companies Act 2006 s 1096(1).

4 Companies Act 2006 s 1096(1)(a).

5 Companies Act 2006 s 1096(1)(b).

6 Companies Act 2006 s 1096(1). The provisions of s 1096 do not apply where the court has other, specific, powers to deal with the matter, for example under the provisions of Pt 15 (ss 380-474) (see PARA 693 et seq) relating to the revision of defective accounts and reports (see PARA 885 et seq), or s 873 (order by court for rectification of register of charges) (see PARA 1287): s 1096(6). The registrar is required to give public notice of the removal from the register of any document which is subject to the Directive disclosure requirements (as to which see s 1078; and PARA 144) or of any material derived from such a document: see PARA 144. As to the meaning of 'document' for these purposes see PARA 141 note 2.

7 Companies Act 2006 s 1096(2).

8 Companies Act 2006 s 1096(3).

9 Companies Act 2006 ss 1094(3)(a)(i), 1096(3). As to company formation under the Companies Act 2006 see PARA 102 et seq.

10 Companies Act 2006 ss 1094(3)(a)(ii), 1096(3). As to change of a company's name see PARAS 217-219.

11 Companies Act 2006 ss 1094(3)(a)(iii), 1096(3). As to company re-registration and its effects generally see PARA 167 et seq.

- 12 Companies Act 2006 ss 1094(3)(a)(iv), 1096(3). As to becoming a community interest company see PARA 82; and as to ceasing to be a community interest company see PARA 193.
- 13 Companies Act 2006 ss 1094(3)(a)(v), 1096(3). As to reduction of share capital generally see PARA 1173 et seq. As to the meaning of 'share capital' see PARA 1042.
- 14 Companies Act 2006 ss 1094(3)(a)(vi), 1096(3). As to changes in the situation of a company's registered office see PARA 129.
- 15 Companies Act 2006 ss 1094(3)(a)(vii), 1096(3). As to the registration of charges see PARA 1277 et seq.
- 16 Companies Act 2006 ss 1094(3)(a)(viii), 1096(3). As to the dissolution of a company see PARA 1521 et seq.
- 17 Companies Act 2006 s 1096(3).
- 18 Companies Act 2006 s 1096(3)(a).
- 19 Companies Act 2006 s 1096(3)(b).
- 20 Companies Act 2006 s 1096(4).
- 21 Companies Act 2006 s 1096(5).
- 22 Ie under the Companies Act 2006 s 1096 (see the text and notes 1-8, 17-21): see s 1097(1).
- 23 Companies Act 2006 s 1097(1). Further to heads (i) and (iii) in the text, any general duty or power of the registrar with respect to annotation of the register is subject to the court's power under s 1097 to direct either that a note be removed from the register (ie under head (i) in the text), or that no note is to be made of the removal of material that is the subject of the court's order (ie under head (iii) in the text): see s 1081(5); and PARA 147. Further to head (ii) in the text, any court order made under s 1096 that the court has directed under s 1097 is not to be made available for public inspection must itself not be made available by the registrar of companies for public inspection: see s 1087(1)(g); and PARA 150.
- 24 As to the provisions that authorise or require the registrar to annotate the register see PARA 147.
- 25 Companies Act 2006 s 1097(2). See note 23.
- 26 Companies Act 2006 s 1097(3). See note 23. As to the inspection and copying of records kept by the registrar see PARA 149; and as to material that must not be made available by the registrar of companies for public inspection generally see PARA 150 et seq.
- 27 Companies Act 2006 s 1097(4)(a). See note 23.
- 28 Companies Act 2006 s 1097(4)(b). See note 23.
- 29 Ie under the Companies Act 2006 s 1097 (see the text and notes 22-28): see s 1097(5).
- 30 Companies Act 2006 s 1097(5).
- 31 Companies Act 2006 s 1097(5)(a)(i). As to the notes mentioned in head (A) of the text see head (iii) in the text.
- 32 Companies Act 2006 s 1097(5)(a)(ii).
- 33 Companies Act 2006 s 1097(5)(a).
- 34 Companies Act 2006 s 1097(5)(b).

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162. Public notice of removal of certain material from the register.

The registrar of companies¹ must cause to be published in the Gazette², or in accordance with the provisions governing alternative means of giving public notice³, notice of the removal from the register⁴ of any document⁵ subject to the Directive disclosure requirements⁶ or of any material derived from such a document⁷. The notice must state the name⁸ and registered number⁹ of the company, the description of document and the date of receipt¹⁰.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16. As to the application of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 163 et seq) see PARA 131 note 1.

2 As to the meaning of the 'Gazette' see PARA 138 note 2.

3 In accordance with the alternative means provided by the Companies Act 2006 s 1116 (see PARA 138): see s 1098(1).

4 As to the meaning of the 'register' see PARA 146. As to the provisions that authorise or require the registrar to remove material from the register see PARA 150 et seq.

5 As to the meaning of 'document' for these purposes see PARA 141 note 2.

6 As to the Directive disclosure requirements see the Companies Act 2006 s 1078; and PARA 144.

7 Companies Act 2006 s 1098(1).

8 As to company names and trading names generally see PARA 196 et seq.

9 As to a company's registered number see the Companies Act 2006 ss 1066, 1067; and PARAS 139, 140.

10 Companies Act 2006 s 1098(2).

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G. THE REGISTRAR'S INDEX OF NAMES

163. Registrar's index of company names.

The registrar of companies¹ must keep an index (called the 'registrar's index of company names') of the names of the following companies and other bodies²:

- 316 (1) UK-registered companies³;
- 317 (2) any body to which any provision of the Companies Acts applies by virtue of regulations⁴ that govern unregistered companies⁵; and
- 318 (3) overseas companies⁶ that have registered particulars with the registrar⁷, other than companies that appear to the registrar not to be required to do so⁸;
- 319 (4) limited partnerships registered in the United Kingdom⁹;
- 320 (5) limited liability partnerships incorporated in the United Kingdom¹⁰;
- 321 (6) European Economic Interest Groupings registered in the United Kingdom¹¹;
- 322 (7) open-ended investment companies authorised in the United Kingdom¹²;
- 323 (8) societies registered under the Industrial and Provident Societies Act 1965 or the Industrial and Provident Societies Act (Northern Ireland) 1969¹³.

Any person may inspect the registrar's index of company names¹⁴.

The Secretary of State¹⁵ may by order¹⁶ amend the list at heads (4) to (8) above¹⁷ either by the addition of any description of body, or by the deletion of any description of body¹⁸; and the Secretary of State may by regulations¹⁹ amend the enactments²⁰ relating to any description of body for the time being within heads (4) to (8) above²¹, so as to²²:

- 324 (a) require the registrar to be provided with information as to the names of bodies registered, incorporated, authorised or otherwise regulated under those enactments²³; and
- 325 (b) make provision in relation to such bodies corresponding to that made by the Companies Act 2006 in relation to company names which are the same as, or similar to, an existing company name²⁴.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16. As to the application of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 164 et seq) see PARA 131 note 1.

2 Companies Act 2006 s 1099(1). As to provision made to amend the list in s 1099(3) (see heads (4) to (8) in the text) see the text and notes 15-24.

3 Companies Act 2006 s 1099(2)(a). As to the meaning of 'UK-registered company' see PARA 24.

4 Ie regulations made under the Companies Act 2006 s 1043 (see PARA 1665): see s 1099(2)(b).

5 Companies Act 2006 s 1099(2)(b). As to the meaning of 'unregistered company' see PARA 1665.

6 As to the meaning of 'overseas company' see PARA 1824.

7 Ie under the Companies Act 2006 s 1046 (see PARA 1826): see s 1099(2)(c).

8 Companies Act 2006 s 1099(2)(c).

9 Companies Act 2006 s 1099(3)(a). As to limited partnerships registered in the United Kingdom see **PARTNERSHIP** vol 79 (2008) PARA 218 et seq. As to the meaning of 'United Kingdom' see PARA 1 note 5.

10 Companies Act 2006 s 1099(3)(b). As to limited liability partnerships incorporated in the United Kingdom see **PARTNERSHIP** vol 79 (2008) PARA 234 et seq.

11 Companies Act 2006 s 1099(3)(c). As to European Economic Interest Groupings registered in the United Kingdom see PARAS 1631, 1632.

12 Companies Act 2006 s 1099(3)(d). As to open-ended investment companies authorised in the United Kingdom see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 621 et seq.

13 Companies Act 2006 s 1099(3)(e). As to societies registered under the Industrial and Provident Societies Act 1965 see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2410 et seq.

14 Companies Act 2006 s 1100.

As to fees payable in respect of the performance of the registrar's functions in relation to the provision of copies of a page of the registrar's index of company names see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 4, Sch 2. The fees prescribed in relation to Sch 2 paras 7(a), 8(a) and 10(a) are not payable in respect of any month for which the applicant pays a fee to the registrar for subscription to Companies House Direct, Extranet or XML (those terms are defined in Sch 2 para 1) under regulations providing for the payment of fees in respect of the functions of the registrar in relation to the inspection, or provision of copies, of documents kept by the registrar relating to European Economic Interest Groupings and limited partnerships: reg 4A (added by SI 2009/2439).

15 As to the Secretary of State see PARA 6 et seq.

16 Any such order is subject to negative resolution procedure (ie the statutory instrument containing the order is subject to annulment in pursuance of a resolution of either House of Parliament): see the Companies Act 2006 ss 1099(5), 1289. As to the making of orders under the Companies Act 2006 generally see ss 1288-1292. At the date at which this volume states the law, no such order had been made under s 1099.

17 It may amend the Companies Act 2006 s 1099(3) (ie the list of bodies other than companies whose names are to be entered in the registrar's index) (see heads (4) to (8) in the text): see s 1099(4).

18 Companies Act 2006 s 1099(4).

19 Regulations under the Companies Act 2006 s 1101 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 1101(2), 1290. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. As to the regulations so made see the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009/1804; and **PARTNERSHIP**.

20 As to the meaning of 'enactment' see PARA 17 note 2.

21 It is within the Companies Act 2006 s 1099(3) (bodies other than companies whose names are to be entered in the registrar's index) (see heads (4) to (8) in the text): see s 1101(1).

22 Companies Act 2006 s 1101(1).

23 Companies Act 2006 s 1101(1)(a).

24 Companies Act 2006 s 1101(1)(b). Head (b) in the text refers specifically to the provisions of s 66 (company name not to be the same as another in the index) (see PARA 205) and ss 67-68 (power to direct change of company name in case of similarity to existing name) (see PARA 205): see s 1101(1)(b). As to restrictions on the use of company names and trading names generally see PARA 196 et seq.

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H. LANGUAGE REQUIREMENTS

164. Translation and transliteration requirements relating to documents.

In relation to all documents¹ required to be delivered to the registrar of companies² under any provision of the Companies Acts, or of the Insolvency Act 1986³, provision has been made for⁴:

- 326 (1) documents to be drawn up and delivered in English⁵;
- 327 (2) documents relating to Welsh companies⁶;
- 328 (3) documents that may be drawn up and delivered in other languages⁷; and
- 329 (4) certified translations⁸.

Accordingly, the general rule is that all documents required to be delivered to the registrar must be drawn up and delivered in English⁹. This is subject to the provisions listed in heads (2) and (3) above¹⁰.

The following documents¹¹, namely:

- 330 (a) agreements required to be forwarded to the registrar¹² because they affect the company's constitution¹³;

- 331 (b) documents required to be delivered¹⁴ under the provisions relating to companies included in the accounts of a larger group¹⁵;
- 332 (c) instruments or copy instruments required to be delivered¹⁶ under the provisions relating to company charges¹⁷;
- 333 (d) documents of any other description specified in regulations made by the Secretary of State¹⁸,

may be drawn up and delivered to the registrar in a language other than English, but when delivered to the registrar they must be accompanied by a certified translation into English¹⁹.

A company may deliver to the registrar one or more certified translations of any document relating to the company that is or has been delivered to the registrar²⁰. The Secretary of State may by regulations²¹ specify the languages, and the descriptions of document, in relation to which this facility is available²². The power of the registrar to impose requirements as to the form and manner of delivery²³ includes power to impose requirements as to the identification of the original document and the delivery of the translation in a form and manner enabling it to be associated with the original²⁴.

Names and addresses in a document delivered to the registrar must contain only letters, characters and symbols (including accents and other diacritical marks) that are permitted²⁵. The Secretary of State may make provision by regulations²⁶, as to the letters, characters and symbols (including accents and other diacritical marks) that are permitted²⁷, and permitting or requiring the delivery of documents in which names and addresses have not been transliterated into a permitted form²⁸.

Where a name or address is or has been delivered to the registrar in a permitted form using other than Roman characters, the company (or other body) to which the document relates may deliver to the registrar a transliteration into Roman characters²⁹. The power of the registrar to impose requirements as to the form and manner of delivery³⁰ includes power to impose requirements as to the identification of the original document and the delivery of the transliteration in a form and manner enabling it to be associated with the original³¹.

The Secretary of State may make provision by regulations³² requiring the certification of transliterations and prescribing the form of certification³³; and different provision may be made for compulsory and voluntary transliterations³⁴.

1 As to the meaning of 'document' for these purposes see PARA 141 note 2.

2 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to the meaning of references to delivering a document for these purposes see PARA 141 note 2. As to the application of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 165 et seq) see PARA 131 note 1.

3 As to the Insolvency Act 1986 see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 1 et seq.

4 Companies Act 2006 s 1102(1). The Secretary of State may make provision by regulations applying all or any of the provisions listed at heads (1) to (4) in the text, with or without modifications, in relation to documents delivered to the registrar under any other enactment: s 1102(2). Regulations made under s 1102 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 1102(4), 1289. As to the meaning of 'enactment' see PARA 17 note 2. As to the Secretary of State see PARA 6. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. See also the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974, which have been made for the purposes of implementing European Parliament and EC Council Directive 2005/56 of 26 October 2005 (OJ L310, 25.11.2005, p 1) on cross-border mergers of limited liability companies (as to which see PARA 23).

5 Companies Act 2006 s 1102(3). Head (1) in the text refers to the provision made by s 1103 (see the text and notes 9-10): see s 1102(3).

6 Companies Act 2006 s 1102(3). Head (2) in the text refers to the provision made by s 1104 (see PARA 165): see s 1102(3). As to the meaning of 'Welsh company' see PARA 129 note 3.

7 Companies Act 2006 s 1102(3). Head (3) in the text refers to the provision made by s 1105 (see the text and notes 11-19): see s 1102(3).

8 Companies Act 2006 s 1102(3). Head (4) in the text refers to the provision made by s 1107: see s 1102(3). For the purposes of Pt 35 (ss 1059A-1120) (registrar of companies) (see PARAS 135 et seq, 165 et seq), a 'certified translation' means a translation certified to be a correct translation: s 1107(1). In the case of any discrepancy between the original language version of a document and a certified translation, the company may not rely on the translation as against a third party, but a third party may rely on the translation unless the company shows that the third party had knowledge of the original: s 1107(2). For these purposes, a 'third party' means a person other than the company or the registrar: s 1107(3).

9 Companies Act 2006 s 1103(1).

10 Companies Act 2006 s 1103(2).

11 Companies Act 2006 s 1105(1).

12 I.e. documents required to be delivered under the Companies Act 2006 Pt 3 Ch 3 (ss 29-30) (resolutions and agreements affecting a company's constitution) (see PARA 231): see s 1105(2)(a). As to the meaning of references to a company's constitution see PARA 227.

13 Companies Act 2006 s 1105(2)(a).

14 I.e. documents required to be delivered under the Companies Act 2006 s 400(2)(e) (exemption for company included in EEA group accounts of larger group) (see PARA 781) or s 401(2)(f) (exemption for company included in non-EEA group accounts of larger group) (see PARA 782): see s 1105(2)(b).

15 Companies Act 2006 s 1105(2)(b).

16 I.e. documents required to be delivered under the Companies Act 2006 Pt 25 (ss 860-894) (company charges) (see PARA 1277 et seq): see s 1105(2)(c).

17 Companies Act 2006 s 1105(2)(c).

18 Companies Act 2006 s 1105(2)(d). Regulations made under s 1105 are subject to negative resolution procedure (i.e. the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 1105(3), 1289. In exercise of the powers conferred by s 1105(2)(d), the Secretary of State has made the Companies (Registrar, Languages and Trading Disclosures) Regulations 2006, SI 2006/3429, reg 4 (applied by virtue of the Interpretation Act 1978 s 17(2)(b)); the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 7; the Overseas Companies Regulations 2009, SI 2009/1801, reg 78; and the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, SI 2009/1917, reg 27; and see the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974 (as to which see note 4).

19 Companies Act 2006 s 1105(1). However, s 1105 does not apply to a document relating to a Welsh company that is drawn up and delivered in Welsh: see s 1104(5); and PARA 165. See also note 8.

20 Companies Act 2006 s 1106(1). The provisions of s 1106 do not apply where the original document was delivered to the registrar before 1 January 2007 (i.e. the day on which s 1106 came into force: see the Companies Act 2006 (Commencement No 1, Transitional Provisions and Savings) Order 2006, SI 2006/3428, art 2(1)(g)): Companies Act 2006 s 1106(6). See also note 8.

21 Regulations made under the Companies Act 2006 s 1106 are subject to negative resolution procedure (i.e. the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 1106(5), 1289. The regulations must provide that the facility mentioned in s 1106 is available as from 1 January 2007 (as to the significance of this date see PARA 141 note 16), in relation to all the official languages of the European Union, and in relation to all documents subject to the Directive disclosure requirements (see s 1078; and PARA 144): s 1106(3). In exercise of the powers conferred by s 1106(2), the Secretary of State has made the Companies (Registrar, Languages and Trading Disclosures) Regulations 2006, SI 2006/3429; and see the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974 (as to which see note 4). Accordingly, the facility described in the Companies Act 2006 s 1106 is available in relation to all the official languages of the European Union, and all documents subject to the

Directive disclosure requirements: Companies (Registrar, Languages and Trading Disclosures) Regulations 2006, SI 2006/3429, reg 5.

22 Companies Act 2006 s 1106(2). As to the regulations so made see note 21.

23 As to this power see PARA 141.

24 Companies Act 2006 s 1106(4).

25 Companies Act 2006 s 1108(1).

The provisions of the Companies Act 2006 ss 1108-1110 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 17: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

26 Regulations made under the Companies Act 2006 s 1108 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 1108(3), 1289. In exercise of the powers conferred by s 1108(2), the Secretary of State has made the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 8, Schedule (reg 8 amended by SI 2009/2399; SI 2009/2400).

27 Companies Act 2006 s 1108(2)(a).

28 Companies Act 2006 s 1108(2)(b).

29 Companies Act 2006 s 1109(1) (amended by SI 2009/1802).

30 As to this power see PARA 141.

31 Companies Act 2006 s 1109(2).

32 Regulations made under the Companies Act 2006 s 1110 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 1110(3), 1289. At the date at which this volume states the law, no such regulations had been made under s 1110.

33 Companies Act 2006 s 1110(1).

34 Companies Act 2006 s 1110(2).

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165. Documents relating to Welsh companies.

In relation to all documents¹ required to be delivered to the registrar of companies² under any provision of the Companies Acts, or of the Insolvency Act 1986³, provision has been made⁴ to allow for such documents, where they relate to a Welsh company⁵, to be drawn up and delivered to the registrar in Welsh⁶.

On delivery to the registrar, any such document must be accompanied by a certified translation⁷ into English, unless it is: (1) of a description excepted from that requirement by regulations made by the Secretary of State⁸; or (2) in a form prescribed⁹ in Welsh (or partly in Welsh and partly in English)¹⁰.

Where a document is properly delivered to the registrar in Welsh without a certified translation into English, the registrar must obtain such a translation if the document is to be available for public inspection¹¹. (The translation is treated as if delivered to the registrar in accordance with the same provision as the original)¹².

A Welsh company may deliver to the registrar a certified translation into Welsh of any document in English that relates to the company and is or has been delivered to the registrar¹³.

- 1 As to the meaning of 'document' for these purposes see PARA 141 note 2.
- 2 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to the meaning of references to delivering a document for these purposes see PARA 141 note 2. As to the application of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARAS 131, 135 et seq, 166) see PARA 131 note 1.
- 3 As to the Insolvency Act 1986 see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 1 et seq.
- 4 See the Companies Act 2006 s 1102(1); and PARA 164.
- 5 As to the meaning of 'Welsh company' see PARA 129 note 3.
- 6 See the Companies Act 2006 s 1104(1). Accordingly, s 1105 (which requires certified translations into English of documents delivered to the registrar in another language) (see PARA 164) does not apply to a document relating to a Welsh company that is drawn up and delivered in Welsh: s 1104(5).
- 7 As to the meaning of 'certified translation' see PARA 164 note 8.
- 8 Companies Act 2006 s 1104(2)(a). As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6. In exercise of the power conferred by s 1104(2)(a), the Secretary of State has made the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 6.
- 9 I.e. by virtue of the Welsh Language Act 1993 s 26 (power to prescribe Welsh version) (see **STATUTES** vol 44(1) (Reissue) PARA 1368): see the Companies Act 2006 s 1104(2)(b). In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167.
- 10 Companies Act 2006 s 1104(2)(b).
- 11 Companies Act 2006 s 1104(3).
- 12 Companies Act 2006 s 1104(3).
- 13 Companies Act 2006 s 1104(4).

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I. ENFORCEMENT OF DUTY TO MAKE RETURNS

166. Enforcement of company's duty to make returns.

Where a company¹ has made default in complying with any obligation under the Companies Acts either to deliver a document² to the registrar of companies³ or to give notice to him of any matter⁴, the registrar, or any member⁵ or creditor of the company, may give notice to the company requiring it to comply with the obligation⁶.

If the company fails to make good the default within 14 days after the service of a notice requiring it to do so, the registrar, or any member or creditor of the company, may apply to the

court⁷ for an order directing the company, and any specified officer⁸ of it, to make good the default within a specified time⁹. Any such order may provide that all costs of and incidental to the application are to be borne by the company or by any officers of the company responsible for the default¹⁰.

Nothing in these enforcement provisions¹¹ affects the operation of any enactment making it an offence, or imposing a civil penalty, in respect of any such default¹².

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and see PARA 131 note 1. As to the meaning of the 'Companies Acts' see PARA 16. As to the application of the Companies Act 2006 Pt 35 (ss 1059A-1120) (see also PARA 131, 135 et seq) see PARA 131 note 1.

2 As to the meaning of 'document' for these purposes see PARA 141 note 2.

3 Companies Act 2006 s 1113(1)(a). As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to the meaning of references to delivering a document for these purposes see PARA 141 note 2.

4 Companies Act 2006 s 1113(1)(b).

5 As to the meaning of 'member' see PARA 321. As to membership of a company generally see PARA 321 et seq.

6 Companies Act 2006 s 1113(2). As to the service of documents on a company generally see PARA 671 et seq; and as to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

7 As to applications made under the Companies Act 2006 see generally PARA 305.

8 As to the meaning of 'officer' generally under the Companies Act 2006 see PARA 607.

9 Companies Act 2006 s 1113(3). For a successful application for attachment by the registrar based on failure to comply with an order made under these provisions see *Re George Dowman Ltd* (1960) Times, 26 July.

10 Companies Act 2006 s 1113(4).

11 Ie nothing in the Companies Act 2006 s 1113: see s 1113(5).

12 Companies Act 2006 s 1113(5). As to the making of disqualification orders under the Company Directors Disqualification Act 1986 s 3 following the making of an order under the Companies Act 2006 s 1113 (formerly the Companies Act 1985 s 713) see PARA 1581. Failure to deliver documents to the registrar of companies as required may give the registrar reasonable cause to believe that the company is defunct, in which case the company may be struck off the register: see PARA 1521 et seq.

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(4) RE-REGISTRATION AND ITS EFFECTS

(i) In general

167. Alteration of status by re-registration.

A company¹ may, by re-registration under the Companies Act 2006², alter its status³:

334 (1) from a private company⁴ to a public company⁵;

- 335 (2) from a public company to a private company⁶;
- 336 (3) from a private limited company⁷ to an unlimited company⁸;
- 337 (4) from an unlimited private company to a limited company⁹;
- 338 (5) from a public company to an unlimited private company¹⁰.

In accordance with Part 2 of the Companies (Audit, Investigations and Community Enterprise) Act 2004¹¹, an existing company may become a community interest company¹² and a community interest company may become a charity¹³ or an industrial and provident society¹⁴.

It is not possible for a company limited by shares¹⁵ to alter its status to a company limited by guarantee¹⁶, or vice versa.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 I.e. under the Companies Act 2006 Pt 7 (ss 89-111) (see also PARA 168 et seq): see s 89. As to fees payable under Pt 7 see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(b).

3 Companies Act 2006 s 89.

4 As to the meaning of 'private company' see PARA 102.

5 Companies Act 2006 s 89(a). Head (1) in the text refers to the provisions of ss 90-96 (see PARA 168 et seq): see s 89(a). As to the meaning of 'public company' see PARA 102.

6 Companies Act 2006 s 89(b). Head (2) in the text refers to the provisions of ss 97-101 (see PARA 173 et seq): see s 89(b).

7 As to the meaning of 'limited company' see PARA 102.

8 Companies Act 2006 s 89(c). Head (3) in the text refers to the provisions of ss 102-104 (see PARAS 176-177): see s 89(c). As to the meaning of 'unlimited company' see PARA 102.

9 Companies Act 2006 s 89(d). Head (4) in the text refers to the provisions of ss 105-108 (see PARA 178 et seq): see s 89(d).

10 Companies Act 2006 s 89(e). Head (5) in the text refers to the provisions of ss 109-111 (see PARAS 181-182): see s 89(e).

11 I.e. in accordance with the Companies (Audit Investigations and Community Enterprise) Act 2004 Pt 2 (ss 26-63) (community interest companies): see s 26(2); the Companies Act 2006 s 6(1); and PARA 82 et seq.

12 I.e. in accordance with the Companies (Audit Investigations and Community Enterprise) Act 2004 ss 37, 38: see PARA 191.

13 I.e. in accordance with the Companies (Audit Investigations and Community Enterprise) Act 2004 ss 54, 55: see PARA 194.

14 I.e. in accordance with the Companies (Audit Investigations and Community Enterprise) Act 2004 s 56: see PARA 195.

15 As to the meaning of 'company limited by shares' see PARA 102. See also PARA 78 et seq. As to the meaning of 'share' see PARA 1042. As to share capital generally see PARA 1042 et seq.

16 As to the meaning of 'company limited by guarantee' see PARA 102. See also PARA 79.

Public Company/168. Procedure on application to re-register a private company as a public company.

(ii) Private Company becoming a Public Company

168. Procedure on application to re-register a private company as a public company.

A private company¹ (whether limited² or unlimited³) may be re-registered under the Companies Act 2006⁴ as a public company limited by shares⁵ provided that⁶:

- 339 (1) a special resolution⁷ that it should be so re-registered is passed⁸;
- 340 (2) the following conditions are met⁹, namely: (a) that the company has a share capital¹⁰; (b) that the statutory requirements are met¹¹ as regards its share capital¹²; (c) that the statutory requirements are met¹³ as regards its net assets¹⁴; (d) if the provisions regarding the recent allotment¹⁵ of shares for a non-cash consideration apply¹⁶, that the statutory requirements of those provisions are met¹⁷; and (e) that the company has not previously been re-registered as unlimited¹⁸; and
- 341 (3) an application for re-registration is delivered to the registrar of companies¹⁹, together with the other necessary documents²⁰, and a statement of compliance²¹.

An application for re-registration as a public company must contain: (i) a statement of the company's proposed name on re-registration²²; and (ii) in the case of a company without a secretary²³, a statement of the company's proposed secretary²⁴. The statement of the company's proposed secretary must contain the required particulars of the person who is or the persons who are to be the secretary or joint secretaries of the company²⁵; and it must also contain a consent by the person named as secretary, or each of the persons named as joint secretaries, to act in the relevant capacity²⁶.

The application must be accompanied by:

- 342 (A) a copy of the special resolution²⁷ that the company should re-register as a public company²⁸;
- 343 (B) a copy of the company's articles of association²⁹ as proposed to be amended³⁰;
- 344 (C) a copy of the balance sheet and of any other documents that are required³¹ regarding the company's net assets³²; and
- 345 (D) if the provisions regarding the recent allotment of shares for a non-cash consideration apply³³, a copy of the valuation report³⁴, if any³⁵.

The statement of compliance that is required to be delivered under head (3) above together with the application is a statement that the statutory requirements³⁶ as to re-registration as a public company have been complied with³⁷. The registrar may accept the statement of compliance as sufficient evidence that the company is entitled to be re-registered as a public company³⁸.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'private company' see PARA 102.

2 As to the meaning of 'limited company' see PARA 102.

3 As to the meaning of 'unlimited company' see PARA 102.

4 le under the Companies Act 2006 Pt 7 (ss 89-111) (see PARAS 167, 169 et seq): see s 89; and PARA 167. As to fees payable under Pt 7 see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(b).

5 As to the meanings of 'public company' and 'company limited by shares' see PARA 102. As to the meaning of 'share' see PARA 1042.

6 Companies Act 2006 s 90(1).

7 As to the meaning of 'special resolution' see PARA 614.

8 Companies Act 2006 s 90(1)(a).

9 Companies Act 2006 s 90(1)(b).

10 Companies Act 2006 s 90(2)(a). As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

11 le that the requirements of the Companies Act 2006 s 91 (see PARA 169) are met: see s 90(2)(b). References in the company law provisions of the Companies Act 2006 to the requirements of that Act include the requirements of regulations and orders made under it: s 1172. As to the meaning of the 'company law provisions' of the Companies Act 2006 see PARA 16 note 6.

12 Companies Act 2006 s 90(2)(b).

13 le that the requirements of the Companies Act 2006 s 92 (see PARA 170) are met: see s 90(2)(c).

14 Companies Act 2006 s 90(2)(c).

15 As to the meaning of 'allotted' shares see PARA 1091.

16 le if the Companies Act 2006 s 93 (see PARA 171) applies: see s 90(2)(d). As to non-cash consideration for shares see PARA 1120 et seq.

17 Companies Act 2006 s 90(2)(d).

18 Companies Act 2006 s 90(2)(e).

19 le in accordance with the requirements of the Companies Act 2006 s 94 (see the text and notes 22-28): see s 90(1)(c). As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to the meanings of 'document' and of references to delivering a document for these purposes see PARA 141 note 2.

20 le the other documents required by the Companies Act 2006 s 94 (see the text and notes 22-28): see s 90(1)(c).

21 Companies Act 2006 s 90(1)(c).

22 Companies Act 2006 s 94(1)(a). The company must make such changes in its name as are necessary in connection with its becoming a public company: s 90(3)(a). As to the change of a company's name see PARAS 217-219. As to the required indications in the name of a public limited company see PARA 200 et seq.

23 There is no requirement for a private company to have a company secretary: see PARA 601.

24 Companies Act 2006 s 94(1)(b).

25 Companies Act 2006 s 95(1). The required particulars are the particulars that will be required to be stated in the company's register of secretaries (see ss 277-279; and PARA 605): s 95(2).

26 Companies Act 2006 s 95(3). If all the partners in a firm are to be joint secretaries, consent may be given by one partner on behalf of all of them: see s 95(3). As to the meaning of 'firm' see PARA 112 note 14.

27 le unless a copy has already been forwarded to the registrar under the Companies Act 2006 Pt 3 Ch 3 (ss 29-30) (resolutions and agreements affecting a company's constitution) (see PARA 231): see s 94(2)(a). As to the meaning of references to a company's constitution see PARA 227.

28 Companies Act 2006 s 94(2)(a).

29 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

30 Companies Act 2006 s 94(2)(b). The company must make such changes in its articles as are necessary in connection with its becoming a public company: s 90(3)(b). If the company is unlimited, it must also make such changes in its articles as are necessary in connection with its becoming a company limited by shares: s 90(4). As to the amendment of articles of association see PARA 232 et seq.

31 Ie the other documents required by the Companies Act 2006 s 92(1) (see PARA 170): see s 94(2)(c).

32 Companies Act 2006 s 94(2)(c).

33 Ie if the Companies Act 2006 s 93 (see PARA 171) applies: see s 94(2)(d).

34 Ie under the Companies Act 2006 s 93(2)(a) (see PARA 171): see s 94(2)(d).

35 Companies Act 2006 s 94(2)(d).

36 Ie the requirements of the Companies Act 2006 Pt 7 (see PARAS 167, 169 et seq): see s 94(3).

37 Companies Act 2006 s 94(3).

38 Companies Act 2006 s 94(4).

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169. Additional requirements relating to share capital.

At the time that the special resolution is passed¹, that a private company² should be re-registered as a public company³, the following requirements with respect to its share capital⁴ must be met⁵:

346 (1) the nominal value⁶ of the company's allotted share capital⁷ must be not less than the authorised minimum⁸;

347 (2) each of the company's allotted shares must be paid up⁹ at least as to one-quarter of the nominal value of that share and the whole of any premium on it¹⁰;

348 (3) if any shares in the company or any premium on them have been fully or partly paid up by an undertaking given by any person that he or another should do work or perform services (whether for the company or any other person), the undertaking must have been performed or otherwise discharged¹¹;

349 (4) if shares have been allotted as fully or partly paid up as to their nominal value or any premium on them otherwise than in cash¹², and the consideration for the allotment consists of or includes an undertaking to the company (other than one to which the condition in head (3) above applies)¹³, then either the undertaking must have been performed or otherwise discharged¹⁴, or there must be a contract between the company and some person pursuant to which the undertaking is to be performed within five years from the time the special resolution for re-registration¹⁵ is passed¹⁶.

For the purpose of determining whether the requirements in heads (2), (3) and (4) above are met, the following shares in the company may be disregarded¹⁷:

- 350 (a) shares which were allotted before 22 June 1982¹⁸, in the case of a company then registered in Great Britain¹⁹;
- 351 (b) shares which were allotted in pursuance of an employees' share scheme²⁰ and by reason of which the company would, but for this provision, be precluded under head (2) above (but not otherwise) from being re-registered as a public company²¹.

Shares disregarded under head (a) or head (b) above are to be treated as not forming part of the allotted share capital for the purposes of head (1) above²².

A company must not be re-registered as a public company if it appears to the registrar of companies²³ that²⁴: (i) the company has resolved to reduce its share capital²⁵; (ii) the reduction: (A) is made under the provisions²⁶ that allow a limited company to pass a resolution redenominating some or all of its shares (that is, for the purpose of adjusting the nominal values of the redenominated shares and so obtain values that are, in the opinion of the company, more suitable)²⁷; or (B) is supported by a statutory solvency statement²⁸; or (C) has been confirmed by an order of the court²⁹; and (iii) the effect of the reduction is, or will be, that the nominal value of the company's allotted share capital is below the authorised minimum³⁰.

1 Ie the special resolution required by the Companies Act 2006 s 90(1)(a): see PARA 168. As to the meaning of 'special resolution' see PARA 614.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'private company' see PARA 102.

3 As to the procedure on application to re-register a private company as a public company see PARA 168. As to the meaning of 'public company' see PARA 102.

4 As to the meanings of 'share' and 'share capital' see PARA 1042.

5 Companies Act 2006 s 91(1).

6 As to the nominal value of shares see PARA 1044.

7 As to the meaning of 'allotted share capital' see PARA 1091. Shares disregarded under the Companies Act 2006 s 91(2) (see the text and notes 17-21) are treated as not forming part of the allotted share capital for the purposes of s 91(1)(a): see s 91(4); and the text and note 22.

8 Companies Act 2006 s 91(1)(a). As to the meaning of 'authorised minimum' see PARA 75.

9 As to payments for shares and paid up shares see PARA 1048 et seq. As to the meaning of 'allotted shares' see PARA 1045.

10 Companies Act 2006 s 91(1)(b).

11 Companies Act 2006 s 91(1)(c).

12 As to the meaning of 'cash' see PARA 564 note 6.

13 Companies Act 2006 s 91(1)(d).

14 Companies Act 2006 s 91(1)(d)(i).

15 See note 1.

16 Companies Act 2006 s 91(1)(d)(ii).

17 Companies Act 2006 s 91(2).

18 Ie before the date which marked the end of the transitional period for which provision was made by the Companies Act 1980: see s 87(1) (repealed).

19 Companies Act 2006 s 91(2)(a). As to the meaning of 'Great Britain' see PARA 1 note 5. However, no more than one-tenth of the nominal value of the company's allotted share capital is to be disregarded under s 91(2)(a): s 91(3). For this purpose, the allotted share capital is treated as not including shares disregarded under s 91(2)(b) (see head (b) in the text): s 91(3).

20 For the purposes of the Companies Acts, an 'employees' share scheme' is a scheme for encouraging or facilitating the holding of shares in, or debentures of, a company, either by or for the benefit of the bona fide employees or former employees of the company, of any subsidiary of the company, or of the company's holding company (or any subsidiary of the company's holding company), or by or for the benefit of the spouses, civil partners, surviving spouses, surviving civil partners, or minor children or step-children of such employees or former employees: Companies Act 2006 s 1166. As to the meaning of 'debenture' see PARA 1299; and as to the meanings of 'holding company' and 'subsidiary' see PARA 25.

21 Companies Act 2006 s 91(2)(b).

22 Companies Act 2006 s 91(4).

23 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to fees payable to the registrar under Pt 7 (ss 89-111) (see PARAS 167 et seq, 170 et seq) see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(b).

24 Companies Act 2006 s 91(5).

25 Companies Act 2006 s 91(5)(a).

26 le under the Companies Act 2006 s 626 (see PARA 1170): see s 91(5)(b)(i).

27 Companies Act 2006 s 91(5)(b)(i).

28 Companies Act 2006 s 91(5)(b)(ii). The text refers to a solvency statement that is made under s 643 (see PARA 1178): see s 91(5)(b)(ii).

29 Companies Act 2006 s 91(5)(b)(iii). The text refers to an order of the court, confirming a reduction in capital, made under s 648 (see PARA 1192 et seq): see s 91(5)(b)(iii).

30 Companies Act 2006 s 91(5)(c).

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170. Additional requirements relating to net assets; meaning of 'unqualified report'.

A private company¹ applying to re-register as a public company² must obtain³:

352 (1) a balance sheet prepared as at a date not more than seven months before the date on which the application to re-register is delivered to the registrar of companies⁴;

353 (2) an unqualified report⁵ by the company's auditor on that balance sheet⁶; and

354 (3) a written statement by the company's auditor that in his opinion at the balance sheet date the amount of the company's net assets was not less than the aggregate of its called-up share capital and undistributable reserves⁷.

Between the balance sheet date and the date on which the application for re-registration is delivered to the registrar, there must be no change in the company's financial position that results in the amount of its net assets becoming less than the aggregate of its called-up share capital and undistributable reserves⁸.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'private company' see PARA 102.

2 As to the meaning of 'public company' see PARA 102. As to the procedure on application to re-register a private company as a public company see PARA 168. As to fees payable to the registrar under the Companies Act 2006 Pt 7 (ss 89-111) (see PARAS 167 et seq, 171 et seq) see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(b).

3 Companies Act 2006 s 92(1).

4 Companies Act 2006 s 92(1)(a). As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

5 For these purposes, an 'unqualified report' means:

78 (1) if the balance sheet was prepared for a financial year of the company, a report stating without material qualification the auditor's opinion that the balance sheet has been properly prepared in accordance with the requirements of the Companies Act 2006 (s 92(3)(a));

79 (2) if the balance sheet was not prepared for a financial year of the company, a report stating without material qualification the auditor's opinion that the balance sheet has been properly prepared in accordance with the provisions of the Companies Act 2006 which would have applied if it had been prepared for a financial year of the company (s 92(3)(b)).

References in the company law provisions of the Companies Act 2006 to the requirements of that Act include the requirements of regulations and orders made under it: s 1172. As to the meaning of the 'company law provisions' of the Companies Act 2006 see PARA 16 note 6. For the purposes of s 92(3), a qualification is material unless the auditor states in his report that the matter giving rise to the qualification is not material for the purpose of determining (by reference to the company's balance sheet) whether at the balance sheet date the amount of the company's net assets was not less than the aggregate of its called-up share capital and undistributable reserves: s 92(5). In Pt 7 (ss 89-111) (see PARAS 167 et seq, 171 et seq), 'net assets' and 'undistributable reserves' have the same meaning as in s 831 (net asset restriction on distributions by public companies) (see PARA 1393): s 92(6). For the purposes of an auditor's report on a balance sheet that was not prepared for a financial year of the company, the provisions of the Companies Act 2006 apply with such modifications as are necessary by reason of that fact: s 92(4). As to the meanings of 'share' and 'share capital' see PARA 1042; and as to the meaning of 'called-up share capital' see PARA 1048. As to the meaning of 'financial year' see PARA 711. As to the meaning of 'balance sheet date' see PARA 718 note 12.

6 Companies Act 2006 s 92(1)(b).

7 Companies Act 2006 s 92(1)(c).

8 Companies Act 2006 s 92(2).

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171. Recent allotment of shares for non-cash consideration.

If shares¹ have been allotted² by the company³ in the period between the date as at which the required balance sheet⁴ is prepared and the passing of the special resolution⁵ that the private company⁶ in question should re-register as a public company⁷, and if those shares were allotted as fully or partly paid up⁸ as to their nominal value⁹ or any premium on them otherwise than in cash¹⁰, then the registrar of companies¹¹ must not entertain an application by the company for re-registration as a public company¹² unless¹³:

355 (1) the consideration for the allotment¹⁴ has been independently valued¹⁵; and

356 (2) the valuer's report has been made to the company (in accordance with such procedure) during the six months immediately preceding the allotment of the shares¹⁶,

or unless the allotment is in connection with either a share exchange¹⁷ or a proposed merger with another company¹⁸.

An allotment is in connection with a share exchange if¹⁹:

357 (a) the shares are allotted in connection with an arrangement²⁰ under which the whole or part of the consideration for the shares allotted is provided by²¹: (i) the transfer to the company allotting the shares of shares (or shares of a particular class) in another company²²; or (ii) the cancellation of shares (or shares of a particular class) in another company²³; and

358 (b) the allotment is open to all the holders of the shares of the other company in question²⁴ (or, where the arrangement applies only to shares of a particular class, to all the holders of the company's shares of that class) to take part in the arrangement in connection with which the shares are allotted²⁵.

It is immaterial, for the purposes of deciding whether an allotment is in connection with a share exchange, whether or not the arrangement in connection with which the shares are allotted involves the issue to the company allotting the shares of shares (or shares of a particular class) in the other company²⁶.

There is a proposed merger with another company²⁷ for these purposes if one of the companies concerned proposes to acquire all the assets and liabilities of the other in exchange for the issue of its shares or other securities to shareholders of the other (whether or not accompanied by a cash payment)²⁸.

1 As to the meaning of 'share' see PARA 1042.

2 As to the meanings of 'allotted shares' see PARA 1091. As to allotment generally see PARA 1088 et seq.

3 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 I.e. the balance sheet required by the Companies Act 2006 s 92 (see PARA 170): see s 93(1)(a).

5 I.e. the special resolution required by the Companies Act 2006 s 90(1)(a): see PARA 168. As to the meaning of 'special resolution' see PARA 614.

6 As to the meaning of 'private company' see PARA 102.

7 Companies Act 2006 s 93(1)(a). As to the meaning of 'public company' see PARA 102.

8 As to payments for shares and paid up shares see PARA 1048.

9 As to the nominal value of shares see PARA 1044.

10 Companies Act 2006 s 93(1)(b). As to the meaning of 'cash' see PARA 564 note 6.

11 As to the meaning of 'registrar of companies' see PARA 131 note 2.

12 As to the procedure on application to re-register a private company as a public company see PARA 168. As to fees payable to the registrar under the Companies Act 2006 Pt 7 (ss 89-111) (see PARAS 167 et seq, 172 et seq) see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(b).

13 Companies Act 2006 s 93(2).

14 For these purposes, the consideration for an allotment does not include any amount standing to the credit of any of the company's reserve accounts, or of its profit and loss account, that has been applied in paying up (to any extent) any of the shares allotted or any premium on those shares: Companies Act 2006 s 93(7)(a).

15 Companies Act 2006 s 93(2)(a). Head (1) in the text refers to the need for the requirements of s 593(1)(a) (see PARA 1120) to have been complied with: see s 93(2)(a). The provisions of ss 1150-1153 (see PARA 1122) apply to the valuation and report required by s 93: s 1149.

16 Companies Act 2006 s 93(2)(a). Head (2) in the text refers to the need for the requirements of s 593(1)(b) (see PARA 1120) to have been complied with: see s 93(2)(b). See note 15.

17 Companies Act 2006 s 93(2)(b)(i). As to a share exchange as mentioned in the text see s 93(3)-(5); and the text and notes 19-26.

18 Companies Act 2006 s 93(2)(b)(ii). As to a proposed merger as mentioned in the text see s 93(6); and the text and notes 27-28.

19 Companies Act 2006 s 93(3).

20 For these purposes, 'arrangement' means any agreement, scheme or arrangement, including an arrangement sanctioned in accordance with the Companies Act 2006 Pt 26 (ss 895-901) (arrangements and reconstructions) (see PARA 1425 et seq) or the Insolvency Act 1986 s 110 (liquidator in voluntary winding up accepting shares as consideration for sale of company's property) (see PARA 1438; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 963): Companies Act 2006 s 93(7)(b).

21 Companies Act 2006 s 93(3)(a).

22 Companies Act 2006 s 93(3)(a)(i). As to classes of shares generally see PARA 1057 et seq.

23 Companies Act 2006 s 93(3)(a)(ii).

24 In determining whether a person is a holder of shares for the purposes of the Companies Act 2006 s 93(3), there must be disregarded shares held by (or by a nominee of) the company allotting the shares, and shares held by (or by a nominee of) the holding company of the company allotting the shares, a subsidiary of the company allotting the shares, or a subsidiary of the holding company of the company allotting the shares: s 93(4). As to the meanings of 'holding company' and 'subsidiary' see PARA 25.

25 Companies Act 2006 s 93(3)(b).

26 Companies Act 2006 s 93(5).

27 For these purposes, 'another company' includes any body corporate: Companies Act 2006 s 93(6). As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5.

28 Companies Act 2006 s 93(6).

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172. Issue of certificate of re-registration as a public company.

If, on an application for re-registration as a public company¹, the registrar of companies² is satisfied that the company is entitled to be so re-registered, the company must be re-registered accordingly³.

The registrar must issue a certificate of incorporation⁴ altered to meet the circumstances of the case⁵; and the certificate must state that it is issued on re-registration and it must state the date on which it is issued⁶. However, the registrar must not issue the certificate if it appears to him that the company has resolved to reduce its share capital⁷ under certain specified statutory

provisions⁸ and that the effect of the reduction is, or will be, that the nominal value⁹ of the company's allotted share capital¹⁰ is below the authorised minimum¹¹.

On the issue to a company of the certificate¹²:

- 359 (1) the company, by virtue of the issue of that certificate, becomes a public company¹³;
- 360 (2) the changes in the company's name and articles take effect¹⁴; and
- 361 (3) where the application contained a statement of the proposed secretary¹⁵, the person or persons named in the statement as secretary or joint secretary of the company are deemed to have been appointed to that office¹⁶.

The certificate is conclusive evidence that the requirements of the Companies Act 2006¹⁷ as to re-registration¹⁸ have been complied with¹⁹.

Where a private company re-registers as a public company, the last statement of capital relating to the company received by the registrar²⁰ under any provision of the Companies Acts becomes subject to the Directive disclosure requirements²¹, and the provisions that require the registrar to give public notice of the receipt of certain documents²² apply as if the statement had been received by the registrar when the re-registration takes effect²³.

1 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the procedure on application to re-register a private company as a public company see PARA 168.

2 As to the meaning of 'registrar of companies' see PARA 131 note 2.

3 Companies Act 2006 s 96(1). The registrar may accept the statement of compliance required by s 90(1)(c) (see PARA 168) as sufficient evidence that the company is entitled to be re-registered as a public company: see s 94(4); and PARA 168. As to fees payable to the registrar under Pt 7 (ss 89-111) (see PARAS 167 et seq, 173 et seq) see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(b).

4 As to a company's certificate of incorporation see PARA 119. As to public notice of the issue of certificates of incorporation see the Companies Act 2006 s 1064; and PARA 138.

5 Companies Act 2006 s 96(2).

6 Companies Act 2006 s 96(3).

7 As to the meanings of 'share' and 'share capital' see PARA 1042.

8 If the reduction is made under the Companies Act 2006 s 626 (see PARA 1170) or is supported by a solvency statement that is made under s 643 (see PARA 1178) or has been confirmed by an order of the court under s 648 (see PARA 1192 et seq): see s 91(5); and PARA 169.

9 As to the nominal value of shares see PARA 1044.

10 As to the meaning of 'allotted share capital' see PARA 1045.

11 See the Companies Act 2006 s 91(5); and PARA 169. As to the meaning of 'authorised minimum' see PARA 75.

12 Companies Act 2006 s 96(4).

13 Companies Act 2006 s 96(4)(a). As to the nature and powers of a public company see PARA 73.

14 Companies Act 2006 s 96(4)(b). An application for re-registration as a public company must contain a statement of the company's proposed name on re-registration and such an application must be accompanied by a copy of the company's articles of association as proposed to be amended: see s 94; and PARA 168. As to the change of a company's name see PARAS 217-219. As to the required indications in the name of a public limited company see PARA 200 et seq. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

15 As to the statement of the proposed secretary see the Companies Act 2006 ss 94, 95; and PARA 168. There is no requirement for a private company to have a company secretary: see PARA 601.

16 Companies Act 2006 s 96(4)(c).

17 References in the company law provisions of the Companies Act 2006 to the requirements of that Act include the requirements of regulations and orders made under it: s 1172. As to the meaning of the 'company law provisions' of the Companies Act 2006 see PARA 16 note 6.

18 Ie under the Companies Act 2006 Pt 7 (see PARAS 167 et seq, 173 et seq): see s 89; and PARA 167.

19 Companies Act 2006 s 96(5).

20 As to the statement of capital and initial shareholdings required in the case of a company limited by shares see PARA 113.

21 As to the Directive disclosure requirements see the Companies Act 2006 s 1078; and PARA 144.

22 Ie the Companies Act 2006 s 1077: see PARA 144.

23 See the Companies Act 2006 s 1078(4); and PARA 144.

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(iii) Public Company becoming a Private Company

173. Procedure on application to re-register a public company as a private limited company.

A public company¹ may be re-registered under the Companies Act 2006² as a private limited company³ if:

- 362 (1) a special resolution⁴ that it should be so re-registered is passed⁵;
- 363 (2) the following conditions are met⁶, namely: (a) where no application⁷ for cancellation of the resolution has been made⁸, that either, having regard to the number of members⁹ who consented to or voted in favour of the resolution, no such application may be made¹⁰, or the period within which such an application could be made has expired¹¹; or (b) where such an application has been made¹², that either the application has been withdrawn¹³, or an order has been made confirming the resolution and a copy of that order has been delivered to the registrar of companies¹⁴.
- 364 (3) an application for re-registration is delivered to the registrar¹⁵, together with the other necessary documents¹⁶, and a statement of compliance¹⁷.

An application for re-registration as a private limited company must contain a statement of the company's proposed name on re-registration¹⁸; and the application must be accompanied by: (i) a copy of the special resolution¹⁹ that the company should re-register as a private limited company²⁰; (ii) a copy of the company's articles of association²¹ as proposed to be amended²².

The statement of compliance that is required to be delivered under head (3) above together with the application is a statement that the statutory requirements²³ as to re-registration as a

private limited company have been complied with²⁴. The registrar may accept the statement of compliance as sufficient evidence that the company is entitled to be re-registered as a private limited company²⁵.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'public company' see PARA 102.

2 le under the Companies Act 2006 Pt 7 (ss 89-111) (see PARAS 167 et seq, 174 et seq): see s 89; and PARA 167. As to fees payable to the registrar under Pt 7 see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(b).

3 As to the meanings of 'private company' and 'limited company' see PARA 102.

4 As to the meaning of 'special resolution' see PARA 614. The court has the power to cancel such a resolution under the Companies Act 2006 s 98 on application by certain specified persons (but not by a person who has consented to or voted in favour of the resolution): see PARA 174.

5 Companies Act 2006 s 97(1)(a). However, where the court makes an order confirming a reduction of a public company's capital which has the effect of bringing the nominal value of its allotted share capital below the authorised minimum, the court may authorise the company to be re-registered as a private company under an expedited procedure which does not require the special resolution as specified in head (1) in the text to be passed: see s 651; and PARA 1194. As to the meaning of 'allotted share capital' see PARA 1045; and as to the meaning of 'authorised minimum' see PARA 75. As to the meaning of 'share' see PARA 1042. As to the nominal value of shares see PARA 1044.

6 Companies Act 2006 s 97(1)(b).

7 le under the Companies Act 2006 s 98 (see PARA 174): see s 97(2)(a).

8 Companies Act 2006 s 97(2)(a).

9 As to the meaning of 'member' see PARA 321. As to membership of a company generally see PARA 321 et seq.

10 Companies Act 2006 s 97(2)(a)(i).

11 Companies Act 2006 s 97(2)(a)(ii).

12 Companies Act 2006 s 97(2)(b).

13 Companies Act 2006 s 97(2)(b)(i).

14 Companies Act 2006 s 97(2)(b)(ii). As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to the meanings of 'document' and of references to delivering a document for these purposes see PARA 141 note 2.

15 le in accordance with the Companies Act 2006 s 100 (see the text and notes 18-25): see s 97(1)(c).

16 le the other documents required by the Companies Act 2006 s 100 (see the text and notes 18-25): see s 97(1)(c).

17 Companies Act 2006 s 97(1)(c).

18 Companies Act 2006 s 100(1). The company must make such changes in its name as are necessary in connection with its becoming a private company limited by shares or, as the case may be, by guarantee: s 97(3)(a). As to the meanings of 'company limited by shares' and 'company limited by guarantee' see PARA 102. As to the change of a company's name see PARAS 217-219. As to the required indications in the name of a private limited company see PARA 200 et seq.

19 le unless a copy has already been forwarded to the registrar under the Companies Act 2006 Pt 3 Ch 3 (ss 29-30) (resolutions and agreements affecting a company's constitution) (see PARA 231): see s 100(2)(a). As to the meaning of references to a company's constitution see PARA 227.

20 Companies Act 2006 s 100(2)(a).

21 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

22 Companies Act 2006 s 100(2)(b). The company must make such changes in its articles as are necessary in connection with its becoming a private company limited by shares or, as the case may be, by guarantee: s 97(3)(b). As to the amendment of articles of association see PARA 232 et seq.

23 In the requirements of the Companies Act 2006 Pt 7 (see PARAS 167 et seq, 174 et seq): see s 100(3). References in the company law provisions of the Companies Act 2006 to the requirements of that Act include the requirements of regulations and orders made under it: s 1172. As to the meaning of the 'company law provisions' of the Companies Act 2006 see PARA 16 note 6.

24 Companies Act 2006 s 100(3).

25 Companies Act 2006 s 100(4).

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174. Application to court to cancel resolution to re-register as private limited company.

Where a special resolution¹ by a public company² to be re-registered as a private limited company³ has been passed⁴, an application to the court for the cancellation of that resolution may be made⁵:

- 365 (1) by the holders of not less in the aggregate than 5 per cent in nominal value⁶ of the company's issued share capital⁷ or any class of it⁸;
- 366 (2) if the company is not limited by shares⁹, by not less than 5 per cent of its members¹⁰; or
- 367 (3) by not less than 50 of the company's members¹¹,

but not by a person who has consented to or voted in favour of the resolution¹².

The application must be made within 28 days after the passing of the resolution and may be made on behalf of the persons entitled to make the application by such one or more of their number as they may appoint for the purpose¹³.

On making such an application¹⁴, the applicants, or the person making the application on their behalf, must immediately give notice to the registrar of companies¹⁵. On being served with notice of any such application, the company must immediately give notice to the registrar¹⁶; and, if a company fails to comply with this requirement, an offence is committed by the company, and by every officer of the company who is in default¹⁷, and any person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹⁸ and (for continued contravention) a daily default fine¹⁹ not exceeding one-tenth of level 3 on the standard scale²⁰.

On the hearing of the application, the court must make an order either cancelling²¹ or confirming²² the resolution²³; and may:

- 368 (a) make that order on such terms and conditions as it thinks fit²⁴;

- 369 (b) adjourn the proceedings, if it thinks fit, in order that an arrangement may be made to the satisfaction of the court for the purchase of the interests of dissentient members²⁵; and
- 370 (c) give such directions and make such orders as it thinks expedient for facilitating or carrying into effect any such arrangement²⁶.

The court's order may, if the court thinks fit, provide for the purchase by the company of the shares of any of its members²⁷ and for the reduction accordingly of the company's capital²⁸, and may make such alteration in the company's articles²⁹ as may be required in consequence of that provision³⁰.

Within 15 days of the making of the court's order on the application, or within such longer period as the court may at any time direct, the company must deliver to the registrar of companies a copy of the order³¹. A company which fails to comply with this requirement, and any officer of it who is in default, commits an offence³² and any person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale and (for continued contravention) a daily default fine not exceeding one-tenth of level 3 on the standard scale³³.

The court's order may, if the court thinks fit, require the company not to make any, or any specified, amendments to its articles without the permission of the court³⁴.

1 As to the meaning of 'special resolution' see PARA 614.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'public company' see PARA 102.

3 As to the meanings of 'private company' and 'limited company' see PARA 102.

4 As required by the Companies Act 2006 s 97 (see PARA 173): see s 98(1). As to the procedure on application to re-register a public company as a private limited company under s 97 see PARA 173.

5 Companies Act 2006 s 98(1). The application should state why the special resolution is being challenged, and it may be struck out where no proper grounds for complaint have been disclosed by the applicant and the court can, on an application for striking out, consider how appropriate is the remedy sought and how reasonable is the conduct of the petitioner in the light of offers made to him to purchase his shares: *Re a Company (No 005685 of 1988), ex p Schwarcz (No 2)* [1989] BCLC 427. As to shares generally see PARA 1042.

6 As to the nominal value of shares see PARA 1044.

7 As to the meanings of 'company having a share capital', 'share' and 'share capital' see PARA 1042. As to the meaning of 'issued share capital' see PARA 1045.

8 Companies Act 2006 s 98(1)(a). For these purposes, any of the company's issued share capital held as treasury shares must be disregarded: see s 98(1)(a). As to treasury shares see PARA 1251. As to classes of shares generally see PARA 1057 et seq.

9 As to the meaning of 'company limited by shares' see PARA 102.

10 Companies Act 2006 s 98(1)(b). As to the meaning of 'member' see PARA 321. As to membership of a company generally see PARA 321 et seq.

11 Companies Act 2006 s 98(1)(c).

12 Companies Act 2006 s 98(1).

13 Companies Act 2006 s 98(2).

14 As under the Companies Act 2006 s 98 (see the text and notes 1-13): see s 99(1).

15 Companies Act 2006 s 99(1). This requirement is without prejudice to any provision of rules of court as to service of notice of the application: see s 99(1). As to the meaning of 'registrar of companies' see PARA 131 note

2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to the meanings of 'document' and of references to delivering a document for these purposes see PARA 141 note 2.

16 Companies Act 2006 s 99(2).

17 Companies Act 2006 s 99(4). As to the meaning of 'officer' generally under the Companies Act 2006 see PARA 607; and as to the meaning of 'officer in default' see PARA 315.

18 As to the standard scale see PARA 1622.

19 As to the meaning of 'daily default fine' see PARA 1622.

20 Companies Act 2006 s 99(5).

21 The court may be disinclined to cancel the resolution where a very large majority of the shareholders have voted in favour of the resolution: see *Re a Company (No 005685 of 1988), ex p Schwarcz (No 2)* [1989] BCLC 427 (94.5% of the shareholders voted in favour).

22 Little guidance is given to the court as to the exercise of its discretion. It would appear from the Companies Act 2006 s 98(4)(a), (b), (5) (see the text and notes 24-25, 27-30) with its reference to the sale of the dissentient's shares that it was envisaged that it might be appropriate to invoke the court's jurisdiction where a dissentient shareholder finds himself locked into a company whereas previously, when the company was a public limited company, he had been able to transfer his shares more freely: see *Re a Company (No 005685 of 1988), ex p Schwarcz (No 2)* [1989] BCLC 427 at 437. Where the court has confirmed the resolution, the company may be re-registered under the Companies Act 2006 s 97: see s 97(2)(b); and PARA 173.

23 Companies Act 2006 s 98(3).

24 Companies Act 2006 s 98(4)(a).

25 Companies Act 2006 s 98(4)(b).

26 Companies Act 2006 s 98(4)(c).

27 The court may be disinclined to do this if a fair offer to purchase the petitioner's shares has been available but not taken up by the petitioner: *Re a Company (No 005685 of 1988), ex p Schwarcz (No 2)* [1989] BCLC 427.

28 Companies Act 2006 s 98(5)(a).

29 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

30 Companies Act 2006 s 98(5)(b). As to the amendment of articles of association see PARA 232 et seq.

31 Companies Act 2006 s 99(3).

32 Companies Act 2006 s 99(4).

33 Companies Act 2006 s 99(5).

34 Companies Act 2006 s 98(6).

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175. Issue of certificate of re-registration as private limited company.

If, on an application for re-registration as a private limited company¹, the registrar of companies² is satisfied that the company is entitled to be so re-registered, the company must be re-registered accordingly³.

The registrar must issue a certificate of incorporation⁴ altered to meet the circumstances of the case⁵; and the certificate must state that it is issued on re-registration and it must state the date on which it is issued⁶.

On the issue to a company of the certificate:

- 371 (1) the company, by virtue of the issue of that certificate, becomes a private limited company⁷; and
- 372 (2) the changes in the company's name and articles take effect⁸.

The certificate is conclusive evidence that the requirements of the Companies Act 2006⁹ as to re-registration¹⁰ have been complied with¹¹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meanings of 'private company' and 'limited company' see PARA 102. As to the procedure on application to re-register a public company as a private limited company see PARA 173.

2 As to the meaning of 'registrar of companies' see PARA 131 note 2.

3 Companies Act 2006 s 101(1). The registrar may accept the statement of compliance required by s 97(1) (c) (see PARA 173) as sufficient evidence that the company is entitled to be re-registered as a private limited company: see s 100(4); and PARA 173. As to fees payable to the registrar under Pt 7 (ss 89-111) (see PARAS 167 et seq, 176 et seq) see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(b).

4 As to a company's certificate of incorporation see PARA 119. As to public notice of the issue of certificates of incorporation see the Companies Act 2006 s 1064; and PARA 138.

5 Companies Act 2006 s 101(2).

6 Companies Act 2006 s 101(3).

7 Companies Act 2006 s 101(4)(a).

8 Companies Act 2006 s 101(4)(b). An application for re-registration as a private limited company must contain a statement of the company's proposed name on re-registration and such an application must be accompanied by a copy of the company's articles of association as proposed to be amended: see s 99; and PARA 174. As to the change of a company's name see PARAS 217-219. As to the required indications in the name of a private limited company see PARA 200 et seq. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

9 References in the company law provisions of the Companies Act 2006 to the requirements of that Act include the requirements of regulations and orders made under it: s 1172. As to the meaning of the 'company law provisions' of the Companies Act 2006 see PARA 16 note 6.

10 Ie under the Companies Act 2006 Pt 7 (see PARAS 167 et seq, 176 et seq): see s 89; and PARA 167.

11 Companies Act 2006 s 101(5).

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(iv) Private Limited Company becoming an Unlimited Company

176. Procedure on application to re-register as unlimited company.

A private limited company¹ may be re-registered as an unlimited company² if:

- 373 (1) all the members of the company³ have assented to its being so re-registered⁴;
- 374 (2) the following condition is met⁵, namely that the company has not previously been re-registered as limited⁶; and
- 375 (3) an application for re-registration is delivered to the registrar of companies⁷, together with the other necessary documents⁸, and a statement of compliance⁹.

An application for re-registration as an unlimited company must contain a statement of the company's proposed name on re-registration¹⁰; and the application must be accompanied by: (a) the prescribed form of assent¹¹ to the company's being registered as an unlimited company, authenticated by or on behalf of all the members of the company¹²; (b) a copy of the company's articles¹³ as proposed to be amended¹⁴.

The statement of compliance that is required to be delivered under head (3) above together with the application is a statement that the statutory requirements as to re-registration¹⁵ as an unlimited company have been complied with¹⁶. The statement must contain a statement by the directors¹⁷ of the company¹⁸: (i) that the persons by whom or on whose behalf the form of assent is authenticated constitute the whole membership of the company¹⁹; and (ii) if any of the members have not authenticated that form themselves, that the directors have taken all reasonable steps to satisfy themselves that each person who authenticated it on behalf of a member was lawfully empowered to do so²⁰. The registrar may accept the statement of compliance as sufficient evidence that the company is entitled to be re-registered as an unlimited company²¹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meanings of 'private company' and 'limited company' see PARA 102.

2 See under the Companies Act 2006 Pt 7 (ss 89-111) (see PARAS 167 et seq, 177 et seq); see s 89; and PARA 167. As to the meaning of 'unlimited company' see PARA 102. As to fees payable to the registrar under Pt 7 see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(b).

3 As to the meaning of 'member' see PARA 321. As to membership of a company generally see PARA 321 et seq.

4 Companies Act 2006 s 102(1)(a). For these purposes, a trustee in bankruptcy of a member of the company is entitled, to the exclusion of the member, to assent to the company's becoming unlimited (s 102(4)(a)); and the personal representative of a deceased member of the company may assent on behalf of the deceased (s 102(4)(b)). As to the trustee in bankruptcy see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 316 et seq. As to the meaning of 'personal representative' see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 4.

5 Companies Act 2006 s 102(1)(b).

6 Companies Act 2006 s 102(2). An unlimited company may have been re-registered as limited under the Companies Act 1967 s 44 (repealed) or the Companies Act 2006 s 105 (see PARA 178).

7 See in accordance with the Companies Act 2006 s 103 (see the text and notes 10-21): see s 102(1)(c). As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to the meanings of 'document' and of references to delivering a document for these purposes see PARA 141 note 2.

8 le the other documents required by the Companies Act 2006 s 103 (see the text and notes 10-21): see s 102(1)(c).

9 Companies Act 2006 s 102(1)(c).

10 Companies Act 2006 s 103(1). The company must make such changes in its name as are necessary in connection with its becoming an unlimited company, and, if it is to have a share capital, as are necessary in connection with its becoming an unlimited company having a share capital: s 102(3). As to the meanings of 'company having a share capital', 'share' and 'share capital' see PARA 1042. As to the change of a company's name see PARAS 217-219. As to the required indications in the name of an unlimited company see PARA 200 et seq.

11 In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6. In exercise of the powers conferred by s 103(2)(a), the Secretary of State has made the Companies (Registration) Regulations 2008, SI 2008/3014. Accordingly, for the purposes of the Companies Act 2006 s 103(2)(a), the prescribed form is the form set out in the Companies (Registration) Regulations 2008, SI 2008/3014, reg 5, Sch 3.

12 Companies Act 2006 s 103(2)(a). In relation to the authentication of a document under the Companies Act 2006 see s 1146; and PARA 678 et seq.

13 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

14 Companies Act 2006 s 103(2)(b). The company must make such changes in its articles as are necessary in connection with its becoming an unlimited company, and, if it is to have a share capital, as are necessary in connection with its becoming an unlimited company having a share capital: s 102(3). As to the amendment of articles of association see PARA 232 et seq.

15 le the requirements of the Companies Act 2006 Pt 7 (see PARAS 167 et seq, 177): see s 103(3). References in the company law provisions of the Companies Act 2006 to the requirements of that Act include the requirements of regulations and orders made under it: s 1172. As to the meaning of the 'company law provisions' of the Companies Act 2006 see PARA 16 note 6.

16 Companies Act 2006 s 103(3).

17 As to the meaning of 'director' see PARA 478.

18 Companies Act 2006 s 103(4).

19 Companies Act 2006 s 103(4)(a).

20 Companies Act 2006 s 103(4)(b).

21 Companies Act 2006 s 103(5).

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177. Issue of certificate of re-registration as unlimited company.

If, on an application for re-registration of a private limited company¹ as an unlimited company², the registrar of companies³ is satisfied that the company is entitled to be so re-registered, the company must be re-registered accordingly⁴.

The registrar must issue a certificate of incorporation⁵ altered to meet the circumstances of the case⁶; and the certificate must state that it is issued on re-registration and it must state the date on which it is issued⁷.

On the issue to a company of the certificate:

- 376 (1) the company, by virtue of the issue of that certificate, becomes an unlimited company⁸; and
- 377 (2) the changes in the company's name and articles take effect⁹.

The certificate is conclusive evidence that the requirements of the Companies Act 2006¹⁰ as to re-registration¹¹ have been complied with¹².

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meanings of 'private company' and 'limited company' see PARA 102.

2 As to the meaning of 'unlimited company' see PARA 102. As to the procedure on application to re-register a private limited company as unlimited see PARA 176.

3 As to the meaning of 'registrar of companies' see PARA 131 note 2.

4 Companies Act 2006 s 104(1). The registrar may accept the statement of compliance required by s 102(1) (c) (see PARA 176) as sufficient evidence that the company is entitled to be re-registered as an unlimited company: see s 103(5); and PARA 176. As to fees payable to the registrar under Pt 7 (ss 89-111) (see PARAS 167 et seq, 178 et seq) see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(b).

5 As to a company's certificate of incorporation see PARA 119. As to public notice of the issue of certificates of incorporation see the Companies Act 2006 s 1064; and PARA 138.

6 Companies Act 2006 s 104(2).

7 Companies Act 2006 s 104(3).

8 Companies Act 2006 s 104(4)(a). As to the nature and powers of an unlimited company see PARA 81.

9 Companies Act 2006 s 104(4)(b). An application for the re-registration of a private limited company as unlimited must contain a statement of the company's proposed name on re-registration and such an application must be accompanied by a copy of the company's articles of association as proposed to be amended: see s 103; and PARA 176. As to the change of a company's name see PARAS 217-219. As to the required indications in the name of an unlimited company see PARA 200 et seq. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally, including their amendment, see PARA 228 et seq.

10 References in the company law provisions of the Companies Act 2006 to the requirements of that Act include the requirements of regulations and orders made under it: s 1172. As to the meaning of the 'company law provisions' of the Companies Act 2006 see PARA 16 note 6.

11 Ie under the Companies Act 2006 Pt 7 (see PARAS 167 et seq, 178 et seq): see s 89; and PARA 167.

12 Companies Act 2006 s 104(5).

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(v) Unlimited Company becoming a Limited Company

178. Procedure on application to re-register unlimited company as private limited company.

An unlimited company¹ may be re-registered as a private limited company² if:

- 378 (1) a special resolution³ that it should be so re-registered is passed⁴;
- 379 (2) the following condition is met⁵, namely that the company has not previously been re-registered as unlimited⁶; and
- 380 (3) an application for re-registration is delivered to the registrar of companies⁷, together with the other necessary documents⁸, and a statement of compliance⁹.

An application for re-registration as a limited company must contain a statement of the company's proposed name on re-registration¹⁰; and it must be accompanied by: (a) a copy of the special resolution¹¹ that the company should re-register as a private limited company¹²; (b) if the company is to be limited by guarantee, a statement of guarantee¹³; (c) a copy of the company's articles of association¹⁴ as proposed to be amended¹⁵.

The statement of compliance that is required to be delivered under head (3) above together with the application is a statement that the statutory requirements as to re-registration¹⁶ as a limited company have been complied with¹⁷. The registrar may accept the statement of compliance as sufficient evidence that the company is entitled to be re-registered as a limited company¹⁸.

The statement of guarantee that is required to be delivered under head (b) above in the case of a company that is to be limited by guarantee must state that each member¹⁹ undertakes that, if the company is wound up²⁰ while he is a member, or within one year after he ceases to be a member, he will contribute to the assets of the company such amount as may be required for²¹: (i) payment of the debts and liabilities of the company contracted before he ceases to be a member²²; (ii) payment of the costs, charges and expenses of winding up²³; and (iii) adjustment of the rights of the contributories among themselves²⁴, not exceeding a specified amount²⁵.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'unlimited company' see PARA 102.

2 Ie under the Companies Act 2006 Pt 7 (ss 89-111) (see PARAS 167 et seq, 179 et seq): see s 89; and PARA 167. As to the meanings of 'private company' and 'limited company' see PARA 102. As to fees payable to the registrar under Pt 7 see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(b).

3 As to the meaning of 'special resolution' see PARA 614.

4 Companies Act 2006 s 105(1)(a). The special resolution must state whether the company is to be limited by shares or by guarantee: s 105(3). As to the meanings of 'company limited by shares' and 'company limited by guarantee' see PARA 102. As to the meaning of 'share' see PARA 1042.

5 Companies Act 2006 s 105(1)(b).

6 Companies Act 2006 s 105(2).

7 Ie in accordance with the Companies Act 2006 s 106 (see the text and notes 10-25): see s 105(1)(c). As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to the meanings of 'document' and of references to delivering a document for these purposes see PARA 141 note 2.

8 Ie the other documents required by the Companies Act 2006 s 106 (see the text and notes 10-25): see s 105(1)(c).

9 Companies Act 2006 s 105(1)(c).

10 Companies Act 2006 s 106(1). The company must make such changes in its name as are necessary in connection with its becoming a company limited by shares or, as the case may be, by guarantee: s 105(4). As

to the change of a company's name see PARAS 217-219. As to the required indications in the name of a limited company see PARA 200 et seq.

11 le unless a copy has already been forwarded to the registrar under the Companies Act 2006 Pt 3 Ch 3 (ss 29-30) (resolutions and agreements affecting a company's constitution) (see PARA 231): see s 106(2)(a). As to the meaning of references to a company's constitution see PARA 227.

12 Companies Act 2006 s 106(2)(a).

13 Companies Act 2006 s 106(2)(b).

14 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

15 Companies Act 2006 s 106(2)(c). The company must make such changes in its articles as are necessary in connection with its becoming a company limited by shares or, as the case may be, by guarantee: s 105(4). As to the amendment of articles of association see PARA 232 et seq.

16 le the requirements of the Companies Act 2006 Pt 7 (see PARAS 167 et seq, 179 et seq): see s 106(4). References in the company law provisions of the Companies Act 2006 to the requirements of that Act include the requirements of regulations and orders made under it: s 1172. As to the meaning of the 'company law provisions' of the Companies Act 2006 see PARA 16 note 6.

17 Companies Act 2006 s 106(4).

18 Companies Act 2006 s 106(5).

19 As to the meaning of 'member' see PARA 321. As to membership of a company generally see PARA 321 et seq.

20 As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

21 Companies Act 2006 s 106(3).

22 Companies Act 2006 s 106(3)(a).

23 Companies Act 2006 s 106(3)(b).

24 Companies Act 2006 s 106(3)(c).

25 Companies Act 2006 s 106(3).

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179. Issue of certificate of re-registration as private limited company.

If, on an application for re-registration of an unlimited company¹ as a limited company², the registrar of companies³ is satisfied that the company is entitled to be so re-registered, the company must be re-registered accordingly⁴.

The registrar must issue a certificate of incorporation⁵ altered to meet the circumstances of the case⁶; and the certificate must state that it is issued on re-registration and it must state the date on which it is so issued⁷.

On the issue to a company of the certificate:

381 (1) the company, by virtue of the issue of that certificate, becomes a limited company⁸; and

382 (2) the changes in the company's name and articles take effect⁹.

The certificate is conclusive evidence that the requirements of the Companies Act 2006¹⁰ as to re-registration¹¹ have been complied with¹².

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'unlimited company' see PARA 102.

2 As to the procedure on application to re-register an unlimited company as a private limited company see PARA 178. As to the meanings of 'private company' and 'limited company' see PARA 102.

3 As to the meaning of 'registrar of companies' see PARA 131 note 2.

4 Companies Act 2006 s 107(1). The registrar may accept the statement of compliance required by s 105(1) (c) (see PARA 178) as sufficient evidence that the company is entitled to be re-registered as a limited company: see s 106(5); and PARA 178. As to fees payable to the registrar under Pt 7 (ss 89-111) (see PARAS 167 et seq, 180 et seq) see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(b).

5 As to a company's certificate of incorporation see PARA 119. As to public notice of the issue of certificates of incorporation see the Companies Act 2006 s 1064; and PARA 138.

6 Companies Act 2006 s 107(2).

7 Companies Act 2006 s 107(3).

8 Companies Act 2006 s 107(4)(a).

9 Companies Act 2006 s 107(4)(b). An application for the re-registration of an unlimited company as limited must contain a statement of the company's proposed name on re-registration and such an application must be accompanied by a copy of the company's articles of association as proposed to be amended: see s 106; and PARA 178. As to the change of a company's name see PARAS 217-219. As to the required indications in the name of a limited company see PARA 200 et seq. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

10 References in the company law provisions of the Companies Act 2006 to the requirements of that Act include the requirements of regulations and orders made under it: s 1172. As to the meaning of the 'company law provisions' of the Companies Act 2006 see PARA 16 note 6.

11 Ie under the Companies Act 2006 Pt 7 (see PARAS 167 et seq, 180 et seq): see s 89; and PARA 167.

12 Companies Act 2006 s 107(5).

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180. Statement of capital required where company already has share capital.

An unlimited company¹ which on re-registration as a private limited company² already has allotted share capital³ must, within 15 days after the re-registration, deliver a statement of capital to the registrar of companies⁴. (However, this does not apply if the information which would be included in the statement has already been sent to the registrar in either a statement of capital and initial shareholdings⁵, or in a statement of capital contained in an annual return⁶).

The statement of capital must state with respect to the company's share capital⁷ on re-registration⁸:

- 383 (1) the total number of shares of the company⁹;
- 384 (2) the aggregate nominal value of those shares¹⁰;
- 385 (3) for each class of shares¹¹: (a) prescribed particulars of the rights attached to the shares¹²; (b) the total number of shares of that class¹³; and (c) the aggregate nominal value of shares of that class¹⁴; and
- 386 (4) the amount paid up and the amount (if any) unpaid on each share¹⁵ (whether on account of the nominal value of the share or by way of premium)¹⁶.

If default is made in complying with these requirements¹⁷, an offence is committed by the company, and by every officer of the company who is in default¹⁸; and any person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹⁹ and (for continued contravention) a daily default fine²⁰ not exceeding one-tenth of level 3 on the standard scale²¹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'unlimited company' see PARA 102.

2 le under the Companies Act 2006 s 107 (see PARA 179); see s 108(1). As to the meanings of 'private company' and 'limited company' see PARA 102.

3 As to the meaning of 'allotted share capital' see PARA 1045.

4 Companies Act 2006 s 108(1). As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to the meanings of 'document' and of references to delivering a document for these purposes see PARA 141 note 2.

5 Companies Act 2006 s 108(2)(a). The text refers to the statement of capital and initial shareholdings required in the case of a company limited by shares (see s 10; and PARA 113): see s 108(2)(a). As to the meaning of 'company limited by shares' see PARA 102. As to the meaning of 'share' see PARA 1042.

6 Companies Act 2006 s 108(2)(b). The text refers to the statement of capital contained in an annual return under s 856(2) (see PARA 1423): see s 108(2)(b).

7 As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

8 Companies Act 2006 s 108(3).

9 Companies Act 2006 s 108(3)(a).

10 Companies Act 2006 s 108(3)(b). As to the nominal value of shares see PARA 1044.

11 Companies Act 2006 s 108(3)(c). As to classes of shares generally see PARA 1057 et seq.

12 Companies Act 2006 s 108(3)(c)(i). In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the meaning of the 'Companies Acts' see PARA 16. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6. In exercise of the powers conferred by s 108(3)(c)(i), the Secretary of State has made the Companies (Shares and Share Capital) Order 2009, SI 2009/388. Accordingly, the following particulars of the rights attached to shares are prescribed for the purposes of the Companies Act 2006 s 108(3)(c)(i) (see the Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 2(1), (2)(c)):

- 80 (1) particulars of any voting rights attached to the shares, including rights that arise only in certain circumstances (art 2(3)(a));
- 81 (2) particulars of any rights attached to the shares, as respects dividends, to participate in a distribution (art 2(3)(b));
- 82 (3) particulars of any rights attached to the shares, as respects capital, to participate in a distribution (including on winding up) (art 2(3)(c)); and

- 83 (4) whether the shares are to be redeemed or are liable to be redeemed at the option of the company or the shareholder (art 2(3)(d)).

As to rights attached to classes of shares generally see PARA 1057 et seq; as to redeemable shares see PARAS 1052, 1229 et seq; and as to distributions and dividends see PARA 1390 et seq. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

13 Companies Act 2006 s 108(3)(c)(ii).

14 Companies Act 2006 s 108(3)(c)(iii).

15 As to paid up and unpaid shares see PARA 1042 et seq.

16 Companies Act 2006 s 108(3)(d).

17 In the requirements of the Companies Act 2006 s 108: see s 108(4). References in the company law provisions of the Companies Act 2006 to the requirements of that Act include the requirements of regulations and orders made under it: s 1172. As to the meaning of the 'company law provisions' of the Companies Act 2006 see PARA 16 note 6.

18 Companies Act 2006 s 108(4). As to the meaning of 'officer' generally under the Companies Act 2006 see PARA 607; and as to the meaning of 'officer in default' see PARA 314.

19 As to the standard scale see PARA 1622.

20 As to the meaning of 'daily default fine' see PARA 1622.

21 Companies Act 2006 s 108(5).

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(vi) Public Company becoming Private and Unlimited

181. Procedure on application to re-register public company as a private unlimited company.

A public company limited by shares¹ may be re-registered as an unlimited private company with a share capital² if:

- 387 (1) all the members of the company³ have assented to its being so re-registered⁴;
 388 (2) the following condition is met⁵, namely that the company has not previously been re-registered either as limited or as unlimited⁶; and
 389 (3) an application for re-registration is delivered to the registrar of companies⁷, together with the other necessary documents⁸, and a statement of compliance⁹.

An application for the re-registration of a public company as an unlimited private company must contain a statement of the company's proposed name on re-registration¹⁰; and the application must be accompanied by: (a) the prescribed form of assent¹¹ to the company's being registered as an unlimited company, authenticated by or on behalf of all the members of the company¹²; (b) a copy of the company's articles¹³ as proposed to be amended¹⁴.

The statement of compliance that is required to be delivered under head (3) above together with the application is a statement that the statutory requirements as to re-registration¹⁵ as an unlimited private company have been complied with¹⁶. The statement must contain a statement

by the directors¹⁷ of the company¹⁸; (i) that the persons by whom or on whose behalf the form of assent is authenticated constitute the whole membership of the company¹⁹; and (ii) if any of the members have not authenticated that form themselves, that the directors have taken all reasonable steps to satisfy themselves that each person who authenticated it on behalf of a member was lawfully empowered to do so²⁰. The registrar may accept the statement of compliance as sufficient evidence that the company is entitled to be re-registered as an unlimited private company²¹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meanings of 'public company' and 'company limited by shares' see PARA 102. As to the meaning of 'share' see PARA 1042.

2 *Ie* under the Companies Act 2006 Pt 7 (ss 89-111) (see PARAS 167 et seq, 182): see s 89; and PARA 167. As to the meanings of 'private company' and 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. As to fees payable to the registrar under Pt 7 see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(b).

3 As to the meaning of 'member' see PARA 321. As to membership of a company generally see PARA 321 et seq.

4 Companies Act 2006 s 109(1)(a). For these purposes, a trustee in bankruptcy of a member of the company is entitled, to the exclusion of the member, to assent to the company's re-registration as unlimited (s 109(4)(a)); and the personal representative of a deceased member of the company may assent on behalf of the deceased (s 109(4)(b)). As to the trustee in bankruptcy see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 316 et seq. As to the meaning of 'personal representative' see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 4.

5 Companies Act 2006 s 109(1)(b).

6 Companies Act 2006 s 109(2).

7 *Ie* in accordance with the Companies Act 2006 s 110 (see the text and notes 10-21): see s 109(1)(c). As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to the meanings of 'document' and of references to delivering a document for these purposes see PARA 141 note 2.

8 *Ie* the other documents required by the Companies Act 2006 s 110 (see the text and notes 10-21): see s 109(1)(c).

9 Companies Act 2006 s 109(1)(c).

10 Companies Act 2006 s 110(1). The company must make such changes in its name as are necessary in connection with its becoming an unlimited private company: s 109(3). As to the change of a company's name see PARAS 217-219. As to the required indications in the name of an unlimited company see PARA 200 et seq.

11 In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6. In exercise of the powers conferred by s 110(2)(a), the Secretary of State has made the Companies (Registration) Regulations 2008, SI 2008/3014. Accordingly, for the purposes of the Companies Act 2006 s 110(2)(a), the prescribed form is the form set out in the Companies (Registration) Regulations 2008, SI 2008/3014, reg 6, Sch 4.

12 Companies Act 2006 s 110(2)(a). In relation to the authentication of a document under the Companies Act 2006 see s 1146; and PARA 678 et seq.

13 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

14 Companies Act 2006 s 110(2)(b). The company must make such changes in its articles as are necessary in connection with its becoming an unlimited private company: s 109(3). As to the amendment of articles of association see PARA 232 et seq.

15 le the requirements of the Companies Act 2006 Pt 7 (see PARAS 167 et seq, 182): see s 110(3). References in the company law provisions of the Companies Act 2006 to the requirements of that Act include the requirements of regulations and orders made under it: s 1172. As to the meaning of the 'company law provisions' of the Companies Act 2006 see PARA 16 note 6.

16 Companies Act 2006 s 110(3).

17 As to the meaning of 'director' see PARA 478.

18 Companies Act 2006 s 110(4).

19 Companies Act 2006 s 110(4)(a).

20 Companies Act 2006 s 110(4)(b).

21 Companies Act 2006 s 110(5).

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182. Issue of certificate of re-registration as private unlimited company.

If, on an application for re-registration of a public company¹ as an unlimited private company², the registrar of companies³ is satisfied that the company is entitled to be so re-registered, the company must be re-registered accordingly⁴.

The registrar must issue a certificate of incorporation⁵ altered to meet the circumstances of the case⁶; and the certificate must state that it is issued on re-registration and it must state the date on which it is so issued⁷.

On the issue to a company of the certificate:

390 (1) the company, by virtue of the issue of that certificate, becomes an unlimited private company⁸; and

391 (2) the changes in the company's name and articles take effect⁹.

The certificate is conclusive evidence that the requirements of the Companies Act 2006¹⁰ as to re-registration¹¹ have been complied with¹².

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'public company' see PARA 102.

2 le under the Companies Act 2006 Pt 7 (ss 89-111) (see PARA 167 et seq): see s 89; and PARA 167. As to the meanings of 'private company' and 'unlimited company' see PARA 102. As to the procedure on application to re-register a public company as an unlimited private company see PARA 181. As to fees payable to the registrar under Pt 7 see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(b).

3 As to the meaning of 'registrar of companies' see PARA 131 note 2.

4 Companies Act 2006 s 111(1). The registrar may accept the statement of compliance required by s 109(1) (c) (see PARA 181) as sufficient evidence that the company is entitled to be re-registered as an unlimited private company: see s 110(5); and PARA 181.

5 As to a company's certificate of incorporation see PARA 119. As to public notice of the issue of certificates of incorporation see the Companies Act 2006 s 1064; and PARA 138.

6 Companies Act 2006 s 111(2).

7 Companies Act 2006 s 111(3).

8 Companies Act 2006 s 111(4)(a).

9 Companies Act 2006 s 111(4)(b). An application for the re-registration of a public company as an unlimited private company must contain a statement of the company's proposed name on re-registration and such an application must be accompanied by a copy of the company's articles of association as proposed to be amended: see s 110; and PARA 181. As to the change of a company's name see PARAS 217-219. As to the required indications in the name of an unlimited company see PARA 200 et seq. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

10 References in the company law provisions of the Companies Act 2006 to the requirements of that Act include the requirements of regulations and orders made under it: s 1172. As to the meaning of the 'company law provisions' of the Companies Act 2006 see PARA 16 note 6.

11 le under the Companies Act 2006 Pt 7 (see PARA 167 et seq): see s 89; and PARA 167.

12 Companies Act 2006 s 111(5).

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(vii) Old Public Companies

183. Meaning and classification of 'old public company'.

An 'old public company' is a company¹ limited by shares² or by guarantee³ and having a share capital⁴ in respect of which the following conditions are satisfied⁵:

392 (1) the company either existed on 22 December 1980⁶ or was incorporated after that date pursuant to an application made before that date⁷;

393 (2) on that date or, if later, on the day of the company's incorporation, the company was not or (as the case may be) would not have been a private company within the Companies Act 1948⁸; and

394 (3) the company has not since that date or the day of the company's incorporation (as the case may be) either been re-registered as a public company⁹ or become¹⁰ a private company¹¹.

With some exceptions¹², references in the Companies Acts to a public company, or a company other than a private company, are to be read as including, unless the context otherwise requires, references to an old public company, and references to a private company are to be read accordingly¹³.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'company limited by shares' see PARA 102.

3 As to the meaning of 'company limited by guarantee' see PARA 102.

4 As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

5 Companies Consolidation (Consequential Provisions) Act 1985 s 1(1).

The Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12, Sch 3 contains provisions preserving the effect of the provisions of the Companies Consolidation (Consequential Provisions) Act 1985: Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12(1). The repeal of the other provisions of the Companies Consolidation (Consequential Provisions) Act 1985 does not affect the operation of any provision amending an enactment that remains in force, of any transitional provision that remains capable of having effect in relation to the corresponding provision of the Companies Act 2006, or of any saving that remains capable of having effect in relation to the repeal of an enactment by the Companies Consolidation (Consequential Provisions) Act 1985: Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12(2). See further Sch 3 paras 1, 2.

6 Ie the date on which the corresponding provisions of the Companies Act 1980 (ie s 8) (now repealed) came into force. As to the Companies Act 1980 generally see PARA 13.

7 Companies Consolidation (Consequential Provisions) Act 1985 s 1(1)(a). See note 5.

8 Companies Consolidation (Consequential Provisions) Act 1985 s 1(1)(b). See note 5. Under the Companies Act 1948 s 28 (repealed), a private company was defined as one which by its articles restricted the right to transfer its shares, limited the number of its members (with certain exceptions) to 50, and prohibited any invitation to the public to subscribe for any shares or debentures of the company.

9 Ie under the Companies Consolidation (Consequential Provisions) Act 1985 s 2 (see PARA 184) or the corresponding preceding provisions of the Companies Act 1980 (ie s 8(3) (repealed)). As to the meaning of 'public company' see PARA 102.

10 Ie under the Companies Consolidation (Consequential Provisions) Act 1985 s 4 (see PARA 186) or the corresponding preceding provisions of the Companies Act 1980 (ie s 8(8) (repealed)).

11 Companies Consolidation (Consequential Provisions) Act 1985 s 1(1)(c). See note 5. As to the meaning of 'private company' see PARA 102. As to the re-registration of old public companies see PARA 184 et seq.

12 Ie so much of the Companies Acts as is derived from the Companies Act 1980 Pt 1 (ss 1-13) (repealed) (see now the Companies Act 2006 s 4 (see PARA 102), s 5(3) (see PARA 80), s 7 (see PARA 102), s 8(2) (see PARA 104), ss 13, 14 (see PARA 111), s 15(4) (see PARA 119), s 58(1), (2) (see PARA 200), ss 90-96 (see PARAS 168-172), ss 97-101 (see PARAS 173-175), ss 650, 651 (see PARA 1194), and ss 761-767 (see PARA 74)).

13 Companies Consolidation (Consequential Provisions) Act 1985 s 1(2). See note 5.

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184. Re-registration of old public company as public company.

An old public company¹ may be re-registered as a public company² if³:

- 395 (1) the directors⁴ pass a resolution⁵ that it should be so re-registered⁶; and
- 396 (2) an application for the purpose in the prescribed form⁷ and signed by a director or secretary⁸ of the company is delivered to the registrar of companies⁹ together with the following documents¹⁰, namely: (a) a printed copy of the articles as altered in pursuance of the resolution¹¹; and (b) a statutory declaration¹² in the prescribed form¹³ by a director or secretary of the company that the resolution has been passed and that the necessary statutory conditions for re-registering¹⁴ were satisfied at the time of the resolution¹⁵; and
- 397 (3) at the time of the resolution, the necessary statutory conditions for re-registering¹⁶ are satisfied¹⁷.

The resolution must make such alterations to the company's articles¹⁸ as are necessary to bring them into conformity with the requirements of the Companies Act 2006¹⁹.

The registrar may accept a declaration under head (2)(b) above as sufficient evidence that the resolution has been passed and the necessary conditions were satisfied²⁰.

1 As to the meaning of 'old public company' see PARA 183.

2 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 Companies Consolidation (Consequential Provisions) Act 1985 s 2(1).

The Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12, Sch 3 contains provisions preserving the effect of the provisions of the Companies Consolidation (Consequential Provisions) Act 1985: Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12(1). The repeal of the other provisions of the Companies Consolidation (Consequential Provisions) Act 1985 does not affect the operation of any provision amending an enactment that remains in force, of any transitional provision that remains capable of having effect in relation to the corresponding provision of the Companies Act 2006, or of any saving that remains capable of having effect in relation to the repeal of an enactment by the Companies Consolidation (Consequential Provisions) Act 1985: Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12(2). See further Sch 3 para 3, which applies the Companies Act 2006 ss 90-96 (see PARA 168 et seq) to an old public company.

4 As to the meaning of 'director' see PARA 478.

5 I.e a resolution complying with the Companies Consolidation (Consequential Provisions) Act 1985 s 2(2) (see the text and notes 18-19): see s 2(1)(a). The Companies Act 2006 Pt 3 Ch 3 (ss 29-30) (resolutions and agreements affecting a company's constitution) (see PARA 231) applies to a resolution of the directors under the Companies Consolidation (Consequential Provisions) Act 1985 s 2: s 2(3) (substituted by SI 2007/2194). See note 3. As to the meaning of references to a company's constitution see PARA 227.

6 Companies Consolidation (Consequential Provisions) Act 1985 s 2(1)(a). See note 3. See also PARA 189.

7 As to the meaning of 'prescribed' see PARA 75 note 3; definition applied by the Companies Consolidation (Consequential Provisions) Act 1985 s 32. As to the form of application so prescribed see the Companies (Forms) Regulations 1985, SI 1985/854, reg 4(1), Sch 3 Form R7.

8 As to the company secretary see PARA 601 et seq.

9 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

10 Companies Consolidation (Consequential Provisions) Act 1985 s 2(1)(b). See note 3.

11 Companies Consolidation (Consequential Provisions) Act 1985 s 2(4)(a); Interpretation Act 1978 s 17(2) (b). See note 3.

12 Statutory declarations are made by virtue of the Statutory Declarations Act 1835: see **CIVIL PROCEDURE** vol 11 (2009) PARA 1024.

13 As to the prescribed form of statutory declaration see the Companies (Forms) Regulations 1985, SI 1985/854, Sch 3, Form R8.

14 I.e the conditions specified in the Companies Consolidation (Consequential Provisions) Act 1985 s 3 (see PARA 185): see s 2(4)(b).

15 Companies Consolidation (Consequential Provisions) Act 1985 s 2(4)(b). See note 3.

16 I.e the conditions specified in the Companies Consolidation (Consequential Provisions) Act 1985 s 3 (see PARA 185): see s 2(1)(c).

17 Companies Consolidation (Consequential Provisions) Act 1985 s 2(1)(c). See note 3.

18 As to a company's articles of association see PARA 228 et seq.

19 Companies Consolidation (Consequential Provisions) Act 1985 s 2(2); Interpretation Act 1978 s 17(2)(b). See note 3.

20 Companies Consolidation (Consequential Provisions) Act 1985 s 2(5). See s 2(6); and see note 3.

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185. Conditions for re-registering an old public company as a public company.

The following statutory conditions must be satisfied at the time of a resolution¹ that an old public company² be re-registered as a public company³:

398 (1) at the time concerned, the nominal value⁴ of the company's allotted share capital⁵ must not be less than the authorised minimum⁶;

399 (2) in the case of all the shares⁷ of the company, or of all those of its shares which are comprised in a portion of the share capital which satisfies the condition in head (1) above⁸:

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38. (a) each share must be paid up⁹ at least as to one-quarter of the nominal value of that share and the whole of any premium on it¹⁰;

39. (b) where any of the shares in question or any premium payable on them has been fully or partly paid up by an undertaking given by any person that he or another should do work or perform services for the company or another, the undertaking must have been performed or otherwise discharged¹¹; and

40. (c) where any of the shares in question has been allotted as fully or partly paid up as to its nominal value or any premium payable on it otherwise than in cash, and the consideration for the allotment consists of or includes an undertaking (other than one to which head (b) above applies) to the company¹², then either: (i) that undertaking must have been performed or otherwise discharged¹³; or (ii) there must be a contract between the company and some person pursuant to which the undertaking is to be performed within five years from the time of the resolution¹⁴.

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1 le a resolution under the Companies Consolidation (Consequential Provisions) Act 1985 s 2: see PARA 184.

2 As to the meaning of 'old public company' see PARA 183.

3 Companies Consolidation (Consequential Provisions) Act 1985 s 3(1). As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

The Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12, Sch 3 contains provisions preserving the effect of the provisions of the Companies Consolidation (Consequential Provisions) Act 1985: Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12(1). The repeal of the other provisions of the Companies Consolidation (Consequential Provisions) Act 1985 does not affect the operation of any provision amending an enactment that remains in force, of any transitional provision that remains capable of having effect in relation to the corresponding provision of the Companies Act 2006, or of any saving that remains capable of having effect in relation to the repeal of an enactment by the Companies Consolidation (Consequential Provisions) Act 1985: Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12(2). See further Sch 3 para 3, which applies the Companies Act 2006 ss 90-96 (see PARA 168 et seq) to an old public company.

- 4 As to the nominal value of shares see PARA 1044.
- 5 As to the meaning of 'share capital' see PARA 1042. As to the meaning of 'allotted share capital' see PARA 1045.
- 6 Companies Consolidation (Consequential Provisions) Act 1985 s 3(2) (amended by SI 2008/948). The authorised minimum is defined in the Companies Act 2006 s 763 (see PARA 75) and the provisions of s 765 (authorised minimum: application of initial requirement) (see PARA 75) apply in relation to the requirement in the Companies Consolidation (Consequential Provisions) Act 1985 s 3(2): s 3(2A) (added by SI 2008/948). See note 3.
- 7 As to the meaning of 'share' see PARA 1042.
- 8 Companies Consolidation (Consequential Provisions) Act 1985 s 3(3). See note 3.
- 9 As to paid up and unpaid shares see PARA 1042 et seq.
- 10 Companies Consolidation (Consequential Provisions) Act 1985 s 3(3)(a). See note 3.
- 11 Companies Consolidation (Consequential Provisions) Act 1985 s 3(3)(b). See note 3.
- 12 Companies Consolidation (Consequential Provisions) Act 1985 s 3(3)(c). See note 3.
- 13 Companies Consolidation (Consequential Provisions) Act 1985 s 3(3)(c)(i). See note 3.
- 14 Companies Consolidation (Consequential Provisions) Act 1985 s 3(3)(c)(ii). See note 3.

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186. Old public company becoming private.

An old public company¹ may pass a special resolution not to be re-registered² as a public company³; and the provisions of the Companies Act 2006 which allow for shareholders, subject to certain conditions, to apply to the court for cancellation of such a resolution apply⁴ to the resolution as they would apply to a special resolution by a public company to be re-registered as private⁵. If either 28 days from the passing of the resolution elapse without such an application being made⁶, or if such an application is made and proceedings are concluded⁷ on the application without the court making an order for the cancellation of the resolution⁸, the registrar of companies must issue the company with a certificate stating that it is a private company; and the company then becomes a private company by virtue of the issue of the certificate⁹.

If an old public company delivers to the registrar of companies a statutory declaration¹⁰ in the prescribed form¹¹ by a director¹² or secretary¹³ of the company that the company does not at the time of the declaration satisfy the necessary statutory conditions¹⁴ for the company to be re-registered as public, the registrar must issue the company with a certificate stating that it is a private company; and the company then becomes a private company by virtue of the issue of the certificate¹⁵.

A certificate issued to a company in this way¹⁶ is conclusive evidence that the relevant statutory requirements have been complied with¹⁷ and that the company is a private company¹⁸.

1 As to the meaning of 'old public company' see PARA 183.

2 Ie under the Companies Consolidation (Consequential Provisions) Act 1985 s 2 (see PARA 184): see s 4(1). As to special resolutions generally see PARA 614.

3 Companies Consolidation (Consequential Provisions) Act 1985 s 4(1). As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

The Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12, Sch 3 contains provisions preserving the effect of the provisions of the Companies Consolidation (Consequential Provisions) Act 1985: Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12(1). The repeal of the other provisions of the Companies Consolidation (Consequential Provisions) Act 1985 does not affect the operation of any provision amending an enactment that remains in force, of any transitional provision that remains capable of having effect in relation to the corresponding provision of the Companies Act 2006, or of any saving that remains capable of having effect in relation to the repeal of an enactment by the Companies Consolidation (Consequential Provisions) Act 1985: Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12(2). See further Sch 3 paras 4, 5, which apply the Companies Act 2006 ss 98, 99 (see PARA 174) to an old public company.

4 Ie the Companies Act 2006 s 98 (see PARA 174) applies to the resolution: see the Companies Consolidation (Consequential Provisions) Act 1985 s 4(1); Interpretation Act 1978 s 17(2)(b). See note 3. As to the prescribed form of notice to the registrar of companies of an application made to the court for the cancellation of such a special resolution see the Companies (Forms) Regulations 1985, SI 1985/854, reg 4(1), Sch 3, Form R7a (amended by SI 1987/752). As to the meaning of 'prescribed' see PARA 75 note 3; definition applied by the Companies Consolidation (Consequential Provisions) Act 1985 s 32. As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

5 Companies Consolidation (Consequential Provisions) Act 1985 s 4(1); Interpretation Act 1978 s 17(2)(b). See note 3. As to the procedure on application to re-register a public company as a private limited company under the Companies Act 2006 s 97 see PARA 173. As to the meaning of 'private company' see PARA 102.

6 Companies Consolidation (Consequential Provisions) Act 1985 s 4(2)(a). See note 3.

7 For these purposes, proceedings on the application are concluded: (1) when the company has been notified that the application has been withdrawn (Companies Consolidation (Consequential Provisions) Act 1985 s 4(3)(b)); or (2) if not withdrawn, when the period mentioned in the Companies Act 2006 s 99(3) (as applied) for delivering a copy of the court's order under s 98 to the registrar (ie 15 days from the making of the order or such longer period as the court may direct) (see PARA 174) has expired (Companies Consolidation (Consequential Provisions) Act 1985 s 4(3)(a); Interpretation Act 1978 s 17(2)(b)). See note 3.

8 Companies Consolidation (Consequential Provisions) Act 1985 s 4(2)(b). See note 3.

9 Companies Consolidation (Consequential Provisions) Act 1985 s 4(2). See note 3.

10 Statutory declarations are made by virtue of the Statutory Declarations Act 1835: see **CIVIL PROCEDURE** vol 11 (2009) PARA 1024.

11 As to the prescribed form of statutory declaration see the Companies (Forms) Regulations 1985, SI 1985/854, Sch 3, Form R9.

12 As to the meaning of 'director' see PARA 478.

13 As to the company secretary see PARA 601 et seq.

14 Ie the conditions specified in the Companies Consolidation (Consequential Provisions) Act 1985 s 3 (see PARA 185): see s 4(4).

15 Companies Consolidation (Consequential Provisions) Act 1985 s 4(4). See note 3.

16 Ie either under the Companies Consolidation (Consequential Provisions) Act 1985 s 4(2) or under s 4(4) (see the text and notes 4-15): see s 4(5).

17 Ie that the requirements of either the Companies Consolidation (Consequential Provisions) Act 1985 s 4(2) or s 4(4) (see the text and notes 4-15) have been complied with: see s 4(5).

18 Companies Consolidation (Consequential Provisions) Act 1985 s 4(5). See note 3.

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187. Failure by old public company to obtain new classification.

If at any time a company which is an old public company¹ has not complied with the requirement to deliver to the registrar of companies² a declaration that the company does not satisfy the necessary statutory conditions for the company to be re-registered as a public company³, the company, and any officer of it who is in default⁴, is guilty of an offence⁵, unless at that time the company:

400 (1) has applied to be re-registered as a public company⁶ and the application has not been refused or withdrawn⁷; or

401 (2) has passed a special resolution not to be so re-registered⁸, and the resolution has not been revoked, and has not been cancelled⁹ by a court order¹⁰.

A person guilty of such an offence¹¹ is liable (on summary conviction) to a fine not exceeding one-fifth of the statutory maximum¹² or (on conviction after continued contravention) to a daily default fine¹³ not exceeding one-fiftieth of the statutory maximum for every day on which the requirement to deliver the declaration to the registrar of companies is contravened¹⁴.

1 As to the meaning of 'old public company' see PARA 183. The text refers to any time after 22 March 1982, ie the end of the re-registration period for 'old public companies': see the Companies Act 1980 s 9 (repealed).

2 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

3 Ie a declaration under the Companies Consolidation (Consequential Provisions) Act 1985 s 4(4) (see PARA 186): see s 5(1). As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 As to the meaning of 'officer' generally under the Companies Act 2006 see PARA 607; and as to the meaning of 'officer in default' see PARA 315.

5 Companies Consolidation (Consequential Provisions) Act 1985 s 5(1).

The Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12, Sch 3 contains provisions preserving the effect of the provisions of the Companies Consolidation (Consequential Provisions) Act 1985: Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12(1). The repeal of the other provisions of the Companies Consolidation (Consequential Provisions) Act 1985 does not affect the operation of any provision amending an enactment that remains in force, of any transitional provision that remains capable of having effect in relation to the corresponding provision of the Companies Act 2006, or of any saving that remains capable of having effect in relation to the repeal of an enactment by the Companies Consolidation (Consequential Provisions) Act 1985: Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12(2). See further Sch 3 para 6.

6 Ie under the Companies Consolidation (Consequential Provisions) Act 1985 s 2 (see PARA 184): see s 5(1)(a).

7 Companies Consolidation (Consequential Provisions) Act 1985 s 5(1)(a). See note 5.

8 Ie not to be re-registered under the Companies Consolidation (Consequential Provisions) Act 1985 s 2 (as to which see PARA 184): see s 5(1)(b). As to special resolutions generally see PARA 614.

9 lie under the Companies Act 2006 s 98 (see PARA 174) as applied by the Companies Consolidation (Consequential Provisions) Act 1985 s 4(1) (see PARA 186); see s 5(1)(b); Interpretation Act 1978 s 17(2)(b).

10 Companies Consolidation (Consequential Provisions) Act 1985 s 5(1)(b). See note 5.

11 lie under the Companies Consolidation (Consequential Provisions) Act 1985 s 5(1) (see the text and notes 1-10); see s 5(2).

12 As to the statutory maximum see PARA 1622.

13 As to the meaning of 'daily default fine' see PARA 1622.

14 Companies Consolidation (Consequential Provisions) Act 1985 s 5(2). See note 5.

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188. Shares of old public company held by or charged to itself.

Notwithstanding the general provision¹ that references in the Companies Acts² to a public company³ or a company other than a private company⁴ are to be read as including an old public company⁵, references to a public company in those provisions of the Companies Act 2006 which relate to the treatment of a company's shares⁶ when acquired by itself⁷ do not include an old public company; and references in those provisions to a private company are to be read accordingly⁸.

In the case of a company which after 22 March 1982⁹ remained an old public company and did not before that date apply to be re-registered under the then statutory provisions¹⁰ as a public company, any charge on its own shares¹¹ which was in existence on or immediately before that date is a permitted charge for the purposes of those provisions of the Companies Act 2006 dealing with the maintenance of capital¹², and accordingly not void under the general provisions to that effect¹³.

1 lie notwithstanding the Companies Consolidation (Consequential Provisions) Act 1985 s 1(2) (see PARA 183); see s 6(1).

2 As to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24.

4 As to the meaning of 'private company' see PARA 102.

5 Companies Consolidation (Consequential Provisions) Act 1985 s 6(1); Interpretation Act 1978 s 17(2)(b). As to the meaning of 'old public company' see PARA 183.

The Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12, Sch 3 contains provisions preserving the effect of the provisions of the Companies Consolidation (Consequential Provisions) Act 1985: Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12(1). The repeal of the other provisions of the Companies Consolidation (Consequential Provisions) Act 1985 does not affect the operation of any provision amending an enactment that remains in force, of any transitional provision that remains capable of having effect in relation to the corresponding provision of the Companies Act 2006, or of any saving that remains capable of having effect in relation to the repeal of an enactment by the Companies Consolidation (Consequential Provisions) Act 1985: Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12(2). See further Sch 3 para 7, which applies the Companies Act 2006 ss 662-669 (see PARA 1200 et seq) to an old public company.

6 As to the meaning of 'share' see PARA 1042.

7 Ie the Companies Act 2006 ss 662-669 (see PARA 1200 et seq): see the Consolidation (Consequential Provisions) Act 1985 s 6(2); Interpretation Act 1978 s 17(2)(b). See note 5.

8 Companies Consolidation (Consequential Provisions) Act 1985 s 6(2); Interpretation Act 1978 s 17(2)(b). See note 5.

9 Ie the final date of the re-registration period for the purposes of the Companies Act 1980 s 9(1) (repealed). As to the Companies Act 1980 generally see PARA 13.

10 Ie under the Companies Act 1980 s 8 (repealed): see the Consolidation (Consequential Provisions) Act 1985 s 6(3).

11 As to charges of a public company on its own shares generally see PARA 1211.

12 Ie the Companies Act 2006 ss 658-676 (see PARA 1197 et seq): see the Consolidation (Consequential Provisions) Act 1985 s 6(3); Interpretation Act 1978 s 17(2)(b). See note 5.

13 Consolidation (Consequential Provisions) Act 1985 s 6(3); Interpretation Act 1978 s 17(2)(b). See note 5. The specific provision which, subject to certain conditions, permits a public company to retain a charge on its own shares is the Companies Act 2006 s 670(4): see PARA 1211. As to the disclosure required by a company when relying upon the Companies Consolidation (Consequential Provisions) Act 1985 s 6(3) see PARA 824.

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189. Trading under misleading name.

An old public company¹ is guilty of an offence if it carries on any trade², profession or business³ under a name which includes, as its last part, the words 'public limited company' or the Welsh⁴ equivalent ('cwmni cyfyngedig cyhoeddus')⁵. A company that is guilty of such an offence, and any officer of the company who is in default⁶, is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale⁷ and (for continued contravention) to a daily default fine⁸ not exceeding one-tenth of level 3 on the standard scale⁹.

1 As to the meaning of 'old public company' see PARA 183.

2 As to the meanings of 'carry on' and 'trade' generally see PARA 1 note 1.

3 As to the meaning of 'business' generally see PARA 1 note 1.

4 As to the meaning of 'Wales' see PARA 1 note 5.

5 Companies Consolidation (Consequential Provisions) Act 1985 s 8(1). As to the requirements for, and limitations placed on, a company name see PARA 200 et seq.

The Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12, Sch 3 contains provisions preserving the effect of the provisions of the Companies Consolidation (Consequential Provisions) Act 1985: Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12(1). The repeal of the other provisions of the Companies Consolidation (Consequential Provisions) Act 1985 does not affect the operation of any provision amending an enactment that remains in force, of any transitional provision that remains capable of having effect in relation to the corresponding provision of the Companies Act 2006, or of any saving that remains capable of having effect in relation to the repeal of an enactment by the Companies Consolidation (Consequential Provisions) Act 1985: Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12(2). See further Sch 3 para 8.

6 As to the meaning of 'officer' generally under the Companies Act 2006 see PARA 607; and as to the meaning of 'officer in default' see PARA 315.

7 As to the standard scale see PARA 1622.

8 As to the meaning of 'daily default fine' see PARA 1622.

9 Companies Consolidation (Consequential Provisions) Act 1985 s 8(2); Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, Sch 3 para 8.

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190. Payment for share capital.

Certain provisions of the Companies Acts relating to the allotment of shares and debentures¹ apply to a company² whose directors³ have passed and not revoked a resolution to be re-registered as a public company⁴, as those provisions apply to a public company⁵. Some of those provisions do not, however, apply to the allotment of shares by a company other than a public company registered as such on its original incorporation, where the contract for the allotment was entered into⁶:

402 (1) except in a case falling within head (2) below, on or before 22 June 1982⁷;
403 (2) in the case of a company re-registered or registered as a public company in pursuance of⁸:

23

- 41. (a) a resolution by a private company⁹ to be re-registered as a public company¹⁰; or
- 42. (b) a resolution to be re-registered as a public company under the special provisions applying to old public companies¹¹; or
- 43. (c) a resolution by a joint stock company¹² that the company be a public company¹³,

24

404 being (in each case) a resolution that was passed on or before 22 June 1982, before the date on which the resolution was passed¹⁴.

1 The certain provisions contained in the Companies Act 2006 ss 584-587 (see PARAS 1114-1117): see the Companies Consolidation (Consequential Provisions) Act 1985 s 9(1); Interpretation Act 1978 s 17(2)(b). See also note 5. As to the meaning of 'allotted' shares see PARA 1091. As to the meaning of 'share' see PARA 1042. As to the meaning of 'debenture' see PARA 1299.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'director' see PARA 478.

4 The under the Companies Consolidation (Consequential Provisions) Act 1985 s 2 (see PARA 184): see s 9(1). As to the meaning of 'public company' see PARA 102.

5 Companies Consolidation (Consequential Provisions) Act 1985 s 9(1); Interpretation Act 1978 s 17(2)(b).

The Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12, Sch 3 contains provisions preserving the effect of the provisions of the Companies Consolidation (Consequential Provisions) Act 1985: Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12(1). The repeal of the other provisions of the Companies Consolidation (Consequential Provisions) Act 1985 does not affect the operation of any provision

amending an enactment that remains in force, of any transitional provision that remains capable of having effect in relation to the corresponding provision of the Companies Act 2006, or of any saving that remains capable of having effect in relation to the repeal of an enactment by the Companies Consolidation (Consequential Provisions) Act 1985: Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 12(2). See further Sch 3 para 9, which applies the Companies Act 2006 ss 584-587 (see PARAS 1114-1117) to an old public company whose directors have passed and not revoked a resolution to be re-registered as a public company, as those sections apply to a public company.

6 Companies Consolidation (Consequential Provisions) Act 1985 s 9(2). See note 5.

7 Companies Consolidation (Consequential Provisions) Act 1985 s 9(2)(a). See note 5. The date referred to in head (1) in the text is the final date of the transitional period for the purposes of the Companies Act 1980 ss 31(2), 87(1) (repealed).

8 Companies Consolidation (Consequential Provisions) Act 1985 s 9(2)(b). See note 5.

9 As to the meaning of 'private company' see PARA 102.

10 Companies Consolidation (Consequential Provisions) Act 1985 s 9(2)(b)(i). The resolution referred to in head (2)(a) in the text is a resolution passed under the Companies Act 2006 s 90 (see PARA 168): see the Companies Consolidation (Consequential Provisions) Act 1985 s 9(2)(b)(i); Interpretation Act 1978 s 17(2)(b). See note 5.

11 Companies Consolidation (Consequential Provisions) Act 1985 s 9(2)(b)(ii). The resolution referred to in head (2)(b) in the text is a resolution passed under s 2 (see PARA 184): see s 9(2)(b)(ii). See note 5.

12 As to the meaning of 'joint stock company' see PARA 33 note 16.

13 Companies Consolidation (Consequential Provisions) Act 1985 s 9(2)(b)(iii). The resolution referred to in head (2)(c) in the text is a resolution passed under the Companies Act 1985 s 685 (repealed): see the Companies Consolidation (Consequential Provisions) Act 1985 s 9(2)(b)(iii). See note 5.

14 Companies Consolidation (Consequential Provisions) Act 1985 s 9(2)(b). See note 5.

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(viii) Existing Company becoming a Community Interest Company

191. Existing companies becoming a community interest company.

If a company is to become a community interest company¹:

- 405 (1) the company must by special resolution²: (a) state that it is to be a community interest company³; (b) make such alterations of its articles of association⁴ as it considers necessary to comply with the statutory requirements⁵ or otherwise appropriate in connection with becoming a community interest company⁶; and (c) change its name to comply with the statutory requirements⁷;
- 406 (2) the following specified conditions must be met⁸, namely that: (a) where no application⁹ for cancellation of the special resolutions has been made, having regard to the number of members who consented to or voted in favour of the resolutions, no such application may be made¹⁰, or the period within which such an application could be made has expired¹¹; or (b) where such an application has been made, the application has been withdrawn¹², or an order has been made confirming the resolutions and a copy of that order has been delivered to the registrar of companies¹³; and

- 407 (3) an application must be delivered to the registrar of companies¹⁴ together with the other documents that are so required¹⁵.

The statutory duty to forward to the registrar of companies copies of resolutions that affect the company's constitution¹⁶ applies to the special resolutions¹⁷.

Where special resolutions have been passed with a view to the company becoming a community interest company, an application to the court for the cancellation of the resolutions may be made¹⁸:

- 408 (i) by the holders of not less in the aggregate than 15 per cent in nominal value of the company's issued share capital¹⁹ or any class of the company's issued share capital²⁰ (disregarding any shares held by the company as treasury shares)²¹;
- 409 (ii) if the company is not limited by shares²², by not less than 15 per cent of its members²³; or
- 410 (iii) by the holders of not less than 15 per cent of the company's debentures²⁴ entitling the holders to object to an alteration of its objects²⁵;

but not by a person who has consented to or voted in favour of the resolutions²⁶. The application must be made within 28 days after the date on which the resolutions are passed or made (or, if the resolutions are passed or made on different days, the date on which the last of them is passed or made)²⁷, and they may be made on behalf of the persons entitled to make it by such one or more of their number as they may appoint for the purpose²⁸. On the hearing of the application, the court must make an order either cancelling or confirming the resolutions²⁹. The court may make that order on such terms and conditions as it thinks fit³⁰; if it thinks fit, the court may adjourn the proceedings in order that an arrangement may be made to the satisfaction of the court for the purchase of the interests of dissentient members³¹; and the court may give such directions, and make such orders, as it thinks expedient for facilitating or carrying into effect any such arrangement³². The court's order may, if the court thinks fit, provide for the purchase by the company of the shares of any of its members and for the reduction accordingly of the company's capital³³, and make such alteration in the company's articles as may be required in consequence of that provision³⁴. The court's order may, if the court thinks fit, require the company not to make any, or any specified, amendments to its articles without the leave of the court³⁵.

An application to become a community interest company must be accompanied by a copy of the special resolutions³⁶, by a copy of the company's articles as proposed to be amended³⁷, and by the prescribed conversion documents³⁸.

On receiving an application to become a community interest company together with the other documents required to accompany it, the registrar of companies must, instead of recording the documents and entering a new name on the register³⁹, forward a copy of each of the documents to the Regulator⁴⁰, and retain the documents pending the Regulator's decision⁴¹.

The Regulator must decide whether the company is eligible to become a community interest company⁴². A company is eligible to become a community interest company if:

- 411 (A) its articles (as proposed to be amended) comply with the statutory requirements⁴³;
- 412 (B) its proposed name complies with the statutory requirements⁴⁴; and
- 413 (C) the Regulator, having regard to the application and accompanying documents and any other relevant considerations, considers that the company will satisfy the community interest test and is not an excluded company⁴⁵.

The Regulator must give notice of the decision to the registrar of companies, but the registrar is not required to record it⁴⁶.

If the Regulator decides that the company is eligible to be formed as a community interest company, the registrar of companies must proceed in accordance with the statutory requirements which govern registration on a change of name and the issue of a new certificate of incorporation⁴⁷; and, if the registrar enters the new name of the company on the register, he must also retain and record the application to become a community interest company together with the other documents required to accompany it⁴⁸. The new certificate of incorporation must state that it is issued on the company's conversion to a community interest company⁴⁹, must state the date on which it is issued⁵⁰, and must state that the company is a community interest company⁵¹. On the issue of the certificate, the company by virtue of the issue of the certificate becomes a community interest company⁵², and the changes in the company's name and articles take effect⁵³. The certificate is conclusive evidence that the company is a community interest company⁵⁴.

If the Regulator decides that the company is not eligible to become a community interest company, the company may appeal to the Appeal Officer⁵⁵ against the decision⁵⁶.

If a company that is an English charity becomes a community interest company, that does not affect the application of any property acquired under any disposition or agreement previously made otherwise than for full consideration in money or money's worth, or any property representing property so acquired, or the application of any property representing income which has previously accrued, or the application of the income from any such property⁵⁷.

1 As to community interest companies see PARA 82.

2 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37(1)(a) (s 37 substituted by SI 2009/1941). As to special resolutions see PARA 614.

3 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37(1)(a)(i) (as substituted: see note 2).

4 As to a community interest company's articles of association see PARA 105; and as to a company's articles of association generally see PARA 228 et seq.

5 Ie make alterations by special resolution in order to comply with requirements imposed by and by virtue of the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 32 (see PARA 105): see s 37(1)(a)(ii) (as substituted: see note 2).

6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37(1)(a)(ii) (as substituted: see note 2).

7 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37(1)(a)(iii) (as substituted: see note 2). The text refers to a special resolution to change the name of the company to comply with s 33 (see PARA 203): see s 37(1)(a)(iii) (as so substituted). However, a company that is an English charity may not become a community interest company without the prior written consent of the Charity Commission: s 39(1) (amended by the Charities Act 2006 s 75(1), Sch 8 paras 200, 201; and SI 2007/1093; SI 2009/1941). If a company that is an English charity contravenes this restriction, the Charity Commission may apply to the High Court for an order quashing any altered certificate of incorporation issued under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 38A (see the text and notes 47-56): s 39(2) (amended by the Charities Act 2006 Sch 8 paras 200, 201; and SI 2007/1093; SI 2009/1941). As to the meaning of 'English charity' see PARA 82 note 6. As to the Charity Commission see **CHARITIES** vol 8 (2010) PARA 538 et seq.

8 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37(1)(b) (as substituted: see note 2).

9 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37A (see the text and notes 18-35): see s 37(2)(a) (as substituted: see note 2).

10 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37(2)(a)(i) (as substituted: see note 2).

11 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37(2)(a)(ii) (as substituted: see note 2).

12 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37(2)(b)(i) (as substituted: see note 2).

13 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37(2)(b)(ii) (as substituted: see note 2). As to the registrar of companies see PARA 131 et seq.

14 In accordance with the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37C (see the text and notes 36-41): see s 37(1)(c) (as substituted: see note 2).

15 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37(1)(c) (as substituted: see note 2). The text refers to the other documents that are required by s 37C (see the text and notes 36-41): see s 37(1)(c) (as so substituted).

16 In the duty under the Companies Act 2006 s 30 (see PARA 231): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37(3) (as substituted: see note 2).

17 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37(3) (as substituted: see note 2). The Companies Act 2006 s 30 (see PARA 231) applies to the special resolutions as follows: (1) s 30 is complied with by forwarding copies of the resolutions together with the application in accordance with the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37C (see the text and notes 36-41) (s 37(3)(a) (as so substituted)); (2) copies of the resolutions must not be so forwarded before the relevant date (s 37(3)(b) (as so substituted)); and (3) the Companies Act 2006 s 30(1) (see PARA 231) has effect in relation to the resolutions as if it referred to 15 days after the relevant date (Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37(3)(c) (as so substituted)). For these purposes, the relevant date is: (a) if an application is made under s 37A (see the text and notes 18-35) for cancellation of the special resolutions, either the date on which the court determines the application (or if there is more than one application, the date on which the last to be determined by the court is determined), or such later date as the court may order (s 37(4) (a) (as so substituted)); (b) if there is no such application, either, if having regard to the number of members who consented to or voted in favour of the resolutions, no such application may be made, the date on which the resolutions were passed or made (or, if the resolutions were passed or made on different days, the date on which the last of them was passed or made) or, in any other case, the end of the period for making such an application (s 37(4)(b) (as so substituted)).

18 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37A(1) (ss 37A-37C added by SI 2009/1941). On making an application under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37A the applicants, or the person making the application on their behalf (see the text and notes 27-28), must immediately give notice to the registrar of companies: s 37B(1) (as so added). This is without prejudice to any provision of rules of court as to service of notice of the application: s 37B(1) (as so added). On being served with notice of any such application, the company must immediately give notice to the registrar: s 37B(2) (as so added). If a company fails to comply with s 37B(2), an offence is committed by the company, and by every officer of the company who is in default: s 37B(4) (as so added). A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale and (for continued contravention) a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 37B(5) (as so added). As to the meaning of 'officer who is in default' see PARA 315; and as to the meaning of 'officer' generally see PARA 607. As to the meanings of 'daily default fine' and as to the standard scale see PARA 1622.

19 As to the meaning of 'issued share capital' see PARA 1045. As to the meanings of 'company having a share capital', 'share' and 'share capital' see PARA 1042. As to the nominal value of shares see PARA 1044.

20 As to the meaning of classes of share see PARA 1057. As to classes of shares generally see PARA 1057 et seq.

21 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37A(1)(a) (as added: see note 18). As to treasury shares see PARA 1251.

22 As to the meaning of 'company limited by shares' see PARA 102.

23 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37A(1)(b) (as added: see note 18). As to membership of a company generally see PARA 321 et seq.

24 As to the meaning of 'debenture' see PARA 1299.

25 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37A(1)(c) (as added: see note 18). As to a company's objects see PARA 240.

- 26 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37A(1) (as added: see note 18).
- 27 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37A(2)(a) (as added: see note 18).
- 28 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37A(2)(b) (as added: see note 18).
- 29 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37A(3) (as added: see note 18). Within 15 days of the making of the court's order on the application, or such longer period as the court may at any time direct, the company must deliver to the registrar a copy of the order: s 37B(3) (as so added). If a company fails to comply with s 37B(3), an offence is committed by the company, and by every officer of the company who is in default: s 37B(4) (as so added). A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale and (for continued contravention) a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 37B(5) (as so added).
- 30 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37A(4)(a) (as added: see note 18).
- 31 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37A(4)(b) (as added: see note 18).
- 32 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37A(4)(c) (as added: see note 18).
- 33 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37A(5)(a) (as added: see note 18).
- 34 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37A(5)(b) (as added: see note 18).
- 35 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37A(6) (as added: see note 18).
- 36 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37C(1)(a) (as added: see note 18).
- 37 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37C(1)(b) (as added: see note 18). As to the procedure for altering a company's constitutional documents generally see [PARA 232](#) et seq.
- 38 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37C(1)(c) (as added: see note 18). For these purposes, the 'prescribed conversion documents' means such declarations or statements as are required by regulations to accompany the application, in such form as may be approved in accordance with the regulations: s 37C(2) (as so added). As to the making of regulations under the Companies (Audit, Investigations and Community Enterprise) Act 2004 generally see s 62 (amended by SI 2009/1941). In exercise of the powers conferred by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37C(2), the Secretary of State has made the Community Interest Company Regulations 2005, SI 2005/1788: see reg 12 (amended by SI 2007/1093; SI 2009/1942). As to the Secretary of State see [PARA 6](#).
- 39 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37C(3) (as added: see note 18).
- 40 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37C(3)(a) (as added: see note 18). As to the Regulator see [PARA 83](#).
- 41 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 37C(3)(b) (as added: see note 18). The material so retained is not available for public inspection: see the Companies Act 2006 s 1087(1)(j); and [PARA 150](#). The registrar of companies must not cause to be published in the Gazette notice pursuant to the Companies Act 2006 s 1077 (see [PARA 144](#)) of the receipt of documents under the Companies (Audit Investigations and Community Enterprise) Act 2004 s 37C(3) unless the registrar records those documents pursuant to s 38A(1)(b) (see the text and note 48): see the Community Interest Company Regulations 2005, SI 2005/1788, reg 34(1); and [PARA 144](#).
- 42 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 38(1) (s 38 substituted by SI 2009/1941).
- 43 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 38(2)(a) (as substituted: see note 42). The text refers to the requirements imposed by and by virtue of s 32 (see [PARA 105](#)): see s 38(2)(a) (as so substituted).

- 44 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 38(2)(b) (as substituted: see note 42). The text refers to compliance with the requirements of s 33 (see PARA 203): see s 38(2)(b) (as so substituted).
- 45 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 38(2)(c) (as substituted: see note 42). As to the community interest test and excluded companies see PARA 87.
- 46 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 38(3) (as substituted: see note 42).
- 47 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 38A(1)(a) (s 38A added by SI 2009/1941). The text refers to the requirement that the registrar proceed in accordance with the Companies Act 2006 s 80 (see PARA 219): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 38A(1)(a) (as so added).
- 48 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 38A(1)(b) (as added: see note 47). The text refers to the requirement that the registrar retain and record the documents mentioned in s 37C(3) (see the text and notes 39-41): see s 38A(1)(b) (as so added). See also note 41.
- 49 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 38A(2)(a) (as added: see note 47).
- 50 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 38A(2)(b) (as added: see note 47).
- 51 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 38A(2)(c) (as added: see note 47).
- 52 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 38A(3)(a) (as added: see note 47).
- 53 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 38A(3)(b) (as added: see note 47).
- 54 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 38A(4) (as added: see note 47).
- 55 As to the Appeal Officer for community interest companies see PARA 84.
- 56 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 38A(5) (as added: see note 47).
- 57 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 39(3) (amended by SI 2007/1093).

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(ix) Changes of Status affecting Community Interest Companies

192. Limitations on re-registration of community interest company.

A community interest company¹ is excluded from re-registering² as an unlimited company³.

If a community interest company which is not a public company⁴ re-registers as a public company⁵, or if a community interest company which is a public company re-registers as a private company⁶, the certificate of incorporation issued in each case⁷ must contain a statement that the company is a community interest company⁸. The fact that the certificate of incorporation contains such a statement is conclusive evidence that the company is a community interest company⁹.

- 1 As to community interest companies see PARA 82.
- 2 Ie under the Companies Act 2006 s 102 (see PARA 176): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 52(1) (amended by SI 2009/1941).
- 3 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 52(1) (as amended: see note 2); Interpretation Act 1978 s 17(2)(b). As to the meaning of 'unlimited company' see PARA 102.
- 4 As to the meaning of 'public company' see PARA 102.
- 5 Ie under the Companies Act 2006 s 90 (see PARA 168): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 52(2) (as amended: see note 8).
- 6 Ie under the Companies Act 2006 s 97 (see PARA 173): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 52(2) (as amended: see note 8). As to the meaning of 'private company' see PARA 102.
- 7 Ie under the Companies Act 2006 s 96(2) (re-registration as a public company) (see PARA 172) or under s 101(2) (re-registration as a private limited company) (see PARA 175): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 52(2) (as amended: see note 8). As to a company's certificate of incorporation generally see PARA 119.
- 8 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 52(2) (amended by SI 2009/1941).
- 9 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 52(3).

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193. Ceasing to be a community interest company.

A community interest company¹ may not cease to be a community interest company except by dissolution² or by virtue of the provisions which allow for such a company to become a charity³ or (if regulations are so made⁴) by virtue of regulations that allow for such a company to become an industrial and provident society⁵.

- 1 As to community interest companies see PARA 82.
- 2 As to the dissolution of a company generally see PARA 1521 et seq.
- 3 Ie as provided by the Companies (Audit, Investigations and Community Enterprise) Act 2004 ss 54-55A (see PARA 194): see s 53 (amended by SI 2008/948; SI 2009/1941). For these purposes, 'charity' means an English charity: Companies (Audit, Investigations and Community Enterprise) Act 2004 s 63(1) (definition substituted by SI 2007/1093). As to the meaning of 'English charity' see PARA 82 note 6. As to provision made for existing charitable companies to become a community interest company see PARA 191.
- 4 Ie if regulations are made under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 56 (see PARA 195): see s 53 (as amended: see note 3).
- 5 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 53 (as amended: see note 3). As to industrial and provident societies generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2394 et seq.

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194. Community interest company becoming a charity.

If a company is to cease being a community interest company¹ and become a charity²:

- 414 (1) the company must by special resolution³: (a) state that it is to cease to be a community interest company⁴; (b) make such alterations of its articles of association⁵ as it considers appropriate⁶; and (c) change its name so that it does not comply with the statutory requirements that govern the names that are reserved for community interest companies⁷;
- 415 (2) the following specified conditions must be met⁸, namely that: (a) where no application⁹ for cancellation of the special resolutions has been made, having regard to the number of members who consented to or voted in favour of the resolutions, no such application may be made¹⁰, or the period within which such an application could be made has expired¹¹; or (b) where such an application has been made, the application has been withdrawn¹², or an order has been made confirming the resolutions and a copy of that order has been delivered to the registrar of companies¹³; and
- 416 (3) an application must be delivered to the registrar of companies¹⁴ together with the other documents that are so required¹⁵.

The statutory duty to forward to the registrar of companies copies of resolutions that affect the company's constitution¹⁶ applies to the special resolutions¹⁷.

Where special resolutions have been passed with a view to a company ceasing to be a community interest company and becoming a charity, an application to the court for the cancellation of the resolutions may be made¹⁸:

- 417 (i) by the holders of not less in the aggregate than 15 per cent in nominal value of the company's issued share capital¹⁹ or any class of the company's issued share capital²⁰ (disregarding any shares held by the company as treasury shares)²¹;
- 418 (ii) if the company is not limited by shares²², by not less than 15 per cent of its members²³; or
- 419 (iii) by the holders of not less than 15 per cent of the company's debentures²⁴ entitling the holders to object to an alteration of its objects²⁵;

but not by a person who has consented to or voted in favour of the resolutions²⁶. The application must be made within 28 days after the date on which the resolutions were passed or made (or, if the resolutions were passed or made on different days, the date on which the last of them was passed or made)²⁷, and they may be made on behalf of the persons entitled to make it by such one or more of their number as they may appoint for the purpose²⁸. On the hearing of the application, the court must make an order either cancelling or confirming the resolutions²⁹. The court may make that order on such terms and conditions as it thinks fit³⁰; if it thinks fit, the court may adjourn the proceedings in order that an arrangement may be made to the satisfaction of the court for the purchase of the interests of dissentient members³¹; and the court may give such directions, and make such orders, as it thinks expedient for facilitating or carrying into effect any such arrangement³². The court's order may, if the court thinks fit, provide for the purchase by the company of the shares of any of its members and for the reduction accordingly of the company's capital³³, and make such alteration in the company's

articles as may be required in consequence of that provision³⁴. The court's order may, if the court thinks fit, require the company not to make any, or any specified, amendments to its articles without the leave of the court³⁵.

An application to cease to be a community interest company and become a charity must be accompanied by a copy of the special resolutions³⁶, by a copy of the company's articles as proposed to be amended³⁷, and by the statement that is required³⁸.

On receiving an application to cease to be a community interest company and become a charity, together with the other documents required to accompany it, the registrar of companies must, instead of recording the documents and entering a new name on the register³⁹, forward a copy of each of the documents to the Regulator⁴⁰, and retain the documents pending the Regulator's decision⁴¹.

The Regulator must decide whether the company is eligible to cease being a community interest company⁴². A company is eligible to cease being a community interest company if it has complied with the provisions above that govern such an application⁴³ and if none of the following applies⁴⁴, namely:

- 420 (A) the Regulator has⁴⁵ appointed an auditor to audit the company's annual accounts and the audit has not been completed⁴⁶;
- 421 (B) civil proceedings instituted by the Regulator in the name of the company⁴⁷ have not been either determined or discontinued⁴⁸;
- 422 (C) a director of the company holds office by virtue of an order⁴⁹ of the Regulator appointing him as a director of the company⁵⁰;
- 423 (D) a director of the company is suspended⁵¹ by order of the Regulator pending a decision whether to remove him as director⁵²;
- 424 (E) there is a manager in respect of the property and affairs of the company appointed⁵³ by order of the Regulator⁵⁴;
- 425 (F) the Official Property Holder⁵⁵ holds property as trustee for the company⁵⁶;
- 426 (G) the Regulator has ordered⁵⁷ a person who holds property on behalf of a community interest company (or on behalf of a trustee of a community interest company) not to part with the property without the Regulator's consent, and ordered any debtor of a community interest company not to make any payment in respect of the debtor's liability to the company without the Regulator's consent, and that order is still in force in relation to the company⁵⁸;
- 427 (H) the Regulator has by order⁵⁹ restricted the transactions which may be entered into by a community interest company, or the nature or amount of the payments that a community interest company may make, and that order is still in force in relation to the company⁶⁰;
- 428 (I) a petition has been presented for the company to be wound up⁶¹.

The Regulator must give notice of the decision to the registrar of companies, but the registrar is not required to record it⁶².

If the Regulator decides that the company is eligible to cease being a community interest company, the registrar of companies must proceed in accordance with the statutory requirements which govern registration on a change of name and the issue of a new certificate of incorporation⁶³; and, if the registrar enters the new name of the company on the register, he must also retain and record the application to become a community interest company together with the other documents that are required to accompany it⁶⁴. The new certificate of incorporation must state that it is issued on the company's ceasing to be a community interest company⁶⁵, and it must state the date on which it is issued⁶⁶. On the issue of the certificate, the changes in the company's name and articles take effect⁶⁷, and the company ceases to be a community interest company⁶⁸.

If the Regulator decides that the company is not eligible to cease being a community interest company, the company may appeal to the Appeal Officer⁶⁹ against the decision⁷⁰.

1 As to community interest companies see PARA 82.

2 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54(1) (s 54 substituted by SI 2009/1941). As to the meaning of 'charity' for these purposes see PARA 193 note 3.

3 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54(1)(a) (as substituted: see note 2). As to special resolutions see PARA 614.

4 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54(1)(a)(i) (as substituted: see note 2).

5 As to a community interest company's articles of association see PARA 105; and as to a company's articles of association generally see PARA 228 et seq.

6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54(1)(a)(ii) (as substituted: see note 2).

7 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54(1)(a)(iii) (as substituted: see note 2). The text refers to a special resolution to change the company's name so that it does not comply with s 33 (see PARA 203): see s 54(1)(a)(iii) (as so substituted).

8 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54(1)(b) (as substituted: see note 2).

9 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54A (see the text and notes 18-35): see s 54(2)(a) (as substituted: see note 2).

10 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54(2)(a)(i) (as substituted: see note 2).

11 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54(2)(a)(ii) (as substituted: see note 2).

12 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54(2)(b)(i) (as substituted: see note 2).

13 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54(2)(b)(ii) (as substituted: see note 2). As to the registrar of companies see PARA 131 et seq.

14 Ie in accordance with the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54C (see the text and notes 36-41): see s 54(1)(c) (as substituted: see note 2).

15 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54(1)(c) (as substituted: see note 2). The text refers to the other documents that are required by s 54C (see the text and notes 36-41): see s 54(1)(c) (as so substituted).

16 Ie the duty under the Companies Act 2006 s 30 (see PARA 231): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54(3) (as substituted: see note 2).

17 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54(3) (as substituted: see note 2). The Companies Act 2006 s 30 (see PARA 231) applies to the special resolutions as follows: (1) s 30 is complied with by forwarding copies of the resolutions together with the application in accordance with the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54C (see the text and notes 36-41) (s 54(3)(a) (as so substituted)); (2) copies of the resolutions must not be so forwarded before the relevant date (s 54(3)(b) (as so substituted)); and (3) the Companies Act 2006 s 30(1) (see PARA 231) has effect in relation to the resolutions as if it referred to 15 days after the relevant date (Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54(3)(c) (as so substituted)). For these purposes, the relevant date is: (a) if an application is made under s 54A (see the text and notes 18-35) for cancellation of the special resolutions, either the date on which the court determines the application (or if there is more than one application, the date on which the last to be determined by the court is determined), or such later date as the court may order (s 54(4) (a) (as so substituted)); (b) if there is no such application, either, if having regard to the number of members who consented to or voted in favour of the resolutions, no such application may be made, the date on which the resolutions were passed or made (or, if the resolutions were passed or made on different days, the date on

which the last of them was passed or made) or, in any other case, the end of the period for making such an application (s 54(4)(b) (as so substituted)).

18 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54A(1) (ss 54A-54C added by SI 2009/1941). On making an application under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54A, the applicants, or the person making the application on their behalf (see the text and notes 27-28), must immediately give notice to the registrar of companies: s 54B(1) (as so added). This is without prejudice to any provision of rules of court as to service of notice of the application: s 54B(1) (as so added). On being served with notice of any such application, the company must immediately give notice to the registrar: s 54B(2) (as so added). If a company fails to comply with s 54B(2), an offence is committed by the company, and by every officer of the company who is in default: s 54B(4) (as so added). A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale and (for continued contravention) a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 54B(5) (as so added). As to the meaning of 'officer who is in default' see PARA 315; and as to the meaning of 'officer' generally see PARA 607. As to the meanings of 'daily default fine' and as to the standard scale see PARA 1622.

19 As to the meaning of 'issued share capital' see PARA 1045. As to the meanings of 'company having a share capital', 'share' and 'share capital' see PARA 1042. As to the nominal value of shares see PARA 1044.

20 As to classes of shares generally see PARA 1057 et seq.

21 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54A(1)(a) (as added: see note 18). As to treasury shares see PARA 1251.

22 As to the meaning of 'company limited by shares' see PARA 102.

23 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54A(1)(b) (as added: see note 18). As to membership of a company generally see PARA 321 et seq.

24 As to the meaning of 'debenture' see PARA 1299.

25 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54A(1)(c) (as added: see note 18). As to a company's objects see PARA 240.

26 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54A(1) (as added: see note 18).

27 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54A(2)(a) (as added: see note 18).

28 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54A(2)(b) (as added: see note 18).

29 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54A(3) (as added: see note 18). Within 15 days of the making of the court's order on the application, or such longer period as the court may at any time direct, the company must deliver to the registrar a copy of the order: s 54B(3) (as so added). If a company fails to comply with s 54B(3), an offence is committed by the company, and by every officer of the company who is in default: s 54B(4) (as so added). A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale and (for continued contravention) a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 54B(5) (as so added).

30 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54A(4)(a) (as added: see note 18).

31 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54A(4)(b) (as added: see note 18).

32 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54A(4)(c) (as added: see note 18).

33 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54A(5)(a) (as added: see note 18).

34 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54A(5)(b) (as added: see note 18).

35 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54A(6) (as added: see note 18).

36 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54C(1)(a) (as added: see note 18).

37 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54C(1)(b) (as added: see note 18). As to the procedure for altering a company's constitutional documents generally see PARA 232 et seq.

38 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54C(1)(c) (as added: see note 18). For these purposes, the statement required is (where the company is to become an English charity) a statement by the Charity Commission that, in its opinion, if the proposed changes take effect the company will be an English charity and will not be an exempt charity, where 'exempt charity' has the same meaning as in the Charities Act 1993 (see s 96; and **CHARITIES** vol 8 (2010) PARA 1): Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54C(2), (3) (as so added). As to the meaning of 'English charity' see PARA 82 note 6. As to the Charity Commission see **CHARITIES** vol 8 (2010) PARA 538 et seq.

39 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54C(4) (as added: see note 18).

40 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54C(4)(a) (as added: see note 18). As to the Regulator see PARA 83.

41 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54C(4)(b) (as added: see note 18). The material so retained is not available for public inspection: see the Companies Act 2006 s 1087(1)(j); and PARA 150. The registrar of companies must not cause to be published in the Gazette notice pursuant to the Companies Act 2006 s 1077 (see PARA 144) of the receipt of documents under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54C(4) unless the registrar records those documents pursuant to s 55A(1)(b) (see the text and note 64): see the Community Interest Company Regulations 2005, SI 2005/1788, reg 34(1); and PARA 144.

42 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55(1) (s 55 substituted by SI 2009/1941).

43 Ie if it has complied with the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 54 (see the text and notes 1-17) and s 54C (see the text and notes 36-41): see s 55(2) (as substituted: see note 42).

44 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55(2) (as substituted: see note 42).

45 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 43 (see PARA 93): see s 55(2)(a) (as substituted: see note 42).

46 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55(2)(a) (as substituted: see note 42).

47 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 44 (see PARA 94): see s 55(2)(b) (as substituted: see note 42).

48 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55(2)(b) (as substituted: see note 42).

49 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 45 (see PARA 95): see s 55(2)(c) (as substituted: see note 42).

50 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55(2)(c) (as substituted: see note 42).

51 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 46(3) (see PARA 96): see s 55(2)(d) (as substituted: see note 42).

52 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55(2)(d) (as substituted: see note 42).

53 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47 (see PARA 97): see s 55(2)(e) (as substituted: see note 42).

54 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55(2)(e) (as substituted: see note 42).

55 As to the Official Property Holder for community interest companies see PARA 85.

- 56 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55(2)(f) (as substituted: see note 42).
- 57 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(2) (see PARA 98): see s 55(2)(g) (as substituted: see note 42).
- 58 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55(2)(g) (as substituted: see note 42).
- 59 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 48(3) (see PARA 98): see s 55(2)(g) (as substituted: see note 42).
- 60 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55(2)(g) (as substituted: see note 42).
- 61 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55(2)(h) (as substituted: see note 42). As to the Regulator's power to petition for a community interest company to be wound up see PARA 100. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.
- 62 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55(3) (as substituted: see note 42).
- 63 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55A(1)(a) (s 55A added by SI 2009/1941). The text refers to the requirement that the registrar proceed in accordance with the Companies Act 2006 s 80 (see PARA 219): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55A(1)(a) (as so added).
- 64 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55A(1)(b) (as added: see note 63). The text refers to the requirement that the registrar retain and record the documents mentioned in s 54C(4) (see the text and notes 39-41): see s 55A(1)(b) (as so added). See also note 41.
- 65 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55A(2)(a) (as added: see note 63).
- 66 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55A(2)(b) (as added: see note 63).
- 67 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55A(3)(a) (as added: see note 63).
- 68 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55A(3)(b) (as added: see note 63).
- 69 As to the Appeal Officer for community interest companies see PARA 84.
- 70 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 55A(4) (as added: see note 63).

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195. Community interest company becoming an industrial and provident society.

Unless regulations made under the Companies (Audit, Investigations and Community Enterprise) Act 2004¹ make provision to the contrary², a community interest company³ may not convert itself into a registered society under the Industrial and Provident Societies Act 1965⁴. However, if regulations do make such provision⁵ they may include provision modifying the

relevant provisions of the Industrial and Provident Societies Act 1965⁶ in its application by virtue of the regulations⁷.

Accordingly⁸, a community interest company may convert itself into a permitted industrial and provident society⁹ and, for these purposes, the relevant provisions of the Industrial and Provident Societies Act 1965¹⁰ apply to community interest companies with such modifications as are specified under the regulations so made¹¹.

1 As to the making of regulations under the Companies (Audit, Investigations and Community Enterprise) Act 2004 generally see s 62 (amended by SI 2009/1941).

2 See the text and notes 8-11.

3 As to community interest companies see PARA 82.

4 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 56(1) (amended by SI 2007/1093). The text refers to conversion into a registered society under the Industrial and Provident Societies Act 1965 s 53 (resolution for conversion of company into society) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2417): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 56(1) (as so amended). As to industrial and provident societies generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2394 et seq.

5 I.e. allowing the conversion of community interest companies under the Industrial and Provident Societies Act 1965 s 53 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2417): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 56(2). See the text and notes 8-11.

6 I.e. modifying the Industrial and Provident Societies Act 1965 s 53 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2417): see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 56(2). See the text and notes 8-11.

7 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 56(2). See the text and notes 8-11.

8 I.e. pursuant to the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 56 (see the text and notes 1-7): see the Community Interest Company Regulations 2005, SI 2005/1788, reg 6A (added by SI 2009/1942).

9 For these purposes, 'permitted industrial and provident society' means an industrial and provident society which has a restriction on the use of its assets in accordance with the Community Benefit Societies (Restriction on Use of Assets) Regulations 2006, SI 2006/264, reg 4 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2402): see the Community Interest Company Regulations 2005, SI 2005/1788, reg 2 (definition added by SI 2009/1942).

10 I.e. the Industrial and Provident Societies Act 1965 s 53 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2417): see the Community Interest Company Regulations 2005, SI 2005/1788, reg 6A (as added: see note 8).

11 See the Community Interest Company Regulations 2005, SI 2005/1788, reg 6A (as added: see note 8). The regulations referred to in the text are the Community Interest Company Regulations 2005, SI 2005/1788, as they have been amended by SI 2009/1942, made under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 56 (amongst other provisions).

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(5) COMPANY AND BUSINESS NAMES

(i) General Requirements as to Company Name

196. Prohibition or restriction on registration under certain names.

A company¹ must not be registered under the Companies Act 2006² by a name³ if, in the opinion of the Secretary of State⁴, its use by the company would constitute a criminal offence⁵, or it is offensive⁶.

The approval of the Secretary of State⁷ is required for a company to be registered under the Companies Act 2006 by a name that:

- 429 (1) would be likely to give the impression that the company is connected with Her Majesty's government or the Welsh Assembly Government⁸, or with a local authority⁹, or with any public authority¹⁰ that is specified for these purposes¹¹ by regulations made by the Secretary of State¹²; or
- 430 (2) includes a word or expression for the time being specified in regulations made by the Secretary of State for these purposes¹³.

The Secretary of State may by regulations made under head (1) or under head (2) above require that, in connection with an application for the approval of the Secretary of State¹⁴, the applicant must seek the view of a specified¹⁵ government department or other body¹⁶. Where such a requirement applies, the applicant must request the specified department or other body (in writing) to indicate whether (and if so why) it has any objections to the proposed name¹⁷. Where such a request is made in connection with an application for the registration of a company under the Companies Act 2006, the application must include a statement that such a request has been made¹⁸ and must be accompanied by a copy of any response received¹⁹. Where such a request is made in connection with a change in a company's name²⁰, the notice of the change sent to the registrar of companies²¹ must be accompanied by a statement by a director²² or secretary²³ of the company that such a request has been made²⁴, and a copy of any response received²⁵.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to company registration under the Companies Act 2006 see PARA 111 et seq. As to companies registered but not formed under the Companies Act 2006, and as to overseas companies, see PARA 32.

3 As to the company name generally see PARA 200 et seq. As to the registered name of an overseas company see PARA 1827.

4 Companies Act 2006 s 53. As to the Secretary of State see PARA 6.

5 Companies Act 2006 s 53(a).

6 Companies Act 2006 s 53(b).

7 Before determining under the Companies Act 2006 s 55 (see head (2) in the text) whether to approve the registration of a company under a name which includes the expression 'chamber of commerce' or 'siambr fasnach', or any other expression for the time being specified in regulations under s 55 which begins with the words 'chamber of' or 'chambers of' (or the Welsh equivalents), the Secretary of State must consult at least one relevant representative body: Company and Business Names (Chamber of Commerce, etc) Act 1999 s 2(1) (amended by SI 2009/1941). The Secretary of State may publish guidance with respect to factors which may be taken into account in determining whether to approve the registration of a name to which the Company and Business Names (Chamber of Commerce, etc) Act 1999 s 2 applies: s 2(2). The relevant representative bodies for these purposes are the British Chambers of Commerce and the body known as the Scottish Chambers of Commerce (see s 4(1)); but the Secretary of State may by order made by statutory instrument amend s 4(1) by adding or deleting from it the name of any body (whether corporate or unincorporated) (see s 4(2), (3)). At the date at which this volume states the law, no such order had been made.

The functions conferred on the Secretary of State by the Companies Act 2006 s 54 and s 55 (both formerly the Companies Act 1985 s 26(2)) may be exercised by, or by employees of, such person (if any) as may be authorised in that behalf by the Secretary of State: see the Contracting Out (Functions in relation to the

Registration of Companies) Order 1995, SI 1995/1013, art 5, Sch 3 para 1(a); and the Interpretation Act 1978 s 17(2)(b); and PARA 8.

8 Companies Act 2006 s 54(1)(a) (amended as from 6 November 2009 by SI 2009/2958). This provision also applies to a name that would be likely to give the impression that the company is connected with any part of the Scottish administration or Her Majesty's Government in Northern Ireland: see the Companies Act 2006 s 54(1)(a) (as so amended).

9 Companies Act 2006 s 54(1)(b). For these purposes, 'local authority' means a local authority within the meaning of the Local Government Act 1972 (see **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 24) (or a council constituted under the Local Government etc (Scotland) Act 1994 s 2 or a district council in Northern Ireland), the Common Council of the City of London or the Council of the Isles of Scilly: Companies Act 2006 s 54(2). As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 51 et seq. As to the Council of the Isles of Scilly see **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 40.

10 For these purposes, 'public authority' includes any person or body having functions of a public nature: Companies Act 2006 s 54(2). As to public bodies and public authorities generally see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 6 et seq.

11 Ie for the purposes of the Companies Act 2006 s 54: see s 54(1)(c).

12 Companies Act 2006 s 54(1)(c). Regulations made under s 54 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 54(3), 1290. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. As to the regulations that have been made under s 54 see the Company, Limited Liability Partnership and Business Names (Public Authorities) Regulations 2009, SI 2009/2982.

13 Companies Act 2006 s 55(1). Head (2) in the text refers to regulations made by the Secretary of State under s 55: see s 55(1). Such regulations are subject to approval after being made: s 55(2). Regulations under the Companies Act 2006 that are subject to 'approval after being made' must be laid before Parliament after being made, and they must cease to have effect at the end of 28 days beginning with the day on which they were made unless during that period they are approved by resolution of each House: s 1291(1). In reckoning the period of 28 days, no account is to be taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days: s 1291(2). The regulations ceasing to have effect does not affect anything previously done under them or it, or the making of new regulations: s 1291(3). It is the duty of the Secretary of State to secure that the expression 'chamber of commerce' and its Welsh equivalent ('siambr fasnach') is specified in regulations under s 55 (company names requiring approval of Secretary of State), as an expression for the registration of which as or as part of a company's name the approval of the Secretary of State is required: Company and Business Names (Chamber of Commerce, etc) Act 1999 s 1 (amended by SI 2009/1941). Accordingly, as to the words and expressions that are specified for the purposes of the Companies Act 2006 s 55(1) see the Company, Limited Liability Partnership and Business Names (Sensitive Words and Expressions) Regulations 2009, SI 2009/2615, regs 3, 4, Sch 1 Pts 1, 2.

14 Ie under the Companies Act 2006 s 54 (see head (1) in the text) or under s 55 (see head (2) in the text), as the case may be: see s 56(1).

15 For these purposes, 'specified' means specified in the regulations: Companies Act 2006 s 56(5). Accordingly, in connection with applications for Secretary of State approval where the situation of the registered office or principal place of business is irrelevant, see the Company, Limited Liability Partnership and Business Names (Sensitive Words and Expressions) Regulations 2009, SI 2009/2615, reg 5, Sch 2 Pt 1; and as to applications where the situation of the registered office or principal place of business is relevant see reg 6, Sch 2 Pt 2.

16 Companies Act 2006 s 56(1).

17 Companies Act 2006 s 56(2). As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

18 Companies Act 2006 s 56(3)(a).

19 Companies Act 2006 s 56(3)(b).

20 As to change of a company's name see PARAS 217-219.

21 As to the procedure that must be followed on a change of company name, and the effect of such a change, see PARA 219. As to the methods generally by which a company name may be changed see PARA 217. As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the

registrar see PARA 141; and as to the requirements for the proper delivery of documents to the registrar see PARA 142.

22 As to the meaning of 'director' see PARA 478.

23 As to the company secretary and other officers see PARA 603.

24 Companies Act 2006 s 56(4)(a).

25 Companies Act 2006 s 56(4)(b). The contents of any document sent to the registrar containing views expressed pursuant to s 56 must not be made available by him for public inspection: see s 1087; and PARA 150.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(5) COMPANY AND BUSINESS NAMES/(i) General Requirements as to Company Name/197. Permitted characters etc in company names.

197. Permitted characters etc in company names.

The Secretary of State¹ may make provision by regulations²: (1) as to the letters or other characters, signs or symbols (including accents and other diacritical marks) and punctuation that may be used in the name of a company³ registered under the Companies Act 2006⁴; and (2) specifying a standard style or format for the name of a company for the purposes of registration⁵. The regulations may prohibit the use of specified⁶ characters, signs or symbols when appearing in a specified position (in particular, at the beginning of a name)⁷. A company may not be registered under the Companies Act 2006 by a name that consists of or includes anything that is not permitted in accordance with such regulations⁸.

1 As to the Secretary of State see PARA 6 et seq.

2 Companies Act 2006 s 57(1). As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 57 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 57(4), 1289. As to the regulations so made see the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085; and notes 4, 7, 8.

3 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 Companies Act 2006 s 57(1)(a). Accordingly, the characters, signs, symbols and punctuation that may be used in any part of the name of a company registered under the Companies Act 2006 (the 'permitted characters') are:

84 (1) any character, sign or symbol set out in the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 2, Sch 1 Table 1 (reg 2(1),(2)(a));

85 (2) 0, 1, 2, 3, 4, 5, 6, 7, 8 or 9 (reg 2(1),(2)(b));

86 (3) full stop, comma, colon, semi-colon or hyphen (reg 2(1),(2)(c)); and

87 (4) any other punctuation referred to in Sch 1 Table 2 column 1 but only in one of the forms set out opposite that punctuation in Sch 1 Table 2 column 2 (reg 2(1),(2)(d)).

As to company registration under the Companies Act 2006 see PARA 111 et seq. As to companies registered but not formed under the Companies Act 2006, and as to overseas companies, see PARA 32.

5 Companies Act 2006 s 57(1)(b).

6 For these purposes, 'specified' means specified in the regulations: Companies Act 2006 s 57(5).

7 Companies Act 2006 s 57(2). Accordingly, the signs and symbols set out in the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, Sch 1 Table 3 are permitted characters that may be used but not as one of the first three permitted characters of the name: reg 2(1),(3).

8 Companies Act 2006 s 57(3). The name must not consist of more than 160 permitted characters: Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 2(1), (4). For the purposes of computing the number of permitted characters in reg 2(4), any blank space between one permitted character and another in the name is to be counted as though it was a permitted character: reg 1(3).

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198. Other restrictions on names.

A company¹ may not carry on business² with a name containing the words 'Red Cross', 'Geneva Cross', 'Red Crescent' or 'Red Lion and Sun' without the authority of the Secretary of State³; nor a name closely resembling the name of an association incorporated by royal charter, which has its name protected⁴ by Order in Council, without the authority of the association⁵; nor a name containing the word 'Anzac' or any word closely resembling that word without the authority of the Secretary of State given on the request of the government of the Commonwealth of Australia or of the Dominion of New Zealand⁶. In all these cases, the registrar of companies⁷ will refuse to register⁸ a company unless the relevant authority is produced.

If a company carries on business under a business name which does not consist of its corporate name without any addition, it must comply with the relevant requirements of the Companies Act 2006 which govern business names⁹.

The words 'limited' or 'cyfyngedig' may be lawfully used as the last word of a trading name only by a company incorporated with limited liability¹⁰. However, there is on the one hand no necessity to use the word 'company' as part of the company's name, nor on the other is there any restriction on its use. Subject to the restrictions mentioned elsewhere¹¹, the subscribers of the memorandum may choose any name they please¹².

In certain circumstances, a director¹³ or shadow director¹⁴ of a company may be personally debarred from using the name of that company if it has gone into insolvent liquidation on or after 29 December 1986, or any name so similar as to suggest an association with that company¹⁵.

1 As to the meaning of 'company' generally see PARA 1.

2 As to the meaning of 'carry on business' generally see PARA 1 note 1.

3 See the Geneva Conventions Act 1957 s 6; and **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 506.

4 Ie under the Chartered Associations (Protection of Names and Uniforms) Act 1926 s 1(1).

5 See the Chartered Associations (Protection of Names and Uniforms) Act 1926 s 1(3); and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1121.

6 See the 'Anzac' (Restriction on Trade Use of Word) Act 1916 s 1(1); and **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 507.

7 As to the meaning of 'registrar of companies' see PARA 131 note 2.

8 As to company registration under the Companies Act 2006 see PARA 111 et seq. As to companies registered but not formed under the Companies Act 2006, and as to overseas companies, see PARA 32.

9 See PARA 223 et seq. The text refers to the requirements of the Companies Act 2006 Pt 41 (ss 1192-1208). References in the company law provisions of the Companies Act 2006 to the requirements of that Act include the requirements of regulations and orders made under it: s 1172. As to the meaning of the 'company law provisions' of the Companies Act 2006 see PARA 16 note 6.

10 See PARA 226. The inclusion of the word 'limited' in a corporate name is not, however, restricted to bodies incorporated under the Companies Act 2006. Cf the Industrial and Provident Societies Act 1965 s 5(2), (5) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2439).

11 See PARA 196 et seq.

12 A company cannot, however, monopolise a word in ordinary use in the English language: *Aerators Ltd v Tollitt* [1902] 2 Ch 319. As to liability for passing-off see **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 304 et seq. As to subscribers of the memorandum see PARAS 104, 321 et seq.

13 As to the meaning of 'director' see PARA 478.

14 As to the meaning of 'shadow director' see PARA 479; and for these purposes see also **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 905.

15 See the Insolvency Act 1986 s 216; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 916.

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199. Name consisting of trade mark.

Where a registered trade mark¹ contains, or consists of, the name of a company², and the name of the company is subsequently changed, application should be made to the Registrar of Trade Marks³ to enter the change of name in the register of trade marks⁴.

Where the registered proprietors of a mark transfer their business to a company under the same name with the addition of the word 'limited', that word will be allowed to be added to the mark⁵, but the word 'limited' must not be abbreviated⁶.

A company which has carried on business under another name is entitled to protection for the latter as a trade name, although it has not complied with the statutory requirements⁷ as to the use of its name⁸.

1 As to registered trade marks see **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 12.

2 As to company names generally see PARA 196 et seq.

3 As to the Registrar of Trade Marks see **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 17.

4 See the Trade Marks Act 1994 s 44; and **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 393. As to the register of trade marks see **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 19 et seq.

5 *Re Guinness & Co's Trade Mark* (1888) 5 RPC 316. See also **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 393.

6 *Re Richard Hayward & Sons Ltd's Trade Marks* (1896) 13 RPC 729; *Re Holbrooks Ltd's Registered Trade Marks* (1901) 18 RPC 447. See also **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 393.

7 As to which see PARAS 196 et seq, 220 et seq.

8 *HE Randall Ltd v British and American Shoe Co Ltd* [1902] 2 Ch 354; *Pearks, Gunston and Tee Ltd v Thompson, Talmey & Co* (1901) 18 RPC 185, CA; and see *Employers' Liability Assurance Corp'n v Sedgwick, Collins & Co* [1927] AC 95 at 119, 120, HL, per Lord Blanesburgh.

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(ii) Indications of Company Type or Legal Form

A. PUBLIC AND PRIVATE LIMITED COMPANIES GENERALLY

200. Required indications for limited companies.

Any application for company registration¹ must state the proposed name of the company².

The name of a limited company³ that is a public company⁴ must end with the words 'public limited company' or 'plc'⁵. In the case of a Welsh company⁶, its name may instead end with 'cwmni cyfyngedig cyhoeddus' or 'ccc'⁷.

The name of a limited company that is a private company⁸ must end with 'limited' or 'ltd'⁹, although, in the case of a Welsh company, its name may instead end with 'cyfyngedig' or 'cyf'¹⁰. Certain private companies are exempt from this requirement¹¹.

Separate provision is made in relation to community interest companies¹².

Under the provisions that govern reductions made in a company's share capital¹³, the court may, if for any special reason it thinks proper to do so, make an order directing that the company must, during such period (commencing on or at any time after the date of the order) as is specified in the order, add to its name as its last words the words 'and reduced'¹⁴.

1 As to a company's application for registration under the Companies Act 2006 see PARA 111. As to companies registered but not formed under the Companies Act 2006, and as to overseas companies, see PARA 32. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 See the Companies Act 2006 s 9(2); and PARA 111. As to required disclosures of a company's name see PARA 220 et seq.

3 As to the meaning of 'limited company' see PARA 102.

4 As to the meaning of 'public company' see PARA 102.

5 Companies Act 2006 s 58(1). See also *Banque de l'Indochine et de Suez SA v Euroseas Group Finance Co Ltd* [1981] 3 All ER 198 (whether 'Co' may replace 'Company').

6 As to the meaning of 'Welsh company' see PARA 129 note 3.

7 Companies Act 2006 s 58(2).

8 As to the meaning of 'private company' see PARA 102.

9 Companies Act 2006 s 59(1).

10 Companies Act 2006 s 59(2).

11 Companies Act 2006 s 59(3). The text refers to the exemption from the requirement to use the word 'limited' in a company name that is provided by s 60 (see PARA 201): see s 59(3).

12 The Companies Act 2006 ss 58, 59 (see the text and notes 1-11) do not apply to community interest companies (but see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 33(1)-(4); and PARA 203): Companies Act 2006 ss 58(3), 59(4). As to community interest companies see PARA 82 et seq.

13 lie under the Companies Act 2006 Pt 17 Ch 10 (ss 641-653): see PARA 1173 et seq. As to the meanings of 'share capital' and 'company having a share capital' see PARA 1042.

14 See the Companies Act 2006 s 648(4); and PARA 1192. If such an order is made, those words are, until the end of the period specified in the order, deemed to be part of the company's name: see s 648(4); and PARA 1192. In practice, however, such orders are not made.

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B. EXEMPTION FROM REQUIREMENT TO USE 'LIMITED'

201. Exemption from requirement to use 'limited' as part of name.

A private company¹ is exempt from the requirement to have its name end with the word 'limited' (or one of the permitted alternatives)² if:

- 431 (1) it is a charity³;
- 432 (2) it is exempted from the requirement⁴ by regulations made by the Secretary of State⁵; or
- 433 (3) it meets the conditions specified to allow either a private company limited by shares⁶, or a private company limited by guarantee⁷, as the case may be, to continue an existing exemption⁸.

Further to head (3) above, a private company limited by shares that on 25 February 1982⁹ was registered in Great Britain¹⁰, and had a name that, by virtue of a licence under the Companies Act 1948¹¹ (or corresponding earlier legislation¹²), did not include the word 'limited' or any of the permitted alternatives¹³, is exempt from the requirement to have a name ending with 'limited' (or a permitted alternative)¹⁴ so long as it does not change its name¹⁵, and so long as it continues to meet the following two conditions¹⁶, namely: (a) that the objects of the company are the promotion of commerce, art, science, education, religion, charity or any profession, and anything incidental or conducive to any of those objects¹⁷; and (b) that the company's articles¹⁸ require its income to be applied in promoting its objects¹⁹, prohibit the payment of dividends, or any return of capital, to its members²⁰, and require all the assets that would otherwise be available to its members generally to be transferred on its winding up²¹ either to another body with objects similar to its own²², or to another body the objects of which are the promotion of charity and anything incidental or conducive thereto²³, whether or not the body is a member of the company²⁴.

Also further to head (3) above, a private company limited by guarantee that immediately before 1 October 2009²⁵ was exempt²⁶ from the requirement to have a name including the word 'limited' (or a permitted alternative)²⁷, and had a name that did not include the word 'limited' (or any of the permitted alternatives)²⁸, is exempt from the requirement to have a name ending with 'limited' (or a permitted alternative)²⁹ so long as it does not change its name, and so long as it continues to meet the following two conditions³⁰, namely: (i) that the objects of the

company are the promotion of commerce, art, science, education, religion, charity or any profession, and anything incidental or conducive to any of those objects³¹; and (ii) that the company's articles require its income to be applied in promoting its objects³², prohibit the payment of dividends to its members³³, and require all the assets that would otherwise be available to its members generally to be transferred on its winding up³⁴ either to another body with objects similar to its own³⁵, or to another body the objects of which are the promotion of charity and anything incidental or conducive thereto³⁶, whether or not the body is a member of the company³⁷.

The registrar of companies³⁸ may refuse to register a private limited company by a name that does not include the word 'limited' (or a permitted alternative) unless a statement has been delivered to him that the company meets the conditions for exemption³⁹. The registrar may accept the statement as sufficient evidence of the matters stated in it⁴⁰.

The Financial Services Authority⁴¹ continues to be exempt from the requirements of the Companies Acts relating to the use of 'limited' as part of its name⁴².

1 As to the meaning of 'private company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie exempt from the Companies Act 2006 s 59 (as to which see PARA 200): see s 60(1). A company which ceases to be entitled to exemption may be directed to change its name: see PARA 213.

3 Companies Act 2006 s 60(1)(a). As to the meaning of 'charity' generally see **CHARITIES** vol 8 (2010) PARA 1 et seq.

4 Ie exempted from the requirement of the Companies Act 2006 s 59 (as to which see PARA 200): see s 60(1)(b).

5 Companies Act 2006 s 60(1)(b). As to the Secretary of State see PARA 6 et seq. Regulations under s 60 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 60(4), 1289. As to the regulations so made under s 60 see the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085. Accordingly, a private company limited by guarantee is exempt from the requirement of the Companies Act 2006 s 59 (as to which see PARA 200) so long as it meets the following two conditions (Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 3(1)), namely:

88 (1) that the objects of that company are the promotion or regulation of commerce, art, science, education, religion, charity or any profession, and anything incidental or conducive to any of those objects (reg 3(2));

89 (2) that the company's articles of association require its income to be applied in promoting its objects (reg 3(3)(a)); prohibit the payment of dividends, or any return of capital, to its members (reg 3(3)(b)); and require all the assets that would otherwise be available to its members generally to be transferred on its winding up either to another body with objects similar to its own, or to another body the objects of which are the promotion of charity and anything incidental or conducive thereto (whether or not the body is a member of the company) (reg 3(3)(c)).

As to the meaning of 'private company limited by guarantee' see PARA 102. As to a company's articles of association see PARA 228 et seq; and as to a company's objects (which are no longer a required part of a company's constitution) see PARA 240. As to the declaration and payment of dividends see PARA 1408 et seq; and as to membership of a company see PARA 321 et seq. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq. As to the power of the Secretary of State to direct a company to change its name if the company exemption ceases see PARA 213.

6 Ie meets the conditions specified in the Companies Act 2006 s 61 (see the text and notes 9-24): see s 60(1)(c). As to the meaning of 'private company limited by shares' see PARA 102. As to the meaning of 'share' see PARA 1042.

7 Ie meets the conditions specified in the Companies Act 2006 s 62 (see the text and notes 25-37): see s 60(1)(c).

8 Companies Act 2006 s 60(1)(c).

9 le the day before the coming into force of the Companies Act 1981 s 25 (repealed), which was the predecessor of the Companies Act 2006 s 61.

10 Companies Act 2006 s 61(1)(a)(i). As to the meaning of 'Great Britain' see PARA 1 note 5.

11 le the Companies Act 1948 s 19 (repealed): see the Companies Act 2006 s 61(1)(a)(ii).

12 As to the provision that has been made generally for continuity in the law see PARAS 14-17.

13 Companies Act 2006 s 61(1)(a)(ii).

14 le is exempt from the Companies Act 2006 s 59 (as to which see PARA 200): see s 61(2). As to restrictions on the amendment of articles imposed on a company which is exempt under s 61 see PARA 202. A company which ceases to be entitled to exemption may be directed to change its name: see PARA 213.

15 Companies Act 2006 s 61(2)(b).

16 Companies Act 2006 s 61(2)(a).

17 Companies Act 2006 s 61(3). 'Science' is not confined to pure or speculative science, or science generally, but includes various branches of science, such as mechanical or engineering science: *IRC v Forrest* (1890) 15 App Cas 334, HL.

18 As to the meaning of references to a company's 'articles' under the Companies Act 2006 see PARA 228 note 2.

19 Companies Act 2006 s 61(4)(a).

20 Companies Act 2006 s 61(4)(b). See also s 63(4); and PARA 202. As to the meaning of 'member' see PARA 321.

21 Companies Act 2006 s 61(4)(c).

22 Companies Act 2006 s 61(4)(c)(i).

23 Companies Act 2006 s 61(4)(c)(ii).

24 Companies Act 2006 s 61(4)(c).

25 le immediately before the commencement of the Companies Act 2006 Pt 5 (ss 53-85) (as to which see PARAS 196 et seq, 202 et seq) (see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3(e)): see the Companies Act 2006 s 62(1).

26 le by virtue of the Companies Act 1985 s 30 (repealed): see the Companies Act 2006 s 62(1)(a).

27 Companies Act 2006 s 62(1)(a).

28 Companies Act 2006 s 62(1)(b).

29 le is exempt from the Companies Act 2006 s 59 (as to which see PARA 200): see s 62(1). As to restrictions on the amendment of articles imposed on a company which is exempt under s 62 see PARA 202. A company which ceases to be entitled to exemption may be directed to change its name: see PARA 213.

30 Companies Act 2006 s 62(1).

31 Companies Act 2006 s 62(2).

32 Companies Act 2006 s 62(3)(a).

33 Companies Act 2006 s 62(3)(b).

34 Companies Act 2006 s 62(3)(c).

35 Companies Act 2006 s 62(3)(c)(i).

36 Companies Act 2006 s 62(3)(c)(ii).

37 Companies Act 2006 s 62(3)(c).

38 As to the meaning of 'registrar of companies' see PARA 131 note 2.

39 Companies Act 2006 s 60(2). As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

40 Companies Act 2006 s 60(3).

41 As to the Financial Services Authority see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 4 et seq.

42 See the Financial Services and Markets Act 2000 s 1, Sch 1 para 14; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 6. If the Secretary of State is satisfied that any action taken by the Authority makes it inappropriate for the exemption given by Sch 1 para 14 to continue he may, after consulting the Treasury, give a direction removing it: see Sch 1 para 15; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 6. As to the Secretary of State in question see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 3. As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

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202. Prohibition on alteration of articles which affect conditions for exemption.

A private company¹ that is exempt² from the requirement to use 'limited' (or a permitted alternative) as part of its name³, and whose name does not include 'limited' (or any of the permitted alternatives)⁴, must not amend its articles⁵ so that it ceases to comply with the required conditions for exemption⁶. If this prohibition is contravened, an offence is committed by the company and by every officer of the company who is in default⁷; and any person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 5 on the standard scale⁸ and (for continued contravention) to a daily default fine⁹ not exceeding one-tenth of level 5 on the standard scale¹⁰.

1 As to the meaning of 'private company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 A company that is exempt under the Companies Act 2006 s 61 or s 62 (as to which see PARA 201): see s 63(1)(a). A company which ceases to be entitled to exemption may be directed to change its name: see PARA 213.

3 Companies Act 2006 s 63(1)(a). As to the requirement for a company to use 'limited' (or a permitted alternative) as part of its name see s 59; and PARA 200.

4 Companies Act 2006 s 63(1)(b).

5 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to the amendment of a company's articles see PARA 232.

6 Companies Act 2006 s 63(1). The text refers to the conditions to be met by a private company limited by shares (see s 61; and PARA 201) or by a private company limited by guarantee (see s 62; and PARA 201), so that an existing exemption may continue: see s 63(1). As to the meanings of 'private company limited by shares' and 'private company limited by guarantee' see PARA 102. As to the power of the Secretary of State to direct a company to change its name if the company exemption ceases see PARA 213.

Where, immediately before 1 October 2009 (ie immediately before the commencement of s 63: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3(e)):

90 (1) a company was exempt by virtue of the Companies Act 1985 s 30 (repealed) from the requirement to have a name including the word 'limited' (or a permitted alternative) (Companies Act 2006 s 63(4)(a)); and

91 (2) the company's memorandum or articles contained provision preventing an alteration of them without the approval of either the Board of Trade (or any other department or Minister) or the Charity Commission (s 63(4)(b)),

that provision, and any condition of any such licence as is mentioned in s 61(1)(a)(ii) (ie a licence under the Companies Act 1948 s 19 or corresponding earlier legislation) (see PARA 201) requiring such provision, ceases to have effect (Companies Act 2006 s 63(4)). However, this does not apply if, or to the extent that, the provision is required by or under any other enactment: s 63(4). As to the meaning of 'enactment' see PARA 17 note 2. Provisions that immediately before 1 October 2009 were contained in a company's memorandum but are not provisions of the kind mentioned in s 8 (which substantially altered the purpose of the memorandum of association) (see PARA 104) are to be treated after that date as provisions of the company's articles: see s 28(1); and PARA 228. As to a company's memorandum of association generally see PARA 104 et seq. As to the Charity Commission see **CHARITIES** vol 8 (2010) PARA 538 et seq.

7 Companies Act 2006 s 63(2). For these purposes, a shadow director is treated as an officer of the company: s 63(2). As to the meaning of 'shadow director' see PARA 479. As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

8 As to the standard scale see PARA 1622.

9 As to the meaning of 'daily default fine' see PARA 1622.

10 Companies Act 2006 s 63(3).

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C. COMMUNITY INTEREST COMPANIES

203. Names of a community interest company.

The name of a community interest company¹ which is not a public company² must end with either 'community interest company', or 'cic'³. In the case of a Welsh company⁴, its name may instead end with 'cwmni buddiant cymunedol', or 'cbc'⁵.

The name of a community interest company which is a public company must end with 'community interest public limited company', or 'community interest plc'⁶. In the case of a Welsh company, its name may instead end with 'cwmni buddiant cymunedol cyhoeddus cyfyngedig', or 'cwmni buddiant cymunedol ccc'⁷.

1 As to community interest companies see PARA 82. As to restrictions on the use of company names and trading names generally see PARAS 196 et seq, 204 et seq.

2 As to public companies see PARAS 73, 102.

3 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 33(1).

4 As to the meaning of 'Welsh company' under the Companies Acts see PARA 129 note 3.

5 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 33(2) (amended by SI 2009/1941).

6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 33(3).

7 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 33(4) (amended by SI 2009/1941).

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D. INAPPROPRIATE USE OF INDICATIONS OF COMPANY TYPE OR LEGAL FORM

204. Inappropriate use in name of indications of company type or legal form.

The Secretary of State¹ may make provision by regulations² prohibiting the use in a company name³ of specified⁴ words, expressions or other indications⁵:

- 434 (1) that are associated with a particular type of company or form of organisation⁶; or
- 435 (2) that are similar to words, expressions or other indications associated with a particular type of company or form of organisation⁷.

The regulations may prohibit the use of words, expressions or other indications either in a specified part, or otherwise than in a specified part, of a company's name⁸, or in conjunction with (or otherwise than in conjunction with) such other words, expressions or indications as may be specified⁹.

A company must not be registered under the Companies Act 2006¹⁰ by a name that consists of or includes anything prohibited by such regulations¹¹.

Accordingly, a company must not be so registered by a name that includes:

- 436 (a) otherwise than at the end of the name, a specified expression or abbreviation of such an expression¹² (or any expression or abbreviation specified as similar)¹³;
- 437 (b) in any part of the name a specified expression or abbreviation¹⁴ (or any expression or abbreviation specified as similar) unless that company is a RTE company¹⁵;
- 438 (c) in any part of the name a specified expression or abbreviation¹⁶ (or any expression or abbreviation specified as similar) unless that company is a RTM company¹⁷;
- 439 (d) in any part of the name a specified expression or abbreviation¹⁸ (or any expression or abbreviation specified as similar)¹⁹;
- 440 (e) immediately before a specified expression or abbreviation²⁰ any of the other specified abbreviations²¹ (or any abbreviation specified as similar)²².

A private company limited by guarantee²³ which is exempt from the requirement to have its name end with the word 'limited' (or one of the permitted alternatives)²⁴ must not be registered under the Companies Act 2006 by a name that concludes with any of the specified words²⁵ (or any word specified as similar)²⁶ or by a name that concludes with a specified expression or abbreviation of such an expression²⁷ (or any expression or abbreviation specified as similar)²⁸.

An unlimited company²⁹ must not be registered under the Companies Act 2006 by a name that concludes with a word or abbreviation specified for these purposes³⁰ (or any word or abbreviation specified as similar)³¹ or by a name that concludes with a specified expression or abbreviation of such an expression³² (or any expression or abbreviation specified as similar)³³.

1 As to the Secretary of State see PARA 6 et seq.

2 As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 65 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 65(5), 1289. As to the regulations so made see the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085; and the text and notes 12-33.

3 As to restrictions on the use of company names and trading names generally see PARAS 196 et seq, 205 et seq. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 For these purposes, 'specified' means specified in the regulations: Companies Act 2006 s 65(4).

5 Companies Act 2006 s 65(1).

6 Companies Act 2006 s 65(1)(a).

7 Companies Act 2006 s 65(1)(b).

8 Companies Act 2006 s 65(2)(a).

9 Companies Act 2006 s 65(2)(b).

10 As to company registration under the Companies Act 2006 see PARA 111 et seq. As to companies registered but not formed under the Companies Act 2006, and as to overseas companies, see PARA 32.

11 Companies Act 2006 s 65(3).

12 Ie an expression or abbreviation specified in inverted commas in the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 4, Sch 2 para 3(a)-(f) (Sch 2 para 3(f) amended by SI 2009/2404): see the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 4(1).

13 Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 4(1). Head (a) in the text is subject to reg 5(b) (see the text and notes 27-28) and reg 6(b) (see the text and notes 32-33): reg 4(6). The expressions and abbreviations specified as similar to the expressions and abbreviations set out in inverted commas in Sch 2 para 3 are any in which:

92 (1) one or more characters have been omitted (reg 1(2), Sch 2 para 4(a));

93 (2) one or more characters, symbols, signs or punctuation have been added (reg 1(2), Sch 2 para 4(b)); or

94 (3) each of one or more characters has been substituted by one or more other characters, signs, symbols or punctuation (reg 1(2), Sch 2 para 4(c)),

in such a way as to be likely to mislead the public as to the legal form of a company if included in the registered name of the company (reg 1(2), Sch 2 para 4). See *Cotronic (UK) Ltd v Dezonie* [1991] BCLC 721, CA.

14 Ie an expression or abbreviation specified in inverted commas in the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, Sch 2 para 3(g), (h): see reg 4(2).

15 Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 4(2). The text refers to a RTE company within the meaning of the Leasehold Reform, Housing and Urban Development Act 1993 s 4A (see **LANDLORD AND TENANT** vol 27(3) (2006 reissue) PARA 1581): see the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 4(2). See note 13.

16 Ie an expression or abbreviation specified in inverted commas in the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, Sch 2 para 3(i), (j): see reg 4(3).

17 Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 4(3). The text refers to a RTM company within the meaning of the Commonhold and Leasehold Reform Act 2002 s 73 (see **LANDLORD AND TENANT** vol 27(1) (2006 reissue) PARA 374): see the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 4(3). See note 13.

18 Is an expression or abbreviation specified in inverted commas in the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, Sch 2 para 3(k)-(ua) (Sch 2 para 3(ua) added by SI 2009/2404): see the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 4(4).

19 Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 4(4). See note 13.

20 Is an expression or abbreviation specified in inverted commas in the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, Sch 2 para 3(a)-(j) (Sch 2 para 3(f) amended by SI 2009/2404): see the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 4(5).

21 Is an abbreviation specified in inverted commas in the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, Sch 2 para 3(v): see reg 4(5).

22 Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 4(5). See note 13. The abbreviations specified as similar to the abbreviations set out in inverted commas in Sch 2 para 3 are any in which:

- 95 (1) one or more characters have been omitted (reg 1(2), Sch 2 para 4(a));
- 96 (2) one or more characters, symbols, signs or punctuation have been added (reg 1(2), Sch 2 para 4(b)); or
- 97 (3) each of one or more characters has been substituted by one or more other characters, signs, symbols or punctuation (reg 1(2), Sch 2 para 4(c)),

in such a way as to be likely to mislead the public as to the legal form of a company if included in the registered name of the company (reg 1(2), Sch 2 para 4).

23 As to the meaning of 'private company' and 'limited by guarantee' see PARA 102.

24 Is exempt from the requirement of the Companies Act 2006 s 59 (as to which see PARA 200) under s 60 (as to which see PARA 201): see the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 5.

25 Is a word specified in inverted commas in the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 5, Sch 2 para 1(c), (d): see reg 5(a).

26 Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 5(a). For these purposes, the words specified as similar to the words set out in inverted commas in Sch 2 para 1(c), (d) are any in which:

- 98 (1) one or more characters have been omitted (reg 1(2), Sch 2 para 2(a));
- 99 (2) one or more characters, symbols, signs or punctuation have been added (reg 1(2), Sch 2 para 2(b)); or
- 100 (3) each of one or more characters has been substituted by one or more other characters, signs, symbols or punctuation (reg 1(2), Sch 2 para 2(c)),

in such a way as to be likely to mislead the public as to the legal form of a company if included in the registered name of the company (reg 1(2), Sch 2 para 2).

27 Is an expression or abbreviation of such an expression specified in inverted commas in the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, Sch 2 para 3(a)-(f), (v) (Sch 2 para 3(f) amended by SI 2009/2404): see the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 5(b).

28 Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 5(b). See notes 13, 22.

29 As to the meaning of 'unlimited company' see PARA 102.

30 le a word or abbreviation specified in inverted commas in the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, Sch 2 para 1(a), (b): see reg 6(a).

31 Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 6(a). For these purposes, the words or abbreviations specified as similar to the words and abbreviations set out in inverted commas in Sch 2 para 1(a), (b) are any in which:

101 (1) one or more characters have been omitted (reg 1(2), Sch 2 para 2(a));

102 (2) one or more characters, symbols, signs or punctuation have been added (reg 1(2), Sch 2 para 2(b)); or

103 (3) each of one or more characters has been substituted by one or more other characters, signs, symbols or punctuation (reg 1(2), Sch 2 para 2(c)),

in such a way as to be likely to mislead the public as to the legal form of a company if included in the registered name of the company (reg 1(2), Sch 2 para 2).

32 le an expression or abbreviation of such an expression specified in inverted commas in the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, Sch 2 para 3(a)-(f), (v) (Sch 2 para 3(f) amended by SI 2009/2404): see the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 6(b).

33 Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 6(b). See notes 13, 22.

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(iii) Procedure where Company Names are Similar

A. SIMILARITY TO OTHER NAME ON REGISTRAR'S INDEX

205. Name that is the same or similar to an existing name.

A company¹ must not be registered under the Companies Act 2006² by a name that is the same as another name appearing in the index of company names³ which is kept by the registrar of companies⁴.

The Secretary of State⁵ may make provision by regulations⁶ supplementing this prohibition⁷. Such regulations may make provision as to matters that are to be disregarded⁸, and as to words, expressions, signs or symbols that are, or are not, to be regarded as the same⁹, for these purposes¹⁰; and such regulations may provide:

- 441 (1) that registration by a name that would otherwise be so prohibited¹¹ is permitted either in specified circumstances¹², or with specified consent¹³; and
- 442 (2) that if those circumstances obtain or that consent is given at the time a company is registered by a name, a subsequent change of circumstances or withdrawal of consent does not affect the registration¹⁴.

Accordingly, a company may be registered under the Companies Act 2006 by a proposed same name¹⁵ if the following conditions are met¹⁶, namely:

- 443 (a) that the company or other body whose name already appears in the registrar's index of company names ('Body X') consents to the proposed same name being the name of a company ('Company Y')¹⁷;
- 444 (b) that Company Y forms, or is to form, part of the same group as Body X¹⁸; and
- 445 (c) that Company Y provides to the registrar a copy of a statement made by Body X indicating¹⁹: (i) the consent of Body X as referred to in head (a) above²⁰; and (ii) that Company Y forms, or is to form, part of the same group as Body X²¹.

The registrar may accept the statement referred to in head (c) above as sufficient evidence that the conditions referred to in head (a) and head (b) above have been met²².

If the written consent referred to in head (a) above is given by Body X, a subsequent withdrawal of that consent does not affect the registration of Company Y by that proposed same name²³.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to company registration under the Companies Act 2006 see PARA 111 et seq. As to companies registered but not formed under the Companies Act 2006, and as to overseas companies, see PARA 32.

3 As to the index of company names see PARA 163. As to restrictions on the use of company names and trading names generally see PARAS 196 et seq, 205 et seq.

4 Companies Act 2006 s 66(1). As to the meaning of 'registrar of companies' see PARA 131 note 2.

5 As to the Secretary of State see PARA 6 et seq.

6 As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 66 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 66(5), 1289. As to the regulations so made see the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085; and notes 8, 9; and the text and notes 15-21.

7 Companies Act 2006 s 66(2).

8 Companies Act 2006 s 66(3)(a). For these purposes, the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 7, Sch 3 has effect for setting out the matters to be disregarded: reg 7(a). For the purposes of computing the number of permitted characters in Sch 3 para 7, any blank space between one permitted character and another in the name is to be counted as though it was a permitted character: reg 1(3).

9 Companies Act 2006 s 66(3)(b). For these purposes, the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, Sch 3 has effect for setting out the words, expressions, signs and symbols that are to be regarded as the same: reg 7(b). See note 8.

10 Companies Act 2006 s 66(3).

11 It is prohibited under the Companies Act 2006 s 66: see s 66(4)(a).

12 Companies Act 2006 s 66(4)(a)(i). For these purposes, 'specified' means specified in the regulations: s 66(6).

13 Companies Act 2006 s 66(4)(a)(ii).

14 Companies Act 2006 s 66(4)(b).

15 For these purposes, 'proposed same name' means a name which is, due to the application of the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 7 and Sch 3 (see note 8), considered the same as a name appearing in the registrar's index of company names and differs from that name appearing in the index only by one of the matters set out in inverted commas in Sch 3 para 4: reg 8(6)(b).

16 Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 8(1). See note 19.

17 Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 8(2)(a).

18 Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 8(2)(b). For these purposes, 'group' means a parent undertaking and its subsidiary undertakings: Companies Act 2006 s 474(1); definition applied by the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 8(6)(a). As to the meanings of 'parent undertaking' and 'subsidiary undertaking' in the Companies Acts see PARA 26.

19 Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 8(2)(c). If the proposed same name is to be taken by a company which has not yet been incorporated, the copy of such statement must be provided to the registrar instead by the person who delivers to the registrar the application for registration of the company (and the reference in reg 8(1) to the conditions in reg 8(2) must be read accordingly): reg 8(3).

20 Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 8(2)(c)(i).

21 Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 8(2)(c)(ii).

22 Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 8(4).

23 Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 8(5).

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B. SIMILARITY TO OTHER NAME IN WHICH PERSON HAS GOODWILL

(A) COMPANY NAMES ADJUDICATORS AND RULES OF PROCEDURE

206. Appointment of company names adjudicators.

The Secretary of State¹ must appoint persons to be company names adjudicators².

The persons appointed must have such legal or other experience as, in the Secretary of State's opinion, makes them suitable for appointment³.

An adjudicator:

- 446 (1) holds office in accordance with the terms of his appointment⁴;
- 447 (2) is eligible for re-appointment when his term of office ends⁵;
- 448 (3) may resign at any time by notice in writing given to the Secretary of State⁶;
- and
- 449 (4) may be dismissed by the Secretary of State on the ground of incapacity or misconduct⁷.

One of the adjudicators must be appointed Chief Adjudicator⁸, who performs such functions as the Secretary of State may assign to him⁹. The other adjudicators are to undertake such duties as the Chief Adjudicator may determine¹⁰.

The Secretary of State also may: (a) appoint staff for the adjudicators¹¹; (b) pay remuneration and expenses to the adjudicators and their staff¹²; (c) defray other costs arising in relation to

the performance by the adjudicators of their functions¹³; (d) compensate persons for ceasing to be adjudicators¹⁴.

- 1 As to the Secretary of State see PARA 6 et seq.
- 2 Companies Act 2006 s 70(1).
- 3 Companies Act 2006 s 70(2).
- 4 Companies Act 2006 s 70(3)(a).
- 5 Companies Act 2006 s 70(3)(b).
- 6 Companies Act 2006 s 70(3)(c).
- 7 Companies Act 2006 s 70(3)(d).
- 8 Companies Act 2006 s 70(4).
- 9 Companies Act 2006 s 70(4).
- 10 Companies Act 2006 s 70(5).
- 11 Companies Act 2006 s 70(6)(a).
- 12 Companies Act 2006 s 70(6)(b).
- 13 Companies Act 2006 s 70(6)(c).
- 14 Companies Act 2006 s 70(6)(d).

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207. Rules of procedure before company names adjudicator.

The Secretary of State¹ may make rules² about proceedings before a company names adjudicator³. The rules may, in particular, make provision:

- 450 (1) as to how an application is to be made and the form and content of an application or other documents⁴;
- 451 (2) for fees to be charged⁵;
- 452 (3) about the service of documents and the consequences of failure to serve them⁶;
- 453 (4) as to the form and manner in which evidence is to be given⁷;
- 454 (5) for circumstances in which hearings are required and those in which they are not⁸;
- 455 (6) for cases to be heard by more than one adjudicator⁹;
- 456 (7) setting time limits for anything required to be done in connection with the proceedings (and allowing for such limits to be extended, even if they have expired)¹⁰;
- 457 (8) enabling the adjudicator to strike out an application, or any defence, in whole or in part, either on the ground that it is vexatious, has no reasonable prospect of

- success or is otherwise misconceived¹¹, or for failure to comply with the requirements of the rules¹²;
- 458 (9) conferring power to order security for costs¹³;
- 459 (10) as to how far proceedings are to be held in public¹⁴;
- 460 (11) requiring one party to bear the costs of another and as to assessing the amount of such costs¹⁵.

The rules may confer on the Chief Adjudicator¹⁶ power to determine any matter that could be the subject of provision in the rules¹⁷.

- 1 As to the Secretary of State see PARA 6 et seq.
- 2 Rules under the Companies Act 2006 s 71 must be made by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 71(4). As to the rules so made see the Company Names Adjudicator Rules 2008, SI 2008/1738; and see PARA 208 et seq.
- 3 Companies Act 2006 s 71(1). As to company names adjudicators see s 70; and PARA 206. As to proceedings before a company names adjudicator see PARA 208 et seq.
- 4 Companies Act 2006 s 71(2)(a).
- 5 Companies Act 2006 s 71(2)(b).
- 6 Companies Act 2006 s 71(2)(c).
- 7 Companies Act 2006 s 71(2)(d).
- 8 Companies Act 2006 s 71(2)(e).
- 9 Companies Act 2006 s 71(2)(f).
- 10 Companies Act 2006 s 71(2)(g).
- 11 Companies Act 2006 s 71(2)(h)(i).
- 12 Companies Act 2006 s 71(2)(h)(ii).
- 13 Companies Act 2006 s 71(2)(i).
- 14 Companies Act 2006 s 71(2)(j).
- 15 Companies Act 2006 s 71(2)(k).
- 16 As to the Chief Adjudicator see PARA 206.
- 17 Companies Act 2006 s 71(3).

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(B) OBJECTION TO COMPANY'S REGISTERED NAME

208. Application objecting to a company's registered name.

A person (the 'applicant') may object to a company's registered name¹ on the ground²:

- 461 (1) that it is the same as a name associated with the applicant in which he has goodwill³; or
- 462 (2) that it is sufficiently similar to such a name that its use in the United Kingdom⁴ would be likely to mislead by suggesting a connection between the company and the applicant⁵.

The objection must be made by application to a company names adjudicator⁶; and such an application must: (a) be made on the appropriate form⁷; (b) include a concise statement of the grounds on which the application is made⁸; (c) include an address for service in the United Kingdom⁹; and (d) be filed at the Office¹⁰.

The company concerned is the primary respondent to the application¹¹; but any of its members¹² or directors¹³ may be joined as respondents¹⁴.

The adjudicator must send a copy of the appropriate form to the primary respondent¹⁵; and he must specify a period within which the primary respondent must file its defence¹⁶. The primary respondent, before the end of that period, must file a counter-statement on the appropriate form¹⁷, otherwise the adjudicator may treat it as not opposing the application and may make an order¹⁸ as he would if an application were upheld¹⁹. In its counter-statement, the primary respondent must:

- 463 (i) include an address for service in the United Kingdom²⁰;
- 464 (ii) include a concise statement of the grounds on which it relies²¹;
- 465 (iii) state which of the allegations in the statement of grounds of the applicant it admits and which it denies²²; and
- 466 (iv) state which of the allegations it is unable to admit or deny, but which it requires the applicant to prove²³.

When the specified period²⁴ within which the primary respondent must file its defence has expired, the adjudicator must specify the periods within which evidence may be filed by the parties²⁵. All evidence must be accompanied by the appropriate form, and must be copied to all other parties in the proceedings²⁶. Where the applicant files no evidence in support of its application, the adjudicator may treat it as having withdrawn its application²⁷. The adjudicator also may strike out the application or any defence in whole or in part if it is vexatious, has no reasonable prospect of success or is otherwise misconceived²⁸.

1 As to the company name generally see PARA 200 et seq. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to company registration under the Companies Act 2006 see PARA 111 et seq. As to companies registered but not formed under the Companies Act 2006, and as to overseas companies, see PARA 32. As to the registered name of an overseas company see PARA 1827.

2 Companies Act 2006 s 69(1).

3 Companies Act 2006 s 69(1)(a). For these purposes, 'goodwill' includes reputation of any description: s 69(7).

4 As to the meaning of 'United Kingdom' see PARA 1 note 5.

5 Companies Act 2006 s 69(1)(b).

6 Companies Act 2006 s 69(2). As to company names adjudicators see s 70; and PARA 206. As to the rules of procedure that apply before a company names adjudicator see PARA 207; and as to the procedure in hearings before a company names adjudicator see PARA 209.

7 Company Names Adjudicator Rules 2008, SI 2008/1738, r 3(1)(a). For these purposes, the 'appropriate form' means the form determined by the Chief Adjudicator in relation to a particular matter: r 1(2). The Chief

Adjudicator has the power to determine the form and content of any form required to be used by the Company Names Adjudicator Rules 2008, SI 2008/1738: r 2(1). Where a form is so required to be used, that form must be accompanied by the fee, if any, specified in r 2(2), Schedule in respect of that matter: r 2(2). Accordingly, a fee of £400 is specified in respect of the form required by r 3(1): Schedule. As to the Chief Adjudicator see PARA 206.

8 Company Names Adjudicator Rules 2008, SI 2008/1738, r 3(1)(b).

9 Company Names Adjudicator Rules 2008, SI 2008/1738, r 3(1)(c). Where a person has provided an address for service in the United Kingdom under r 3, he may substitute a new address for service in the United Kingdom by notifying the adjudicator on the appropriate form: r 13(1). As to the appropriate form see note 7. Where the primary respondent has a registered office in the United Kingdom, the adjudicator may treat this as the address for service in the United Kingdom unless and until an alternative address is provided: r 13(2). As to a company's registered office see PARA 129.

10 Company Names Adjudicator Rules 2008, SI 2008/1738, r 3(1)(d). For these purposes, the 'Office' means the office of the company names adjudicator at the Intellectual Property Office, Concept House, Cardiff Road, Newport, South Wales NP10 8QQ: r 1(2). For the transaction of relevant business by the public under the Companies Act 2006, the Office must be open on Monday to Friday between 9 in the morning and midnight, and on Saturday between 9 in the morning and 1 in the afternoon, unless the day is an excluded day: Company Names Adjudicator Rules 2008, SI 2008/1738, r 14(1). For the transaction of all other business by the public under the Companies Act 2006, the Office must be open on Monday to Friday between 9 in the morning and 5 in the afternoon unless the day is an excluded day: Company Names Adjudicator Rules 2008, SI 2008/1738, r 14(2). The following are excluded days for the transaction of any business by the public under the Companies Act 2006: a Sunday; Good Friday; Christmas Day; a day which is specified or proclaimed to be a bank holiday by or under the Banking and Financial Dealings Act 1971 s 1 (see **TIME** vol 97 (2010) PARA 321); or a Saturday where the previous Friday and the following Monday are both excluded days: Company Names Adjudicator Rules 2008, SI 2008/1738, r 15(1). Any application or document received on an excluded day must be treated as having been filed on the next day on which the Office is open for relevant business: r 15(2). Where any period for filing any document ends on an excluded day that period must be extended to the next day on which the Office is open for relevant business: r 15(3). For the purposes of rr 14, 15 'relevant business' means the filing of any application or other document: r 14(3).

11 Companies Act 2006 s 69(3).

12 As to the meaning of 'member' see PARA 321.

13 As to the meaning of 'director' see PARA 478.

14 Companies Act 2006 s 69(3). Any member or director of the primary respondent who is joined as a respondent to the application must be joined before the end of a period specified by the adjudicator: Company Names Adjudicator Rules 2008, SI 2008/1738, r 3(6).

15 Company Names Adjudicator Rules 2008, SI 2008/1738, r 3(2).

16 Company Names Adjudicator Rules 2008, SI 2008/1738, r 3(3).

17 Company Names Adjudicator Rules 2008, SI 2008/1738, r 3(4). A fee of £150 is specified in respect of the form required by r 3(4): Schedule. The adjudicator must send a copy of the appropriate form referred to in r 3(4) to the applicant: r 3(7).

18 *Ie* under the Companies Act 2006 s 73(1) (see PARA 211): see the Company Names Adjudicator Rules 2008, SI 2008/1738, r 3(4).

19 Company Names Adjudicator Rules 2008, SI 2008/1738, r 3(4).

20 Company Names Adjudicator Rules 2008, SI 2008/1738, r 3(5)(a).

21 Company Names Adjudicator Rules 2008, SI 2008/1738, r 3(5)(b).

22 Company Names Adjudicator Rules 2008, SI 2008/1738, r 3(5)(c).

23 Company Names Adjudicator Rules 2008, SI 2008/1738, r 3(5)(d).

24 *Ie* the period specified under the Company Names Adjudicator Rules 2008, SI 2008/1738, r 3(3) (see the text and note 16): see r 4(1).

25 Company Names Adjudicator Rules 2008, SI 2008/1738, r 4(1).

26 Company Names Adjudicator Rules 2008, SI 2008/1738, r 4(2). As to the 'appropriate form' see note 7. A fee of £150 is specified in respect of the form required by r 4(2): Schedule.

27 Company Names Adjudicator Rules 2008, SI 2008/1738, r 5(1).

28 Company Names Adjudicator Rules 2008, SI 2008/1738, r 5(2).

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(C) PROCEDURE, DECISIONS AND ORDERS

209. Procedure in hearings before company names adjudicator.

Any party to an application which has been made objecting to a company's registered name¹ may, by filing the appropriate form², request to be heard in person before a decision is made by the company names adjudicator³ under the Companies Act 2006 or under the company names adjudicator rules⁴. Following such a request, the adjudicator must decide whether a decision can be made without an oral hearing in circumstances where⁵:

- 467 (1) the primary respondent⁶ files no evidence⁷; or
- 468 (2) the applicant files no evidence in reply to the respondent's evidence⁸; or
- 469 (3) the decision will not terminate the proceedings⁹.

Where the adjudicator decides that a decision can be made without an oral hearing, the adjudicator will specify a period for the parties to submit written submissions before making a decision¹⁰. Where the adjudicator decides that a hearing is necessary, he must require the parties or their legal representatives to attend a hearing and he must give the parties at least 14 days' notice of the hearing¹¹.

At any stage of proceedings before him, the adjudicator may direct that the parties to the proceedings attend a case management conference or pre-hearing review¹². The adjudicator may give such directions as to the management of the proceedings as he thinks fit, and in particular he may¹³:

- 470 (a) direct a document to be filed or to be copied to a party to proceedings within a specified period¹⁴;
- 471 (b) allow for the electronic filing and sending of documents¹⁵;
- 472 (c) direct how documents filed or sent electronically are to be authenticated¹⁶;
- 473 (d) direct that a document shall not be available for public inspection¹⁷;
- 474 (e) require a translation of any document¹⁸;
- 475 (f) direct that a witness be cross-examined¹⁹;
- 476 (g) consolidate proceedings²⁰;
- 477 (h) direct that proceedings are to be heard by more than one adjudicator²¹;
- 478 (i) direct that part of any proceedings be dealt with as separate proceedings²²; or
- 479 (j) suspend or stay proceedings²³.

The adjudicator may control the evidence by giving directions as to the issues on which he requires evidence²⁴, the nature of the evidence which he requires to decide those issues²⁵, and the way in which the evidence is to be placed before him²⁶; and the adjudicator may use this

power to exclude evidence which would otherwise be admissible²⁷. Subject to this rule, evidence that is filed²⁸ may be given by witness statement²⁹, affidavit³⁰ or statutory declaration³¹, or in any other form which would be admissible as evidence in proceedings before the court³². A witness statement may only be given in evidence if it includes a statement of truth³³, being, for these purposes, a statement that the person making the statement believes that the facts stated in a particular document are true³⁴. Such a statement must be dated and signed by the maker of the statement³⁵.

The adjudicator may extend (or further extend) any period which has been specified under the company names adjudicator rules³⁶ even if the period has expired³⁷; and any party can request an extension of any such time period³⁸. Any request for a retrospective extension must be filed before the end of the period of two months beginning with the date the time period in question expired³⁹.

Any hearing before the adjudicator of proceedings relating to an application⁴⁰ must be held in public⁴¹, although any party to the proceedings may apply to the adjudicator for the hearing to be held in private⁴². However, the adjudicator may only grant such an application⁴³ where it is in the interests of justice for the hearing to be in held in private⁴⁴, and where all the parties to the proceedings have had an opportunity to be heard on the matter⁴⁵. Where the application is granted, the hearing must be held in private⁴⁶.

All documents connected to proceedings are available for public inspection unless the adjudicator directs otherwise⁴⁷.

Any irregularity in procedure may be rectified on such terms as the adjudicator may direct⁴⁸.

The adjudicator may, at any stage in any proceedings before him under the Companies Act 2006, award to any party by order such costs as he considers reasonable, and direct how and by what parties they are to be paid⁴⁹. An application for security for costs must be made on the appropriate form⁵⁰. The adjudicator may require a person to give security for costs if he is satisfied, having regard to all the circumstances of the case, that it is just to require such security⁵¹.

1 As to applications made objecting to a company's registered name see PARA 208. As to the company name generally see PARA 200 et seq. As to company registration under the Companies Act 2006 see PARA 111 et seq. As to companies registered but not formed under the Companies Act 2006, and as to overseas companies, see PARA 32. As to the registered name of an overseas company see PARA 1827.

2 As to the 'appropriate form' see PARA 208 note 7. A fee of £100 is specified in respect of the form required by the Company Names Adjudicator Rules 2008, SI 2008/1738, r 5(3): s 2(2), Schedule.

3 As to company names adjudicators see the Companies Act 2006 s 70; and PARA 206. As to the rules of procedure that apply before a company names adjudicator see PARA 207.

4 Company Names Adjudicator Rules 2008, SI 2008/1738, r 5(3). The company names adjudicator rules are those rules made under the Companies Act 2006 and contained in the Company Names Adjudicator Rules 2008, SI 2008/1738: see the Companies Act 2006 s 71; and PARA 207.

5 Company Names Adjudicator Rules 2008, SI 2008/1738, r 5(4).

6 The company whose registered name is concerned in the proceedings is the primary respondent to the application, although any of its members or directors may be joined as respondents: see the Companies Act 2006 s 69(3); and PARA 208.

7 Company Names Adjudicator Rules 2008, SI 2008/1738, r 5(4)(a). As to provision made for the filing of evidence see PARA 208.

8 Company Names Adjudicator Rules 2008, SI 2008/1738, r 5(4)(b).

9 Company Names Adjudicator Rules 2008, SI 2008/1738, r 5(4)(c).

10 Company Names Adjudicator Rules 2008, SI 2008/1738, r 5(5).

- 11 Company Names Adjudicator Rules 2008, SI 2008/1738, r 5(6).
- 12 Company Names Adjudicator Rules 2008, SI 2008/1738, r 6(1).
- 13 Company Names Adjudicator Rules 2008, SI 2008/1738, r 6(2).
- 14 Company Names Adjudicator Rules 2008, SI 2008/1738, r 6(2)(a).
- 15 Company Names Adjudicator Rules 2008, SI 2008/1738, r 6(2)(b).
- 16 Company Names Adjudicator Rules 2008, SI 2008/1738, r 6(2)(c).
- 17 Company Names Adjudicator Rules 2008, SI 2008/1738, r 6(2)(d).
- 18 Company Names Adjudicator Rules 2008, SI 2008/1738, r 6(2)(e).
- 19 Company Names Adjudicator Rules 2008, SI 2008/1738, r 6(2)(f).
- 20 Company Names Adjudicator Rules 2008, SI 2008/1738, r 6(2)(g).
- 21 Company Names Adjudicator Rules 2008, SI 2008/1738, r 6(2)(h).
- 22 Company Names Adjudicator Rules 2008, SI 2008/1738, r 6(2)(i).
- 23 Company Names Adjudicator Rules 2008, SI 2008/1738, r 6(2)(j).
- 24 Company Names Adjudicator Rules 2008, SI 2008/1738, r 6(3)(a).
- 25 Company Names Adjudicator Rules 2008, SI 2008/1738, r 6(3)(b).
- 26 Company Names Adjudicator Rules 2008, SI 2008/1738, r 6(3)(c).
- 27 Company Names Adjudicator Rules 2008, SI 2008/1738, r 6(3).
- 28 Ie under any provision of the Company Names Adjudicator Rules 2008, SI 2008/1738: see r 9(1).
- 29 In the Company Names Adjudicator Rules 2008, SI 2008/1738, a witness statement is a written statement signed by a person that contains the evidence which that person would be allowed to give orally: r 9(3). As to witness statements generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 981 et seq.
- 30 As to affidavits see **CIVIL PROCEDURE** vol 11 (2009) PARA 989 et seq.
- 31 Company Names Adjudicator Rules 2008, SI 2008/1738, r 9(1)(a). Statutory declarations are made by virtue of the Statutory Declarations Act 1835: see **CIVIL PROCEDURE** vol 11 (2009) PARA 1024.
- 32 Company Names Adjudicator Rules 2008, SI 2008/1738, r 9(1)(b).
- 33 Company Names Adjudicator Rules 2008, SI 2008/1738, r 9(1).
- 34 Company Names Adjudicator Rules 2008, SI 2008/1738, r 9(2)(a).
- 35 Company Names Adjudicator Rules 2008, SI 2008/1738, r 9(2)(b).
- 36 Ie specified under any provision of the Company Names Adjudicator Rules 2008, SI 2008/1738: see r 7(1).
- 37 Company Names Adjudicator Rules 2008, SI 2008/1738, r 7(1).
- 38 Company Names Adjudicator Rules 2008, SI 2008/1738, r 7(2). The text refers to an extension of any time period specified under any provision of the Company Names Adjudicator Rules 2008, SI 2008/1738: see r 7(2). Any request made under r 7(2) must be made on the appropriate form and must include reasons why the extra time is required: r 7(4). As to the 'appropriate form' see PARA 208 note 7. A fee of £100 is specified in respect of the form required by r 7(4): Schedule.
- 39 Company Names Adjudicator Rules 2008, SI 2008/1738, r 7(3). A request for a retrospective extension must also include reasons why the request is being made out of time: r 7(4).

- 40 le under the Companies Act 2006 s 69(2) (see PARA 208): see the Company Names Adjudicator Rules 2008, SI 2008/1738, r 8(1). For these purposes, a reference to a hearing includes any part of a hearing: r 8(5).
- 41 Company Names Adjudicator Rules 2008, SI 2008/1738, r 8(1). This provision is subject to r 8(3), (4) (see the text and notes 43-46): see r 8(1). Nothing in r 8 prevents a member of the Administrative Justice and Tribunals Council from attending a hearing: r 8(6).
- 42 Company Names Adjudicator Rules 2008, SI 2008/1738, r 8(2). See note 41.
- 43 le an application under the Company Names Adjudicator Rules 2008, SI 2008/1738, r 8(2) (see the text and note 42): see r 8(3). Any hearing of an application under r 8(2) itself must be held in private: r 8(4). See note 41.
- 44 Company Names Adjudicator Rules 2008, SI 2008/1738, r 8(3)(a).
- 45 Company Names Adjudicator Rules 2008, SI 2008/1738, r 8(3)(b).
- 46 Company Names Adjudicator Rules 2008, SI 2008/1738, r 8(3).
- 47 Company Names Adjudicator Rules 2008, SI 2008/1738, r 8(7).
- 48 Company Names Adjudicator Rules 2008, SI 2008/1738, r 10(1). Where rectification includes the amendment of a document by the adjudicator the parties will be given notice of this amendment: r 10(2).
- 49 Company Names Adjudicator Rules 2008, SI 2008/1738, r 11.
- 50 Company Names Adjudicator Rules 2008, SI 2008/1738, r 12. As to the 'appropriate form' see PARA 208 note 7. A fee of £150 is specified in respect of the form required by r 12: Schedule.
- 51 Company Names Adjudicator Rules 2008, SI 2008/1738, r 12.

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210. Decisions in hearings before company names adjudicator.

If either ground upon which a person (the 'applicant') may object to a company's registered name¹, that is to say:

- 480 (1) that it is the same as a name associated with the applicant in which he has goodwill²; or
- 481 (2) that it is sufficiently similar to such a name that its use in the United Kingdom³ would be likely to mislead by suggesting a connection between the company and the applicant⁴,

is established upon an application making objection to such a name, it is for the respondents⁵ to show⁶:

- 482 (a) that the name was registered before the commencement of the activities on which the applicant relies to show goodwill⁷; or
- 483 (b) that the company is operating under the name⁸, or is proposing to do so and has incurred substantial start-up costs in preparation⁹, or was formerly operating under the name and is now dormant¹⁰; or

- 484 (c) that the name was registered in the ordinary course of a company formation business and the company is available for sale to the applicant on the standard terms of that business¹¹; or
- 485 (d) that the name was adopted in good faith¹²; or
- 486 (e) that the interests of the applicant are not adversely affected to any significant extent¹³.

If none of those is shown, the objection must be upheld¹⁴. If the facts mentioned in head (a), head (b) or head (c) above are established, the objection must nevertheless be upheld if the applicant shows that the main purpose of the respondents (or any of them) in registering the name was to obtain money (or other consideration) from the applicant or prevent him from registering the name¹⁵. If the objection is not upheld under either such provision¹⁶, it must be dismissed¹⁷.

When the adjudicator has made a decision on the application¹⁸, he must send to the parties written notice of it, stating the reasons for his decision¹⁹; and, within 90 days of determining such an application²⁰, he must make his decision and his reasons for it available to the public²¹.

1 As to applications made objecting to a company's registered name, and as to applicants, see PARA 208. As to the company name generally see PARA 200 et seq. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to company registration under the Companies Act 2006 see PARA 111 et seq. As to companies registered but not formed under the Companies Act 2006, and as to overseas companies, see PARA 32. As to the registered name of an overseas company see PARA 1827.

2 I.e. the ground specified in the Companies Act 2006 s 69(1)(a) (see PARA 208): see s 69(4). As to the meaning of 'goodwill' for these purposes see PARA 208 note 3.

3 As to the meaning of 'United Kingdom' see PARA 1 note 5.

4 I.e. the ground specified in the Companies Act 2006 s 69(1)(b) (see PARA 208): see s 69(4).

5 The company whose registered name is concerned in the proceedings is the primary respondent to the application, although any of its members or directors may be joined as respondents: see the Companies Act 2006 s 69(3); and PARA 208.

6 Companies Act 2006 s 69(4). As to the rules of procedure that apply before a company names adjudicator see PARA 207; and as to the procedure in hearings before a company names adjudicator see PARA 209. As to company names adjudicators see PARA 206.

7 Companies Act 2006 s 69(4)(a).

8 Companies Act 2006 s 69(4)(b)(i).

9 Companies Act 2006 s 69(4)(b)(ii).

10 Companies Act 2006 s 69(4)(b)(iii). As to the meaning of a company that is 'dormant' see PARA 28.

11 Companies Act 2006 s 69(4)(c).

12 Companies Act 2006 s 69(4)(d).

13 Companies Act 2006 s 69(4)(e).

14 Companies Act 2006 s 69(4). As to hearings before, and decisions of, company names adjudicators see PARA 209.

15 Companies Act 2006 s 69(5).

16 I.e. under either the Companies Act 2006 s 69(4) (see the text and notes 1-14) or s 69(5) (see the text and note 15): see s 69(6).

17 Companies Act 2006 s 69(6).

18 In the application under the Companies Act 2006 s 69(2) (see PARA 208): see the Company Names Adjudicator Rules 2008, SI 2008/1738, r 5(7).

19 Company Names Adjudicator Rules 2008, SI 2008/1738, r 5(7). The date on which the decision was sent to the parties is taken to be the date of the decision for the purposes of any appeal: r 5(8). As to appeals from the adjudicator's decision see PARA 212.

20 In an application under the Companies Act 2006 s 69 (see PARA 208): see s 72(1).

21 Companies Act 2006 s 72(1). The adjudicator may make his decision and his reasons for it available to the public by means of a website or by such other means as appear to him to be appropriate: s 72(2).

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211. Orders following decision by company names adjudicator.

If an application made objecting to a company's registered name¹ is upheld², the company names adjudicator must make an order³:

487 (1) requiring the respondent company⁴ to change its name to one that is not an offending name⁵; and

488 (2) requiring all the respondents to take all such steps as are within their power to make, or facilitate the making, of that change⁶, and not to cause or permit any steps to be taken calculated to result in another company being registered with a name that is an offending name⁷.

The order must specify a date by which the respondent company's name is to be changed⁸ and may be enforced in the same way as an order of the High Court⁹.

If the respondent company's name is not changed in accordance with the order by the specified date, the adjudicator may determine a new name for the company¹⁰. If the adjudicator determines a new name for the respondent company, he must give notice of his determination to the applicant¹¹, to the respondents¹², and to the registrar of companies¹³.

1 In an application under the Companies Act 2006 s 69 (see PARA 208): see s 73(1). As to the company name generally see PARA 200 et seq. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to company registration under the Companies Act 2006 see PARA 111 et seq. As to companies registered but not formed under the Companies Act 2006, and as to overseas companies, see PARA 32. As to the registered name of an overseas company see PARA 1827.

2 As to decisions in hearings before a company names adjudicator see PARA 210. As to the rules of procedure that apply before a company names adjudicator see PARA 207; and as to the procedure in hearings before a company names adjudicator see PARA 209. As to company names adjudicators see PARA 206.

3 Companies Act 2006 s 73(1).

4 The company whose registered name is concerned in the proceedings is the primary respondent to the application, although any of its members or directors may be joined as respondents: see the Companies Act 2006 s 69(3); and PARA 208.

5 Companies Act 2006 s 73(1)(a). For these purposes, an 'offending name' means a name that, by reason of its similarity to the name associated with the applicant under s 69 (see PARA 208) in which he claims goodwill, would be likely either to be the subject of a direction under s 67 (power of Secretary of State to direct change of

name) (see PARA 214), or to give rise to a further application under s 69: s 73(2). As to the meaning of 'goodwill' for these purposes see PARA 208 note 3.

6 Companies Act 2006 s 73(1)(b)(i).

7 Companies Act 2006 s 73(1)(b)(ii).

8 For these purposes, a company's name is changed when the change takes effect in accordance with the Companies Act 2006 s 81(1) (on the issue of the new certification of incorporation) (see PARA 219): s 73(6). As to the issue of a new certificate on a change of name see PARA 219.

9 Companies Act 2006 s 73(3).

10 Companies Act 2006 s 73(4). The practice is to alter the company's name to its registered number.

11 Companies Act 2006 s 73(5)(a). As to the applicant see PARA 208.

12 Companies Act 2006 s 73(5)(b).

13 Companies Act 2006 s 73(5)(c). Any notice of a change of the company's name is subject to the disclosure requirements in s 1078: see PARA 144. As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the procedure that must be followed on a change of company name, and the effect of such a change, see PARA 219. As to the methods generally by which a company name may be changed see PARA 217.

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212. Appeal from adjudicator's decision.

An appeal lies to the court¹ from any decision of a company names adjudicator² to uphold or dismiss an application made³ objecting to a company's registered name⁴.

Notice of appeal against a decision upholding an application must be given before the date specified in the adjudicator's order by which the respondent company's name is to be changed⁵. If notice of appeal is given against a decision upholding an application, the effect of the adjudicator's order is suspended⁶.

If on appeal the court either: (1) affirms the decision of the adjudicator to uphold the application⁷; or (2) reverses the decision of the adjudicator to dismiss the application⁸, the court may (as the case may require) specify the date by which the adjudicator's order is to be complied with, remit the matter to the adjudicator or make any order or determination that the adjudicator might have made⁹.

If the court determines a new name for the company it must give notice of the determination both to the parties to the appeal¹⁰, and to the registrar of companies¹¹.

1 Except as otherwise provided, in the Companies Acts, 'court' means the High Court or a county court: Companies Act 2006 s 1156(1). However, the Lord Chancellor may, with the concurrence of the Lord Chief Justice, by order exclude a county court from having jurisdiction under the Companies Acts, and, for the purposes of that jurisdiction attach that court's district, or any part of it, to another county court: s 1156(3). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the Companies Act 2006 s 1156(3): s 1156(4). The provisions of the Companies Acts conferring jurisdiction on the 'court' as so defined have effect subject to any enactment or rule of law relating to the allocation of jurisdiction or distribution of business between courts in any part of the United Kingdom: s 1156(2). As to the meaning of 'United Kingdom' see PARA 1 note 5.

2 As to decisions in hearings before a company names adjudicator see PARA 210. As to the rules of procedure that apply before a company names adjudicator see PARA 207; and as to the procedure in hearings before a company names adjudicator see PARA 209. As to company names adjudicators see PARA 206.

3 le under the Companies Act 2006 s 69 (see PARA 208): see s 74(1).

4 Companies Act 2006 s 74(1). As to the company name generally see PARA 200 et seq. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to company registration under the Companies Act 2006 see PARA 111 et seq. As to companies registered but not formed under the Companies Act 2006, and as to overseas companies, see PARA 32. As to the registered name of an overseas company see PARA 1827.

5 Companies Act 2006 s 74(2). As to orders made following a decision by a company names adjudicator see PARA 211.

6 Companies Act 2006 s 74(3).

7 Companies Act 2006 s 74(4)(a).

8 Companies Act 2006 s 74(4)(b).

9 Companies Act 2006 s 74(4).

10 Companies Act 2006 s 74(5)(a).

11 Companies Act 2006 s 74(5)(b). Any notice of a change of the company's name is subject to the disclosure requirements in s 1078: see PARA 144. As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the procedure that must be followed on a change of company name, and the effect of such a change, see PARA 219. As to the methods generally by which a company name may be changed see PARA 217.

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(iv) Secretary of State's Powers to Direct Change of Name

213. Power to direct change of name where company exemption ceases.

If it appears to the Secretary of State¹ that a company² whose name does not include 'limited' (or any of the permitted alternatives)³:

- 489 (1) has ceased to be entitled to exemption under the protections afforded charities⁴ or companies that fall within regulations made for the purpose⁵ by the Secretary of State⁶; or
- 490 (2) has carried on any business other than the promotion of any of the objects allowed under the conditions⁷ which provide for existing exemptions to continue⁸; or
- 491 (3) has allowed its income to be applied otherwise than in promoting such objects⁹; or
- 492 (4) has paid a dividend to its members¹⁰ or (in the case of a private company limited by shares only) made any return of capital to its members¹¹,

he may direct the company to change its name¹² so that its name ends with 'limited' (or one of the permitted alternatives)¹³. The direction must be in writing and must specify the period within which the company is to change its name¹⁴.

If the company fails to comply with such a direction, an offence is committed by the company and by every officer of the company who is in default¹⁵; and any person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 5 on the standard scale¹⁶ and (for continued contravention) to a daily default fine¹⁷ not exceeding one-tenth of level 5 on the standard scale¹⁸.

A company that has been directed to change its name in this way¹⁹ may not, without the approval of the Secretary of State, subsequently change its name so that it does not include 'limited' (or one of the permitted alternatives)²⁰.

1 As to the Secretary of State see PARA 6 et seq.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 Companies Act 2006 s 64(1). As to the requirement for a company to use 'limited' (or a permitted alternative) as part of its name see s 59; and PARA 200. As to the meaning of 'limited company' see PARA 102.

4 It has ceased to be entitled to exemption under the Companies Act 2006 s 60(1)(a) (see PARA 201): see s 64(1)(a).

5 It has ceased to be entitled to exemption under the Companies Act 2006 s 60(1)(b) (see PARA 201): see s 64(1)(a). As to the conditions for such exemption see the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 3; and PARA 201.

6 Companies Act 2006 s 64(1)(a).

7 It is the conditions to be met by a private company limited by shares under the Companies Act 2006 s 61(3) (PARA 201) or by a private company limited by guarantee under s 62(2) (see PARA 201): see s 64(1)(b)(i). As to the meanings of 'private company', 'limited by shares' and 'limited by guarantee' see PARA 102. As to the meanings of 'share', 'company having a share capital' and 'share capital' see PARA 1042.

8 Companies Act 2006 s 64(1)(b)(i). Heads (2) to (4) in the text apply in the case of a company within s 61 or s 62 (PARA 201), which impose conditions as to the objects and articles of the company: s 64(1)(b). As to the meaning of references to a company's 'articles' under the Companies Act 2006 see PARA 228 note 2. As to a company's articles of association see PARA 228 et seq; and as to a company's objects (which are no longer a required part of a company's constitution) see PARA 240.

9 Companies Act 2006 s 64(1)(b)(ii). Head (3) in the text refers to a company that has acted inconsistently with the provision required, in relation to a private company limited by shares, by s 61(4)(a) (PARA 201) or, in relation to a private company limited by guarantee, by s 62(3)(a) (PARA 201): see s 64(1)(b)(ii). See note 8.

10 As to membership of a company see PARA 321 et seq.

11 Companies Act 2006 s 64(1)(b)(ii). Head (4) in the text refers to a company that has acted inconsistently with the provision required, in relation to a private company limited by shares, by s 61(4)(b) (PARA 201) or, in relation to a private company limited by guarantee, by s 62(3)(b) (PARA 201): see s 64(1)(b)(ii). See note 8.

12 A change of name in order to comply with a direction under the Companies Act 2006 s 64 may be made by resolution of the directors: s 64(3). This is without prejudice to any other method of changing the company's name (as to which see PARA 217): see s 64(3). Where a resolution of the directors is passed in accordance with s 64(3), the company must give notice to the registrar of companies of the change; and ss 80, 81 (procedure on, and effect of, change of company's name) (see PARA 219) apply as regards the registration and effect of the change: s 64(4). As to the meaning of 'director' see PARA 478; and as to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to meetings of directors and the taking of resolutions see PARA 528 et seq. As to change of a company's name generally see PARAS 217-219. Any notice of a change of the company's name is subject to the disclosure requirements in s 1078: see PARA 144.

13 Companies Act 2006 s 64(1). As to the similar power held by the Secretary of State in relation to the Financial Services Authority see PARA 201.

14 Companies Act 2006 s 64(2).

15 Companies Act 2006 s 64(5). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

16 As to the standard scale see PARA 1622.

17 As to the meaning of 'daily default fine' see PARA 1622.

18 Companies Act 2006 s 64(6).

19 Ie under the Companies Act 2006 s 64: see s 64(7).

20 Companies Act 2006 s 64(7). This does not apply to a change of name on re-registration or on conversion to a community interest company: s 64(7). As to a change of name when a company alters its status by means of re-registration see PARA 167 et seq; and as to conversion to a community interest company see PARA 191 et seq.

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214. Direction to change company name that is the same or similar to an existing name.

The Secretary of State¹ may direct a company² to change its name if it has been registered in a name³ that is the same as or, in the opinion of the Secretary of State, too like: (1) a name appearing at the time of the registration in the index of company names⁴ which is kept by the registrar of companies⁵; or (2) a name that should have appeared in that index at that time⁶.

Any such direction must be given within 12 months of the company's registration by the name in question⁷, and must specify the period within which the company is to change its name⁸ (although the Secretary of State may by a further direction extend that period⁹).

If a company fails to comply with such a direction, an offence is committed by the company and by every officer of the company who is in default¹⁰; and any person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹¹ and (for continued contravention) to a daily default fine¹² not exceeding one-tenth of level 3 on the standard scale¹³.

The Secretary of State may make provision by regulations¹⁴ supplementing his power to direct a change of name¹⁵. Such regulations may make provision as to matters that are to be disregarded¹⁶, and as to words, expressions, signs or symbols that are, or are not, to be regarded as the same¹⁷, for these purposes¹⁸; and such regulations may provide:

- 493 (a) that no such direction is to be given in respect of a name in specified circumstances¹⁹, or if specified consent is given²⁰; and
- 494 (b) that a subsequent change of circumstances or withdrawal of consent does not give rise to grounds for such a direction²¹.

Except in the circumstances mentioned above, a company registered under the Companies Acts is not entitled to carry on its business²² in such a way, or under such a name, as to represent that its business is the business of any other company or firm or person; and the absence of fraud is immaterial²³. In such cases, the old company or firm may apply to the court for an injunction, and the principles then apply which apply to individuals trading under

identical or similar names²⁴. This remedy is equally available to companies registered under the Companies Acts.

In some cases the court will grant an injunction before the new company has been registered²⁵, and will protect a foreign trader who has a market in England²⁶ from having the benefit of his trade name annexed by a trader in England through registration under the Companies Act 2006 of a company which assumes the name without justification²⁷.

1 As to the Secretary of State see PARA 6 et seq.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to company registration under the Companies Act 2006 see PARA 111 et seq. As to companies registered but not formed under the Companies Act 2006, and as to overseas companies, see PARA 32. As to restrictions on the use of company names and trading names generally see PARAS 196 et seq, 215 et seq.

4 As to the index of company names see PARA 163.

5 Companies Act 2006 s 67(1)(a). As to the meaning of 'registrar of companies' see PARA 131 note 2.

6 Companies Act 2006 s 67(1)(b).

7 Companies Act 2006 s 68(2)(a). A direction under s 67 (see the text and notes 1-6) must be in writing: s 68(4). The provisions of s 68 have effect in relation to a direction under s 67: s 68(1).

8 Companies Act 2006 s 68(2)(b). See note 7. As to the procedure that must be followed on a change of company name, and the effect of such a change, see PARA 219. As to the methods generally by which a company name may be changed see PARA 217. Any notice of a change of the company's name is subject to the disclosure requirements in s 1078: see PARA 144.

9 Companies Act 2006 s 68(3). Any such direction must be given before the end of the period for the time being specified: s 68(3). A direction under s 68 must be in writing: s 68(4). See note 7.

10 Companies Act 2006 s 68(5). For these purposes, a shadow director is treated as an officer of the company: s 68(5). See note 7. As to the meaning of 'shadow director' see PARA 479. As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

11 As to the standard scale see PARA 1622.

12 As to the meaning of 'daily default fine' see PARA 1622.

13 Companies Act 2006 s 68(6). See note 7.

14 As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 67 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 67(5), 1289. At the date at which this volume states the law, no such regulations had been made under s 67.

15 Companies Act 2006 s 67(2). The text refers to the power conferred by s 67 (see the text and notes 1-6): see s 67(2).

16 Companies Act 2006 s 67(3)(a).

17 Companies Act 2006 s 67(3)(b).

18 Companies Act 2006 s 67(3).

19 Companies Act 2006 s 67(4)(a)(i). For these purposes, 'specified' means specified in the regulations: s 67(6).

20 Companies Act 2006 s 67(4)(a)(ii).

21 Companies Act 2006 s 67(4)(b).

22 As to the meaning of 'carry on business' generally see PARA 1 note 1.

23 *North Cheshire and Manchester Brewery Co v Manchester Brewery Co* [1899] AC 83, HL (injunction granted as businesses competing and appellant adopted name suggesting amalgamation); *Ewing v Buttercup Margarine Co Ltd* [1917] 2 Ch 1, CA (injunction granted as businesses competing and name adopted by defendants similar to that of Buttercup Dairy Co used by plaintiff); *Society of Motor Manufacturers and Traders Ltd v Motor Manufacturers' and Traders' Mutual Insurance Co Ltd* [1925] Ch 675, CA (injunction refused as businesses different and names consisted of words in ordinary use). See further **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 317 et seq.

24 See **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 437 et seq.

25 *Hendriks v Montagu* (1881) 17 ChD 638, CA; *Tussaud v Tussaud* (1890) 44 ChD 678.

26 As to the meaning of 'England' see PARA 1 note 5.

27 *Anciens Etablissements Panhard et Levassor SA v Panhard Levassor Motor Co Ltd* [1901] 2 Ch 513.

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215. Direction to change name due to irregularities.

If it appears to the Secretary of State¹ that misleading information has been given for the purpose of a company's registration² with a particular name³, or that an undertaking or assurance has been given for that purpose and has not been fulfilled⁴, then he may direct the company to change its name⁵.

Any such direction must be given within five years of the company's registration by the name in question⁶, and must specify the period within which the company is to change its name⁷ (although the Secretary of State may by a further direction extend that period⁸).

If a company fails to comply with such a direction, an offence is committed by the company and by every officer of the company who is in default⁹; and a person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹⁰ and (for continued contravention) to a daily default fine¹¹ not exceeding one-tenth of level 3 on the standard scale¹².

1 As to the Secretary of State see PARA 6 et seq.

2 As to company registration under the Companies Act 2006 see PARA 111 et seq. As to companies registered but not formed under the Companies Act 2006, and as to overseas companies, see PARA 32. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 Companies Act 2006 s 75(1)(a). As to company names generally see PARAS 196 et seq, 216 et seq; and as to the registered name of an overseas company see PARA 1827.

4 Companies Act 2006 s 75(1)(b).

5 Companies Act 2006 s 75(1). A direction under s 75 must be in writing: s 75(4).

6 Companies Act 2006 s 75(2)(a).

7 Companies Act 2006 s 75(2)(b).

8 Companies Act 2006 s 75(3). Any such direction must be given before the end of the period for the time being specified: s 75(3).

9 Companies Act 2006 s 75(5). For these purposes, a shadow director is treated as an officer of the company: s 75(5). As to the meaning of 'shadow director' see PARA 479. As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

10 As to the standard scale see PARA 1622.

11 As to the meaning of 'daily default fine' see PARA 1622.

12 Companies Act 2006 s 75(6).

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216. Power to require company to abandon misleading name.

If, in the opinion of the Secretary of State¹, the name by which a company is registered² gives so misleading an indication of the nature of its activities as to be likely to cause harm to the public³, he may direct the company to change its name⁴.

The direction must be complied with within a period of six weeks from the date of the direction or such longer period as the Secretary of State may think fit to allow⁵. However, this does not apply if, within the period of three weeks from the date of the direction, the company duly makes an application to the court⁶ to set the direction aside⁷.

The court may set the direction aside or confirm it⁸. If the direction is confirmed, the court must specify the period within which the direction is to be complied with⁹.

If a company fails to comply with such a direction, an offence is committed by the company and by every officer of the company who is in default¹⁰; and a person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹¹ and (for continued contravention) to a daily default fine¹² not exceeding one-tenth of level 3 on the standard scale¹³.

1 As to the Secretary of State see PARA 6 et seq.

2 As to company registration under the Companies Act 2006 see PARA 111 et seq. As to companies registered but not formed under the Companies Act 2006, and as to overseas companies, see PARA 32. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to company names generally see PARAS 196 et seq, 217 et seq; and as to the registered name of an overseas company see PARA 1827.

3 It is not sufficient to show that the name is misleading; a likelihood of harm being caused to the public must also be shown: *Association of Certified Public Accountants of Britain v Secretary of State for Trade and Industry* [1998] 1 WLR 164, [1997] 2 BCLC 307.

4 Companies Act 2006 s 76(1). A direction under s 76 must be in writing: s 76(2). As to the procedure that must be followed on a change of company name, and the effect of such a change, see PARA 219. As to the methods generally by which a company name may be changed see PARA 217. Any notice of a change of the company's name is subject to the disclosure requirements in s 1078: see PARA 144.

5 Companies Act 2006 s 76(3).

6 As to the meaning of 'court' see PARA 212 note 1.

7 Companies Act 2006 s 76(3), (4).

8 Companies Act 2006 s 76(5). The burden of proof is on the Secretary of State to show that the name is misleading at the time of the judgment of the court (and not at the date of the direction): *Association of*

Certified Public Accountants of Britain v Secretary of State for Trade and Industry [1998] 1 WLR 164, [1997] 2 BCLC 307.

9 Companies Act 2006 s 76(5).

10 Companies Act 2006 s 76(6). For these purposes, a shadow director is treated as an officer of the company: s 76(6). As to the meaning of 'shadow director' see PARA 479. As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

11 As to the standard scale see PARA 1622.

12 As to the meaning of 'daily default fine' see PARA 1622.

13 Companies Act 2006 s 76(7).

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(v) Changes of Company Name

217. Methods by which company name may be changed.

A company¹ may change its name² voluntarily: (1) by special resolution³; or (2) by other means provided for by the company's articles⁴.

However, the name of a company may also be changed:

- 495 (a) by resolution of the directors⁵ in order to comply with a direction of Secretary of State⁶;
- 496 (b) on the determination of a new name by a company names adjudicator⁷ under his powers on upholding an objection to a company name⁸;
- 497 (c) on the determination of a new name by the court⁹ on appeal against a decision of a company names adjudicator¹⁰;
- 498 (d) upon restoration to the register¹¹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to company names generally see PARAS 196 et seq, 218 et seq; and as to the registered name of an overseas company see PARA 1827. As to the procedure that must be followed on a change of company name, and the effect of such a change, see PARA 219.

As to transitional provisions that apply where, in the case of an existing or transitional company, the company's articles are deemed to contain a statement of its name by virtue of the Companies Act 2006 s 28 (provisions of memorandum treated as provisions of articles) (see PARA 228), and the company changes its name (by any means) on or after 1 October 2009, see the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 5; and PARA 228.

3 Companies Act 2006 s 77(1)(a). Head (1) in the text refers to the special resolution that must be passed in accordance with s 283 (see PARA 614): see s 77(1)(a). As to the meaning of 'special resolution' see PARA 614.

4 Companies Act 2006 s 77(1)(b). Head (2) in the text refers to other means provided for by the company's articles: see s 77(1)(b). As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

5 ie acting under the Companies Act 2006 s 64 (see PARA 213): see s 77(2)(a). As to the meaning of 'director' see PARA 478. As to meetings of directors and the making of resolutions see PARA 528 et seq.

6 Companies Act 2006 s 77(2)(a). As to the Secretary of State see PARA 6 et seq.

7 le under the Companies Act 2006 s 73 (see PARA 211): see s 77(2)(b). As to company names adjudicators see PARA 206.

8 Companies Act 2006 s 77(2)(b). As to applications made objecting to a company's registered name see PARA 208 et seq.

9 le under the Companies Act 2006 s 74 (see PARA 212): see s 77(2)(c). As to the meaning of 'court' see PARA 212 note 1.

10 Companies Act 2006 s 77(2)(c). As to decisions in hearings before a company names adjudicator see PARA 210.

11 Companies Act 2006 s 77(2)(d). Head (d) in the text refers to a change of name under s 1033 (see PARA 1539): see s 77(2)(d). As to the meaning of the 'register' see PARA 146. As to restoration to the register see PARA 1532 et seq.

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218. Change of company name by the company by voluntary means.

Where a change of name¹ has been agreed to by a company² by special resolution³, the company must give notice to the registrar of companies⁴. Where a change of name by special resolution is conditional on the occurrence of an event, the notice given to the registrar of the change must specify that the change is conditional⁵, and state whether the event has occurred⁶. If the notice states that the event has not occurred:

- 499 (1) the registrar is not required to enter the new name on the register⁷ in place of the former name or to issue a certificate of incorporation⁸ altered to meet the circumstances of the case⁹ until further notice¹⁰;
- 500 (2) when the event occurs, the company must give notice to the registrar stating that it has occurred¹¹; and
- 501 (3) the registrar may rely on the statement as sufficient evidence of the matters stated in it¹².

Where a change of a company's name has been made by other means provided for by its articles¹³, the company must give notice to the registrar¹⁴, and the notice must be accompanied by a statement that the change of name has been made by means provided for by the company's articles¹⁵. The registrar may rely on the statement as sufficient evidence of the matters stated in it¹⁶.

1 As to the methods by which a company name may be changed see PARA 217. As to company names generally see PARA 196 et seq. As to the procedure that must be followed on a change of company name, and the effect of such a change, see PARA 219.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'special resolution' see PARA 614. CPR Sch 1 RSC Ord 45 r 8 (court's powers to order act to be done at expense of disobedient party) (see **CIVIL PROCEDURE** vol 12 (2009) PARA 1249) does not empower the court to make an order to a third party or to the registrar to authorise a company name change

without compliance with the Companies Act 1985 s 28 (see now the Companies Act 2006 ss 78, 80): *Halifax plc v Halifax Repossessions Ltd* [2004] EWCA Civ 331, [2004] 2 BCLC 455.

4 Companies Act 2006 s 78(1). This is in addition to the obligation to forward a copy of the resolution to the registrar (see PARA 616): s 78(1). As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements for the proper delivery of documents to the registrar see PARA 142. Any notice of a change of the company's name is subject to the disclosure requirements in s 1078: see PARA 144.

5 Companies Act 2006 s 78(2)(a).

6 Companies Act 2006 s 78(2)(b).

7 As to the meaning of the 'register' see PARA 146.

8 As to certificates issued by the registrar after a company's name has been altered see PARA 219.

9 ie the registrar is not required to act under the Companies Act 2006 s 80 (see PARA 219): s 78(3)(a).

10 Companies Act 2006 s 78(3)(a).

11 Companies Act 2006 s 78(3)(b). Where a change of name is conditional on the occurrence of an event, the giving of notice of the event to the registrar under s 78(3)(b) is the required document for the registration of the change of name for the purposes of the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 (see PARA 219): Sch 1 para 8(2).

12 Companies Act 2006 s 78(3)(c).

13 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

14 Companies Act 2006 s 79(1)(a).

15 Companies Act 2006 s 79(1)(b).

16 Companies Act 2006 s 79(2).

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219. Procedure on change of name and effect.

Where the registrar of companies¹ receives notice of a change of a company's name², then if he is satisfied that the new name complies with the requirements of the Companies Act 2006³ so far as it governs a company's name⁴, and that the requirements of the Companies Acts, and any relevant requirements of the company's articles⁵, with respect to a change of name are complied with⁶, the registrar must enter the new name on the register⁷ in place of the former name⁸. On the registration of the new name, the registrar must issue a certificate of incorporation altered to meet the circumstances of the case⁹. The change of name is not complete until it has been made upon the register and the new certificate has been issued; and, until the certificate is obtained, the company exists under its original name, although notice of a call stating the new name which is sent before the certificate is obtained is sufficient¹⁰.

A change of a company's name has effect from the date on which the new certificate of incorporation is issued¹¹. The effect of the issue of the certificate of incorporation on change of name is not to re-form or reincorporate the company as a new entity but to recognise the continued existence of the company under its new name¹². The change does not affect any

rights or obligations of the company or render defective any legal proceedings by or against it¹³; and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name¹⁴. If, after the issue of the certificate, it is found that the special resolution was not duly passed, application may be made to the registrar to vacate the registration¹⁵.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2.

2 Companies Act 2006 s 80(1). As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the methods by which a company name may be changed see PARA 217. As to company names generally see PARAS 196 et seq. As to the delivery of documents to the registrar see PARA 141; and as to the requirements for the proper delivery of documents to the registrar see PARA 142.

3 As to the requirements of the Companies Act 2006 Pt 5 (ss 53-85) (as to which see PARAS 196 et seq, 220 et seq): see s 80(2)(a). References in the company law provisions of the Companies Act 2006 to the requirements of that Act include the requirements of regulations and orders made under it: s 1172. As to the meaning of the 'company law provisions' of the Companies Act 2006 see PARA 16 note 6.

4 Companies Act 2006 s 80(2)(a).

5 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

6 Companies Act 2006 s 80(2)(b). As to a company's articles which provide for a change of name see PARA 218.

7 As to the meaning of the 'register' see PARA 146.

8 Companies Act 2006 s 80(2). As to fees payable under s 80 (other than a change made in response to a direction of the Secretary of State under s 64 (see PARA 213) or s 67 (see PARA 214), a determination by a company names adjudicator or a court under s 73(5) (see PARA 211) or s 74(5) (see PARA 212), or on the restoration of the company to the register under s 1033(2) (see PARA 1539)), see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(f). The fee specified in Sch 1 para 7(f) is not payable where the change of name relates solely to the indication of the particular type of company that the company whose name is changed becomes on its re-registration under the Companies Act 2006 Pt 7 (ss 89-111) (see PARA 167 et seq): Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, Sch 1 para 8(1).

9 Companies Act 2006 s 80(3).

10 *Shackleford, Ford & Co Ltd v Dangerfield, Shackleford, Ford & Co Ltd v Owen* (1868) LR 3 CP 407 at 411 per Bovill CJ.

11 Companies Act 2006 s 81(1).

12 *Oshkosh B'Gosh Inc v Dan Marbel Inc Ltd* [1989] 1 CMLR 94, [1989] BCLC 507, CA.

13 Companies Act 2006 s 81(2). As to the company's name in litigation see PARA 301.

14 Companies Act 2006 s 81(3).

15 See *Re Australasian Mining Co* [1893] WN 74 (where the court expressed the opinion that it had no jurisdiction to order the registrar to vacate the registration).

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(vi) Trading Disclosures

220. Provision made as to trading disclosures.

The Secretary of State¹ may by regulations² make provision requiring companies³:

- 502 (1) to display specified⁴ information in specified locations⁵;
- 503 (2) to state specified information in specified descriptions of document or communication⁶; and
- 504 (3) to provide specified information on request to those they deal with in the course of their business⁷.

The regulations must in every case require disclosure of the name of the company⁸, and may make provision as to the manner in which any specified information is to be displayed, stated or provided⁹. The regulations may provide that, for the purposes of any requirement to disclose a company's name, any variation between a word or words required to be part of the name and a permitted abbreviation of that word or those words (or vice versa) is to be disregarded¹⁰. Such regulations also may provide that where a company fails, without reasonable excuse, to comply with any specified¹¹ requirement of the regulations an offence is committed by the company, and by every officer of the company who is in default¹²; and that a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale¹³ and, for continued contravention, a daily default fine¹⁴ not exceeding one-tenth of level 3 on the standard scale¹⁵.

1 As to the Secretary of State see PARA 6 et seq.

2 Regulations under the Companies Act 2006 s 82 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 82(5), 1290. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. In exercise of the powers so conferred by s 82, the Secretary of State has made the Companies (Trading Disclosures) Regulations 2008, SI 2008/495. See further PARA 221.

The provisions of the Companies Act 2006 ss 82, 84, 85 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 4, but as modified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Companies Act 2006 s 82(1). As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 For these purposes, 'specified' means specified in the regulations: Companies Act 2006 s 82(4).

5 Companies Act 2006 s 82(1)(a).

6 Companies Act 2006 s 82(1)(b).

7 Companies Act 2006 s 82(1)(c).

8 Companies Act 2006 s 82(2)(a).

9 Companies Act 2006 s 82(2)(b).

10 Companies Act 2006 s 82(3). For the purposes of Pt 5 Ch 6 (ss 82-85) (see also PARA 222), in considering a company's name no account is to be taken of:

104 (1) whether upper or lower case characters (or a combination of the two) are used (s 85(1)(a));

105 (2) whether diacritical marks or punctuation are present or absent (s 85(1)(b));

106 (3) whether the name is in the same format or style as is specified under s 57(1)(b) (see PARA 197) for the purposes of registration (s 85(1)(c)),

provided there is no real likelihood of names differing only in those respects being taken to be different names (s 85(1)). This provision does not affect the operation of regulations under s 57(1)(a) (see PARA 197) permitting only specified characters, diacritical marks or punctuation: s 85(2).

11 For these purposes, 'specified' means specified in the regulations: Companies Act 2006 s 84(3).

12 Companies Act 2006 s 84(1)(a). The regulations may provide that, for the purposes of any provision made under s 84(1), a shadow director of the company is to be treated as an officer of the company: s 84(2). Accordingly, see the Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 10(3); and PARA 221. As to the meaning of 'shadow director' see PARA 479. As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607. As to provision made for civil consequences to flow from a failure to make required disclosures see PARA 222.

13 As to the standard scale see PARA 1622.

14 As to the meaning of 'daily default fine' see PARA 1622.

15 Companies Act 2006 s 84(1)(b).

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221. Requirements as to disclosure of company's name etc.

A company¹ which has a common seal² must have its name³ engraved in legible characters on its seal⁴.

A company⁵ must display⁶ its registered name at its registered office⁷, and at any inspection place⁸. A company also must display its registered name at any location, other than a company's registered office or any inspection place, at which it carries on business⁹. Where a company is required to display its registered name at any office, place or location, the registered name must be so positioned that it may be easily seen by any visitor to that office, place or location¹⁰. The registered name must be displayed continuously but where any such office, place or location is shared by six or more companies, each such company is only required to display its registered name for at least 15 continuous seconds at least once in every three minutes¹¹. A company also must disclose the address of its registered office, any inspection place, and the type of company records which are kept at that office or place, to any person it deals with in the course of business who makes a written request to the company for that information¹².

Every company must disclose its registered name on:

- 505 (1) its business letters, notices and other official publications¹³;
- 506 (2) its bills of exchange, promissory notes, endorsements and order forms¹⁴;
- 507 (3) cheques purporting to be signed by or on behalf of the company¹⁵;
- 508 (4) orders for money, goods or services purporting to be signed by or on behalf of the company¹⁶;
- 509 (5) its bills of parcels, invoices and other demands for payment, receipts and letters of credit¹⁷;
- 510 (6) its applications for licences to carry on a trade or activity¹⁸; and
- 511 (7) all other forms of its business correspondence and documentation¹⁹.

Every company also must disclose its registered name on its websites²⁰.

On its business letters, its order forms, and its websites, every company must disclose the following particulars²¹:

- 512 (a) the part of the United Kingdom²² in which the company is registered²³;
- 513 (b) the company's registered number²⁴;
- 514 (c) the address of the company's registered office²⁵;
- 515 (d) in the case of a limited company²⁶ that is exempt from the obligation to use the word 'limited' as part of its registered name²⁷, the fact that it is a limited company²⁸;
- 516 (e) in the case of a community interest company²⁹ that is not a public company³⁰, the fact that it is a limited company³¹; and
- 517 (f) in the case of an investment company³², the fact that it is such a company³³.

If, in the case of a company having a share capital³⁴, there is a disclosure as to the amount of share capital on its business letters, on its order forms, or on its websites, that disclosure must refer to paid up share capital³⁵.

Where a company's business letter includes the name of any director of that company³⁶, other than in the text or as a signatory, the letter must disclose the name of every director of that company³⁷.

Where a company fails, without reasonable excuse, to comply with any such requirement relating to trading disclosures³⁸, an offence is committed by the company, and by every officer of the company who is in default³⁹. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale⁴⁰ and (for continued contravention) a daily default fine⁴¹ not exceeding one-tenth of level 3 on the standard scale⁴².

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 A company may have a common seal, but need not have one: see the Companies Act 2006 s 45; and PARA 283.

3 As to the company name generally see PARA 200 et seq. As to companies registered but not formed under the Companies Act 2006, and as to overseas companies, see PARA 32. As to the registered name of an overseas company see PARA 1827. As to permitted contractions in relation to the words 'limited', 'public limited company' and their Welsh equivalents, which may be included as part of the ordinary name of the company, see the Companies Act 2006 ss 58, 59; and PARA 200. It seems that 'Company' may be abbreviated for present purposes to 'Coy', 'limited' to 'Ltd', and 'and' to '&': see *F Stacey & Co Ltd v Wallis* (1912) 106 LT 544; *Banque de l'Indochine et de Suez SA v Euroseas Group Finance Co Ltd* [1981] 3 All ER 198.

4 See the Companies Act 2006 s 45(2); and PARA 283. Where a bond had been entered into as a deed, but the company obtaining the bond had used a seal engraved with its trading name rather than its registered name, non-compliance with the statutory provisions did not in itself render the bond a nullity or unenforceable by a third party beneficiary against the surety which had validly sealed the bond: *OTV Birwelco Ltd v Technical and General Guarantee Co Ltd* [2002] EWHC 2240 (TCC), [2002] 4 All ER 668, [2002] 2 BCLC 723.

5 As to the meaning of 'company' generally see PARA 1. See note 8.

6 Any display or disclosure of information required by the Companies (Trading Disclosures) Regulations 2008, SI 2008/495, must be in characters that can be read with the naked eye: reg 2. As to compliance with the requirement under previous legislation that the company's name must be 'mentioned' see *F Stacey & Co Ltd v Wallis* (1912) 106 LT 544.

7 As to a company's registered office see PARA 129. As to incorporation by registration under the Companies Act 2006 see PARA 111 et seq.

8 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 3(1). For these purposes, 'inspection place' means any location, other than a company's registered office, at which a company keeps available for inspection any company record which it is required under the Companies Acts to keep available for inspection: Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 1(2). See further the Companies (Company

Records) Regulations 2008, SI 2008/3006, reg 3, made under the Companies Act 2006 s 1136; and PARA 676. 'Company record' means any register, index, accounting records, agreement, memorandum, minutes or other document required by the Companies Acts to be kept by a company, and any register kept by a company of its debenture holders: Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 1(2). A reference to any type of document is a reference to a document of that type in hard copy, electronic or any other form: reg 1(2). As to the meaning of the 'Companies Acts' see PARA 16. As to the keeping of company records (the 'register') by the registrar see PARA 146; as to the registers etc that must be kept at a company's registered office see PARA 130; and as to a company's register of debenture holders see PARA 1321.

The Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 3(1) does not apply to any company which has at all times since its incorporation been dormant: reg 3(2). As to the meaning of a company that is 'dormant' see PARA 28. The provisions of reg 3(1) also do not apply to the registered office or an inspection place of a company where: (1) in respect of that company, a liquidator, administrator or administrative receiver has been appointed (reg 3(3)(a) (reg 3(3) added by SI 2009/218)); and (2) the registered office or inspection place is also a place of business of that liquidator, administrator or administrative receiver (Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 3(3)(b) (as so added)). As to administrators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 158 et seq; as to administrative receivers see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 380 et seq; and as to the appointment of a liquidator see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 950.

9 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 4(1), (2). As to the meaning of 'carry on business' generally see PARA 1 note 1.

The provisions mentioned in the text do not apply to a location which is primarily used for living accommodation: reg 4(3). Nor do they apply to any location at which business is carried on by a company where: (1) in respect of that company, a liquidator, administrator or administrative receiver has been appointed (reg 4(4)(a) (reg 4(4)-(6) added by SI 2009/218)); and (2) the location is also a place of business of that liquidator, administrator or administrative receiver (Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 4(4)(b) (as so added)). For these purposes, 'administrative receiver' has the meaning given by the Insolvency Act 1986 s 251 (see PARA 1336): Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 4(6) (as so added). Nor do the provisions mentioned in the text apply to any location at which business is carried on by a company of which every director who is an individual is a relevant director: reg 4(5) (as so added). For these purposes, 'relevant director' means an individual in respect of whom the registrar of companies is required by regulations made pursuant to the Companies Act 2006 s 243(4) (see PARA 503) to refrain from disclosing protected information to a credit reference agency, where 'credit reference agency' has the meaning given in s 243(7) (see PARA 503) and 'protected information' has the meaning given in s 240 (see PARA 501): Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 4(6) (as so added). As to the registrar of companies see PARA 131 et seq.

10 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 5(1), (2).

11 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 5(3).

12 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 9(1). The company must send a written response to that person within five working days of the receipt of that request: reg 9(2).

13 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 6(1)(a). As to whether an advertisement is included in 'other official publications' see *General Radio Co v General Radio Co (Westminster) Ltd* [1957] RPC 471 at 484-485 per Roxburgh J.

14 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 6(1)(b). As to a company's capacity to deal with bills and notes etc see PARA 292.

15 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 6(1)(c). See also PARA 222.

16 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 6(1)(d).

17 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 6(1)(e). As to bills and notes see further PARAS 292-295.

18 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 6(1)(f).

19 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 6(1)(g).

20 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 6(2). In relation to a company, a reference to 'its websites' includes a reference to any part of a website relating to that company which that company has caused or authorised to appear: reg 1(2).

21 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 7(1).

- 22 As to the meaning of 'United Kingdom' see PARA 1 note 5.
- 23 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 7(2)(a).
- 24 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 7(2)(b). As to a company's registered number see PARAS 139, 140.
- 25 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 7(2)(c).
- 26 As to the meaning of 'limited company' under the Companies Act 2006 see PARA 102.
- 27 Ie exempt under the Companies Act 2006 s 60 (see PARA 201): see the Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 7(2)(d) (amended by SI 2009/218).
- 28 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 7(2)(d) (as amended: see note 27).
- 29 As to community interest companies see PARA 82.
- 30 As to the meaning of 'public company' under the Companies Act 2006 see PARA 102.
- 31 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 7(2)(e).
- 32 Ie within the meaning of the Companies Act 2006 s 833 (see PARA 1394): see the Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 7(2)(f).
- 33 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 7(2)(f).
- 34 As to the meanings of 'share capital' and 'company having a share capital' under the Companies Act 2006 see PARA 1042.
- 35 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 7(3). As to paid up and unpaid shares see PARA 1042 et seq.
- 36 As to a company's directors see PARA 478 et seq. For these purposes, in the case of a director who is an individual, 'name' has the meaning given in the Companies Act 2006 s 163(2) (see PARA 499) and, in the case of a director who is a body corporate or a firm that is a legal person under the law by which it is governed, 'name' means corporate name or firm name: Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 8(2). As to companies, corporations and partnerships etc see PARAS 2-4.
- 37 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 8(1).
- 38 Ie fails, without reasonable excuse, to comply with any requirement in the Companies (Trading Disclosures) Regulations 2008, SI 2008/495, regs 2-9 (see the text and notes 5-37): see reg 10(1). A breach of these provisions will not deprive the company of the right to protect a trade name used separately from its corporate name: *Pearks Gunston and Tee Ltd v Thompson Talmey & Co* (1901) 18 RPC 185, CA; *HE Randall Ltd v British and American Shoe Co* [1902] 2 Ch 354 (approved in *Employers' Liability Assurance Corp'n v Sedgwick, Collins & Co* [1927] AC 95 at 120, HL, per Lord Blanesburgh). As to provision made for civil consequences to flow from a failure to make required disclosures see PARA 222.
- 39 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 10(1). For these purposes, a shadow director of the company is to be treated as an officer of the company: reg 10(3). As to the meaning of 'shadow director' under the Companies Act 2006 see PARA 479. As to the meaning of 'officer who is in default' under the Companies Act 2006 see PARA 315. As to the meaning of 'officer' generally under the Companies Act 2006 see PARA 607.
- 40 As to the standard scale see PARA 1622.
- 41 As to the meaning of 'daily default fine' see PARA 1622.
- 42 Companies (Trading Disclosures) Regulations 2008, SI 2008/495, reg 10(2).

COMPANIES ACTS/(5) COMPANY AND BUSINESS NAMES/(vi) Trading Disclosures/222. Civil remedies for breach of trading disclosure provisions.

222. Civil remedies for breach of trading disclosure provisions.

In relation to any legal proceedings brought by a company¹ which is subject to the trading disclosures provisions² to enforce a right arising out of a contract made in the course of a business in respect of which the company was, at the time the contract was made, in breach of regulations made under those provisions³, the proceedings must be dismissed if the defendant to the proceedings shows⁴:

- 518 (1) that he has a claim against the claimant arising out of the contract that he has been unable to pursue by reason of the latter's breach of the regulations⁵; or
- 519 (2) that he has suffered some financial loss in connection with the contract by reason of the claimant's breach of the regulations⁶,

unless the court before which the proceedings are brought is satisfied that it is just and equitable to permit the proceedings to continue⁷.

This provision does not affect the right of any person to enforce such rights as he may have against another person in any proceedings brought by that person⁸.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 I.e a company to which the Companies Act 2006 s 82 applies (as to which see PARA 220): see s 83(1).

3 Companies Act 2006 s 83(1). The text refers to a company that was, at the time the contract was made, in breach of regulations made under s 82 (as to which see PARA 220): see s 83(1). The provisions of s 83 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 4, but as modified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

Under the Companies Act 1985 s 349(4) (repealed) (see now the Companies Act 2006 s 83), a director who signed a company cheque, bill of exchange etc which did not contain the name of the company was personally liable to the holder of the bill, etc, unless the amount was duly paid by the company: see *Scottish and Newcastle Breweries Ltd v Blair* 1967 SLT 72; *Fiorentino Comm Giuseppe Srl v Farnesi* [2005] EWHC 160 (Ch), [2005] 2 All ER 737, [2005] 1 WLR 3718. See also *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd* [1968] 2 QB 839, [1968] 2 All ER 987 (holders estopped from enforcing personal liability as they had initiated the misdescription of the company); *Hendon v Adelman* (1973) 117 Sol Jo 631 (cheque printed by bank for 'L & R Agencies Ltd' gave as the company's name 'L R Agencies Ltd'; signatories to cheque personally liable); *British Airways Board v Parish* [1979] 2 Lloyd's Rep 361, CA ('limited' omitted). The director who signed is liable not as surety but for breach of statutory duty: *Maxform SpA v B Mariani and Goodville Ltd* [1981] 2 Lloyd's Rep 54, CA (signature in trading name not sufficient to avoid personal liability); *Banque de l'Indochine et de Suez SA v Euroseas Group Finance Co Ltd* [1981] 3 All ER 198 (abbreviation of 'Company' to 'Co' no breach); *John Wilkes (Footwear) Ltd v Lee International (Footwear) Ltd* [1985] BCLC 444, CA (officer of the company authorised the placing of an order for goods on the company's behalf by a company servant in a written form omitting the company's name); *Lindholst & Co A/S v Fowler* [1988] BCLC 166, CA ('Ltd' omitted); *Blum v OCP Repartition SA* [1988] BCLC 170, CA ('Ltd' omitted); *Rafsanjan Pistachio Producers Co-operative v Reiss* [1990] BCLC 352. Cf *Jenice Ltd v Dan* [1993] BCLC 1349 (company's name on cheques was misspelt in circumstances which did not lead to any of the vices against which the statutory provisions were directed and, accordingly, the defendant was not personally liable). Although documents omitting the company's name could not have been relied on as against the company, moneys paid under them to persons known to represent the company were not on that account payable over again: *Mahony v East Holyford Mining Co* (1875) LR 7 HL 869 at 893 per Lord Chelmsford; *Beer v London and Paris Hotel Co* (1875) LR 20 Eq 412; *OTV Birwelco Ltd v Technical and General Guarantee Co Ltd* [2002] EWHC 2240 (TCC), [2002] 4 All ER 668, [2002] 2 All ER (Comm) 1116, [2002] 2 BCLC 723. As to the liability of directors generally see PARA 559 et seq.

4 Companies Act 2006 s 83(2).

5 Companies Act 2006 s 83(2)(a).

6 Companies Act 2006 s 83(2)(b).

7 Companies Act 2006 s 83(2).

8 Companies Act 2006 s 83(3).

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(vii) Business Names

223. Persons subject to the business names provisions of the Companies Act 2006.

The business names provisions of the Companies Act 2006¹ apply to any person carrying on business in the United Kingdom². However, those provisions do not prevent:

- 520 (1) an individual carrying on business under a name consisting of his surname without any addition other than a permitted addition³; or
- 521 (2) individuals carrying on business in partnership⁴ under a name consisting of the surnames of all the partners without any addition other than a permitted addition⁵.

The 'permitted additions' for these purposes are: (a) in the case of an individual, his forename or initial⁶; (b) in the case of a partnership, the forenames of individual partners or the initials of those forenames⁷ or, where two or more individual partners have the same surname, the addition of 's' at the end of that surname⁸; and (c) in either case, an addition merely indicating that the business is carried on in succession to a former owner of the business⁹.

1 ie the Companies Act 2006 Pt 41 Ch 1 (ss 1192-1199) (see also PARA 224 et seq): see s 1192(1). As to Pt 41 Ch 2 (ss 1200-1206), which relates to trading disclosures required of individuals and partnerships, see **PARTNERSHIP** vol 79 (2008) PARA 9. (The equivalent provisions to Pt 41 Ch 2 that apply to companies are set out in ss 82-84: see PARAS 220, 222).

2 Companies Act 2006 s 1192(1). For these purposes, 'business' includes a profession: see s 1208. As to the meaning of 'carry on business' generally see PARA 1 note 1. As to the meaning of 'United Kingdom' see PARA 1 note 5.

However, s 1192 does not apply to the carrying on of a business by a person who:

- 107 (1) carried on the business immediately before 1 October 2009 (ie the date on which Pt 41 Ch 1 came into force: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3(x)) (Companies Act 2006 s 1199(1), (2)(a)); and
- 108 (2) continues to carry it on under the name that immediately before that date was its lawful business name (s 1199(1), (2)(b)).

Where a business is transferred to a person on or after 1 October 2009, and that person carries on the business under the name that was its lawful business name immediately before the transfer, s 1192 does not apply in relation to the carrying on of the business under that name during the period of 12 months beginning with the date of the transfer: s 1199(3). For these purposes, 'lawful business name', in relation to a business, means a name under which the business was carried on without contravening the Business Names Act 1985 s 2(1) (repealed) (see now the Companies Act 2006 ss 1193-96; and PARA 224) or, after 1 October 2009, the provisions of Pt 41 Ch 1: s 1199(4). The Business Names Act 1985 (repealed) (see now the Companies Act 2006 Pt 41 Ch 1) was capable of applying to educational establishments as it was intended to deal with situations where a contracting party fails to disclose its true identity in documents which could be evidence of a contract: *London College of Science and Technology Ltd v Islington London Borough Council* [1997] ELR 162, 140 Sol Jo LB 166.

3 Companies Act 2006 s 1192(2)(a). For these purposes, 'surname', in relation to a peer or person usually known by a British title different from his surname, means the title by which he is known: see s 1208.

4 For these purposes, 'partnership' means a partnership within the Partnership Act 1890 (see **PARTNERSHIP** vol 79 (2008) PARA 1 et seq), or a limited partnership registered under the Limited Partnerships Act 1907 (see **PARTNERSHIP** vol 79 (2008) PARA 218 et seq), or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom: see the Companies Act 2006 s 1208. As to the meaning of 'firm' see PARA 112 note 14. As to the meanings of 'firm' and 'partnership' generally see **PARTNERSHIP** vol 79 (2008) PARA 1; and as to the legal personality of a partnership or firm generally see **PARTNERSHIP** vol 79 (2008) PARA 2.

5 Companies Act 2006 s 1192(2)(b).

6 Companies Act 2006 s 1192(3)(a). For these purposes, 'initial' includes any recognised abbreviation of a name: see s 1208.

7 Companies Act 2006 s 1192(3)(b)(i).

8 Companies Act 2006 s 1192(3)(b)(ii).

9 Companies Act 2006 s 1192(3)(c).

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224. Business names requiring Secretary of State's approval.

A person¹ must not, without the approval of the Secretary of State², carry on business in the United Kingdom³ under a name that:

- 522 (1) would be likely to give the impression that the business is connected with Her Majesty's government or the Welsh Assembly Government⁴, or with any local authority⁵, or with any public authority⁶ that is specified for these purposes⁷ by regulations made by the Secretary of State⁸; or
- 523 (2) includes a word or expression for the time being specified in regulations made by the Secretary of State for these purposes⁹.

A person who contravenes either prohibition under head (1) or under head (2) above commits an offence¹⁰; and where such an offence is committed by a body corporate¹¹, an offence is also committed by every officer of the body who is in default¹². Any person guilty of either such offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹³ and (for continued contravention) to a daily default fine¹⁴ not exceeding one-tenth of level 3 on the standard scale¹⁵.

The Secretary of State may by regulations made under head (1) or under head (2) above require that, in connection with an application for the approval of the Secretary of State¹⁶, the applicant must seek the view of a specified¹⁷ government department or other body¹⁸. Where such a requirement applies, the applicant must request the specified department or other body (in writing) to indicate whether (and if so why) it has any objections to the proposed name¹⁹. He must submit to the Secretary of State a statement that such a request has been made and a copy of any response received from the specified body²⁰. If these requirements are not complied with, the Secretary of State may refuse to consider the application for approval²¹.

Where approval has been given for the purposes of head (1) or head (2) above, and it appears to the Secretary of State that there are overriding considerations of public policy that require

such approval to be withdrawn, the approval may be withdrawn by notice in writing given to the person concerned²². The notice must state the date as from which approval is withdrawn²³.

1 As to the persons to whom the Companies Act 2006 Pt 41 Ch 1 (ss 1192-1199) (see also PARAS 223, 225 et seq) (business names) applies see PARA 223. However, ss 1193-1196 do not apply to the carrying on of a business by a person who:

109 (1) carried on the business immediately before 1 October 2009 (ie the date on which Pt 41 Ch 1 came into force: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3(x)) (Companies Act 2006 s 1199(1), (2)(a)); and

110 (2) continues to carry it on under the name that immediately before that date was its lawful business name (s 1199(1), (2)(b)).

Where a business is transferred to a person on or after 1 October 2009, and that person carries on the business under the name that was its lawful business name immediately before the transfer, ss 1193-1196 do not apply in relation to the carrying on of the business under that name during the period of 12 months beginning with the date of the transfer: s 1199(3). As to the meaning of 'lawful business name' for these purposes see PARA 223 note 2. As to the meaning of 'business' for these purposes see PARA 223 note 2. As to the meaning of 'carry on business' generally see PARA 1 note 1.

2 As to the Secretary of State see PARA 6. It is the duty of the Secretary of State to secure that the expression 'chamber of commerce' and its Welsh equivalent ('siambr fasnach') is specified in regulations under s 1194 (business names requiring approval of Secretary of State) (see head (2) in the text), as an expression for the registration of which as or as part of a company's name the approval of the Secretary of State is required: Company and Business Names (Chamber of Commerce, etc) Act 1999 s 1 (amended by SI 2009/1941). Before determining under the Companies Act 2006 s 1194 whether to approve the carrying on of a business under a name which includes the expression 'chamber of commerce' or 'siambr fasnach', or any other expression for the time being specified in regulations under s 1194 which begins with the words 'chamber of' or 'chambers of' (or the Welsh equivalents), the Secretary of State must consult at least one relevant representative body: Company and Business Names (Chamber of Commerce, etc) Act 1999 s 3(1) (amended by SI 2009/1941). The Secretary of State may publish guidance with respect to factors which may be taken into account in determining whether to approve the use of a business name to which the Company and Business Names (Chamber of Commerce, etc) Act 1999 s 3 applies: s 3(2). The relevant representative bodies for these purposes are the British Chambers of Commerce and the body known as the Scottish Chambers of Commerce (see s 4(1)); but the Secretary of State may by order made by statutory instrument amend s 4(1) by adding or deleting from it the name of any body (whether corporate or unincorporated) (see s 4(2), (3)). At the date at which this volume states the law, no such order had been made.

The functions conferred on the Secretary of State by the Companies Act 2006 s 1193 (see head (1) in the text) or under s 1194 (see head (2) in the text) (together formerly the Business Names Act 1985 s 2(1)) may be exercised by, or by employees of, such person (if any) as may be authorised in that behalf by the Secretary of State: see the Contracting Out (Functions in relation to the Registration of Companies) Order 1995, SI 1995/1013, Sch 3 para 2; and the Interpretation Act 1978 s 17(2)(b); and PARA 8.

3 As to the meaning of 'United Kingdom' see PARA 1 note 5.

4 Companies Act 2006 s 1193(1)(a) (amended as from 6 November 2009 by SI 2009/2958). This provision also applies to a name that would be likely to give the impression that the business is connected with any part of the Scottish administration or Her Majesty's Government in Northern Ireland: see the Companies Act 2006 s 1193(1)(a) (as so amended).

5 Companies Act 2006 s 1193(1)(b). For these purposes, 'local authority' means a local authority within the meaning of the Local Government Act 1972 (see **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 24) (or a council constituted under the Local Government etc (Scotland) Act 1994 s 2 or a district council in Northern Ireland), the Common Council of the City of London or the Council of the Isles of Scilly: Companies Act 2006 s 1193(2). As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 51 et seq. As to the Council of the Isles of Scilly see **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 40.

6 For these purposes, 'public authority' includes any person or body having functions of a public nature: Companies Act 2006 s 1193(2). As to public bodies and public authorities generally see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 6 et seq.

7 Ie for the purposes of the Companies Act 2006 s 1193: see s 1193(1)(c).

8 Companies Act 2006 s 1193(1)(c). Regulations made under s 1193 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has

been laid before Parliament and approved by a resolution of each House of Parliament): see ss 1193(3), 1290. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. As to the regulations that have been made under s 1193 see the Company, Limited Liability Partnership and Business Names (Public Authorities) Regulations 2009, SI 2009/2982. There is no requirement for the purposes of head (1) in the text for the court to have before it evidence that confusion had in fact been caused as a result of the use of a business name said to have given the impression that the business was connected to the government: *Department of Trade and Industry v Cedenio* [2001] All ER (D) 323 (Feb) (considering the Business Names Act 1985 s 2(1) (repealed)).

9 Companies Act 2006 s 1194(1). Head (2) in the text refers to regulations made by the Secretary of State under s 1194: see s 1194(1). Regulations made under s 1194 are subject to approval after being made: s 1194(2). As to the meaning of 'approval after being made' see s 1291; and PARA 196 note 13. As to the words and expressions that are specified for the purposes of s 1194(1) see the Company, Limited Liability Partnership and Business Names (Sensitive Words and Expressions) Regulations 2009, SI 2009/2615, reg 3, Sch 1 Pt 1.

10 Companies Act 2006 ss 1193(4), 1194(3). Because the statute carries criminal sanctions, it should not be given a purposive construction: *Department of Trade and Industry v Cedenio* [2001] All ER (D) 323 (Feb). The provisions of the Companies Act 2006 ss 1121-1123 (liability of officer in default) (see PARA 315) and 1125-1131 (general provisions about offences) (see PARA 1622 et seq) apply in relation to offences under Pt 41 (ss 1192-1208) (see also PARAS 223, 225 et seq) as in relation to offences under the Companies Acts: Companies Act 2006 s 1207. As to the meaning of the 'Companies Acts' see PARA 16.

11 As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5.

12 Companies Act 2006 ss 1193(5), 1194(4). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

13 As to the standard scale see PARA 1622.

14 As to the meaning of 'daily default fine' see PARA 1622.

15 Companies Act 2006 ss 1193(6), 1194(5).

16 Ie under the Companies Act 2006 s 1193 (see head (1) in the text) or under s 1194 (see head (2) in the text), as the case may be: see s 1195(1).

17 For these purposes, 'specified' means specified in the regulations: Companies Act 2006 s 1195(5). Accordingly, in connection with applications for Secretary of State approval where the situation of the registered office or principal place of business is irrelevant see the Company, Limited Liability Partnership and Business Names (Sensitive Words and Expressions) Regulations 2009, SI 2009/2615, reg 5, Sch 2 Pt 1; and as to applications where the situation of the registered office or principal place of business is relevant see reg 6, Sch 2 Pt 2.

18 Companies Act 2006 s 1195(1).

19 Companies Act 2006 s 1195(2).

20 Companies Act 2006 s 1195(3).

21 Companies Act 2006 s 1195(4).

22 Companies Act 2006 s 1196(1), (2).

23 Companies Act 2006 s 1196(1), (3).

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225. Business name containing inappropriate indication of company type or legal form.

The Secretary of State¹ may make provision by regulations² prohibiting a person³ from carrying on business in the United Kingdom⁴ under a name consisting of or containing specified⁵ words, expressions or other indications⁶:

- 524 (1) that are associated with a particular type of company or form of organisation⁷; or
- 525 (2) that are similar to words, expressions or other indications associated with a particular type of company or form of organisation⁸.

The regulations may prohibit the use of words, expressions or other indications either in a specified part, or otherwise than in a specified part, of a name⁹, or in conjunction with (or otherwise than in conjunction with) such other words, expressions or indications as may be specified¹⁰.

A person who uses a name in contravention of such regulations commits an offence¹¹; and where such an offence is committed by a body corporate¹², an offence is also committed by every officer of the body who is in default¹³. Any person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹⁴ and (for continued contravention) to a daily default fine¹⁵ not exceeding one-tenth of level 3 on the standard scale¹⁶.

1 As to the Secretary of State see PARA 6 et seq.

2 As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 1197 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 1197(4), 1289. As to the regulations so made see the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085; and note 10.

3 As to the persons to whom the Companies Act 2006 Pt 41 Ch 1 (ss 1192-1199) (see also PARAS 223 et seq, 226) (business names) applies see PARA 223. However, s 1197 does not apply to the carrying on of a business by a person who:

111 (1) carried on the business immediately before 1 October 2009 (ie the date on which Pt 41 Ch 1 came into force: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3(x)) (Companies Act 2006 s 1199(1), (2)(a)); and

112 (2) continues to carry it on under the name that immediately before that date was its lawful business name (s 1199(1), (2)(b)).

Where a business is transferred to a person on or after 1 October 2009, and that person carries on the business under the name that was its lawful business name immediately before the transfer, s 1197 does not apply in relation to the carrying on of the business under that name during the period of 12 months beginning with the date of the transfer: s 1199(3). As to the meaning of 'lawful business name' for these purposes see PARA 223 note 2. As to the meaning of 'business' for these purposes see PARA 223 note 2. As to the meaning of 'carry on business' generally see PARA 1 note 1.

4 As to the meaning of 'United Kingdom' see PARA 1 note 5.

5 For these purposes, 'specified' means specified in the regulations: Companies Act 2006 s 1197(3).

6 Companies Act 2006 s 1197(1).

7 Companies Act 2006 s 1197(1)(a).

8 Companies Act 2006 s 1197(1)(b).

9 Companies Act 2006 s 1197(2)(a).

10 Companies Act 2006 s 1197(2)(b).

Accordingly, no person may carry on business in the United Kingdom under a name that concludes with any word or abbreviation set out in inverted commas in the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 13, Sch 2 para 1(a), (b) unless that person is:

- 113 (1) a company or an overseas company registered in the United Kingdom by that name (reg 13(1)(a));
- 114 (2) an overseas company incorporated with that name (reg 13(1)(b) (amended by SI 2009/2404));
- 115 (3) a society registered under the Industrial and Provident Societies Act 1965 or the Industrial and Provident Societies Act (Northern Ireland) 1969 by that name (Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 13(1)(c));
- 116 (4) an incorporated friendly society (as defined in the Friendly Societies Act 1992 s 116: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 2082-2083) which has that name (Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 13(1)(d) (added by SI 2009/2404)); or
- 117 (5) a company to which the Companies Act 2006 s 1040 (companies authorised to register under the Companies Act 2006) (see PARA 33) applies which has that name (Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, reg 13(1)(e) (added by SI 2009/2404)).

Nor may any person carry on business in the United Kingdom under a name that concludes with any word or abbreviation specified as similar to any word or abbreviation set out in inverted commas in Sch 2 para 1(a), (b): reg 13(2). For these purposes, the words or abbreviations specified as similar to the words and abbreviations set out in inverted commas in Sch 2 para 1(a), (b) are any in which:

- 118 (a) one or more characters have been omitted (reg 1(2), Sch 2 para 2(a));
- 119 (b) one or more characters, symbols, signs or punctuation have been added (reg 1(2), Sch 2 para 2(b)); or
- 120 (c) each of one or more characters has been substituted by one or more other characters, signs, symbols or punctuation (reg 1(2), Sch 2 para 2(c)),

in such a way as to be likely to mislead the public as to the legal form of a company if included in the registered name of the company (reg 1(2), Sch 2 para 2). As to the meaning of 'overseas company' see PARA 1824. As to company registration under the Companies Act 2006 see PARA 111 et seq. As to companies registered but not formed under the Companies Act 2006, and as to overseas companies, see PARA 32. As to societies registered under the Industrial and Provident Societies Act 1965 see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2410 et seq.

A person must not carry on business in the United Kingdom under a name that includes any expression or abbreviation set out in inverted commas in the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, Sch 2 para 3 unless that person is such a company, partnership or grouping as is indicated in that expression or abbreviation: reg 14(1). Nor may any person carry on business in the United Kingdom under a name that includes any expression or abbreviation specified as similar to any expression or abbreviation set out in inverted commas in Sch 2 para 3: reg 14(2). As to transitional provisions see reg 15. The expressions and abbreviations specified as similar to the expressions and abbreviations set out in inverted commas in Sch 2 para 3 are any in which:

- 121 (i) one or more characters have been omitted (reg 1(2), Sch 2 para 4(a));
- 122 (ii) one or more characters, symbols, signs or punctuation have been added (reg 1(2), Sch 2 para 4(b)); or
- 123 (iii) each of one or more characters has been substituted by one or more other characters, signs, symbols or punctuation (reg 1(2), Sch 2 para 4(c)),

in such a way as to be likely to mislead the public as to the legal form of a company if included in the registered name of the company (reg 1(2), Sch 2 para 4).

11 Companies Act 2006 s 1197(5). The provisions of ss 1121-1123 (liability of officer in default) (see PARA 315) and 1125-1131 (general provisions about offences) (see PARA 1622 et seq) apply in relation to offences under Pt 41 (ss 1192-1208) (see also PARAS 223 et seq, 226) as in relation to offences under the Companies Acts: Companies Act 2006 s 1207. As to the meaning of the 'Companies Acts' see PARA 16.

12 As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5.

13 Companies Act 2006 s 1197(6). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

14 As to the standard scale see PARA 1622.

15 As to the meaning of 'daily default fine' see PARA 1622.

16 Companies Act 2006 s 1197(7).

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226. Offence of trading under misleading business name.

A person¹ must not carry on business² in the United Kingdom³ under a name that gives so misleading an indication of the nature of the activities of the business as to be likely to cause harm to the public⁴.

A person who uses a name in contravention of this prohibition commits an offence⁵; and where such an offence is committed by a body corporate⁶, an offence is also committed by every officer of the body who is in default⁷. Any person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale⁸ and (for continued contravention) to a daily default fine⁹ not exceeding one-tenth of level 3 on the standard scale¹⁰.

1 As to the persons to whom the Companies Act 2006 Pt 41 Ch 1 (ss 1192-1199) (see also PARA 223 et seq) (business names) applies see PARA 223.

2 As to the meaning of 'business' for these purposes see PARA 223 note 2. As to the meaning of 'carry on business' generally see PARA 1 note 1.

3 As to the meaning of 'United Kingdom' see PARA 1 note 5.

4 Companies Act 2006 s 1198(1). See also PARA 216 note 3.

5 Companies Act 2006 s 1198(2). The provisions of ss 1121-1123 (liability of officer in default) (see PARA 315) and 1125-1131 (general provisions about offences) (see PARA 1622 et seq) apply in relation to offences under Pt 41 (ss 1192-1208) (see also PARA 223 et seq) as in relation to offences under the Companies Acts: Companies Act 2006 s 1207. As to the meaning of the 'Companies Acts' see PARA 16.

6 As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5.

7 Companies Act 2006 s 1198(3). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

8 As to the standard scale see PARA 1622.

9 As to the meaning of 'daily default fine' see PARA 1622.

10 Companies Act 2006 s 1198(4).

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COMPANIES ACTS/(6) THE COMPANY CONSTITUTION/(i) Introduction/227. Meaning of references to a company's constitution.

(6) THE COMPANY CONSTITUTION

(i) Introduction

227. Meaning of references to a company's constitution.

Unless the context otherwise requires, references in the Companies Acts¹ to the constitution of a company² (a 'company's constitution') include³:

- 526 (1) the company's articles of association⁴; and
- 527 (2) any of the following resolutions and agreements⁵:
 - 25
 - 44. (a) any special resolution⁶;
 - 45. (b) any resolution or agreement agreed to by all the members⁷ of a company that, if not so agreed to, would not have been effective for its purpose unless passed as a special resolution⁸;
 - 46. (c) any resolution or agreement agreed to by all the members of a class of shareholders⁹ that, if not so agreed to, would not have been effective for its purpose unless passed by some particular majority or otherwise in some particular manner¹⁰;
 - 47. (d) any resolution or agreement that effectively binds all members of a class of shareholders though not agreed to by all those members¹¹;
 - 48. (e) any other resolution or agreement which affects a company's constitution¹² by virtue of any enactment¹³.
 - 26

References to a company's constitution in the provisions of the Companies Act 2006 that (amongst other things) impose duties and limitations upon a company's directors¹⁴ include, in addition to the matters mentioned in heads (1) and (2) above¹⁵: (i) any resolution or other decision come to in accordance with the constitution¹⁶; and (ii) any decision by the members of the company, or a class of members, that is treated by virtue of any enactment or rule of law as equivalent to a decision by the company¹⁷.

1 As to the meaning of the 'Companies Acts' for these purposes see PARA 16.

2 As to the meaning of 'company' under the Companies Acts see PARA 24. As to the effect of a company's constitution see PARA 243 et seq.

3 Companies Act 2006 s 17. The use of the word 'include' indicates that the list given in heads (1) and (2) in the text is not exhaustive, eg a company's certificate of incorporation has constitutional relevance serving as it does to define a company and therefore to indicate its general nature, powers and limitations: see PARA 119.

In the case of an unregistered company (see PARA 1665 et seq), any reference to the company's constitution must be read as referring to any instrument constituting or regulating the company: see the Unregistered Companies Regulations 2009, SI 2009/2436, reg 5(1)(c); and PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 2006 s 17(a). As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to articles of association generally see PARA 228 et seq.

5 Companies Act 2006 s 17(b). Head (2) in the text refers to any resolutions and agreements to which Pt 3 Ch 3 (ss 29-30) (resolutions and agreements affecting a company's constitution) applies (see s 29; heads (2)(a) to (2)(e) in the text; and PARA 231): see s 17(b). As to resolutions and decisions of the company generally see PARA 612 et seq.

6 See the Companies Act 2006 s 29(1)(a); and PARA 231. As to the meaning of 'special resolution' see PARA 614.

7 References in the Companies Act 2006 s 29(1) to a member of a company do not include the company itself where it is such a member by virtue only of its holding shares as treasury shares: see s 29(2); and PARA 231. As to the meaning of 'member' see PARA 321; and as to the meaning of 'shares' see PARA 1042. As to treasury shares see PARA 1251.

8 See the Companies Act 2006 s 29(1)(b); and PARA 231. The redenomination of shares does not affect any rights or obligations of members under the company's constitution, or any restrictions affecting members under the company's constitution: see s 624(1); and PARA 1168.

9 References in the Companies Act 2006 s 29(1) to a class of members of a company do not include the company itself where it is such a member by virtue only of its holding shares as treasury shares: see s 29(2); and PARA 231. As to classes of shares generally see PARA 1057 et seq.

10 See the Companies Act 2006 s 29(1)(c); and PARA 231.

11 See the Companies Act 2006 s 29(1)(d); and PARA 231.

12 In any other resolution or agreement to which the Companies Act 2006 Pt 3 Ch 3 applies (see note 5): see s 29(1)(e); and PARA 231.

13 See the Companies Act 2006 s 29(1)(e); and PARA 231. As to the meaning of 'enactment' see PARA 17 note 2.

14 In references to a company's constitution in the Companies Act 2006 Pt 10 (ss 154-259) (see PARA 478 et seq): see s 257(1); and PARA 540. A director of a company has a duty to act in accordance with the company's constitution: see s 171; and PARA 540. As to the meaning of 'director' see PARA 478.

15 In addition to the matters mentioned in the Companies Act 2006 s 17: see s 257(2); and PARA 540.

16 See the Companies Act 2006 s 257(1)(a); and PARA 540.

17 See the Companies Act 2006 s 257(1)(b); and PARA 540.

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(ii) Articles of Association

228. Power to prescribe model articles and their application.

A company¹ must have articles of association² prescribing regulations for the company³.

Unless it is a company to which model articles apply⁴, it must register articles of association⁵; and articles of association registered by a company must⁶: (1) be contained in a single document⁷; and (2) be divided into paragraphs numbered consecutively⁸.

The Secretary of State⁹ may by regulations prescribe¹⁰ model articles of association for companies¹¹; and different model articles may be prescribed for different descriptions of company¹². A company may adopt all or any of the provisions of model articles¹³.

On the formation of a limited company¹⁴:

528 (a) if articles are not registered¹⁵; or

529 (b) if articles are registered, in so far as they do not exclude or modify the relevant model articles¹⁶,

the relevant model articles (so far as applicable) form part of the company's articles in the same manner and to the same extent as if articles in the form of those articles had been duly registered¹⁷.

According to the jurisprudence of the European Court of Justice, it may be that the articles should, in a case where the number of directors is only one, explicitly state, for the purpose of registration, that such one director may alone represent the company, even though this is in any event the position under the general law¹⁸.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 References in the Companies Acts to a company's 'articles' are to its articles of association (Companies Act 2006 s 18(4)); and, unless the context otherwise requires, references in the Companies Acts to a company's constitution include the company's articles (see s 17; and PARA 227). As to the articles of association of a community interest company see PARA 105.

In the case of an unregistered company (see PARA 1665 et seq), any reference to the company's articles of association must be read as referring to any instrument constituting or regulating the company: see the Unregistered Companies Regulations 2009, SI 2009/2436, reg 5(1)(c); and PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Companies Act 2006 s 18(1). Any such article, at any rate when read with other articles, may be directory only: *Re Hansard Publishing Union Ltd* (1892) 8 TLR 280, CA; *Landowners West of England and South Wales Land Drainage and Inclosure Co v Ashford* (1880) 16 ChD 411.

Provisions that immediately before 1 October 2009 were contained in a company's memorandum but are not provisions of the kind mentioned in the Companies Act 2006 s 8 (which substantially altered the purpose of the memorandum of association) (see PARA 104) are to be treated after that date as provisions of the company's articles: s 28(1). This applies not only to substantive provisions but also to provision for entrenchment, as defined in s 22 (see PARA 233): s 28(2). The provisions of Pt 3 (ss 17-38) (a company's constitution) about provision for entrenchment apply to such provision as they apply to provision made on the company's formation, except that the company's duty under s 23(1)(a) (see PARA 233) to give notice to the registrar of any provision for entrenchment contained in the articles does not apply: s 28(3). Nothing in s 18(3) (see the text and notes 6-8) is to be read as affecting the operation of s 28: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 3(2). Nor is anything in the Companies Act 2006 as a whole to be read as enabling a company to amend or omit provisions of its articles that were formerly in its memorandum so as to change its status as a limited or unlimited company otherwise than in accordance with the relevant provisions of Pt 7 (ss 89-111) (re-registration as a means of changing company's status) (see PARA 167 et seq): see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 10. The date of 1 October 2009 is the date by which all the provisions of the Companies Act 2006 Pt 3 had been commenced: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3. Where, in the case of an existing or transitional company, the company's articles are deemed to contain a statement of its name by virtue of the Companies Act 2006 s 28, and the company changes its name (by any means) on or after 1 October 2009, the company is not required to amend its articles in order to effect the change of name (see the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 5(1), (2)); and the company is not required to send a copy of its articles to the registrar in accordance with the Companies Act 2006 s 26 (see PARA 236) (see the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 5(4)). The deemed statement in the company's articles ceases to have effect when the change of name takes effect: art 5(3). As to the meaning of 'existing company' for these purposes see PARA 18 note 2; definition applied by art 5(6). As to the meaning of 'transitional company' for these purposes see PARA 17 note 4; definition applied by art 5(6).

Prior to the Companies Act 2006, the articles of association were considered subordinate to the memorandum of association; and any clause in them, if and so far as it was at variance with the memorandum, was to that extent overruled by it and inoperative: see *Guinness v Land Corp'n of Ireland Ltd* (1882) 22 ChD 349 at 376 per Cotton LJ; *Angostura Bitters (Dr JGB Siegert & Sons) Ltd v Kerr* [1933] AC 550 at 554, PC; *Re Duncan Gilmour & Co Ltd*, *Duncan Gilmour & Co Ltd v Inman* [1952] 2 All ER 871 at 874 per Wynn-Parry J. The memorandum was regarded as the charter of the company, defining its powers, while the articles of association (in their subsidiary role) defined the duties, rights and powers of the governing body as between themselves and the company at large, and the mode and form in which the business of the company was to be carried on and in which changes in its internal regulations may from time to time be made: see *Ashbury v Watson* (1885) 30 ChD 376, CA. However, in certain circumstances, the memorandum and articles were read together, at all events so far as was necessary to explain any ambiguity appearing in the terms of one document or to supplement it upon any matter as to which it is silent: see *Angostura Bitters (Dr JGB Siegert & Sons) Ltd v Kerr* at 554; *Re Duncan Gilmour & Co Ltd*, *Duncan Gilmour & Co Ltd v Inman*. See also *Harrison v Mexican Rly Co* (1875) LR 19 Eq 358;

Re Wedgewood Coal and Iron Co, Anderson's Case (1877) 7 ChD 75 at 99, CA, per Jessel MR; *London Financial Association v Kelk* (1884) 26 ChD 107 at 135 per Bacon V-C; *Ashbury v Watson* (explained in *Re Marshall, Fleming & Co* 1938 SC 873 at 877-878, Ct of Sess per Lord Keith); *Re South Durham Brewery Co* (1885) 31 ChD 261, CA; *Andrews v Gas Meter Co* [1897] 1 Ch 361 at 369, CA, per Lindley LJ; *Re Southern Brazilian Rio Grande do Sul Rly Co Ltd* [1905] 2 Ch 78.

Questions as to the true meaning of the memorandum or articles of a company may be decided by the court in the course of proceedings: see PARA 305.

4 le by virtue of the Companies Act 2006 s 20 (default application of model articles in case of limited company) (see the text and notes 14-17): see the Companies Act 2006 s 18(2).

5 Companies Act 2006 s 18(2). As to registration requirements see PARA 111 et seq. Articles duly registered and acted on for many years may be held binding: *Ho Tung v Man On Insurance Co* [1902] AC 232, PC.

6 Companies Act 2006 s 18(3). See note 3.

7 Companies Act 2006 s 18(3)(a). See note 3.

8 Companies Act 2006 s 18(3)(b). See note 3.

9 As to the Secretary of State see PARA 6.

10 In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 19 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 19(5), 1289. In exercise of the powers conferred by s 19, the Secretary of State has made the Companies (Model Articles) Regulations 2008, SI 2008/3229 (as to which see PARA 229). Any amendment of model articles by regulations under the Companies Act 2006 s 19 does not affect a company registered before the amendment takes effect; and, for these purposes, 'amendment' here includes addition, alteration or repeal: s 19(4).

11 Companies Act 2006 s 19(1). See note 10. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230; and see note 16.

12 Companies Act 2006 s 19(2). See the Companies (Model Articles) Regulations 2008, SI 2008/3229, regs 2-4, Sch 1 (private companies limited by shares), Sch 2 (private companies limited by guarantee), Sch 3 (public companies); and PARA 229. No such model articles have been prescribed for unlimited companies.

13 Companies Act 2006 s 19(3). See also *Gaiman v National Association for Mental Health* [1971] Ch 317, [1970] 2 All ER 362 (provided that he follows the general form of the model articles, the draftsman is free to add, subtract or vary the articles as circumstances require). As to provision made for the alteration of articles see PARA 232 et seq.

14 Companies Act 2006 s 20(1). As to the meaning of 'limited company' see PARA 102.

15 Companies Act 2006 s 20(1)(a). As to the registration of articles see PARA 111 et seq.

16 Companies Act 2006 s 20(1)(b). For these purposes, the 'relevant model articles' means the model articles prescribed for a company of that description as in force at the date on which the company is registered (see notes 10, 11): s 20(2). As to the importance of using words clearly excluding prescribed model articles see *Fisher v Black and White Publishing Co* [1901] 1 Ch 174, CA; *R Paterson & Sons Ltd v Paterson Publishing Co* [1916] WN 352, HL.

17 Companies Act 2006 s 20(1).

18 See Case 32/74 *Friedrich Haaga GmbH* [1974] ECR 1201, [1975] 1 CMLR 32, ECJ (interpreting the second sentence of EC Council Directive 68/151 of 9 March 1968 (OJ L65, 14.3.68, p 8) art 2(1)(d)). As to EC Council Directive 68/151 (OJ L65, 14.03.68, p 8) on co-ordination of safeguards which, for the protection of the interests of members and others, are required by member states of companies, with a view to making such safeguards equivalent throughout the Community, see PARA 23. A private company need have only one director: see the Companies Act 2006 s 154(1); and PARA 483.

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229. Model articles prescribed for the purposes of the Companies Act 2006.

The Secretary of State¹ has by regulations prescribed² different versions of model articles³ for the following different descriptions of company⁴:

- 530 (1) private companies limited by shares⁵;
- 531 (2) private companies limited by guarantee⁶; and
- 532 (3) public companies⁷.

The default articles prescribed for the purposes of the Companies Act 1985⁸ have not been revoked and may, in their amended form⁹, continue to be used by companies after the commencement of the Companies Act 2006¹⁰.

1 As to the Secretary of State see PARA 6.

2 I.e. by regulations made under the Companies Act 2006 s 19: see PARA 228. In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. In exercise of the powers conferred by s 19, the Secretary of State has made the Companies (Model Articles) Regulations 2008, SI 2008/3229 (as to which see heads (1) to (3) in the text).

3 As to the meaning of references to 'articles' see PARA 228 note 2. As to articles of association generally see PARAS 228, 230 et seq.

4 See the Companies Act 2006 s 19; and PARA 228. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

5 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1. As to the meanings of 'private company' and 'company limited by shares' see PARA 102.

6 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 3, Sch 2. As to the meaning of 'company limited by guarantee' see PARA 102.

7 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3. As to the meaning of 'public company' see PARA 102.

8 I.e. the Companies (Tables A to F) Regulations 1985, SI 1985/805: see PARA 230.

9 I.e. the Companies (Tables A to F) Regulations 1985, SI 1985/805, as amended by the Companies (Tables A to F) (Amendment) Regulations 2007, SI 2007/2541, the Companies (Tables A to F) (Amendment) (No. 2) Regulations 2007, SI 2007/2826, and the Companies (Tables A to F) (Amendment) Regulations 2008, SI 2008/739: see PARA 230.

10 See PARA 230. As to the statutory authority of Table A etc see PARA 230 note 4.

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230. Legacy articles and the Companies Act 2006.

The Companies Act 2006 does not vary the rule that the version of the default articles¹ that applies to any given company is the version in force at the date that the company was registered².

Prior to 1 October 2009³, a company would have adopted default articles (known as 'Table A') that were issued under the Companies Act 1985⁴.

Where companies relied on the default articles prescribed for the purposes of the Companies Act 1985 ('Table A')⁵, or indeed any preceding version (such as the Companies Act 1948 'Table A'⁶), those articles continued to regulate the company after the Companies Act 2006 had come fully into force, unless action was taken to replace them⁷.

1 le the articles of association that govern a company's activities if its fails to register its own bespoke articles. As to the meaning of references to 'articles' see PARA 228 note 2. As to articles of association generally see PARAS 228-229, 231 et seq. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. A limited company need not register its articles: see PARA 228. As to the meaning of 'limited company' see PARA 102.

2 See the Companies Act 2006 s 19; and PARA 228. As to articles applicable to companies incorporated under the Companies Act 2006 see PARA 228. As to incorporation and registration under the Companies Act 2006 see PARA 111 et seq; and as to the re-registration of a private company as a public company under the Companies Act 2006 see PARAS 168-172.

3 le the date by which all the provisions of the Companies Act 2006 that affect the law in England and Wales had come into force: see PARA 17 note 1. Companies formed and registered between 1 October 2007 and 30 September 2009, which elected to adopt Table A articles, would have adopted such articles that had been specifically amended in order to make the articles compatible with the requirements of the Companies Act 2006 ('compatible articles'): see the Companies (Tables A to F) Regulations 1985, SI 1985/805 (amended by SI 1985/1052; SI 2000/3373; SI 2007/2541; SI 2007/2826; SI 2008/739); and see the Companies (Tables A to F) (Amendment) Regulations 2007, SI 2007/2541 (applicable to a company registered on or after 1 October 2007 and before 1 October 2009 which adopted Table A or Table C as its articles of association); the Companies (Tables A to F) (Amendment) (No. 2) Regulations 2007, SI 2007/2826 (applicable to a company registered on or after 1 October 2007 and before 1 October 2009 which adopted Table A as its articles of association); and the Companies (Tables A to F) (Amendment) Regulations 2008, SI 2008/739 (applicable to a company registered on or after 6 April 2008 and before 1 October 2009 which adopted Table C or Table E as its articles of association). The requirement for compatibility also led, in some instances, to articles which had appeared in the Companies (Tables A to F) Regulations 1985, SI 1985/805, being revoked.

4 See the Companies (Tables A to F) Regulations 1985, SI 1985/805; and PARA 18. The expressions 'Table A', 'Table B' etc were not formally defined in statute, although they were referred to in statute, eg in the Companies Act 1985 s 8 (repealed).

The regulations in the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule Table A and the forms in Schedule Tables B, C, D, E and F were the regulations and forms of memorandum and articles of association prescribed for the purposes of the Companies Act 1985 ss 3, 8 (repealed): see the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A contains a model set of regulations for the management of a company limited by shares; Table B sets out the model memorandum of association for a private company limited by shares; and Table F sets out the model memorandum of association for a public company limited by shares. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table C sets out the model memorandum of association for a company limited by guarantee and not having a share capital and applies modified Table A as articles of association; Table D Pts I-III sets out the model memorandum of association for a public or private company limited by guarantee and having a share capital and applies unmodified Table A as articles of association; and Table E sets out the model memorandum of association for an unlimited company having a share capital and applies modified Table A as articles of association. As to the meanings of 'company limited by guarantee', 'company limited by shares', 'private company', 'public company' and 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

As to the statutory authority of Table A see *Re Barnard's Banking Co, ex p Contract Corp'n* (1867) 3 Ch App 105 at 113-114 per Lord Cairns LJ; *Re Pyle Works* (1890) 44 ChD 534 at 571, CA; *Lock v Queensland Investment and Land Mortgage Co* [1896] AC 461, HL; *New Balkis Eersteling Ltd v Randt Gold Mining Co* [1904] AC 165 at 167, HL, per Lord Davey; *Trevor v Whitworth* (1887) 12 App Cas 409, HL. Case law that was applicable to Table A can be assumed generally to apply to model articles prescribed under the Companies Act 2006: see eg the cases cited in PARA 228 notes 5, 13, 16.

5 See note 4.

6 See PARA 18 note 4.

7 Nothing in the Companies Act 2006 affects the application in relation to an existing company of Table B in the Joint Stock Companies Act 1856 or Table A in the former Companies Acts or the Companies (Tables A to F) Regulations 1985, SI 1985/805: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 1; and PARA 18. As to the general savings made for existing companies under the Companies Act 2006 see PARA 18. As to the general provision made for continuity in company law see PARA 17. As to the formal adoption of amended articles see PARA 232 et seq. There is, of course, nothing to prevent a company from replacing their existing articles (whether they are based on default articles of previous vintage or not) with the model articles prescribed for the purposes of the Companies Act 2006, so long as the articles are altered in accordance with s 21: see PARA 232 et seq.

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(iii) Resolutions and Agreements relating to Constitution

231. Resolutions and agreements affecting a company's constitution.

A copy of every resolution or agreement¹ which falls under any of heads (1) to (5) below², namely:

- 533 (1) any special resolution³;
- 534 (2) any resolution or agreement agreed to by all the members of a company⁴ that, if not so agreed to, would not have been effective for its purpose unless passed as a special resolution⁵;
- 535 (3) any resolution or agreement agreed to by all the members of a class of shareholders⁶ that, if not so agreed to, would not have been effective for its purpose unless passed by some particular majority or otherwise in some particular manner⁷;
- 536 (4) any resolution or agreement that effectively binds all members of a class of shareholders though not agreed to by all those members⁸;
- 537 (5) any other resolution or agreement which affects a company's constitution⁹ by virtue of any enactment¹⁰,

or (in the case of a resolution or agreement that is not in writing) a written memorandum setting out its terms, must be forwarded to the registrar of companies¹¹ within 15 days after it is passed or made¹².

If a company fails to comply with this requirement¹³, an offence is committed by the company, and by every officer of the company who is in default¹⁴; and any person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹⁵ and (for continued contravention) a daily default fine¹⁶ not exceeding one-tenth of level 3 on the standard scale¹⁷.

1 As to company resolutions and decisions generally see PARA 612 et seq.

2 Heads (1) to (5) in the text specify the resolutions and agreements to which the Companies Act 2006 Pt 3 Ch 3 (ss 29-30) (resolutions and agreements affecting a company's constitution) applies: see s 29(1).

3 Companies Act 2006 s 29(1)(a). As to the meaning of 'special resolution' see PARA 614.

- 4 References in the Companies Act 2006 s 29(1) to a member of a company do not include the company itself where it is such a member by virtue only of its holding shares as treasury shares: see s 29(2). As to the meaning of 'member' see PARA 321; and as to the meaning of 'shares' see PARA 1042. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' for these purposes see PARA 16. As to treasury shares see PARA 1251.
- 5 Companies Act 2006 s 29(1)(b). The redenomination of shares does not affect any rights or obligations of members under the company's constitution, or any restrictions affecting members under the company's constitution: see s 624(1); and PARA 1168.
- 6 References in the Companies Act 2006 s 29(1) to a class of members of a company do not include the company itself where it is such a member by virtue only of its holding shares as treasury shares: see s 29(2). As to classes of shares generally see PARA 1057 et seq.
- 7 Companies Act 2006 s 29(1)(c).
- 8 Companies Act 2006 s 29(1)(d).
- 9 In any other resolution or agreement to which the Companies Act 2006 Pt 3 Ch 3 applies (see note 2): see s 29(1)(e). As to the meaning of references in the Companies Acts to a company's constitution see PARA 227. As to the effect of a company's constitution see PARA 243 et seq.
- 10 Companies Act 2006 s 29(1)(e). As to the meaning of 'enactment' see PARA 17 note 2.
- 11 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. Any amendment of the company's articles (including every resolution or agreement required to be embodied in or annexed to copies of the company's articles issued by the company) is subject to the disclosure requirements in the Companies Act 2006 s 1078: see PARA 144. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.
- 12 Companies Act 2006 s 30(1). Agreements which are required to be forwarded to the registrar under Pt 3 Ch 3 may be drawn up and delivered to the registrar in a language other than English, but when delivered to the registrar they must be accompanied by a certified translation into English: see s 1105; and PARA 164. A company must, on request by any member, send to him a copy of any resolution or agreement to which Pt 3 Ch 3 applies: see s 32(1)(b); and PARA 242.
- 13 If it fails to comply with the Companies Act 2006 s 30: see s 30(2).
- 14 Companies Act 2006 s 30(2). For these purposes, a liquidator of the company is treated as an officer of it: s 30(4). As to the meaning of 'officer' generally see PARA 607; and as to the meaning of 'officer in default' see PARA 315. As to the appointment of liquidators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 950 et seq.
- 15 As to the standard scale see PARA 1622.
- 16 As to the meaning of 'daily default fine' see PARA 1622.
- 17 Companies Act 2006 s 30(3).

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(iv) Alterations to Constitution

A. ALTERATION OF ARTICLES BY MEMBERS' RESOLUTION

232. How amendment of articles is effected.

A company¹ may amend its articles of association² by special resolution³.

A member⁴ of a company is not bound by any such alteration to its articles after the date on which he became a member⁵, if and so far as the alteration either requires him to take or subscribe for more shares⁶ than the number held by him at the date on which the alteration is made, or in any way increases his liability as at that date to contribute to the company's share capital⁷ or otherwise to pay money to the company, subject to agreement⁸.

The power of alteration, which is statutory, cannot be modified by the articles⁹. Nor can a company contract itself out of the power to alter its articles¹⁰, even by the express terms of the articles¹¹. The conferring of special voting rights on a particular class of shares, which would in effect make it impossible to alter the articles without the consent of a particular person, would not, however, be a provision depriving the company of the power to alter the articles; it is otherwise if the provisions were merely that no alteration should be made without the consent of a particular person¹².

Directors cannot by resolution alter the articles¹³; but the words 'articles of association' as used in a contract may refer to provisions put forward by the company as its articles even if they have not been validly adopted¹⁴.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq. As to the amendment of 'entrenched provisions': see PARA 233. As to alterations to a company's articles that are required to be made when the company alters its status by means of re-registration see PARA 167 et seq.

3 Companies Act 2006 s 21(1). As to the meaning of 'special resolution' see PARA 614. The registrar of companies must be sent a copy of the amended articles (see PARA 236); and he has power to issue a notice to comply where a company has failed to observe the procedural requirements with respect to amended articles (see PARA 237). See also PARA 145. See also the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 5; and PARA 236.

If the company which is proposing to alter its articles is a charity whose objects clause is being altered thus, s 21(1) is subject, in England and Wales, to the procedure that must be observed in such cases (ie it is subject to the Charities Act 1993 s 64: see **CHARITIES** vol 8 (2010) PARA 238): see the Companies Act 2006 s 21(2). As to the meanings of 'England' and 'Wales' see PARA 1 note 5. As to the statement of a company's objects see PARA 240.

4 As to the meaning of 'member' see PARA 321.

5 Ie except where the member agrees in writing, either before or after the alteration is made, to be bound by the alteration: see the Companies Act 2006 s 25(2); and PARA 367.

6 As to the meaning of 'share' see PARA 1042.

7 As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

8 See the Companies Act 2006 s 25(1), (2); and PARA 367. See also *Morshead Mansions Ltd v Di Marco* [2008] EWCA Civ 1371, [2008] All ER (D) 113 (Dec) (interaction between the Landlord and Tenant Act 1985 ss 18-30 (limits on the amount of service charges payable to a landlord of residential premises) (see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 325 et seq) and the claimant's articles of association).

9 *Ayre v Skelsey's Adamant Cement Co Ltd* (1904) 20 TLR 587; affd (1905) 21 TLR 464, CA.

10 *Malleon v National Insurance and Guarantee Corp* [1894] 1 Ch 200; *Andrews v Gas Meter Co* [1897] 1 Ch 361, CA. See also PARA 235.

11 *Walker v London Tramways Co* (1879) 12 ChD 705.

12 *Bushell v Faith* [1970] AC 1099, [1970] 1 All ER 53, HL. As to classes of shares and the rights attached to classes of shares generally see PARA 1057 et seq.

13 *Re British Provident Life and Guarantee Association, De Ruvigne's Case* (1877) 5 ChD 306, CA.

14 *Muirhead v Forth and North Sea Steamboat Mutual Insurance Association* [1894] AC 72, HL. Cf *Re Miller's Dale and Ashwood Dale Lime Co* (1885) 31 ChD 211, CA. Articles irregularly adopted may be treated as adopted by the company, if acted upon, amended and added to by the shareholders for many years without objection: *Ho Tung v Man On Insurance Co Ltd* [1902] AC 232, PC.

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233. Entrenched provisions of the articles.

The articles¹ of a company² may contain provision ('provision for entrenchment') to the effect that specified provisions of the articles may be amended or repealed³ only if conditions are met, or procedures are complied with, that are more restrictive than those applicable in the case of a special resolution⁴. As from a day to be appointed⁵, provision for entrenchment may only be made in this way either in the company's articles on formation, or by an amendment of the company's articles agreed to by all the members of the company⁶. Provision for entrenchment does not prevent amendment of the company's articles by agreement of all the members of the company⁷, or by order of a court or other authority having power to alter the company's articles⁸.

Where a company's articles: (1) on formation contain provision for entrenchment⁹; (2) are amended so as to include such provision¹⁰; or (3) are altered by order of a court or other authority so as to restrict or exclude the power of the company to amend its articles¹¹, the company must give notice of that fact to the registrar of companies¹². Similarly, where a company's articles: (a) are amended so as to remove provision for entrenchment¹³; or (b) are altered by order of a court or other authority so as to remove such provision¹⁴, or so as to remove any other restriction on, or any exclusion of, the power of the company to amend its articles¹⁵, the company must give notice of that fact to the registrar¹⁶.

Where a company's articles are subject either to provision for entrenchment¹⁷, or to an order of a court or other authority restricting or excluding the company's power to amend the articles¹⁸, if the company amends its articles¹⁹, and is required to send to the registrar a document making or evidencing the amendment²⁰, then the company must deliver with that document a statement of compliance²¹. The statement of compliance required is a statement certifying that the amendment has been made in accordance with the company's articles and, where relevant, any applicable order of a court or other authority²². The registrar may rely on the statement of compliance as sufficient evidence of the matters stated in it²³.

1 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the amendment of a company's articles generally see PARA 232. As to alterations to a company's articles that are required to be made when the company alters its status by means of re-registration see PARA 167 et seq.

4 Companies Act 2006 s 22(1). However, nothing in s 22 affects any power of a court or other authority to alter a company's articles: s 22(4). As to the meaning of 'special resolution' see PARA 614.

5 The Companies Act 2006 s 22(2) comes into force on a day to be appointed under s 1300(2). However, at the date at which this volume states the law, no such day had been appointed. As to the commencement of s 22(1), (3), (4) see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3(c) (amended by SI 2009/2476).

6 Companies Act 2006 s 22(2) (not yet in force: see note 5). See note 4. As to the meaning of 'member' see PARA 321. As to company formation and registration under the Companies Act 2006 see PARA 102 et seq.

7 Companies Act 2006 s 22(3)(a). See note 4.

8 Companies Act 2006 s 22(3)(b). See note 4.

9 Companies Act 2006 s 23(1)(a).

10 Companies Act 2006 s 23(1)(b).

11 Companies Act 2006 s 23(1)(c).

12 Companies Act 2006 s 23(1). As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to the meaning of 'document' for these purposes see PARA 141 note 2. Any amendment of the company's articles (including every resolution or agreement required to be embodied in or annexed to copies of the company's articles issued by the company) and, after any amendment of the company's articles, the text of the articles as amended are subject to the disclosure requirements in s 1078: see PARA 144.

13 Companies Act 2006 s 23(2)(a).

14 Companies Act 2006 s 23(2)(b)(i).

15 Companies Act 2006 s 23(2)(b)(ii).

16 Companies Act 2006 s 23(2). The registrar of companies must be sent a copy of any amended articles (see PARA 236); and he has power to issue a notice to comply where a company has failed to observe the disclosure requirements with respect to amended articles (see PARA 237). See also PARA 145.

17 Companies Act 2006 s 24(1)(a).

18 Companies Act 2006 s 24(1)(b).

19 Companies Act 2006 s 24(2)(a).

20 Companies Act 2006 s 24(2)(b).

21 Companies Act 2006 s 24(2).

22 Companies Act 2006 s 24(3).

23 Companies Act 2006 s 24(4).

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234. Rectification of mistake in company's articles of association.

A mistake in a company's articles of association¹ may be rectified only by altering the articles by special resolution² pursuant to the Companies Act 2006³; the court will not rectify the mistake in the course of proceedings⁴. A special resolution altering the articles may be followed

immediately at the same meeting by a resolution operating under the articles as so altered⁵. Where the Companies Act 2006 requires the articles to give the necessary power, as in cases of a public company issuing redeemable shares⁶, the resolution purporting to exercise the power is of no avail unless the power is already in the articles or has been added by special resolution⁷.

1 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to a company's articles of association generally see PARA 228 et seq.

2 As to the meaning of 'special resolution' see PARA 614.

3 As to the amendment of a company's articles under the Companies Act 2006 see PARAS 232, 233.

4 *Evans v Chapman* (1902) 86 LT 381; *Scott v Frank F Scott (London) Ltd* [1940] Ch 794, [1940] 3 All ER 508, CA. The articles should, however, be regarded as a business document and should be construed so as to give them reasonable business efficacy: see PARA 243.

5 Cf *Re Imperial Hydropathic Hotel Co, Blackpool v Hampson* (1882) 23 ChD 1, CA (decided on its own special facts); *Re Patent Invert Sugar Co* (1885) 31 ChD 166, CA (decided at a time when it was necessary that a special resolution should be passed and confirmed, and it was held that, until a special resolution altering the articles to empower the company to reduce its capital had been passed and confirmed, a special resolution for its reduction could not be proposed; but a special resolution need not now be confirmed).

6 See the Companies Act 2006 s 684(3); and PARA 1229.

7 *James v Buena Ventura Nitrate Grounds Syndicate Ltd* [1896] 1 Ch 456 at 463, CA, per Lord Herschell; *Harben v Phillips* (1883) 23 ChD 14, CA; *Boschoek Pty Co Ltd v Fuke* [1906] 1 Ch 148 at 163 per Swinfen Eady J. This is not the case if the passing of the special resolution completes the transaction as far as is necessary for the company to act, the directors being able to do the rest under their general powers, as, for example, prior to the Companies Act 1929, to issue new capital (*Campbell's Case* (1873) 9 Ch App 1 at 7, 22 per Lord Selborne LC; followed in *Taylor v Pilsen Joel and General Electric Light Co* (1884) 27 ChD 268), or if sanction is given to what the company already has power to do (*Re Bank of Hindustan, China and Japan, Campbell's Case* (1873) 9 Ch App 1 at 22-23 per Lord Selborne LC; *James v Buena Ventura Nitrate Grounds Syndicate Ltd* [1896] 1 Ch 456, CA). Cf *Re Metropolitan Cemetery Co* 1934 SC 65, Ct of Sess. See also PARAS 1160, 1187.

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235. How far company's articles of association may be altered.

Any alterations to a company's articles¹ must be made in good faith for the benefit of the company as a whole², that is of the corporators as a general body³. Subject to this, articles may be freely altered. It is for the shareholders and not the court to determine whether or not the alteration is for the benefit of the company; and the court will not readily interfere with an alteration made in good faith unless it is of such a character that no reasonable person could have regarded it as made for the benefit of the company⁴. The alteration may affect the rights of a member as between himself and the company by retrospective operation, since the shares are held subject to the statutory power of altering the articles⁵.

If a contract, whether with a member or an outsider, is so drawn as by its terms or implication to prohibit the company from altering its articles to the prejudice of the other contracting party, then, although the company cannot be precluded from altering its articles, thereby giving itself power to act upon the provisions of the altered articles, so to act may nevertheless be a breach of the contract⁶.

The articles cannot be so altered as to increase the liability of a member to contribute to share capital or otherwise to pay money to the company without his consent⁷; and a special resolution altering articles of association may be impeached if its effect is to discriminate between the majority of shareholders and the minority shareholders so as to give the former an advantage of which the latter are deprived⁸. In a case where an order by the court by way of protection of a member of the company against unfair prejudice⁹ requires the company not to make any, or any specified, alteration in its articles, the company has no power without leave of the court to make any such alteration¹⁰.

1 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to a company's articles of association generally see PARA 228 et seq; and as to the amendment of a company's articles under the Companies Act 2006 see PARAS 232, 233.

2 *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 at 671, CA, per Lindley MR (as explained in *Sidebottom v Kershaw, Leese & Co* [1920] 1 Ch 154, CA, and in *Shuttleworth v Cox Bros & Co (Maidenhead) Ltd* [1927] 2 KB 9, CA); *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286 at 291, [1950] 2 All ER 1120 at 1126, CA, per Evershed MR. Cf *Brown v British Abrasive Wheel Co* [1919] 1 Ch 290; *Dafen Tinplate Co v Llanelly Steel Co (1907) Ltd* [1920] 2 Ch 124. The court will not allow the majority of the shareholders to benefit (as shareholders) at the expense of a minority: see PARA 463. It is for the benefit of a company to alter articles for the purpose of clarifying the rights of the various classes of shareholders: *Caledonian Insurance Co v Scottish-American Investment Co Ltd* 1951 SLT 23, Ct of Sess; *Edinburgh Railway Access and Property Co v Scottish Metropolitan Assurance Co* 1932 SC 2 at 9, Ct of Sess. As to whether it is permissible to alter the articles so as to introduce a compulsory transfer provision see *Constable v Executive Connections Ltd* [2005] EWHC 3 (Ch), [2005] 2 BCLC 638, applying *Allen v Gold Reefs of West Africa Ltd*.

3 *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286 at 291, [1950] 2 All ER 1120 at 1126, CA, per Evershed MR.

4 *Shuttleworth v Cox Bros & Co (Maidenhead) Ltd* [1927] 2 KB 9, CA; disapproving dicta in *Dafen Tinplate Co v Llanelly Steel Co (1907) Ltd* [1920] 2 Ch 124. See also *Citico Banking NV v Pusser's Ltd* [2007] UKPC 13, [2007] 2 BCLC 483, [2007] 4 LRC 626 (it was not necessary for the chairman and the company to prove to the judge that the arguments, as to whether the amendment was for the benefit of the company, were justified by the facts).

5 *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, CA (where the fully paid shares affected by the extension to them of the company's lien in respect of an existing debt were vendor's shares known by the company to be held by the shareholder as nominee for the vendor, and the alteration was intended to affect only this individual shareholder). See also *Last v Buller & Co Ltd* (1919) 36 TLR 35. The articles may be altered so as to allow for the issue of preference shares: *Andrews v Gas Meter Co* [1897] 1 Ch 361, CA. Cf *Pepe v City and Suburban Permanent Building Society* [1893] 2 Ch 311; *Botten v City and Suburban Permanent Building Society* [1895] 2 Ch 441; *James v Buena Ventura Nitrate Grounds Syndicate Ltd* [1896] 1 Ch 456, CA; *Swabey v Port Darwin Gold Mining Co* (1889) 1 Meg 385, CA. In *W and A M'Arthur Ltd (Liquidator) v Gulf Line Ltd* 1909 SC 732, Ct of Sess, it was held that the rights of a transferee could not be prejudiced by an alteration in the articles made after the lodgment of the transfer, following the *ratio decidendi* in *Re Cawley & Co* (1889) 42 ChD 209 at 227, CA, per Lord Esher MR. As to preference shares see PARA 1688.

6 See *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701 at 740, [1940] 2 All ER 445 at 469, HL, per Lord Porter; *Re TN Farrer Ltd* [1937] Ch 352 at 356 per Simonds J; *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 at 673, CA, per Lindley MR, and at 676 per Vaughan Williams LJ; *Griffith v Paget* (1877) 5 ChD 894 (where the company had paid for property by preference shares and attempted to issue pre-preference shares). In *British Murac Syndicate Ltd v Alperton Rubber Co Ltd* [1915] 2 Ch 186, an injunction was granted to restrain an alteration of articles which would have involved a breach of contract; this was directly opposed to the decision in *Punt v Symons & Co Ltd* [1903] 2 Ch 506 (which was treated as being overruled by *Baily v British Equitable Assurance Co* [1904] 1 Ch 374, CA; revsd on other grounds sub nom *British Equitable Assurance Co Ltd v Baily* [1906] AC 35, HL), where it was held that a company could not contract itself out of its statutory powers of altering its articles as against an outside contractor (see *Re Barrow Haematite Steel Co* (1888) 39 ChD 582). However, the judgment of the Court of Appeal in *Baily v British Equitable Assurance Co* did not cite *Punt v Symons & Co Ltd*, and seems only to restate the position that a company cannot justify a breach of contract by such alteration. It is implicit in both the majority and minority opinions in *Southern Foundries (1926) Ltd v Shirlaw* that *Punt v Symons & Co Ltd* was correct (see *Southern Foundries (1926) Ltd v Shirlaw* at 713, 717 and 452, 454 per Viscount Maugham, at 722 and 458 per Lord Wright, at 731 and 464 per Lord Romer, and at 739-740 and 468-469 per Lord Porter), and that *British Murac Syndicate Ltd v Alperton Rubber Co Ltd* was wrongly decided (see *Southern Foundries (1926) Ltd v Shirlaw* at 740 and 469 per Lord Porter). Cf *Shuttleworth v Cox Bros & Co (Maidenhead) Ltd* [1927] 2 KB 9, CA.

7 See the Companies Act 2006 s 25(1); and PARA 367.

8 *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286 at 291, [1950] 2 All ER 1120 at 1126, CA, per Evershed MR. As to the meaning of 'special resolution' see PARA 614.

9 See PARA 466 et seq.

10 See the Companies Act 2006 s 996(2)(d); and PARA 475.

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236. Registrar to be sent copy of amended articles.

Where a company¹ amends its articles of association² it must send to the registrar of companies³ a copy of the articles as amended⁴ not later than 15 days after the amendment takes effect⁵. If a company fails to comply with this requirement⁶, an offence is committed by the company, and by every officer of the company who is in default⁷; and any person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale⁸ and (for continued contravention) a daily default fine⁹ not exceeding one-tenth of level 3 on the standard scale¹⁰.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq. As to the amendment of a company's articles generally see PARA 232. As to alterations to a company's articles that are required to be made when the company alters its status by means of re-registration see PARA 167 et seq.

3 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

4 The provisions of the Companies Act 2006 s 26 do not require a company to set out in its articles any provisions of model articles that either are applied by the articles, or apply by virtue of s 20 (default application of model articles) (see PARA 228): s 26(2). The provisions of s 26 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 1, but as modified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

Nothing in the Companies Act 2006 s 28 (see PARA 228) requires a company to give notice to the registrar of an alteration of its articles: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 8. A company whose articles are deemed by virtue of the Companies Act 2006 s 28 to contain provisions formerly in its memorandum may comply with any obligation to send a person a copy of its articles either: (1) by appending to a copy of the other provisions of the articles a copy of the provisions of its old-style memorandum that are deemed to be provisions of the articles (see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 9(1)(a)); or (2) by sending together with a copy of the other provisions of the articles a copy of its old-style memorandum indicating the provisions that are deemed to be provisions of the articles (see Sch 2 para 9(1)(b)). For these purposes, references to a company's 'old-style memorandum' are (in the case of an existing company) to its memorandum of association as it stood immediately before 1 October 2009, and (in the case of a transitional company) to its memorandum of association as it stood on its registration or re-registration (as the case may be) apart from the operation of the Companies Act 2006 s 28: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 9(2). As to the meaning of 'existing company' for these purposes see PARA 18 note 2; and as to the meaning of 'transitional company' for these purposes see PARA 17 note 4.

Where, in the case of an existing or transitional company, the company's articles are deemed to contain a statement of its name by virtue of the Companies Act 2006 s 28, and the company changes its name (by any means) on or after 1 October 2009 the company is not required to send a copy of its articles to the registrar in accordance with s 26: see the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 5(1), (4). Where the company, in complying with any obligation to send a person a copy of its articles, relies on the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 9(1)(a) (see head (1) above) or Sch 2 para 9(1)(b) (see head (2) above), it must (if it relies on Sch 2 para 9(1)(a)) omit the provision stating the company's former name or (if it relies on Sch 2 para 9(1)(b)) indicate that the provision stating the company's former name is no longer effective: see the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 5(5). As to the meaning of 'existing company' for these purposes see PARA 18 note 2; definition applied by art 5(6). As to the meaning of 'transitional company' for these purposes see PARA 17 note 4; definition applied by art 5(6).

5 Companies Act 2006 s 26(1). Any amendment of the company's articles (including every resolution or agreement required to be embodied in or annexed to copies of the company's articles issued by the company) and, after any amendment of the company's articles, the text of the articles as amended are subject to the disclosure requirements in s 1078: see PARA 144.

6 If it fails to comply with the Companies Act 2006 s 26: see s 26(3).

7 Companies Act 2006 s 26(3). As to the meaning of 'officer' see PARA 607; and as to the meaning of 'officer in default' see PARA 315.

8 As to the standard scale see PARA 1622.

9 As to the meaning of 'daily default fine' see PARA 1622.

10 Companies Act 2006 s 26(4).

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237. Registrar's notice to comply in case of failure with respect to amended articles.

If it appears to the registrar of companies¹ that a company has failed to comply with any enactment² requiring it either to send to the registrar a document³ making or evidencing an alteration in the company's articles⁴, or to send to the registrar a copy of the company's articles as amended⁵, the registrar may give notice to the company requiring it to comply⁶. The notice must state the date on which it is issued⁷, and require the company to comply within 28 days from that date⁸.

If the company complies with the notice within the specified time, no criminal proceedings may be brought in respect of the failure to comply with the relevant enactment⁹.

However, if the company does not comply with the notice within the specified time, it is liable to a civil penalty of £200¹⁰; and this is in addition to any liability to criminal proceedings in respect of the failure¹¹ to comply with the relevant enactment¹². The penalty may be recovered by the registrar and is to be paid into the Consolidated Fund¹³.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'enactment' see PARA 17 note 2.

3 As to the meaning of 'document' for these purposes see PARA 141 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

4 Companies Act 2006 s 27(1)(a). As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq. As to the amendment of a company's articles generally see PARA 232. The provisions of s 27 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 1, but as modified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 Companies Act 2006 s 27(1)(b).

6 Companies Act 2006 s 27(1).

7 Companies Act 2006 s 27(2)(a).

8 Companies Act 2006 s 27(2)(b).

9 Companies Act 2006 s 27(3). The text refers to the relevant enactment mentioned in s 27(1) (see the text and notes 1-6): see s 27(3).

10 Companies Act 2006 s 27(4).

11 Ie the failure mentioned in the Companies Act 2006 s 27(1) (see the text and notes 1-6): see s 27(4).

12 Companies Act 2006 s 27(4).

13 Companies Act 2006 s 27(5). Nothing in the Companies Acts or any other enactment as to the payment of receipts into the Consolidated Fund is to be read as affecting the operation in relation to the registrar of the Government Trading Funds Act 1973 s 3(1) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 748): see the Companies Act 2006 s 1118; and PARA 135. As to the Consolidated Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARAS 1028-1031.

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B. ALTERATION OF CONSTITUTION BY ENACTMENT OR ORDER

238. Notice to registrar required where company's constitution altered by enactment.

Where a company's constitution¹ is altered by an enactment², other than an enactment amending the general law, the company must give notice of the alteration to the registrar of companies³, specifying the enactment, not later than 15 days after the enactment comes into force⁴. In the case of a special enactment⁵, the notice must be accompanied by a copy of the enactment⁶.

If the enactment amends either the company's articles⁷, or a resolution or agreement which affects the company's constitution⁸, the notice must be accompanied by a copy of the company's articles, or the resolution or agreement in question, as amended⁹.

If a company fails to comply with this requirement¹⁰, an offence is committed by the company, and by every officer of the company who is in default¹¹; and any person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹² and (for continued contravention) a daily default fine¹³ not exceeding one-tenth of level 3 on the standard scale¹⁴.

1 As to the meaning of references to a company's constitution see PARA 227. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'enactment' see PARA 17 note 2.

3 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

4 Companies Act 2006 s 34(1), (2). A company must, on request by any member, send to him a copy of any document required to be sent to the registrar of companies under s 34(2): see s 32(1)(c); and PARA 242. As to the meaning of 'member' see PARA 321. The provisions of s 34 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 2, but as modified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 For these purposes, a 'special enactment' means an enactment that is not a public general enactment, and includes an Act for confirming a provisional order, any provision of a public general Act in relation to the passing of which any of the standing orders of the House of Lords or the House of Commons relating to Private Business applied, or any enactment to the extent that it is incorporated in or applied for the purposes of a special enactment: Companies Act 2006 s 34(4). As to the nature and classification of enactments see **STATUTES** vol 44(1) (Reissue) PARA 1232 et seq.

6 Companies Act 2006 s 34(2).

7 Companies Act 2006 s 34(3)(a). As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq. As to the amendment of a company's articles by members' resolution see PARA 232.

8 Companies Act 2006 s 34(3)(b). The text refers to any resolution or agreement to which Pt 3 Ch 3 (ss 29-30) applies (see PARA 231): see s 34(3)(b).

9 Companies Act 2006 s 34(3).

A company whose articles are deemed by virtue of the Companies Act 2006 s 28 (see PARA 228) to contain provisions formerly in its memorandum may comply with any obligation to send a person a copy of its articles either by appending to a copy of the other provisions of the articles a copy of the provisions of its old-style memorandum that are deemed to be provisions of the articles, or by sending together with a copy of the other provisions of the articles a copy of its old-style memorandum indicating the provisions that are deemed to be provisions of the articles: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 9(1). As to the meaning of references to a company's 'old-style memorandum' for these purposes see PARA 236 note 4.

10 It fails to comply with the Companies Act 2006 s 34: see s 34(5).

11 Companies Act 2006 s 34(5). As to the meaning of 'officer' see PARA 607; and as to the meaning of 'officer in default' see PARA 315.

12 As to the standard scale see PARA 1622.

13 As to the meaning of 'daily default fine' see PARA 1622.

14 Companies Act 2006 s 34(6).

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239. Notice to registrar required where company's constitution altered by order.

Where a company's constitution¹ is altered by an order of a court or other authority, the company must give notice to the registrar of companies² of the alteration not later than 15 days after the alteration takes effect³.

The notice must be accompanied by a copy of the order⁴ and, if the order amends either the company's articles⁵, or a resolution or agreement which affects a company's constitution⁶, the notice must be accompanied by a copy of the company's articles, or the resolution or agreement in question, as amended⁷.

If a company fails to comply with this requirement⁸, an offence is committed by the company, and by every officer of the company who is in default⁹; and any person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹⁰ and (for continued contravention) a daily default fine¹¹ not exceeding one-tenth of level 3 on the standard scale¹².

1 As to the meaning of references to a company's constitution see PARA 227. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

3 Companies Act 2006 s 35(1). However, s 35 does not apply where provision is made by another enactment for the delivery to the registrar of a copy of the order in question: s 35(5). As to the meaning of 'enactment' see PARA 17 note 2. The provisions of s 35 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 2, but as modified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 2006 s 35(2)(a). A company must, on request by any member, send to him a copy of any document required to be sent to the registrar of companies under s 35(2)(a): see s 32(1)(c); and PARA 242. As to the meaning of 'member' see PARA 321.

5 Companies Act 2006 s 35(2)(b)(i). As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq. As to the amendment of a company's articles by members' resolution see PARA 232.

6 Companies Act 2006 s 35(2)(b)(ii). The text refers to any resolution or agreement to which Pt 3 Ch 3 (ss 29-30) applies (see PARA 231): see s 35(2)(b)(ii).

7 Companies Act 2006 s 35(2)(b).

A company whose articles are deemed by virtue of the Companies Act 2006 s 28 (see PARA 228) to contain provisions formerly in its memorandum may comply with any obligation to send a person a copy of its articles either by appending to a copy of the other provisions of the articles a copy of the provisions of its old-style memorandum that are deemed to be provisions of the articles, or by sending together with a copy of the other provisions of the articles a copy of its old-style memorandum indicating the provisions that are deemed to be provisions of the articles: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 9(1). As to the meaning of references to a company's 'old-style memorandum' for these purposes see PARA 236 note 4.

8 If it fails to comply with the Companies Act 2006 s 35: see s 35(3).

9 Companies Act 2006 s 35(3). As to the meaning of 'officer' see PARA 607; and as to the meaning of 'officer in default' see PARA 315.

10 As to the standard scale see PARA 1622.

11 As to the meaning of 'daily default fine' see PARA 1622.

12 Companies Act 2006 s 35(4).

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(v) Stating a Company's Objects

240. Statement of company's objects.

Unless the articles of association¹ of a company² specifically restrict the objects of the company, its objects are unrestricted³.

Where a company amends its articles⁴ so as to add, remove or alter a statement of the company's objects⁵:

- 538 (1) it must give notice to the registrar of companies⁶;
- 539 (2) on receipt of the notice, the registrar must register it⁷; and
- 540 (3) the amendment is not effective until entry of that notice on the register⁸.

Any such amendment does not affect any rights or obligations of the company or render defective any legal proceedings by or against it⁹.

1 As to the meaning of references to 'articles' see PARA 228 note 2. As to articles of association generally see PARA 228 et seq.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 Companies Act 2006 s 31(1). This is a change from the situation that pertained under the Companies Act 1985 and earlier legislation where a company was obliged to state its objects in the memorandum of association. The role of the memorandum of association has been altered fundamentally under the Companies Act 2006, and provisions that immediately before 1 October 2009 were contained in a company's memorandum but are not provisions of the kind mentioned in the Companies Act 2006 s 8 are to be treated after that date as provisions of the company's articles: see s 28(1); and PARA 228. 1 October 2009 is the date by which s 8 had come fully into force: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3(b). Where a company's objects are unrestricted, so is its capacity: see PARA 252. As to the consequences that may arise, in terms of a company's capacity to act, from stating a company's objects (or, in the case of companies formed before the Companies Act 2006 came into effect, from continuing to operate under existing objects) see the cases cited in PARAS 257-258.

4 As to provision made for the alteration of articles see PARA 232 et seq.

5 Companies Act 2006 s 31(2). The need to add, remove or alter a statement of the company's objects will be most applicable to existing companies which, because of s 28 (see PARA 228), will have objects in their articles.

In the case of a company that is a charity, the provisions of s 31 have effect subject to, in England and Wales, the Charities Act 1993 s 64 (see **CHARITIES** vol 8 (2010) PARA 238): see the Companies Act 2006 s 31(4). As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

6 Companies Act 2006 s 31(2)(a). As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. Any amendment of the company's articles (including every resolution or agreement required to be embodied in or annexed to copies of the company's articles issued by the company) is subject to the disclosure requirements in the Companies Act 2006 s 1078: see PARA 144.

7 Companies Act 2006 s 31(2)(b).

8 Companies Act 2006 s 31(2)(c). As to the register see PARA 146.

9 Companies Act 2006 s 31(3).

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(vi) Constitutional Documents issued by or provided by the Company

241. Documents to be incorporated in or accompany copies of articles issued by company.

Every copy of a company's articles¹ issued by the company must be accompanied by²:

- 541 (1) a copy of any resolution or agreement³ relating to the company which affects its constitution⁴;
- 542 (2) where the company has been required to give notice to the registrar of companies⁵ under the provisions that apply where a company's constitution is altered by an enactment (other than an enactment amending the general law)⁶, a statement that the enactment in question alters the effect of the company's constitution⁷;
- 543 (3) where the company's constitution is altered by a special enactment⁸, a copy of the enactment⁹; and
- 544 (4) a copy of any order required to be sent to the registrar¹⁰ under the provisions that apply where a company's constitution is altered by an order of a court or other authority¹¹.

This provision does not require the articles to be accompanied by a copy of a document or by a statement if the effect of the resolution, agreement, enactment or order (as the case may be) on the company's constitution has been incorporated into the articles by amendment¹², or if the resolution, agreement, enactment or order (as the case may be) is not for the time being in force¹³.

If a company fails to comply with this requirement¹⁴, an offence is committed by every officer of the company who is in default¹⁵; and any person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹⁶ for each occasion on which copies are issued, or, as the case may be, requested¹⁷.

1 As to the meaning of references to 'articles' see PARA 228 note 2; as to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to articles of association generally see PARA 228 et seq.

2 Companies Act 2006 s 36(1).

A company whose articles are deemed by virtue of the Companies Act 2006 s 28 (see PARA 228) to contain provisions formerly in its memorandum may comply with any obligation to send a person a copy of its articles either by appending to a copy of the other provisions of the articles a copy of the provisions of its old-style memorandum that are deemed to be provisions of the articles, or by sending together with a copy of the other provisions of the articles a copy of its old-style memorandum indicating the provisions that are deemed to be provisions of the articles: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 9(1). As to the meaning of references to a company's 'old-style memorandum' for these purposes see PARA 236 note 4.

3 As to resolutions and decisions of the company generally see PARA 612 et seq.

4 Companies Act 2006 s 36(1)(a). Head (1) in the text refers to any resolution or agreement to which Pt 3 Ch 3 (ss 29-30) (resolutions and agreements affecting a company's constitution) applies (see PARA 231); see s 36(1)(a). As to the meaning of references to a company's constitution see PARA 227.

5 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of references to delivering a document, and as to the meaning of 'document' for these purposes, see PARA 141 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

6 Ie under the Companies Act 2006 s 34(2) (see PARA 238); see s 36(1)(b). As to the meaning of 'enactment' see PARA 17 note 2.

7 Companies Act 2006 s 36(1)(b).

8 Ie as mentioned in the Companies Act 2006 s 34(4) (see PARA 238); see s 36(1)(c). As to the meaning of 'special enactment' see PARA 238 note 5.

9 Companies Act 2006 s 36(1)(c).

10 Ie under the Companies Act 2006 s 35(2)(a) (see PARA 239); see s 36(1)(d).

11 Companies Act 2006 s 36(1)(d).

12 Companies Act 2006 s 36(2)(a). As to provision made for the alteration of articles see PARA 232 et seq.

13 Companies Act 2006 s 36(2)(b).

14 Ie fails to comply with the Companies Act 2006 s 36: see s 36(3).

15 Companies Act 2006 s 36(3). For these purposes, a liquidator of the company is treated as an officer of it: s 36(5). As to the meaning of 'officer' generally see PARA 607; and as to the meaning of 'officer in default' see PARA 315. As to the appointment of liquidators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 950 et seq.

16 As to the standard scale see PARA 1622.

17 Companies Act 2006 s 36(4).

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242. Copies of constitutional documents to be provided to members.

A company¹ must, on request by any member², send to him the following documents³:

- 545 (1) an up-to-date copy of the company's articles of association⁴;
- 546 (2) a copy of any resolution or agreement⁵ relating to the company which affects its constitution⁶ and that is for the time being in force⁷;
- 547 (3) a copy of any document required to be sent to the registrar of companies⁸ under the provisions that apply where a company's constitution is altered either by an enactment (other than an enactment amending the general law)⁹ or by an order of a court or other authority¹⁰;
- 548 (4) a copy of any court order which either sanctions a compromise or arrangement¹¹ or facilitates a reconstruction or amalgamation¹²;
- 549 (5) a copy of any court order, made under the court's powers to protect members against unfair prejudice¹³, that alters the company's constitution¹⁴;

- 550 (6) a copy of the company's current certificate of incorporation¹⁵, and of any past certificates of incorporation¹⁶;
- 551 (7) in the case of a company with a share capital¹⁷, a current statement of capital¹⁸;
- 552 (8) in the case of a company limited by guarantee¹⁹, a copy of the statement of guarantee²⁰.

If a company makes default in complying with these requirements²¹, an offence is committed by every officer of the company who is in default²²; and any person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale²³.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'member' see PARA 321.

3 Companies Act 2006 s 32(1). As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

4 Companies Act 2006 s 32(1)(a). As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq. A limited company need not register its articles: see PARA 228.

A company whose articles are deemed by virtue of the Companies Act 2006 s 28 (see PARA 228) to contain provisions formerly in its memorandum may comply with any obligation to send a person a copy of its articles either by appending to a copy of the other provisions of the articles a copy of the provisions of its old-style memorandum that are deemed to be provisions of the articles, or by sending together with a copy of the other provisions of the articles a copy of its old-style memorandum indicating the provisions that are deemed to be provisions of the articles: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 9(1). As to the meaning of references to a company's 'old-style memorandum' for these purposes see PARA 236 note 4.

5 As to resolutions and decisions of the company generally see PARA 612 et seq.

6 Ie any resolution or agreement to which the Companies Act 2006 Pt 3 Ch 3 (ss 29-30) (resolutions and agreements affecting a company's constitution) applies (see PARA 231): see s 32(1)(b). As to the meaning of references to a company's constitution see PARA 227.

7 Companies Act 2006 s 32(1)(b).

8 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of references to delivering a document, and as to the meaning of 'document' for these purposes, see PARA 141 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

9 Ie under the Companies Act 2006 s 34(2) (see PARA 238): see s 32(1)(c). As to the meaning of 'enactment' see PARA 17 note 2.

10 Companies Act 2006 s 32(1)(c). The text refers to the notice required to be sent to the registrar of companies under s 35(2)(a) (ie where an order of a court or other authority alters a company's constitution) (see PARA 239): see s 32(1)(c).

11 Ie under the Companies Act 2006 s 899 (see PARA 1431): see s 32(1)(d).

12 Companies Act 2006 s 32(1)(d). The text refers to any court order required to be sent to the registrar of companies under s 900 (ie where a court order facilitates a reconstruction or amalgamation) (see PARA 1434): see s 32(1)(d).

13 Ie under the Companies Act 2006 s 996 (see PARA 475): see s 32(1)(e).

14 Companies Act 2006 s 32(1)(e).

15 As to the issue of a company's certificate of incorporation upon successful completion of registration see PARA 119; and as to certificates issued by the registrar after a company's status has been altered following re-registration see PARA 167 et seq.

16 Companies Act 2006 s 32(1)(f).

17 As to the meanings of 'company having a share capital', 'share' and 'share capital' see PARA 1042.

18 Companies Act 2006 s 32(1)(g). The statement of capital required by s 32(1)(g) is a statement of:

124 (1) the total number of shares of the company (s 32(2)(a));

125 (2) the aggregate nominal value of those shares (s 32(2)(b));

126 (3) for each class of shares: (a) prescribed particulars of the rights attached to the shares (s 32(2)(c)(i)); (b) the total number of shares of that class (s 32(2)(c)(ii)); and (c) the aggregate nominal value of shares of that class (s 32(2)(c)(iii)); and

127 (4) the amount paid up and the amount (if any) unpaid on each share (whether on account of the nominal value of the share or by way of premium) (s 32(2)(d)).

As to classes of shares generally see PARA 1057 et seq. As to the nominal value of shares, and as to paid up and unpaid shares, see PARA 1042 et seq. As to rights attached to classes of shares generally see PARA 1057 et seq. In the Companies Acts, 'prescribed' (see head (3)(a) above) means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6. In exercise of the powers conferred by s 32(2)(c)(i), the Secretary of State has made the Companies (Shares and Share Capital) Order 2009, SI 2009/388. Accordingly, the following particulars of the rights attached to shares are prescribed for the purposes of the Companies Act 2006 s 32(2)(c)(i) (see the Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 2(1), (2)(a)):

128 (i) particulars of any voting rights attached to the shares, including rights that arise only in certain circumstances (art 2(3)(a));

129 (ii) particulars of any rights attached to the shares, as respects dividends, to participate in a distribution (art 2(3)(b));

130 (iii) particulars of any rights attached to the shares, as respects capital, to participate in a distribution (including on winding up) (art 2(3)(c)); and

131 (iv) whether the shares are to be redeemed or are liable to be redeemed at the option of the company or the shareholder (art 2(3)(d)).

As to redeemable shares see PARAS 1052, 1229 et seq; and as to distributions see PARA 1389 et seq. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq. As to the initial statement of capital and initial shareholdings required in the case of a company limited by shares see PARA 113. As to the meaning of 'company limited by shares' see PARA 102.

19 As to the meaning of 'company limited by guarantee' see PARA 102.

20 Companies Act 2006 s 32(1)(h). As to the statement of guarantee see PARA 115.

21 Ie in complying with the Companies Act 2006 s 32: see s 32(3).

22 Companies Act 2006 s 32(3). As to the meaning of 'officer' see PARA 607; and as to the meaning of 'officer in default' see PARA 315.

23 Companies Act 2006 s 32(4). As to the standard scale see PARA 1622.

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(vii) Effect of Company's Constitution

243. Binding as if under seal.

The provisions of a company's constitution¹ bind the company and its members² to the same extent as if there were covenants on the part of the company and of each member to observe those provisions³. By virtue of this, the constitution becomes a contract between the company and its members; it is a 'statutory contract' of a special nature with its own distinctive features⁴.

Once a company's articles are registered⁵, the court has no power to rectify them even if they do not accord with what is proved to be the concurrent intention of the members⁶. The articles should, however, be regarded as a business document and should be construed so as to give them reasonable business efficacy⁷, where a construction tending to that result is admissible on the language of the articles, in preference to a result which would or might prove unworkable⁸. A purely constructional implication is not precluded but the court will not imply a term from extrinsic circumstances⁹.

Money payable by a member to the company under its constitution is a debt due from him to the company¹⁰; and it is¹¹ of the nature of an ordinary contract debt¹².

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of references to a company's constitution see PARA 227.

2 As to the meaning of 'member' see PARA 321.

3 Companies Act 2006 s 33(1). This provision gives effect to *Hickman v Kent or Romney Marsh Sheep Breeders' Association* [1915] 1 Ch 881 (see PARA 244).

The provision made by the Companies Act 2006 s 33(1) is subject to any overriding provisions of the Companies Act 2006 and may be modified by separate shareholder agreements and by amendment under s 21(1) (see PARA 232). As to shareholders' agreements see also PARA 251. In the case of any contract binding on a company and its members under s 33, the Contracts (Rights of Third Parties) Act 1999 s 1 (see **CONTRACT**) confers no rights on a third party: s 6(2) (amended by SI 2009/1941).

4 *Scott v Frank F Scott (London) Ltd* [1940] Ch 794, [1940] 3 All ER 508, CA; *Bratton Seymour Service Co Ltd v Oxborough* [1992] BCLC 693 at 698, CA, per Steyn LJ. A company may amend its articles of association (and, therefore, the statutory 'contract') by special resolution: see the Companies Act 2006 s 21(1); and PARA 232. As to contracts which are enforceable between a member and the company and between members *inter se* see PARA 244 et seq. As to outsider rights see PARA 247.

5 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to the registration of articles of association, and as to the articles generally, see PARA 228 et seq.

6 *Scott v Frank F Scott (London) Ltd* [1940] Ch 794, [1940] 3 All ER 508, CA.

7 The 'business efficacy' test is merely one way of stating the proposition that the implication of a term is an exercise in the construction of the instrument as a whole: *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10 at [19], [2009] 2 All ER 1127 at [19] (construction of the articles of association of Belize Telecom Ltd). It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean; there is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?: see *Attorney General of Belize v Belize Telecom Ltd* at [21]. The fact that any proposed implied term would be inequitable or unreasonable, or contradict what the parties have expressly said, or is incapable of clear expression, are all good reasons for saying that a reasonable man would not have understood that to be what the instrument meant: see *Attorney General of Belize v Belize Telecom Ltd* at [23], [27]. The approach to the question when to imply a term into a contract or other instrument which is set out in *Attorney General of Belize v Belize Telecom Ltd* has been endorsed in *Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc, The Reborn* [2009] EWCA Civ 531 at [8]-[18], [2009] All ER (D) 83 (Jun) at [8]-[18] per Lord Clarke of Stone-cum-Ebony MR (considering terms of a charterparty).

8 *Holmes v Lord Keyes* [1959] Ch 199 at 215, [1958] 2 All ER 129 at 318, CA, per Jenkins LJ; *Robert Batcheller & Sons Ltd v Batcheller* [1945] Ch 169 at 177, [1945] 1 All ER 522 at 531 per Romer J (disapproved in

Grundt v Great Boulder Pty Gold Mines Ltd [1948] Ch 145, [1948] 1 All ER 21, CA, where the court refused to find any absurdity). See also *Folkes Group plc v Alexander* [2002] EWHC 51 (Ch), [2002] 2 BCLC 254 (court used additional words to construe an amended article whose natural and ordinary meaning gave a result so absurd that something had to have gone seriously wrong with its drafting); *BWE International Ltd v Jones* [2003] EWCA Civ 298, [2004] 1 BCLC 406; *Davenport v Cream Holdings Ltd* [2008] EWCA Civ 1363, [2008] All ER (D) 89 (Dec) (construction of articles proposed by defendant produced consequences so surprising that it was doubtful that they could have been within the contemplation of the parties).

9 *Bratton Seymour Service Co Ltd v Oxborough* [1992] BCLC 693, CA.

10 Companies Act 2006 s 33(2).

11 Ie in England and Wales and Northern Ireland: see the Companies Act 2006 s 33(2). As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

12 Companies Act 2006 s 33(2). Such a debt will become time-barred after six years: see the Limitation Act 1980 s 5; and **LIMITATION PERIODS** vol 68 (2008) PARA 956. See also *St Johnstone Football Club Ltd v Scottish Football Association Ltd* 1965 SLT 171, Ct of Sess (fines imposed pursuant to powers in articles). The debt referred to in the text was previously a specialty debt, ie under the Companies Act 1985 s 14(2) (repealed).

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244. How far articles constitute a contract.

The question of how far a company's articles¹ constitute a binding contract (on the one hand, between a company and its members² and, on the other hand, between its members *inter se*) is one of great difficulty and the principles are not altogether clear³. It has, however, been held that the contractual force given to the articles of association is limited to those provisions which apply to the relationship of members in their capacity as members and does not extend to those provisions which govern the relationship of a company and its directors⁴ as such⁵.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to a company's articles of association generally see PARA 228 et seq. As to the relative force of the memorandum and articles see PARA 228.

2 As to membership of a company see PARA 321 et seq.

3 As to a general discussion of this question see *Hickman v Kent or Romney Marsh Sheep Breeders' Association* [1915] 1 Ch 881.

4 As to a company's directors see PARA 478 et seq.

5 *Beattie v E & F Beattie Ltd* [1938] Ch 708 at 721, [1938] 3 All ER 214 at 218, following *Hickman v Kent or Romney Marsh Sheep Breeders' Association* [1915] 1 Ch 881.

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245. Contract between company and member.

A company's articles of association¹ constitute a contract between the company and a member² in respect of his rights³ and liabilities as a shareholder⁴; and a company may sue a member and a member may sue a company to enforce and restrain breaches of the regulations contained in the articles dealing with such matters⁵. The purpose of the articles is to define the position of the shareholder as a shareholder, not to bind him in his capacity as an individual⁶. The articles do not constitute a contract between the company and a member in respect of rights and liabilities which he has in a capacity other than that of member, whether he becomes a member originally or subsequently⁷; and, where such rights and liabilities are the subject of a written agreement, the articles will not be imported unless they are referred to⁸.

Where the articles provide that the company on incorporation is to enter into an agreement for the purchase of property and for the appointment of the vendor as a director⁹, the vendor who becomes a shareholder cannot sue nor can any person claiming through the vendor sue or rely on the articles as constituting a contract¹⁰; and, where the articles provide that a solicitor who subsequently becomes a shareholder is to be the solicitor of the company, he cannot sue the company on the articles¹¹. Similarly, where the articles provide that a director is to hold a certain number of shares¹², the provision does not constitute an agreement on his part to take the shares, even though he is already a member of the company¹³.

The articles may be evidence of the terms upon which services are rendered to the company¹⁴; thus an agreement on the part of a director to act on the terms as to qualification contained in the articles¹⁵, or on the part of the company to remunerate its directors on the terms of the articles¹⁶, may be inferred from the subsequent action of the parties.

Any contract, so far as it relates to the constitution of the company, or the rights or obligations of its incorporators or members, is exempt from the prohibitions on exclusion of liability imposed by the Unfair Contract Terms Act 1977¹⁷.

1 As to a company's articles of association generally see PARA 228 et seq. As to the relative force of the memorandum and articles see PARA 228.

2 As to membership of a company see PARA 321 et seq.

3 A member may have legitimate expectations and interests not set out in the articles which the courts will be prepared to recognise in some circumstances: *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, [1972] 2 All ER 492, HL. This is of particular importance in the context of petitions by members under the Companies Act 2006 s 994, alleging that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to their interests: see PARA 466.

4 As to shareholders generally see PARA 321 et seq.

5 *Johnson v Lyttle's Iron Agency* (1877) 5 ChD 687, CA; *Pender v Lushington* (1877) 6 ChD 70; *Re Imperial Hydropathic Hotel Co, Blackpool v Hampson* (1882) 23 ChD 1, CA; *Bradford Banking Co Ltd v Briggs, Son & Co Ltd* (1886) 12 App Cas 29 at 33, HL, per Lord Blackburn; *Wood v Odessa Waterworks Co* (1889) 42 ChD 636; *Welton v Saffery* [1897] AC 299 at 315, HL, per Lord Herschell; *Hickman v Kent or Romney Marsh Sheep Breeders' Association* [1915] 1 Ch 881; *Re Greene, Greene v Greene* [1949] Ch 333 at 340, [1949] 1 All ER 167 at 170 per Harman J (no contract where article invalid) (see contra *Re Tavarone Mining Co, Pritchard's Case* (1873) 8 Ch App 956 at 960 per Mellish LJ); *Eley v Positive Government Security Life Assurance Co Ltd* (1875) 1 ExD 20 at 26 per Amplett B (on appeal) (1876) 1 ExD 88 at 89, CA, per Lord Cairns LC); *Baring-Gould v Sharpington Combined Pick and Shovel Syndicate* [1899] 2 Ch 80 at 89, CA, per Lindley MR. See also *Quin & Axtens Ltd v Salmon* [1909] AC 442 at 443, HL, per Lord Loreburn LC. As to actions by a shareholder against the company see PARA 455 et seq.

6 *Bisgood v Henderson's Transvaal Estates Ltd* [1908] 1 Ch 743 at 759, CA, per Buckley LJ.

7 *Re Tavarone Mining Co, Pritchard's Case* (1873) 8 Ch App 956; *Eley v Positive Government Security Life Assurance Co* (1876) 1 ExD 88, CA; *Browne v La Trinidad* (1887) 37 ChD 1, CA; *Re Dale and Plant Ltd* (1889) 61 LT 206; *Re Famatina Development Corp* [1914] 2 Ch 271 at 279 per Sargant J; *Hickman v Kent or Romney Marsh Sheep Breeders' Association* [1915] 1 Ch 881; *McEllistrim v Ballymacelligott Co-operative Agricultural and Dairy Society* [1919] AC 548 at 575, HL, per Lord Atkinson; *Beattie v E & F Beattie Ltd* [1938] Ch 708, [1938] 3 All ER 214.

8 *Re Alexander's Timber Co* (1901) 70 LJ Ch 767; *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339, CA; *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 521, CA, per Warrington LJ.

9 As to a company's directors see PARA 478 et seq.

10 *Re Tavarone Mining Co, Pritchard's Case* (1873) 8 Ch App 956; *Browne v La Trinidad* (1887) 37 ChD 1, CA.

11 *Eley v Positive Government Security Life Assurance Co* (1876) 1 ExD 88, CA.

12 As to shares and a company's share capital see PARA 1042 et seq.

13 *Re Wheal Buller Consols* (1888) 38 ChD 42, CA; *Re Printing Telegraph and Construction Co of the Agence Havas, ex p Cammell* [1894] 2 Ch 392, CA; *Re R Bolton & Co, Salisbury-Jones and Dale's Case* [1894] 3 Ch 356, CA.

14 See *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 520-521, CA, per Warrington LJ; and the cases cited in notes 15, 16.

15 *Re Anglo-Austrian Printing and Publishing Union, Isaacs' Case* [1892] 2 Ch 158, CA; *Re Hercynia Copper Co* [1894] 2 Ch 403, CA; *Salton v New Beeston Cycle Co* [1899] 1 Ch 775; *Molineaux v London, Birmingham and Manchester Insurance Co Ltd* [1902] 2 KB 589, CA. Cf *Re International Cable Co Ltd, ex p Official Liquidator* (1892) 66 LT 253.

16 *Salton v New Beeston Cycle Co* [1899] 1 Ch 775; *Swabey v Port Darwin Gold Mining Co* (1889) 1 Meg 385, CA; *Re London and Scottish Bank, ex p Logan* (1870) LR 9 Eq 149; *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339 at 366, CA, per Bowen LJ; *Re New British Iron Co, ex p Beckwith* [1898] 1 Ch 324. Cf *Re TN Farrer Ltd* [1937] Ch 352, [1937] 2 All ER 505.

17 Unfair Contract Terms Act 1977 s 1(2), Sch 1 para 1(d). As to the exemptions from liability arising in contract referred to in the text generally see **CONTRACT** vol 9(1) (Reissue) PARA 828.

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246. Contract between members *inter se*.

While a company's articles of association¹ regulate the rights of the members² *inter se*, the older authorities support the view that they do not constitute a contract between the members *inter se*, but only a contract between the company and its members³. Therefore, the rights and liabilities of members as members under the articles may be enforced by or against the members only through the company⁴. However, more recent authorities support the direct enforcement by members of rights as members conferred by the articles⁵.

1 As to a company's articles of association generally see PARA 228 et seq. As to the relative force of the memorandum and articles see PARA 228.

2 As to membership of a company see PARA 321 et seq.

3 *Welton v Saffery* [1897] AC 299 at 315, HL, per Lord Herschell; *Re Greene, Greene v Greene* [1949] Ch 333 at 340, [1949] 1 All ER 167 at 170 per Harman J; contra *Re Tavarone Mining Co, Pritchard's Case* (1873) 8 Ch App 956; *Eley v Positive Government Security Life Assurance Co Ltd* (1876) 1 ExD 88 at 89, CA, per Lord Cairns LC; *Browne v La Trinidad* (1887) 37 ChD 1, CA; *Borland's Trustee v Steel Bros & Co Ltd* [1901] 1 Ch 279 at 288 per Farwell J; *Re Famatina Development Corp Ltd* [1914] 2 Ch 271 at 279 per Sargant J; and see *Salmon v Quin & Axtens Ltd* [1909] 1 Ch 311 at 318, CA, per Farwell LJ (affd sub nom *Quin & Axtens Ltd v Salmon* [1909] AC 442, HL), qualifying dicta of Stirling J in *Wood v Odessa Waterworks Co* (1889) 42 ChD 636 at 642; *Rayfield v Hands* [1960] Ch 1, [1958] 2 All ER 194 (directors, as members of the company, bound by provision in the articles that they would take at a fair value shares offered to them by the members).

4 See cases cited in PARA 245 note 5; and *MacDougall v Gardiner* (1875) 1 ChD 13, CA.

5 *Rayfield v Hands* [1960] Ch 1, [1958] 2 All ER 194 (where it was held to be unnecessary to join the company in the action); *Hurst v Crompton Bros (Coopers) Ltd* [2002] EWHC 1375 (Ch), [2003] 1 BCLC 304 (transfer of shares by member in breach of pre-emption requirements in articles defeasible at the suit of another member). As to the exercise of members' rights generally see PARA 368 et seq.

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247. Articles not a contract between company and outsider.

As between the company and a person who is not a member¹, the articles of association² do not in any circumstances constitute a contract of which that person may take advantage³, as, for example, where they provide that the preliminary expenses of forming the company are to be paid out of the assets of the company⁴ or that a solicitor is to be the solicitor of the company⁵.

1 As to membership of a company see PARA 321 et seq.

2 As to a company's articles of association generally see PARA 228 et seq. As to the relative force of the memorandum and articles see PARA 228.

3 See *Hickman v Kent or Romney Marsh Sheep Breeders' Association* [1915] 1 Ch 881 at 897, 900 per Astbury J; *Beattie v E & F Beattie Ltd* [1938] Ch 708 at 721, [1938] 3 All ER 214 at 218 per Greene MR. See also PARA 243.

4 *Melhado v Porto Alegre Rly Co* (1874) LR 9 CP 503; *Re Rotherham Alum and Chemical Co* (1883) 25 ChD 103 at 110, CA, per Lindley LJ; and see PARA 64.

5 *Re Rhodesian Properties Ltd* (1901) 45 Sol Jo 580.

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248. Notice of constitution.

Members of a company¹ are deemed to be aware of the contents of the company's constitution², and to understand its meaning³. Notice is not, however, to be imputed to persons who have been induced by fraudulent misrepresentations to take shares⁴, since they are entitled to repudiate the contract of membership⁵.

In favour of a person dealing with a company⁶ in good faith, the power of the directors⁷ to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company's constitution⁸; and such a person dealing with a company is not bound to inquire as to any limitation on the powers of the directors to bind the company or authorise others to do so, he is presumed to have acted in good faith unless the contrary is proved, and he is not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution⁹.

- 1 As to membership of a company see PARA 321 et seq. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.
- 2 *Re Barnard's Banking Co, Peel's Case* (1867) 2 Ch App 674 at 684 per Lord Cairns LJ; *Re New Zealand Banking Corp'n, Sewell's Case* (1868) 3 Ch App 131 at 140 per Lord Cairns LJ; *Griffith v Paget* (1877) 6 ChD 511 at 517 per Jessel MR. As to the meaning of references to a company's constitution under the Companies Act 2006 see PARA 227.
- 3 *Oakbank Oil Co v Crum* (1882) 8 App Cas 65 at 71, HL, per Lord Selborne LC.
- 4 As to shares and a company's share capital see PARA 1042 et seq.
- 5 *Central Rly Co of Venezuela (Directors etc) v Kisch* (1867) LR 2 HL 99 at 123 per Lord Cranworth, as explained in *Oakes v Turquand and Harding* (1867) LR 2 HL 325 at 345, 346 per Lord Chelmsford. Cf *Downes v Ship* (1868) LR 3 HL 343.
- 6 For these purposes, a person 'deals with' a company if he is a party to any transaction or other act to which the company is a party: see the Companies Act 2006 s 40(2); and PARA 263.
- 7 As to a company's directors see PARA 478 et seq.
- 8 See the Companies Act 2006 s 40(1); and PARA 263.
- 9 See the Companies Act 2006 s 40(2); and PARA 263.

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249. Articles at variance with statutory provision.

Any provision in a company's articles¹ which is at variance with the provisions of the Companies Act 2006 is void, as, for example, an article purporting to authorise a company to forfeit, instead of selling, shares for debts due from a member otherwise than as a contributory²; to pay dividends out of capital or allot shares at a discount³; to limit the right of a member to present a winding-up petition⁴; to shut dissentient shareholders⁵ out of their statutory rights on a reconstruction of the company⁶; to fetter the power of the company to alter its articles⁷, or to increase its share capital⁸, or to register a transferee of shares without a proper instrument of transfer having been delivered⁹, or to bar a shareholder from petitioning for relief under the provisions which govern unfairly prejudicial conduct¹⁰.

A provision in any article which is in accordance with the model articles¹¹ is valid (subject to any subsequent legislation), as the model articles have statutory authority¹².

- 1 As to a company's articles of association generally see PARA 228 et seq.
- 2 *Hopkinson v Mortimer, Harley & Co Ltd* [1917] 1 Ch 646. As to shares and a company's share capital see PARA 1042 et seq; and as to membership of a company see PARA 321 et seq. As to the meaning of 'contributory' see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 703. As to the meaning of 'contributory' under the Companies Acts see PARA 115 note 10.
- 3 *Welton v Saffery* [1897] AC 299, HL. As to the allotment of shares at a discount and the consequences of so allotting shares in contravention of the statutory prohibition see PARA 1111.
- 4 *Re Peveril Gold Mines Ltd* [1898] 1 Ch 122, CA. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.
- 5 As to shareholders generally see PARA 321 et seq.

6 *Baring-Gould v Sharpington Combined Pick and Shovel Syndicate* [1899] 2 Ch 80, CA. As to reconstruction of a company see PARA 1425 et seq.

7 *Malleson v National Insurance and Guarantee Corpn* [1894] 1 Ch 200; *Russell v Northern Bank Development Corp Ltd* [1992] 3 All ER 161, [1992] 1 WLR 588, HL. As to provision made for the alteration of articles see PARA 232 et seq. An agreement outside the articles between shareholders as to how they would exercise their voting rights on a resolution to alter the articles would, however, not necessarily be invalid: see PARA 251.

8 *Russell v Northern Bank Development Corp Ltd* [1992] 3 All ER 161, [1992] 1 WLR 588, HL. See also note 10.

9 *Re Greene, Greene v Greene* [1949] Ch 333, [1949] 1 All ER 167.

10 *Exeter City AFC Ltd v Football Conference Ltd* [2004] EWHC 831 (Ch), [2005] 1 BCLC 238. As to the provisions referred to in the text see the Companies Act 2006 s 994; and PARA 466.

11 le as they are in existence from time to time: see PARAS 228-230.

12 See *Lock v Queensland Investment and Land Mortgage Co* [1896] AC 461, HL; and PARA 230. See also *Movitex Ltd v Bulfield* [1988] BCLC 104.

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250. Restrictions on articles of association under the Companies Act 2006.

In certain cases, the Companies Act 2006 provides that certain provisions contained in the articles of association¹ are to be void or subject to restriction. Thus the production to a company of any document which is by law sufficient evidence of probate of the will, or letters of administration of the estate, or confirmation as executor of a deceased person, must be accepted by the company as sufficient evidence of the grant, notwithstanding anything in its articles²; and any provision of the company's articles is void in so far as it would have the effect of inhibiting or denying members' rights that are guaranteed under the Companies Act 2006³.

1 As to a company's articles of association generally see PARA 228 et seq.

2 See the Companies Act 2006 s 774; and PARA 434.

3 See eg the Companies Act 2006 s 321 (cited in PARA 655), s 327 (cited in PARA 664).

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251. Shareholders' agreements.

Individual shareholders¹ may deal with their own interests by contract in such way as they may think fit; but such contracts, whether made by all or some only of the shareholders, create personal obligations, or a personal exception against themselves only, and do not become a

regulation of the company or binding on the transferees of the parties to it or upon new or non-assenting shareholders².

Thus although a provision in a company's articles of association³ which restricts the company's statutory power to alter the articles⁴ or a formal undertaking by the company to that effect, would be invalid⁵, an agreement outside the articles between shareholders as to how they are to exercise their voting rights on a resolution to alter the articles would not necessarily be so⁶.

1 As to shareholders and the membership of companies generally see PARA 321 et seq.

2 *Welton v Saffery* [1897] AC 299 at 331, HL, per Lord Davey; applied in *Russell v Northern Bank Development Corpn Ltd* [1992] 3 All ER 161, [1992] 1 WLR 588, HL.

3 As to a company's articles of association generally see PARA 228 et seq.

4 Amendment might be subject to certain conditions being met if the articles in question are 'entrenched provisions': see PARA 233. As to provision made for the alteration of articles generally see PARA 232 et seq.

5 See PARA 249.

6 *Russell v Northern Bank Development Corpn Ltd* [1992] 3 All ER 161, [1992] 1 WLR 588, HL. See also *Greenwell v Porter* [1902] 1 Ch 530; *Puddephatt v Leith* [1916] 1 Ch 200; *Bushell v Faith* [1969] 2 Ch 438, [1969] 1 All ER 1002, CA (affd [1970] AC 1099, [1970] 1 All ER 53, HL).

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(7) CAPACITY

(i) In general

252. Capacity, and limits on capacity, deriving from corporate status.

Under the Companies Act 2006, a company¹ may be incorporated² for carrying out any lawful purpose³.

Moreover, a company is subject to the common law and to statutory provisions which affect the conduct of its affairs or business⁴, like any other person⁵, and may come within the scope of special statutory restrictions as, for example, those enabling restriction or winding-up orders to be made if the business is carried on by or on behalf of enemies or enemy subjects⁶ or those restricting the transfer of businesses abroad⁷, or those restricting insolvency proceedings or other legal processes while the company is in administration⁸.

Unless it is a private company⁹, a company registered under the Companies Act 2006 does not acquire the right to exercise all its powers immediately on incorporation, for it must comply with certain statutory requirements before it may either properly commence business or exercise its borrowing powers or enter into binding contracts¹⁰.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to incorporation upon registration under the Companies Act 2006 see PARA 119 et seq.

3 See the Companies Act 2006 s 7(2); and PARA 102. As to companies which are formed for an illegal purpose see PARA 106 et seq. The objects of a company are unrestricted unless its articles of association specifically restrict them: see s 31; and PARA 240. This is a change from the situation that pertained under the Companies Act 1985 where a company was obliged to state its objects in the memorandum of association (the role of which has been altered fundamentally under the Companies Act 2006). The case law that is cited in PARA 257 et seq derives from the time when the statement of a company's objects was a requirement.

4 See PARAS 254-256.

5 A limited company may be a 'respectable and responsible person' within the meaning of a proviso against assigning a lease without the landlord's consent: *Willmott v London Road Car Co Ltd* [1910] 2 Ch 525, CA; *Re Greater London Properties Ltd's Lease, Taylor Bros (Grocers) Ltd v Covent Garden Properties Co Ltd* [1959] 1 All ER 728, [1959] 1 WLR 503.

6 See the Trading with the Enemy Act 1939 s 3A; and **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 582.

7 See PARA 123.

8 As to applications for administration orders see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 148 et seq.

9 As to the meaning of 'private company' see PARA 102.

10 See PARA 74.

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253. Company exceeding statutory powers.

A company¹, even if apparently authorised to do so by its constitution², cannot lawfully do anything beyond the powers given by the Companies Acts³. Thus it cannot, for example⁴:

- 553 (1) purchase its own shares⁵ save in compliance with the statutory requirements⁶; or
- 554 (2) in the case of a public company, give financial assistance for the purchase of its shares⁷; or
- 555 (3) reduce or repay capital without complying with the statutory requirements⁸; or
- 556 (4) distribute bonus shares gratuitously⁹; or
- 557 (5) allot shares at a discount¹⁰; or
- 558 (6) pay dividends on shares out of capital¹¹; or
- 559 (7) make presents to directors out of capital¹²; or
- 560 (8) make payments for the benefit of a section only of the shareholders¹³, such as paying the costs of a prosecution for libel¹⁴ or the costs of pursuing proceedings not instituted by itself, even though it is for the company's benefit¹⁵.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'company' more generally see PARA 1.

2 *Trevor v Whitworth* (1887) 12 App Cas 409 at 430, HL, per Lord Watson; *Re Castle Crag Steamship Co, Raine's Case* (1888) 4 TLR 302; *Re Mersina and Adana Construction Co* (1889) 5 TLR 680; *General Property Investment Co v Matheson's Trustees* (1888) 16 R 282. As to the meaning of references to a company's constitution see PARA 227.

3 This position is not affected by the Companies Act 2006 ss 39-42 (as to which see PARAS 263-265).

4 This list is not exhaustive.

5 *Trevor v Whitworth* (1887) 12 App Cas 409, HL (overruling *Re Dronfield Silkstone Coal Co* (1880) 17 ChD 76); *Re Balgooley Distillery Co* (1886) 17 LR Ir 239, CA; *Taylor v Pilsen, Joel and General Electric Light Co* (1884) 27 ChD 268; *Phosphate of Lime Co Ltd v Green* (1871) LR 7 CP 43; *Cree v Somervail* (1879) 4 App Cas 648, HL. As to shares and a company's share capital see PARA 1042.

6 As to which see PARAS 1234, 1244.

7 See PARA 1222 et seq.

8 As to which see PARA 1173 et seq.

9 *Re Eddystone Marine Insurance Co* [1893] 3 Ch 9, CA; *Welton v Saffery* [1897] AC 299, HL.

10 As to the allotment of shares at a discount and the consequences of so allotting shares in contravention of the statutory prohibition see PARA 1111. As to the meaning of 'allotted' see PARA 1091.

11 See PARA 1390 et seq. As to the declaration and payment of dividends especially see PARA 1408 et seq.

12 *Re George Newman & Co* [1895] 1 Ch 674, CA. See also PARA 1222. As to a company's directors see PARA 478 et seq.

13 As to shareholders and membership of companies generally see PARAS 321 et seq, 1697 et seq.

14 *Pickering v Stephenson* (1872) LR 14 Eq 322 at 340 per Wickens V-C; *Studdert v Grosvenor* (1886) 33 ChD 528. These two decisions were adversely commented on in *Cullerne v London and Suburban General Permanent Building Society* (1890) 25 QBD 485 at 490, CA, per Lindley LJ, on the question of the directors' liability to repay funds improperly paid ultra vires the company.

15 *Kernaghan v Williams* (1868) LR 6 Eq 228; *Re Liverpool Household Stores Association* (1890) 59 LJ Ch 616.

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254. Statutory powers exercisable subject to authorisation by, restriction or prohibition in, articles.

Many powers are conferred on a company¹ by the Companies Act 2006 unless they are restricted or excluded by the company's articles of association²; a small number of other powers are subject to authorisation.

For example, the following powers are conferred unless they are excluded or restricted, namely the power³:

561 (1) to increase its share capital⁴ by sub-dividing its shares (or any of them) into shares of a smaller nominal amount⁵ than its existing shares, or by consolidating and dividing all or any of its share capital into shares of a larger nominal amount than its existing shares⁶, or to redenominate its share capital (or any class of its share capital) by converting shares from having a fixed nominal value in one currency to having a fixed nominal value in another currency⁷;

562 (2) to reduce its share capital⁸;

563 (3) to issue redeemable shares, if a private company⁹;

564 (4) to purchase its own shares¹⁰.

The following powers are subject to authorisation, namely the power¹¹:

- 565 (a) to pay commission to a person in consideration of his subscribing or agreeing to subscribe (whether absolutely or conditionally) for shares in the company, or procuring or agreeing to procure subscriptions (whether absolute or conditional) for shares in the company¹²;
- 566 (b) to make provision for different amounts to be paid on its shares, with proportionate dividends¹³;
- 567 (c) to issue redeemable shares, if a public company¹⁴;
- 568 (d) to issue share warrants to bearer¹⁵;
- 569 (e) to provide, by a resolution of its directors¹⁶, for employees on cessation or transfer of the business of the company or any of its subsidiaries¹⁷.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

3 This list is not exhaustive.

4 As to the meanings of 'share capital' and 'company having a share capital' see PARA 1042. As to the meaning of 'share' see PARA 1042.

5 As to the nominal value of shares see PARA 1044.

6 See the Companies Act 2006 s 618; and PARA 1161 et seq.

7 See the Companies Act 2006 s 622; and PARA 1167.

8 See the Companies Act 2006 Pt 17 Ch 10 (ss 641-653); and PARA 1173 et seq.

9 See the Companies Act 2006 s 684; and PARA 1229. As to the meaning of 'private company' see PARA 102. As to rights attached to classes of shares generally see PARA 1057 et seq; as to redeemable shares see PARAS 1052, 1229 et seq.

10 See the Companies Act 2006 s 690; and PARA 1234.

11 This list is not exhaustive.

12 See the Companies Act 2006 s 553(1), (2); and PARA 1152.

13 See the Companies Act 2006 s 581; and PARAS 1112, 1410. As to the declaration and payment of dividends see PARA 1408 et seq.

14 See note 9. As to the meaning of 'public company' see PARA 102.

15 See the Companies Act 2006 s 779(1); and PARA 382.

16 As to a company's directors generally see PARA 478 et seq. As to meetings of directors, and the taking of resolutions, see PARA 528 et seq.

17 See the Companies Act 2006 s 247; and PARA 546. As to the meaning of 'subsidiary' see PARA 25.

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255. Powers exercisable under the Companies Act 2006 only by special resolution.

A special resolution¹ is required by the Companies Act 2006 for the exercise of certain powers. These include² the power:

- 570 (1) to change the company's name³;
- 571 (2) to alter its articles of association⁴;
- 572 (3) to redenominate some or all of the company's shares in order to reduce its share capital⁵;
- 573 (4) to reduce its share capital, either supported by a solvency statement or subject to confirmation by the court⁶;
- 574 (5) to make a payment out of capital (if a private company⁷) for the redemption or purchase of its own shares⁸;
- 575 (6) to disapply pre-emption rights⁹;
- 576 (7) to alter the company's status by re-registration¹⁰;
- 577 (8) to opt in to, or out of, the takeover provisions¹¹;
- 578 (9) as a rule, to wind up voluntarily¹²;
- 579 (10) to require the register¹³ to be amended so that it states that the company's registered office¹⁴ is to be situated in Wales¹⁵ (rather than England¹⁶ and Wales)¹⁷.

1 As to special resolutions see PARA 614.

2 This list is not exhaustive.

3 See the Companies Act 2006 ss 77, 78; and PARAS 217-218. Head (1) in the text is not prescriptive; a company may change its name voluntarily by other means provided for by the company's articles: see s 77(1) (b); and PARA 217. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 See the Companies Act 2006 s 21; and PARA 232. As to a company's articles of association generally see PARA 228 et seq; and as to the amendment of a company's articles under the Companies Act 2006 see PARAS 232, 233.

5 See the Companies Act 2006 s 626; and PARA 1167 et seq. As to the meanings of 'share capital' and 'company having a share capital' see PARA 1042.

6 See the Companies Act 2006 Pt 17 Ch 10 (ss 641-653); and PARA 1173 et seq.

7 As to the meaning of 'private company' see PARA 102.

8 See the Companies Act 2006 Pt 18 Ch 5 (ss 709-723); and PARA 1244 et seq.

9 See the Companies Act 2006 ss 569-573; and PARA 1102 et seq.

10 See the Companies Act 2006 Pt 7 (ss 89-111); and PARA 167 et seq.

11 See the Companies Act 2006 Pt 28 Ch 2 (ss 966-973); and PARA 1507 et seq.

12 See the Insolvency Act 1986 s 84(1)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 939. The company may also, by special resolution, resolve that it be wound up by the court: see s 122(1)(a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 444 et seq.

13 As to the register see PARA 146.

14 As to a company's registered office see PARA 129.

15 As to the meaning of 'Wales' see PARA 1 note 5.

16 As to the meaning of 'England' see PARA 1 note 5.

17 See the Companies Act 2006 s 88; and PARA 129.

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(ii) Company's Powers

A. IN GENERAL

256. Objects and capacity.

Previously, the capacity of a company was determined by the breadth of the company's objects as expressed in the company's memorandum of association¹, and acts beyond those objects were ultra vires and void².

The Companies Act 2006 provides that, unless a company's articles³ specifically restrict the objects of the company⁴, its objects are unrestricted⁵. A company with unrestricted objects has an unrestricted capacity other than restrictions imposed by the requirements of the Companies Act 2006 and the general law⁶. However, it remains the duty of the directors to observe any limitation on their powers, whether flowing from the company's constitution or otherwise⁷.

1 See PARA 240 note 3.

2 As to the authorities on ultra vires generally see PARA 259 et seq.

3 As to a company's articles of association generally see PARA 228 et seq.

4 As to restricting a company's objects see PARA 257.

5 See the Companies Act 2006 s 31(1); and PARA 240.

6 See PARAS 252-255.

7 See PARA 265 et seq.

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B. STATEMENT OF COMPANY'S OBJECTS

257. Restricting a company's objects.

For companies formed under the Companies Act 2006¹, the company's objects are unrestricted², unless the company's articles³ specifically restrict them⁴.

Existing companies⁵ were required to have an objects clause in the memorandum of association and those clauses now are treated as forming part of the company's articles⁶. Those clauses, if retained⁷, would be regarded, it seems, as restricting the company's objects, although the original drafting of such clauses was intended to expand and not to restrict a company's capacity⁸.

Whether the company is a company formed under the Companies Act 2006 which chooses to restrict its objects, or is a company formed under the Companies Act 1985 or earlier enactments which retains its objects clause, the objects clause operates only to limit the powers of the directors⁹, for the validity of an act done by the company cannot be called into question on the ground of a lack of capacity by reason of anything in the company's constitution¹⁰. No issue of ultra vires may be raised¹¹, but it remains the duty of the directors of a company (now a statutory duty) to act in accordance with the constitution and to only exercise powers for the purposes for which they are conferred¹². The authorities on ultra vires¹³, though obsolete on that issue, may remain of some value in determining whether the directors have complied with that duty.

Persons dealing with the company in good faith are afforded a considerable measure of statutory protection against limitations on the directors' powers to bind the company¹⁴.

- 1 As to company formation under the Companies Act 2006 see PARA 111 et seq.
- 2 See PARA 240.
- 3 As to a company's articles of association generally see PARA 228 et seq.
- 4 See the Companies Act 2006 s 31(1); and PARA 240. See also *Cotman v Brougham* [1918] AC 514 at 522, 523, HL, per Lord Wrenbury (where the practice of inserting powers in the objects clause is criticised). The requirement to 'specifically restrict' suggests that the articles must delimit and identify the objects in such a manner that the reader may identify the field of industry within which the company's activities are to be confined: see *Cotman v Brougham*.
- 5 I.e. those formed under the Companies Act 1985 and earlier enactments: see PARA 18.
- 6 See the Companies Act 2006 s 28(1); and PARA 228.
- 7 I.e. because companies may remove objects clauses by amending their articles, subject to the need to give notice to the registrar, and subject to any such amendment not being effective until notice is entered on the register: see the Companies Act 2006 s 31(2); and PARA 240.
- 8 See *Cotman v Brougham* [1918] AC 514, HL; *Bell Houses Ltd v City Wall Properties Ltd* [1966] 2 QB 656, [1966] 2 All ER 674, CA.
- 9 As to a company's directors see PARA 478 et seq.
- 10 See the Companies Act 2006 s 39; and PARA 265. As to the meaning of references to a company's constitution see PARA 227.
- 11 See generally PARA 259 et seq.
- 12 See the Companies Act 2006 s 171; and PARA 540.
- 13 These are discussed elsewhere: see PARA 259 et seq.
- 14 See the Companies Act 2006 s 40; and PARA 263.

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258. Construction of objects adopted by company.

The ordinary rules applicable to construing documents apply to the construction of the objects adopted by a company¹. The first question is: what is the fair construction of the company's

constitution² as a whole? General words following a particular specification may be construed *eiusdem generis*, but there is no special rule of interpretation by reference to what are supposed to be the main or principal objects of a company where the question is whether something done or proposed to be done is *ultra vires*³. (However, this consideration may be of importance where the question is whether the company ought to be wound up on the ground that its substratum is gone)⁴. Although the subjective intent with which a transaction is carried out by the directors may result in a charge of misfeasance against them, and, if participated in by the other contracting party, may entitle the company to rescind the contract, such intent is irrelevant to the question whether the transaction is *intra vires* the company⁵.

It is possible to provide that the objects set out in the articles are to be construed as separate objects and are not limited by reference to any other clause or the name of the company⁶, but such a provision does not operate to turn what is properly a power into an object in itself⁷.

1 Under the Companies Act 2006, the objects of a company are unrestricted unless its articles of association specifically restrict them: see s 31; and PARA 240. This is a change from the situation that pertained under the Companies Act 1985 where a company was obliged to state its objects in the memorandum of association (the role of which has been altered fundamentally under the Companies Act 2006). The case law that is cited below and in PARA 257 derives from the time when the statement of a company's objects was a requirement. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'company' more generally see PARA 1. As to the meaning of references to 'articles' see PARA 228 note 2. As to articles of association generally see PARA 228 et seq.

2 As to the meaning of references to a company's constitution see PARA 227.

3 *Cotman v Brougham* [1918] AC 514, HL; *Pedlar v Road Block Gold Mines of India Ltd* [1905] 2 Ch 427. Cf *Stephens v Mysore Reefs (Kangundy) Mining Co Ltd* [1902] 1 Ch 745; *Re German Date Coffee Co* (1882) 20 ChD 169 at 188, CA, per Lindley LJ; *Re New Finance and Mortgage Co Ltd* [1975] Ch 420, [1975] 1 All ER 684 ('and merchants generally' covers all purely commercial occupations). The name of the company may be important in construing wide objects: see *Re Crown Bank* (1890) 44 ChD 634; *Re Coolgardie Consolidated Gold Mines Ltd* (1897) 76 LT 269, CA. See also *Re London and Edinburgh Shipping Co Ltd* 1909 SC 1, Ct of Sess; *Butler v Northern Territories Mines of Australia Ltd* (1906) 96 LT 41.

For some purposes, it is necessary to discover what is the main object of a company. This inquiry involves not merely the construction of the constitutional documents but also evidence on the further question of which activities have in fact been so far the main objects: *North of England Zoological Society v Chester RDC* [1959] 3 All ER 116, [1959] 1 WLR 773, CA.

4 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 449.

5 *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246, [1985] 3 All ER 52, CA; *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62, [1969] 2 All ER 1185.

6 *Cotman v Brougham* [1918] AC 514, HL; *Anglo-Overseas Agencies Ltd v Green* [1961] 1 QB 1, [1960] 3 All ER 244.

7 *Re Introductions Ltd, Introductions Ltd v National Provincial Bank Ltd* [1970] Ch 199, [1969] 1 All ER 887, CA (where a clause conferring a power to borrow was held incapable of being a wholly independent object). Cf *Re Horsley & Weight Ltd* [1982] Ch 442, [1982] 3 All ER 1045, CA (where a provision of the memorandum relating to the granting of pensions was construed as an independent object of the company).

In the light of the statutory modifications of the *ultra vires* doctrine (see PARAS 240, 252-256, 259 et seq), the distinction between an object and a power, in that context, is irrelevant but it remains of importance to questions of directors exceeding their authority (see *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246, [1985] 3 All ER 52, CA), and to the statutory duty imposed on a director to act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole (see the Companies Act 2006 s 172; and PARA 544).

259. Meaning of 'ultra vires'.

The term 'ultra vires' in its proper sense denotes some act or transaction on the part of a corporation¹ which, although not unlawful or contrary to public policy if done by an individual, is yet beyond the corporation's legitimate powers as defined by the statute under which it is formed², or the statutes which are applicable to it, or by its constitution³, although the scope of the ultra vires doctrine as it applies to companies and corporations is now restricted by statute⁴. The term is not appropriate in relation to any act or transaction which is beyond the lawful powers of any person. Thus the term is used in two senses: (1) beyond the powers of the company; and (2) beyond the powers of the directors⁵ under the authority conferred on them by the company or its constitution⁶.

Acts of directors which should not be undertaken by them without the sanction of the members⁷ of the company are often described as acts ultra vires the directors⁸; and exercises by the directors of powers for purposes other than the promotion of the objects⁹ of the company are also often denominated as being ultra vires¹⁰.

1 As to companies and corporations see PARA 2.

2 As to the creation of corporations generally see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1128 et seq.

3 As to the meaning of references to a company's constitution see PARA 227.

4 See PARAS 256, 264-265.

5 As to a company's directors see PARA 478 et seq.

6 The term was also used in two different ways in relation exclusively to the powers of a company in *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1982] Ch 478, [1982] 3 All ER 1057 per Vinelott J. On appeal, however, the Court of Appeal considered that such use of the term could lead to confusion and that the term should be confined rigidly to 'describing acts which are beyond the corporate capacity of a company': see *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246 at 297, [1985] 3 All ER 52 at 87, CA, per Slade LJ, and at 303 and 91 per Browne-Wilkinson LJ.

7 As to who qualifies as a member of a company see PARA 321.

8 As to a director's liability to the company for causing it to commit ultra vires acts see PARA 585. As to the personal liability of a director for any breach of duty in tort see PARA 588.

9 Under the Companies Act 2006, the objects of a company are unrestricted unless its articles of association specifically restrict them: see s 31; and PARA 240. As to the meaning of references to 'articles' see PARA 228 note 2. As to articles of association generally see PARA 228 et seq.

10 Directors are under a statutory duty to act in accordance with the company's constitution, and to only exercise powers for the purposes for which they are conferred: see the Companies Act 2006 s 171; and PARA 540.

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260. Examples of ultra vires acts.

Formerly, when the capacity of a company¹ was limited by the objects clause in the memorandum², and the absence of a special power in the company's constitution³, it was, for example, *ultra vires*⁴:

- 580 (1) for any company to take shares⁵ in another carrying on a different class of business⁶;
- 581 (2) for one company to amalgamate with another company⁷;
- 582 (3) for a company which has power to invest on second mortgages, and which is a second mortgagee, to guarantee payment of the prior mortgage debt for good consideration⁸;
- 583 (4) for a company with power to lend to guarantee the debts of a company promoted by it⁹;
- 584 (5) unless first sanctioned¹⁰, for a company to treat its former employees not merely generously but beyond all entitlement¹¹;
- 585 (6) for a company authorised by its constitution to make and deal in railway carriages to purchase a concession for a foreign railway¹²;
- 586 (7) for a bill-broking company to take shares in a banking company for the purpose of increasing its own business¹³; and
- 587 (8) for a body dedicated to preventing cruelty to animals to pay money over to a political party whose aims include such an aim, but with no obligation to expend the money in any particular manner¹⁴.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'company' more generally see PARA 1.

2 As to a company's objects see PARA 240. Provisions that immediately before 1 October 2009 were contained in a company's memorandum but are not provisions of the kind mentioned in the Companies Act 2006 s 8 (see PARA 104) are to be treated after that date as provisions of the company's articles: see s 28(1); and PARA 228. See also PARA 257 et seq.

3 As to the meaning of references to a company's constitution see PARA 227.

4 This list is not exhaustive. As to the meaning of '*ultra vires*' see PARA 259.

5 As to shares and a company's share capital see PARA 1042.

6 *Re Lands Allotment Co* [1894] 1 Ch 616, CA. As to the meaning of 'business' generally see PARA 1 note 1. Cf *Re BARNED'S BANKING CO, ex p CONTRACT CORPN* (1867) 3 Ch App 105 (where there was power in the company's memorandum). In the case of a banking company, no express power is required, as it is an inherent part of its business that it should advance money on securities such as shares: see *Re ASIATIC BANKING CORPN, ROYAL BANK OF INDIA'S CASE* (1869) 4 Ch App 252; *Re FINANCIAL CORPN, GOODSON'S CLAIM* (1880) 28 WR 760. In *Re WILLIAM THOMAS & CO* [1915] 1 Ch 325, a company with a power of amalgamating was held to have a power to sell part of its undertaking for shares, although apart from the power of amalgamating there was no other authority for it to hold shares in another company. As to accepting shares by way of compromise and not for investment see *Re Lands Allotment Co*.

7 *Re EUROPEAN SOCIETY ARBITRATION ACTS, ex p BRITISH NATION LIFE ASSURANCE ASSOCIATION (LIQUIDATORS)* (1878) 8 ChD 679, CA. A power to amalgamate does not include a power to force partly paid shares on a member: *Re EUROPEAN SOCIETY ARBITRATION ACTS, ex p BRITISH NATION LIFE ASSURANCE ASSOCIATION (LIQUIDATORS)*. As to amalgamation generally see PARA 1434 et seq.

8 *Small v Smith* (1884) 10 App Cas 119, HL.

9 *Re QUEEN ANNE AND GARDEN MANSIONS CO* (1894) 1 Mans 460. As to the promotion of companies generally see PARA 49 et seq.

10 See PARA 1431.

11 *Parke v Daily News Ltd* [1962] Ch 927, [1962] 2 All ER 929. See, however, PARA 546.

12 *British and Foreign Railway Plant Co Ltd v Ashbury Carriage and Iron Co Ltd, Smith v Ashbury etc Co* (1869) 20 LT 360; *Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653. See also *Guinness v Land Corp of Ireland Ltd* (1882) 22 ChD 349, CA.

13 *Joint Stock Discount Co v Brown* (1866) LR 3 Eq 139 (subsequent proceedings (1869) LR 8 Eq 381). Cf *Re West of England Bank, ex p Booker* (1880) 14 ChD 317.

14 *Simmonds v Heffer* [1983] BCLC 298.

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261. Examples of acts not ultra vires.

Formerly, when the capacity of a company¹ was limited by the objects clause in the memorandum², it was not ultra vires³ for a trading company⁴, without any special powers to do so, to pay a pension to the family of a deceased officer⁵; or to give gratuities to its employees⁶; or to pay a loss not within the terms of a policy⁷; or to pay a reasonable brokerage for placing its shares⁸; or to let off a large part of a hotel for government offices⁹; or to take a larger house than necessary and underlet a portion¹⁰. A company established to buy a special brewery, but with general powers, may buy a different one, even though it will not have enough money left to buy the first¹¹. A trading company may borrow, with or without security¹²; or accept bills of exchange¹³; or deposit its title deeds to secure an overdraft¹⁴; or issue debenture stock¹⁵ as collateral security¹⁶.

A company formed to work a patent may purchase it¹⁷. A company whose powers include that of promoting may promote another company, subscribe shares, and pay the expenses of the promotion¹⁸. A chemical company may distribute money to scientific institutions in the United Kingdom for the furtherance of scientific education and research¹⁹. A company formed for the development of salt concessions and the manufacture of salt may export salt²⁰.

In these and similar cases, it is a question dependent on the true construction of the company's constitution and all the circumstances of the case whether the proceeding in question will facilitate or is otherwise incidental to the business which the company was formed to carry on²¹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'company' more generally see PARA 1.

2 As to a company's objects see PARA 240. Provisions that immediately before 1 October 2009 were contained in a company's memorandum but are not provisions of the kind mentioned in the Companies Act 2006 s 8 (see PARA 104) are to be treated after that date as provisions of the company's articles: see s 28(1); and PARA 228. See also PARA 257 et seq.

3 As to the meaning of 'ultra vires' see PARA 259.

4 Where a company is registered without the word 'limited' or words 'plc' but with limited liability, the power to give pensions depends on its constitution: *Cyclists' Touring Club v Hopkinson* [1910] 1 Ch 179. As to the meaning of references to a company's constitution see PARA 227.

5 *Henderson v Bank of Australasia* (1888) 40 ChD 170. Cf *Re Lee, Behrens & Co Ltd* [1932] 2 Ch 46, applied in *Re W & M Roith Ltd* [1967] 1 All ER 427, [1967] 1 WLR 432, but criticised in *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62, [1969] 2 All ER 1185, and purportedly overruled in *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246, [1985] 3 All ER 52, CA.

6 *Hampson v Price's Patent Candle Co* (1876) 45 LJ Ch 437. Cf *Warren v Lambeth Waterworks* (1905) 21 TLR 685. See also *Re Birkbeck Permanent Benefit Building Society* [1913] 1 Ch 400.

- 7 *Taunton v Royal Insurance Co* (1864) 2 Hem & M 135. See also PARA 464.
- 8 *Metropolitan Coal Consumers' Association v Scrimgeour* [1895] 2 QB 604, CA. As to brokerage see PARA 1158. As to shares and a company's share capital see PARA 1042.
- 9 *Simpson v Westminster Palace Hotel Co* (1860) 8 HL Cas 712.
- 10 *Re London and Colonial Co, Horsey's Claim* (1868) LR 5 Eq 561.
- 11 *Syers v Brighton Brewery Co Ltd, Wright v Brighton Brewery Co Ltd* (1864) 11 LT 560. Cf *Re Langham Skating Rink Co* (1877) 5 ChD 669 at 685, CA, per Jessel MR.
- 12 As to a company's capacity to borrow see PARA 1256.
- 13 *Peruvian Rlys Co v Thames and Mersey Marine Insurance Co, Re Peruvian Rlys Co* (1867) 2 Ch App 617, distinguishing *Bateman v Mid-Wales Rly Co* (1866) LR 1 CP 499.
- 14 *Re Patent File Co, ex p Birmingham Banking Co* (1870) 6 Ch App 83.
- 15 As to the meaning of 'debenture' see PARA 1299; and as to the meaning of 'stock' see PARA 1163.
- 16 *Whitehaven Joint Stock Banking Co v Reed* (1886) 54 LT 360, CA.
- 17 *Re British and Foreign Cork Co, Leifchild's Case* (1865) LR 1 Eq 231.
- 18 *Butler v Northern Territories Mines of Australia Ltd* (1906) 96 LT 41; *Re Financial Corpn, Goodson's Claim* (1880) 28 WR 760. As to the promotion of companies generally see PARA 49 et seq.
- 19 *Evans v Brunner, Mond & Co Ltd* [1921] 1 Ch 359.
- 20 *Egyptian Salt and Soda Co Ltd v Port Said Association Ltd* [1931] AC 677, PC.
- 21 As to the meanings of 'carry on' and 'business' generally see PARA 1 note 1. A company may purchase land on a joint account (*London Financial Association v Kelk* (1884) 26 ChD 107); an insurance company may compromise claims (*Re Norwich Provident Insurance Society, Bath's Case* (1878) 8 ChD 334, CA); a banking company may be empowered to guarantee payment of interest on debentures in another company (*Re West of England Bank, ex p Booker* (1880) 14 ChD 317); a company may be empowered to guarantee the debenture stock of another company (*Re Friary Holyrood and Healy's Breweries Ltd* (1922) 67 Sol Jo 97, 126); a newspaper company may pay the cost of defending the editor in libel proceedings (*Breay v Royal British Nurses' Association* [1897] 2 Ch 272, CA); and a colliery company may purchase a colliery (*Re Baglan Hall Colliery Co* (1870) 5 Ch App 346; *Johns v Balfour* (1889) 5 TLR 389), or sell land to a builder for the erection of cottages (*Re Kingsbury Collieries Ltd and Moore's Contract* [1907] 2 Ch 259).

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262. Failure to act in accordance with restricted objects.

Any shareholder of a company¹ may bring proceedings to restrain the doing of an act that is beyond either the company's constitution² or the directors' powers³.

If the directors act in breach of the constitution, the act may not be called into question on the grounds of a lack of capacity⁴. The breach of the constitution is a breach of the directors' duties⁵ which may be ratified by an ordinary resolution of the members⁶, although to authorise such acts in the future, an alteration to the articles by special resolution⁷ is required⁸. The possibility of ratification is subject, in the case of ratification to relieve a director of the consequences of his action (rather than to affirm the transaction), to the statutory requirements as to voting on that ratification⁹ and subject generally to the common law limits

on ratification¹⁰. Even in the absence of ratification, the position of a person dealing with the company in good faith is protected by statute¹¹.

A corporation in a matter *intra vires* cannot be heard to deny a transaction to which all the shareholders have given their assent, even when such assent has been given in an informal manner, or by conduct, as distinct from a formal resolution at a duly convened meeting¹². If shareholders require directors to make certain decisions, or approve the decisions which the directors have already taken, then such decisions become the acts of the company, and binding on it, so that thereafter it cannot sue its directors in negligence¹³. However, it is otherwise if the shareholders or directors are acting fraudulently¹⁴.

1 As to shareholders and membership of companies generally see PARAS 321 et seq, 1697 et seq.

2 As to the meaning of references to a company's constitution under the Companies Act 2006 see PARA 227.

3 See the Companies Act 2006 s 40(4); and PARA 263. See also *Simpson v Westminster Palace Hotel Co* (1860) 8 HL Cas 712 at 717 per Lord Campbell LC. See also *Mosely v Koffyfontein Mines Ltd* [1911] 1 Ch 73, CA (affd sub nom *Koffyfontein Mines Ltd v Mosely* [1911] AC 409, HL). As to a company's directors see PARA 478 et seq.

4 This is the effect of the Companies Act 2006 s 39: see PARA 265.

5 See the Companies Act 2006 s 171; and PARA 540.

6 As to ordinary resolutions see PARA 613.

7 As to alterations in a company's articles of association by special resolution see PARA 232 et seq. As to special resolutions see PARA 614.

8 *Grant v United Kingdom Switchback Rlys Co* (1888) 40 ChD 135, CA. See also *Hogg v Cramphorn* [1967] Ch 254, [1966] 3 All ER 420; *Bamford v Bamford* [1970] Ch 212, [1968] 2 All ER 655; and PARA 278.

9 As to the ratification by a company of conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company, see the Companies Act 2006 s 239; and PARA 593. See also PARA 278.

10 *Id* which have been retained by the Companies Act 2006 s 239(7) (see PARA 593). See also PARAS 463, 464.

11 See the Companies Act 2006 s 40; and PARA 263.

12 *Walton v Bank of Nova Scotia* (1965) 52 DLR (2d) 506; *CPHC Holding Co Ltd v Western Pacific Trust Co* (1973) 36 DLR (3d) 431, BC SC; *Re Horsley & Weight Ltd* [1982] Ch 442, [1982] 3 All ER 1045, CA; *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258, [1983] 2 All ER 563, CA.

13 *A-G for Canada v Standard Trust Co of New York* [1911] AC 498, PC; *Re Express Engineering Works Ltd* [1920] 1 Ch 466, CA; *Re Horsley & Weight Ltd* [1982] Ch 442, [1982] 3 All ER 1045, CA (where Cumming-Bruce LJ (at 455 and 1055) and Templeman LJ (at 456 and 1056) reserved their views on the situation where what had been done by the directors amounted to misfeasance).

14 *A-G Reference (No 2 of 1982)* [1984] QB 624, [1984] 2 All ER 216, CA.

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C. BINDING THE COMPANY

263. Powers of directors to bind the company.

In favour of a person dealing with a company¹ in good faith, the power of the directors² to bind the company, or to authorise others to do so, is deemed to be free of any limitation under the company's constitution³.

For these purposes:

- 588 (1) a person 'deals with' a company if he is a party to any transaction or other act to which the company is a party⁴; and
- 589 (2) a person dealing with a company: (a) is not bound to inquire as to any limitation on the powers of the directors to bind the company or authorise others to do so⁵; (b) is presumed to have acted in good faith unless the contrary is proved⁶; and (c) is not regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution⁷.

These protections do not affect any right of a member of the company to bring proceedings to restrain the doing of an action that is beyond the powers of the directors⁸; but no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company⁹. Nor do the statutory protections affect any liability incurred by the directors, or any other person, by reason of the directors' exceeding their powers¹⁰.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'director' see PARA 478.

3 Companies Act 2006 s 40(1). The Companies Act 2006 s 40 has effect subject to s 41 (transactions with directors or their associates) (see PARA 264) and s 42 (charities) (see PARA 265): s 40(6). As to the meaning of references to a company's constitution see PARA 227. For these purposes, the references to limitations on the directors' powers under the company's constitution include limitations deriving: (1) from a resolution of the company or of any class of shareholders (s 40(3)(a)); or (2) from any agreement between the members of the company or of any class of shareholders (s 40(3)(b)). As to resolutions of the company generally see PARA 612 et seq. As to shareholders and membership of companies generally see PARAS 321 et seq, 1697 et seq. As to classes of shares and the rights attached to classes of shares generally see PARA 1057 et seq. See also *Smith v Henniker-Major & Co (a firm)* [2002] EWCA Civ 762, [2003] Ch 182, [2002] 2 BCLC 655 (whether act of an inquorate board attracts the protection of the Companies Act 1985 s 35A (see now the Companies Act 2006 s 40)); *Ford v Polymer Vision Ltd* [2009] EWHC 945 (Ch), [2009] 2 BCLC 160 (meeting of directors which was quorate but not validly convened constituted a constitutional limitation under the Companies Act 2006 s 40).

Persons dealing with the company may also rely on the rule in *Royal British Bank v Turquand* (1856) 6 E & B 327, which provides that such persons are not obliged to inquire into the internal proceedings of a company but can assume that all acts of internal management had been properly carried out, save where an outsider knows or ought to know of a failure to adhere to procedures: see PARA 266.

The provisions of the Companies Act 2006 s 40 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 3: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

The Companies Act 2006 s 40 reflects the requirements of EC Council Directive 68/151 (OJ L65, 14.3.68, p 8) (the 'First EC Company Law Directive') (see PARA 23).

4 Companies Act 2006 s 40(2)(a). See note 3. As to a director as a 'person dealing with a company' see *Smith v Henniker-Major & Co (a firm)* [2002] EWCA Civ 762, [2003] Ch 182, [2002] 2 BCLC 655. (However, the Companies Act 2006 s 40 is now qualified in s 40(6) (see note 3) so directors are governed by s 41 (transactions with directors or their associates) (see PARA 264) and not by s 40). A shareholder receiving bonus shares is not 'a person dealing with a company' for these purposes: see *EIC Services Ltd v Phipps* [2004] EWCA Civ 1069, [2005] 1 All ER 338, [2005] 1 WLR 1377, [2004] 2 BCLC 589 (the Companies Act 1985 s 35A(1) (see now the Companies Act 2006 s 40(1)) contemplated a bilateral transaction between the company and the person dealing with the company or an act to which both were parties, such as would bind the company other than in good faith; such would not be the case where a bonus issue was made by a single resolution applicable to all shareholders) (rvrsng on this point *EIC Services Ltd v Phipps* [2003] EWHC 1507 (Ch), [2003] 3 All ER 804, [2003] 1 WLR 2360, [2004] 2 BCLC 589). See also *Cottrell v King* [2004] EWHC 397 (Ch), [2004] 2 BCLC 413 (it

was not clear that the operation of a share transfer provision in the articles could amount to 'dealing' with the company for these purposes).

5 Companies Act 2006 s 40(2)(b)(i). See notes 3, 7.

6 Companies Act 2006 s 40(2)(b)(ii). See note 3, 7. See *TCB Ltd v Gray* [1986] Ch 621, [1986] 1 All ER 587 (manner in which the company's seal is to be affixed; lack of good faith could not be presumed merely from failure to inquire); *Thompson v J Barke & Co (Caterers) Ltd* 1975 SLT 67, Ct of Sess (cheque drawn on company account by director for the purpose of paying off his private account; regularity of transaction suspect; other party put on inquiry); *Ford v Polymer Vision Ltd* [2009] EWHC 945 (Ch), [2009] 2 BCLC 160 (power in question has to be exercised for the purpose for which it was conferred; arguable that contract to dispose of company's assets to meet liabilities and indebtedness to claimant was proper exercise).

7 Companies Act 2006 s 40(2)(b)(iii). See note 3.

In *Wrexham Association Football Club Ltd v Crucialmove Ltd* [2006] EWCA Civ 237, [2008] 1 BCLC 508, the dictum of Slade LJ in *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246 at 284, [1984] BCLC 466 at 498, CA, was applied to the Companies Act 1985 ss 35A, 35B (see now the Companies Act 2006 s 40) in holding that the statutory protections thereby afforded did not absolve a person dealing with a company from any duty to inquire whether the persons acting for the company were authorised by the board to enter into the transaction when the circumstances were such as to put that person on inquiry.

8 Companies Act 2006 s 40(4). See note 3.

9 Companies Act 2006 s 40(4). See note 3.

10 Companies Act 2006 s 40(5). See note 3. As to directors' liabilities generally see para 559. Directors are under a statutory duty to act in accordance with the company's constitution, and to only exercise powers for the purposes for which they are conferred (see s 171; and para 540).

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264. Transactions involving director or person connected with director.

If, or to the extent that, the validity of a transaction¹ depends on the statutory protection² afforded a person dealing with the company³ in good faith⁴, then where: (1) a company enters into such a transaction⁵; and (2) the parties to the transaction include: (a) a director of the company⁶ (or of its holding company)⁷; or (b) a person connected with any such director⁸, the transaction is voidable at the instance of the company⁹.

Whether or not it is avoided, any such party to the transaction as is mentioned in head (2)(a) or head (2)(b) above, and any director of the company who authorised the transaction, is liable¹⁰ to account to the company for any gain he has made directly or indirectly by the transaction¹¹, and to indemnify the company for any loss or damage resulting from the transaction¹².

The transaction ceases to be voidable if: (i) restitution of any money or other asset which was the subject matter of the transaction is no longer possible¹³; or (ii) the company is indemnified for any loss or damage resulting from the transaction¹⁴; or (iii) rights acquired bona fide for value and without actual notice of the directors' exceeding their powers by a person who is not party to the transaction would be affected by the avoidance¹⁵; or (iv) the transaction is affirmed by the company¹⁶.

Nothing in these provisions¹⁷ affects the rights of any party to the transaction not mentioned in head (2)(a) or head (2)(b) above¹⁸. But the court may, on the application of the company or any such party, make an order affirming, severing or setting aside the transaction on such terms as appear to the court to be just¹⁹.

- 1 For these purposes, 'transaction' includes any act: Companies Act 2006 s 41(7)(a).
- 2 It depends on the Companies Act 2006 s 40 (see PARA 263): see s 41(1).
- 3 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.
- 4 See the Companies Act 2006 s 41(1). The provisions of s 41 apply to a transaction if or to the extent that its validity depends on s 40 (see PARA 263): see s 41(1). However, nothing in s 41 is to be read as excluding the operation of any other enactment or rule of law by virtue of which the transaction may be called in question or any liability of the company may arise: see s 41(1). As to the meaning of 'enactment' see PARA 17 note 2. See also *Smith v Henniker-Major & Co (a firm)* [2002] EWCA Civ 762 at [51], [2003] Ch 182, [2002] 2 BCLC 655 at [51] per Robert Walker LJ, at [109] per Carnwath LJ, and at [128] per Schiemann LJ.
The provisions of the Companies Act 2006 s 41 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 3: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.
- 5 Companies Act 2006 s 41(2)(a). See note 4.
- 6 As to the meaning of 'director' see PARA 478.
- 7 Companies Act 2006 s 41(2)(b)(i). See note 4. As to the meaning of 'holding company' see PARA 25.
- 8 Companies Act 2006 s 41(2)(b)(ii). For these purposes, the reference to a person connected with a director has the same meaning as in Pt 10 (ss 154-259) (see PARA 481): s 41(7)(b). See note 4.
- 9 Companies Act 2006 s 41(2). See note 4.
- 10 Companies Act 2006 s 41(3). A person other than a director of the company is not liable under s 41(3) if he shows that at the time the transaction was entered into he did not know that the directors were exceeding their powers: s 41(5). See note 4.
- 11 Companies Act 2006 s 41(3)(a). See note 4.
- 12 Companies Act 2006 s 41(3)(b). See note 4.
- 13 Companies Act 2006 s 41(4)(a). See note 4.
- 14 Companies Act 2006 s 41(4)(b). See note 4.
- 15 Companies Act 2006 s 41(4)(c). See note 4.
- 16 Companies Act 2006 s 41(4)(d). See note 4.
- 17 It is nothing in the Companies Act 2006 s 41(1)-(5) (see the text and notes 1-16): see s 41(6).
- 18 Companies Act 2006 s 41(6). See note 4.
- 19 Companies Act 2006 s 41(6). See note 4. In applying this power, it seems that the court is allowed a very wide and unfettered discretion: see *Re Torvale Group Ltd* [1999] 2 BCLC 605 (decided under the Companies Act 1985 s 322A(7): see now the Companies Act 2006 s 41(6)).

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265. Company's capacity not limited generally by its constitution; charities.

The validity of an act done by a company¹ may not be called into question on the ground of lack of capacity by reason of anything in the company's constitution².

However, this statutory protection applies to the acts of a company that is a charity only in favour of a person who: (1) does not know at the time the act is done that the company is a charity³; or (2) gives full consideration in money or money's worth in relation to the act in question and does not know (as the case may be) either that the act is not permitted by the company's constitution, or that the act is beyond the powers of the directors⁴. Where a company that is a charity purports to transfer or grant an interest in property, the fact that (as the case may be) either the act was not permitted by the company's constitution⁵, or the directors in connection with the act exceeded any limitation on their powers under the company's constitution⁶, does not affect the title of a person who subsequently acquires the property or any interest in it for full consideration without actual notice of any such circumstances affecting the validity of the company's act⁷. In any proceedings so arising⁸, the burden of proving that a person knew that the company was a charity⁹, or that a person knew that an act was not permitted by the company's constitution or was beyond the powers of the directors¹⁰, lies on the person asserting that fact¹¹. In the case of a company that is a charity, the affirmation of a transaction whose validity depends upon the power of the directors to bind the company (or to authorise others to do so) free of any limitation under the company's constitution¹² is ineffective without the prior written consent of, in England and Wales¹³, the Charity Commission¹⁴.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 39(1). As to the meaning of references to a company's constitution see PARA 227. The Companies Act 2006 s 39 has effect subject to s 42 (see the text and notes 3-14): s 39(2).

The provisions of the Companies Act 2006 ss 39, 42 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 3: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

The Companies Act 2006 s 39 reflects the requirements of EC Council Directive 68/151 (OJ L65, 14.3.68, p 8) (the 'First EC Company Law Directive') (see PARA 23).

3 Companies Act 2006 s 42(1)(a).

4 Companies Act 2006 s 42(1)(b). As to the meaning of 'director' see PARA 478. As to the powers of directors generally to bind the company see PARAS 263, 264.

5 Companies Act 2006 s 42(2)(a).

6 Companies Act 2006 s 42(2)(b).

7 Companies Act 2006 s 42(2).

8 In any proceedings arising out of the Companies Act 2006 s 42(1) (see the text and notes 3-4) or s 42(2) (see the text and notes 5-7): see s 42(3).

9 Companies Act 2006 s 42(3)(a).

10 Companies Act 2006 s 42(3)(b).

11 Companies Act 2006 s 42(3).

12 In a transaction to which the Companies Act 2006 s 41 (see PARA 264) applies: see s 42(4).

13 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

14 Companies Act 2006 s 42(4). As to the Charity Commission see **CHARITIES** vol 8 (2010) PARA 538 et seq.

COMPANIES ACTS/(7) CAPACITY/(ii) Company's Powers/C. BINDING THE COMPANY/266.
Notice of company's constitution assumed.

266. Notice of company's constitution assumed.

The doctrine of constructive notice means that persons contracting with a company, whether or not they are shareholders, are bound to know, or are precluded from denying that they know, the constitution of the company and its powers as given by statute and the constitution¹.

This doctrine of constructive notice of a company's registered documents is a purely negative one which does not operate against a company, but only in its favour². Its effect, however, is now much modified by statute which provides that a person dealing in good faith with a company is not bound to inquire as to whether it is permitted by the company's constitution or as to any limitation on the powers of the directors to bind the company or authorise others to do so³.

1 See *Re Barnard's Banking Co, Peel's Case* (1867) 2 Ch App 674; *Re New Zealand Banking Corp, Sewell's Case* (1868) 3 Ch App 131 at 140 per Lord Cairns LJ; *Re Bank of Hindustan, China and Japan, Campbell's Case* (1873) 9 Ch App 1; *Griffith v Paget* (1877) 6 ChD 511 at 517 per Jessel MR; *Oakbank Oil Co v Crum* (1882) 8 App Cas 65 at 70, HL, per Lord Selborne LC (as to shareholders). See *Ernest v Nicholls* (1857) 6 HL Cas 401 at 419 per Lord Wensleydale; *Mahony v East Holyford Mining Co* (1875) LR 7 HL 869 at 893 per Lord Chelmsford (as to outsiders). As to constructive notice in relation to companies generally see PARA 126. See also PARA 248. As to the meaning of references in the Companies Acts to a company's constitution see PARA 227.

2 *Houghton & Co v Nothard, Lowe and Wills Ltd* [1927] 1 KB 246, CA (affd [1928] AC 1, HL); *Rama Corp Ltd v Proved Tin and General Investments Ltd* [1952] 2 QB 147, [1952] 1 All ER 554. As to the required registration of constitutional documents see PARA 111.

3 See the Companies Act 2006 s 40; and PARAS 263.

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Presumption as to matters of internal management.

267. Presumption as to matters of internal management.

Persons contracting with a company and dealing in good faith have always been entitled to assume that acts within its constitution and powers have been properly and duly performed¹, and were never bound to inquire whether acts of internal management have been regular². This rule does not, however, apply to a director, or de facto director, who contracts with the company, as he should know the true position³. In any case, persons contracting with the company must take the articles of association in force to be those registered, and they are not entitled to assume that a special resolution has been passed pursuant to the articles, for that would have to be registered⁴, and where the act is within the company's power only on the fulfilment of a statutory condition, persons dealing with the company are bound to ascertain whether the condition has been fulfilled⁵. An irregularity may be cured by a special article validating certain acts of the officers notwithstanding any irregularity⁶; but the particular act to be protected must on the face of it comply with the articles⁷.

1 Cf *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246, [1985] 3 All ER 52, CA (where the dealing was not in good faith).

2 *Royal British Bank v Turquand* (1856) 6 E & B 327 (where a power to borrow could only be exercised with the sanction of a general meeting which had not been held). This statement in the text of the so-called 'rule in *Turquand's Case*' was cited with approval by Lord Simonds in *Morris v Kanssen* [1946] AC 459 at 474, [1946] 1 All ER 586 at 592, HL. See now the Companies Act 2006 ss 39-42; and PARAS 263-265. As to the interaction between the protection afforded by the Companies Act 2006 s 40 and the 'rule in *Turquand's Case*' see *Wrexham Association Football Club Ltd v Crucialmove Ltd* [2006] EWCA Civ 237, [2008] 1 BCLC 508.

See also *Landowners West of England and South Wales Land Drainage and Inclosure Co v Ashford* (1880) 16 ChD 411 (where the order of a statutory meeting was held to be directory only); *Heiton v Waverley Hydropathic Co* (1877) 4 R 830 (where the meeting had been irregularly summoned); *Agar v Athenaeum Life Assurance Society Official Manager* (1858) 3 CBNS 725; *Re Athenaeum Life Assurance Society, ex p Eagle Insurance Co* (1858) 4 K & J 549 (issue of debentures not duly authorised); *Prince of Wales Assurance Co v Harding* (1858) EB & E 183 (policies); *Re British Provident Life and Fire Assurance Society, Grady's Case* (1863) 1 De GJ & Sm 488 (no consent by a general meeting); *Reuter v Electric Telegraph Co* (1856) 6 E & B 341 (where an oral contract was upheld, the constitution requiring special formalities); *Bargate v Shortridge* (1855) 5 HL Cas 297 (irregular registration of transfer by directors); *Gloucester County Bank v Rudry Merthyr Steam and House Coal Colliery Co* [1895] 1 Ch 629, CA (mortgage executed at a board meeting of less than a quorum); *Cox v Dublin City Distillery (No 2)* [1915] 1 IR 345, CA; *Re Fireproof Doors Ltd, Umney v Fireproof Doors Ltd* [1916] 2 Ch 142 (debentures issued at a board meeting where there was an insufficient quorum); *Mahony v East Holyford Mining Co* (1875) LR 7 HL 869 at 893 per Lord Chelmsford (bankers honouring cheques signed by a self-appointed board); *Re County Life Assurance Co* (1870) 5 Ch App 288 at 293 per Giffard LJ (policy issued by de facto directors); *Montreal and St Lawrence Light and Power Co v Robert* [1906] AC 196, PC (contract made on a resolution of directors less than a quorum); *Re Bank of Syria, Owen and Ashworth's Claim, Whitworth's Claim* [1901] 1 Ch 115, CA (security given for debts in similar circumstances, following *Re Scottish Petroleum Co* (1883) 23 ChD 413, CA (allotment of shares)); *Duck v Tower Galvanizing Co* [1901] 2 KB 314 (debenture issued, although no directors had been appointed and no resolution of the company had been passed); *Gillies v Craigton Garage Co* 1935 SC 423, Ct of Sess (borrowing without sanction of a general meeting); *Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, [1964] 1 All ER 630, CA (company bound by acts of person held out as managing director); *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 at 584-585, [1967] 3 All ER 98 at 102-103 per Lord Denning MR (similar point); *Albert Gardens (Manly) Pty Ltd v Mercantile Credits Ltd* (1973) 9 ALR 653, Aust HC (security given by invalidly appointed directors); *IRC v Ufitec Group Ltd* [1977] 3 All ER 924 (company permitting chairman to continue negotiations estopped from denying his authority to contract). See also *Re David Payne & Co Ltd, Young v David Payne & Co Ltd* [1904] 2 Ch 608, CA; *Re Marseilles Extension Rly Co, ex p Crédit Foncier and Mobilier of England* (1871) 7 Ch App 161; *Totterdell v Fareham Blue Brick and Tile Co Ltd* (1866) LR 1 CP 674. As to bills of exchange see PARAS 292-295.

3 *Morris v Kanssen* [1946] AC 459, [1946] 1 All ER 586, HL (invalid allotment of shares to a de facto director). Cf *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549, [1967] 3 All ER 98, CA (director entitled to rely on managing director's ostensible authority). As to directors and de facto directors see PARA 478 et seq.

4 *Irvine v Union Bank of Australia* (1877) 2 App Cas 366, PC. As to articles of association generally see PARA 228 et seq. As to resolutions and decisions of the company generally see PARA 612 et seq.

5 *Pacific Coast Coal Mines Ltd v Arbuthnot* [1917] AC 607, PC.

6 As to the effect of defects in the appointment of directors or managers see PARA 486. As to an article validating acts notwithstanding such irregularity see PARA 486 note 6.

7 *Davies v R Bolton & Co* [1894] 3 Ch 678 at 688 per Vaughan Williams J.

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268. Notice of irregularity.

Actual or constructive notice of an irregularity prevents a person contracting with the company obtaining the protection of the rule that the regularity of internal management may be relied on¹, except where he is claiming for value through another who had no notice². A person does not obtain the protection of the rule where he was put on inquiry by the circumstances out of which the transaction with the company arose³.

Further, the rule does not operate to protect a person who has accepted a document which is a forgery⁴.

1 *Irvine v Union Bank of Australia* (1877) 2 App Cas 366, PC; *Wandsworth and Putney Gas-Light and Coke Co v Wright* (1870) 22 LT 404. Circumstances in which there is actual or constructive notice arise where a director is himself claiming (*Howard v Patent Ivory Manufacturing Co* (1888) 38 ChD 156 at 170 per Kay J); *Re Greymouth-Point Elizabeth Railway and Coal Co Ltd*, *Yuill v Greymouth-Point Elizabeth Railway and Coal Co Ltd* [1904] 1 Ch 32, although he is only a de facto director (*Morris v Kanssen* [1946] AC 459, [1946] 1 All ER 586, HL); where a copy of the articles was supplied to the creditor (*Davies v R Bolton & Co* [1894] 3 Ch 678); or where the company's solicitor was claiming (*Re General Provident Assurance Co Ltd* (1869) 38 LJ Ch 320). Cf *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549, [1967] 3 All ER 98, CA (director acting as an individual not in his capacity as a director; no notice). The employment by a woman of her husband as agent to apply for debentures has been held not to affect the woman with all the husband knew as a director: *Re Fireproof Doors Ltd*, *Umney v Fireproof Doors Ltd* [1916] 2 Ch 142. As to directors and de facto directors see PARA 478 et seq. As to the meaning of references to a company's 'articles' under the Companies Act 2006 see PARA 228 note 2. As to articles of association generally see PARA 228 et seq.

As to whether the fact that a person has actual notice of an internal irregularity may prevent him from taking advantage of the protection afforded persons dealing with the company in good faith under the Companies Act 2006 ss 39-42, modifying the common law 'ultra vires' rule (see PARAS 263-265), where the irregularity is not a limitation under the company's constitution for those purposes see *Smith v Henniker-Major & Co (a firm)* [2002] EWCA Civ 762, [2003] Ch 182, [2002] 2 BCLC 655; and PARA 263 note 3.

2 *Re Bank of Syria, Owen and Ashworth's Claim, Whitworth's Claim* [1901] 1 Ch 115, CA.

3 *AL Underwood Ltd v Bank of Liverpool and Martins* [1924] 1 KB 775; *Houghton & Co v Nothard, Lowe and Wills Ltd* [1927] 1 KB 246, CA (affd [1928] AC 1, HL, this point not being discussed); *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48.

4 *Kreditbank Cassel GmbH v Schenkers Ltd* [1927] 1 KB 826, CA (applying *Ruben v Great Fingall Consolidated* [1906] AC 439, HL); *South London Greyhound Racecourses Ltd v Wake* [1931] 1 Ch 496 (fact that board had not authorised affixing of the seal rendered certificate a forgery and a nullity). See further *Lovett v Carson Country Homes Ltd* [2009] EWHC 1143 (Ch), [2009] 2 BCLC 196 (company bound by debenture on which director's signature had been forged); but see also PARA 387.

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(iii) Acting through Agents

269. How a company may act.

A company¹, not being a physical person, may only act either by the resolution of its members², or by its agents³. It is not the agent of its members⁴, and a member as such is not the agent of the company⁵, the company being a separate entity or legal person apart from its members, who are not, even collectively, the company⁶. The legal position of a company, as so stated, must be regarded in relation to its contracts⁷, to torts committed by it⁸, and to such liabilities as regards acts which might bring it within the criminal law⁹.

A company exists because there is a rule, usually in a statute, which says that a *persona ficta* is deemed to exist and to have certain powers, rights and duties of a natural person; and the company exercises these through natural persons as its agents, those acts being attributable to the company¹⁰. It also makes itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as ostensible authority in contract and vicarious liability in tort¹¹.

- 1 As to the meaning of 'company' generally see PARA 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.
- 2 As to resolutions of the company generally see PARA 612 et seq.
- 3 *Ferguson v Wilson* (1866) 2 Ch App 77 at 89 per Cairns LJ. As to a consideration of the position of a company's directors as agents of the company see PARA 271.
- 4 *Ferguson v Wilson* (1866) 2 Ch App 77 at 89 per Cairns LJ; *Salomon v A Salomon & Co Ltd* [1897] AC 22 at 31, HL, per Lord Halsbury LC, at 51 per Lord Macnaghten, and at 57 per Lord Davey.
- 5 *Oakes v Turquand and Harding* (1867) LR 2 HL 325 at 358 per Lord Cranworth.
- 6 *Re Exchange Banking Co, Flitcroft's Case* (1882) 21 ChD 519 at 536, CA, per Cotton LJ; *John Foster & Sons v IRC* [1894] 1 QB 516 at 528, CA, per Lindley LJ; *Society of Practical Knowledge v Abbott* (1840) 2 Beav 559 at 567 per Lord Langdale MR; *Re Sheffield and South Yorkshire Permanent Building Society* (1889) 22 QBD 470 at 476 per Cave J; *Farrar v Farrars Ltd* (1888) 40 ChD 395 at 410, CA, per Lindley LJ. See also PARA 120 text and note 16.
- 7 See PARAS 279-295.
- 8 See PARAS 297-300.
- 9 See PARA 312 et seq.
- 10 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 506, [1995] 3 All ER 918 at 922-923, PC. See also *Odyssey Re (London) Ltd (formerly Sphere Drake Insurance plc) v OIC Run-Off Ltd (formerly Orion Insurance Co plc)* [2001] Lloyd's Rep IR 1, CA (fraudulent evidence given on behalf of company by natural person treated as evidence of company).
- 11 See note 10.

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270. Appointment of agents.

The appointment of an agent by a company¹ need not be made under its corporate seal²; and it may employ an agent or employee to do ordinary services without a deed³.

- 1 As to the meaning of 'company' generally see PARA 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.
- 2 As to a company's seal see PARA 283.
- 3 See **AGENCY** vol 1 (2008) PARA 21; **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1122. As to the form of a company's contracts generally see PARA 282 et seq.

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271. Directors' position as company's agents.

A company's directors¹ are agents of the company². Wherever an agent is liable, they are liable; and, where the liability would attach to the principal, and the principal only, the liability is the company's liability³. It does not follow that they are the only agents of the company; and they, or the company in general meeting where its powers in this respect are not exclusively vested in the directors, may appoint other agents of the company, by whose acts it will be bound⁴. For example, the secretary is able to bind the company in all administrative matters⁵, and clerks in a company's registered office⁶, in the absence of evidence to the contrary, are deemed to have authority during business hours in the absence of the secretary to receive notices on the company's behalf⁷.

In practice, it is clear that in many companies most of the transactions are carried out by employees of the company, not by the directors; such employees will in most cases have actual authority to bind the company in the matters with which their employment is concerned. All agents are limited at all times by a requirement to act for the benefit of the principal⁸.

1 As to a company's directors see PARA 478 et seq.

2 See PARA 544.

3 *Ferguson v Wilson* (1866) 2 Ch App 77 at 89-90 per Cairns LJ.

4 *Smith v Hull Glass Co* (1852) 11 CB 897. As to the authority of a secretary see PARA 604.

5 See PARA 604.

6 As to a company's registered office see PARA 129.

7 *Re Brewery Assets Corp'n, Truman's Case* [1894] 3 Ch 272. See further PARA 127.

8 See eg *Criterion Properties v Stratford UK Properties* [2004] UKHL 28, [2004] 1 WLR 1846, [2006] 1 BCLC 729 (the test for determining whether the agreement was a valid and binding agreement, and therefore enforceable, turned solely on whether, applying the ordinary principles of agency, the directors who signed the agreement did so within the actual or apparent scope of their authority).

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272. Exercise of delegated powers.

Where there is a power of delegation to a committee of directors or a managing director, a person contracting with the company may assume that that power has been duly exercised¹. Where there is a power of delegation to agents, a person is entitled to assume only that such powers as are within the ostensible authority of such an agent have been so delegated²; but where an agreement entered into by a director is unusual, a person contracting with the company through that director is put upon inquiry as to whether the necessary power has been delegated to that director³. A person who has only ostensible authority to do an act or make a representation cannot make a representation which may be relied upon as giving a further agent an ostensible authority which he would not otherwise have had⁴.

Where a power of delegation has been exercised, the subsequent act of the agent within the scope of his authority is binding on the company as against the person with whom the company is contracting; but, if the power of delegation has not been exercised, a person is not entitled to rely on the supposed exercise of the power unless he actually knew of its existence, because there is no estoppel in such circumstances⁵.

A company which has appointed a manager of its business is bound by contracts made by him in the usual course of the business, even though sufficient powers have not in fact been delegated to him; and, where goods are supplied to the order of unauthorised persons, the company is liable if the goods are received and used for the purposes of its trade⁶.

1 *Biggerstaff v Rowatt's Wharf Ltd* [1896] 2 Ch 93, CA; *Re Fireproof Doors Ltd, Umney v Fireproof Doors Ltd* [1916] 2 Ch 142; *Clay Hill Brick and Tile Co Ltd v Rawlings* [1938] 4 All ER 100 (payment by valid cheque to managing director equivalent to payment in cash to company); *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549, [1967] 3 All ER 98, CA (act within managing director's ostensible authority). As to the importance, when entering into a contract on behalf of a company, of so stating in unmistakable terms, see *The Swan* [1968] 1 Lloyd's Rep 5; and **AGENCY** vol 1 (2008) PARA 156 et seq. As to delegation see generally **AGENCY** vol 1 (2008) PARA 48 et seq. As to statutory protections afforded a person dealing with the company in good faith see PARAS 256, 263 et seq. As to liability for contracts on the part of an agent see PARA 277.

2 *Kreditbank Cassel GmbH v Schenkers Ltd* [1927] 1 KB 826, CA; *British Thomson-Houston Co Ltd v Federated European Bank Ltd* [1932] 2 KB 176, CA; *Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, [1964] 1 All ER 630, CA; *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549, [1967] 3 All ER 98, CA; *Armagas Ltd v Mundogas SA, The Ocean Forest* [1986] AC 717, [1986] 2 All ER 385, HL (no ostensible authority to make contract; no actual or ostensible authority to inform other party of alleged approval by board of company); *Hopkins v TL Dallas Group Ltd* [2004] EWHC 1379 (Ch), [2005] 1 BCLC 543 (agent acting fraudulently or in furtherance of his own interests nullifies actual authority, but not apparent authority). The grant of actual authority should be implied as being subject to a condition that it is to be exercised honestly and on behalf of the principal: *Lysaght Bros & Co Ltd v Falk* (1905) 2 CLR 421; *Hopkins v TL Dallas Group Ltd*.

3 *Houghton & Co v Nothard, Lowe and Wills Ltd* [1927] 1 KB 246, CA (affd [1928] AC 1, HL, this point not being discussed); *Kreditbank Cassel GmbH v Schenkers Ltd* [1927] 1 KB 826, CA. See also *Rama Corp Ltd v Proved Tin and General Investments Ltd* [1952] 2 QB 147, [1952] 1 All ER 554, which was a correct decision on its facts, but the suggestion of Slade J at 161 and 563 that the earlier cases were conflicting is not justified (see *Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, [1964] 1 All ER 630, CA, at 493-494 and 638 per Willmer LJ, and at 508-509 and 647 per Diplock LJ).

4 *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising and Addressing Co Pty Ltd* (1975) 7 ALR 527, Aust HC; *British Bank of the Middle East v Sun Life Assurance Co of Canada (UK) Ltd* [1983] 2 Lloyd's Rep 9, HL.

5 *Kreditbank Cassel GmbH v Schenkers Ltd* [1927] 1 KB 826, CA; *Houghton & Co v Nothard, Lowe and Wills Ltd* [1927] 1 KB 246 at 266, CA, per Sargant LJ. For reservations see *Houghton & Co v Nothard, Lowe and Wills Ltd* at 266 per Sargant LJ; *Rama Corp Ltd v Proved Tin and General Investments Ltd* [1952] 2 QB 147, [1952] 1 All ER 554.

6 *Smith v Hull Glass Co* (1852) 11 CB 897. As to the meanings of 'trade' and 'business' generally see PARA 1 note 1.

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273. Agent's liability for torts.

An agent who commits a tort in the course of his employment is himself liable in damages to the full amount¹, and, if more than one agent, each agent is so liable². This applies to a company's agent in the same way as to any person's agent; but one of two or more agents is not liable for the acts of the other or others unless he has expressly or impliedly authorised such acts³.

Directors are not responsible to third persons for torts committed by sub-agents of the company properly appointed, unless they themselves committed or knowingly procured the commission of the tortious acts⁴.

1 As to the liability of an agent for torts see **AGENCY** vol 1 (2008) PARA 164.

2 An officer of the company may be a joint tortfeasor with the company itself: *The Radiant* [1958] 2 Lloyd's Rep 596 (managing director aware of defects in equipment which contributed to accident); *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 2 All ER 415, [1985] 1 WLR 317, CA. As to proceedings against and contributions between joint and several tortfeasors see the Civil Liability (Contribution) Act 1978; and **TORT** vol 45(2) (Reissue) PARA 346 et seq.

3 *Cargill v Bower* (1878) 10 ChD 502. See also **AGENCY** vol 1 (2008) PARA 28.

4 *Weir v Bell* (1878) 3 ExD 238, CA; *Betts v De Vitre* (1868) 3 Ch App 429 at 441, CA, per Lord Chelmsford LC; *Cargill v Bower* (1878) 10 ChD 502; *The Radiant* [1958] 2 Lloyd's Rep 596. See further **AGENCY** vol 1 (2008) PARAS 57-59, 150 et seq. As to directors' personal liability for breach of a duty in tort see PARA 588. As to the liability of directors for the torts of a company see PARA 585.

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274. Position of company's agents.

The agent of a company cannot normally obtain an injunction to prevent his discharge, since the court will not usually specifically enforce a contract of personal service; but he will be left to his claim for damages¹. Agents of a company are in the position of agents of an individual, except that their principal is a corporate body and must act in accordance with its constitution². An agent of a company has a right to be repaid the expenses incurred by him in the performance of his agency³.

1 *Mair v Himalaya Tea Co* (1865) LR 1 Eq 411; *Johnson v Shrewsbury and Birmingham Rly Co* (1853) 3 De GM & G 914. See, however, *Hill v CA Parsons & Co Ltd* [1972] Ch 305, [1971] 3 All ER 1345, CA; and *CH Giles & Co Ltd v Morris* [1972] 1 All ER 960, [1972] 1 WLR 307 (specific performance of execution of service agreement). As to the discharge of directors, and a director's right to protest, see PARA 517.

2 *Imperial Hydropathic Hotel Co, Blackpool v Hampson* (1882) 23 ChD 1 at 13, CA, per Bowen LJ. As to the meaning of references to a company's constitution see PARA 227.

3 *Re Famatina Development Corp'n Ltd* [1914] 2 Ch 271, CA. As to the expenses of defending criminal proceedings see *Tomlinson v Scottish Amalgamated Silks Ltd (Liquidators)* 1935 SC (HL) 1; and see **AGENCY** vol 1 (2008) PARA 111 et seq.

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275. Admissions by agents.

In cases of express authorisation, an admission by an agent of the company is an admission by the company itself, where the statement or act is made or done in the ordinary course of employment¹. A statement made by a director to the shareholders at a general meeting is not an admission which may be used by a shareholder against the company, being a statement by the agent of the company and of the shareholders to his joint principals².

1 See **AGENCY** vol 1 (2008) PARA 136. See also *Lampson & Co v London and India Dock Joint Co* (1901) 17 TLR 663; *Simmons v London Joint Stock Bank* (1890) 62 LT 427; *Re Royal Bank of Australia, Meux's Executors' Case*

(1852) 2 De GM & G 522 at 533 per Lord St Leonards LC; *Bruff v Great Northern Rly Co* (1858) 1 F & F 344. As to representations by agents generally see PARA 277.

2 *Re Devala Provident Gold Mining Co* (1883) 22 ChD 593; and see **AGENCY** vol 1 (2008) PARA 136.

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276. Presumption that acts are properly performed.

It is presumed in favour of third persons or members of the company that acts which are proved to have been performed have been properly performed, so that the burden of proving the contrary is thrown upon the company¹.

1 *Re North Hallenbeagle Mining Co, Knight's Case* (1867) 2 Ch App 321 (forfeiture of shares held to be valid although there was no proof of a directors' resolution to that effect); *Clarke v Imperial Gas Light and Coke Co* (1832) 4 B & Ad 315. See also *Re Fireproof Doors Ltd, Umney v Fireproof Doors Ltd* [1916] 2 Ch 142.

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277. Respective liability for contracts on part of company and agent.

A company is liable in respect of contracts made by its agents when acting within the scope of their authority, provided that the contract is within the company's powers¹, but not for acts or representations without that scope². The question whether the act or representation was committed or made by the agent for his own benefit or for the benefit of the company is irrelevant³. Similarly, the company may be bound by the knowledge of, or notice given to, a subordinate official⁴.

An agent may become liable on a contract made by him on behalf of a company if it is made in his own name and it does not appear from the document that he did not intend to contract as principal; and, where there is an ambiguity in this respect on the face of the document, parol evidence is admissible to explain it⁵. When an agent expressly contracts on behalf of his company or makes a contract in its name, he is not personally liable to the other contracting party in the absence of fraud or misrepresentation⁶ unless he expressly or impliedly warrants an authority which he does not have or a state of facts which does not exist⁷, in which case the contracting party has a remedy against him⁸. Thus borrowing by the directors is a warranty that they as directors, or the company, as the case may be, have or has power to borrow⁹. A director or other agent may, however, act in such a way as to expose himself to liability for breach of trust¹⁰.

1 See **AGENCY** vol 1 (2008) PARA 121 et seq; **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1273. As to the limitations on a principal's liability in respect of contracts made by an agent see *Re International Contract Co, Pickering's Claim* (1871) 6 Ch App 525; and **AGENCY** vol 1 (2008) PARA 127 et seq. As to an analysis of this subject see *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 506, [1995] 3 All ER 918 at 922-923, PC.

2 *Kleinwort, Sons & Co v Associated Automatic Machine Corpn Ltd* (1934) 151 LT 1, HL; *George Whitechurch Ltd v Cavanagh* [1902] AC 117, HL (secretary falsely certifying transfers of shares); *Ruben v Great Fingall Consolidated* [1906] AC 439, HL (secretary issuing fraudulent certificates); *Shaw v Port Philip Colonial Gold Mining Co Ltd* (1884) 13 QBD 103. The effect of the first two cases in so far as they relate to certification of transfers was negated by the Companies Act 1948 s 79 (repealed): see now the Companies Act 2006 s 775; and PARAS 405, 417. As to the exercise of delegated powers in making company contracts see PARA 272.

It is not within the scope of a manager's duties to make an unusual contract (*Re Cunningham & Co Ltd, Simpson's Claim* (1887) 36 ChD 532; *Houghton & Co v Nothard, Lowe and Wills Ltd* [1927] 1 KB 246, CA (affd on other grounds [1928] AC 1, HL); cf *Re County Palatine Loan and Discount Co, Cartmell's Case* (1874) 9 Ch App 691); nor is it within the ostensible authority of a provincial manager of a bank to draw or indorse cheques (*Kreditbank Cassel GmbH v Schenkers Ltd* [1927] 1 KB 826, CA); nor is the resident agent of a mining company authorised to borrow money to pay wages, although warrants of distress have been issued (*Hawtayne v Bourne* (1841) 7 M & W 595); nor may a local agent grant a policy (*Linford v Provincial Horse and Cattle Insurance Co* (1864) 34 Beav 291); nor is it within the scope of a secretary's duties to make representations as to the financial arrangements of a company with its contractors (*Barnett v South London Tramways Co* (1887) 18 QBD 815, CA) or to make false statements to induce an investor to take shares (*Newlands v National Employers' Accident Association Ltd* (1885) 54 LJQB 428, CA). See further **AGENCY** vol 1 (2008) PARA 124.

3 *Lloyd v Grace, Smith & Co* [1912] AC 716, HL, which overruled many dicta to the effect that the act or representation had to be committed for the benefit of the principal (see also PARA 296 note 4).

4 *Evans v Employers' Mutual Insurance Association Ltd* [1936] 1 KB 505. As to notice of assignments see **CHOSES IN ACTION** vol 13 (2009) PARA 72.

5 *McCollin v Gilpin* (1881) 6 QBD 516, CA; *Re International Contract Co, Pickering's Claim* (1871) 6 Ch App 525. See also **AGENCY** vol 1 (2008) PARA 156 et seq.

6 *Godwin v Francis* (1870) LR 5 CP 295 (misrepresentation of authority); *Chapman v Smethurst* [1909] 1 KB 927, CA (promissory note); *Premier Industrial Bank Ltd v Carlton Manufacturing Co Ltd and Crabtree Ltd* [1909] 1 KB 106; *Landes v Marcus and Davids* (1909) 25 TLR 478; *HB Etlin & Co v Asselstyne* (1962) 34 DLR (2d) 191, Ont CA; *Elkington & Co v Hürter* [1892] 2 Ch 452; *Ferguson v Wilson* (1866) 2 Ch App 77; *Gadd v Houghton* (1876) 1 ExD 357, CA; *Bondina Ltd v Rollaway Shower Blinds Ltd* [1986] 1 All ER 564, [1986] 1 WLR 517, CA. See also **AGENCY** vol 1 (2008) PARA 142.

7 *Collen v Wright* (1857) 8 E & B 647, Ex Ch. See also **AGENCY** vol 1 (2008) PARA 160. Directors are liable on bills accepted by them for the company without authority: *West London Commercial Bank Ltd v Kitson* (1884) 13 QBD 360, CA; and see PARA 295. See also *ING Re (UK) Ltd v R&V Versicherung AG*, sub nom *ING Re (UK) Ltd v R* [2006] EWHC 1544 (Comm), [2006] 2 All ER (Comm) 870, [2007] 1 BCLC 108 (claimant had entered into contract in mistaken belief that defendant had assigned authority to act on its behalf).

8 See note 7.

9 *Chapleo v Brunswick Permanent Building Society* (1881) 6 QBD 696, CA; *Richardson v Williamson and Lawson* (1871) LR 6 QB 276; *Looker v Wrigley* (1882) 9 QBD 397; *Whitehaven Joint Stock Banking Co v Reed* (1886) 54 LT 360, CA. See also *Contex Drouzhba Ltd v Wiseman* [2007] EWCA Civ 1201, [2008] 1 BCLC 631 (affmg [2006] EWHC 2708 (QB), [2007] 1 BCLC 758) (not every contract signed by a director would contain implied representations by the director but a director signing for a company might be making an implied representation about the ability of the company to pay since by promising terms of payment there was, by implication, a representation that the company had the capacity to meet the payment terms; if that was so, there might be situations in which, by the signing of contracts by directors, where those directors were guilty of fraudulent trading, the creditors might have a direct remedy against the director in deceit).

10 *Wilson v Lord Bury* (1880) 5 QBD 518, CA.

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278. Ratification of agents' acts.

A company cannot confirm or ratify anything which is beyond the powers conferred by statute¹. At common law, it was not possible for a company to ratify an ultra vires transaction, in the

sense of an act beyond the capacity of the company as expressed or implied in the company's constitution². It is possible for a company to ratify conduct by a director³ amounting to negligence, default, breach of duty or breach of trust in relation to the company if the decision to ratify such conduct is duly made by resolution of the members of the company⁴.

A transaction by the directors which is beyond their own powers but within the company's powers may be ratified by a resolution of the company or even by acquiescence, provided the shareholders have knowledge of the facts relating to the transaction to be ratified or the means of knowledge are available to them⁵.

By resolution at a subsequent meeting, a company may ratify any business which it has purported to transact at a meeting informally called⁶. Such a ratification will not be implied merely from the fact that the shareholders have seen and passed without comment the balance sheet or formal documents⁷, but it may be implied from acquiescence⁸. A contract entered into by directors at a meeting irregularly constituted may be ratified at a subsequent duly constituted meeting, and is sufficiently ratified by proceedings being brought by the company to enforce it⁹. A company may ratify the institution and conduct of litigation commenced in its name without proper authority, but, until ratified, the proceedings may be stayed¹⁰.

1 See PARA 252 et seq.

2 *Oakbank Oil Co v Crum* (1882) 8 App Cas 65 at 71, HL, per Lord Selborne LC; *Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653 at 668 per Lord Cairns LC; *Preston v Liverpool, Manchester and Newcastle-upon-Tyne Junction Rly Co (Proprietors)* (1856) 5 HL Cas 605; *Athy Guardians v Murphy* [1896] 1 IR 65; *James v Eve* (1873) LR 6 HL 335; *Re Empress Engineering Co* (1880) 16 ChD 125, CA; *Re Exchange Banking Co, Flitcroft's Case* (1882) 21 ChD 519, CA; *Re Dale and Plant Ltd* (1889) 43 ChD 255; *Mann and Beattie v Edinburgh Northern Tramways Co* [1893] AC 69, HL. As to the meaning of 'ultra vires' see PARA 259. As to the meaning of references to a company's constitution see PARA 227.

3 As to a company's directors see PARA 478 et seq.

4 See the Companies Act 2006 s 239; and PARA 593. As to company resolutions and decisions generally see PARA 612 et seq. As to membership of a company see PARA 321 et seq. A director is under a statutory duty not only to act in accordance with the company's constitution and to only exercise powers for the purposes for which they are conferred (see s 171; and PARA 540 et seq) but also to exercise reasonable care, skill and diligence (see s 174; and PARA 548).

5 *Grant v United Kingdom Switchback Rlys Co* (1888) 40 ChD 135, CA; *Irvine v Union Bank of Australia* (1877) 2 App Cas 366, PC. See also *Srimati Premila Devi v Peoples Bank of Northern India Ltd* [1938] 4 All ER 337, PC; *Bamford v Bamford* [1970] Ch 212, [1969] 1 All ER 969, CA (issue of shares voidable on assumption of improper motives in directors ratified by company in general meeting after full and frank disclosure); *Baillie v Oriental Telephone and Electric Co Ltd* [1915] 1 Ch 503, CA (insufficient notice of effect of resolution to ratify irregular payment of remuneration); *Re Bank of Hindustan, China and Japan, Campbell's Case* (1873) 9 Ch App 1 (irregular amalgamation); *Sewell's Case* (1868) 3 Ch App 131; *Re London and New York Investment Corp'n* [1895] 2 Ch 860 (increase of capital, made without the previous sanction of a resolution required by the articles, validated by a subsequent resolution); *Phosphate of Lime Co v Green* (1871) LR 7 CP 43 (what is a sufficient intimation to shareholders); *Spackman v Evans* (1868) LR 3 HL 171; *Houldsworth v Evans* (1868) LR 3 HL 263; *Re Republic of Bolivia Exploration Syndicate Ltd* [1914] 1 Ch 139 at 176 per Astbury J (approving of balance sheet). Cf *Re Railway and General Light Improvement Co, Marzetti's Case* (1880) 42 LT 206, CA. See also *Imperial Mercantile Credit Association (Liquidators) v Coleman* (1873) LR 6 HL 189; *London Financial Association v Kelk* (1884) 26 ChD 107 at 152 per Bacon V-C; and PARA 535. As to ratification after repudiation by the other party see **AGENCY** vol 1 (2008) PARA 66. A contract entered into by an agent in his own name and without authority cannot be ratified: *Keighley, Maxsted & Co v Durant* [1901] AC 240, HL. As to ratification generally see **AGENCY** vol 1 (2008) PARA 57 et seq.

6 *Briton Medical, General and Life Association v Jones (No 2)* (1889) 61 LT 384. It is possible that ratification may be effected by the individual consents of all the shareholders without a meeting; see PARA 666.

7 *Blackburn and District Benefit Building Society v Cunliffe, Brooks & Co* (1885) 29 ChD 902, CA.

8 *London Financial Association v Kelk* (1884) 26 ChD 107; *Evans v Smallcombe* (1868) LR 3 HL 249. See also *MacLae v Sutherland* (1854) 3 E & B 1; *Re Magdalena Steam Navigation Co* (1860) John 690; *Phosphate of Lime Co v Green* (1871) LR 7 CP 43; *Reuter v Electric Telegraph Co* (1856) 6 E & B 341.

9 *Re Portuguese Consolidated Copper Mines Ltd, ex p Badman, ex p Bosanquet* (1890) 45 ChD 16 at 26-27, CA, per Cotton LJ. See also *Re Land Credit Co of Ireland, ex p Overend, Gurney & Co* (1869) 4 Ch App 460 at 473 per Giffard LJ (not necessary for the directors to pass any resolution in order to make the acceptance of bills binding on the company); *Re State of Wyoming Syndicate* [1901] 2 Ch 431.

10 *Danish Mercantile Co Ltd v Beaumont* [1951] Ch 680, [1951] 1 All ER 925, CA (proceedings a nullity until ratified), approved in *Alexander Ward & Co Ltd v Samyang Navigation Co Ltd* [1975] 2 All ER 424, [1975] 1 WLR 673, HL (company without directors; two individuals brought proceedings on company's behalf to recover debt without authority; acts of individuals subsequently ratified by liquidator). See also *Airways Ltd v Bowen* [1985] BCLC 355, CA. As to a solicitor's liability for costs where he institutes proceedings without authority see **LEGAL PROFESSIONS** vol 66 (2009) PARA 884.

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(iv) Contracts

A. CONTRACTS BEFORE INCORPORATION OR COMMENCEMENT OF BUSINESS

279. Pre-incorporation contracts.

A company is not bound by contracts purporting to be entered into on its behalf by its promoters or other persons before its incorporation¹. After incorporation, it cannot ratify or adopt any such contract because in such cases there is no agency and the contract is that of the parties making it². The adoption and confirmation by a directors' resolution of a contract made before the incorporation of the company by persons purporting to act on its behalf does not create any contractual relation between it and the other party to the contract, or impose any obligation on it towards him³.

The principle that there is no agency before the company is incorporated does not apply where a company, awaiting a certificate of incorporation on change of name⁴, purports to contract in the new name; in such a case no personal liability attaches to a director for contracts authorised by him or made by him on behalf of the company in the new name⁵.

1 See PARA 63; *FJ Neale (Glasgow) Ltd v Vickery* 1973 SLT (Sh Ct) 88 (new company formed with same name as old company and taking over assets and goodwill not liable on old company's contracts). The person purporting to enter into such a contract is personally liable upon it: *Kelner v Baxter* (1866) LR 2 CP 174; *Wilson & Co v Baker, Lees & Co* (1901) 17 TLR 473. A contract which purports to be made by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as agent for it; and he is personally liable on the contract accordingly: see the Companies Act 2006 s 51 (cited in PARA 66); and the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, SI 2009/1917 (cited in PARAS 282, 288, 1825, 1833). See also *Phonogram Ltd v Lane* [1982] QB 938, [1981] 3 All ER 182, CA. A contract cannot purport to be made on behalf of a company not yet formed if no one had thought of the new company at the time of contracting: *Cotronic (UK) Ltd v Dezonie* [1991] BCLC 721, CA (parties contracted with first company which in fact had been struck off the register and dissolved and, when this was discovered years later, a second company was incorporated; it was impossible to say that the contract purported to be made by or on behalf of the second company). The person actually issuing an invoice showing chargeable VAT is liable for that amount if he issues such invoices in the name of a company before its incorporation: *Customs and Excise Comrs v Wells* [1982] 1 All ER 920. A solicitor who prepares a company's constitutional documents cannot recover his costs for doing so from the company when it is incorporated (*Re English and Colonial Produce Co Ltd* [1906] 2 Ch 435, CA); or even the fees required to be paid on the registration of the company (*Re National Motor Mail-Coach Co Ltd, Clinton's Claim* [1908] 2 Ch 515, CA, overruling the decision of Buckley J in *Re English and Colonial Produce Co Ltd* at 439, which was not appealed against on this point). See also *Smith v Brown* [1896] AC 614, PC.

2 *Kelner v Baxter* (1866) LR 2 CP 174; *Scott v Lord Ebury* (1867) LR 2 CP 255; *Re Northumberland Avenue Hotel Co* (1886) 33 ChD 16, CA; *Re Dale and Plant Ltd* (1889) 61 LT 206; *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234 at 249, CA, per Bowen LJ; *Natal Land and Colonization Co v Pauline Colliery and Development Syndicate* [1904] AC 120, PC; *Bagot Pneumatic Tyre Co v Clipper Pneumatic Tyre Co* [1901] 1 Ch 196 (affd [1902] 1 Ch 146, CA); *North Sydney Investment and Tramway Co v Higgins* [1899] AC 263 at 721, PC; *Bridgetown Co-operative Society v Whelan* [1917] 2 IR 39. See also **AGENCY** vol 1 (2008) PARA 61.

3 *North Sydney Investment and Tramway Co v Higgins* [1899] AC 263, PC; *Re Johannesburg Hotel Co, ex p Zoutpansberg Prospecting Co* [1891] 1 Ch 119 at 128, CA, per Lord Halsbury LC.

4 As to change of a company's name generally see PARAS 217-219.

5 *Oshkosh B'Gosh Inc v Dan Marbel Inc Ltd* [1989] 1 CMLR 94, [1989] BCLC 507, CA.

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280. Adoption of pre-incorporation contracts.

In order that the company may be bound by agreements entered into before its incorporation, there must be a new contract to the effect of the previous agreement¹; although this new contract may be inferred from the company's acts when incorporated², except where such acts are done in the mistaken belief that the agreement is binding³.

If the company has notice of a contract made before its incorporation between the persons under whom it claims property of which it takes possession and a former owner of the property, whereby a charge or incumbrance was imposed on the property, the company takes subject to the charge or incumbrance, although it is not liable to be sued for breach of the contract⁴.

It is the duty of directors of a company which is formed to adopt and enter into a contract to make careful and full inquiries before finally committing the company to it and to act as prudent men of affairs would in their own business⁵.

1 *Melhado v Porto Alegre Rly Co* (1874) LR 9 CP 503; *Re Hereford and South Wales Waggon and Engineering Co* (1876) 2 ChD 621, CA; *Re Empress Engineering Co* (1880) 16 ChD 125 at 128, CA, per Jessel MR (and see at 130 per James LJ, criticising *Spiller v Paris Skating Rink Co* (1878) 7 ChD 368); *Re Rotherham Alum and Chemical Co* (1883) 25 ChD 103, CA; *Tinnevelly Sugar Refining Co Ltd v Mirrlees, Watson and Varyan Co Ltd* (1894) 31 SLR 823. Cf *Hutchison v Surrey Consumers Gaslight and Coke Association* (1851) 11 CB 689; *Payne v New South Wales Coal and Intercolonial Steam Navigation Co* (1854) 10 Exch 283; *Kelner v Baxter* (1866) LR 2 CP 174; *Natal Land and Colonization Co v Pauline Colliery and Development Syndicate* [1904] AC 120, PC.

2 *Re Empress Engineering Co* (1880) 16 ChD 125 at 128, CA, per Jessel MR; *Re Rotherham Alum and Chemical Co* (1883) 25 ChD 103, CA; *Howard v Patent Ivory Manufacturing Co, Re Patent Ivory Manufacturing Co* (1888) 38 ChD 156. See also *Browning v Great Central Mining Co* (1860) 5 H & N 856; *Touche v Metropolitan Railway Warehousing Co* (1871) 6 Ch App 671 (and as to this case see *Gandy v Gandy* (1885) 30 ChD 57 at 67, CA, per Cotton LJ).

3 *Re Northumberland Avenue Hotel Co* (1886) 33 ChD 16, CA; *Bagot Pneumatic Tyre Co v Clipper Pneumatic Tyre Co* [1901] 1 Ch 196 at 203 per Kekewich J (affd [1902] 1 Ch 146, CA).

4 *Werderman v Société Générale d'Electricité* (1881) 19 ChD 246, CA, as explained in *Bagot Pneumatic Tyre Co v Clipper Pneumatic Tyre Co* [1902] 1 Ch 146 at 157, CA, per Vaughan Williams LJ. It may be, however, that the original assignor might succeed by suing in the name of the intermediate assignee: *Werderman v Société Générale d'Electricité*, as explained in *Bagot Pneumatic Tyre Co v Clipper Pneumatic Tyre Co* at 161-162 per Romer LJ. As to lien see *Gifford v Mashonaland Development Co (Willoughby's) Ltd* (1902) 18 TLR 274, HL; and see generally **LIEN**.

5 See *Overend, Gurney & Co v Gibb and Gibb* (1872) LR 5 HL 480; *Twycross v Grant* (1877) 2 CPD 469 at 494, CA, per Bramwell LJ. As to the disclosures to be made to the company as regards profit and other matters see PARA 60. A director is under a statutory duty (amongst others) to exercise reasonable care, skill and diligence in relation to the company's affairs: see the Companies Act 2006 s 174; and PARA 548.

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281. Contracts made before company entitled to commence business.

A company¹ that is a public company² must not do business³ or exercise any borrowing powers⁴ unless the registrar of companies⁵ has issued it with a certificate (a 'trading certificate') entitling it to do so⁶.

Any contract made by a company before the issue of the registrar's certificate is, nevertheless, not invalid on that account⁷. If, however, the company fails to comply with its obligations under any such contract within 21 days from being called upon to do so, the directors⁸ of the company are jointly and severally liable to indemnify any other party to the transaction in respect of any loss or damage suffered by him by reason of the company's failure to comply with its obligations⁹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 I.e. a company that is registered as a public company on its original incorporation rather than by virtue of its re-registration as a public company: see the Companies Act 2006 s 761(1); and PARA 74. As to incorporation by registration under the Companies Act 2006 see PARA 111 et seq; and as to the re-registration of a private company as a public company under the Companies Act 2006 see PARAS 168-172. As to the meanings of 'private company' and 'public company' see PARA 102. See also PARAS 72, 73.

3 As to the meaning of 'business' generally see PARA 1 note 1.

4 As to a company's borrowing powers see PARA 1256 et seq.

5 As to the meaning of 'registrar of companies' see PARA 131 note 2.

6 See the Companies Act 2006 s 761(2); and PARA 74. As to the meaning of 'trading certificate' see PARA 74.

7 See the Companies Act 2006 s 767(3); and PARAS 76, 590. However, if a company does business or exercises borrowing powers in contravention of s 761 (see PARA 74), an offence is committed by the company, and by any officer of it who is in default: see s 767(1), (2); and PARA 74. As to the meaning of 'officer' see PARA 607; and as to the meaning of 'officer in default' see PARA 315.

8 As to a company's directors see PARA 478 et seq.

9 See the Companies Act 2006 s 767(3); and PARAS 76, 590. The directors who are so liable are those who were directors at the time the company entered into the transaction: see s 767(4); and PARAS 76, 1263.

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B. FORM OF CONTRACT; AUTHENTICATION OF DOCUMENTS

282. Company contracts.

Under the law of England and Wales¹ a contract may be made²:

- 590 (1) by a company³, by writing under its common seal⁴; or
 591 (2) on behalf of a company, by any person acting under its authority, express or implied⁵;

and any formalities required by law in the case of a contract made by an individual also apply, unless a contrary intention appears, to a contract made by or on behalf of a company⁶.

Contracts may be validly made between companies on a Sunday⁷.

1 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

2 Companies Act 2006 s 43(1).

The Secretary of State has made provision by regulations (see the Companies Act 2006 s 1045; and PARA 1825) applying s 43 to overseas companies, but with modifications: see the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, SI 2009/1917, reg 4. As to the meaning of 'overseas company' see PARA 1824. The provisions of the Companies Act 2006 s 43 apply also to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 3: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 Companies Act 2006 s 43(1)(a). See note 2. A company may have a common seal, but need not have one: see s 45; and PARA 283. As to contracts under seal see further PARA 287; and as to written contracts see PARA 284.

Contracts required in the case of individuals to be under seal are those which are made without valuable consideration; conveyances of land, leases, assignments and surrenders of leases, assignments of ships and shares in ships must also in most cases be under seal: see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 10 et seq.

5 Companies Act 2006 s 43(1)(b). See note 2.

6 Companies Act 2006 s 43(2). See note 2. See also PARA 66 note 2. As to the name of the company being engraved on its seal see PARA 221. As to appointing an attorney to execute deeds see PARA 289. As to the company's power to have an official seal for use abroad see PARA 290. As to execution of deeds by corporations generally see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1263 et seq. See also **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 40 et seq.

7 *Rolloswin Investments Ltd v Chromolit Portugal Cutelarias e Produtos Metálicos SARL* [1970] 2 All ER 673, [1970] 1 WLR 912. See also **TIME** vol 97 (2010) PARA 324 et seq.

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283. Company seal.

A company¹ may have a common seal², but need not have one³.

A company which has a common seal must have its name⁴ engraved in legible characters on the seal⁵. If a company fails to comply with this requirement⁶, an offence is committed by the company, and by every officer of the company who is in default⁷. An officer of a company, or a person acting on behalf of a company, also commits an offence if he uses, or authorises the use of, a seal purporting to be a seal of the company on which its name is not engraved as so required⁸. A person guilty of either such offence⁹ is liable on summary conviction to a fine not exceeding level 3 on the standard scale¹⁰.

Under the model articles of association¹¹, any common seal may only be used by the authority of the directors¹², who may decide by what means and in what form any common seal is to be used¹³. Unless otherwise decided by the directors, if the company has a common seal and it is affixed to a document, the document must also be signed by at least one authorised person¹⁴ in the presence of a witness who attests the signature¹⁵.

Where the company is a public company, the directors also may decide under the model articles by what means and in what form any securities seal is to be used¹⁶; and if the company has a securities seal, it may only be affixed to securities by the company secretary or a person authorised to apply it to securities by the company secretary¹⁷. If a public company has an official seal for use abroad, it may only be affixed to a document if its use on that document, or documents of a class to which it belongs, has been authorised by a decision of the directors¹⁸.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the use of the company's seal for making company contracts see PARA 282; for use in the execution of documents see PARA 288; for use outside the United Kingdom see PARA 290; and for use for sealing securities issued by the company, or for sealing documents creating or evidencing securities so issued, see PARA 291. As to the appointment of an attorney to execute deeds see PARA 289. See also PARAS 270, 287.

3 Companies Act 2006 s 45(1).

The Secretary of State may make provision by regulations applying the Companies Act 2006 ss 43-52 (see PARAS 282, 284 et seq) to overseas companies, subject to such exceptions, adaptations or modifications as may be specified in the regulations: see s 1045; and PARA 1825. However, at the date at which this volume states the law, no such provision has been made in relation to s 45.

The provisions of the Companies Act 2006 s 45(1) apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 3: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. In the case of an unregistered company, any reference to the common seal of the company must be read as referring to the common or other authorised seal of the company: see the Unregistered Companies Regulations 2009, SI 2009/2436, reg 5(1)(d); and PARA 1666.

4 As to the requirements for, and limitations on, the name of a company registered under the Companies Acts see PARA 200 et seq.

5 Companies Act 2006 s 45(2). As to the name of the company being engraved on its common seal see further PARA 221. Where a bond had been entered into as a deed, but the company obtaining the bond had used a seal engraved with its trading name rather than its registered name, non-compliance with the Companies Act 1985 s 350 (see now the Companies Act 2006 s 45) did not in itself render the bond a nullity or unenforceable by a third party beneficiary against the surety which had validly sealed the bond: *OTV Birwelco Ltd v Technical and General Guarantee Co Ltd* [2002] EWHC 2240 (TCC), [2002] 4 All ER 668, [2002] 2 BCLC 723.

6 It fails to comply with the Companies Act 2006 s 45(2) (see the text and notes 4-5): see s 45(3).

7 Companies Act 2006 s 45(3). As to the meaning of 'officer' see PARA 607; and as to the meaning of 'officer in default' see PARA 315.

8 Companies Act 2006 s 45(4). The text refers to a seal of the company on which its name is not engraved as required by s 45(2) (see the text and notes 4-5): see s 45(4).

9 It is guilty of an offence under the Companies Act 2006 s 45: see s 45(5).

10 Companies Act 2006 s 45(5). As to the standard scale see PARA 1622.

11 As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

12 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 Pt 5 art 49(1); Sch 2 Pt 4 art 35(1); Sch 3 Pt 5 art 81(1). Under the Companies (Tables A to F) Regulations 1985, SI 1985/805, the seal may only be used by the authority of the directors or of a committee of directors authorised by the directors: see reg 2, Schedule, Table A art 101. As to a company's directors see PARA 478 et seq.

13 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 Pt 5 art 49(2); Sch 2 Pt 4 art 35(2); Sch 3 Pt 5 art 81(2). This wording is not used in the Companies (Tables A to F) Regulations 1985, SI 1985/805.

14 For these purposes, an authorised person is any director of the company, the company secretary (if any), or any person authorised by the directors for the purpose of signing documents to which the common seal is applied: Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 Pt 5 art 49(4); Sch 2 Pt 4 art 35(4); Sch 3 Pt 5 art 81(4). This wording is not used in the Companies (Tables A to F) Regulations 1985, SI 1985/805. As to the company secretary and other officers see PARA 603. Private companies are not required to have a secretary: see PARA 601.

15 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 Pt 5 art 49(3); Sch 2 Pt 4 art 35(3); Sch 3 Pt 5 art 81(3). The wording used for the purposes of the Companies (Tables A to F) Regulations 1985, SI 1985/805, allows the directors to determine who is to sign any instrument to which the seal is affixed and, unless otherwise so determined, it must be signed by a director and by the secretary or by a second director: see art 101.

16 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 Pt 5 art 81(2).

17 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 Pt 5 art 81(6). For these purposes, references to the securities seal being affixed to any document include the reproduction of the image of that seal on or in a document by any mechanical or electronic means which has been approved by the directors in relation to that document or documents of a class to which it belongs: Sch 3 Pt 5 art 81(7). As to documents or information sent or supplied by electronic means see PARA 679.

18 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 Pt 5 art 81(5).

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284. Written contracts made by, or on behalf of, a company.

A contract which, if made between private persons, would be required under law to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed¹ by any person acting under its authority, express or implied². A contract so made is effectual in law and binds the company and its successors and all other parties to it; it may be varied or discharged in the same manner in which it is authorised so to be made.

It is not essential to the validity of a contract made on behalf of a company that the company should be described with precision, since the normal rule can be applied that a contract was to be construed by reference to the surrounding circumstances or in the light of the known facts³.

Many contracts when made by individuals are required by statute to be in writing and duly signed⁴; and such a contract, if made by a company, must comply with the like formalities⁵. A

director's signature to a resolution referring to a draft agreement may be sufficient for this purpose⁶.

1 The signature may consist of the company's stamp: *McDonald v John Twinn Ltd* [1953] 2 QB 304, [1953] 2 All ER 589, CA (apprenticeship agreement). An instrument which fails as a deed because of lack of delivery may yet take effect as an instrument in writing: *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 375, [1961] 1 All ER 277, CA.

2 See the Companies Act 2006 s 43(1); and PARA 282. See also *Beer v London and Paris Hotel Co* (1875) LR 20 Eq 412. As to bills and notes see PARAS 292-295. The Corporate Bodies' Contracts Act 1960 (see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1272 et seq) does not apply to a company registered under the Companies Act 2006, to a company incorporated outside the United Kingdom, or to a limited liability partnership: Corporate Bodies' Contracts Act 1960 s 2 (substituted by SI 2009/1941). As to the meaning of 'United Kingdom' see PARA 1 note 5. As to formation and registration under the Companies Act 2006 see PARA 102 et seq. As to companies incorporated outside the United Kingdom ('overseas companies') see PARA 1824 et seq. As to limited liability partnerships incorporated in the United Kingdom see **PARTNERSHIP** vol 79 (2008) PARA 234 et seq.

3 *F Goldsmith (Sicklesmere) Ltd v Baxter* [1970] Ch 85, [1969] 3 All ER 733 (company named as 'Goldsmith Coaches (Sicklesmere) Ltd').

4 See **CONTRACT** vol 9(1) (Reissue) PARA 623 et seq; **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 8.

5 See the Companies Act 2006 s 43(2); and PARA 282.

6 *Jones v Victoria Graving Dock Co* (1877) 2 QBD 314, CA; *Howard v Patent Ivory Manufacturing Co, Re Patent Ivory Manufacturing Co* (1888) 38 ChD 156; *Wilson v West Hartlepool Rly Co* (1865) 2 De GJ & Sm 475.

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285. Parol contracts.

A contract which, if made between private persons, would under law be valid, although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied¹. A contract so made is effectual in law and binds the company and its successors; it may be varied or discharged in the same manner in which it is authorised so to be made².

A company is liable, equally with an individual, to be estopped by the acts of its agents, for example by a parol consent to an act, even though no resolution on the subject has been passed³.

1 See the Companies Act 2006 s 43(1); and PARA 282.

2 This proposition contains the provisions of the Companies Act 1985 s 36(2) (as originally enacted). Those provisions are not re-enacted in the Companies Act 2006 s 43 (see PARA 282) but the proposition nevertheless remains correct.

3 See *Bourke v Alexandra Hotel Co Ltd* (1877) 25 WR 393 (on appeal 25 WR 782, CA).

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286. Assignment of contracts.

The question how far the benefit of a commercial contract is assignable by or to a company is decided on the same principles as in the case of an individual, and depends on the circumstances of each case¹.

¹ *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414, HL; *Kemp v Baerselman* [1906] 2 KB 604, CA. See also **CONTRACT** vol 9(1) (Reissue) PARA 926.

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C. EXECUTION OF DOCUMENTS

287. Execution of documents under seal.

A document is executed by a company by the affixing of its common seal¹; but while a company may have a common seal, there is no requirement to have one². If the company does have a common seal, and if it has adopted prescribed articles of association³, its articles will almost invariably contain provisions as to its affixation⁴. If these provisions are apparently complied with, the company will be bound as against a person dealing with it in good faith⁵. If no particular formalities are prescribed, whoever, as a matter of practice, manages the affairs of a company may use the seal for those acts which he is authorised to perform⁶.

A document that is a forgery does not ordinarily bind the company⁷.

¹ As to use of a company's common seal in the execution of documents see PARA 288; as to a company's common seal generally see PARA 283. As to the use of the company's seal for making company contracts see PARA 282; for use outside the United Kingdom see PARA 290; and for use for sealing securities issued by the company, or for sealing documents creating or evidencing securities so issued, see PARA 291. As to the appointment of an attorney to execute deeds abroad see PARA 289. See also PARA 270.

² See the Companies Act 2006 s 45; and PARA 283.

³ As to articles of association generally see PARA 228 et seq.

⁴ See eg the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A art 101; the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 5 art 49; reg 3, Sch 2 Pt 4 art 35; reg 4, Sch 3 Pt 5 art 81; and PARA 283.

⁵ *Re County Life Assurance Co* (1870) 5 Ch App 288 at 293 per Giffard LJ. See also *Re Athenaeum Life Assurance Society, ex p Eagle Insurance Co* (1858) 4 K & J 549; *Re Barned's Banking Co, ex p Contract Corp'n* (1867) 3 Ch App 105; *Gloucester County Bank v Rudry Merthyr Steam and House Coal Colliery Co* [1895] 1 Ch 629, CA; *Ruben v Great Fingall Consolidated* [1906] AC 439, HL; *Re Fireproof Doors Ltd, Umney v Fireproof Doors Ltd* [1916] 2 Ch 142. Cf *Mayor Constables and Co of Merchants of the Staple of England v Governors and Co of the Bank of England* (1887) 21 QBD 160, CA; *Davies v R Bolton & Co* [1894] 3 Ch 678. Directors who subscribe a deed in accordance with articles of association are not signing as witnesses attesting its execution: see *Shears v Jacob* (1866) LR 1 CP 513; *Deffell v White* (1866) LR 2 CP 144 (bills of sale).

Under the Companies Act 2006, in favour of a purchaser, a document is deemed to have been duly executed by a company if it purports to be signed on behalf of the company either by two authorised signatories, or by a director of the company in the presence of a witness who attests the signature: see s 44(5); and PARA 288.

6 *Re Barnard's Banking Co, ex p Contract Corp'n* (1867) 3 Ch App 105 at 116 per Lord Cairns LJ.

7 *Ruben v Great Fingall Consolidated* [1906] AC 439, HL. However, there may be circumstances in which a company is estopped from denying the validity of a document (see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 reissue) PARA 72) and the company may be bound where the person executing the document has ostensible authority to warrant that all formalities relating to execution have been complied with (see *Lovett v Carson Country Homes Ltd* [2009] EWHC 1143 (Ch), [2009] 2 BCLC 196 (distinguishing *Ruben v Great Fingall Consolidated*); and see PARA 387). The court in *Lovett v Carson Country Homes Ltd* also doubted (obiter) whether the Companies Act 2006 s 44(5) (see also note 5) should be subject to an implied proviso that it operates subject to *Ruben v Great Fingall Consolidated*: see *Lovett v Carson Country Homes Ltd* at [99].

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288. Execution of documents by signature.

Under the law of England and Wales¹, a document is executed by a company² either: (1) by the affixing of its common seal³; or (2) by signature⁴.

If head (2) above applies, a document is validly executed by a company only if it is signed on behalf of the company either by two authorised signatories⁵, or by a director of the company in the presence of a witness who attests the signature⁶. A document signed in this way⁷ and expressed, in whatever words, to be executed by the company has the same effect as if executed under the common seal of the company⁸.

Where a document is to be signed by a person on behalf of more than one company, it is not duly signed by that person for these purposes⁹ unless he signs it separately in each capacity¹⁰.

In favour of a purchaser¹¹, a document is deemed to have been duly executed by a company if it purports to be signed on behalf of the company either by two authorised signatories, or by a director of the company in the presence of a witness who attests the signature¹².

A document is validly executed by a company as a deed¹³ if, and only if it is duly executed by the company¹⁴, and it is delivered as a deed¹⁵.

1 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

2 The Companies Act 2006 s 44 applies to a document that is (or purports to be) executed by a company in the name of or on behalf of another person whether or not that person is also a company: s 44(8). As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the execution of deeds or other documents by an attorney appointed by a company for the purpose see PARA 289. A document that is a forgery does not ordinarily bind the company: see PARA 287.

The Secretary of State has made provision by regulations (see the Companies Act 2006 s 1045; and PARA 1825) applying ss 44, 46 to overseas companies, but with modifications: see the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, SI 2009/1917, reg 4. As to the meaning of 'overseas company' see PARA 1824. The provisions of the Companies Act 2006 ss 44, 46 apply also to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 3: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Companies Act 2006 s 44(1)(a). See note 2. A company may have a common seal, but need not have one: see s 45; and PARA 283.

4 Companies Act 2006 s 44(1)(b). Where head (2) in the text applies, the procedure for execution must be in accordance with s 44(2)-(8) (see the text and notes 2, 5-12): see s 44(1)(b). See note 2.

5 Companies Act 2006 s 44(2)(a). For these purposes, the following are 'authorised signatories': (1) every director of the company (s 44(3)(a)); and (2) in the case of a private company with a secretary or a public company, the secretary (or any joint secretary) of the company (s 44(3)(b)). References in s 44 to a document being (or purporting to be) signed by a director or secretary are to be read, in a case where that office is held by a firm, as references to its being (or purporting to be) signed by an individual authorised by the firm to sign on its behalf: s 44(7). See note 2. As to the meaning of 'director' see PARA 478; and as to the meaning of 'firm' see PARA 112 note 14. As to the meanings of 'private company' and 'public company' see PARA 102. As to the company secretary and other officers see PARA 603. Private companies are not required to have a secretary: see PARA 601.

6 Companies Act 2006 s 44(2)(b). See note 2.

7 Ie in accordance with the Companies Act 2006 s 44(2) (see the text and notes 5-6): see s 44(4).

8 Companies Act 2006 s 44(4). See note 2. See *OTV Birwelco Ltd v Technical and General Guarantee Co Ltd* [2002] EWHC 2240 (TCC), [2002] 4 All ER 668, [2002] 2 All ER (Comm) 1116, [2002] 2 BCLC 723 (there is nothing in the Companies Act 1985 s 36A (see now the Companies Act 2006 s 44) which requires a company to use its registered name rather than its trading name in the body of a deed or bond, as such a requirement would abrogate the common law rule that extraneous evidence was admissible to identify a contracting party when its identity was not clear from the face of the deed).

9 Ie for the purposes of the Companies Act 2006 s 44: see s 44(6).

10 Companies Act 2006 s 44(6). See note 2.

11 For these purposes, 'purchaser' means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property: Companies Act 2006 s 44(5). See note 2. See also *Lovett v Carson Country Homes Ltd* [2009] EWHC 1143 (Ch), [2009] All ER (D) 95 (Jun) (forbearance may be valuable consideration for these purposes).

12 Companies Act 2006 s 44(5). The text refers to a document that purports to be signed in accordance with s 44(2) (see the text and notes 5-6): see s 44(5). See notes 2, 5. See also *Lovett v Carson Country Homes Ltd* [2009] EWHC 1143 (Ch), [2009] All ER (D) 95 (Jun) (company bound by debenture on which director's signature had been forged; bank had been a 'purchaser' for the purpose of the Companies Act 2006 s 44(5), and the debenture 'purported' (ie that was the impression conveyed by the document) to have been signed on behalf of the company by two authorised signatories).

In relation to the execution of a document by a company where the Companies Act 2006 s 44(2) applies by virtue of the Land Registration Act 2002 s 91(4) (electronic dispositions), the effect of s 91(4) is modified in relation to the Companies Act 2006 s 44(2) and the other provisions of s 44 apply accordingly: see the Land Registration Act 2002 s 91(9); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 1051.

13 Ie for the purposes of the Law of Property (Miscellaneous Provisions) Act 1989 s 1(2)(b) (see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 reissue) PARA 8): see the Companies Act 2006 s 46(1).

14 Companies Act 2006 s 46(1)(a).

15 Companies Act 2006 s 46(1)(b). For the purposes of s 46(1)(b), a document is presumed to be delivered upon its being executed, unless a contrary intention is proved: s 46(2).

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289. Appointment of attorney to execute deeds.

Under the law of England and Wales¹, a company² may, by instrument executed as a deed, empower any person, either generally or in respect of specified matters, as its attorney to

execute deeds or other documents on its behalf³. A deed or other document so executed, whether in the United Kingdom⁴ or elsewhere, has effect as if executed by the company⁵.

1 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 Companies Act 2006 s 47(1). The provisions of s 47 apply where the instrument empowering a person to act as a company's attorney is executed on or after 1 October 2009: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 16.

The Secretary of State may make provision by regulations applying the Companies Act 2006 ss 43-52 (see PARAS 282 et seq, 290 et seq) to overseas companies, subject to such exceptions, adaptations or modifications as may be specified in the regulations: see s 1045; and PARA 1825. However, at the date at which this volume states the law, no such provision has been made in relation to s 47. As to the meaning of 'overseas company' see PARA 1824.

4 As to the meaning of 'United Kingdom' see PARA 1 note 5.

5 Companies Act 2006 s 47(2).

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290. Company's official seal for use outside the United Kingdom.

A company¹ that has a common seal² may have for use outside the United Kingdom³ an official seal⁴, which must be a facsimile of the company's common seal, with the addition on its face of the place or places where it is to be used⁵.

A company having an official seal for use outside the United Kingdom may, by writing under its common seal, authorise any person appointed for the purpose to affix the official seal to any deed or other document to which the company is party⁶.

As between the company and a person dealing with such an agent, the agent's authority continues, during the period mentioned in the instrument conferring the authority⁷, or, if no period is mentioned, then until notice of the revocation or determination of the agent's authority has been given to the person dealing with him⁸.

The person affixing the official seal must certify in writing on the deed or other document to which the seal is affixed the date on which, and the place at which, it is affixed⁹.

When duly affixed to a document, the official seal has the same effect as the company's common seal¹⁰.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 A company may have a common seal, but need not have one: see the Companies Act 2006 s 45; and PARA 283.

3 As to the meaning of 'United Kingdom' see PARA 1 note 5.

4 Companies Act 2006 s 49(1).

The Secretary of State may make provision by regulations applying the Companies Act 2006 ss 43-52 (see PARAS 282 et seq, 291 et seq) to overseas companies, subject to such exceptions, adaptations or modifications as may be specified in the regulations: see s 1045; and PARA 1825. However, at the date at which this volume states the law, no such provision has been made in relation to s 49. As to the meaning of 'overseas company' see PARA 1824.

5 Companies Act 2006 s 49(2).

6 Companies Act 2006 s 49(4).

7 Companies Act 2006 s 49(5)(a).

8 Companies Act 2006 s 49(5)(b).

9 Companies Act 2006 s 49(6).

10 Companies Act 2006 s 49(3).

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291. Company's official seal for share certificates etc.

A company¹ that has a common seal² may have, for use for sealing securities issued by the company³, or for sealing documents creating or evidencing securities so issued⁴, an official seal⁵, which must be a facsimile of the company's common seal, with the addition on its face of the word 'Securities'⁶. When duly affixed to a document, the official seal has the same effect as the company's common seal⁷.

A company which was incorporated before 12 February 1979⁸ and which has such an official seal⁹ may use the seal for sealing such securities and documents¹⁰, notwithstanding anything in any instrument constituting or regulating the company or in any instrument made before that date which relates to any securities issued by the company¹¹. Any provision of such an instrument which requires any such securities or documents to be signed does not apply to the securities or documents if they are sealed with that seal¹².

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 A company may have a common seal, but need not have one: see the Companies Act 2006 s 45; and PARA 283.

3 Companies Act 2006 s 50(1)(a).

The provisions of the Companies Act 2006 s 50 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 3: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. The Secretary of State also may make provision by regulations applying the Companies Act 2006 ss 43-52 (see PARAS 282 et seq, 293) to overseas companies, subject to such exceptions, adaptations or modifications as may be specified in the regulations: see s 1045; and PARA 1825. However, at the date at which this volume states the law, no such provision has been made in relation to s 50. As to the meaning of 'overseas company' see PARA 1824.

4 Companies Act 2006 s 50(1)(b).

5 Companies Act 2006 s 50(1).

6 Companies Act 2006 s 50(2)(a). A share certificate evidenced in this way imputes a prima facie entitlement to the shares: see PARA 381.

7 Companies Act 2006 s 50(2)(b).

8 le the date on which the Stock Exchange (Completion of Bargains) Act 1976 s 2(2), from which the Companies Consolidation (Consequential Provisions) Act 1985 s 11 is derived, was brought into force. As to the Stock Exchange (Completion of Bargains) Act 1976 see PARA 13.

9 le such an official seal as is mentioned in the Companies Act 2006 s 50 (see the text and notes 1-7): see the Companies Consolidation (Consequential Provisions) Act 1985 ss 11(1), 32; Interpretation Act 1978 s 17(2)(b).

10 le such securities and documents as are mentioned in the Companies Act 2006 s 50 (see the text and notes 1-7): see the Companies Consolidation (Consequential Provisions) Act 1985 ss 11(1), 32; Interpretation Act 1978 s 17(2)(b).

11 Companies Consolidation (Consequential Provisions) Act 1985 ss 11(1), 32; Interpretation Act 1978 s 17(2)(b).

12 Companies Consolidation (Consequential Provisions) Act 1985 s 11(2).

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D. BILLS AND NOTES

292. Power to deal with bills and notes.

A non-trading company has no general power to incur liability on bills of exchange or promissory notes¹ and, although it may transfer the property in a bill or note, it cannot incur liability on it unless its instrument of incorporation expressly or by clear implication confers the power². The Companies Acts³ do not give to every company incorporated under it, as an incident of its incorporation⁴, the power of accepting bills or issuing negotiable instruments⁵, but leaves such power to be determined on the construction of its constitution⁶. If the constitutional documents are silent on the subject, the power may be inferred where the nature of the company's business involves such a power⁷.

A proviso in a bill of exchange by an unlimited company professing to limit the liability under the bill is void⁸.

1 As to liability of the parties on bills of exchange or promissory notes generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1574 et seq. As to the personal liability of a company's officers see PARA 295.

2 *Peruvian Rlys Co v Thames and Mersey Marine Insurance Co, Re Peruvian Rlys Co* (1867) 2 Ch App 617 at 623 per Lord Cairns LJ. As to inferring the power from the course of dealing see *Bramah v Roberts* (1837) 5 Scott 172. The following companies have been held not to be trading companies which have as such the implied power: a waterworks company (*Broughton v Manchester and Salford Waterworks Co* (1819) 3 B & Ald 1); a cemetery company (*Steele v Harmer* (1845) 14 M & W 831); a gas company (*Bramah v Roberts* (1837) 5 Scott 172); a salt company (*Bult v Morrell* (1840) 12 Ad & El 745); a salvage company (*Thompson v Universal Salvage Co* (1848) 1 Exch 694); a mining company (*Hawtayne v Bourne* (1841) 7 M & W 595; *Dickinson v Valpy* (1829) 10 B & C 128 at 137); a railway company incorporated by statute (*Bateman v Mid-Wales Rly Co* (1866) LR 1 CP 499). 'Trade' probably has a more restricted significance than 'business': see PARA 1 note 1.

Companies with unrestricted objects under the Companies Act 2006 (see PARA 240) will have the powers referred to in the text, the exercise of which will be limited only by the statutory duty imposed on a director to act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole: see s 172; and PARA 544.

3 As to the meaning of the 'Companies Acts' see PARA 16.

4 As to incorporation by registration under the Companies Act 2006, and its effects, see PARA 111 et seq.

5 As to provision made in the Companies Act 2006 in relation to the making, acceptance or indorsement of bills of exchange or promissory notes on behalf of a company: see PARA 293.

6 *Peruvian Rlys Co v Thames and Mersey Marine Insurance Co, Re Peruvian Rlys Co* (1867) 2 Ch App 617. See also note 2. As to the meaning of references in the Companies Acts to a company's constitution see PARA 227.

7 *Re General Estates Co, ex p City Bank* (1868) 3 Ch App 758 (where a land and building company was held to have the power). See also *East London Waterworks Co v Bailey* (1827) 4 Bing 283 at 288; *Slark v Highgate Archway Co* (1814) 5 Taunt 792; *Murray v East India Co* (1821) 5 B & Ald 204; *Dickinson v Valpy* (1829) 10 B & C 128; *Steele v Harmer* (1845) 14 M & W 831. As to the power of a liquidator see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 577 et seq.

8 *Re State Fire Insurance Co, ex p Meredith's and Conner's Claim* (1863) 1 New Rep 510. As to the meaning of 'unlimited company' see PARA 102.

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293. Signature on bill or note.

Where, in the case of an individual, a bill of exchange or promissory note is required to be signed¹, it is sufficient, in the case of a company, if it is signed on behalf of the company by any person acting on its authority or if it is sealed with the corporate seal². However, a company's bill or note is not required to be under seal³.

A bill of exchange or promissory note is deemed to have been made, accepted or indorsed on behalf of a company⁴ if made, accepted or indorsed in the name of, or by or on behalf or on account of, the company by a person acting under its authority⁵. It is not necessary that a formal resolution of the directors should be passed that bills should be accepted⁶; and, where a director without authority accepts bills on behalf of a company whose articles give power to delegate the duty of accepting bills to one director, the company is liable to a holder in due course, even though the delegation has not in fact taken place⁷.

1 Under the Bills of Exchange Act 1882: see s 91; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1465-1466.

2 See the Bills of Exchange Act 1882 s 91; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1465-1466. See also *Re General Estates Co, ex p City Bank* (1868) 3 Ch App 758 at 762 per Page Wood LJ, and at 763 per Selwyn LJ; and PARA 284. A company may have a common seal, but need not have one: see the Companies Act 2006 s 45; and PARA 283. As to the use of a company's common seal in the execution of documents generally see PARA 288.

3 See the Bills of Exchange Act 1882 s 91; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1465-1466.

4 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

5 Companies Act 2006 s 52. See also *Re Barber & Co, ex p Agra Bank* (1870) LR 9 Eq 725. Cf *Herald v Connah* (1876) 34 LT 885.

The Secretary of State may make provision by regulations applying the Companies Act 2006 ss 43-52 (see PARA 282 et seq) to overseas companies, subject to such exceptions, adaptations or modifications as may be specified in the regulations: see s 1045; and PARA 1825. However, at the date at which this volume states the

law, no such provision has been made in relation to s 52. As to the meaning of 'overseas company' see PARA 1824.

6 *Re Land Credit Co of Ireland, ex p Overend, Gurney & Co* (1869) 4 Ch App 460 at 473 per Giffard LJ.

7 *Dey v Pullinger Engineering Co* [1921] 1 KB 77 (dissenting from *Premier Industrial Bank Ltd v Carlton Manufacturing Co Ltd and Crabtree Ltd* [1909] 1 KB 106). Cf *Kreditbank Cassel GmbH v Schenkers Ltd* [1927] 1 KB 826, CA (branch manager of bank); *AL Underwood Ltd v Bank of Liverpool and Martins* [1924] 1 KB 775, CA; *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48 (as to being put on inquiry). See also PARA 268. A signature 'for and on behalf of a company, X, director' is not a signature by procuration within the Bills of Exchange Act 1882 s 25 (as to which see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1474), and does not put the person taking the bill on inquiry as to the actual authority of the director to sign: *Alexander Stewart & Son of Dundee Ltd v Westminster Bank Ltd* [1926] WN 126; revsd on other grounds [1926] WN 271, CA.

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294. Holders' duties to inquire.

A holder in due course¹ is not concerned to see that the agent's authority has been strictly followed². Where no express authority has been given to the agent, the company is not liable if the bill is given to meet an unusual occurrence or emergency not in the ordinary course of business³. Where a holder has notice that the agent had only a limited authority, he is in the same position as if he had inquired into the extent of that authority⁴.

1 As to the meaning of 'holder in due course' see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1407.

2 *Re Land Credit Co of Ireland, ex p Overend, Gurney & Co* (1869) 4 Ch App 460 (where bills were authorised on condition that security was deposited); *Hambro v Burnard* [1904] 2 KB 10, CA (where the agent acted for his own purposes); *Thompson v Wesleyan Newspaper Association* (1849) 8 CB 849 (where the authorised amount was exceeded); *Re State Fire Insurance Co, ex p Meredith's and Conner's Claim* (1863) 1 New Rep 510.

3 *Re Cunningham & Co Ltd, Simpson's Claim* (1887) 36 ChD 532; *Hawtayne v Bourne* (1841) 7 M & W 595; *Re Moseley Green Coal and Coke Co, ex p Official Liquidator* (1864) 10 LT 819.

4 *Reckitt v Barnett, Pembroke and Slater Ltd* [1929] AC 176, HL; *John v Dodwell & Co* [1918] AC 563, PC; *Bryant, Powis and Bryant v La Banque du Peuple* [1893] AC 170, PC; *Gompertz v Cook* (1903) 20 TLR 106; *Reid v Rigby & Co* [1894] 2 QB 40; *Stagg v Elliott* (1862) 12 CBNS 373; *National Bank of Scotland Ltd v Dewhurst, The Gonchar and The Izgar* (1896) 1 Com Cas 318; *Jacobs v Morris* [1902] 1 Ch 816, CA. See further **AGENCY** vol 1 (2008) PARA 123.

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295. Liability of company's officers.

If the company is liable on a bill of exchange¹, its authorised agents are not personally liable, even though they used words apparently sufficient to render them so liable, such as 'I promise' or 'We promise'², provided the signatures are expressed to be on behalf of the company as

principal or in a representative capacity³. Thus if a bill is directed to a company and accepted by its directors describing themselves as directors of the (named) company, the company alone is liable⁴; but words describing them as being officers of the company may not of themselves exempt them⁵.

Where a company has no power to accept, an acceptance by directors and secretary 'for and on behalf of the company' makes them personally liable on a warranty of authority⁶, but there is no implied warranty that the company has funds at its bank to meet a cheque or acceptance⁷. If a loan is made to a director who has become liable on a bill accepted for the company's purposes, it is a question of evidence whether the loan is made to him personally or to the company⁸.

The company's name is not properly mentioned on a bill of exchange or similar document if the word 'limited' or words 'public limited company' (or their Welsh equivalents) is or are omitted from the name on the document⁹, or if additions are made to it¹⁰; but if the company's name appears on the face of the bill, it is a sufficient mention and the name need not appear again in the acceptance¹¹.

1 As to a company's power to deal with bills and notes see PARA 292. As to liability of the parties on bills of exchange or promissory notes generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1574 et seq.

2 *Chapman v Smethurst* [1909] 1 KB 927, CA; *HB Etlin Co Ltd v Asselstyne* (1962) 34 DLR (2d) 191, Ont CA; *Bondina Ltd v Rollaway Shower Blinds Ltd* [1986] 1 All ER 564, [1986] 1 WLR 517, CA; *Lindus v Melrose* (1858) 3 H & N 177, Ex Ch; *Halford v Cameron's Coalbrook Steam Coal and Swansea and Loughor Rly Co* (1851) 16 QB 442; *Forbes v Marshall* (1855) 11 Exch 166; *Aggs v Nicholson* (1856) 1 H & N 165.

3 *Alexander v Sizer* (1869) LR 4 Exch 102; *Dutton v Marsh* (1871) LR 6 QB 361 at 364 per Cockburn CJ; *Landes v Marcus and Davids* (1909) 25 TLR 478; *Leadbitter v Farrow* (1816) 5 M & S 345; *Mare v Charles* (1856) 5 E & B 978; *Liverpool Borough Bank v Walker* (1859) 4 De G & J 24; *W and T Avery Ltd v Charlesworth* (1914) 31 TLR 52, CA. Even so, evidence is admissible to show the defendant signed in his personal capacity: *Rolfe Lubell & Co v Keith* [1979] 1 All ER 860.

Alternatively, the form of the document may indicate that the signatories are intended to be liable jointly with the company: *Glatt v Ritt* (1973) 34 DLR (3d) 295, Ont HC. See further **AGENCY** vol 1 (2008) PARA 159.

4 *Okell v Charles* (1876) 34 LT 822, CA. As to a company's directors see PARA 478 et seq.

5 *Courtauld v Saunders (or Sanders)* (1867) 16 LT 562; *Dutton v Marsh* (1871) LR 6 QB 361 (notwithstanding that the company's seal was also affixed to the note); *Penkivil v Connell* (1850) 5 Exch 381; *Jones v Jackson* (1870) 22 LT 828; *Kettle v Dunster and Wakefield* (1927) 138 LT 158 (signed by the receiver of a company); *F Stacey & Co Ltd v Wallis* (1912) 106 LT 544; *Brebner v Henderson* 1925 SC 643, Ct of Sess. See also *Elliott v Bax-Ironside* [1925] 2 KB 301, CA (where bills were accepted by two directors on behalf of a company and indorsed by the company and the two directors, and it was held that the signatures were intended to create a personal liability on the directors), explained in *Britannia Electric Lamp Works Ltd v Mandler & Co Ltd and Mandler* [1939] 2 KB 129 at 135, [1939] 2 All ER 469 at 472 per Branson J. See also **AGENCY** vol 1 (2008) PARA 159; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1475-1476, 1495.

6 *West London Commercial Bank v Kitson* (1884) 13 QBD 360, CA. Cf *Liverpool Borough Bank v Walker* (1859) 4 De G & J 24. As to the company secretary and other officers see PARA 603.

7 *Beattie v Lord Ebury* (1874) LR 7 HL 102.

8 *Colley v Smith* (1838) 2 Mood & R 96. Cf *McCollin v Gilpin* (1881) 6 QBD 516, CA.

9 *Penrose v Martyr* (1858) EB & E 499; *Atkins (or Atkin) & Co v Wardle* (1889) 58 LJQB 377. The abbreviation 'Ltd' has always been sufficient for this purpose: *F Stacey & Co Ltd v Wallis* (1912) 106 LT 544. It seems that 'company' may be abbreviated for present purposes to 'Coy', and 'and' to '&': see *F Stacey & Co Ltd v Wallis*; *Banque de l'Indochine et de Suez SA v Euroseas Group Finance Co Ltd* [1981] 3 All ER 198. See also *Scottish and Newcastle Breweries Ltd v Blair* 1967 SLT 72. Cf *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd* [1968] 2 QB 839, [1968] 2 All ER 987 (holders estopped from enforcing personal liability as they had initiated the misdescription of the company). A trading name is not sufficient: *Maxform SpA v B Mariani and Goodville Ltd* [1981] 2 Lloyd's Rep 54, CA. As to permitted wordings which may be included as part of the

ordinary name of the company see PARA 197. As to the obligation to put the company's name on business correspondence etc and the penalty for non-compliance see PARA 220.

10 *Nassau Steam Press v Tyler* (1894) 70 LT 376.

11 *F Stacey & Co Ltd v Wallis* (1912) 106 LT 544; *Dermatine Co Ltd v Ashworth* (1905) 21 TLR 510 (where the word 'limited' was omitted by accident, the words of acceptance being on a rubber stamp which overlapped the edge of the bill).

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(v) Torts

296. Company's liability in tort for agent's acts.

Although every tort is ultra vires¹, on the basis that no corporation is formed for the purpose of committing wrongs², a company is not thereby exempted from tortious liability³.

A company is liable for torts committed by its agents in the course of their employment, and proceedings may be brought if an individual would be liable for the tort that has been committed, if the agent is acting in the course of his employment (or within the actual or ostensible scope of his authority), and if the act complained of is one which the company might possibly be authorised by its constitution to commit⁴. No express command or privity of the company need be proved⁵ but, in general, the claim arises whenever the relevant person or body (not necessarily the directors) made the relevant decision⁶.

A company may also be liable for the torts and contracts of its agents under the doctrine of estoppel⁷, when they are either acting within their apparent authority⁸ or apparently acting within their actual authority⁹.

Proceedings based on fraudulent misrepresentation as to the credit, trade or dealings of third persons made for the purpose of such persons obtaining credit, money or goods cannot be maintained unless the misrepresentation is in writing signed by the party to be charged¹⁰. For these purposes, a representation signed on behalf of a limited company by a duly authorised agent acting within the scope of his authority, or by an officer or employee of the company acting in the course of his duties in the business of the company, constitutes a representation made by the company and signed by it¹¹, but it may also constitute the personal signature of the agent signing so as to make him personally liable in deceit too¹².

1 As to the meaning of 'ultra vires' see PARA 259.

2 As to the legal effect of companies formed for an illegal purpose see PARA 106.

3 See *Yarborough v Bank of England* (1812) 16 East 6; and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1275 et seq. See also note 7.

4 See **AGENCY** vol 1 (2008) PARA 150 et seq; **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1275. As to the meaning of references to a company's constitution see PARA 227. See also *New Brunswick and Canada Rly and Land Co v Conybeare* (1862) 9 HL Cas 711 at 738 per Lord Cranworth (shares taken on directors' fraudulent representations); *Ranger v Great Western Rly Co* (1854) 5 HL Cas 72; *Western Bank of Scotland v Addie* (1867) LR 1 Sc & Div 145, HL (managers); *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317, HL; *Refuge Assurance Co Ltd v Kettlewell* [1909] AC 243, HL; *Barwick v English Joint Stock Bank* (1867) LR 2 Exch 259 (fraud of agents); *Re United Service Co, Johnston's Claim* (1870) 6 Ch App 212; *Mackay v Commercial Bank of New Brunswick* (1874) LR 5 PC 394; *Swire v Francis* (1877) 3 App Cas 106, PC (deceit); *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) LR 1 HL 93 (negligence); *Edwards v Midland Rly Co* (1880) 6 QBD 287; *Kemp v Courage & Co* (1890) 7 TLR 50 (malicious prosecution; trover); *Goff v Great Northern Rly Co* (1861) 3 E

& E 672; *Cornford v Carlton Bank* [1899] 1 QB 392 (malicious prosecution) (cf *Bank of New South Wales v Owston* (1879) 4 App Cas 270, PC; *Bank of New South Wales v Piper* [1897] AC 383, PC; *Lambert v Great Eastern Ry Co* [1909] 2 KB 776, CA (false imprisonment); *Yarborough v Bank of England* (1812) 16 East 6; *Butler v Manchester, Sheffield and Lincolnshire Ry Co* (1888) 21 QBD 207, CA (assault); *Pratt v British Medical Association* [1919] 1 KB 244 (boycotting medical practitioner); *Nevill v Fine Arts and General Insurance Co* [1897] AC 68, HL (libel); *Citizens' Life Assurance Co v Brown* [1904] AC 423, PC (malicious libel); *Whitfield v South Eastern Ry Co* (1858) EB & E 115; *E Hulton & Co v Jones* [1910] AC 20, HL (libel); *Finburgh v Moss Empires Ltd* 1908 SC 928, Ct of Sess (slander); *M'Adam v City and Suburban Dairies Ltd* 1911 SC 430, Ct of Sess (slander); *Aiken v Caledonian Ry Co* 1913 SC 66 (slander); *Mandelston v North British Ry Co* 1917 SC 442, Ct of Sess (slander); *Maund v Monmouthshire Canal Co* (1842) 4 Man & G 452; *Eastern Counties Ry Co v Broom* (1851) 6 Exch 314, Ex Ch (trespass); *Green v London General Omnibus Co* (1859) 7 CBNS 290 (obstruction in business); *United Telephone Co v London and Globe Telephone and Maintenance Co* (1884) 26 ChD 766 (infringement of patent).

As to fraudulent misrepresentation see *Lloyd v Grace, Smith & Co* [1912] AC 716, HL, overruling a dictum in *Barwick v English Joint Stock Bank* (1867) LR 2 Exch 259 at 266 per Willes J, which had been approved in subsequent cases. See also *London County Freehold and Leasehold Properties Ltd v Berkeley Property and Investment Co Ltd* [1936] 2 All ER 1039, CA. Cf *Briess v Woolley* [1954] AC 333, [1954] 1 All ER 909, HL (where the negotiations for the sale of shares by the managing director in which the false representations were made were held to have been authorised by the shareholders and the shareholders were in consequence liable). As to the rescission of contracts to take shares on the ground of misrepresentation see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 781 et seq. Liability for fraud will not be established against a company in the absence of specific allegations against officials: see *Smith and Houston Ltd v Metal Industries (Salvage) Ltd* (1953) 103 L Jo 734, Ct of Sess.

5 It is possible that a company may sometimes be liable for the tortious acts of its liquidator: see *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210 at 218, HL, per Lord Selborne LC.

6 *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258, [1983] 2 All ER 563, CA; *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, [1995] 3 All ER 918, PC. As to the personal liability of directors for any breach of duty in tort see PARA 588.

7 *Smith v Hull Glass Co* (1852) 11 CB 897 at 928; *Re Henry Bentley & Co and Yorkshire Breweries, ex p Harrison* (1893) 69 LT 204, CA. Thus, as a principal is estopped from denying the full authority of his agent where the limitation of it is not disclosed, an application for shares which is conditional in the hands of the applicant's agent may be absolute in the hands of the company: *Re Henry Bentley & Co and Yorkshire Breweries, ex p Harrison*; and see **AGENCY** vol 1 (2008) PARA 25. A concealed limitation of the directors' powers does not bind third persons without notice: *Commercial Mutual Marine Insurance Co v Union Mutual Insurance Co* (1856) 19 Howard 318. See also the Companies Act 2006 ss 39-42; and PARAS 263-265.

8 *Sutton v Tatham* (1839) 10 Ad & El 27 at 30 per Litterdale J; *Trott v National Discount Co* (1900) 17 TLR 37.

9 *Bryant, Powis and Bryant v La Banque du Peuple* [1893] AC 170, PC; *Hambro v Burnand* [1904] 2 KB 10, CA; *Cuthbert v Robarts, Lubbock & Co* [1909] 2 Ch 226 at 235, CA, per Buckley LJ; *Re Land Credit Co of Ireland, ex p Overend, Gurney & Co* (1869) 4 Ch App 460 (distinguished in *Premier Industrial Bank Ltd v Carlton Manufacturing Co Ltd and Crabtree Ltd* [1909] 1 KB 106). The last-named case was expressly dissented from in *Dey v Pullinger Engineering Co* [1921] 1 KB 77, where the principle laid down in *Royal British Bank v Turquand* (1856) 6 E & B 327 (see PARA 266) was applied (see also PARA 263 note 3). As to agency by estoppel see **AGENCY** vol 1 (2008) PARA 25.

10 See the Statute of Frauds Amendment Act 1828 s 6; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 804.

11 *UBAF Ltd v European American Banking Corp'n, The Pacific Colcotronis* [1984] QB 713, [1984] 2 All ER 226, CA. On proper examination, *Swift v Jewsbury and Goddard* (1874) LR 9 QB 301, Ex Ch and *Hirst v West Riding Union Banking Co Ltd* [1901] 2 KB 560, CA, which had been presumed to support the contrary, do not preclude such a finding.

12 *Contex Drouzhba Ltd v Wiseman* [2007] EWCA Civ 1201, [2008] 1 BCLC 631 (affmg [2006] EWHC 2708 (QB)), [2007] 1 BCLC 758 (director liable).

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297. Misrepresentation.

Persons who have been induced to enter into transactions with a company for the purchase of chattels or goods by misrepresentation may, instead of claiming rescission with a return of money paid, elect to retain the goods or chattels and recover any damages which have been sustained¹.

The statutory liability² as to misstatements in listing particulars³ or a prospectus⁴ does not affect any liability which any person may incur under the general law apart from that liability⁵. In respect of the liability so incurred, the remedies for misrepresentation open to an allottee of shares, but not necessarily to a transferee of his shares⁶, or to a person in whose favour an allotment of shares is renounced⁷, are:

- 592 (1) rectification of the register of members by the court and consequent relief⁸;
- 593 (2) rescission of the contract⁹;
- 594 (3) damages in a claim of deceit¹⁰ or negligent misrepresentation¹¹ or negligent misstatement¹²;
- 595 (4) compensation or damages under the statutory provisions¹³; and
- 596 (5) criminal proceedings¹⁴.

The issuer of securities that are traded on a regulated market situated or operating in the United Kingdom, and of securities that: (a) are traded on a regulated market situated or operating outside the United Kingdom; and (b) are issued by an issuer for which the United Kingdom is the home member state, is liable to pay compensation to a person who has acquired such securities issued by it, and has suffered loss in respect of them as a result of any untrue or misleading statement in related publications¹⁵, or the omission from any such publication of any matter required to be included in it¹⁶.

1 See the Misrepresentation Act 1967 s 2(2); and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 834.

2 See under the Financial Services and Markets Act 2000 s 90 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 427-428). See also PARA 1070.

3 As to listing particulars see the Financial Services and Markets Act 2000 s 79; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 391 et seq. See also PARA 1070.

4 As to prospectuses see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 395 et seq. See also PARA 1070.

5 See the Financial Services and Markets Act 2000 s 90(6) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427). See also PARA 1070. As to the exemptions from liability for non-compliance (in relation to listed securities) see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 428.

6 *Hyslop v Morel* (1891) 7 TLR 263; *Andrews v Mockford* [1896] 1 QB 372, CA. As to sub-underwriters see PARA 1157.

7 *Collins v Associated Greyhound Racecourses Ltd* [1930] 1 Ch 1.

8 See PARA 351. As to the register of members see PARA 335 et seq.

9 See PARA 1071.

10 See PARA 1081 et seq.

11 See the Misrepresentation Act 1967 s 2; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 798. See also PARA 1087.

12 See **NEGLIGENCE** vol 78 (2010) PARA 14. See also PARA 1087.

13 See note 2.

14 For example, in circumstances where criminal liability for fraud may be proved (as to which see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 309 et seq).

15 In any reports and statements published in response to a requirement imposed by a provision implementing the Transparency Obligations Directive (ie European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38)) art 4, 5 or 6; and any preliminary statement made in advance of a report or statement to be published in response to a requirement imposed by a provision implementing art 4, to the extent that it contains information that it is intended: (1) will appear in the report or statement; and (2) will be presented in the report or statement in substantially the same form as that in which it is presented in the preliminary statement: see the Financial Services and Markets Act 2000 s 90A; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427. See also PARA 1070.

16 See the Financial Services and Markets Act 2000 s 90A; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427. See also PARA 1070.

The issuer is so liable only if a person discharging managerial responsibilities within the issuer in relation to the publication either knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading, or knew the omission to be dishonest concealment of a material fact: see s 90A(4); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427. These provisions do not affect s 382 (power of court to make restitution order) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 472) and s 384 (power of Financial Services Authority to require restitution) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 474), liability for a civil penalty and liability for a criminal offence (see s 90A(8); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427); but otherwise the issuer is not subject to any other liability than that provided for by s 90A in respect of loss suffered as a result of reliance by any person on an untrue or misleading statement in a publication to which this section applies, or the omission from any such publication of any matter required to be included in it, and a person other than the issuer is not subject to any liability, other than to the issuer, in respect of any such loss (see s 90A(6); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427).

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298. Defamation at company meetings etc.

At common law, a claim cannot be brought for slanders uttered at a meeting of a company, provided the allegations are germane to its affairs and there is no malice, for to that extent the occasion is privileged; complaints made to the directors or managers touching the conduct of its affairs are similarly privileged¹. Even away from meetings of the company, a shareholder has a qualified privilege in making communications to another shareholder as such².

Neither a company nor its directors are liable in proceedings for libel if, without malice, they circulate among the shareholders an auditor's report reflecting on one of the agents³.

1 *Harris v Thompson* (1853) 13 CB 333. As to company meetings generally see PARA 629 et seq. As to the defence of privilege in the law of defamation see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 94 et seq.

2 *Quartz Hill Consolidated Gold Mining Co v Beall* (1882) 20 ChD 501, CA.

3 *Lawless v Anglo-Egyptian Cotton and Oil Co* (1869) LR 4 QB 262. Cf *Nevill v Fine Arts and General Insurance Co* [1897] AC 68, HL; *Philadelphia, Wilmington and Baltimore Railroad Co v Quigley* 62 US (21 How) 202 (1858). As to statements in official reports in a winding up by official receivers and other officials see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 527 et seq.

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COMPANIES ACTS/(7) CAPACITY/(v) Torts/299. Defamation in published reports of proceedings or in published documents.

299. Defamation in published reports of proceedings or in published documents.

For the purposes of defamation proceedings¹, the publication² of any of the following reports or statements³ is subject to a statutory defence of qualified privilege⁴ unless the publication is shown to be made with malice⁵:

- 597 (1) a fair and accurate report of proceedings at a general meeting of a United Kingdom public company⁶;
- 598 (2) a fair and accurate copy of or extract from any document circulated to members of a United Kingdom public company⁷:
- 27
 - 49. (a) by or with the authority of the board of directors of the company⁸;
 - 50. (b) by the auditors of the company⁹; or
 - 51. (c) by any member of the company in pursuance of a right conferred by any statutory provision¹⁰;
- 28
 - 599 (3) a fair and accurate copy of or extract from any document circulated to members of a United Kingdom public company which relates to the appointment, resignation, retirement or dismissal of directors of the company¹¹;
 - 600 (4) a fair and accurate report of proceedings at any corresponding meeting of, or copy of or extract from any corresponding document circulated to members of, a public company formed under the law of any of the Channel Islands or the Isle of Man or of another member state¹².

However, in defamation proceedings in respect of the publication of such a report or statement, the statutory defence of qualified privilege is not available if the claimant shows that the defendant¹³:

- 601 (i) was requested by him to publish in a suitable manner¹⁴ a reasonable letter or statement by way of explanation or contradiction¹⁵; and
- 602 (ii) refused or neglected to do so¹⁶.

Nor is the statutory defence available to protect the publication of matter the publication of which is prohibited by law¹⁷.

1 As to defamation proceedings generally see **LIBEL AND SLANDER**.

2 For these purposes, 'publication' and 'publish', in relation to a statement, have the meaning they have for the purposes of the law of defamation generally (see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 60 et seq): Defamation Act 1996 s 17(1). The provisions of s 15 (see **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 131-132) do not apply to the publication to the public, or a section of the public, of matter which is not of public concern and the publication of which is not for the public benefit: s 15(3). Publication of a report of charges against a company's officers is not for the public benefit: *Ponsford v Financial Times Ltd and Hart* (1900) 16 TLR 248 (a meeting of company shareholders is a public meeting). See further **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 294, 297.

3 A statement may be in the form of words or pictures or visual images or gestures or other methods of signifying meaning: see the Defamation Act 1952 s 16(1); the Defamation Act 1996 s 17(1); and **LIBEL AND SLANDER** vol 28 (Reissue) PARA 10 et seq.

4 Ie under the Defamation Act 1996 s 15 (see **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 131-132). As to the defence of qualified privilege generally see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 109 et seq.

5 Defamation Act 1996 s 15(1). As to malice sufficient to defeat a defence raised in defamation proceedings see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 149 et seq.

6 Defamation Act 1996 s 15(1), Sch 1 para 13(1). For the purposes of heads (1)-(3) in the text, 'United Kingdom public company' means: (1) a public company within the meaning of the Companies Act 2006 s 4(2) (see PARA 102); or (2) a body corporate incorporated by or registered under any other statutory provision, or by royal charter, or formed in pursuance of letters patent (see PARAS 1-2): Defamation Act 1996 Sch 1 para 13(4) (amended by SI 2009/1941).

7 Defamation Act 1996 Sch 1 para 13(2).

8 Defamation Act 1996 Sch 1 para 13(2)(a). As to a company's directors see PARA 478 et seq.

9 Defamation Act 1996 Sch 1 para 13(2)(b). As to company auditors see PARA 905 et seq.

10 Defamation Act 1996 Sch 1 para 13(2)(c). See note 4.

11 Defamation Act 1996 Sch 1 para 13(3).

12 Defamation Act 1996 Sch 1 para 13(5). Provision may be made by order identifying for these purposes the corresponding meetings and documents: see Sch 1 para 17(1)(b). As to the procedure for making such an order see Sch 1 para 17(2), (3); and **LIBEL AND SLANDER** vol 28 (Reissue) PARA 133.

13 Defamation Act 1996 s 15(2). See note 4.

14 For this purpose, 'in a suitable manner' means in the same manner as the publication complained of or in a manner that is adequate and reasonable in the circumstances: Defamation Act 1996 s 15(2). The terms of the letter or statement which the claimant requires must be sent by him to the defendant as part of the request: see *Khan v Ahmed* [1957] 2 QB 149, [1957] 2 All ER 385 (a decision on an earlier similar provision under the Defamation Act 1952).

15 Defamation Act 1996 s 15(2)(a).

16 Defamation Act 1996 s 15(2)(b).

17 Defamation Act 1996 s 15(4)(a). See note 4. Nothing in these provisions is to be construed as limiting or abridging any privilege subsisting otherwise: s 15(4)(b).

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300. Torts committed against companies.

A company may claim for any damage done to it in its corporate capacity by a tort not of a purely personal nature, such as a libel affecting its property, or a libel reflecting on the management of its trade or business¹, or attacking its financial position². It is not necessary to prove special damage³.

A claim is available to a trading company in respect of the malicious and unreasonable presentation of a winding-up petition against it⁴.

Where the company is a victim of a conspiracy to which its directors acting on its behalf are parties, the company will not be considered a co-conspirator, and may recover damages from the directors if it suffers loss as a result of the conspiracy⁵.

A company is not a 'person' for the purpose of seeking injunctive relief⁶ against harassment⁷.

1 As to the meanings of 'trade' and 'business' generally see PARA 1 note 1.

2 *Metropolitan Saloon Omnibus Co v Hawkins* (1859) 4 H & N 87; *Thorley's Cattle Food Co v Massam* (1880) 14 ChD 763, CA; *Slazengers Ltd v C Gibbs & Co* (1916) 33 TLR 35. See also *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234, sub nom *Lewis v Daily Telegraph Ltd* [1963] 2 All ER 151, HL (subsequent proceedings sub nom *Lewis v Daily Telegraph Ltd (No 2)* [1964] 2 QB 601, [1964] 1 All ER 705, CA); and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1279.

3 *South Hetton Coal Co v North-Eastern News Association* [1894] 1 QB 133, CA; *Linotype Co Ltd v British Empire Type-setting Machine Co Ltd* (1899) 81 LT 331, HL.

4 *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674, CA. See also **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 450. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

5 *Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] Ch 250, [1979] 1 All ER 118, CA (conspiracy to cause company to breach the Companies Act 1948 s 54 (see now the Companies Act 2006 ss 678, 679; and see PARAS 1224-1225)).

6 See under the Protection from Harassment Act 1997 s 3: see **TORT** vol 45(2) (Reissue) PARA 457.

7 *Daiichi UK Ltd v Stop Huntingdon Animal Cruelty* [2003] EWHC 2337 (QB), [2004] 1 WLR 1503, [2005] 1 BCLC 27.

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(vi) Civil Proceedings involving a Company

301. Company's name in litigation.

As from the date of a company's incorporation¹, the subscribers of the memorandum of association², together with such other persons as may from time to time become members of the company³, are a body corporate⁴ by the name stated in the certificate of incorporation⁵. As such, the company may only proceed or be proceeded against in its corporate name⁶.

A change of a company's name has effect from the date on which the new certificate of incorporation is issued⁷; and the effect of the issue of the certificate of incorporation on change of name is not to re-form or reincorporate the company as a new entity but to recognise the continued existence of the company under its new name⁸. The change does not affect any rights or obligations of the company or render defective any legal proceedings by or against it⁹; and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name¹⁰.

If the name of the company has been wrongly used as claimant, it will be struck out as claimant¹¹, but may be added as defendant¹². The solicitor¹³ or the person who instructed him and who was also claimant¹⁴ may be ordered to pay the costs of a company improperly made claimant and of the defendant¹⁵. However, where, in bringing the proceedings in the company's name, the claimants substantially represent the wishes of the majority of the shareholders, the claimants' costs may be directed to be paid by the company¹⁶. Where proceedings are properly brought in the company's name, the solicitors for those who unsuccessfully apply in its name for a stay may be ordered to pay the costs personally¹⁷.

A company which purports to have been incorporated in a foreign country may be recognised as a corporation in England and, as such, English law will allow it to sue and be sued in England in its corporate capacity¹⁸.

- 1 le the date mentioned in the certificate of incorporation, following the registration of a company: see PARA 119 note 7. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to a company's incorporation by registration under the Companies Act 2006 see PARA 111 et seq. As to companies registered but not formed under the Companies Act 2006, and as to overseas companies, see PARA 32.
- 2 As to the memorandum of association, and subscribers of the memorandum, see PARA 104.
- 3 As to membership of a company see PARA 321 et seq.
- 4 As to the meaning of 'body corporate' see PARA 1 note 5.
- 5 See the Companies Act 2006 s 16; and PARA 120. As to the company's name see PARA 200 et seq.
- 6 *Re Hodges* (1873) 8 Ch App 204; *Pilbrow v Pilbrow's Atmospheric Rly Co* (1846) 3 CB 730. In *Springate v Questier* [1952] 2 All ER 21, notice of an intended prosecution under the Road Traffic Act 1972 s 179(2)(c) (now repealed) (see now the Road Traffic Offenders Act 1988 s 1(1)(c), (2); and **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 1028) was held to have been validly served on a limited company, though the word 'limited' was omitted. See generally **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1291. As to the amendment of misnomers for the purpose of proceedings see *Etablissement Baudelot v RS Graham & Co Ltd* [1953] 2 QB 271, [1953] 1 All ER 149, CA (French trading firm wrongly described as incorporated company). As to the rules that apply to proceedings under companies legislation generally see PARA 305.
- 7 See the Companies Act 2006 s 81(1); and PARA 219.
- 8 *Oshkosh B'Gosh Inc v Dan Marbel Inc Ltd* [1989] 1 CMLR 94, [1989] BCLC 507, CA.
- 9 See the Companies Act 2006 s 81(2); and PARA 219.
- 10 See the Companies Act 2006 s 81(3); and PARA 219. Where a company changes its name in the course of proceedings, the title of any claim form, application, affidavit, witness statement, notice or other document in such proceedings (see PARA 305 note 6) must be altered by substituting the new name for the old, and by inserting the old name in brackets at the end of the title: see *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 4(2).
- 11 *Atwool v Merryweather* (1867) LR 5 Eq 464n at 468n per Page Wood V-C; *Pender v Lushington* (1877) 6 ChD 70; *Oystermouth Rly or Tramroad Co v Morris* [1876] WN 129 (on appeal [1876] WN 192 (dismissed with costs)); *West End Hotels Syndicate Ltd v Bayer* (1912) 29 TLR 92.
- 12 *Silber Light Co v Silber* (1879) 12 ChD 717.
- 13 *Newbiggin-by-the-Sea Gas Co v Armstrong* (1879) 13 ChD 310, CA; *John Morley Building Co v Barras* [1891] 2 Ch 386; *Gold Reefs of Western Australia Ltd v Dawson* [1897] 1 Ch 115; *West End Hotels Syndicate Ltd v Bayer* (1912) 29 TLR 92.
- 14 *Compagnie de Mayville v Whitley* [1896] 1 Ch 788 at 810, CA, per Smith LJ. See also *Wandsworth and Putney Gas-Light and Coke Co v Wright* (1870) 22 LT 404.
- 15 See *Silber Light Co v Silber* (1879) 12 ChD 717. Where a solicitor had originally authority to defend an action for a company which was afterwards dissolved, he was ordered to pay the costs of the plaintiff as from the date on which he might with due diligence have known of the dissolution: *Salton v New Beeston Cycle Co* [1900] 1 Ch 43. The proper order would now date from the dissolution itself: see *Yonge v Toynbee* [1910] 1 KB 215, CA. As to the effect of solicitors acting without authority see **LEGAL PROFESSIONS** vol 66 (2009) PARA 884.
- 16 *Re Imperial Hydropathic Hotel Co, Blackpool v Hampson* (1882) 23 ChD 1, CA.
- 17 *Marshall's Valve Gear Co Ltd v Manning, Wardle & Co Ltd* [1909] 1 Ch 267 at 275 per Neville J.
- 18 *Henriques v General Privileged Dutch Co Trading to West Indies* (1728) 2 Ld Raym 1532; *Newby v von Oppen and Colt's Patent Firearms Manufacturing Co* (1872) LR 7 QB 293; *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289 at 297, HL. As to the principles on which recognition is accorded or withheld see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 465 et seq. The universal succession of one foreign corporate body to another will also be recognised: *National Bank of Greece and Athens SA v Metliss* [1958] AC 509, [1957] 3 All ER 608, HL (creditor's action against successor to foreign guarantor company).

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302. Control of company's litigation.

As regards litigation by an incorporated company¹, where management powers are vested generally in the board of directors², it is the directors who have authority to act for the company³. In the absence of any provision to the contrary in the articles of association, the majority of the members of a company⁴ are not entitled to decide whether an action in the company's name should be begun or allowed to proceed⁵. The secretary⁶ of a company cannot institute proceedings in its name in the absence of express authority to do so⁷; but proceedings begun without proper authority may subsequently be ratified⁸.

Any objection that proceedings in the name of the company are not properly authorised should be raised at the outset by an application to have the name of the company struck out; if not so raised, it may be raised when it comes to the attention of the court or the defendant that this is the case⁹. Where appropriate, the proceedings may be adjourned so that the issue as to the initial authorisation, or subsequent ratification, of the proceedings may be tried¹⁰.

1 As to incorporated companies generally see PARA 2.

2 In the manner provided for by the company's articles of association: see PARA 541. As to a company's articles of association generally see PARA 228 et seq. As to a company's directors see PARA 478 et seq.

3 See PARA 544; *Harben v Phillips* (1883) 23 ChD 14 at 29 per Chitty J. See also *Mitchell & Hobbs (UK) Ltd v Mill* [1996] 2 BCLC 102 (managing director does not have power to bring proceedings in the name of the company without reference to the other directors unless that power has been specifically delegated to him). As to delegation see also PARA 537.

4 As to membership of a company see PARA 321 et seq.

5 *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34, CA; *Gramophone and Typewriter Ltd v Stanley* [1908] 2 KB 89 at 98, CA, per Fletcher Moulton LJ, and at 105 per Buckley LJ; *Quin & Axtens Ltd v Salmon* [1909] AC 442, HL; *Breckland Group Holdings Ltd v London & Suffolk Properties Ltd* [1989] BCLC 100. Cf *Marshall's Valve Gear Co Ltd v Manning, Wardle & Co Ltd* [1909] 1 Ch 267 at 272 per Neville J; *Pender v Lushington* (1877) 6 ChD 70; *Duckett v Gover* (1877) 6 ChD 82; *Harben v Phillips* (1883) 23 ChD 14, CA. See also PARA 455.

6 As to the company secretary see PARA 601 et seq.

7 *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307, HL. As to the court procedure where there is want of authority to sue see *Russian Commercial and Industrial Bank v Comptoir d'Escompte de Mulhouse* [1925] AC 112, HL; *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113, CA; and **CIVIL PROCEDURE** vol 11 (2009) PARA 208.

8 *Danish Mercantile Co Ltd v Beaumont* [1951] Ch 680, [1951] 1 All ER 925, CA; approved in *Alexander Ward & Co Ltd v Samyang Navigation Co Ltd* [1975] 2 All ER 424, [1975] 1 WLR 673, HL (company without directors; two individuals brought proceedings on company's behalf to recover debt without authority; acts of individuals subsequently ratified by liquidator).

9 *Airways Ltd v Bowen* [1985] BCLC 355, CA.

10 *Airways Ltd v Bowen* [1985] BCLC 355, CA.

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COMPANIES ACTS/(7) CAPACITY/(vi) Civil Proceedings involving a Company/303.
Representative parties.

303. Representative parties.

Where more than one person has the same interest in a claim¹, as where a member of a company seeks to enforce or protect the rights of members generally, the claim may be begun (or the court may order that the claim be continued) by or against one or more of the persons who have the same interest, as representatives of any other persons who have that interest². Unless the court otherwise directs, any judgment or order given in a claim in which a party is acting as a representative under the rules governing representative parties is binding on all persons represented in the claim, but may only be enforced by or against a person who is not a party to the claim with the permission of the court³.

No consent is required from those on whose behalf the claimant purports to sue⁴. A claimant suing on behalf of a class must specify the class as accurately as possible⁵; but the fact that the interest of some members of the class is different from that of the claimant does not make the proceedings defective⁶. The fact that the claimant is suing on behalf of himself and others should be stated in the title of the pleading, and not merely in the statement of claim⁷.

Whatever is a defence against the party making a claim in a representative capacity is a defence to the proceedings, even though other persons on whose behalf he is making a claim might maintain the proceedings⁸. If anyone objects to the claimant suing on his behalf, he should apply to have himself added as a defendant⁹; but the application must be made promptly¹⁰.

The court will not allow a person to represent himself and others as defendants unless it is satisfied that he is authorised to represent the others¹¹.

If the claimant is suing as a creditor and a trustee is appointed in his bankruptcy whilst the proceedings are pending, the right of action vests in his trustee, and, unless the trustee intervenes, the proceedings will be dismissed¹².

1 le other than proceedings under CPR 19.7 (representation of interested persons who cannot be ascertained): see **CIVIL PROCEDURE** vol 11 (2009) PARA 230.

2 See CPR 19.6(1); and **CIVIL PROCEDURE** vol 11 (2009) PARA 229.

3 See CPR 19.6(4); and **CIVIL PROCEDURE** vol 11 (2009) PARA 229. See also *City of London Sewers Comrs v Gellatly* (1876) 3 ChD 610 at 615 per Jessel MR; *Friends Provident and Century Life Office v Investment Trust Corp'n Ltd* [1951] 2 All ER 632 at 634, HL, per Lord Simonds. As to a judgment against trustees for debenture holders binding the debenture holders see *Cox v Dublin City Distillery Co Ltd (No 3)* [1917] 1 IR 203, CA.

4 *White v Carmarthen etc Rly Co* (1863) 1 Hem & M 786; *Bloxam v Metropolitan Rly Co* (1868) 3 Ch App 337. As to the claimant's right to discontinue proceedings see *Handford v Storie* (1825) 2 Sim & St 196; *Re Alpha Co Ltd, Ward v Alpha Co* [1903] 1 Ch 203.

5 *Marshall v South Staffordshire Tramways Co* [1895] 2 Ch 36, CA.

6 *Hallows v Fernie* (1868) 3 Ch App 467; *Watson v Cave* (1881) 17 ChD 19, CA.

7 *Re Tottenham, Tottenham v Tottenham* [1896] 1 Ch 628 (explaining *Eyre v Cox* (1876) 24 WR 317); *Worraker v Pryer* (1876) 2 ChD 109; *Dover Picture Palace Ltd and Pessers v Dover Corp'n and Crundall, Wraith, Gurr and Knight* (1913) 11 LGR 971, CA.

8 *Burt v British Nation Life Assurance Association* (1859) 4 De G & J 158; *Scarth v Chadwick* (1850) 14 Jur 300.

9 *Wilson v Church* (1878) 9 ChD 552; *Watson v Cave* (1881) 17 ChD 19, CA; *Fraser v Cooper, Hall & Co* (1882) 21 ChD 718; *May v Newton* (1887) 34 ChD 347.

10 *Conybeare v Lewis* (1883) 48 LT 527.

11 *Morgan's Brewery Co v Crosskill* [1902] 1 Ch 898. As to appointing parties to represent absent persons see CPR 19.7; and **CIVIL PROCEDURE** vol 11 (2009) PARA 230.

12 *Wolff v Van Boonen* (1906) 94 LT 502. As to trustees in bankruptcy see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 316 et seq.

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304. When representative action may be brought.

A representative action is properly brought¹ by a shareholder to prevent the improper declaration or payment of dividends², or the misapplication of the company's funds³, or purchase by the company of its own shares⁴, or an improper reduction of capital⁵, or improper forfeiture of shares⁶, or to stop directors from making calls unfairly⁷, or to prevent loans to them⁸, or to impeach the validity of resolutions as to the issue of shares or otherwise⁹.

Proceedings may be brought by an applicant for shares on behalf of himself and other depositors when the company is abortive and no shares have been issued¹⁰.

Where another class of shareholders has a conflicting interest, they should be made defendants¹¹.

In proceedings against directors for misrepresentation, several persons may join as claimants¹².

1 As to representative actions by debenture holders see PARA 1383.

2 *Hoole v Great Western Rly Co* (1867) 3 Ch App 262; *Bloxam v Metropolitan Rly Co* (1868) 3 Ch App 337; *Wood v Odessa Waterworks Co* (1889) 42 ChD 636. Cf *Carlisle v South Eastern Rly Co* (1850) 1 Mac & G 689 (payment of dividends actually declared; not restrained); *Salisbury v Metropolitan Rly Co* (1870) 18 WR 484 at 486 per James V-C; *Will v United Lankat Plantations Co Ltd* [1912] 2 Ch 571, CA (affd [1914] AC 11, HL). Cf *Fawcett v Laurie* (1860) 1 Drew & Sm 192 at 202-203 per Kindersley V-C. As to proceedings by creditors or debenture holders to restrain the payment of improper dividends see PARA 1407.

3 *Guinness v Land Corp of Ireland Ltd* (1882) 22 ChD 349, CA; *Smith v Duke of Manchester* (1883) 24 ChD 611 (costs of dismissed winding-up petition by directors); *Studdert v Grosvenor* (1886) 33 ChD 528 (as to the points decided in this case see *Peel v London and North Western Rly Co* [1907] 1 Ch 5, CA); *Tomkinson v South-Eastern Rly Co* (1887) 35 ChD 675; *Lyde v Eastern Bengal Rly Co* (1866) 36 Beav 10; *Vance v East Lancashire Rly Co* (1856) 3 K & J 50 (application to Parliament); *Warburton v Huddersfield Industrial Society* [1892] 1 QB 817, CA; *Evans v Brunner, Mond & Co Ltd* [1921] 1 Ch 359.

4 *Hope v International Financial Society* (1876) 4 ChD 327, CA; *Rowell v John Rowell & Sons Ltd* [1912] 2 Ch 609. A company may obtain authorisation to purchase its own shares: see PARA 1229 et seq.

5 *Bannatyne v Direct Spanish Telegraph Co* (1886) 34 ChD 287, CA.

6 *Sweny v Smith* (1869) LR 7 Eq 324.

7 *Alexander v Automatic Telephone Co* [1900] 2 Ch 56, CA.

8 *Bluck v Mallaloe* (1859) 27 Beav 398.

9 *Andrews v Gas Meter Co* [1897] 1 Ch 361, CA; *Preston v Grand Collier Dock Co* (1840) 11 Sim 327; *McEllistrim v Ballymacelligott Co-operative Agricultural and Dairy Society Ltd* [1919] AC 548, HL.

10 *Moseley v Cressey's Co* (1865) LR 1 Eq 405.

11 *Hoole v Great Western Rly Co* (1867) 3 Ch App 262 at 277-278 per Rolt LJ.

12 *Drincqbier v Wood* [1899] 1 Ch 393.

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305. Procedure for making claims and applications to court under companies legislation.

The legislation relating to companies provides for many applications to be made to the court with reference to the companies which are subject to its provisions¹.

The Civil Procedure Rules² apply to proceedings under the Companies Act 1985³, the Companies Act 2006⁴ and other legislation relating to companies and limited liability partnerships⁵, subject to the provision of the relevant practice direction which applies to those proceedings⁶. The claim form will be issued (where issued in the High Court) out of the Companies Court or a Chancery district registry or (where issued in a county court) out of a county court office⁷. Where, in a claim under the Companies Act 2006, the company concerned is not the claimant, the company is to be made a defendant to the claim unless any other enactment, the Civil Procedure Rules or a relevant practice direction⁸ makes a different provision or unless the court orders otherwise⁹; and where an application is made in the course of proceedings to which the company is or is required to be a defendant, the company must be made a respondent to the application unless any other enactment, the Civil Procedure Rules or a relevant practice direction¹⁰ makes a different provision or unless the court orders otherwise¹¹.

Provisions in the Companies Act 2006¹², supplemented by Civil Procedure Rules¹³, introduce a two-stage procedure for permission to continue a derivative claim: (1) the applicant is required to make a prima facie case for permission to continue a derivative claim and the court is required to consider the issue on the basis of the evidence filed by the applicant only, without requiring evidence from the defendant¹⁴; (2) before the substantive action begins, the court may require evidence to be provided by the company, and the matters which the court must take into account in considering whether to give permission and the circumstances in which the court is bound to refuse permission are set out¹⁵.

Questions as to the true meaning of a company's constitution¹⁶ may be decided by the court in the course of proceedings. The court may decide the question as between the company and the shareholder who is the other party to the claim¹⁷, but will not usually appoint a defendant shareholder to represent a class, or decide the question so as to bind the class unless a meeting of the members of the class is first called and nominates a person to represent the class¹⁸.

1 As to the procedure that applies generally to such applications see the text and notes 2-7. See also the Insolvency Rules 1986, SI 1986/1925; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1041 et seq. The mode in which applications are to be made is dealt with in this title where the provisions under which the applications may be made are dealt with.

2 As to the Civil Procedure Rules generally see **CIVIL PROCEDURE**.

3 CPR 49(a) (CPR 49 substituted by SI 2009/2092). As to proceedings under the Companies Act 1985 see PARA 1541 et seq.

4 CPR 49(b) (as substituted: see note 3).

5 CPR 49(c) (as substituted: see note 3).

6 CPR 49 (as substituted: see note 3). The *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 applies to proceedings under the Companies Act 1985 (as to which see PARA 1541 et seq), under the Companies Act 2006 (except proceedings under Pt 11 Ch 1 (ss 260-264) (derivative claims in England and Wales or Northern Ireland) (see PARA 455 et seq) or under Pt 30 (ss 994-999) (protection of members against unfair prejudice) (see PARA 466 et seq)), under EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) arts 22, 25 and 26 (see PARA 1643), under the Financial Services and Markets Act 2000 Pt VII (ss 104-117) (control of business transfers) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 590 et seq) and under the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974 (see PARA 1451): see *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 2. CPR Pt 19, and the practice direction supplementing CPR Pt 19, contain provisions about proceedings under the Companies Act 2006 Pt 11 Ch 1: see *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 2; and see PARA 455 et seq.

7 See *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 5(2). Proceedings to which *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 applies must be started by a CPR Pt 8 claim form (as to which see **CIVIL PROCEDURE** vol 11 (2009) PARAS 117, 127 et seq) unless a provision of *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 or another practice direction provides otherwise, but subject to any modification of that procedure by *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 or any other practice direction: *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 5(1). Where *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 requires a party to proceedings to notify another person of an application, such notification must, unless the court orders otherwise, be given by sending to that other person a copy of the claim form as soon as reasonably practicable after the claim form has been issued: see para 5(3).

The claim form in proceedings under the Companies Act 1985 (as to which see PARA 1541 et seq), under the Companies Act 2006, under the Financial Services and Markets Act 2000 Pt VII (control of business transfers) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 590 et seq), under EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) (see PARA 1643) or under the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974 (see PARA 1451), and any application, affidavit, witness statement, notice or other document in such proceedings, must be entitled 'In the matter of [*the name of the company in question*] and in the matter of [*the relevant law*]', where the 'relevant law' means the 'Companies Act 1985', the 'Companies Act 2006', 'Part VII of the Financial Services and Markets Act 2000', 'Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE)' or the 'Companies (Cross-Border Merger) Regulations 2007', as the case may be: see *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 4(1). A statement of claim against a company, if it states the corporate title, need not allege that the company is a corporation or state how it was incorporated: *Woolf v City Steam Boat Co* (1849) 7 CB 103. In a debenture holders' claim, the statement of claim must be entitled in the matter of the company: see PARA 1381.

8 Ie *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 or another practice direction: see *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 7(1).

9 *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 7(1).

10 Ie *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 or another practice direction: see *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 7(2).

11 *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 7(2).

12 Ie the Companies Act 2006 Pt 11 Ch 1 (derivative claims in England and Wales or Northern Ireland): see PARA 455 et seq.

13 Ie CPR 19.9-19.9F: see PARA 456 et seq. See also note 5.

14 See PARA 457 et seq.

15 See PARA 460 et seq.

16 As to the meaning of references to a company's constitution see PARA 227.

17 *Mason v Schuppisser* (1899) 81 LT 147; *Re William Thomas & Co Ltd* [1915] 1 Ch 325.

18 *Morgan's Brewery Co v Crosskill* [1902] 1 Ch 898.

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306. Practice relating to claims and applications to court under companies legislation.

A company may be represented, with the permission of the court, by a duly-authorised employee¹. In relation to the small-claims track, a corporate party may be represented by any of its officers or employees².

Where a transaction by a company is within its powers but is about to be carried out without the necessary sanction of the shareholders, an injunction may be granted until the meeting has been held to sanction the transaction³.

1 See CPR 39.6; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1126.

2 See *Practice Direction--Small Claims Track* PD 27 para 3.2(4); and **CIVIL PROCEDURE** vol 11 (2009) PARA 279.

3 *Kaye v Croydon Tramways Co* [1898] 1 Ch 358, CA; *Towers v African Tug Co* [1904] 1 Ch 558, CA; *Lawson v Financial News Ltd* (1917) 34 TLR 52, CA.

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307. Disclosure.

An officer of a company¹ need not be made a party to proceedings in order to obtain disclosure of documents².

If a company is a party to proceedings, the opposite party may apply to the court for an order asking the company to clarify any matter which is in dispute in the proceedings or to give additional information in relation to any such matter, whether or not the matter is contained, or referred to, in a statement of case³.

A response to such a request must be in writing, dated and signed by the party from whom the information is sought or his legal representative⁴, and must be verified by a statement of truth⁵. A responsible or proper officer or member⁶ of the company, normally the company secretary⁷, should make the statement of truth, but the order may name any officer or member who has personal knowledge as to the information in the company's possession⁸.

1 As to officers of the company see PARA 607.

2 *Cooke v Oceanic Steam Co* [1875] WN 220; *Dyke v Stephens* (1885) 30 ChD 189 at 191 per Pearson J. Cf *Wilson v Church* (1878) 9 ChD 552 (interrogatories).

3 See CPR Pt 18; and **CIVIL PROCEDURE** vol 11 (2009) PARA 611. However, before applying for such an order, the party seeking clarification or information should first serve on the party from whom it is sought a written request for that clarification or information stating a date by which the response to the request should be served; the date must allow the second party a reasonable time to respond: see *Practice Direction--Further Information* PD 18 para 1; and **CIVIL PROCEDURE** vol 11 (2009) PARA 611. The request should be concise and

strictly confined to matters which are reasonably necessary and proportionate in order to enable the requesting party to prepare his case or to understand the case he has to meet: see para 1; and **CIVIL PROCEDURE** vol 11 (2009) PARA 611.

4 See *Practice Direction--Further Information* PD 18 para 2(1); and **CIVIL PROCEDURE** vol 11 (2009) PARA 611.

5 See *Practice Direction--Further Information* PD 18 para 3; and **CIVIL PROCEDURE** vol 11 (2009) PARA 611. See also CPR Pt 22; and **CIVIL PROCEDURE** vol 11 (2009) PARA 613.

6 As to who qualifies as a member of a company see PARA 321.

7 As to the company secretary see PARA 601 et seq.

8 See *A-G v North Metropolitan Tramways Co* [1892] 3 Ch 70 at 74 per North J.

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308. Security for costs in company claims.

A defendant to any claim may apply¹ for security for his costs of the proceedings².

In exercising its discretion, the court will have regard to all the circumstances of the case, and must balance the injustice to the claimant (if he should be prevented from pursuing a proper claim by an order for security) against the injustice to the defendant (if no security is ordered and at the trial the claim fails and the defendant finds himself unable to recover from the claimant the costs which have been incurred by him in his defence of the claim)³. In considering all the circumstances, the court will have regard to the claimant company's prospects of success but without going into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure⁴. The court will not refuse to order security on the ground that it would unfairly stifle a valid claim unless it is satisfied that in all the circumstances, including whether the company can fund the litigation from outside sources, it is probable that the claim would be stifled⁵.

Pre-action costs could be the subject of an application for security but the court should be slow to exercise its discretion in favour of an applicant in such circumstances because of the risk that, if the pre-action period were lengthy, the costs might be extensive and any subsequent attempt to obtain security in respect of such costs might become penal in nature⁶.

The requirement for security does not enable security to be ordered to be given by the liquidator of a company taking proceedings in his own name, even where he has no means, either when he is conducting proceedings for misfeasance or is coming to the court in exercise of any other statutory duty⁷.

The fact of a company being in liquidation is prima facie evidence that it will, if unsuccessful, be unable to pay the defendant's costs, even if the liquidation occurs while proceedings are pending⁸. The mere fact that a company has issued a debenture charging all its assets to secure the repayment of money then or at any time owing to a particular person is not itself a sufficient reason for ordering security⁹. A defendant company is not obliged to give security¹⁰; nor need it do so if it is claimant in proceedings against a person who is suing it in other proceedings in regard to the same subject matter¹¹.

If, however, there is a counterclaim or separate proceedings to impeach the transaction in respect of which the original proceedings are brought, security may be ordered¹², but the amount of the security should be determined by the claim alone, and not by the cross claim¹³.

In interpleader proceedings, if both parties are in substance claimants, and are in a similar financial position, an order for security may only be made by one upon giving the like security as the other is ordered to give¹⁴.

Where the court makes an order for security for costs, it will determine the amount of security¹⁵ and direct the manner in which¹⁶ and the time within which the security must be given¹⁷.

1 le under CPR Pt 25 Section II (CPR 25.12-CPR 25.15): see CPR 25.12(1); and **CIVIL PROCEDURE** vol 11 (2009) PARA 745.

2 See CPR 25.12; **CIVIL PROCEDURE** vol 11 (2009) PARA 745. Security for costs is dealt with among the interim remedies ordered under CPR Pt 25: see Section II; and **CIVIL PROCEDURE** vol 11 (2009) PARA 745 et seq. As to the court's power to order indemnity against liability for costs in favour of the claimant in derivative claims see PARA 461. The court will only have jurisdiction to award security if it appears by credible testimony that there is reason to believe that the company will, and not merely may, be unable to pay the defendant's costs if successful in its defence: *Europa Holdings Ltd v Circle Industries (UK) plc* [1993] BCLC 320, CA. There is a critical difference between a conclusion that there is 'reason to believe' that a company will be unable to pay costs and a conclusion that this has been proved to be the case: *Jirehouse Capital v Beller* [2008] EWCA Civ 908, [2009] 1 WLR 751, [2008] BPIR 1498.

The Companies Act 1985 provided that where a limited company was a claimant in any legal proceeding, the court having jurisdiction in the matter had power, if it appeared by credible testimony that there was reason to believe that the company would have been unable to pay the costs of the defendant if successful in his defence, to require sufficient security to be given for those costs, and to stay all proceedings until the security was given: see s 726 (repealed). This provision, which covered proceedings commenced by petition (*Re Unisoft Group Ltd* [1993] BCLC 528) and patent proceedings before the Comptroller-General of Patents, Designs and Trade Marks (*Abdulhayoglu's Application* [2000] RPC 18) has not been re-enacted in the Companies Act 2006. However, the cases cited in the text remain relevant to applications for security for costs under CPR 25.12, which used to interact with the Companies Act 1985 s 726 (repealed). As to the interaction between CPR Pt 25 and the Companies Act 1985 s 726 (repealed) see *Classic Catering Ltd v Donnington Park Leisure Ltd* [2001] 1 BCLC 537; *Anglo Petroleum Ltd v Hocking* [2002] EWHC 2375 (Ch), [2002] All ER (D) 444 (Oct) (application made by receivers for security for costs under CPR 25.13 and the Companies Act 1985 s 726 (repealed) allowed as it was clear that, if a costs order were to be made in favour of the receivers following the trial of the claim, the company would be unable to pay it). As to the Comptroller-General of Patents, Designs and Trade Marks see **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 577.

Remission of the case to the county court did not deprive the judge in the county court of his power under the Companies Act 1985 s 726 (repealed) to order security: *Plasycoed Collieries Co Ltd v Partridge, Jones & Co Ltd* (1911) 104 LT 807, DC. Security may be ordered up to a certain stage of the proceedings, with liberty to apply: *Western of Canada Oil, Lands and Works Co v Walker* (1875) 10 Ch App 628. The fact that there was another claimant, whose claim only slightly overlapped the claimant company's claim, was held not to be a ground for excusing the company from giving security in *John Bishop (Caterers) Ltd v National Union Bank Ltd* [1973] 1 All ER 707. In *Bilcon Ltd v Fegmay Investments Ltd* [1966] 2 QB 221, [1966] 2 All ER 513, security was ordered in a reference to arbitration. See also *Pearson v Naydler* [1977] 3 All ER 531, [1977] 1 WLR 899 (security ordered where there was a natural person as co-plaintiff with the company). A successful claimant will not be entitled to have the security paid out to him where the defendant has lodged an appeal and the interests of justice require that the payment stays with the court: *Stabilad Ltd v Stephens & Carter Ltd* [1998] 4 All ER 129, [1999] 1 WLR 1201, CA.

3 *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609, [1973] 2 All ER 273, CA (discretion exercisable according to all the circumstances of the particular case); *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074, [1987] 1 WLR 420; *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534, [1995] 2 BCLC 395, CA.

4 *Trident International Freight Services Ltd v Manchester Ship Canal Co* [1990] BCLC 263, CA; *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534, [1995] 2 BCLC 395, CA. Account should also be taken of the conduct of the litigation, including any open offer or payment into court, any changes of stance by the parties and the lateness of the application, if appropriate: *Keary Developments Ltd v Tarmac Construction Ltd*.

5 *Trident International Freight Services Ltd v Manchester Ship Canal Co* [1990] BCLC 263, CA; *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534, [1995] 2 BCLC 395, CA. In this regard, it is for the claimant company to satisfy the court that it would be prevented by an order for security from continuing the litigation (*Keary Developments Ltd v Tarmac Construction Ltd*); but it is not necessary for the company, in order to have the application dismissed, to adduce evidence that it will or may be unable to pursue the proceedings if the order is granted (*Trident International Freight Services Ltd v Manchester Ship Canal Co*).

6 *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* [2008] EWHC 413 (TCC), [2008] 2 All ER 1173, [2008] 1 BCLC 722. Moreover, the greater the distance in time between the incurring of the costs and the commencement of the proceedings, the greater would be the likelihood that the losing party would have good grounds to dispute its liability to reimburse such costs in any event and/or would have a stronger argument to the effect that the court should not exercise its discretion under CPR Pt 25 and order security in respect of such historic costs: *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd*.

7 *Re Strand Wood Co Ltd* [1904] 2 Ch 1, CA. In such a case, the liquidator may be ordered to pay the costs personally: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 594. As to security for costs by a foreign company as petitioning creditor see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 475.

8 *Northampton Coal, Iron and Waggon Co v Midland Waggon Co* (1878) 7 ChD 500, CA; *Pure Spirit Co v Fowler* (1890) 25 QBD 235; *Re Diamond Fuel Co* (1879) 13 ChD 400, CA; *Re Photographic Artists' Co-operative Supply Association* (1883) 23 ChD 370, CA; *Lydney and Wigpool Iron Ore Co v Bird* (1883) 23 ChD 358 at 359; *City of Moscow Gas Co v International Financial Society Ltd* (1872) 7 Ch App 225 at 229.

9 *Universal Aircraft Ltd v Hickey* (4 May 1943, unreported); *Tudor Furnishers Ltd v Montague & Co and Finer Production Co Ltd* [1950] Ch 113 at 115, [1950] 1 All ER 65 at 66 per Wynn-Parry J.

10 *Accidental and Marine Insurance Co v Mercati* (1866) LR 3 Eq 200; *Maatshappij Voor Fondsenbezit v Shell Transport and Trading Co* [1923] 2 KB 166, CA; *Naamlooze Vennootschap Beleggings Compagnie 'Uranus' v Bank of England* [1948] 1 All ER 465, CA; *CT Bowring & Co (Insurance) Ltd v Corsi & Partners Ltd* [1994] 2 Lloyd's Rep 567, [1995] 1 BCLC 148, CA.

11 *Accidental and Marine Insurance Co v Mercati* (1866) LR 3 Eq 200.

12 *Strong v Carlyle Press (No 2)* (1893) 37 Sol Jo 357; *City of Moscow Gas Co v International Financial Society* (1872) 7 Ch App 225; *Washoe Mining Co v Ferguson* (1866) LR 2 Eq 371. See also *Sinclair v Glasgow and London Contract Corp* (1904) 6 F 818; *Freehold Land and Brickmaking Co v Spargo* [1868] WN 94; *Hutchison Telephone (UK) Ltd v Ultimate Response Ltd* [1993] BCLC 307, CA; *Thistle Hotels Ltd v Orb Estates plc* [2004] All ER (D) 326 (Feb). In *Hart Investments Ltd v Larchpark Ltd* [2007] EWHC 291 (TCC), [2008] 1 BCLC 589, the claimant's claim and the defendant's counterclaim both had a reasonable prospect of success, but security was ordered on the grounds that it had not been shown that the grant of security would stifle the claim or that the claimant was responsible for the defendant's financial difficulties or that the application for security was made at a late stage of the proceedings, and because the defendant had refused to comply with previous costs orders made against it.

13 *T Sloyan & Sons (Builders) Ltd v Brothers of Christian Instruction* [1974] 3 All ER 715 (arbitration).

14 *Tudor Furnishers Ltd v Montague & Co and Finer Production Co Ltd* [1950] Ch 113, [1950] 1 All ER 65.

15 See CPR 25.12(3)(a); and **CIVIL PROCEDURE** vol 11 (2009) PARA 745. See also *Imperial Bank of China, India, and Japan v Bank of Hindustan, China and Japan* (1866) 1 Ch App 437; *Dominion Brewery Ltd v Foster* (1897) 77 LT 507, CA. In considering the amount of security that might be ordered, the court will have regard to the fact that it is not required to order the full amount claimed by way of security and it is not even bound to make an order of a substantial amount: *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534, [1995] 2 BCLC 395, CA.

16 The manner in which security is ordered to be given is usually that the amount of security is to be paid into court. As to the payment of money into court see CPR Pt 37; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1553 et seq.

17 See CPR 25.12(3)(b); and **CIVIL PROCEDURE** vol 11 (2009) PARA 745.

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309. Non-party costs orders against directors.

Generally, where the court is considering whether to exercise its power¹ to make a costs order in favour of or against a person who is not a party to proceedings, that person must be added as a party to the proceedings for the purposes of costs only².

Although the circumstances in which it is appropriate to make an order for costs against a person who was not a party to the litigation always have to be exceptional³, liability for costs has been ordered in this way where a non-party director has been described as the 'real party', seeking his own benefit, in controlling or funding a company's litigation⁴, even where he has acted in good faith or without any impropriety⁵.

However, the mere fact that an action brought by a company has been held to be an abuse of process does not necessarily mean that the company's managing director should be personally liable to pay the costs owed by the company⁶.

1 le under the Senior Courts Act 1981 s 51 (costs are in the discretion of the court): see **CIVIL PROCEDURE** vol 12 (2009) PARA 1748.

2 See CPR 48.2; and **CIVIL PROCEDURE** vol 11 (2009) PARA 217.

3 See *Metalloy Supplies Ltd (in liquidation) v MA (UK) Ltd* [1997] 1 All ER 418 at 424-425, [1997] 1 WLR 1613 at 1620, CA, per Millett LJ. See also note 6.

4 *Goodwood Recoveries Ltd v Breen* [2005] EWCA Civ 414, [2006] 2 All ER 533, [2006] 1 WLR 2723. See also *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, [2005] 4 All ER 195, [2004] 1 WLR 2807 (non-party who promoted and funded proceedings by an insolvent company solely or substantially for his own financial benefit was liable for costs as the appeals would not have been made without this assistance); *Halton International Inc (Holdings) SARL v Guernroy Ltd* [2005] EWHC 1968 (Ch), [2006] 1 BCLC 78 (where the claimant company had been used by its sole director and shareholder as an investment vehicle, and had no other assets of its own, there was a strong inference that the shareholder had funded the proceedings on behalf of the company for his own personal benefit); *BE Studios Ltd v Smith & Williamson Ltd* [2005] EWHC 2730 (Ch), [2006] 2 All ER 811 (company could not realistically be regarded as the real party interested in the result of speculative litigation which could have resulted in the repayment of certain loan creditors of the company, of whom the non-party director was by far the largest); *CIBC Mellon Trust Co v Stolzenberg* [2005] EWCA Civ 628, [2005] 2 BCLC 618 (order for costs against shareholder who had funded and controlled litigation by the company); *Equitas Ltd v Horace Holman & Co Ltd* [2008] EWHC 2287 (Comm), [2009] 1 BCLC 662 (no justification for piercing the corporate veil where company funding litigation was controlled and indirectly owned by another company if any benefit accruing to first company from the litigation could not be treated as tantamount to a financial benefit accruing to latter company); and see *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2006] EWCA Civ 1038 at [11], 150 Sol Jo LB 984 at [10]-[16], [2006] All ER (D) 260 (Jul) at [10]-[16] per Longmore LJ (jurisdiction not limited to directors; costs can be ordered against a corporate controller); and *Alan Phillips Associates Ltd v Dowling (t/a The Joseph Dowling Partnership)* [2007] EWCA Civ 64 at [20]-[22], [2007] BLR 151 at [20]-[22], [2007] All ER (D) 37 (Jan) at [20]-[22] per Chadwick LJ (there was so close an identity between director and substantial shareholder of the company and the company itself, and so close an identity between his interests and the interests of the company, that it was just to make a third party costs order against him personally).

5 *Goodwood Recoveries Ltd v Breen* [2005] EWCA Civ 414, [2006] 2 All ER 533, [2006] 1 WLR 2723; *BE Studios Ltd v Smith & Williamson Ltd* [2005] EWHC 2730 (Ch), [2006] 2 All ER 811.

6 *Landare Investments Ltd v Welsh Development Agency* [2004] EWHC 946 (QB), [2006] 1 BCLC 451 (where an action brought by a company had been dismissed, with indemnity costs, as constituting an abuse of process, the defendants' application for an order for costs against the managing director was refused, on the grounds that he could not be blamed for the company's failure to prove its loss, since he had received professional advice at all stages, had acted bona fide throughout and had not acted improperly at any stage, and that making an order for costs against him would amount to an erosion of the principle of limited liability).

See also *Taylor v Pace Developments Ltd* [1991] BCC 406, CA (where the court refused to order the sole director and shareholder personally liable for costs where an insolvent company had unsuccessfully defended court proceedings; although it may be possible so to order in certain cases, as eg where the company's defence was not bona fide); *Metalloy Supplies Ltd (in liquidation) v MA (UK) Ltd* [1997] 1 All ER 418 at 424-425, [1997] 1 WLR 1613 at 1620, CA, per Millett LJ; *Floods of Queensferry Ltd v Shand Construction Ltd* [2002] EWCA Civ 918, [2003] Lloyd's Rep IR 181.

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310. Enforcement of judgments and orders against company.

Judgment against a company may be enforced by writ of fieri facias¹, as in the case of a natural person². Any judgment or order against the company requiring it to do an act within a specified time or requiring it to abstain from doing an act may, with the permission of the court, be enforced by sequestration against its property, or by committal against any of its directors or other officers, or by sequestration against their property³. For this purpose, an undertaking given to the court and embodied in a court order has the same effect as a judgment or order⁴. A company cannot be attached for contempt of court⁵, but the court may inflict an appropriate fine⁶; and sequestration will be ordered if the company contumaciously refuses to obey, though not in the case of casual or accidental and unintentional disobedience⁷.

1 As to writs of fieri facias see **CIVIL PROCEDURE** vol 12 (2009) PARAS 1266, 1273 et seq.

2 *Worral Waterworks Co v Lloyd* (1866) LR 1 CP 719; *Spokes v Banbury Board of Health* (1865) LR 1 Eq 42. See also **CIVIL PROCEDURE** vol 12 (2009) PARA 1238. It was held that where a winding-up petition was presented founded on a judgment debt, the petition was not a mode of enforcing the judgment so as to be covered by a civil aid certificate given in the original proceedings (*Re Parker Davies and Hughes Ltd* [1953] 2 All ER 1158, [1953] 1 WLR 1349); but following a change in the wording of the relevant rules this decision has become obsolete (*Re Peretz Co Ltd* [1965] Ch 200, [1964] 3 All ER 633). As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

3 See CPR Sch 1 RSC Ord 45 r 5(1); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1249. As to writs of sequestration see **CIVIL PROCEDURE** vol 12 (2009) PARA 1269; and as to orders of committal see **CIVIL PROCEDURE** vol 12 (2009) PARA 1514 et seq. The remedies against the company, and against its directors for committal, are alternative: *Iberian Trust Ltd v Founders Trust and Investment Co Ltd* [1932] 2 KB 87. See also *Benabo v William Jay & Partners Ltd* [1941] Ch 52, [1940] 4 All ER 196. It was formerly not necessary that the judgment or order which had been disobeyed should have been served personally on the company, as service on the company's solicitors was sufficient (*Aberdonia Cars Ltd v Brown, Hughes and Strachan Ltd* (1915) 59 Sol Jo 598 (sequestration)), at all events where the order was merely prohibitive (see *Ronson Products Ltd v Ronson Furniture Ltd* [1966] Ch 603, [1966] 2 All ER 381). Personal service on the director affected is now essential: see CPR Sch 1 RSC Ord 45 r 7(3); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1249. Execution may be issued against shareholders or public officers of joint stock companies which were registered under 7 & 8 Vict c 110 (Joint Stock Companies) (1844), or the Country Bankers Act 1826, and have not been re-registered under the Joint Stock Companies Acts (see PARA 24 note 5); but such a proceeding is now so rare as to be practically obsolete. Cf PARA 1711. As to the power of a court to punish by committal or sequestration see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 465.

4 *Biba Ltd v Stratford Investments Ltd* [1973] Ch 281, [1972] 3 All ER 1041.

5 *R v Windham* (1776) 1 Cowp 377; *Re Hooley, ex p Hooley* (1899) 79 LT 706.

6 *R v JG Hammond & Co Ltd* [1914] 2 KB 866; *R v Hutchison, ex p McMahon* [1936] 2 All ER 1514.

7 *Fairclough & Sons v Manchester Ship Canal Co (No 2)* [1897] WN 7, CA. On the true construction of CPR Sch 1 RSC Ord 45 r 5 (as to which see **CIVIL PROCEDURE** vol 12 (2009) PARA 1249), under which a director or other officer of a company may be committed or have his property sequestered where the company disobeys an injunction, such a person is not rendered liable in contempt merely by virtue of his office and his knowledge that the order sought to be enforced was made, but will be liable only if he can otherwise be shown to be in contempt under the general law of contempt; in the absence of mens rea or an actus reus, such a director or other officer of a company will not be liable in contempt: *Director General of Fair Trading v Buckland* [1990] 1 All ER 545, [1990] 1 WLR 920. Where, however, a company is ordered by the court not to do certain acts or to give an undertaking to the like effect and a director of the company is aware of that order or undertaking, the director is under a duty to take reasonable steps to ensure that the order or undertaking is obeyed; and if he wilfully fails to take those steps and the order or undertaking is breached, he may be punished for contempt unless he reasonably believes that some other director or officer of the company is taking them: *A-G for Tuvalu v Philatelic Distribution Corp'n Ltd* [1990] 2 All ER 216, [1990] 1 WLR 926, CA.

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(vii) Company's Liability for Criminal Acts etc

311. Potential criminal liability of a company.

The activities of a registered company¹ are subject to the criminal law in the same way as those of a natural person²; and a company may be convicted of offences both at common law³ and under statute⁴, including those offences which require mens rea⁵. Where an offence requires mens rea, a company may be convicted if the offence is committed in the course of business by a person in control of its affairs to such a degree that the company may fairly be said to think and act through him so that his actions and intent are the actions and intent of the company⁶; in such a case, those who 'constitute the directing mind and will of the company' are the company for this purpose⁷. Although the 'directing mind' may delegate its functions, it is not enough, for criminal liability to attach, that the person whose conduct it is sought to impute to the company is a manager or responsible agent or high executive⁸; whether persons are the 'directing mind and will' of a company, so that their conduct in its affairs becomes the conduct of the company, must depend on all the circumstances⁹.

A company cannot be guilty of any criminal offences which, by their very nature, may be committed only by natural persons¹⁰. Nor can a company be indicted for a crime where the only punishment is imprisonment¹¹.

1 As to the meaning of 'company' generally see PARA 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 The subject to the proviso that there are certain offences that can be committed only by natural persons or for which only natural persons may be convicted: see the text and notes 10-11. In any Act, unless the contrary intention appears, 'person' includes a body of persons corporate or unincorporate: see the Interpretation Act 1978 ss 5, 22(1), Sch 1; and **STATUTES** vol 44(1) (Reissue) PARA 1382. This definition of 'person', so far as it includes bodies corporate, applies to any provision of an Act whenever passed relating to an offence punishable on indictment or on summary conviction: see s 22(1), Sch 2 para 4(5). As to corporate liability for criminal acts generally see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1280; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 38 et seq. As to corporate personality generally see PARA 2; and **CORPORATIONS** vol 9(2) (2006 Reissue) PARAS 1225-1226. As to the effect of a petition for administration, an administration order or a winding-up order on the initiation or pursuit of proceedings against a company see PARA 48; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 149, 157, 490; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 887, 893. As to the criminal liability of partnerships as distinct from the liability of individual partners see *R v W Stevenson & Sons (a partnership)* [2008] EWCA Crim 273, [2008] Bus LR 1200, [2008] All ER (D) 351 (Feb); and **PARTNERSHIP** vol 79 (2008) PARA 2.

3 See eg *R v Great North of England Rly Co* (1846) 2 Cox CC 70 (public nuisance); *R v JG Hammond & Co Ltd* [1914] 2 KB 866 (contempt of court); *R v ICR Haulage Ltd* [1944] KB 551, [1944] 1 All ER 691, CCA (conspiracy to defraud); *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass* (1939) Ltd [1939] 2 KB 395, [1939] 2 All ER 613, CA (criminal libel).

4 See eg *R v Birmingham and Gloucester Rly Co* (1842) 3 QB 223 (non-repair of highway); *A-G v London and North Western Rly Co* [1900] 1 QB 78, CA (excessive speed of trains); *Pearks, Gunston and Tee Ltd v Ward* [1902] 2 KB 1, DC; *R v Ascanio Puck & Co and Paice* (1912) 76 JP 487 (sale of food); *Provincial Motor Cab Co Ltd v Dunning* [1909] 2 KB 599 (breach of road traffic regulations); *R v Gainsford Justices* (1913) 29 TLR 359 (breach of Factory and Workshop Acts); *Evans & Co Ltd v LCC* [1914] 3 KB 315 (breach of the Shops Act 1912 s 4 (repealed)); *Mousell Bros Ltd v London and North Western Rly Co* [1917] 2 KB 836 (giving false account of goods to toll collector); *Brentnall and Cleland Ltd v LCC* [1945] 1 KB 115, [1944] 2 All ER 552, DC (offence against the Weights and Measures Act 1889 s 29 (repealed)); *Orpen v Haymarket Capitol Ltd* (1931) 145 LT

614; *Houghton-Le Touzel v Mecca Ltd* [1950] 2 KB 612, [1950] 1 All ER 638 (offence against the Sunday Observance Act 1780 (repealed)); *Worthy v Gordon Plant (Services) Ltd* [1989] RTR 7n, DC (breach of road traffic legislation concerning drivers' hours); *R v Associated Octel Co Ltd* [1996] 4 All ER 846, [1996] 1 WLR 1543, HL (breach of Health and Safety at Work etc Act 1974 s 3(1)); *R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78, [1997] 2 Cr App Rep 40, CA (breach of Health and Safety at Work etc Act 1974 s 2(1)). As to the liability of officers of the company for failing to comply with requirements imposed by the Companies Acts see PARAS 314, 315; and see eg *R v Tyler and International Commercial Co* [1891] 2 QB 588 at 592-594, CA (default in complying with the Companies Act 1862 s 26 (now repealed) (forwarding annual list of members to registrar)).

5 *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146, [1944] 1 All ER 119, DC; *R v ICR Haulage Ltd* [1944] KB 551, [1944] 1 All ER 691, CCA (doubting *R v Cory Bros & Co* [1927] 1 KB 810).

6 One source of difficulty in attaching criminal liability to a company lies in the principle of separate corporate personality: see PARA 120 note 16. Since a company is an artificial person, the knowledge of those who manage and control it must be treated as the knowledge of the company: see *Houghton & Co v Nothard, Lowe and Wills Ltd* [1928] AC 1, [1927] All ER Rep 97.

Historically, cases of 'corporate manslaughter' have tested this principle: see *R v P & O European Ferries (Dover) Ltd* (1991) 93 Cr App Rep 72; *R v HM Coroner for East Kent, ex p Spooner* (1987) 88 Cr App Rep 10, 3 BCC 636, DC. In *A-G's Reference (No 2 of 1999)* [2000] QB 796, [2000] 3 All ER 182, CA, which was made partly on the question of whether a non-human defendant can be convicted of the criminal offence of manslaughter by gross negligence in the absence of evidence establishing the guilt of an identified human individual for the same crime, the court held that a corporation's liability for manslaughter was based solely on the principle of 'identification', which was just as relevant to actus reus as to mens rea, and that unless an identified individual's conduct, characterisable as gross criminal negligence, could be attributed to the corporation, the corporation was not, at common law, liable for manslaughter; the court on that reference also held that civil negligence rules were not apt to confer criminal liability on a corporation: see *A-G's Reference (No 2 of 1999)* at 815-816, 191-192. This position, as it relates to the common law offence of manslaughter by gross negligence in its application to corporations, has been modified by statute: see the Corporate Manslaughter and Corporate Homicide Act 2007; and PARA 313.

A corporation may be vicariously liable for a crime committed by its servant or agent in the course of his employment or agency in the same circumstances as an employer or principal who is a natural person: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 59 et seq.

7 *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, [1971] 2 All ER 127, HL. See also *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146, [1944] 1 All ER 119, DC; *R v ICR Haulage Ltd* [1944] KB 551, [1944] 1 All ER 691, CCA; *Moore v I Bressler Ltd* [1944] 2 All ER 515, DC; *Magna Plant Ltd v Mitchell* (1966) 110 Sol Jo 349, DC; *John Henshall (Quarries) Ltd v Harvey* [1965] 2 QB 233, [1965] 1 All ER 725, DC; *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159, [1956] 3 All ER 624, CA. It is not possible to aggregate the acts and states of mind of two or more controlling officers (none of whom could be criminally liable) so as to render the corporation liable: *R v HM Coroner for East Kent, ex p Spooner* (1987) 88 Cr App Rep 10, 3 BCC 636, DC; *R v P & O European Ferries (Dover) Ltd* (1990) 93 Cr App Rep 72; *A-G's Reference (No 2 of 1999)* [2000] QB 796, [2000] 3 All ER 182, CA. As to the 'identification principle', which attributes the directing mind and will of the company, see PARA 312.

The principle of non-attribution, by which knowledge of a fraud would not be attributed to a company when the fraud was practised on the company itself, could apply where the fraud or dishonesty of the company's directing mind and will was targeted against the company itself, depending on whether the company was to be regarded as the villain or victim of the fraud: see *Stone & Rolls Ltd (in liq) v Moore Stephens (a firm)* [2008] EWCA Civ 644, [2008] 3 WLR 1146, [2008] 2 BCLC 461 (where a company's sole directing mind and will procured the company to enter into fraudulent transactions with the bank, and it was the company that dealt with the bank, his dishonesty was to be imputed to the company; the company was therefore itself liable for the frauds and, being the fraudster rather than the target of the fraud, the adverse consequences which it suffered from the fraud did not make it a victim; where the fraudulent conduct of the directing mind and will of the company was to be treated as the conduct of the company, ex turpi causa would defeat a claim by the company against its auditors for failure to detect the fraud); affd [2009] UKHL 39, [2009] 3 WLR 455.

8 *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159, [1956] 3 All ER 624, CA; *R v Andrews Weatherfoil Ltd* [1972] 1 All ER 65, [1972] 1 WLR 118, CA. It would bring the law into disrepute if every act and state of mind of an individual employee was attributed to a company which was entirely blameless: see *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 169, [1971] 2 All ER 127 at 131, HL, per Lord Reid; and see *Canadian Dredge & Dock Co Ltd v R* (1985) 19 DLR (4th) 314, 19 CCC (3d) 1, Can SC.

9 An important circumstance is the constitution of the corporation and the extent to which it identifies the natural persons who, by the constitution or as a result of action taken by the directors or by the corporation in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the corporation: see *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 199-200, [1971] 2 All ER 127 at 155, HL, per Lord Diplock. As to the meaning of references to a company's constitution see PARA 227.

10 See *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146, [1944] 1 All ER 119, DC, where earlier cases are also discussed. There appears to be a conflict in the case law as to whether a corporation can commit perjury: cf *R v ICR Haulage Ltd* [1944] KB 551 at 554, [1944] 1 All ER 691 at 693, CCA ('[there] are the cases in which, from its very nature, the offence cannot be committed by a corporation, as, for example, perjury, an offence which cannot be vicariously committed, or bigamy, an offence which a limited company, not being a natural person, cannot commit vicariously or otherwise'); *Wych v Meal* (1734) 3 P Wms 310 (corporation cannot commit perjury); *Odyssey Re (London) Ltd (formerly Sphere Drake Insurance plc) v OIC Run-Off Ltd (formerly Orion Insurance Co plc)* [2001] Lloyd's Rep IR 1, CA (where a party is a corporation, it is possible for evidence perjured by a natural person to be treated as that of the company, the test to be adopted being whether the natural person in question has the status and authority which in law make his acts in the matter under consideration the acts of the company, so that he is to be treated as the company itself). A corporation cannot be convicted of conspiracy where the only other party to it is the sole director of the corporation: *R v McDonnell* [1966] 1 QB 233, 50 Cr App Rep 5. As to manslaughter see note 6.

A corporation cannot be guilty as a principal of dangerous driving or of driving without due care and attention. In *R v Robert Millar (Contractors) Ltd, R v Millar* [1970] 2 QB 54, 54 Cr App Rep 158, CA, the corporation was convicted as a secondary party to the offence of causing death through dangerous driving (contrary to what is now the Road Traffic Act 1988 s 1: see **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 963).

11 *R v ICR Haulage Ltd* [1944] KB 551 at 554, 557, [1944] 1 All ER 691 at 693, 694, CCA, per Stable J. See also *Pharmaceutical Society v London and Provincial Supply Association* (1880) 5 App Cas 857 at 869, HL, per Lord Blackburn; *R v Cory Bros & Co Ltd* [1927] 1 KB 810; *Law Society v United Service Bureau Ltd* [1934] 1 KB 343 at 350, DC, per Avory J. However, the Companies Act 2006 provides copiously for individual 'officers in default' to become liable to terms of imprisonment for contravention of its provisions: see PARA 315.

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312. Directing mind of company.

Since a company cannot act of itself, but only through an individual, and even then not necessarily through one and the same individual, the question arises whether, on the one hand, a person so acting is acting as a living embodiment of the company, or whether, on the other hand, he is merely acting as the company's employee or agent¹.

For most civil purposes, it is not necessary to decide the matter, since usually as a result of the doctrine of ostensible authority the company will be bound by the acts of the person acting on its behalf². The question is, however, often a live one so far as the criminal law is concerned, since for the acts of a person who may properly be classified as the 'directing mind of the company'³ the company will undoubtedly be liable criminally⁴ if those acts are in breach of any of the provisions of the criminal law⁵; but if the person who has acted is merely an employee or agent, the company may well be able to refute any charge or take advantage of any exempting provision based on actual fault in the actor⁶.

The directors may delegate part of their functions of management in such a way as to make their delegate an embodiment of the company within the sphere of the delegation; but they do not do this merely because, of necessity, ministerial functions have to be delegated⁷. Once the facts relating to the precise position of the person alleged to form the directing mind of the company have been ascertained, it is a question of law whether that person, in doing a particular act, is or is not to be regarded as the company⁸. The main considerations are the relative position in the company which he holds and the extent to which, as a matter of fact, he is in actual control of its operations or a section of them without effective superior control⁹.

1 See *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 170, [1971] 2 All ER 127 at 131-132, HL, per Lord Reid. Where a company's rights and obligations cannot be determined either by the primary rules of attribution,

expressed in its constitution or implied by law, for determining what acts are to be attributed to the company, or by the application of the general principles of agency or vicarious liability, the question of attribution for a particular substantive rule is a matter of interpretation or construction of that rule. If the court decides that the substantive rule is intended to apply to a company, it then has to decide how the rule is intended to apply and whose act or knowledge or state of mind is for that purpose intended to count as the act, knowledge or state of mind of the company. Although in some cases that can be determined by applying the test of whose was the 'directing mind and will' of the company so that his fault or knowledge becomes the company's fault or knowledge, that test is not appropriate in all cases: *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, [1995] 3 All ER 918, PC, applying *Tesco Supermarkets Ltd v Natrass*. See also *KR v Royal & Sun Alliance plc* [2006] EWCA Civ 1454, [2007] 1 All ER (Comm) 161, [2007] Lloyd's Rep IR 368 (acts of managing director and majority shareholder attributed to company).

2 See PARA 266 et seq. As to cases under the Landlord and Tenant Act 1954 s 30(1)(f), involving a consideration of the landlord's intention, see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 741 et seq.

3 The line of authority for attributing the 'directing mind of the company' ('identification') is usually traced back to *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at 713, HL, per Viscount Haldane LC ('a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation'). See also *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 at 172, [1956] 3 All ER 624 at 630, CA, per Denning LJ; and *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 170, [1971] 2 All ER 127 at 131-132, HL, per Lord Reid. If there is just one person classified as the 'directing mind of the company', he cannot conspire with the company, since conspiracy requires two minds: *R v McDonnell* [1966] 1 QB 233, [1966] 1 All ER 193.

4 This doctrine, sometimes known as the 'alter ego' doctrine, has been developed in both civil and criminal jurisdictions with no divergence of approach, the authorities in each being cited indifferently in the other. A company having no mind or will of its own, the need for it arises because the criminal law often requires mens rea as a constituent of the crime and the civil law often requires intention or knowledge as an ingredient of the cause of action or defence: *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 at 472-473, CA, per Nourse LJ.

5 This will not be so, however, where the directors or other directing minds are acting for their own benefit at the expense of the company, or in order to deprive the company of part of its assets: see eg *Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] Ch 250, [1979] 1 All ER 118, CA.

6 *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, [1971] 2 All ER 127, HL; *Dumfries and Maxwelltown Co-operative Society v Williamson* 1950 JC 76; *John Henshall (Quarries) Ltd v Harvey* [1965] 2 QB 233, [1965] 1 All ER 725, DC (lorry of excessive weight allowed on road); *Magna Plant Ltd v Mitchell* (1966) 110 Sol Jo 349, DC (unmaintained vehicle allowed on road).

7 *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, [1971] 2 All ER 127, HL (delegation to branch managers).

8 *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 170, 173, [1971] 2 All ER 127 at 131, 134, HL, per Lord Reid; *Essendon Engineering Co Ltd v Maile* [1982] RTR 260, DC (no evidence as to responsibilities of guilty employee, so company not liable). See also *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, CA; *Morris v Bank of India* [2005] EWCA Civ 693, [2005] 2 BCLC 328 (it would in practice defeat the effectiveness of the Insolvency Act 1986 s 213 (as to which see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 911) if liability were limited to those cases in which the board of directors was actually a direct privy to the fraud of the company with whom the transactions were entered into; the scheme of delegation of authority might provide only an incomplete picture of what was done and might not be sufficient for the purposes of determining whether the company should be treated as possessing the requisite knowledge); *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2008] EWCA Civ 644, [2008] 3 WLR 1146, [2008] 2 BCLC 461 (the essence of the case was that it was one in which the sole directing mind and will of the company procured it to enter into fraudulent transactions with banks).

9 *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146, [1944] 1 All ER 119, DC; *R v ICR Haulage Ltd* [1944] KB 551, [1944] 1 All ER 691, CCA. Cf *R v Andrews Weatherfoil Ltd* [1972] 1 All ER 65, [1972] 1 WLR 118, CA (not every 'high executive' binds the company). See also *Odyssey Re (London) Ltd (formerly Sphere Drake Insurance plc) v OIC Run-Off Ltd (formerly Orion Insurance Co plc)* [2001] Lloyd's Rep IR 1, CA (where a party is a corporation, it is possible for evidence perjured by a natural person to be treated as that of the company, the test to be adopted being whether the natural person in question has the status and authority which in law make his acts in the matter under consideration the acts of the company, so that he is to be treated as the company itself).

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313. Liability for corporate manslaughter.

The common law offence of manslaughter by gross negligence¹ is abolished in its application to corporations², and in any application it has to other organisations to which the Corporate Manslaughter and Corporate Homicide Act 2007³ applies⁴.

Under the 2007 Act, a corporation or other such organisation⁵ is guilty of the offence of corporate manslaughter if the way in which its activities are managed or organised causes a person's death, amounting to a gross breach of a relevant duty of care owed by the organisation to the deceased, but only if the way in which its activities are managed or organised by its senior management is a substantial element in that breach⁶. For these purposes, the term 'relevant duty of care', in relation to an organisation, is defined by reference to specified duties owed under the law of negligence⁷. In assessing whether an organisation's breach of a relevant duty of care was 'gross', the jury is required to consider whether the organisation failed to comply with relevant health and safety legislation, the seriousness of such a failure, how much of a risk of death it posed, and the wider context of the failure⁸.

An organisation that is guilty of corporate manslaughter is liable on conviction on indictment to a fine⁹.

1 As to manslaughter by gross negligence generally see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 100.

2 For these purposes, 'corporation' does not include a corporation sole but includes any body corporate wherever incorporated: see the Corporate Manslaughter and Corporate Homicide Act 2007 s 25; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**. As to corporations sole see **CORPORATIONS** vol 9(2) (2006 Reissue) PARAS 1111-1112. As to the criminal liability of companies generally see PARAS 311-312.

3 Ie by virtue of the Corporate Manslaughter and Corporate Homicide Act 2007 s 1 (as to which see note 4): see s 20; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

4 See the Corporate Manslaughter and Corporate Homicide Act 2007 s 20; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**. The organisations to which s 1 applies are a corporation (other than a corporation sole: see s 25; and note 2), a government department or other body that is listed in Sch 1, a police force, and a partnership (or a trade union or employers' association) that is an employer: see s 1; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**. As to the application of the Corporate Manslaughter and Corporate Homicide Act 2007 to the Crown see s 11; as to its application to the armed forces see s 12; and as to police forces see s 13; and see generally **CRIMINAL LAW, EVIDENCE AND PROCEDURE**. As to partnerships see s 14; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

5 Ie any organisation to which the Corporate Manslaughter and Corporate Homicide Act 2007 s 1 applies (see note 4): see s 1; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

6 See the Corporate Manslaughter and Corporate Homicide Act 2007 s 1; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**. For these purposes, a breach of a duty of care by an organisation is a 'gross' breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances (see also the text and note 8); and 'senior management', in relation to an organisation, means the persons who play significant roles in the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or in the actual managing or organising of the whole or a substantial part of those activities: see s 1; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

An individual cannot be guilty of aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter: see s 18; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

7 See the Corporate Manslaughter and Corporate Homicide Act 2007 s 2, which is subject to the modifications and exceptions contained in ss 3-7; and see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

8 See the Corporate Manslaughter and Corporate Homicide Act 2007 s 8; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**. See also note 6.

9 See the Corporate Manslaughter and Corporate Homicide Act 2007 s 1; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**. A court before which an organisation is convicted of corporate manslaughter may make an order (a 'remedial order') requiring the organisation to take specified steps to remedy the relevant breach, and any matter that appears to the court to have resulted from the relevant breach and to have been a cause of the death, and any deficiency, as regards health and safety matters, in the organisation's policies, systems or practices of which the relevant breach appears to the court to be an indication: see s 9; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**. A court before which an organisation is convicted of corporate manslaughter also may make an order (a 'publicity order') requiring the organisation to publicise in a specified manner the fact that it has been convicted of the offence, specified particulars of the offence, the amount of any fine imposed and the terms of any remedial order made: see s 10 (not yet in force); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**. The fact that an organisation is charged with or has been convicted of corporate manslaughter does not preclude a further charge of a health and safety offence which arises out of the same set of circumstances: see s 19; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

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314. Criminal liability attaching to officers of a company.

Where a company is criminally liable for an offence, a natural person involved may also be convicted of it, as a joint principal or as an accomplice¹. In addition, many statutes now provide for the guilt of controlling officers of the company who would not be criminally liable under ordinary principles, or whose guilt it would otherwise be hard to prove².

Directors, officers and members may be liable for the general offences of theft in relation to the company's property (ie if any such person dishonestly appropriates property belonging to the company with the intention of permanently depriving the company of it)³ or for false accounting⁴. Where an offence of false accounting is committed by a body corporate and the offence is proved to have been committed with the consent or connivance of any director, manager, secretary or other similar officer⁵ of the body corporate, he, as well as the body corporate, is guilty of the offence, and is liable to be proceeded against and punished accordingly⁶. A person, on the basis that to do otherwise would incriminate either himself or his spouse or civil partner, cannot refuse to give evidence in civil proceedings, or to comply with any order made in any such proceedings; but no statement or admission made by him in answering a question put or in complying with such an order will be admissible in evidence against that person in proceedings for any offence under the Theft Act 1968⁷.

Where an officer of a body corporate or unincorporated association (or person purporting to act as such), with intent to deceive members or creditors of the body corporate or association about its affairs, publishes or concurs in publishing a written statement or account which to his knowledge is or may be misleading, false or deceptive in a material particular, he is (on conviction on indictment) liable to imprisonment for a term not exceeding seven years⁸.

Any person may become liable under the general offence of fraud, which may be committed by false representation, by failing to disclose information, or by abuse of position⁹. In all cases of fraud where two or more persons such as directors co-operate, an indictment for conspiracy will normally lie¹⁰; but, where only one person is the directing mind of the company¹¹, a charge of conspiracy with the company will not lie, as there are not the necessary two minds concerned¹². Where the conspiracy is to commit a fraud on the company or to deprive it of part of its assets, the natural persons to the conspiracy being the company's directors, a charge of

conspiracy will not lie against the company, even though the company, through the agency of the conspiring directors, carries out part of the conspired acts¹³.

The Companies Act 2006, the Insolvency Act 1986 and the Company Directors Disqualification Act 1986 include many provisions rendering directors and others liable to imprisonment¹⁴. Many of the offences punishable are those committed in connection with a company which is being wound up¹⁵.

Provision is made under the Companies Acts in relation to the criminal liability of an officer in default¹⁶.

1 See PARAS 311, 312.

2 The most pertinent example is the Corporate Manslaughter and Corporate Homicide Act 2007: see PARA 313. However, more commonly, statutes provide that, where an offence created by the particular statute which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence: see eg the Trade Descriptions Act 1968 s 20(1) (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 500); the Insolvency Act 1986 s 432(2) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 928); the Consumer Protection Act 1987 s 40(2) (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 538); the Food Safety Act 1990 s 36 (see **FOOD** vol 18(2) (Reissue) PARA 460); the Clean Air Act 1993 s 52 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 247); and the Railways Act 1993 s 147 (see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 428). See further **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 38. See also the text and note 16; and the Fraud Act 2006 s 12 (cited in PARA 316).

3 See the Theft Act 1968 s 1; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 282. See also *R (on the application of A) v Crown Court at Snaresbrook* (2001) Times, 12 July, [2001] All ER (D) 123 (Jun) (director could be found guilty of theft where appropriation was dishonest).

4 See the Theft Act 1968 s 17; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 316.

5 This extends also to a person purporting to act as such: see the Theft Act 1968 s 18(1).

6 Theft Act 1968 s 18(1). Where the affairs of a company are managed by its members, s 18 applies in relation to the member's acts and defaults in connection with his management functions as if he were a director: s 18(2).

7 Theft Act 1968 s 31(1). When an act done by a person is first disclosed by him without making any objection during cross-examination in civil proceedings, it is not disclosed by him 'in consequence of any compulsory process of any court of law' (the phrase used in the Larceny Act 1861 s 85 (repealed), which is now replaced by the Theft Act 1968 s 31(1)): *R v Noel* [1914] 3 KB 848, CCA. See also *R v Gunnell* (1886) 55 LT 786, CCR; *R v Strahan, Paul and Bates* (1855) 7 Cox CC 85; *R v Oliver* (1909) 3 Cr App Rep 246, CCA; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1477.

8 Theft Act 1968 s 19(1). For these purposes, a person who has entered into a security for the benefit of a body corporate or association is to be treated as a creditor of it: s 19(2). Where the affairs of a body corporate or association are managed by its members, s 19 applies to any statement which a member publishes or concurs in publishing in connection with his functions of management as if he were an officer of the body corporate or association: s 19(3).

9 See the Fraud Act 2006 ss 1-5; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 309. The general offence of fraud mentioned in the text replaces various deception offences contained in the Theft Act 1968 s 15 (repealed) and s 16 (repealed).

10 *Twycross v Grant* (1877) 2 CPD 469 at 493, CA, per Bramwell LJ (directors receiving presents etc from promoters); *Re Gold Co* (1879) 11 ChD 701 at 723, CA, per Bramwell LJ (directors may have deluded the public by allotting gratuitous shares to existing shareholders, thereby diluting the capital); *Burnes v Pennell* (1849) 2 HL Cas 497 at 524 per Lord Campbell (publishing false statements); *R v De Berenger* (1814) 3 M & S 67 (inducing purchase of shares); *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724 at 730, CA, per Lopes LJ; *R v Aspinall* (1876) 2 QBD 48, CA (inducing the Committee of the Stock Exchange to grant a quotation of shares); *R v Barber* (1887) 3 TLR 491 (paying a concealed profit to a broker). An agreement between two or more persons to purchase shares in a company in order to induce persons thereafter purchasing shares in it to believe, contrary to the fact, that there is a bona fide market in the shares, and that there is a real premium,

being an offence indictable as a conspiracy, no claim may be maintained in respect of such an agreement or purchase of shares: *Scott v Brown, Doering, McNab & Co*. See also *Taylor v Chester* (1869) LR 4 QB 309; *Begbie v Phosphate Sewage Co* (1876) 1 QBD 679.

11 See PARA 312.

12 *R v McDonnell* [1966] 1 QB 233, [1966] 1 All ER 193.

13 *Belmont Finance Corp'n Ltd v Williams Furniture Ltd* [1979] Ch 250, [1979] 1 All ER 118, CA.

14 See eg the Companies Act 2006 s 119 (offences in connection with request for or disclosure of information from register of members) (see PARA 349); s 350 (offences relating to failure to provide information to independent assessor) (see PARA 659); s 387 (officer of company failing to keep accounting records) (see PARA 708); s 389 (where and for how long records to be kept) (see PARA 709); s 418 (contents of directors' report: statement as to disclosure to auditors) (see PARA 820); s 501 (auditor's rights to information) (see PARA 931); s 572 (authorising the inclusion of misleading, false or deceptive matter in a statement setting out the reasons for a resolution disapplying pre-emption rights) (see PARA 1103); s 643(4) (directors making a solvency statement without having reasonable grounds for the opinions expressed in it) (see PARA 1178); s 658 (company acquiring its own shares otherwise than in accordance with statutory provisions) (see PARA 1197); s 680 (company giving financial assistance towards acquisition of own shares) (see PARA 1226); s 715 (making statutory declaration relating to a payment out of capital for redemption or purchase of own shares) (see PARA 1246); s 993 (being a party to carrying on company's business with intent to defraud creditors, or for any fraudulent purpose) (see PARA 316); s 1153 (making misleading, false or deceptive statement to valuer of non-cash asset) (see PARA 1122); the Insolvency Act 1986 s 89 (making statutory declaration of company's solvency without reasonable grounds for opinion) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 941); s 206 (fraud in anticipation of winding up) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 905); s 207 (entering into transactions in fraud of company's creditors) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 908); s 208 (misconduct in course of winding up) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 906); s 209 (destroying, falsifying etc the company's books) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 907); s 210 (making material omission from statement relating to company's affairs) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 909); s 211 (making false representation or fraud for purpose of obtaining creditors' consent to an agreement in connection with winding up) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 911); and the Company Directors Disqualification Act 1986 s 13 (undischarged bankrupt acting as director or director acting in contravention of a disqualification order or undertaking) (see PARAS 1590, 1614). This list is not exhaustive.

The offence of impersonation under the Companies Act 1948 s 84 (repealed) was one for which imprisonment could be ordered: see now the Fraud Act 2006; and note 9.

15 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 905 et seq.

16 See PARA 315.

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315. Criminal liability of officer in default under the Companies Acts.

Certain provisions of the Companies Acts¹ are worded to the effect that, in the event of contravention of an enactment² in relation to a company³, an offence is committed by every officer of the company who is in default⁴. For these purposes, 'officer' includes any director⁵, manager or secretary⁶, and any person who is to be treated as an officer of the company for the purposes of the provision in question⁷; and an officer is 'in default' for the purposes of the provision if he authorises or permits, participates in, or fails to take all reasonable steps to prevent, the contravention⁸.

Where a company is an officer⁹ of another company, it does not commit an offence as an officer in default¹⁰ unless one of its officers is in default¹¹. Where any such offence is committed by a

company the officer in question also commits the offence and is liable to be proceeded against and punished accordingly¹².

1 As to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'enactment' see PARA 17 note 2.

3 As to the meaning of 'company' under the Companies Acts see PARA 24. The provisions of the Companies Act 2006 s 1121 apply to a body other than a company as they apply to a company: s 1123(1). See further notes 5, 6.

4 Companies Act 2006 s 1121(1). See eg s 32(3) (constitutional documents to be provided to members) (see PARA 242); and s 36(3) (documents to be incorporated in or accompany copies of articles issued by company) (see PARA 241).

In most cases under the Companies Act 2006, however, liability falls upon both the company and the 'officer in default': see s 26(3) (registrar to be sent copy of amended articles) (see PARA 236); s 30(2) (copies of resolutions or agreements to be forwarded to registrar) (see PARA 231); s 34(5) (notice to registrar where company's constitution altered by enactment) (see PARA 238); s 35(3) (notice to registrar where company's constitution altered by order) (see PARA 239); s 45(3) (common seal) (see PARA 283); s 63(2) (restriction on amendment of articles of exempt company) (see PARA 202); s 64(5) (power to direct change of name in case of company ceasing to be entitled to exemption) (see PARA 213); s 68(5) (direction to change name) (see PARA 214); s 75(5) (provision of misleading information for the purposes of a company's registration by a particular name etc) (see PARA 215); s 76(6) (misleading indication of activities) (see PARA 216); s 84(1) (criminal consequences of failure to make required trading disclosures) (see PARA 220); s 99(4) (notice to registrar of court application or court order to cancel special resolution by a public company to be re-registered as a private limited company) (see PARA 174); s 108(4) (statement of capital required where company already has share capital) (see PARA 180); s 113(7) (register of members) (see PARA 335); s 114(5) (register to be kept available for inspection) (see PARA 347); s 115(5) (index of members) (see PARA 339); s 118(1) (refusal of inspection or default in providing copy of register of members) (see PARA 349); s 120(3) (information as to state of register and index) (see PARA 349); s 123(4) (single member companies) (see PARA 336); s 130(2) (notice of opening of overseas branch register) (see PARA 358); s 132(3) (register or duplicate to be kept available for inspection in UK) (see PARA 359); s 135(4) (discontinuance of overseas branch register) (see PARA 361); s 156(6) (direction requiring company to make appointment of director) (see PARA 483); s 162(6) (register of directors) (see PARA 499); s 165(4) (register of directors' residential addresses) (see PARA 500); s 167(4) (duty to notify registrar of changes) (see PARA 514); s 228(5) (copy of contract or memorandum of terms of service contract to be available for inspection) (see PARA 525); s 229(3) (right of member to inspect and request copy of contract or memorandum of terms of service contract) (see PARA 525); s 231(3) (contract with sole member who is also a director) (see PARA 584); s 237(6) (copy of qualifying indemnity provision to be available for inspection) (see PARA 598); s 238(3) (right of member to inspect and request copy of qualifying indemnity provision) (see PARA 599); s 246(5) (putting the address on the public record) (see PARA 513); s 248(3) (minutes of directors' meetings) (see PARA 530); s 272(6) (direction requiring public company to appoint secretary) (see PARA 602); s 275(6) (duty to keep register of secretaries) (see PARA 605); s 276(3) (duty to notify registrar of changes) (see PARA 606); s 291(5) (circulation of written resolutions proposed by directors) (see PARA 624); s 293(5) (circulation of written resolution proposed by members) (see PARA 625); s 315(3) (company's duty to circulate members' statement) (see PARA 642); s 325(3) (notice of meeting to contain statement of rights) (see PARA 662); s 326(3) (company-sponsored invitations to appoint proxies) (see PARA 663); s 336(3) (notice of annual general meeting of public companies) (see PARA 630); s 339(4) (public companies' duty to circulate members' resolutions for AGMs) (see PARA 643); s 341(3) (results of poll to be made available on website) (see PARA 656); s 343(4) (appointment of independent assessor to report on a poll) (see PARA 658); s 351(3) (information about appointment of independent assessor to be made available on website) (see PARA 658); s 355(3) (records of resolutions and meetings etc) (see PARA 668); s 358(5) (inspection of records of resolutions and meetings) (see PARA 669); s 387(1) (duty to keep accounting records) (see PARA 708); s 389(1) (where and for how long records to be kept) (see PARA 709); s 410(4) (information about related undertakings) (see PARAS 755; 793); s 425(1) (default in sending out copies of accounts and reports) (see PARA 852); s 429(1) (summary financial statements) (see PARA 853); s 430(6) (annual accounts and reports of quoted companies to be made available on website) (see PARA 864); s 431(3) (right of member or debenture holder to copies of accounts and reports of unquoted companies) (see PARA 860); s 432(3) (right of member or debenture holder to copies of accounts and reports of quoted companies) (see PARA 860); s 433(4) (name of signatory to be stated in published copies of accounts and reports) (see PARA 861); s 434(4) (requirements in connection with publication of statutory accounts) (see PARA 862); s 435(5) (requirements in connection with publication of non-statutory accounts) (see PARA 862); s 440(1) (procedure for approval of directors' remuneration report for quoted companies) (see PARA 849); s 486(3) (appointment of auditors of private company) (see PARA 913); s 490(3) (appointment of auditors of public company) (see PARA 917); s 501(4) (auditor's rights to information) (see PARA 932); s 505(3) (names to be stated in published copies of auditor's report) (see PARA 935); s 512(2) (notice to registrar of resolution removing auditor from office) (see PARA 938); s 517(2) (notice to registrar of resignation of auditor) (see PARA 941); s 519(8) (statement by auditor to be deposited with company) (see PARA 943); s 520(6) (company's duties in relation to statement by auditor) (see

PARA 943); s 521(6) (copy of auditor's statement to be sent to registrar) (see PARA 944); s 523(4) (duty of company to notify appropriate audit authority where auditor ceases to hold office before the end of his term of office) (see PARA 946); s 530(1) (default in complying with requirements as to website publication of audit concerns) (see PARA 949); s 542(4) (company purporting to allot shares without fixed nominal value) (see PARA 1044); s 554(3) (registration of allotment) (see PARA 1108); s 557(1) (failure to make return of allotment of shares or new class of shares) (see PARA 1108); s 590(1) (payment for shares) (see PARA 1111); s 597(3) (copy of valuer's report of non-cash consideration for shares to be delivered to registrar) (see PARA 1124); s 602(2) (copy of resolution for transfer of non-cash asset to be delivered to registrar) (see PARA 1128); s 607(2) (public company allotting shares for non-cash consideration or entering into agreement for transfer of non-cash asset) (see PARA 1125); s 619(4) (notice to registrar of sub-division or consolidation) (see PARA 1161); s 621(4) (notice to registrar of reconversion of stock into shares) (see PARA 1165); s 625(4) (notice to registrar of redenomination) (see PARA 1169); s 627(7) (notice to registrar of reduction of capital in connection with redenomination) (see PARA 1171); s 635(2) (copy of court order on application objecting to variation of class rights to be forwarded to the registrar) (see PARA 1061); s 636(2) (notice of name or other designation of class of shares) (see PARA 1064); s 637(2) (notice of particulars of variation of rights attached to shares) (see PARA 1064); s 638(2) (notice of new class of members) (see PARA 1065); s 639(2) (notice of name or other designation of class of members) (see PARA 1065); s 640(2) (notice of particulars of variation of class rights) (see PARA 1065); s 643(4) (solvency statement) (see PARA 1178); s 644(7); (8) (registration of resolution for reducing share capital and supporting documents) (see PARA 1179); s 658(2) (rule against limited company acquiring its own shares) (see PARA 1197); s 663(4) (notice of cancellation of shares) (see PARA 1202); s 667(2) (failure to cancel shares or re-register) (see PARA 1204); s 680(1) (prohibited financial assistance) (see PARA 1226); s 689(4) (notice to registrar of redemption) (see PARA 1231); s 703(1) (enforcement of right to inspect copy or memorandum relating to authorisation of market or off-market purchase) (see PARA 1240); s 707(6) (return to registrar of purchase of own shares) (see PARA 1241); s 708(4) (notice to registrar of cancellation of shares) (see PARA 1239); s 720(5) (directors' statement and auditor's report to be available for inspection) (see PARA 1248); s 722(4) (notice to registrar of court application or order to cancel resolution approving a payment out of capital for the redemption or purchase of any of its shares) (see PARA 1249); s 728(4) (notice of disposal of treasury shares) (see PARA 1252); s 730(6) (notice of cancellation of treasury shares) (see PARA 1253); s 732(1) (contravention of provisions relating to treasury shares) (see PARA 1255); s 741(2) (registration of allotment of debentures) (see PARA 1315); s 743(4) (register of debenture holders) (see PARA 1321); s 746(1) (refusal of inspection or default in providing copy of register of debenture holders) (see PARA 1322); s 749(2) (right of debenture holder to copy of deed) (see PARA 1303); s 767(1) (consequences of doing business etc without a trading certificate) (see PARA 74); s 769(3) (duty of company as to issue of certificates etc on allotment) (see PARA 383); s 771(3) (procedure on transfer of shares in or debentures of company being lodged with the company) (see PARAS 393, 399, 415); s 776(5) (duty of company as to issue of certificates etc on transfer) (see PARA 406, 418); s 780(3) (duty of company as to issue of certificates on surrender of share warrant) (see PARA 382); s 798(3) (attempted evasion of restrictions on shares) (see PARA 447); s 804(2) (duty of company to exercise powers to require information about interests in company's shares) (see PARA 450); s 806(1); (3) (report to members on outcome of investigation) (see PARA 451); s 807(3) (right to inspect and request copy of reports) (see PARA 451); s 808(5) (register of interests disclosed) (see PARA 452); s 809(4) (register of interests disclosed to be kept available for inspection) (see PARA 453); s 810(5) (associated index of interests) (see PARA 452); s 813(1) (refusal of inspection or default in providing copy of register of interests disclosed) (see PARA 453); s 815(3) (entries not to be removed from register of interests disclosed) (see PARA 454); s 819(2) (continuing duty of company ceasing to be public company to keep register of interests disclosed etc) (see PARA 452); s 858(1); (5) (failure to deliver annual return) (see PARA 1421); s 860(4) (charges created by a company) (see PARA 1277); s 862(4) (charges existing on property acquired) (see PARA 1280); s 877(5) (instruments creating charges and register of charges to be available for inspection) (see PARA 1297); s 897(5) (statement to be circulated or made available where meeting of creditors or members summoned) (see PARA 1429); s 900(7) (failure to deliver to registrar court order facilitating reconstruction or amalgamation) (see PARA 1436); s 901(5) (obligations of company with respect to amended constitution following court order sanctioning compromise or arrangement or facilitating reconstruction or amalgamation) (see PARA 1436); s 949(3) (disclosure of information obtained for purposes of Takeover Panel) (see PARA 1486); s 970(3) (communication of decisions regarding opting-in or opting-out resolution) (see PARA 1508); s 984(5) (notice regarding rights of minority shareholder to be bought out by offeror) (see PARA 1517); s 998(3) (copy of order affecting company's constitution on petition to protect members against unfair prejudice to be delivered to registrar) (see PARA 475); s 999(4) (obligations of company with respect to amended constitution following court order on petition to protect members against unfair prejudice) (see PARA 475); s 1033(6) (company's name on restoration) (see PARA 1539); s 1093(3) (registrar's notice to resolve inconsistency on the register) (see PARA 158); s 1135(3) (form of company records) (see PARA 674); s 1138(2) (duty to take precautions against falsification where company records kept otherwise than in bound books) (see PARA 674); s 1145(4) (right to hard copy version where member or holder of company's debentures has received a document or information otherwise than in hard copy form) (see PARA 681); s 1193(5) (name suggesting connection with government or public authority) (see PARA 224); s 1194(4) (name using other sensitive words or expressions) (see PARA 224); s 1197(6) (name containing inappropriate indication of company type or legal form) (see PARA 225); and s 1198(3) (name giving misleading indication of activities) (see PARA 226).

5 As to the meaning of 'director' see PARA 478. As the Companies Act 2006 s 1121 applies in relation to a body corporate other than a company (see note 3), the reference to a director of the company must be read as

referring, where the body's affairs are managed by its members, to a member of the body and, in any other case, to any corresponding officer of the body: s 1123(2)(a). As s 1121 applies in relation to a partnership, the reference to a director of the company must be read as referring to a member of the partnership (s 1123(3)(a)); and, as it applies in relation to an unincorporated body other than a partnership, the reference to a director of the company must be read as referring, where the body's affairs are managed by its members, to a member of the body and, in any other case, to a member of the governing body (s 1123(4)(a)). As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5. As to the meaning of 'member' see PARA 321; and as to the meaning of 'officer' generally see PARA 607. As to companies, corporations and partnerships etc see PARAS 2-4.

6 Companies Act 2006 s 1121(2)(a). As to the company secretary and other officers see PARA 601. As s 1121 applies in relation to a body corporate other than a company, the reference to a manager or secretary of the company must be read as referring to any manager, secretary or similar officer of the body: s 1123(2)(b). As it applies in relation to a partnership, the reference to a manager or secretary of the company must be read as referring to any manager, secretary or similar officer of the partnership (s 1123(3)(b)); and, as it applies in relation to an unincorporated body other than a partnership, the reference to a manager or secretary of the company must be read as referring to any manager, secretary or similar officer of the body (s 1123(4)(b)).

7 Companies Act 2006 s 1121(2)(b).

8 Companies Act 2006 s 1121(3).

9 For these purposes, 'officer' has the meaning given by the Companies Act 2006 s 1121 (see the text and notes 5-7): s 1122(3).

10 For these purposes, 'in default' has the meaning given by the Companies Act 2006 s 1121 (see the text and note 8): s 1122(3).

11 Companies Act 2006 s 1122(1).

12 Companies Act 2006 s 1122(2).

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316. Punishment for fraudulent trading.

If any business of a company¹ is carried on² with intent to defraud³ creditors of the company or creditors of any other person, or for any fraudulent purpose⁴, every person who is knowingly a party to the carrying on⁵ of the business in that manner commits an offence⁶ and is liable (on conviction on indictment) to imprisonment for a term not exceeding ten years or a fine (or to both)⁷ or (on summary conviction) to imprisonment for a term not exceeding 12 months⁸ or a fine not exceeding the statutory maximum⁹ (or to both)¹⁰. The allegation of intent to defraud contains an ingredient of dishonesty without which finding no jury would be entitled to convict¹¹. It must be dishonesty on the part of those who are carrying on the business of the company¹². Where a person carries on the business of two companies with the fraudulent intent of defrauding the companies' customers, he commits the offence of fraudulent trading¹³.

Where a business is carried on by a person who is outside the reach of this offence of fraudulent trading¹⁴, and with intent to defraud creditors of any person or for any other fraudulent purpose¹⁵, and if he is knowingly a party to the carrying on of such a business, that person is guilty of an offence¹⁶. A person guilty of such an offence is liable (on summary conviction) to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or to both)¹⁷ or (on conviction on indictment) to imprisonment for a term not exceeding ten years or to a fine (or to both)¹⁸. If such an offence¹⁹ is committed by a body corporate²⁰, and if the offence is proved to have been committed with the consent or connivance of a director, manager, secretary or other similar officer of the body corporate, or a

person who was purporting to act in any such capacity, he (as well as the body corporate) is guilty of the offence and liable to be proceeded against and punished accordingly²¹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 'Carrying on of the business' is not necessarily synonymous with actively carrying on trade: *Re Sarflax Ltd* [1979] Ch 592, [1979] 1 All ER 529. It is necessary to show an act which could be described as carrying on the business of the company: *Re Augustus Barnett & Son Ltd* [1986] BCLC 170 (letters of comfort provided by parent did not themselves constitute the carrying on of the subsidiary's business). One transaction may be sufficient: *Re Gerald Cooper Chemicals Ltd* [1978] Ch 262, [1978] 2 All ER 49. However, it does not follow that whenever a fraud on a creditor is perpetrated in the course of carrying on business that the business is being carried on with intent to defraud creditors: *Morphitis v Bernasconi* [2003] EWCA Civ 289, [2003] Ch 552, [2003] 2 WLR 1521. Where the only allegation is the bare fact of preferring one creditor over another, such preference will not per se be sufficient to constitute fraud: *Re Sarflax Ltd*. As to the meanings of 'business', 'carry on business' and 'trade' generally see PARA 1 note 1.

3 The persons who actually carry on the business must be guilty of fraud, and a holding company cannot be liable otherwise than as a knowing party to such conduct: *Re Augustus Barnett & Son Ltd* [1986] BCLC 170. See also note 11. As to the general offence of fraud see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 309 et seq.

4 'Defraud' and 'fraudulent purpose' connote actual dishonesty: *Re Patrick & Lyon Ltd* [1933] Ch 786. 'Intent to defraud creditors' may in general be properly inferred if the company continues to carry on business and incurs debts when to the knowledge of the persons liable there is no reasonable prospect of those debts being paid: *Re William C Leitch Bros Ltd* [1932] 2 Ch 71. One transaction may constitute fraudulent trading: *Re Gerald Cooper Chemicals Ltd* [1978] Ch 262, [1978] 2 All ER 49. Where the only allegation is the bare fact of preferring one creditor to another, such preference per se cannot constitute fraud within the meaning of the Insolvency Act 1986 s 213 (as to which see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 911): *Re Sarflax Ltd* [1979] Ch 592, [1979] 1 All ER 529. It is not necessary to prove knowledge that there was no reasonable prospect of the debts ever being paid; proof of knowledge that there was no reason for thinking that funds would become available to pay the debt when it became due or shortly thereafter may be sufficient: *R v Grantham* [1984] QB 675, [1984] 3 All ER 166, CA. See also *R v Cox*, *R v Hodges* [1983] BCLC 169, CA; *R v Lockwood* [1986] Crim LR 244, CA. An intent to defraud customers as potential creditors is sufficient even where those customers, through want of assets, have not obtained judgment or pursued other civil remedies against the company: *R v Kemp* [1988] QB 645, [1988] 2 WLR 975, CA. The word 'creditor' in its ordinary meaning denotes one to whom money is owed; and whether that debt can presently be sued for is immaterial: *R v Smith* [1996] 2 BCLC 109, CA. In order to fall within the Insolvency Act 1986 s 213 the behaviour of the respondent must be deserving of real moral blame: *Re L Todd (Swanscombe) Ltd* [1990] BCLC 454, [1990] BCC 125. A receiver carrying on the business of a company is exposed to a claim for fraudulent trading if he allows debts or liabilities to be incurred by a company under continuing contracts during the receivership for which he has no personal liability and in respect of which he knows that there is no good reason for thinking that they can or will be paid: *Powdrill v Watson*, *Re Leyland DAF Ltd*, *Re Ferranti International plc* [1995] 2 AC 394, [1995] 2 All ER 65, HL (receivers not liable where, in pursuance of their duties to the debenture holder, they postponed the sale of properties on which unoccupied business rates continued to accrue); cf *Brown v City of London Corp'n* [1996] 1 WLR 1070, sub nom *Re Sobam BV (in receivership)* [1996] 1 BCLC 446.

5 A person who, although not a director, manages the business in consultation with a director is within this description: *Re Peake and Hall* [1985] PCC 87, Isle of Man HC. A creditor who knowingly receives money procured by carrying on a business with intent to defraud may be liable (see *Re Gerald Cooper Chemicals Ltd* [1978] Ch 262, [1978] 2 All ER 49); but not a secretary who merely performs the duties appropriate to that office (*Re Maidstone Buildings Provisions Ltd* [1971] 3 All ER 363, [1971] 1 WLR 1085). Similarly, a financial adviser who fails to give advice is not liable by reason of that fact alone (*Re Maidstone Buildings Provisions Ltd*); nor is a director who did not concern himself with the company's financial affairs (*Re Peake and Hall*). A company which was involved in and assisted and benefited from an offending business or a business carried on in an offending way and did so knowingly and therefore dishonestly may fall within this provision: *Re Bank of Credit and Commerce International SA (No 2)*, *Banque Arabe et Internationale D'Investissement SA v Morris* [2001] 1 BCLC 263. Where there is an issue as to whether the accused falls within what is now the Companies Act 2006 s 993, that issue must be put to the jury with clear guidance as to the meaning of 'a party to the carrying on of the business of the company': *R v Miles* [1992] Crim LR 657, CA.

6 Companies Act 2006 s 993(1). The provisions of s 993 apply whether or not the company has been, or is in the course of being, wound up: s 993(2). As to the possible unlimited liability of persons in a winding up see further **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 911.

The provisions of the Companies Act 2006 s 993 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 15: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

7 Companies Act 2006 s 993(3)(a).

8 In relation to an offence committed after the commencement of the Companies Act 2006 s 1131 (summary proceedings) (see PARA 1625), but before a day is appointed in relation to the commencement of the Criminal Justice Act 2003 s 154(1) (general limit on magistrates' courts' power to impose imprisonment), the reference in the Companies Act 2006 s 993(3)(b) to '12 months' must be read as a reference to 'six months': see ss 993(b), 1131, 1133; and see PARA 1625.

9 As to the statutory maximum see PARA 1622.

10 Companies Act 2006 s 993(3)(b). As to any civil liability that might arise see the Insolvency Act 1986 s 213; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 911.

11 See *Re Patrick and Lyon Ltd* [1933] Ch 786; *DPP v Schildkamp* [1971] AC 1, [1969] 3 All ER 1640, HL; *R v Rollafson* [1969] 2 All ER 833, [1969] 1 WLR 815, CA. To establish an intent to defraud it is not necessary to prove knowledge that there was no reasonable prospect of the debts ever being paid; proof of knowledge that there was no reason for thinking that funds would become available to pay the debt when it became due or shortly thereafter may be sufficient: *R v Grantham* [1984] QB 675, [1984] 3 All ER 166, CA.

12 *Re Augustus Barnett & Son Ltd* [1986] BCLC 170.

13 *R v Kemp* [1988] QB 645, [1988] 2 WLR 975, CA. See also *R v Seillon* [1982] Crim LR 676, CA.

14 Ie outside the reach of the Companies Act 2006 s 993 (see the text and notes 1-10): see the Fraud Act 2006 s 9(2) (amended by SI 2007/2194). The following are within the reach of the Companies Act 2006 s 993 (Fraud Act 2006 s 9(3) (amended by SI 2007/2194)):

132 (1) a company, as defined in the Companies Act 2006 s 1(1) (see PARA 24) (Fraud Act 2006 s 9(3)(a) (amended by SI 2009/1941));

133 (2) a person to whom the Companies Act 2006 s 993 applies (with or without adaptations or modifications) as if the person were a company (Fraud Act 2006 s 9(3)(b));

134 (3) a person exempted from the application of the Companies Act 2006 s 993 (Fraud Act 2006 s 9(3)(c)).

15 Fraud Act 2006 s 9(2) (as amended: see note 14). For these purposes, 'fraudulent purpose' has the same meaning as in the Companies Act 2006 s 993 (which depends upon common law for that meaning: see note 4): Fraud Act 2006 s 9(5) (amended by SI 2007/2194).

16 Fraud Act 2006 s 9(1). See also note 5.

17 Fraud Act 2006 s 9(6)(a).

18 Fraud Act 2006 s 9(6)(b).

19 Ie any offence under the Fraud Act 2006: see s 12(1).

20 Fraud Act 2006 s 12(1).

21 Fraud Act 2006 s 12(2). If the affairs of a body corporate are managed by its members, s 12(2) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 12(3).

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(viii) Ownership and Disposition of Property

317. Company's power to hold land.

Any company incorporated under the Companies Act 2006¹ or the former Companies Acts², or registered, though not formed, under that Act or the former Companies Acts³, has always had power to hold land in the United Kingdom⁴.

The fact that a company holds land does not make its shares an interest in land within the Law of Property (Miscellaneous Provisions) Act 1989⁵, or, where it is established for charitable purposes, render it necessary to obtain any consent of the Charity Commission⁶ to the sale of its land which would not be required if it was not incorporated⁷.

The power of holding land imposes no restriction on the mode in which the company may acquire land, which may therefore be taken on lease⁸. The company may let the land acquired unless the company's objects expressly or impliedly restrict the letting of its property⁹.

1 As to incorporation under the Companies Act 2006 see PARA 102 et seq. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of the 'former Companies Acts' see PARA 18 note 1.

3 As to predecessor legislation to the Companies Act 2006 and the continuity maintained in the law see PARA 16 et seq.

4 As to the power to hold personal property see PARA 318. As to the meaning of 'United Kingdom' see PARA 1 note 5. Formerly, a company formed for the purpose of promoting art, science, religion, charity or any other like object, not involving the acquisition of gain by the company or by its individual members, could not without the licence of the Board of Trade hold more than two acres of land, although the Board might license any such company to hold land in such quantity and subject to such conditions as the Board thought fit: see the Companies Act 1948 s 14(1) proviso (repealed).

5 I.e. within the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (see **SALE OF LAND** vol 42 (Reissue) PARA 31). See also the Companies Act 2006 ss 541, 544, under which the shares or other interest of any company member are personal property, transferable as provided by the articles, and are not of the nature of real estate (see PARA 1055); and *Bligh v Brent* (1837) 2 Y & C Ex 268; *Humble v Mitchell* (1839) 11 Ad & El 205.

6 I.e. previously the Charity Commissioners. The functions, rights, liabilities etc of the Charity Commissioners were transferred to the Charity Commission under the Charities Act 2006 s 6: see **CHARITIES**. As to the Charity Commission see **CHARITIES** vol 8 (2010) PARA 538 et seq.

7 *Re Church Army* (1906) 75 LJ Ch 467, CA. See also *Re Society for Training Teachers of the Deaf and Whittle's Contract* [1907] 2 Ch 486; and **CHARITIES** vol 8 (2010) PARA 395.

8 If the company takes premises which are the best for its purposes, it is no objection to the validity of the lease that the premises are too large and that part will have to be sublet: *Re London and Colonial Co, Horsey's Claim* (1868) LR 5 Eq 561 (judgment of Wood V-C cited at 562n(1)). Directors entering into an agreement for a lease in their own names are personally liable: *Kay v Johnson* (1864) 2 Hem & M 118. As to the effect of the dissolution of the company on leases see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 933-935.

9 A lease of the company's undertaking may be sanctioned as a term in a scheme of arrangement under the Companies Act 2006 s 899 (see PARA 1431): see *Re Dynevor, Dyffryn and Neath Abbey Collieries Co* (1879) 11 ChD 605, CA. As to schemes of arrangement see PARA 1425 et seq. As to a company's objects (which are no longer a required part of a company's constitution) see PARA 240.

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318. Personality.

An incorporated company¹ may hold personal property to any extent without licence from any government department². Its powers in this respect may, however, be limited by its constitution³.

Regardless of whether such limitations exist or not, a company cannot (save in the manner provided by the Companies Act 2006⁴) purchase its own shares⁵, although it may buy up its debentures⁶ for the purpose of redeeming or reissuing them⁷, or redeem redeemable shares⁸.

Where a person transfers property to a company for the purpose of defeating his creditors, its title to the property may in certain cases be displaced in favour of his trustee in bankruptcy⁹.

A bill of sale to a company must state its address and description¹⁰.

1 As to incorporated companies see PARA 2.

2 As to corporations' ownership of property generally see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1245 et seq.

3 As to the meaning of references to a company's constitution see PARA 227.

4 See PARA 1229 et seq.

5 *Trevor v Whitworth* (1887) 12 App Cas 409, HL.

6 As to the meaning of 'debenture' see PARA 1299.

7 See the Companies Act 2006 s 752; and PARA 1318.

8 See PARA 1229 et seq.

9 As to the vesting of property in a trustee in bankruptcy and the property available for creditors see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 390 et seq.

10 *Altree v Altree* [1898] 2 QB 267. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1715 et seq.

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319. Joint ownership.

Being a body corporate¹, a company² is capable of acquiring and holding any real or personal property in joint tenancy³ in the same manner as if it were an individual⁴. Where it and an individual, or two or more bodies corporate, become entitled to any such property under circumstances or by virtue of any instrument which would, if the company had been an individual, have created a joint tenancy, they are entitled to the property as joint tenants⁵. Such acquisition and holding of property in joint tenancy are, however, subject to the like conditions and restrictions which attach to the acquisition and holding of property by a body corporate in severalty⁶.

1 As to companies and corporations generally see PARA 2.

2 As to the general meaning of 'company' see PARA 1.

3 See generally **REAL PROPERTY** vol 39(2) (Reissue) PARA 190 et seq. See also **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1244.

4 Bodies Corporate (Joint Tenancy) Act 1899 s 1(1). As to corporations as joint tenants see also **REAL PROPERTY** vol 39(2) (Reissue) PARA 192.

5 Bodies Corporate (Joint Tenancy) Act 1899 s 1(1). On the dissolution of a body corporate which is a joint tenant the property devolves on the other joint tenant: s 1(2).

6 Bodies Corporate (Joint Tenancy) Act 1899 s 1(1) proviso.

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320. Company's power to sell property.

Unless specifically restricted to do so by its constitution¹, a company may have, for example, extensive powers to sell its personal property², or to sell its business for shares in another company³.

Even if its constitution purports to give it power to do so, a company which is proposed to be wound up cannot sell all its assets and undertaking and provide for the distribution of the proceeds in the winding up otherwise than in accordance with the statutory provisions⁴.

An agreement for sale is not necessarily bad on the ground that one of its terms is the payment of a bonus to the directors of the selling company, unless the bonus is in fact a bribe to them⁵; but it is not lawful to make any such payment to a director unless a memorandum setting out particulars of the proposed payment (including its amount) is made available to the members of the company, whose approval is sought, and a resolution approving the payment has been duly passed⁶.

1 See PARA 240. As to the meaning of references to a company's constitution see PARA 227.

2 *Wilson v Miers* (1861) 10 CBNS 348 at 366.

3 *Re European Society Arbitration Acts, ex p British Nation Life Assurance Association (Liquidators)* (1878) 8 ChD 679, CA (power had to be implied at time when company's objects had to be specified in the memorandum of association). See also *Re Bamed's Banking Co* (1867) 3 Ch App 105; *Grant v United Kingdom Switchback Rly Co* (1888) 40 ChD 135, CA; *Wall v London and Northern Assets Corpn* [1898] 2 Ch 469, CA; *Re HH Vivian & Co Ltd, Metropolitan Bank of England and Wales Ltd v HH Vivian & Co Ltd* [1900] 2 Ch 654; *Re Borax Co, Foster v Borax Co* [1901] 1 Ch 326, CA (disapproving *Re Borax Co, Foster v Borax Co* [1899] 2 Ch 130); *Loeffler v Donna Thereza Christina Rly Co Ltd* (1901) 18 TLR 149; *Booth v New Afrikander Gold Mining Co Ltd* [1903] 1 Ch 295 at 313, CA, per Vaughan Williams LJ; *Mason v Motor Traction Co Ltd* [1905] 1 Ch 419; *Bisgood v Henderson's Transvaal Estates Ltd* [1908] 1 Ch 743, CA; *Re William Thomas & Co Ltd* [1915] 1 Ch 325.

4 *Bisgood v Henderson's Transvaal Estates Ltd* [1908] 1 Ch 743, CA; and see *MacPherson v European Strategic Bureau Ltd* [2000] 2 BCLC 683. As to the statutory provisions referred to in the text regarding distributions in a winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 812 et seq. As to reconstructions and amalgamations see PARA 1434.

5 *Southall v British Mutual Life Assurance Society* (1871) 6 Ch App 614.

6 See the Companies Act 2006 s 218; and PARA 580.

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(8) COMPANY MEMBERSHIP

(i) In general

321. Who are members.

The subscribers of a company's memorandum of association¹ are deemed to have agreed to become members of the company and, on its registration², become members and must be entered as such in its register of members³. However, neither this entry in the register nor any allotment⁴ of shares⁵ is a condition precedent to their becoming members⁶.

Every other person who agrees to become a member of a company⁷, and whose name is entered in its register of members, is a 'member of the company'⁸.

As from the date of incorporation⁹, the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, are a body corporate¹⁰ by the name stated in the certificate of incorporation¹¹. Accordingly, the members of a company are those persons (including corporations¹², if any) who collectively constitute the company, or, in other words, are its incorporators. A member is not necessarily a shareholder¹³, because an unlimited company¹⁴ or a company limited by guarantee may exist without a share capital¹⁵. However, where a company has a capital limited by shares, the shareholders are the only members¹⁶.

The bearer of a share warrant¹⁷ may, if the articles of the company so provide, be deemed a member of the company within the meaning of the Companies Act 2006, either to the full extent or for any purposes defined in the articles¹⁸.

1 As to the meaning of 'memorandum of association' see PARA 104. As to subscribers of the memorandum see PARA 104. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to company registration under the Companies Act 2006 see PARA 111 et seq. As to companies registered but not formed under the Companies Act 2006, and as to overseas companies, see PARA 32.

3 Companies Act 2006 s 112(1). As to the register of members see PARA 335 et seq. As to subscribers' liability see PARA 322.

4 As to the meaning of 'allotted' see PARA 1091.

5 As to shares generally see PARA 1042 et seq.

6 *Re Florence Land and Public Works Co*, *Nicol's Case*, *Tufnell and Ponsonby's Case* (1885) 29 ChD 421 at 445, CA, per Fry LJ; *Evans's Case* (1867) 2 Ch App 427; *Hall's Case* (1870) 5 Ch App 707; *Sidney's Case* (1871) LR 13 Eq 228; *Re London and Provincial Consolidated Coal Co* (1877) 5 ChD 525; *Re Argyle Coal and Cannell Co Ltd*, *ex p Watson* (1885) 54 LT 233.

7 See PARA 325.

8 Companies Act 2006 s 112(2).

Under the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule Table C (which applies modified Table A articles of association to companies limited by guarantee and not having a share capital), it is specified that the subscribers to the memorandum of association of the company and such other persons as are admitted to membership in accordance with the articles are members of the company: see Schedule Table C art 3. However, no person may be admitted a member of the company unless he is approved by the directors; and every person who wishes to become a member must deliver to the company an application for membership in such form as the directors require executed by him: Schedule Table C art 3. Such a member may at any time

withdraw from the company by giving at least seven clear days' notice to the company but membership is not transferable and it ceases on death: Schedule Table C art 4. As to the meaning of 'company limited by guarantee' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. As to the meanings of 'Table A' and 'Table C', and as to the treatment of legacy articles under the Companies Act 2006, see PARA 230. As to a company's directors see PARA 478 et seq. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq. Similar provision is made by the model articles which have been made for the purposes of the Companies Act 2006 and intended for adoption by private companies limited by guarantee (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 3, Sch 2; and PARA 228 et seq). Under those model articles, no person may become a member of the company unless that person has completed an application for membership in a form approved by the directors, and the directors have approved the application: see Sch 2 Pt 3 art 21. A member may withdraw from membership of the company by giving seven days' notice to the company in writing: Sch 2 Pt 3 art 22(1). However, membership is not transferable (Sch 2 Pt 3 art 22(2)); and a person's membership terminates when that person dies or ceases to exist (Sch 2 Pt 3 art 22(3)). As to the meaning of 'private company' see PARA 102.

9 le the date stated in the certificate of incorporation, following the registration of a company: see PARA 119 note 7.

10 As to the meaning of 'body corporate' see PARA 1 note 5.

11 See the Companies Act 2006 s 16; and PARA 120. As to the company's name see PARA 200 et seq.

12 *Re Barnard's Banking Co, ex p Contract Corp'n* (1867) 3 Ch App 105 at 113 per Lord Cairns LC. As to membership of a corporation generally see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1146 et seq. As to companies and corporations generally see PARA 2.

13 As to shareholders and membership of companies generally see PARAS 321 et seq, 1697 et seq.

14 As to the meaning of 'unlimited company' see PARA 102.

15 *Re South London Fish Market Co* (1888) 39 ChD 324, CA. As to share capital and companies limited by guarantee see PARA 79. As to share capital and unlimited companies see PARA 81.

16 As to the meaning of 'company limited by shares' see PARA 102.

17 As to the meaning of 'share warrant' see PARA 382.

18 See the Companies Act 2006 s 122(3); and PARA 337.

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322. Subscribers' liability for shares.

By subscribing, each subscriber at once irrevocably agrees to take from the company the subscribed number of shares¹, being at least one share each, unless all its share capital has been duly allotted to other persons². The fact that no shares are allotted to him and that he has ceased to be treated as a member for a considerable time does not relieve him from liability³, though a valid surrender will do so⁴. A subscriber who is a director is bound to see that the allotment is made⁵.

The subscriber's obligation to take shares is not satisfied by a transfer to him, or by an allotment to him of shares, credited as fully paid up, to which a third person is entitled⁶. The obligation of a person who subscribes in his own name, but in fact as an agent, is satisfied by his principal taking the number of shares subscribed for⁷.

Shares taken by a subscriber of the memorandum of association⁸ of a public company⁹ in pursuance of an undertaking of his in the memorandum, and any premium on the shares, must

be paid up in cash¹⁰; and if the company contravenes this provision, it, and any officer of it, who is in default¹¹ is liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum¹². Otherwise, the shares so subscribed for may be paid for either in cash or in money's worth¹³. The shares paid for in money's worth must, however, be identified with the shares subscribed for¹⁴.

A subscriber for preference shares¹⁵ may take the like amount of ordinary shares instead¹⁶. If a person subscribes for shares, some of which are to be allotted as fully paid up, he is liable only as contributory in respect of the others; but, if he subscribes for fully paid up shares only, he is liable for them as unpaid¹⁷, except in so far as he has actually paid for them.

1 *Alexander v Automatic Telephone Co* [1900] 2 Ch 56, CA. Unless otherwise agreed, by the articles or otherwise, the subscriber is bound to pay only when calls are made: *Alexander v Automatic Telephone Co*. As to a company's articles of association generally see PARA 228 et seq. As to a shareholder's liability for calls or capital not paid up generally see PARA 1703 et seq. See also *Re Freen & Co Ltd* (1866) 15 LT 406; *Gilman's Case* (1886) 31 ChD 420; *Re China Steamship and Labuan Coal Co Ltd, Drummond's Case* (1869) 4 Ch App 772; *Dunster's Case* [1894] 3 Ch 473, CA.

Prior to the commencement of the Companies Act 2006, the number of shares agreed to be taken by a subscriber on formation was placed opposite the subscriber's signature on the memorandum of association (the role of which has been altered fundamentally under the Companies Act 2006): see PARA 104. This information is not amongst the information that is required to be included in the form of memorandum prescribed by regulations made under the Companies Act 2006 (see the Companies (Registration) Regulations 2008, SI 2008/3014, reg 2(a), Sch 1 (memorandum of association of a company having a share capital)), but this information does have to be included in the statement of capital and initial shareholdings that is required to be delivered in the case of a company limited by shares: see the Companies Act 2006 s 10(4),(5); and PARA 113. As to shares, share capital and allotments generally see PARA 1042 et seq.

2 *Mackley's Case* (1875) 1 ChD 247. See also *Evans's Case* (1867) 2 Ch App 427; *Re China Steamship and Labuan Coal Co Ltd, Drummond's Case* (1869) 4 Ch App 772 at 780 per Giffard LJ.

3 *Re Imperial Land Co of Marseilles Ltd, Levick's Case* (1870) 40 LJ Ch 180; *Ex p London and Colonial Co Ltd, Tooth's Case* (1868) 19 LT 599; *Sidney's Case* (1871) LR 13 Eq 228.

4 *Re Freen & Co Ltd* (1866) 15 LT 406; *Snell's Case* (1869) 5 Ch App 22; *Hall's Case* (1870) 5 Ch App 707; *Re London and Provincial Consolidated Coal Co* (1877) 5 ChD 525.

5 *Evans's Case* (1867) 2 Ch App 427; *Re United Service Co, Hall's Case* (1870) 5 Ch App 707 at 711 per James LJ. As to a company's directors see PARA 478 et seq.

6 *Migotti's Case* (1867) LR 4 Eq 238; *Forbes and Judd's Case* (1870) 5 Ch App 270; *Dent's Case, Forbes' Case* (1873) 8 Ch App 768. Cf *Re Pen'Allt Silver Lead Mining Co Ltd, Fraser's Case* (1873) 42 LJ Ch 358. As to paid up and unpaid shares see PARA 1042 et seq.

7 *Dunster's Case* [1894] 3 Ch 473, CA.

8 As to the meaning of 'memorandum of association' see PARA 104.

9 As to the meaning of 'public company' see PARA 102.

10 See the Companies Act 2006 s 584; and PARA 1114. As to the meaning of 'cash' for these purposes see PARA 1091 note 10. As to the meaning of 'premium' see PARA 1146.

11 As to the meaning of 'officer who is in default' see PARA 315.

12 See the Companies Act 2006 s 590; and PARA 1114. As to the statutory maximum see PARA 1622.

13 *Re China Steamship and Labuan Coal Ltd, Drummond's Case* (1869) 4 Ch App 772; *Pell's Case* (1869) 5 Ch App 11; *Re Baglan Hall Colliery Co* (1870) 5 Ch App 346; *Jones' Case* (1870) 6 Ch App 48; *Maynard's Case* (1873) 9 Ch App 60. As to payments in cash see also PARA 1109. Directors cannot pay for the shares out of fees paid to themselves ultra vires: *Re Great Northern and Midland Coal Co Ltd, Currie's Case* (1863) 3 De GJ & Sm 367 at 371. Nor can they pay for the shares out of money of the company paid to other persons ultra vires: *Hay's Case* (1875) 10 Ch App 593. Cf *Re Canadian Oil Works Corp'n, Eastwick's Case* (1876) 45 LJ Ch 225, CA.

14 *Fothergill's Case* (1873) 8 Ch App 270.

- 15 As to preference shares see PARA 1688.
- 16 *Duke's Case* (1876) 1 ChD 620.
- 17 *Baron De Beville's Case* (1868) LR 7 Eq 11.

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323. Shareholders not debarred from damages.

Formerly a shareholder could not both retain his shares¹ and bring proceedings against a company for deceit inducing him to buy from the company its shares or, by analogy, to take up shares of the company². A person is, however, no longer debarred from obtaining damages or other compensation from a company³ by reason only of his holding or having held shares in the company or any right to apply or subscribe for shares or to be included in the company's register of members⁴ in respect of shares⁵.

1 As to the meaning of 'share' see PARA 1042. As to shareholders and membership of companies generally see PARAS 321-322, 324 et seq, 1697 et seq.

2 *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317, HL; *Re Addlestone Linoleum Co* (1887) 37 ChD 191, CA. In principle, it was thought that such a claim was inconsistent with the contract into which the claimant had entered and the claimant had, therefore, to have severed his connection with the company by agreement or judgment for rescission before he could sue the company for misrepresentation: see *Houldsworth v City of Glasgow Bank* at 324-325 per Lord Cairns LC. This principle did not prevent proceedings being maintained for rescission in a proper case: see *Western Bank of Scotland v Addie* (1867) LR 1 Sc & Div 145 at 163-164, HL, per Lord Chelmsford. As to the grounds for claims of deceit see PARA 1081 et seq.

3 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 As to the register of members see PARA 335 et seq.

5 Companies Act 2006 s 655.

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324. Service of notice on members of company.

Provisions in a company's articles of association¹ as to service of notices on members² generally apply only to notices relating to the ordinary business of the company, and service in the manner set out by them is not in itself sufficient to fix a shareholder with knowledge of the falsity of a misrepresentation which would entitle him to repudiate his shares³. Similarly, such a provision that service of a notice at the registered address was to be good did not necessarily apply to give validity to substituted service of a debtor's summons at the address on the company register⁴.

When a member has died⁵, a notice addressed to him at his registered address is good, if the company has no notice of his death⁶; but not if the directors⁷ are aware of the death⁸, in which case, unless the articles themselves otherwise provide⁹, a notice required by the articles to be served on members need not be sent at all, even to the personal representatives, unless they have been registered as members¹⁰.

A notice sent to all the members on the register at the date of sending out is good, even though the register is subsequently rectified with effect retrospective to a day prior to that date¹¹.

1 As to articles of association generally see PARA 228 et seq.

2 The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. They make extensive provision as to the service of notices on members: see the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A arts 111-116 (art 111 substituted by, arts 112, 115 amended by, SI 2000/3373). The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A arts 112, 113 are modified by Table C arts 12, 13, and arts 114, 116 are disapplied by Table C art 1, in relation to companies limited by guarantee and not having a share capital). Table A arts 112 and 115 do not require that service of a notice on a member by the company by post had to be to his registered address; rather, a notice was 'properly addressed' if it was accurately addressed: *Hunter v Senate Support Services Ltd* [2004] EWHC 1085 (Ch), [2005] 1 BCLC 175, applying *Rayfield v Hands* [1958] 2 All ER 194 at 196 per Vaisey J. See also *Bradman v Trinity Estates plc* [1989] BCLC 757 (notices not timeously served because of postal strike; injunction granted restraining the holding of the meeting until a later date). As to the meaning of 'company having a share capital' see PARA 1042. As to the meaning of 'company limited by guarantee' see PARA 102. As to notices which must be served on members to convene a meeting of the company see PARA 634 et seq.

Model articles have been prescribed under the Companies Act 2006 for use by public companies (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3) and these make general provision as to notice. Accordingly, if the company sends two consecutive documents to a member over a period of at least 12 months, and if each of those documents is returned undelivered, or the company receives notification that it has not been delivered, that member ceases to be entitled to receive notices from the company: Sch 3 art 80(1). A member who has ceased to be entitled to receive notices from the company becomes entitled to receive such notices again by sending the company either a new address to be recorded in the register of members or (if the member has agreed that the company should use a means of communication other than sending things to such an address) the information that the company needs to use that means of communication effectively: Sch 3 art 80(2). As to the meaning of 'public company' see PARA 102.

3 *Re London and Staffordshire Fire Insurance Co* (1883) 24 ChD 149. See also *Peek v Gurney* (1873) LR 6 HL 377.

4 *Re Studer, ex p Chatteris* (1875) 10 Ch App 227.

5 See the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 116; and note 2.

6 *New Zealand Gold Extraction Co (Newbery-Vautin Process) v Peacock* [1894] 1 QB 622, CA (notice of a call).

7 As to directors of a company see PARA 478 et seq.

8 *James v Buena Ventura Nitrate Grounds Syndicate Ltd* [1896] 1 Ch 456 at 465, CA, per Lord Herschell (offer of new shares), followed in *Ward v Dublin North City Milling Co Ltd* [1919] 1 IR 5 (forfeiture of unclaimed dividends).

9 See the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 116; and note 2.

10 *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, CA (meeting to alter articles to prejudice of deceased).

11 *Re Sussex Brick Co* [1904] 1 Ch 598, CA.

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(ii) Agreement to become a Member

325. Requirement for an agreement.

Except in the case of the subscribers to a company's memorandum of association¹, the Companies Act 2006 requires an agreement to become a member² and entry in the register of members³ in order to constitute membership⁴. No particular form of agreement is required⁵ and it may be express or implied, written or oral⁶.

By agreement it is meant that a person assents to become a member and it does not require that there should be a binding contract between the person and the company⁷. Accordingly, where the name of a person is entered on the register of members with his consent, he is a member of the company, subject to the power vested in the court to rectify the register in cases of error⁸.

1 le whose membership of a company may be deemed: see PARA 321. As to the meaning of 'memorandum of association' see PARA 104. As to subscribers of the memorandum see PARA 104. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to who qualifies as a member of a company see PARA 321. Any contract, so far as it relates to the constitution of a company or the rights or obligations of its corporators or members, is exempt from the prohibitions on exclusion of liability imposed by the Unfair Contract Terms Act 1977: see s 1(2), Sch 1 para 1(d); and PARA 245. As to the exemptions from liability referred to see **CONTRACT** vol 9(1) (Reissue) PARA 828.

For cases where it was held that there was no agreement to become a member of a company limited by guarantee see *Re Premier Underwriting Association Ltd (No 2)*, *Cory's Case* [1913] 2 Ch 81; *WR Corfield & Co v Buchanan* (1913) 29 TLR 258, HL. As to the meaning of 'company limited by guarantee' see PARA 102.

3 As to the register of members see PARA 335 et seq. References in any enactment or instrument to a company's register of members, unless the context otherwise requires, is to be construed in relation to a company which is a participating issuer as referring to the company's issuer register of members and operator register of members: see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 20(4); and PARA 340. As to the meaning of 'participating issuer' see PARA 421 note 9. As to the meaning of 'issuer register of members' and 'operator register of members' see PARA 340.

4 See the Companies Act 2006 s 112(2); and PARA 321 et seq. As to share warrant bearers being deemed members by provisions in the articles see s 122(3); and PARA 337. The entry of a person's name and address in a company's issuer register of members must not be treated as showing that person to be a member of the company unless certain conditions are met: see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 24(3); and PARA 346.

5 *Ritso's Case* (1877) 4 ChD 774, CA.

See, however, the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule Table C (which applies modified Table A articles of association to companies limited by guarantee and not having a share capital) and the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 3, Sch 2 (the model articles which have been made for the purposes of the Companies Act 2006 and intended for adoption by private companies limited by guarantee) making membership conditional on the submission of a formal application to the directors who must approve: see PARA 321 note 7. As to the meanings of 'company limited by guarantee' and 'private company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. As to the meanings of 'Table A' and 'Table C', and as to the treatment of legacy articles under the Companies Act 2006, see PARA 230. As to a company's directors see PARA 478 et seq. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

6 *Re New Theatre Co Ltd, Bloxam's Case* (1864) 33 LJ Ch 574, which shows that contracts to take shares were not within the Statute of Frauds (1677) s 17 (repealed). As to express contracts see PARA 326; and as to implied contracts see PARA 327.

7 *Re Nuneaton Borough Association Football Club Ltd* [1989] BCLC 454 at 456, 459, CA. See also *Re Railway Time Tables Publishing Co, ex p Sandys* (1889) 42 ChD 98, CA.

8 See the cases cited in note 7. As to the power to rectify the register in cases of error see PARA 356 et seq. See *POW Services Ltd v Clare* [1995] 2 BCLC 435 (entry of individuals with their consent on register of company limited by guarantee did not confer membership when this was in breach of an express provision on membership in the articles).

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326. Express contract.

While there is no requirement that there should be a binding contract between a person and the company in order for a person to agree to become a member¹, in most instances there will be a contractual relationship² governed by the ordinary law of contract.

To constitute an express agreement to take shares, there must be an absolute and unqualified acceptance of a proposal to take or allot them and a communication of the acceptance to the proposer; but, in the case of a qualified acceptance, there is a contract if the qualification is agreed to, or if the applicant pays for the shares within the specified time³. Where an application for shares is subject to a condition precedent, the condition must be performed to create a liability to take them⁴. Where, however, the application is subject to a condition subsequent, the liability arises although the condition is never complied with⁵. An application for shares, being a mere offer, may be withdrawn before it is accepted⁶.

1 See PARA 325.

2 It may be a contract between the shareholder and the company or one between the shareholder and the transferor of shares to him. In *Re Nuneaton Borough Association Football Club Ltd* [1989] BCLC 454, CA (cited in PARA 325 note 7), there would have been a contract had there been a properly constituted board of directors of the company.

3 *Re Adelphi Hotel Co Ltd, Best's Case* (1865) 2 De GJ & Sm 650; *Addinell's Case* (1865) LR 1 Eq 225; *Jackson v Turquand* (1869) LR 4 HL 305; *Oriental Steam Navigation Co, ex p Briggs* (1861) 4 De GF & J 191; *Pentelow's Case* (1869) 4 Ch App 178; *Ex p Capper* (1850) 1 Sim NS 178; *Gustard's Case* (1869) LR 8 Eq 438; *Beck's Case* (1874) 9 Ch App 392; *Re Leeds Banking Co, ex p Barrett* (1865) 2 Drew & Sm 415. See also PARAS 1088-1090. As to shares, allotments of shares, and payments for shares generally see PARA 1042 et seq.

4 *Roger's Case, Harrison's Case* (1868) 3 Ch App 633. Cf *Wood's Case* (1873) LR 15 Eq 236. See also *Re London and Provincial Provident Association Ltd, Re Mogridge* (1888) 57 LJ Ch 932; *Simpson's Case* (1869) 4 Ch App 184; *Gorissen's Case* (1873) 8 Ch App 507; *Humphrey and Denman Ltd v Kavanagh* (1925) 41 TLR 378, CA.

5 *Elkington's Case* (1867) 2 Ch App 511; *Re Matlock Old Bath Hydropathic Co Ltd, Wheatcroft's Case* (1873) 42 LJ Ch 853; *Bridger's Case* (1870) 5 Ch App 305; *Black & Co's Case* (1872) 8 Ch App 254; *Gore and Durant's Case* (1866) LR 2 Eq 349; *Re Alexandra Park Co, Sharon's Claim* (1866) 12 Jur NS 482; *Re Life Association of England, Thomson's Case* (1865) 4 De GJ & Sm 749; *Re Southport and West Lancashire Banking Co, Fisher's Case, Sherrington's Case* (1885) 31 ChD 120, CA; *Mare, Holmwood & Co v Anglo-Indian Steamship Co Ltd* (1886) 3 TLR 142, CA.

6 *Ramsgate Victoria Co v Montefiore, Ramsgate Victoria Hotel Co v Goldsmid* (1866) LR 1 Exch 109; *Re Bowron, Baily & Co, ex p Baily* (1868) 3 Ch App 592. As to offer and acceptance in relation to contracts generally see **CONTRACT** vol 9(1) (Reissue) PARA 631 et seq. As to acceptance by allotment see PARA 1088.

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327. Implied contract.

An agreement to take shares may be implied from conduct¹. Although a person's name is entered in the register as the holder of shares allotted to him, no agreement will be implied, by reason only of his receiving notice of the allotment, if he forthwith repudiates them², or if he has not acted as the holder of the shares or otherwise accepted them³. In such a case, even when a winding up has supervened, he may have his name removed from the register in respect of the shares⁴.

Where a company's articles of association⁵ require a director to have a share qualification⁶, the fact of a person becoming a director does not in itself constitute an agreement to take the required qualification shares from the company⁷. The company's constitution⁸ may, however, constitute a contract to take shares, as where they require every original holder of a founders' share to apply for and take a specified number of ordinary shares⁹. A statement in a prospectus that the directors will take all the ordinary shares not taken by the vendors does not constitute a contract which can be enforced against them to take such shares¹⁰.

A person may be estopped by his conduct from denying that he agreed to accept shares, as, for example, where, being the registered holder of shares forming part of an irregular or invalid issue of capital, he deals with them as his own, by paying calls or receiving dividends, or by attempting to transfer them¹¹, or where he has held himself out as having in fact subscribed¹².

1 See PARA 1088 et seq. As to shares, allotments of shares, and payments for shares generally see PARA 1042 et seq.

2 *Austin's Case* (1866) LR 2 Eq 435; *Re Imperial Land Credit Corp'n Ltd, ex p Eve* (1868) 37 LJ Ch 844. As to the necessity of assent on the part of the member see *Re Nuneaton Borough Association Football Club Ltd* [1989] BCLC 454 at 456, CA, per Fox LJ, and at 459 per Nicholls LJ; and see PARA 325.

3 *Re Imperial Mercantile Credit Association, Chapman and Barker's Case* (1867) LR 3 Eq 361 at 365 per Page Wood V-C; *Oakes v Turquand and Harding* (1867) LR 2 HL 325 at 350-351 per Lord Chelmsford LC; *Re Empire Assurance Corp'n, Challis's Case, Somerville's Case* (1871) 6 Ch App 266; *Wynne's Case* (1873) 8 Ch App 1002; *Baillie's Case* [1898] 1 Ch 110.

4 *Arnot's Case* (1887) 36 ChD 702, CA.

5 As to a company's articles of association generally see PARA 228 et seq.

6 See PARA 495.

7 *Brown's Case* (1873) 9 Ch App 102. See also PARA 496.

8 As to the meaning of references to a company's constitution see PARA 227.

9 *General Phosphate Corp'n v Horrocks* (1892) 8 TLR 350.

10 *Re Moore Bros & Co Ltd* [1899] 1 Ch 627, CA; *Todd v Millen* 1910 SC 868, Ct of Sess. As to potential liability with respect to misstatements in offer documents see PARA 297.

11 *Re Bank of Hindustan, China and Japan, Campbell's Case, Hippisley's Case* (1873) 9 Ch App 1 at 15 per Lord Selborne LC.

12 *New Brunswick and Canada Railway and Land Co Ltd v Boore* (1858) 3 H & N 249; *Re Oola Lead and Copper Mining Co, Palmer's Case* (1868) 2 IR Eq 573. See also *Re Llanharry Hematite Iron Ore Co Ltd, Roney's Case* (1864) 33 LJ Ch 731; *Tothill's Case* (1865) 1 Ch App 85; *Re Patent File Co Ltd, ex p White* (1867) 16 LT 276.

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328. Agent's contract.

A person who agrees, on behalf of another, to take shares, without disclosing the agency, is personally liable to take them¹. Where he purports to agree to take shares on behalf of another, but is without authority², he is liable, unless the other person ratifies the act³, to pay damages for breach of warranty of authority, the measure of damages being the amount which the company has lost by losing the contract to take shares⁴.

A person purporting to contract to take shares on behalf of a fictitious or non-existent person is himself bound to take them⁵.

If an application is made for shares on behalf of a person who is ignorant of the matter, and he is registered as the holder, and the directors know that the person applying does not intend to take the shares himself, neither the person registered nor the applicant is liable as a shareholder; but the applicant is liable to those who are deceived for breach of an implied warranty of authority⁶.

¹ *Re Southampton, Isle of Wight and Portsmouth Improved Steam Boat Co Ltd, Bird's Case* (1864) 4 De GJ & Sm 200.

² A person applying for shares in the name of a minor is himself liable: *Richardson's Case* (1875) LR 19 Eq 588; *Re North of England Joint Stock Banking Co, ex p Reavely* (1849) 1 H & Tw 118; *Re Electric Telegraph Co of Ireland, Maxwell's Case* (1857) 24 Beav 321.

³ *Levita's Case* (1870) 5 Ch App 489.

⁴ *Re National Coffee Palace Co, ex p Panmure* (1883) 24 ChD 367, CA (where, the alleged applicant being solvent, and the shares having become unsaleable, the loss was equivalent to the nominal value of the shares). As to the liabilities of agents on breach of warranty of authority see generally **AGENCY** vol 1 (2008) PARA 160.

⁵ *Re Wheal Emily Mining Co, Cox's Case* (1863) 4 De GJ & Sm 53; *Pugh and Sharman's Case* (1872) LR 13 Eq 566; *Savigny's Case* (1898) 5 Mans 336.

⁶ *Re Britannia Fire Association, Coventry's Case* [1891] 1 Ch 202 at 210, CA, per Lindley LJ, and at 211 per Bowen LJ; *Collen v Wright* (1857) 8 E & B 647. Cf *Re London, Bombay, and Mediterranean Bank* (1881) 18 ChD 581.

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329. Contract by company to take shares.

A contract by a company to take shares in another company is binding¹ even if the former company lacks the capacity to purchase such shares².

1 It is provided that it is not a subsidiary of the latter, unless one of the statutory exceptions applies: see the Companies Act 2006 s 136; and PARA 334. As to the meaning of 'subsidiary' see PARA 25.

2 This is the effect of the Companies Act 2006 s 39: see PARA 265. As to a company's capacity and the effect of s 39 generally see PARA 265 et seq.

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330. Effect of minor's agreement to take or transfer shares.

A minor¹ may repudiate his membership and his holding in the company, either during his minority or upon attaining full age, because his agreement to take shares is voidable²; but he cannot recover money paid by him for shares unless there has been a total failure of consideration³. If, however, he does not repudiate⁴ within a reasonable time after attaining full age, he will thenceforth be subject to all the liabilities of membership⁵.

Where shares are transferred into the name of a minor, the transferor remains liable for calls in respect of the shares⁶, whether at the time of the transfer he was aware that the transferee was a minor or not⁷; but, if he was ignorant of that fact, he may claim to have his liability transferred to the person who effected the transaction⁸. If, however, a company or the liquidator of a company, knowing the transferee to be a minor, is guilty of laches in making a claim against the transferor, the transferor is relieved from his liability⁹. He is also relieved by a subsequent transfer by the minor to an adult¹⁰.

1 As to the attainment of majority at the age of 18 see the Family Law Reform Act 1969 s 1; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 1.

2 *Newry and Enniskillen Rly Co v Coombe* (1849) 3 Exch 565; *North Western Rly Co v M'Michael, Birkenhead, Lancashire and Cheshire Junction Rly Co v Pilcher* (1850) 5 Exch 114; *Re Alexandra Park Co, Hart's Case* (1868) LR 6 Eq 512; *Re Financial Corpn, Sassoon's Case* (1869) 20 LT 161 (affd 20 LT 424); *Hamilton v Vaughan-Sherrin Electrical Engineering Co* [1894] 3 Ch 589. See also the Minors' Contracts Act 1987 s 1 (with regard to contracts made by a minor after 9 June 1987); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 14; **CONTRACT** vol 9(1) (Reissue) PARA 1051. As to subscription of the memorandum of association by a minor see PARA 103.

3 *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452, CA. If and in so far as *Hamilton v Vaughan-Sherrin Electrical Engineering Co* [1894] 3 Ch 589 decides the contrary, it must be treated as having been overruled: *Steinberg v Scala (Leeds) Ltd* at 457, 461 per Lord Sterndale MR, at 462 per Warrington LJ, and at 465 per Younger LJ.

4 As to confirmation see *Baker's Case* (1871) 7 Ch App 115; *Wilson's Case* (1869) LR 8 Eq 240; *Castello's Case* (1869) LR 8 Eq 504; *Mitchell's Case* (1870) LR 9 Eq 363; *Symons' Case* (1870) 5 Ch App 298; *Re Ottoman Financial Association, Cheetham's Case* [1869] WN 201. See also the Minors' Contracts Act 1987; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 14.

5 *Cork and Bandon Rly Co v Cazenove* (1847) 10 QB 935; *Leeds and Thirsk Rly Co v Fearnley* (1849) 4 Exch 26; *North Western Rly Co v M'Michael, Birkenhead, Lancashire and Cheshire Junction Rly Co v Pilcher* (1850) 5 Exch 114; *Dublin and Wicklow Rly Co v Black* (1852) 8 Exch 181; *Lumsden's Case* (1868) 4 Ch App 31; *Mitchell's Case* (1870) LR 9 Eq 363; *Ebbetts' Case* (1870) 5 Ch App 302; *Re Yeoland Consols Ltd (No 2)* (1888) 58 LT 922. A director knowingly allotting shares to a minor is liable to the company for any loss thereby occasioned: *Re Crenver and Wheal Abraham United Mining Co, ex p Wilson* (1872) 8 Ch App 45.

6 *Re St George's Steam Packet Co, Litchfield's Case* (1850) 3 De G & Sm 141; *Re Electric Telegraph Co of Ireland, Reid's Case* (1857) 24 Beav 318; *Curtis's Case* (1868) LR 6 Eq 455; *Castello's Case* (1869) LR 8 Eq 504; *Re Imperial Mercantile Credit Association, Edwards' Case* [1869] WN 211; *Weston's Case* (1870) 5 Ch App 614; *Re Crenver and Wheal Abraham United Mining Co, ex p Wilson* (1872) 8 Ch App 45. As to transfer of shares by a minor see PARA 398. As to a shareholder's liability for calls or capital not paid up generally see PARA 1703 et seq.

7 *Re Joint Stock Discount Co, Mann's Case* (1867) 3 Ch App 459n; *Capper's Case* (1868) 3 Ch App 458.

8 *Nickalls v Furneaux* [1869] WN 118; *Re National Provincial Marine Insurance Co, Maitland's Case* (1869) 38 LJ Ch 554; *Brown v Black* (1873) 8 Ch App 939; *Richardson's Case* (1875) LR 19 Eq 588; *Watson v Miller* [1876] WN 18.

9 *Capper's Case* (1868) 3 Ch App 458 at 461 per Page Wood LJ; *Parson's Case* (1869) LR 8 Eq 656; *Re National Bank of Wales Ltd, Massey and Giffin's Case* [1907] 1 Ch 582.

10 *Gooch's Case* (1872) 8 Ch App 266.

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331. Married women.

The contractual liability of a married woman is the same as the contractual liability of a single woman¹.

1 See the Law Reform (Married Women and Tortfeasors) Act 1935 s 1; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 204.

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332. Enforcement of contract for shares.

Specific performance of an agreement to take and pay for shares¹ or to allot shares² may be obtained³.

In addition to obtaining a decree for the specific performance of a contract to allot shares, the disappointed allottee may obtain damages equal to the dividends at the rates declared by the company between the date when the shares should have been allotted and the date of actual allotment, together with interest on the dividends until payment⁴.

When a contract to take shares is disclaimed by a trustee in bankruptcy, the contract is at an end and the company's remedy is a claim for damages against the bankrupt's estate⁵.

An agreement with a company to take shares proposed to be issued at a discount cannot be enforced and an allottee of shares pursuant to such an agreement may have the register rectified in order to remove his name. He may, however, lose his remedy if he has assented to the registration or has not sought the remedy promptly⁶.

1 *Odessa Tramways Co v Mendel* (1878) 8 ChD 235, CA. See also *New Brunswick and Canada Rly and Land Co v Muggeridge* (1859) 4 Drew 686; *Oriental Inland Steam Co v Briggs* (1861) 2 John & H 625 (on appeal sub nom *Oriental Steam Navigation Co, ex p Briggs* (1861) 4 De GF & J 191); and **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 825 et seq. As to shares, allotments of shares, and payments for shares generally see PARA 1042 et seq.

2 *Sri Lanka Omnibus Co Ltd v Perera* [1952] AC 76, PC.

3 A distinction must, however, be drawn between cases where shares are readily available in the market (*Re Schwabacher* (1907) 98 LT 127) and where they are not (*Jobson v Johnson* [1989] 1 All ER 621, [1989] 1 WLR 1026, CA; *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207, [1985] 2 All ER 966, HL). See also **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 825 et seq.

4 *Sri Lanka Omnibus Co Ltd v Perera* [1952] AC 76, PC.

5 *Re Hooley, ex p United Ordnance and Engineering Co Ltd* [1899] 2 QB 579. See also **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 518.

6 See *Re Railway Time Tables Publishing Co, ex p Sandys* (1889) 42 ChD 98, CA; *Re Nuneaton Borough Association Football Club Ltd* [1989] BCLC 454, CA.

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(iii) Prohibition on Subsidiary being Member of its Holding Company

333. General rule against company acquiring own shares.

The general rule is that a limited company¹ must not acquire its own shares², whether by purchase, subscription, or otherwise³. If a company purports to act in contravention of this prohibition, an offence is committed by the company, and by every officer of the company who is in default⁴; and a person guilty of such an offence is liable (on conviction on indictment) to imprisonment for a term not exceeding two years or a fine (or both)⁵ and (on summary conviction) to imprisonment for a term not exceeding 12 months⁶ or a fine not exceeding the statutory maximum⁷ (or both)⁸. Also in the event of such a contravention, the purported acquisition is void⁹.

The general prohibition on a limited company acquiring its own shares¹⁰ does not prohibit¹¹:

- 603 (1) acquisition in accordance with the statutory scheme¹² for the purchase by a company of its own shares¹³;
- 604 (2) the acquisition of shares in a reduction of share capital duly made¹⁴;
- 605 (3) the purchase of shares in pursuance of an order of the court¹⁵ under the powers conferred in relation to: (a) proceedings objecting to a resolution proposing that the company be re-registered as a private company¹⁶; (b) an objection to the redemption or purchase of shares out of capital¹⁷; (c) a breach of the prohibition on public offers being made by a private company¹⁸; or (d) the protection of company members against unfair prejudice¹⁹; or
- 606 (4) the forfeiture of shares, or the acceptance of shares surrendered in lieu, in pursuance of the company's articles²⁰, for failure to pay any sum payable in respect of the shares²¹.

As a general rule, shares so acquired are cancelled, save with respect to treasury shares, which may be held by a company²²; and, where shares are held by the company in this way, the company must be entered in its register of members as the member holding the shares²³.

A limited company may acquire any of its own fully paid²⁴ shares otherwise than for valuable consideration²⁵.

1 As to the meaning of 'limited company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie except in accordance with the Companies Act 2006 Pt 18 (ss 658-737) (see PARA 1197 et seq): see s 658(1); and PARA 1197. As to the meaning of 'share' see PARA 1042.

3 See the Companies Act 2006 s 658(1); and PARA 1197. This gives statutory force to *Trevor v Whitworth* (1887) 12 App Cas 409, HL; *Kirby v Wilkins* [1929] 2 Ch 444; *Vision Express (UK) Ltd v Wilson* [1995] 2 BCLC 419. This does not prohibit a company from acquiring the shares of another company (the 'acquired company') in circumstances where the sole asset of the acquired company is shares in the acquiring company: *Acatos & Hutcheson plc v Watson* [1995] 1 BCLC 218 (in view of the potential for abuse, the court will, however, look carefully at the transaction to ensure that the directors have fulfilled their fiduciary duties to safeguard the interests of shareholders and creditors alike). See also *British and Commonwealth Holdings plc v Barclays Bank plc* [1996] 1 All ER 381, [1996] 1 WLR 1, CA.

As to the prohibition on a body corporate being a member of a company which is its holding company see PARA 334.

4 See the Companies Act 2006 s 658(2)(a); and PARA 1197. As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

5 See the Companies Act 2006 s 658(3)(a); and PARA 1197.

6 In relation to an offence committed after the commencement of the Companies Act 2006 s 1131 (summary proceedings) (see PARA 1625), but before a day is appointed in relation to the commencement of the Criminal Justice Act 2003 s 154(1) (general limit on magistrates' courts' power to impose imprisonment), the reference in the Companies Act 2006 s 658(3)(b) to '12 months' must be read as a reference to 'six months': see ss 658(3)(b), 1131, 1133; and see PARA 1625.

7 As to the statutory maximum see PARA 1622.

8 See the Companies Act 2006 s 658(3)(b); and PARA 1197.

9 See the Companies Act 2006 s 658(2)(b); and PARA 1197.

10 Ie the Companies Act 2006 s 658 (see PARA 1197): see s 659(2); and PARA 1198.

11 See the Companies Act 2006 ss 658(1), 659(2); and PARAS 1197, 1198.

12 Ie except in accordance with the Companies Act 2006 Pt 18 (ss 658-737) (see PARA 1197 et seq): see s 658(1); and PARA 1197.

13 See the Companies Act 2006 s 658(1); and PARA 1197.

14 See the Companies Act 2006 s 659(2)(a); and PARA 1198. As to the meaning of 'share capital' see PARA 1042. As to a reduction of capital see PARA 1173 et seq.

15 As to the meaning of 'court' see PARA 212 note 1.

16 See the Companies Act 2006 s 659(2)(b)(i); and PARA 1198. Head (3)(a) in the text refers to an order of the court under s 98 (see PARA 174): see s 659(2)(b)(i). As to the meaning of 'private company' see PARA 102.

17 See the Companies Act 2006 s 659(2)(b)(ii); and PARA 1198. Head (3)(b) in the text refers to an order of the court under s 721(6) (see PARA 1250): see s 659(2)(b)(ii).

18 See the Companies Act 2006 s 659(2)(b)(iii); and PARA 1198. Head (3)(c) in the text refers to an order of the court under s 759 (see PARA 1066): see s 659(2)(b)(iii).

19 See the Companies Act 2006 s 659(2)(b)(iv); and PARA 1198. Head (3)(d) in the text refers to an order of the court under Pt 30 (ss 994-999) (see PARA 466 et seq): see s 659(2)(b)(iv).

20 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq. As to the power given by articles in relation to the forfeiture and surrender of shares see PARA 1213.

21 See the Companies Act 2006 s 659(2)(c); and PARA 1198. As to payment for shares comprised in a company's share capital see PARA 1113 et seq.

22 See the Companies Act 2006 s 724(5); and PARA 1251.

23 See the Companies Act 2006 s 724(4); and PARA 1251.

24 As to the meaning of 'fully paid' see PARA 1048.

25 See the Companies Act 2006 s 659(1); and PARA 1198. See eg *Re Castiglione's Will Trusts*, *Hunter v Mackenzie* [1958] Ch 549, [1958] 1 All ER 480.

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334. Membership of holding company.

A body corporate¹ cannot² be a member of a company³ that is its holding company⁴; and any allotment⁵ or transfer of shares⁶ in a company to its subsidiary is⁷ void⁸. The prohibition does not, however, apply:

607 (1) where the subsidiary is concerned only as personal representative⁹ or as trustee unless, in the latter case, the holding company or a subsidiary of it is beneficially interested under the trust¹⁰;

608 (2) where the shares in the holding company are held by the subsidiary in the ordinary course of its business as an intermediary¹¹.

Where a body corporate became a holder of shares in a company before 1 July 1948¹² or on or after that date and before 1 October 2009¹³ in circumstances in which the prohibition on membership as it then had effect¹⁴ did not apply, or at any time on or after 1 October 2009¹⁵ in circumstances in which the prohibition on membership did not apply, it may continue to be a member of that company¹⁶. So long as a body corporate is permitted in this way¹⁷ to continue as a member of a company, an allotment to it of fully paid¹⁸ shares in the company may be validly made by way of capitalisation of reserves of the company¹⁹; but, for so long as the prohibition on membership would otherwise apply²⁰, it has no right to vote in respect of any shares so allotted²¹, or in respect of any shares it acquired before the prohibition came to apply²², either on a written resolution²³ or at meetings of the company²⁴ or of any class of its members²⁵.

1 As to the meaning of 'body corporate' see PARA 1 note 5.

2 Ie except as provided by the Companies Act 2006 Pt 8 Ch 4 (ss 136-144): see s 136(1). The exceptions are provided for in s 138 (subsidiary acting as personal representative or trustee) (see head (1) in the text), and in s 141 (subsidiary acting as authorised dealer in securities) (see head (2) in the text): s 136(2). The provisions of Pt 8 Ch 4 apply to a nominee acting on behalf of a subsidiary as to the subsidiary itself: s 144. As to the meaning of 'subsidiary' see PARA 25. As to shares held by a company's nominee generally see PARA 1199.

3 As to the meaning of 'member of a company' see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 Companies Act 2006 s 136(1)(a). As to the meaning of 'holding company' see PARA 25. See also note 10.

5 As to the meaning of 'allotted' see PARA 1091.

6 For these purposes, in relation to a company other than a company limited by shares, the references to shares in the Companies Act 2006 Pt 8 Ch 4 are to be read as references to the interest of its members as such, whatever the form of that interest: s 143. As to the meaning of 'company limited by shares' see PARA 102. As to the meaning of 'share' see PARA 1042.

7 See note 2.

8 Companies Act 2006 s 136(1)(b).

9 As to the meaning of 'personal representative' see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 4.

10 Companies Act 2006 s 138(1). For the purpose of ascertaining whether the holding company or a subsidiary is so interested, the following must be disregarded:

- 135 (1) any interest held only by way of security for the purposes of a transaction entered into by the holding company or subsidiary in the ordinary course of a business that includes the lending of money (s 138(2)(a));
- 136 (2) any interest within s 139 (residual interest under pension scheme or employees' share scheme to be disregarded), or within s 140 (employer's rights of recovery under pension scheme or employees' share scheme to be disregarded) (s 138(2)(b));
- 137 (3) any rights that the company or subsidiary has in its capacity as trustee, including in particular, any right to recover its expenses or be remunerated out of the trust property, and any right to be indemnified out of the trust property for any liability incurred by reason of any act or omission in the performance of its duties as trustee (s 138(2)(c)).

Further to head (2) above, where shares in a company are held on trust for the purposes of a pension scheme or employees' share scheme, there must be disregarded for the purposes of s 138 any residual interest that has not vested in possession: s 139(1). For these purposes, a 'residual interest' means a right of the company or subsidiary (the 'residual beneficiary') to receive any of the trust property in the event of: (a) all the liabilities arising under the scheme having been satisfied or provided for (s 139(2)(a)); or (b) the residual beneficiary ceasing to participate in the scheme (s 139(2)(b)); or (c) the trust property at any time exceeding what is necessary for satisfying the liabilities arising or expected to arise under the scheme (s 139(2)(c)). For the purposes of s 139(2), the reference to a right includes a right dependent on the exercise of a discretion vested by the scheme in the trustee or another person, and the reference to liabilities arising under a scheme includes liabilities that have resulted, or may result, from the exercise of any such discretion: s 139(3). A residual interest vests in possession, in a case within head (a) above, on the occurrence of the event mentioned there (whether or not the amount of the property receivable pursuant to the right is ascertained) or, in a case within head (b) or head (c) above, when the residual beneficiary becomes entitled to require the trustee to transfer to him any of the property receivable pursuant to the right: s 139(4). 'Pension scheme' means a scheme for the provision of benefits consisting of or including relevant benefits for or in respect of employees or former employees (s 139(5)), where 'relevant benefits' means any pension, lump sum, gratuity or other like benefit given or to be given on retirement or on death or in anticipation of retirement or, in connection with past service, after retirement or death, and 'employee' must be read as if a director of a company were employed by it (s 139(6)). Where shares in a company are held on trust for the purposes of a pension scheme or employees' share scheme, there must be disregarded for the purposes of s 138 any charge or lien on, or set-off against, any benefit or other right or interest under the scheme for the purpose of enabling the employer or former employer of a member of the scheme to obtain the discharge of a monetary obligation due to him from the member: s 140(1). In the case of a trust for the purposes of a pension scheme, there must also be disregarded any right to receive from the trustee of the scheme, or as trustee of the scheme to retain, an amount that can be recovered or retained, under the Pension Schemes Act 1993 s 61 (deduction of contributions equivalent premium from refund of scheme contributions) (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 924) or otherwise, as reimbursement or partial reimbursement for any contributions equivalent premium paid in connection with the scheme under Pt 3 (ss 7-68) (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 878 et seq): Companies Act 2006 s 140(2). For these purposes, 'pension scheme' means a scheme for the provision of benefits consisting of or including relevant benefits for or in respect of employees or former employees, where 'relevant benefits' means any pension, lump sum, gratuity or other like benefit given or to be given on retirement or on death or in anticipation of retirement or, in connection with past service, after retirement or death (s 140(3)); and 'employer' and 'employee' must be read as if a director of a company were employed by it (s 140(4)). As to the meaning of 'director' see PARA 478. As to the meaning of 'employees' share scheme' see PARA 169 note 20.

¹¹ Companies Act 2006 s 141(1). For this purpose, a person is an intermediary if he:

- 138 (1) carries on a bona fide business of dealing in securities (s 141(2)(a));
- 139 (2) is a member of or has access to a regulated market (s 141(2)(b)); and
- 140 (3) does not carry on an excluded business (s 141(2)(c)).

For these purposes, 'securities' includes options, futures and contracts for differences; and rights or interests in those investments: s 141(4)(d). As to the meanings of 'business' and 'carry on business' generally see PARA 1 note 1. In the Companies Acts, 'regulated market' means a multilateral system operated and/or managed by a

market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, in the system and in accordance with its non-discretionary rules, in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provisions of European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) Title III (arts 36-47) (see further **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 88 et seq): art 4.1(14); definition applied by the Companies Act 2006 s 1173(1). Further to head (3) above, the excluded businesses are:

- 141 (a) any business that consists wholly or mainly in the making or managing of investments (s 141(3)(a));
- 142 (b) any business that consists wholly or mainly in, or is carried on wholly or mainly for the purpose of, providing services to persons who are connected with the person carrying on the business (s 141(3)(b));
- 143 (c) any business that consists in insurance business (s 141(3)(c));
- 144 (d) a business that consists in managing or acting as trustee in relation to a pension scheme or which is carried on by the manager or trustee of such a scheme in connection with or for the purposes of the scheme (s 141(3)(d));
- 145 (e) a business that consists in operating or acting as trustee in relation to a collective investment scheme or is carried on by the operator or trustee of such a scheme in connection with or for the purposes of the scheme (s 141(3)(e)).

For these purposes, the question whether a person is connected with another is to be determined in accordance with the provisions of the Income and Corporation Taxes Act 1988 s 839 (see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1258): Companies Act 2006 s 141(4)(a). 'Collective investment scheme' has the meaning given in the Financial Services and Markets Act 2000 s 236 (ie an open-ended investment company) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 603): Companies Act 2006 s 141(4)(b). 'Insurance business' means business which consists of the effecting or carrying out of contracts of insurance: s 141(4)(c). 'Trustee' and 'operator', in relation to a collective investment scheme, must be construed in accordance with the Financial Services and Markets Act 2000 s 237(2) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 606): Companies Act 2006 s 141(4)(e). Expressions used in s 141 that are also used in the provisions regulating activities under the Financial Services and Markets Act 2000 have the same meaning here as they do in those provisions (see s 22, orders made under s 22, s 22(2), Sch 2; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 80 et seq): Companies Act 2006 s 141(5). Where:

- 146 (i) a subsidiary that is a dealer in securities has purportedly acquired shares in its holding company in contravention of the prohibition in s 136 (see the text and notes 1-8) (s 142(1)(a)); and
- 147 (ii) a person acting in good faith has agreed, for value and without notice of that contravention, to acquire shares in the holding company, either from the subsidiary or from someone who has purportedly acquired the shares after their disposal by the subsidiary (s 142(1)(b)),

any transfer to that person of the shares mentioned in head (i) above has the same effect as it would have had if their original acquisition by the subsidiary had not been in contravention of the prohibition (s 142(2)).

12 Ie the date on which the Companies Act 1948 (repealed) came into force. As to the Companies Act 1948 generally see PARA 12.

13 Ie before the commencement of the Companies Act 2006 Pt 8 Ch 4 (see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3(h)): see the Companies Act 2006 s 137(1).

14 Ie the prohibition in the Companies Act 1985 s 23(1) (repealed) (or any corresponding earlier enactment): see the Companies Act 2006 s 137(1). As to the meaning of 'enactment' see PARA 17 note 2. As to predecessor legislation from which the Companies Act 2006 is derived see PARA 10 et seq.

15 Ie on or after the commencement of the Companies Act 2006 Pt 8 Ch 4 (see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3(h)): see the Companies Act 2006 s 137(1).

16 Companies Act 2006 s 137(1), (2).

17 Ie by virtue of the Companies Act 2006 s 137 (see the text and notes 12-16): see s 137(3).

18 As to the meaning of 'fully paid' see PARA 1048.

19 Companies Act 2006 s 137(3).

20 In so long as the prohibition in the Companies Act 2006 s 136 (see the text and notes 1-8) would, apart from s 137, apply: see s 137(4).

21 In it has no right to vote in respect of any shares allotted as mentioned in the Companies Act 2006 s 137(3) (see the text and notes 17-19): see s 137(4).

22 In it has no right to vote in respect of the shares mentioned in the Companies Act 2006 s 137(1) (see the text and notes 12-16): see s 137(4).

23 As to the meaning of 'written resolution' see PARA 623.

24 As to resolutions and meetings of members see PARA 612 et seq. As to voting at meetings see PARA 653 et seq.

25 Companies Act 2006 s 137(4). As to classes of shares and class rights see PARA 1057 et seq.

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(iv) Register of Members

A. CONTENTS

335. Requirement for register of members.

Every company¹ must keep a register of its members²; and there must be entered in the register the following particulars³:

- 609 (1) the names and addresses of members⁴;
- 610 (2) the date on which each person was registered as a member⁵; and
- 611 (3) the date at which any person ceased to be a member⁶.

In the case of a company having a share capital⁷:

- 612 (a) there must be entered in the register, with the names and addresses of the members, a statement of the shares held by each member, distinguishing each share by its number (so long as the share has a number)⁸, and, where the company has more than one class of issued shares⁹, by its class¹⁰, and a statement of the amount paid or agreed to be considered as paid on the shares of each member¹¹;
- 613 (b) where the company has converted any of its shares into stock¹² and given notice of the conversion to the registrar of companies¹³, the register must show the amount and class of stock held by each member, instead of the amount of shares and the particulars relating to shares specified in head (a) above¹⁴.

The subscribers of the company's memorandum of association¹⁵, as well as other persons agreeing to become members¹⁶, must be entered in the register¹⁷.

In the case of a company which does not have a share capital, but has more than one class of members, there must be entered in the register, with the names and addresses of the members, a statement of the class to which each member belongs¹⁸.

If a company makes default in complying with these requirements¹⁹, an offence is committed by the company, and by every officer of the company who is in default²⁰; and a person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale²¹ and (for continued contravention) to a daily default fine²² not exceeding one-tenth of level 3 on the standard scale²³.

An entry relating to a former member of the company may be removed from the register after the expiration of ten years from the date on which he ceased to be a member²⁴.

Liability incurred by a company from the making or deletion of an entry in its register of members²⁵, or from a failure to make or delete any such entry²⁶, is not enforceable more than ten years after the date on which the entry was made or deleted or, as the case may be, the failure first occurred²⁷.

The company must not enter in the register a statement that it has a lien on the shares of a member²⁸, and cannot insist on putting on the register anything except what is required by statute to be inserted in it²⁹.

Where the name of a firm is entered in the register as the holder of shares, the members of the firm are jointly liable for the shares³⁰. A firm which has no separate legal persona is not entitled to be registered in the name of the firm, but only in the names of its partners³¹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 113(1). As to the meaning of 'member' see PARA 321. An overseas branch register is regarded as part of the company's register of members: see s 131; and PARA 359. As to the meaning of 'overseas company' see PARA 1824. The register of members falls within the definition of 'company records' that is used for the purposes of the Companies Act 2006: see PARA 674. As to the form of company records, their inspection and the duty to take precautions against their falsification see PARAS 674- 676. Prior to the Companies Act 1948, it had been held that rough memoranda on sheets of paper intended as materials from which a register might be prepared are not a register (*Re Printing, Telegraph and Construction Co of Agence Havas, ex p Cammell* [1894] 2 Ch 392, CA), and this is presumably still good law in spite of the relaxations as to the form of company records now provided for under the Companies Act 2006.

References in any enactment or instrument to a company's register of members, unless the context otherwise requires, is to be construed in relation to a company which is a participating issuer as referring to the company's issuer register of members and operator register of members: see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 20(4); and PARA 340. As to the meaning of 'participating issuer' see PARA 421 note 9. As to the meanings of 'issuer register of members' and 'operator register of members' see PARA 340; and as to the meaning of 'operator' see PARA 421 note 1. As to the entries to be made generally in registers regarding uncertificated securities see PARA 340.

3 Companies Act 2006 s 113(2). As to the entries to be made in the registers regarding uncertificated securities see PARA 340; as to the entries and amendments to be made where there are share warrants see PARA 337; as to the statements required to be made in the register where a private company has only one member see PARA 336; and as to the registration requirements where a company holds its own shares as treasury shares see PARA 338.

4 Companies Act 2006 s 113(2)(a). Any obligation under the Companies Acts to give a person's address is, unless otherwise expressly provided, to give a service address for that person: Companies Act 2006 s 1142. As to service of documents on a company generally see PARA 671.

In the case of joint holders of shares or stock in a company, the company's register of members must state the names of each joint holder: s 113(5). Where two or more persons hold a share or shares jointly, they may insist on having their names registered in such order as they choose, or to have their holding split into several joint holdings with their names in different orders: *Re TH Saunders & Co Ltd* [1908] 1 Ch 415; *Burns v Siemens Bros Dynamo Works Ltd* [1919] 1 Ch 225. In other respects, joint holders are regarded for the purposes of the Companies Act 2006 Pt 8 Ch 2 (ss 113-128) (see also PARA 336 et seq) as a single member (so that the register must show a single address): s 113(5). As to the meaning of 'share' see PARA 1042. As to the meaning of 'stock' see PARA 1163.

- 5 Companies Act 2006 s 113(2)(b).
- 6 Companies Act 2006 s 113(2)(c). As to cessation of company membership see PARAS 379, 380.
- 7 Companies Act 2006 s 113(3). As to the meanings of 'share capital' and 'company having a share capital' see PARA 1042.
- 8 Companies Act 2006 s 113(3)(a)(i). As to the numbering of shares see PARA 1050.
- 9 As to classes of shares generally see PARA 1057 et seq; and as to the meaning of 'issued shares' see PARA 1045.
- 10 Companies Act 2006 s 113(3)(a)(ii).
- 11 Companies Act 2006 s 113(3)(b). As to payments for shares and paid up shares see PARA 1042 et seq.
- 12 As to the conversion of shares into stock see PARA 1163 et seq. A company's shares may no longer be converted into stock: see the Companies Act 2006 s 540(2); and PARA 1042.
- 13 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the notice required to be given to the registrar of the reconversion of stock into shares see PARA 1165.
- 14 Companies Act 2006 s 113(4).
- 15 As to the meaning of 'memorandum of association' see PARA 104. As to subscribers of the memorandum see PARA 104.
- 16 As to the requirement for persons other than subscribers of the memorandum to agree to become members before their membership is duly constituted see PARA 325.
- 17 See the Companies Act 2006 s 112; and PARA 321 et seq.
- 18 Companies Act 2006 s 113(6). This nullifies the decision in *Re Performing Right Society Ltd, Lyttleton v Performing Right Society Ltd* [1978] 3 All ER 972, [1978] 1 WLR 1197, CA.
- 19 In complying with the Companies Act 2006 s 113: see s 113(7). See note 23.
- 20 Companies Act 2006 s 113(7). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.
- 21 As to the standard scale see PARA 1622.
- 22 As to the meaning of 'daily default fine' see PARA 1622.
- 23 Companies Act 2006 s 113(8). Although s 113 does not apply to a company which is a participating issuer (other than as respects any overseas branch register) (Uncertificated Securities Regulations 2001, SI 2001/3755, reg 23(4), Sch 4 para 2(4) (reg 23(4), Sch 4 para 2(4) amended by SI 2009/1889)), the Companies Act 2006 s 113(7), (8) applies to a participating issuer which is a company which makes default in complying with the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 2 (see PARA 340) and every officer of it who is in default as if such a default were a default in complying with the Companies Act 2006 s 113 (Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 2(5) (amended by SI 2009/1889)). An officer of a participating issuer is in default in complying with, or in contravention of the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 2, if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: Sch 4 para 20. Notwithstanding any other enactment, a participating issuer may not close a register of securities relating to a participating security without the consent of the operator: reg 26 (amended by SI 2009/1889). As to the meaning of 'officer' (in relation to an operator or a participating issuer) see PARA 421 note 4. As to the meaning of 'operator register of securities' see PARA 421 note 3. As to the overseas branch register of members see PARA 358.
- 24 Companies Act 2006 s 121. The power conferred by s 121 is exercisable on and after 6 April 2018, whenever the period of ten years referred to in that provision expired: see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, art 9, Sch 4 para 2(1) (amended by SI 2008/674). A copy of any details that were included in the register immediately before that date and that are removed from the register under that power must be retained by the company until 6 April 2008 or, if earlier, 20 years after the member concerned ceased to be a member: see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, Sch 4 para 2(2).

25 Companies Act 2006 s 128(1)(a).

26 Companies Act 2006 s 128(1)(b).

27 Companies Act 2006 s 128(1). This is without prejudice to any lesser period of limitation: s 128(2). The provisions of s 128 apply to causes of action arising on or after 6 April 2008: see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, Sch 4 para 3(1). The time limit for causes of action arising before that date is ten years from 6 April 2008, or 20 years (as provided by the Companies Act 1985 s 352(7) (repealed)) from when the cause of action arose, whichever expires first: see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, Sch 4 para 3(2). This is without prejudice to any lesser period of limitation: see Sch 4 para 3(3).

28 *Re W Key & Son Ltd* [1902] 1 Ch 467. As to a company's lien on shares for moneys owing see PARAS 1206-1211.

29 *Re TH Saunders & Co Ltd* [1908] 1 Ch 415.

30 *Weikersheim's Case* (1873) 8 Ch App 831. See also *Dunster's Case* [1894] 3 Ch 473, CA.

31 *Re Vagliano Anthracite Collieries Ltd* (1910) 79 LJ Ch 769.

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336. Statement in register that private company has only one member.

If a limited company¹ is formed under the Companies Act 2006² with only one member³ there must be entered in the company's register of members⁴, with the name and address of the sole member, a statement that the company has only one member⁵.

If the number of members of a limited company falls to one, or if an unlimited company⁶ with only one member becomes a limited company on re-registration⁷, there must, upon the occurrence of that event, be entered in the company's register of members, with the name and address of the sole member⁸:

614 (1) a statement that the company has only one member⁹; and

615 (2) the date on which the company became a company having only one member¹⁰.

If the membership of a limited company increases from one to two or more members, there must, upon the occurrence of that event, be entered in the company's register of members, with the name and address of the person who was formerly the sole member, a statement that the company has ceased to have only one member¹¹ together with the date on which that event occurred¹².

If a company makes default in complying with these requirements¹³, an offence is committed by the company, and by every officer of the company who is in default¹⁴; and a person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹⁵ and (for continued contravention) to a daily default fine¹⁶ not exceeding one-tenth of level 3 on the standard scale¹⁷.

1 As to the meaning of 'limited company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

- 2 As to company formation and registration under the Companies Act 2006, and the different forms that such a company may take, see PARA 72 et seq.
- 3 As to the meaning of 'member of a company' see PARA 321. By virtue of the Companies Act 2006 s 7(1), (2), a company is duly formed under the Act by one or more persons: see PARA 102.
- 4 As to the register of members see PARA 335 et seq.
- 5 Companies Act 2006 s 123(1). An unlimited company is not required to make such a statement whether it is formed with, or becomes, a company with one member. See also the text and notes 6-9.
- 6 As to the meaning of 'unlimited company' see PARA 102.
- 7 As to the re-registration of an unlimited company as a private limited company see PARA 178 et seq.
- 8 Companies Act 2006 s 123(2).
- 9 Companies Act 2006 s 123(2)(a).
- 10 Companies Act 2006 s 123(2)(b).
- 11 Companies Act 2006 s 123(3)(a).
- 12 Companies Act 2006 s 123(3)(b).
- 13 In complying with the Companies Act 2006 s 123: see s 123(4).
- 14 Companies Act 2006 s 123(4). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.
- 15 As to the standard scale see PARA 1622.
- 16 As to the meaning of 'daily default fine' see PARA 1622.
- 17 Companies Act 2006 s 123(5).

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337. Entries and amendments to be made where there are share warrants.

On the issue of a share warrant¹, the company² must:

- 616 (1) enter in the register of members³: (a) the fact of the issue of the warrant⁴; (b) a statement of the shares⁵ included in the warrant, distinguishing each share by its number so long as it has a number⁶; and (c) the date of the issue of the warrant⁷; and
- 617 (2) amend the register, if necessary, so that no person is named on the register as the holder of the shares specified in the warrant⁸.

The bearer of a share warrant may, if the company's articles⁹ so provide, be deemed a member of the company within the meaning of the Companies Act 2006, either to the full extent or for any purposes defined in the articles¹⁰; and, subject to the company's articles, the bearer of a share warrant is entitled, on surrendering it for cancellation, to have his name entered as a member in the register of members¹¹. The company is responsible for any loss incurred by any person by reason of the company entering in the register the name of a bearer of a share warrant in respect of the shares specified in it without the warrant being surrendered and

cancelled¹². Until the warrant is surrendered, the particulars specified in heads (1)(a) to (1)(c) above are deemed to be the particulars required by the Companies Act 2006 to be entered in the register of members¹³. On the surrender of a share warrant, the date of the surrender must be entered in the register¹⁴.

1 As to share warrants see PARA 382.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 Companies Act 2006 s 122(1)(a). See the text and notes 13-14. As to the meaning of 'member' see PARA 321. As to the register of members see PARA 335 et seq. The Companies Act 2006 s 122 applies to a company which is a participating issuer as if references to the company's register of members were references instead to its issuer register of members: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 23(4), Sch 4 para 8 (reg 23(4), Sch 4 para 8 amended by SI 2009/1889). As to the meaning of 'participating issuer' see PARA 421 note 9. As to the meaning of 'issuer register of members' see PARA 340.

4 Companies Act 2006 s 122(1)(a)(i).

5 As to the meaning of 'share' see PARA 1042.

6 Companies Act 2006 s 122(1)(a)(ii). As to the numbering of shares see PARA 1050.

7 Companies Act 2006 s 122(1)(a)(iii).

8 Companies Act 2006 s 122(1)(b).

9 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

10 Companies Act 2006 s 122(3). As to articles providing that share warrant bearers be deemed members see PARA 321.

11 Companies Act 2006 s 122(4).

12 Companies Act 2006 s 122(5).

13 Companies Act 2006 s 122(2).

14 Companies Act 2006 s 122(6).

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338. Registration requirements where company holds own shares as treasury shares.

Where a company¹ purchases its own shares² in circumstances where it is deemed to be holding them as treasury shares³:

618 (1) the requirements to make entries in the register of members⁴ need not be complied with if the company cancels all of the shares forthwith after the purchase⁵; and

619 (2) if the company does not cancel all of the shares forthwith after the purchase, any share that is so cancelled must be disregarded for the purposes of that requirement⁶.

Subject to these provisions⁷, where a company holds shares as treasury shares the company must be entered in the register as the member holding those shares⁸.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 In accordance with the Companies Act 2006 Pt 18 Ch 4 (ss 690-708): see PARA 1234 et seq. As to the meaning of 'share' see PARA 1042.

3 In circumstances in which the Companies Act 2006 s 724 (treasury shares) applies (see PARA 1251): see s 124(1). As to treasury shares see PARA 1251.

4 In the requirements of the Companies Act 2006 s 113 (see PARA 335): see s 124(1)(a). As to the register of members see PARA 335 et seq. As to the meaning of 'member' see PARA 321.

5 Companies Act 2006 s 124(1)(a).

6 Companies Act 2006 s 124(1)(b). Head (2) in the text refers to the purposes of s 113 (see PARA 335): see s 124(1)(b).

7 In subject to the Companies Act 2006 s 124(1) (see the text and notes 1-6): see s 124(2).

8 Companies Act 2006 s 124(2).

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339. Index of names of members.

Every company¹ having more than 50 members² must keep an index of the names of the members of the company, unless the register of members³ is in such a form as to constitute in itself an index⁴. The company must, within 14 days after the date on which any alteration is made in the register of members, make any necessary alteration in the index⁵. The index must contain, in respect of each member, a sufficient indication to enable the account of that member in the register to be readily found⁶; and the index must be at all times kept available for inspection at the same place as the register of members⁷.

If default is made in complying with these requirements⁸, an offence is committed by the company, and by every officer of the company who is in default⁹; and a person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹⁰ and (for continued contravention) to a daily default fine¹¹ not exceeding one-tenth of level 3 on the standard scale¹².

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'member' see PARA 321.

3 As to the register of members see PARA 335 et seq.

4 Companies Act 2006 s 115(1). The index of members' names falls within the definition of 'company records' that is used for the purposes of the Companies Act 2006: see PARA 674. As to the form of company records, their inspection and the duty to take precautions against their falsification see PARAS 674-676. As to the index of names of members to be kept regarding uncertificated securities see PARA 341.

5 Companies Act 2006 s 115(2).

6 Companies Act 2006 s 115(3).

7 Companies Act 2006 s 115(4). As to the custody and inspection of the register and index see PARA 347 et seq.

8 le in complying with the Companies Act 2006 s 115: see s 115(5).

9 Companies Act 2006 s 115(5). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

10 As to the standard scale see PARA 1622.

11 As to the meaning of 'daily default fine' see PARA 1622.

12 Companies Act 2006 s 115(6). Although s 115 does not apply to a company which is a participating issuer (Uncertificated Securities Regulations 2001, SI 2001/3755, reg 23(4), Sch 4 para 7(4) (reg 23(4), Sch 4 para 7(4) amended by SI 2009/1889)), the Companies Act 2006 s 115(5), (6) applies to a participating issuer which is a company which makes default in complying with the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 7 (see PARA 341) and every officer of it who is in default as if such a default were a default in complying with the Companies Act 2006 s 115 (Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 7(5) (amended by SI 2009/1889)). An officer of a participating issuer is in default in complying with, or in contravention of the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 7, if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: Sch 4 para 20. As to the meaning of 'participating issuer' see PARA 421 note 9. As to the meaning of 'officer' (in relation to an operator or a participating issuer) see PARA 421 note 4.

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340. Entries to be made in registers regarding uncertificated securities.

In respect of every company¹ which is a participating issuer², there must be a register maintained by the participating issuer (an 'issuer register of members')³; and a register maintained by the operator⁴ (an 'operator register of members')⁵. References in any enactment or instrument to a company's register of members, unless the context otherwise requires, is to be construed in relation to a company which is a participating issuer as referring to the company's issuer register of members and operator register of members⁶.

Every participating issuer⁷ which is a company must enter in its issuer register of members⁸:

- 620 (1) the names and addresses of the members⁹;
- 621 (2) the date on which each person was registered as a member¹⁰; and
- 622 (3) the date at which any person ceased to be a member¹¹.

With the names and addresses of the members there must be entered a statement of the certificated shares¹² held by each member¹³, distinguishing each share by its number (so long as the share has a number) and, where the company has more than one class of issued shares, by its class¹⁴, and a statement of the amount paid or agreed to be considered as paid on the certificated shares of each member¹⁵. Where the company has converted any of its shares into stock¹⁶ and given notice of the conversion to the registrar of companies¹⁷, the issuer register of members must show the amount and class of the certificated stock¹⁸ held by each member, instead of the amount of shares and the particulars relating to shares so specified¹⁹. Provision is made in respect of persons who make default in complying with these requirements²⁰.

An entry relating to a former member of the company may be removed from the issuer register of members after the expiration of ten years beginning with the day on which he ceased to be a member²¹.

In relation to every participating issuer which is a company, an operator of a relevant system must, in respect of any class of shares which is a participating security for the purposes of that system, enter on an operator register of members²²:

- 623 (a) the names and addresses of the members who hold uncertificated shares in the company²³;
- 624 (b) with those names and addresses, a statement of the uncertificated shares held by each member, distinguishing, where the company has more than one class of issued uncertificated shares, each share by its class²⁴; and
- 625 (c) where the company has converted any of its shares into stock and given notice of the conversion to the registrar of companies, the operator register of members must show the amount and class of uncertificated stock held by each member, instead of the amount of shares and the particulars relating to shares specified in head (b) above²⁵.

An entry relating to a member of a company who has ceased to hold any uncertificated shares in the company may be removed from the operator register of members after the expiration of ten years beginning with the day on which he ceased to hold any such shares²⁶. Members of a company who hold shares in uncertificated form may not be entered as holders of those shares on an overseas branch register²⁷.

The obligations of an operator to maintain and to keep and enter up any register of securities, imposed by the Uncertificated Securities Regulations 2001²⁸:

- 626 (i) does not give rise to any form of duty or liability on the operator, except such as is expressly provided for in the Regulations or as arises from fraud or other wilful default, or negligence, on the part of the operator²⁹;
- 627 (ii) does not give rise to any form of duty or liability on a participating issuer, other than where the operator acts on the instructions of that participating issuer, in the absence of fraud or other wilful default, or negligence, on the part of that participating issuer³⁰; and
- 628 (iii) does not give rise to any form of duty or liability enforceable by civil proceedings for breach of statutory duty³¹.

Without prejudice to the above (or to any lesser period of limitation or to any rule as to the prescription of rights), any liability incurred by a participating issuer or by an operator arising either from the making or deletion of an entry in a register of securities or record of securities pursuant to the Uncertificated Securities Regulations 2001³², or from a failure to make or delete any such entry, is not enforceable more than ten years after the date on which the entry was made or deleted or, in the case of a failure, the failure first occurred³³.

A participating issuer which is a company must maintain a record³⁴ of the entries made in its operator register of members (a 'record of uncertificated³⁵ shares')³⁶. Every participating issuer which is a company must enter in its record of uncertificated shares³⁷:

- 629 (A) the same particulars, so far as practicable, as are required³⁸ to be entered in the operator register of members³⁹; and
- 630 (B) a statement of the amount paid or agreed to be considered as paid on the uncertificated shares of each member⁴⁰.

Such a company must, unless it is impracticable to do so by virtue of circumstances beyond its control, ensure that the record of uncertificated shares is regularly reconciled with the operator register of members⁴¹. Provided that it has so complied, a company is not liable in respect of any act or thing done or omitted to be done by or on behalf of the company in reliance upon the assumption that the particulars entered in any record of uncertificated shares which the company is required to keep by the Uncertificated Securities Regulations 2001 accord with the particulars entered in its operator register of members⁴².

Such sanctions as apply to a company and its officers in the event of a default in complying with keeping a register of members under the Companies Act 2006⁴³ apply to a company which is a participating issuer and its officers⁴⁴, or an operator and his officers⁴⁵ (as the case may be)⁴⁶.

1 For these purposes, 'company' means a company within the meaning of the Companies Act 2006 s 1(1); Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(1) (amended by SI 2009/1889). As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'participating issuer' see PARA 421 note 9.

3 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 20(1)(a). A participating issuer which is a company must keep and enter up the issuer register of members in accordance with reg 23(4), Sch 4 para 2 (see the text and notes 7-21); reg 20(2).

4 As to the meaning of 'operator' see PARA 421 note 1.

5 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 20(1)(b). In respect of every company which is a participating issuer, the operator must keep and enter up the operator register of members in accordance with Sch 4 para 4 (see the text and notes 22-27); reg 20(3). Every register which an operator is required to maintain by virtue of the Uncertificated Securities Regulations 2001, SI 2001/3755 (other than an operator register of eligible debt securities) which relates to securities issued by a company is deemed to be kept (in the case of a company registered in England and Wales), in England and Wales, or (in the case of a company registered in Scotland), in Scotland: Sch 4 para 16 (amended by SI 2009/1889). For these purposes, 'register of members' means either or both of an issuer register of members and an operator register of members: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(1). As to the meanings of 'England' and 'Wales' see PARA 1 note 5. As to the operator register of eligible debt securities see PARA 425.

6 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 20(4). This provision does not apply in relation to a company's issuer register of members to the extent that any of the particulars entered in that register in accordance with Sch 4 para 2(1) (see the text and notes 7-11) are inconsistent with the company's operator register of members: reg 20(5).

7 The Companies Act 2006 s 123 (see PARA 336) applies to a participating issuer which is a private company limited by shares as if references therein to the company's register of members were references to its issuer register of members: Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 3 (amended by SI 2009/1889). As to the meanings of 'company limited by shares' and 'private company' see PARA 102.

8 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 2(1). For these purposes, references to an issuer register of members must not be taken to include an overseas branch register: Sch 4 para 2(7). As to the overseas branch register of members see PARA 358.

9 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 2(1)(a).

10 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 2(1)(b).

11 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 2(1)(c). As to cessation of company membership see PARAS 379, 380.

12 For this purpose, 'certificated shares' means shares which are not uncertificated shares; and 'uncertificated shares' means shares title to which may be transferred by means of a relevant system: Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 1. As to the meaning of 'share' see PARA 421 note 2. Nothing in the Uncertificated Securities Regulations 2001, SI 2001/3755 requires a participating issuer or its officers to maintain a register which records how many units of a wholly dematerialised security are held in certificated form: reg 45(a). As to the meaning of 'wholly dematerialised security' see PARA 421 note 8. As to the meaning of 'officer' (in relation to an operator or a participating issuer) see PARA 421 note 4. As to the meaning of 'relevant system' see PARA 421 note 1.

- 13 As to who qualifies as a member of a company see PARA 321.
- 14 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 2(2)(a). As to the numbering of shares see PARA 1050; and as to classes of shares see PARA 1057 et seq.
- 15 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 2(2)(b).
- 16 As to the meaning of 'stock' see PARA 1163.
- 17 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the notice required to be given to the registrar of the reconversion of stock into shares see PARA 1165.
- 18 For these purposes, 'certificated stock' means stock which is not uncertificated stock; and 'uncertificated stock' means stock title to which may be transferred by means of a relevant system: Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 1.
- 19 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 2(3).
- 20 See PARA 335.
- 21 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 2(6) (amended by SI 2009/1889). See note 5.
- 22 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 4(1). For these purposes, references to an operator register of members must not be taken to include an overseas branch register: Sch 4 para 4(3).
- 23 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 4(1)(a).
- 24 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 4(1)(b).
- 25 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 4(1)(c).
- 26 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 4(2) (amended by SI 2009/1889).
- 27 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 4(4).
- 28 Is imposed by the Uncertificated Securities Regulations 2001, SI 2001/3755: see reg 23(1).
- 29 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 23(1)(a).
- 30 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 23(1)(b).
- 31 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 23(1)(c).
- 32 Is pursuant to the Uncertificated Securities Regulations 2001, SI 2001/3755: see reg 23(2). An entry in a register of securities or in a record of securities (see the text and notes 34-42) relating to a person who no longer holds the securities which are the subject of the entry may be removed from the register or the record (as the case may be) after the expiration of 20 years beginning with the day on which the person ceased to hold any of those securities: Sch 4 para 17(1). It is submitted that the reference to 20 years in Sch 4 para 17(1) should be a reference to ten years. This does not apply in respect of an entry in a register of members: Sch 4 para 17(2).
- 33 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 23(2) (amended by SI 2009/1889). In relation to the keeping of registers and records of participating securities, the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4, which also excludes, or applies with appropriate modifications, certain provisions of the Companies Act 2006, has effect (see the text and notes 6-27, 32, 37-46): Uncertificated Securities Regulations 2001, SI 2001/3755, reg 23(4) (amended by SI 2009/1889). As to entries relating to trusts and equitable interests see PARA 343.
- 34 The record must be kept and entered up in accordance with the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 5 (see the text and notes 37-42): reg 20(6)(b).
- 35 As to the meaning of 'uncertificated' see PARA 421 note 3.
- 36 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 20(6)(a). See note 33.
- 37 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 5(1).

38 le required by the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 4(1) (see heads (a)-(c) in the text): see Sch 4 para 5(1)(a).

39 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 5(1)(a).

40 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 5(1)(b).

41 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 5(2).

42 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 5(3).

43 le the Companies Act 2006 s 113(7), (8) (see PARA 335): see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 20(7), Sch 4 para 5(4) (reg 20(7), Sch 4 para 5(4) amended by SI 2009/1889).

44 le in the event of a default in complying with the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 20(1)(a) (see the text and notes 1-3) or reg 20(6)(a) (see the text and notes 35-36): see reg 20(7), Sch 4 para 5(4) (as amended: see note 43).

45 le in the event of a default in complying with the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 20(1)(b) (see the text and notes 4-5): see reg 20(7), Sch 4 para 5(4) (as amended: see note 43). Such sanctions as apply to a company and its officers in the event of a default in complying with the Companies Act 2006 s 113 (see PARA 335) apply also to an operator and his officers in the event of a default in complying with the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 4 (see the text and notes 22-27): Sch 4 para 19(1) (amended by SI 2009/1889). An officer of an operator is in default in complying with, or in contravention of, the provisions of the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 4, if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: see Sch 4 para 21 (amended by SI 2009/1889).

46 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 20(7), Sch 4 para 5(4) (as amended: see note 43). For the purposes of the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 20(7), an officer of a participating issuer, or an officer of an operator, is in default in complying with, or in contravention of, the provision mentioned in that regulation if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: reg 47(1), (2). An officer of a participating issuer is in default in complying with, or in contravention of Sch 4 para 5, if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: Sch 4 para 20.

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341. Index of names of members regarding uncertificated securities.

Every participating issuer¹ which is a company² having more than 50 members³ must (unless the particulars required⁴ to be entered in the issuer register of members⁵ are kept in such a form as to constitute in themselves an index) keep an index of the names of the members of the company and must, within 14 days after the date on which any alteration is made in the issuer register of members or the operator register of members⁶, make any necessary alteration in the index⁷. The index must in respect of each member contain a sufficient indication to enable the account of that member in the issuer register of members (and, in the case of a member who holds uncertificated shares⁸ in the company, in the record of uncertificated shares) to be readily found⁹. The index must be at all times kept available for inspection at the same place as the issuer register of members and the record of uncertificated shares¹⁰.

1 As to the meaning of 'participating issuer' see PARA 421 note 9.

2 As to the meaning of 'company' see PARA 340 note 1.

- 3 As to who qualifies as a member of a company see PARA 321.
- 4 Is required by the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 23(4), Sch 4 para 2(1) (see PARA 340): see Sch 4 para 7(1).
- 5 As to the meaning of 'issuer register of members' see PARA 340.
- 6 As to the meaning of 'operator register of members' see PARA 340.
- 7 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 7(1).
- 8 As to the meaning of 'uncertificated shares' see PARA 340 note 12.
- 9 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 7(2).
- 10 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 7(3) (amended by SI 2009/1889). As to the meaning of 'record of uncertificated shares' see PARA 340. As to the location of the register see PARA 348. Where, under the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 6(1) (see PARA 348), a company's issuer register of members and record of uncertificated shares is kept available for inspection at the office of some person other than the company, and by reason of any default of his the company fails to comply with Sch 4 para 6(2) (record of uncertificated shares to be kept available for inspection with issuer register of members) (see PARA 348), Sch 4 para 6(3) (notice to registrar) (see PARA 348), Sch 4 para 7(3) or the Companies Act 2006 s 116 (rights to inspect and require copies) (see PARA 349), or with any requirement of the 2006 Act as to the production of the register of members or any part thereof, that other person is liable to the same penalties as if he were an officer of the company who was in default, and the power of the court under s 118(3) extends to the making of orders against that other and his officers and servants: Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 10 (amended by SI 2009/1889). An officer of a participating issuer is in default in complying with, or in contravention of the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 paras 6, 7, if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: Sch 4 para 20. As to the meaning of 'participating issuer' see PARA 421 note 9. As to the meaning of 'officer' (in relation to an operator or a participating issuer) see PARA 421 note 4.

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342. How far entry on register necessary for membership.

In order to constitute membership of a company¹, entry on the register is necessary², except in the case of signatories or persons deemed to be signatories to the memorandum of association³.

- 1 As to membership of a company see PARA 321 et seq.
- 2 *Nicol's Case*, *Tufnell and Ponsonby's Case* (1885) 29 ChD 421, CA; *Re Macdonald, Sons & Co* [1894] 1 Ch 89, CA. As to the register of members see PARA 335 et seq.
- 3 See PARA 321. As to the meaning of 'memorandum of association' see PARA 104. As to subscribers of the memorandum see PARA 104.

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343. Trusts and equitable interests.

No notice of any trust, expressed, implied or constructive¹, is to be entered on the register of members² of a company³ registered in England and Wales⁴, or to be receivable by the registrar of companies⁵.

The entry of the Public Trustee by that name in the books of a company does not constitute notice of a trust, and a company is not entitled to object to enter the name of the Public Trustee on its books by reason only that the Public Trustee is a corporation, and in dealings with property the fact that the person or one of the persons dealt with is the Public Trustee does not of itself constitute notice of a trust⁶.

Although a member, to the knowledge of the company, is merely a trustee (or legal mortgagee)⁷ of shares registered in his name, he is liable to the company for calls and other obligations of membership⁸, and this liability is not limited to the amount of the trust estate⁹. He is, however, entitled to be indemnified against all such liabilities by the beneficiary¹⁰; but he cannot maintain a claim to enforce this right, unless the liability has been or is about to be enforced against him¹¹. The right of indemnity may be assigned to the liquidator of the company, and enforced by him¹².

Where a company's articles of association¹³ supplement the statutory provision by expressly providing that the company is entitled to treat a shareholder as the absolute owner of his registered shares, and is not to be bound to recognise any equitable interest in shares¹⁴, the company is not bound to accept or preserve notices of equitable interests, and such notices do not affect the company or its officers or agents with any trust¹⁵; but, where the company in which the shares are held claims to have a lien or charge on the shares for its own benefit, the company is liable to be affected with notice of the interests of third parties, and the provisions of the articles will not protect the company if, in the face of notice that the shareholder is not the beneficial owner of the shares, it makes advances or gives credit to the shareholder¹⁶.

Notice to the company does not give any priority as between two persons claiming title to shares registered in the name of a third¹⁷.

No notice of any trust, expressed, implied or constructive, may be entered on an operator register of securities¹⁸, or a part of such a register, or be receivable by an operator¹⁹. Unless expressly prohibited from transferring units of a security²⁰ by means of any computer-based system²¹, a trustee or personal representative is not chargeable with a breach of trust or, as the case may be, with default in administering the estate by reason only of the fact that²²:

- 631 (1) for the purpose of acquiring units of a security which he has the power to acquire in connection with the trust or estate, he has paid for the units under arrangements which provide for them to be transferred to him from a system-member but not to be so transferred until after the payment of the price²³;
- 632 (2) for the purpose of disposing of units of a security which he has power to dispose of in connection with the trust or estate, he has transferred the units to a system-member under arrangements which provide that the price is not to be paid to him until after the transfer is made²⁴; or
- 633 (3) for the purpose of holding units of a security belonging to the trust or estate in uncertificated form and for transferring title to them by means of a relevant system²⁵, he has become a system-member²⁶.

1 As to express, implied or constructive trusts etc see **TRUSTS** vol 48 (2007 Reissue) PARA 624 et seq.

2 As to the register of members see PARA 335 et seq. As to the meaning of 'member' see PARA 321.

3 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 As to the meanings of 'England' and 'Wales' see PARA 1 note 5. As to company formation and registration in England and Wales under the Companies Act 2006 see PARA 102 et seq. As to companies registered, but not formed, under the Companies Act 2006, and as to overseas companies, see PARA 32. As to the position in Scotland see *Muir v City of Glasgow Bank* (1879) 4 App Cas 337 at 360, HL, per Earl Cairns LC.

5 Companies Act 2006 s 126. As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

Without prejudice to the Companies Act 2006 s 126 or to the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 23(3) (see the text and notes 18-19), the operator is not bound by or compelled to recognise any express, implied or constructive trust or other interest in respect of uncertificated units of a security, even if he has actual or constructive notice of the said trust or interest: reg 40(3) (amended by SI 2009/1889). This provision does not prevent, however, in the case of a participating issuer constituted under the law of Scotland, an operator giving notice of a trust to the participating issuer on behalf of a system-member: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 40(4). As to the meaning of 'operator' see PARA 421 note 1. As to the meaning of 'participating issuer' see PARA 421 note 9. As to the meaning of 'system-member' see PARA 422 note 9. As to the meaning of 'uncertificated' see PARA 421 note 3. See further the text and notes 18-26.

6 See the Public Trustee Act 1906 s 11(5); and **TRUSTS** vol 48 (2007 Reissue) PARA 786. Note that the offices of the Public Trustee and the Official Solicitor have been reorganised, and functions relating to trusts have been transferred from the Public Trustee to the Official Solicitor: see **TRUSTS** vol 48 (2007 Reissue) PARA 766.

7 *Royal Bank of India's Case* (1869) 4 Ch App 252; *Weikersheim's Case* (1873) 8 Ch App 831.

8 *Chapman and Barker's Case* (1867) LR 3 Eq 361; *Muir v City of Glasgow Bank* (1879) 4 App Cas 337, HL. Cf *Re Moseley Green Coal and Coke Co Ltd*, *Barrett's Case* (1864) 4 De GJ & Sm 416; *Re Phoenix Life Assurance Co*, *Hoare's Case* (1862) 2 John & H 229; *Gray's Case* (1876) 1 ChD 664; *Re Electric Telegraph Co of Ireland*, *Bunn's Case* (1860) 2 De GF & J 275; *Re East of England Banking Co*, *ex p Bugg* (1865) 2 Drew & Sm 452. As to trust shares being sufficient to qualify a director see PARA 497; and as to lien on trust shares see PARA 1207.

9 *Re British and Foreign Cork Co*, *Leifchild's Case* (1865) LR 1 Eq 231 at 235-236 per Kindersley V-C; *Muir v City of Glasgow Bank* (1879) 4 App Cas 337, HL.

10 *Hardoon v Belilios* [1901] AC 118, PC; *Hemming v Maddick* (1872) 7 Ch App 395; *Hughes-Hallett v Indian Mammoth Gold Mines Co* (1882) 22 ChD 561; *Butler v Cumpston* (1868) LR 7 Eq 16; *James v May* (1873) LR 6 HL 328; *Cruse v Paine* (1869) 4 Ch App 441; *Chapman and Barker's Case* (1867) LR 3 Eq 361 (trusts for the company). See also *Re European Society Arbitration Acts*, *ex p Liquidators of the British Nation Life Assurance Association* (1878) 8 ChD 679 at 708, CA, per James LJ (enforcement against the beneficiary through and in name of trustee). As to a trustee's right of indemnity under the Trustee Act 2000 in respect of expenses and liabilities generally see **TRUSTS** vol 48 (2007 Reissue) PARA 902 et seq.

A person holding shares as a trustee is accountable to the beneficiary: *Rooney v Stanton* (1900) 17 TLR 28, CA. See also *Merlo v Duffy* [2009] EWHC 296 (Ch), [2009] All ER (D) 91 (Feb) (claimant did not have to prove that he was entitled to half of company's share capital which had been held by a legal owner as a nominee on a trust established by agreement, the beneficiaries of which were the claimant and defendant; although the legal ownership of the shares had changed several times, the claimant had not disposed of his beneficial interest to the defendant at any point).

11 *Hughes-Hallett v Indian Mammoth Gold Mines Co* (1882) 22 ChD 561; *Hobbs v Wayet* (1887) 36 ChD 256. See also *Re National Financial Co*, *ex p Oriental Commercial Bank* (1868) 3 Ch App 791.

12 *Hemming v Maddick* (1872) 7 Ch App 395; *Massey v Allen* (1878) 9 ChD 164; *Heritage v Paine* (1876) 2 ChD 594.

13 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

14 Provision is made by the model articles which have been made for the purposes of the Companies Act 2006 and intended for adoption by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1; and PARA 228 et seq) and by public companies (see reg 4, Sch 3; and PARA 228 et seq). As to the meanings of 'company limited by shares', 'private company' and 'public company' see PARA 102. Accordingly, where those articles are adopted, it is provided that, except as required by law, no person is to be recognised by the company as holding any share upon any trust, and except as otherwise required by law or the articles, the company is not in any way to be bound by or recognise any interest in a share other than the holder's absolute ownership of it and all the rights attaching to it: Sch 1 Pt 3 (art 23); Sch 3 Pt 3 (art 45). Very similar provision is made in the regulations for management of a company limited by shares contained in the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule

Table A: see art 5 (which is disapplied by reg 2, Schedule Table C art 1, in relation to companies limited by guarantee and not having a share capital). As to the meaning of 'company limited by guarantee' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. As to 'Table A' and 'Table C', and as to the treatment of legacy articles under the Companies Act 2006, see PARA 230.

15 *Société Générale de Paris v Walker* (1885) 11 App Cas 20 at 30, HL, per Earl of Selborne; *Simpson v Molson's Bank* [1895] AC 270, PC. Probably, even where the articles contain no such provision, the company is not bound to accept notices of equitable interests, but may treat a registered shareholder as the absolute owner of shares registered in his name. Such provisions do not operate to prevent an equitable owner of shares obtaining a court order to protect his equitable interests: *McGrattan v McGrattan* [1985] NI 28, CA.

16 *Rearden v Provincial Bank of Ireland* [1896] 1 IR 532; *Mackereth v Wigan Coal and Iron Co Ltd* [1916] 2 Ch 293; *Bradford Banking Co v Briggs, Son & Co Ltd* (1886) 12 App Cas 29, HL (applying the principle of *Hopkinson v Rolt* (1861) 9 HL Cas 514). See also *Bank of Africa v Salisbury Gold Mining Co* [1892] AC 281, PC. As to the equitable claims where shares have been transferred by an assignment for the benefit of creditors see *Peat v Clayton* [1906] 1 Ch 659.

17 *Roots v Williamson* (1888) 38 ChD 485; *Moore v North Western Bank* [1891] 2 Ch 599. The principle of *Dearle v Hall* (1828) 3 Russ 1 (see **CHOSSES IN ACTION** vol 13 (2009) PARA 41) does not apply: *Société Générale de Paris v Walker* (1885) 11 App Cas 20 at 30, HL, per Earl of Selborne.

18 As to the meaning of 'operator register of securities' see PARA 421 note 3; and as to the meaning of 'operator' see PARA 421 note 1. As to the entries to be made generally in registers regarding uncertificated securities see PARA 340.

19 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 23(3). See note 5.

20 As to the meanings of 'securities' see PARA 420 note 2. As to the meaning of 'unit' (of a security) see PARA 420 note 36.

21 As to the transfer of uncertificated securities by means of a computer-based system see PARA 420.

22 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 40(1).

23 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 40(1)(a).

24 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 40(1)(b).

25 As to the meaning of 'relevant system' see PARA 421 note 1.

26 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 40(1)(c).

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344. Stop notice and charging order.

A person who has an equitable claim to shares may prevent his claim from being prejudiced by the registered holder dealing with them, by serving upon the company a stop notice¹, after which the company cannot permit the shares claimed to be dealt with by the registered holder, except after proper notice to the claimant².

A charging order³ cannot be made on shares for a debt due from the registered shareholder, if he is a trustee of the shares; for they are not stock (including shares, debentures and debenture stock) in which the judgment debtor has a beneficial interest⁴.

A charging order may, however, be made in respect of a judgment debt due from a debtor who holds any beneficial interest in any shares, debentures or securities of any company incorporated in England and Wales⁵, or incorporated outside England and Wales, or of any state

or territory outside the United Kingdom⁶ if registered in a register kept at any place within England and Wales in relation to that interest⁷.

1 As to stop notices see CPR Pt 73 s III (CPR 73.16-73.21); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1492 et seq.

2 *Société Générale de Paris v Tramways Union Co* (1884) 14 QBD 424 at 453, CA, per Lindley LJ; affd sub nom *Société Générale de Paris v Walker* (1885) 11 App Cas 20, HL. Any person claiming to be beneficially entitled to an interest in the securities may apply to the High Court for a stop order which may prohibit (amongst other things): (1) the registration of any transfer of the securities; or (2) the making of any payment by way of dividend, interest or otherwise in respect of the securities: see CPR Pt 73 s II (CPR 73.11-73.15); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1488 et seq.

3 As to charging orders see CPR Pt 73 s I (CPR 73.2-73.10); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1472 et seq.

4 The charge affects the beneficial interest: *Cragg v Taylor* (1867) LR 2 Exch 131; *South Western Loan and Discount Co v Robertson* (1881) 8 QBD 17; *Dixon v Wrench* (1869) LR 4 Exch 154; *Bolland v Young* [1904] 2 KB 824, CA; *Ideal Bedding Co Ltd v Holland* [1907] 2 Ch 157; *Hawks v McArthur* [1951] 1 All ER 22. As to charging orders on stocks and shares generally see **CIVIL PROCEDURE** vol 12 (2009) PARA 1467 et seq.

5 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

6 As to the meaning of 'United Kingdom' see PARA 1 note 5.

7 See the Charging Orders Act 1979 ss 2(1)(a)(i), (2)(b)(ii), (iii), 6(1); CPR Pt 73; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1467 et seq.

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345. Register as evidence.

The register of members¹ is prima facie evidence of any matters which are by the Companies Act 2006 directed or authorised to be inserted in it². Where a company is being wound up³, it is, as between the contributories of the company⁴, prima facie evidence of the truth of all matters purporting to be recorded in it (along with all books and papers of the company and of the liquidators)⁵. However, the register is not conclusive evidence, although the courts endeavour to make it as conclusive as they can consistently with the statutory provisions⁶.

Inaccuracies or omissions do not necessarily prevent the register from being evidence⁷. As, however, it is only prima facie evidence, a person whose name is registered, or omitted from the register, may adduce evidence to show that he ought not or ought to have been registered⁸.

A book or document, intended to be a register of members⁹, may be admitted in evidence as such, although the statutory requirements as to how it should be kept have not been regularly complied with¹⁰.

1 As to the register of members see PARA 335 et seq.

2 Companies Act 2006 s 127. The provisions of s 127 do not apply with respect to a company which is a participating issuer: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 24(4) (amended by SI 2009/1889). As to the meaning of 'participating issuer' see PARA 421 note 9. As to the effect of entries on registers relating to uncertificated securities see PARA 346.

- 3 As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.
- 4 As to the meaning of 'contributory' see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 703. As to the meaning of 'contributory' under the Companies Acts see PARA 115 note 10.
- 5 See the Insolvency Act 1986 s 191; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1075.
- 6 See *Reese River Silver Mining Co v Smith* (1869) LR 4 HL 64 at 80 per Lord Cairns; *Re Briton Medical and General Life Association* (1888) 39 ChD 61 at 71 per Stirling J.
- 7 *Wills v Murray* (1850) 4 Exch 843; *Bain v Whitehaven and Furness Junction Rly Co* (1850) 3 HL Cas 1; *Southampton Dock Co v Richards* (1840) 1 Man & G 448; *London and Brighton Rly Co v Fairclough* (1841) 2 Man & G 674.
- 8 *Carmarthen Rly Co v Wright* (1858) 1 F & F 282; *Portal v Emmens* (1876) 1 CPD 201 at 212 per Lindley J (affd (1876) 1 CPD 664, CA); *Hallmark's Case* (1878) 9 ChD 329, CA. As to rectification of the register see PARA 356 et seq.
- 9 See the cases cited in note 8.
- 10 *Re Printing, Telegraph and Construction Co of the Agence Havas, ex p Cammell* [1894] 2 Ch 392, CA.

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346. Effect of entries on registers relating to uncertificated securities.

Any purported registration of a transfer of title to an uncertificated¹ unit of a security² other than in accordance with the due provisions³ is of no effect⁴. Subject to this restriction, a register of members⁵ is prima facie evidence of any matters which are by the Uncertificated Securities Regulations 2001⁶ directed or authorised to be inserted in it⁷.

The entry of a person's name and address in a company's issuer register of members must not be treated as showing that person to be a member of the company unless⁸:

- 634 (1) the issuer register of members also shows him as holding shares⁹ in the company in certificated form¹⁰;
- 635 (2) the operator register of members shows him as holding shares in the company in uncertificated form¹¹; or
- 636 (3) he is deemed to be a member of the company¹².

- 1 As to the meaning of 'uncertificated' see PARA 421 note 3.
- 2 As to the meaning of 'securities' see PARA 420 note 2. As to the transfer of uncertificated shares see PARA 420.
- 3 Ie other than in accordance with the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27 (see PARA 426) or reg 28 (see PARA 427): see reg 29.
- 4 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 29.
- 5 As to the meaning of 'register of members' where the company is a participating issuer see PARA 340 note 5.
- 6 Ie the Uncertificated Securities Regulations 2001, SI 2001/3755: see reg 24(1).

7 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 24(1). This provision does not apply to a company's issuer register of members to the extent that any of the particulars entered in that register in accordance with reg 23(4), Sch 4 para 2(1) (see PARA 340) are inconsistent with the company's operator register of members: reg 24(2). Reg 24(1) is also subject to reg 24(3): see text and notes 8-12. As to the meaning of 'issuer register of members' see PARA 340. As to the meaning of 'operator register of members' see PARA 340.

8 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 24(3).

9 As to the meaning of 'share' see PARA 421 note 2.

10 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 24(3)(a). As to the meaning of 'certificated' see PARA 421 note 3.

11 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 24(3)(b).

12 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 24(3)(c). Head (3) in the text refers to a person who is deemed to be a member of the company by reg 32(6)(b) (see PARA 422): see reg 24(3)(c).

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B. CUSTODY AND INSPECTION

347. Custody of register and index.

A company's register of members¹ must be kept available for inspection² either: (1) at its registered office³; or (2) at a place specified in regulations⁴ made for the purposes of specifying where certain company records are to so kept⁵.

A company must give notice to the registrar of companies⁶ of the place where its register of members is kept available for inspection, and of any change in that place⁷. If a company makes default for 14 days in complying with the requirement to give such notice⁸, an offence is committed by the company, and by every officer of the company who is in default⁹; and a person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹⁰ and (for continued contravention) to a daily default fine¹¹ not exceeding one-tenth of level 3 on the standard scale¹². However, no such notice is required if the register has, at all times since it came into existence (or, in the case of a register in existence on 1 July 1948¹³, at all times since then) been kept available for inspection at the company's registered office¹⁴.

The index of the names of members¹⁵ must at all times be kept at the same place as the register of members¹⁶.

Neither the register nor the index may be dealt with by way of charge or otherwise in such a way as to interfere with the purposes for which they must be kept¹⁷.

1 As to the register of members see PARA 335 et seq. As to the meaning of 'member' see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 114(1). Shares in a company are choses in action which are situate at the place where the existence of the choses in action is recorded. The situs of shares in a company is, therefore, at the registered office, or some other specified place at which the register of members should be kept (see heads (1) and (2) in the text), which place must be within England and Wales or Scotland, as the case may be: *International Credit and Investment Co (Overseas) Ltd v Adham* [1994] 1 BCLC 66 at 72 per Harman J. See also PARA 122 text and notes 13-14; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 388-389. As to the meanings of

'England' and 'Wales' see PARA 1 note 5. As to a company's registered office see PARA 129. As to the form of company records, their inspection and the duty to take precautions against their falsification see PARAS 674-676. As to the location of the issuer register of members and records of uncertificated shares see PARA 348.

3 Companies Act 2006 s 114(1)(a).

4 In regulations made under the Companies Act 2006 s 1136 (see PARA 676): see s 114(1)(b).

5 Companies Act 2006 s 114(1)(b).

6 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

7 Companies Act 2006 s 114(2).

8 In complying with the Companies Act 2006 s 114(2) (see the text and notes 6-7): see s 114(5).

9 Companies Act 2006 s 114(5). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

10 As to the standard scale see PARA 1622.

11 As to the meaning of 'daily default fine' see PARA 1622.

12 Companies Act 2006 s 114(6). Although s 114 does not apply to a company which is a participating issuer (Uncertificated Securities Regulations 2001, SI 2001/3755, reg 23(4), Sch 4 para 6(5) (reg 23(4), Sch 4 para 6(5) amended by SI 2009/1889)), the Companies Act 2006 s 114(6) applies to a participating issuer which is a company which makes default in complying with the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 6(2) (see PARA 348) and every officer of it who is in default as if such a default were a default in complying with the Companies Act 2006 s 114(2) (Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 6(6) (amended by SI 2009/1889)). An officer of a participating issuer is in default in complying with, or in contravention of the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 6, if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: Sch 4 para 20. As to the meaning of 'participating issuer' see PARA 421 note 9. As to the meaning of 'officer' (in relation to an operator or a participating issuer) see PARA 421 note 4.

13 In the day on which the Companies Act 1948 (now repealed) came into force. As to the Companies Act 1948 see PARA 12.

14 Companies Act 2006 s 114(3), (4).

15 As to the index of members see PARA 339.

16 See the Companies Act 2006 s 115(4); and PARA 339.

17 *Re Capital Fire Insurance Association* (1883) 24 ChD 408 at 418, CA, per Cotton LJ (where it was held that a solicitor had not acquired a lien as against the liquidator).

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348. Location of issuer register of members and records of uncertificated shares.

A company's issuer register of members¹ and its record of uncertificated shares² must be kept available for inspection at its registered office³, or at a place specified in regulations⁴. However, the issuer register of members must not be kept available for inspection, in the case of a company registered in England and Wales⁵, at any place elsewhere than in England and Wales or, in the case of a company registered in Scotland, at any place elsewhere than in Scotland⁶. A

company's issuer register of members and its record of uncertificated shares must at all times be kept at the same place⁷.

Every participating issuer⁸ which is a company must send notice to the registrar of companies⁹ of the place where its issuer register of members and its record of uncertificated shares are kept available for inspection, and of any change in that place, provided that any notice sent by such a company¹⁰, and which has effect on the coming into force of the Uncertificated Securities Regulations 2001¹¹, is treated as being a notice sent in compliance with this provision¹². However, the notice need not be sent if the issuer register of members and the record of uncertificated shares have at all times since they came into existence been kept at the company's registered office¹³.

1 As to the meaning of 'issuer register of members' see PARA 340. As to the meaning of 'company' see PARA 340 note 1.

2 As to the meaning of 'record of uncertificated shares' see PARA 340. As to the meaning of 'share' see PARA 421 note 2; and as to the meaning of 'uncertificated' see PARA 421 note 3.

3 As to a company's registered office see PARA 129. As to the custody of a company's register and index of members that are required to be kept under the Companies Act 2006 see PARA 347.

4 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 23(4), Sch 4 para 6(1) (reg 23(4), Sch 4 para 6(1) amended by SI 2009/1889). The text refers to regulations made under the Companies Act 2006 s 1136 (see PARA 676): see the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 6(1) (as so amended). Where, under Sch 4 para 6(1), a company's issuer register of members and record of uncertificated shares is kept available for inspection at the office of some person other than the company, and by reason of any default of his the company fails to comply with Sch 4 para 6(2) (record of uncertificated shares to be kept available for inspection with issuer register of members) (see the text and note 7), Sch 4 para 6(3) (notice to registrar) (see the text and notes 8-12), Sch 4 para 7(3) (see PARA 341) or the Companies Act 2006 s 116 (rights to inspect and require copies) (see PARA 349), or with any requirement of the 2006 Act as to the production of the register of members or any part thereof, that other person is liable to the same penalties as if he were an officer of the company who was in default, and the power of the court under s 118(3) extends to the making of orders against that other and his officers and servants: Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 10 (amended by SI 2009/1889). An officer of a participating issuer is in default in complying with, or in contravention of the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 paras 6, 7, if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: Sch 4 para 20. As to the meaning of 'participating issuer' see PARA 421 note 9. As to the meaning of 'officer' (in relation to an operator or a participating issuer) see PARA 421 note 4.

5 As to company registration under the Companies Act 2006 see PARA 111 et seq. As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

6 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 6(1) (as amended: see note 4).

7 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 6(2). See notes 4, 8.

8 The Companies Act 2006 s 114 (see PARA 347) does not apply to a company which is a participating issuer: Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 6(5) (amended by SI 2009/1889). However, the Companies Act 2006 s 114(6) applies to a participating issuer which is a company which makes default in complying with the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 6(2) (see the text and note 7) or makes default for 14 days in complying with Sch 4 para 6(3) (see the text and notes 9-12), and every officer of it who is in default, as if such a default were a default in complying with the Companies Act 2006 s 114(2): Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 6(6) (amended by SI 2009/1889). An officer of a participating issuer is in default in complying with, or in contravention of the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 6, if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: Sch 4 para 20.

9 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements for the proper delivery of documents to the registrar see PARA 142.

10 In accordance with the Companies Act 2006 s 114(2) (see PARA 347): see the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 6(3) (amended by SI 2009/1889).

11 le 26 November 2001 (see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 1): see Sch 4 para 6(3).

12 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 6(3) (as amended: see note 10). See notes 4, 8.

13 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 6(4).

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349. Inspection of register and index.

The company's register of members¹ and the index of members' names² must be open to the inspection³: (1) of any member of the company without charge⁴; and (2) of any other person on payment of such fee as may be prescribed⁵. A person seeking to exercise the right of inspection so conferred must make a request to the company to that effect⁶; and such a request must contain the following information⁷:

- 637 (a) in the case of an individual, his name and address⁸;
- 638 (b) in the case of an organisation, the name and address of an individual responsible for making the request on behalf of the organisation⁹;
- 639 (c) the purpose for which the information is to be used¹⁰; and
- 640 (d) whether the information will be disclosed to any other person¹¹, and if so: (i) where that person is an individual, his name and address¹²; (ii) where that person is an organisation, the name and address of an individual responsible for receiving the information on its behalf¹³; and (iii) the purpose for which the information is to be used by that person¹⁴.

Where a company receives such a request, it must within five working days either comply with the request¹⁵, or apply to the court¹⁶.

If the company applies to the court, it must notify the person making the request¹⁷. If, on such an application, the court is satisfied that the inspection is not sought for a proper purpose¹⁸: (A) it must direct the company not to comply with the request¹⁹; and (B) it may further order that the company's costs on the application be paid in whole or in part by the person who made the request, even if he is not a party to the application²⁰. If the court makes such a direction and it appears to the court that the company is or may be subject to other requests made for a similar purpose (whether made by the same person or different persons), it may direct that the company is not to comply with any such request²¹. The order must contain such provision as appears to the court appropriate to identify the requests to which it applies²². If, on such an application²³, the court does not direct the company not to comply with the request, the company must comply with the request immediately upon the court giving its decision or, as the case may be, the proceedings being discontinued²⁴.

If an inspection required under the right to inspect the register and index²⁵ is refused, otherwise than in accordance with an order of the court, an offence is committed by the company, and by every officer of the company who is in default²⁶; and a person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale²⁷ and (for continued contravention) to a daily default fine²⁸ not exceeding one-tenth of level 3 on the standard scale²⁹. In the case of any such refusal, the court may by order compel an immediate inspection³⁰.

The right of inspection ceases when the company is being wound up³¹. The inspection may be made, under proper restrictions, by an agent of the member desiring inspection³².

It is an offence for a person knowingly or recklessly to make, in a request to inspect the register and/or index³³, a statement that is misleading, false or deceptive in a material particular³⁴; and it is an offence for a person in possession of information obtained by exercise of the right of inspection³⁵ to do anything that results in the information being disclosed to another person³⁶, or to fail to do anything with the result that the information is disclosed to another person³⁷, knowing, or having reason to suspect, that person may use the information for a purpose that is not a proper purpose³⁸. A person guilty of such an offence is liable (on conviction on indictment) to imprisonment for a term not exceeding two years or a fine (or both)³⁹; and (on summary conviction) to imprisonment for a term not exceeding 12 months⁴⁰ or to a fine not exceeding the statutory maximum (or both)⁴¹.

When a person inspects the register, the company must inform him of the most recent date (if any) on which alterations were made to the register and there were no further alterations to be made⁴²; and when a person inspects the index of members' names, the company must inform him whether there is any alteration to the register that is not reflected in the index⁴³. If a company fails to provide the information so required⁴⁴, an offence is committed by the company, and by every officer of the company who is in default⁴⁵; and a person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale⁴⁶.

1 As to the register of members see PARA 335 et seq. As to the meaning of 'member' see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the index of members see PARA 339.

The Companies Act 2006 s 116 applies to a company which is a participating issuer as if references to the company's register of members were references to its issuer register of members and its record of uncertificated shares; and as if references in s 116 to the company's index of members' names were references to the index required to be kept by the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 23(4), Sch 4 para 7 (see PARA 341); Sch 4 para 9 (amended by SI 2009/1889). References to the Companies Act 2006 in the Companies (Fees for Inspection and Copying of Company Records) Regulations 2007, SI 2007/2612, and in the Companies (Fees for Inspection of Company Records) Regulations 2008, SI 2008/3007, are to be construed accordingly: Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 9 (as so amended). As to the meaning of 'issuer register of members' see PARA 340. As to the meaning of 'record of uncertificated shares' see PARA 340.

3 Companies Act 2006 s 116(1). As to the inspection of company records generally see PARA 676. As to the right conferred on any person to require a copy of the register see PARA 350.

4 Companies Act 2006 s 116(1)(a).

5 Companies Act 2006 s 116(1)(b). In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the Secretary of State see PARA 6. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. In exercise of the powers conferred by s 116(1)(b), the Secretary of State has made the Companies (Fees for Inspection and Copying of Company Records) Regulations 2007, SI 2007/2612. Accordingly, for the purpose of the Companies Act 2006 s 116(1)(b), the fee prescribed is £3.50 for each hour or part thereof during which the right of inspection is exercised: Companies (Fees for Inspection and Copying of Company Records) Regulations 2007, SI 2007/2612, reg 2.

The object of giving non-members a right of inspection is to enable them to ascertain what assets they may rely on: *Oakes v Turquand and Harding*, *Peek v Turquand and Harding*, *Re Overend*, *Gurney & Co* (1867) LR 2 HL 325 at 366 per Lord Cranworth. Cf the provision under the Companies Clauses Consolidation Act 1845 (see PARA 1700).

6 Companies Act 2006 s 116(3).

7 Companies Act 2006 s 116(4).

8 Companies Act 2006 s 116(4)(a). Any obligation under the Companies Acts to give a person's address is, unless otherwise expressly provided, to give a service address for that person: Companies Act 2006 s 1142. As to service of documents on a company generally see PARA 671.

9 Companies Act 2006 s 116(4)(b).

10 Companies Act 2006 s 116(4)(c).

11 Companies Act 2006 s 116(4)(d).

12 Companies Act 2006 s 116(4)(d)(i).

13 Companies Act 2006 s 116(4)(d)(ii).

14 Companies Act 2006 s 116(4)(d)(iii).

15 Companies Act 2006 s 117(1)(a). As to the meaning of 'working day' see PARA 145 note 16.

16 Companies Act 2006 s 117(1)(b). As to the meaning of 'court' see PARA 212 note 1. As to the procedure that applies to proceedings under companies legislation generally see PARA 305.

17 Companies Act 2006 s 117(2).

18 Companies Act 2006 s 117(3).

19 Companies Act 2006 s 117(3)(a).

20 Companies Act 2006 s 117(3)(b).

21 Companies Act 2006 s 117(4).

22 Companies Act 2006 s 117(4).

23 Ie an application under the Companies Act 2006 s 117 (see the text and notes 15-22): see s 117(5).

24 Companies Act 2006 s 117(5).

25 Ie an inspection required under the Companies Act 2006 s 116 (see the text and notes 1-14): see s 118(1).

26 Companies Act 2006 s 118(1). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

27 As to the standard scale see PARA 1622.

28 As to the meaning of 'daily default fine' see PARA 1622.

29 Companies Act 2006 s 118(2).

30 Companies Act 2006 s 118(3). The court has discretion to refuse an application for an order requiring a company to disclose its register of members: *Pelling v Families Need Fathers Ltd* [2001] EWCA Civ 1280, [2002] 2 All ER 440, [2002] 1 BCLC 645. As to the extension of the power of the court under the Companies Act 2006 s 118(3) where a company's issuer register of members and record of uncertificated shares is kept at the office of some person other than the company see PARAS 341 note 10, 348 note 4.

31 *Re Kent Coalfields Syndicate* [1898] 1 QB 754, CA; *Re Yorkshire Fibre Co* (1870) LR 9 Eq 650. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

32 *Re Joint-Stock Discount Co, Buchanan's Case* (1866) 15 LT 261; *Bevan v Webb* [1901] 2 Ch 59, CA; *Norey v Keep* [1909] 1 Ch 561.

33 Ie in a request under the Companies Act 2006 s 116 (see the text and notes 1-14): see s 119(1).

34 Companies Act 2006 s 119(1).

35 Ie the right conferred by the Companies Act 2006 s 116 (see the text and notes 1-14): see s 119(2).

36 Companies Act 2006 s 119(2)(a).

37 Companies Act 2006 s 119(2)(b).

38 Companies Act 2006 s 119(2).

39 Companies Act 2006 s 119(3)(a).

40 In relation to an offence committed after the commencement of the Companies Act 2006 s 1131 (summary proceedings) (see PARA 1625), but before a day is appointed in relation to the commencement of the Criminal Justice Act 2003 s 154(1) (general limit on magistrates' courts' power to impose imprisonment), the reference in the Companies Act 2006 s 119(3)(b) to '12 months' must be read as a reference to 'six months': see ss 119(3)(b), 1131, 1133; and see PARA 1625.

41 Companies Act 2006 s 119(3)(b).

42 Companies Act 2006 s 120(1). The provisions of s 120 do not apply with respect to a company which is a participating issuer: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 23(5) (added by SI 2009/1889). As to the meaning of 'participating issuer' see PARA 421 note 9.

43 Companies Act 2006 s 120(2). See note 42.

44 It is under either the Companies Act 2006 s 120(1) (see the text and note 42) or under s 120(2) (see the text and note 43): see s 120(3).

45 Companies Act 2006 s 120(3). See note 42.

46 Companies Act 2006 s 120(4). See note 42.

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350. Copies of register of members.

Any person may require a copy of a company's register of members¹, or of any part of it, on payment of such fee as may be prescribed². A person seeking to exercise the right that is so conferred³ to require a copy must make a request to the company to that effect⁴; and such a request must contain the following information⁵:

- 641 (1) in the case of an individual, his name and address⁶;
- 642 (2) in the case of an organisation, the name and address of an individual responsible for making the request on behalf of the organisation⁷;
- 643 (3) the purpose for which the information is to be used⁸; and
- 644 (4) whether the information will be disclosed to any other person⁹, and if so: (a) where that person is an individual, his name and address¹⁰; (b) where that person is an organisation, the name and address of an individual responsible for receiving the information on its behalf¹¹; and (c) the purpose for which the information is to be used by that person¹².

Where a company receives such a request, it must within five working days either comply with the request¹³, or apply to the court¹⁴.

If the company applies to the court, it must notify the person making the request¹⁵. If, on such an application, the court is satisfied that the inspection is not sought for a proper purpose¹⁶: (i) it must direct the company not to comply with the request¹⁷; and (ii) it may further order that the company's costs on the application be paid in whole or in part by the person who made the request, even if he is not a party to the application¹⁸. If the court makes such a direction and it

appears to the court that the company is or may be subject to other requests made for a similar purpose (whether made by the same person or different persons), it may direct that the company is not to comply with any such request¹⁹. The order must contain such provision as appears to the court appropriate to identify the requests to which it applies²⁰. If, on such an application²¹, the court does not direct the company not to comply with the request, the company must comply with the request immediately upon the court giving its decision or, as the case may be, the proceedings being discontinued²².

If default is made in providing a copy of the register upon such a request²³, otherwise than in accordance with an order of the court, an offence is committed by the company, and by every officer of the company who is in default²⁴; and a person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale²⁵ and (for continued contravention) to a daily default fine²⁶ not exceeding one-tenth of level 3 on the standard scale²⁷. In the case of any such default, the court may by order direct that the copy required be sent to the person requesting it²⁸.

It is an offence for a person knowingly or recklessly to make, in a request that requires a company to provide a copy of its register (or any part of it)²⁹, a statement that is misleading, false or deceptive in a material particular³⁰; and it is an offence for a person in possession of information obtained by exercise of the right to require a copy of the register (or any part of it) to be provided³¹ to do anything that results in the information being disclosed to another person³², or to fail to do anything with the result that the information is disclosed to another person³³, knowing, or having reason to suspect, that person may use the information for a purpose that is not a proper purpose³⁴. A person guilty of such an offence is liable (on conviction on indictment) to imprisonment for a term not exceeding two years or a fine (or both)³⁵; and (on summary conviction) to imprisonment for a term not exceeding 12 months³⁶ or to a fine not exceeding the statutory maximum (or both)³⁷.

When the company provides a person with a copy of the register (or any part of it), the company must inform him of the most recent date (if any) on which alterations were made to the register and there were no further alterations to be made³⁸. If a company fails to provide the information so required³⁹, an offence is committed by the company, and by every officer of the company who is in default⁴⁰; and a person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale⁴¹.

1 As to the register of members see PARA 335 et seq. As to the meaning of 'member' see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 116(2). As to the provision of copies of company records generally see PARA 676. As to the right conferred on members and others to inspect the register and index see PARA 349. In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6. In exercise of the powers conferred by s 116(2), the Secretary of State has made the Companies (Fees for Inspection and Copying of Company Records) Regulations 2007, SI 2007/2612. Accordingly, for the purpose of the Companies Act 2006 s 116(2), the fee prescribed is: (1) in terms of the amount per number of entries copied by the company, £1 for each of the first five entries, £30 for the next 95 entries or part thereof, £30 for the next 900 entries or part thereof, £30 for the next 99,000 entries or part thereof, and £30 for the remainder of the entries in the register or part thereof (Companies (Fees for Inspection and Copying of Company Records) Regulations 2007, SI 2007/2612, reg 3(1)(a)(i), (2)); and (2) the reasonable costs incurred by the company in delivering the copy of the entries to the person entitled to be provided with that copy (reg 3(1)(a)(ii)).

The Companies Act 2006 ss 116-118 apply to a company which is a participating issuer as if references to the company's register of members were references to its issuer register of members and its record of uncertificated shares; and as if references in s 116 to the company's index of members' names were references to the index required to be kept by the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 23(4), Sch 4 para 7 (see PARA 341): Sch 4 para 9 (amended by SI 2009/1889). References to the Companies Act 2006 in the Companies (Fees for Inspection and Copying of Company Records) Regulations 2007, SI 2007/2612, and in the Companies (Fees for Inspection of Company Records) Regulations 2008, SI 2008/3007, are to be construed accordingly: Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 9 (as so amended). As to the

meaning of 'issuer register of members' see PARA 340. As to the meaning of 'record of uncertificated shares' see PARA 340.

3 le conferred by the Companies Act 2006 s 116 (see the text and notes 1-2): see s 116(3).

4 Companies Act 2006 s 116(3). See note 2.

5 Companies Act 2006 s 116(4). See note 2.

6 Companies Act 2006 s 116(4)(a). See note 2. Any obligation under the Companies Acts to give a person's address is, unless otherwise expressly provided, to give a service address for that person: Companies Act 2006 s 1142. As to service of documents on a company generally see PARA 671.

7 Companies Act 2006 s 116(4)(b). See note 2.

8 Companies Act 2006 s 116(4)(c). See note 2.

9 Companies Act 2006 s 116(4)(d). See note 2.

10 Companies Act 2006 s 116(4)(d)(i). See note 2.

11 Companies Act 2006 s 116(4)(d)(ii). See note 2.

12 Companies Act 2006 s 116(4)(d)(iii). See note 2.

13 Companies Act 2006 s 117(1)(a). See note 2. As to the meaning of 'working day' see PARA 145 note 16.

14 Companies Act 2006 s 117(1)(b). See note 2. As to the meaning of 'court' see PARA 212 note 1. As to the procedure that applies to proceedings under companies legislation generally see PARA 305.

15 Companies Act 2006 s 117(2). See note 2.

16 Companies Act 2006 s 117(3). See note 2.

17 Companies Act 2006 s 117(3)(a). See note 2.

18 Companies Act 2006 s 117(3)(b). See note 2.

19 Companies Act 2006 s 117(4). See note 2.

20 Companies Act 2006 s 117(4). See note 2.

21 le an application under the Companies Act 2006 s 117 (see the text and notes 13-20): see s 117(5).

22 Companies Act 2006 s 117(5). See note 2.

23 le as required under the Companies Act 2006 s 116 (see the text and notes 1-12): see s 118(1).

24 Companies Act 2006 s 118(1). See note 2. As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

25 As to the standard scale see PARA 1622.

26 As to the meaning of 'daily default fine' see PARA 1622.

27 Companies Act 2006 s 118(2). See note 2.

28 Companies Act 2006 s 118(3). See note 2. The court has discretion to refuse an application for an order requiring a company to disclose its register of members: *Pelling v Families Need Fathers Ltd* [2001] EWCA Civ 1280, [2002] 2 All ER 440. As a general rule, the court will make a mandatory order to give effect to the legal right to be supplied with a copy of the register upon request, the importance of the right and the obligation of the company to give effect to it being underscored by the penalties to which the company would otherwise be exposed; but it is not a matter of unqualified right. As to mandatory orders see **JUDICIAL REVIEW** vol 61 (2010) PARA 703 et seq. As to the extension of the power of the court under the Companies Act 2006 s 118(3) where a company's issuer register of members and record of uncertificated shares is kept at the office of some person other than the company see PARAS 341 note 10, 348 note 4.

29 le in a request under the Companies Act 2006 s 116 (see the text and notes 1-12): see s 119(1).

- 30 Companies Act 2006 s 119(1).
- 31 ie the right conferred by the Companies Act 2006 s 116 (see the text and notes 1-2): see s 119(2).
- 32 Companies Act 2006 s 119(2)(a).
- 33 Companies Act 2006 s 119(2)(b).
- 34 Companies Act 2006 s 119(2).
- 35 Companies Act 2006 s 119(3)(a).
- 36 In relation to an offence committed after the commencement of the Companies Act 2006 s 1131 (summary proceedings) (see PARA 1625), but before a day is appointed in relation to the commencement of the Criminal Justice Act 2003 s 154(1) (general limit on magistrates' courts' power to impose imprisonment), the reference in the Companies Act 2006 s 119(3)(b) to '12 months' must be read as a reference to 'six months': see ss 119(3)(b), 1131, 1133; and see PARA 1625.
- 37 Companies Act 2006 s 119(3)(b).
- 38 Companies Act 2006 s 120(1).
- 39 ie required under the Companies Act 2006 s 120(1) (see the text and note 38): see s 120(3).
- 40 Companies Act 2006 s 120(3).
- 41 Companies Act 2006 s 120(4).

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C. RECTIFICATION OF REGISTER

351. Application to court for rectification of company's register.

A person aggrieved, or any member of the company¹, or the company itself, may apply to the court² for rectification of the register of members³, if⁴:

- 645 (1) the name of any person is, without sufficient cause, entered in or omitted from the register⁵; or
- 646 (2) default is made, or unnecessary delay takes place, in entering on the register the fact of any person having ceased to be a member⁶.

On such an application, the court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand; and generally the court may decide any question necessary or expedient to be decided for rectification of the register⁷. The court may either refuse the application, or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved⁸. However, the company may be ordered to pay damages only when the register is ordered to be rectified⁹. If money has been paid on the shares, the amount will be ordered to be returned with interest at an appropriate rate¹⁰, and the amount with costs is provable in a winding up¹¹.

- 1 As to the meaning of 'member of a company' see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.
- 2 As to the meaning of 'court' see PARA 212 note 1. For an example of an unmeritorious application by a member who was not affected see *Re Piccadilly Radio plc* [1989] BCLC 683 (cited in PARA 352 note 5).
- 3 As to the register of members see PARA 335 et seq. Rectification of the share register is a matter for the court of the country of incorporation of the company: *International Credit and Investment Co (Overseas) Ltd v Adham* [1994] 1 BCLC 66 at 78 per Harman J. See also *Re Fagin's Bookshop plc* [1992] BCLC 118. As to custody of the register see PARA 347. For instances of applications by the company itself see *Re Indo-China Steam Navigation Co* [1917] 2 Ch 100; *Re London Electrobuses Co Ltd* (1906) 22 TLR 677; *Re Cleveland Trust plc* [1991] BCLC 424, [1991] BCC 33.
- 4 Companies Act 2006 s 125(1).
- 5 Companies Act 2006 s 125(1)(a). The jurisdiction of the court under this provision is not limited to cases where a name has been entered improperly but extends to cases where a name stands on the register without sufficient cause: *Re Imperial Chemical Industries Ltd* [1936] 2 All ER 463. See *Re New Cedros Engineering Co Ltd* (1975) [1994] 1 BCLC 797; *Re Transatlantic Life Assurance Co Ltd* [1979] 3 All ER 352, [1980] 1 WLR 79. There is no necessity to show any wrongdoing by the company and any question of omission by error or entry by error can be raised. The phrase 'without sufficient cause' is a requirement that the court must be shown at the hearing that there is no sufficient cause for the omission or entry, as the case may be: *Re Diamond Rock Boring Co Ltd, ex p Shaw* (1877) 2 QBD 463 at 482, CA, per Brett LJ; *Re Fagin's Bookshop plc* [1992] BCLC 118 at 123 per Harman J. There is, however, no jurisdiction to rectify on the grounds of omission if there never was an entitlement to entry in the register in the first place: *Re BTR plc* (1988) 4 BCC 45; *Re Welsh Highland Railway Light Railway Co* [1993] BCLC 338. For a case where the register had been lost, and rectification of an entirely blank new register was ordered, see *Re Data Express Ltd* (1987) Times, 27 April.
- 6 Companies Act 2006 s 125(1)(b). As to the power of the court to rectify the register when a company is being wound up see PARA 354; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 726 et seq. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.
- 7 Companies Act 2006 s 125(3). For an example where a court granted the relief sought in respect of the rectification of the register see *Domoney v Godinho* [2004] EWHC 328 (Ch), [2004] 2 BCLC 15. The court's general discretionary power under the Companies Act 2006 s 125(3) is not limited by the scope of its jurisdiction to rectify the register of members under s 125(1) (see the text and notes 1-6): *Re Hoicrest, Keene v Martin* [2000] 1 WLR 414, [2000] 1 BCLC 194, CA. See also PARA 352.
- 8 Companies Act 2006 s 125(2). Where, under s 125, the court orders rectification of the register of members of a company which is a participating issuer, it must not order the payment of any damages under s 125(2) to the extent that such rectification relates to the company's operator register of members and does not arise from an act or omission of the operator on the instructions of that company or from fraud or other wilful default, or negligence, on the part of that company: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 23(4), Sch 4 para 11 (reg 23(4), Sch 4 para 11 amended by SI 2009/1889). As to the meaning of 'register of members' see PARA 340 note 5. As to the meaning of 'participating issuer' see PARA 421 note 9. As to the meaning of 'operator register of members' see PARA 340.
- 9 *Re Ottos Kopje Diamond Mines Ltd* [1893] 1 Ch 618, CA. As to the measure of damages see *Re Ottos Kopje Diamond Mines Ltd*; *Skinner v City of London Marine Insurance Corp* (1885) 14 QBD 882, CA.
- 10 *Karberg's Case* [1892] 3 Ch 1, CA; *Re Metropolitan Coal Consumers' Association, Wainwright's Case* (1889) 62 LT 30 (affd (1890) 63 LT 429, CA) (no fixed rate applicable). See also *Re Railway Time Tables Publishing Co, ex p Sandys* (1889) 42 ChD 98 at 108 per Stirling J.
- 11 *Re British Gold Fields of West Africa* [1899] 2 Ch 7, CA.

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352. General jurisdiction to rectify company's register of members.

The jurisdiction to rectify a company's register of members is discretionary¹; and it is not limited by the provisions of the Companies Act 2006². Thus the court will rectify the register, apart from that Act, to enable the members of a company to have a fair and reasonable exercise of their rights³.

When the court entertains the application, it is bound to go into all the circumstances of the case, and to consider what equity the applicant has to call for its interposition⁴ and the purpose for which relief is sought⁵.

The power to rectify has been exercised where there has been misrepresentation in the prospectus⁶; where it is expedient to have an order which will bind all the shareholders and effectually bar any subsequent application for restoration of a name struck out by the directors⁷; where shares have been illegally allotted at a discount⁸; where the application for shares has been made in the name of a person, as, for example, an underwriter, without his authority⁹; where there is no valid allotment of shares¹⁰; or the allotment is not made within a reasonable time¹¹, or is irregular¹²; where a transfer of shares has been improperly registered or registration has been refused¹³; where there are joint holders of shares who wish to divide the shares so held into two parts with their names entered in the register in respect of each part in a different order¹⁴; where the company puts on its register matters which are not required by the statute¹⁵; in order to set right allotments of shares which have been issued as fully paid without a proper contract being filed¹⁶; and where an overseas company was entered in the register without the permission of the Treasury, which was at the time required¹⁷.

1 *Re Diamond Rock Boring Co Ltd, ex p Shaw* (1877) 2 QBD 463, CA; *Re Kimberley North Block Diamond Co, ex p Wernher* (1888) 59 LT 579, CA. Cf *Ward and Henry's Case* (1867) 2 Ch App 431 at 441 per Lord Cairns LJ; *Re Tahiti Cotton Co, ex p Sargent* (1874) LR 17 Eq 273 at 276 per Jessel MR; *Re Piccadilly Radio plc* [1989] BCLC 683 at 697 per Millett J. As to the register of members see PARA 335 et seq. As to membership of a company see PARA 321 et seq.

2 As to the provisions of the Companies Act 2006 which allow for rectification of the register see s 125; and PARA 351.

3 *Burns v Siemens Bros Dynamo Works Ltd* [1919] 1 Ch 225. Cf *Re Welsh Highland Railway Light Railway Co* [1993] BCLC 338 at 351 per Vinelott J.

4 *Trevor v Whitworth* (1887) 12 App Cas 409 at 440, HL, per Lord Macnaghten; *Re Joint Stock Discount Co, Sichell's Case* (1867) 3 Ch App 119; *Bellerby v Rowland and Marwood's Steamship Co Ltd* [1902] 2 Ch 14, CA; *Re Onward Building Society* [1891] 2 QB 463, CA; *Re Hannan's King (Browning) Gold Mining Co Ltd* (1898) 14 TLR 314, CA. By virtue of the corresponding provision in the Companies Act 1862 s 35 (repealed), the court might have made an order for rectification 'if satisfied of the justice of the case'. The words last quoted have been omitted from the later Companies Acts, but, it seems, without affecting the law. See also PARA 1079 note 2.

5 *Re Piccadilly Radio plc* [1989] BCLC 683 (shares in a radio company were transferred without obtaining the consent of the broadcasting authority as required by the articles of association; rectification was refused; the applicants had no interest in the shares and were not seeking to have their own names restored to the register but were searching for a means to disenfranchise opposition to proposals to be put to the general meeting; the broadcasting authority had not complained; the transferor did not seek rectification and the company itself did not support the application). Cf *Dempsey v Celtic Football and Athletic Co Ltd* [1993] BCC 514, Ct of Sess.

6 See PARA 1079.

7 *Re Bank of Hindustan, China and Japan, ex p Martin* (1865) 2 Hem & M 669; *Re Bank of Hindustan, China and Japan, Higgs's Case* (1865) 2 Hem & M 657; *Re Bank of Hindustan, China and Japan, ex p Los* (1865) 6 New Rep 327.

8 See PARA 1111.

9 *Re Consort Deep Level Gold Mines Ltd, ex p Stark* [1897] 1 Ch 575, CA. Cf *Re Henry Bentley & Co Ltd and Yorkshire Breweries, ex p Harrison* (1893) 69 LT 204, CA; *Hindley's Case* [1896] 2 Ch 121, CA; *Re Hannan's Empress Gold Mining and Development Co, Carmichael's Case* [1896] 2 Ch 643, CA.

- 10 *Re Homer District Consolidated Gold Mines, ex p Smith* (1888) 39 ChD 546 at 551 per North J; *Re Portuguese Consolidated Copper Mines Ltd* (1889) 42 ChD 160, CA. This arises eg where a director has, without his authority, been placed on the register in respect of qualification shares (*Re Printing, Telegraph and Construction Co of the Agence Havas, ex p Cammell* [1894] 2 Ch 392, CA) or where the allotment was made at an improperly constituted meeting of directors (*Re Sly, Spink & Co* [1911] 2 Ch 430).
- 11 *Re Bowron, Baily & Co, ex p Baily* (1868) 3 Ch App 592.
- 12 *Re Homer District Consolidated Gold Mines, ex p Smith* (1888) 39 ChD 546; *Re Cleveland Trust plc* [1991] BCLC 424, [1991] BCC 33 (register rectified by deletion of bonus shares after bonus issue mistakenly made); *Re Thundercrest Ltd* [1995] 1 BCLC 117 (register rectified by cancellation of allotment to two members who were also directors when the third member of the company, to their knowledge, had not received a provisional letter of allotment of those shares to him, a letter which was in any event defective as it allowed insufficient time for acceptance).
- 13 *Pulbrook v Richmond Consolidated Mining Co* (1878) 9 ChD 610 at 615 per Jessel MR; *Re Bahia and San Francisco Rly Co* (1868) LR 3 QB 584 (forged transfer); *Re Stranton Iron and Steel Co* (1873) LR 16 Eq 559 (transfer to increase voting power); *Re Manchester and Oldham Bank* (1885) 54 LJ Ch 926. See also *Re Tahiti Cotton Co, ex p Sargent* (1874) LR 17 Eq 273 (dispute between transferor and transferee); *Re Diamond Rock Boring Co Ltd, ex p Shaw* (1877) 2 QBD 463, CA (dispute between transferor and transferee); *Re Stockton Malleable Iron Co* (1875) 2 ChD 101 (lien); *Re Ystalyfera Gas Co* (1887) 3 TLR 321; *Re Violet Consolidated Gold Mining Co* (1899) 68 LJ Ch 535; *Re Copal Varnish Co Ltd* [1917] 2 Ch 349; *Re Imperial Chemical Industries Ltd* [1936] 2 All ER 463 (entry of name proper, but name standing on register without good cause); *Welch v Bank of England* [1955] Ch 508, [1955] 1 All ER 811 (restoration of status quo after forged transfers); *International Credit and Investment Co (Overseas) Ltd v Adham* [1994] 1 BCLC 66 (restoration of status quo; no proper share transfers were executed, merely entries made in the share register purporting to deprive the true owner of entire holding); *Re New Cedros Engineering Co Ltd* (1975) [1994] 1 BCLC 797 (on their true construction right to be registered existed under the articles); *Stothers v William Steward (Holdings) Ltd* [1994] 2 BCLC 266, CA (directors purported to exercise their discretion to refuse registration, which power on the true construction of the articles they did not possess); *Re Claygreen Ltd, Romer-Ormiston v Claygreen Ltd* [2005] EWHC 2032 (Ch), [2006] 1 BCLC 715 (transfer provisions not triggered so claimant entitled to have register rectified and name re-entered on register). See also PARA 393.
- 14 *Burns v Siemens Bros Dynamo Works Ltd* [1919] 1 Ch 225. See also PARA 335 note 4.
- 15 *Re W Key & Son Ltd* [1902] 1 Ch 467; *Re TH Saunders & Co Ltd* [1908] 1 Ch 415.
- 16 *Re New Zealand Kapanga Gold Mining Co, ex p Thomas* (1873) LR 18 Eq 17n; *Re Denton Colliery Co, ex p Shaw* (1874) LR 18 Eq 16; *Re Broad Street Station Dwellings Co* [1887] WN 149; *Re Nottingham Brewery Ltd and Reduced* (1888) 4 TLR 429; *Re Maynards Ltd* [1898] 1 Ch 515; *Re Henry Lovibond & Sons (1900) Ltd* (1901) 17 TLR 315; *Re Darlington Forge Co* (1887) 34 ChD 522 (where the contract was oral).
- 17 *Re Transatlantic Life Assurance Co Ltd* [1979] 3 All ER 352, [1980] 1 WLR 79. As to overseas companies see PARA 1824 et seq. As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517.

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353. Procedure on application to court for rectification of register.

The application to the court¹ for rectification of a company's register of members² may be made by the person aggrieved, by any member of the company, or by the company³. Such an application must be made by the issue of a claim form⁴. The jurisdiction of the court is summary in nature with affidavit evidence and ought not to be invoked where there is a substantial dispute as to fact; in such a case, the court will look to actively manage the dispute by making appropriate directions rather than simply striking out the application for rectification⁵.

A claim may be instituted for rectification of the register⁶ without any direction by the court, a course which should be followed where there is much complexity, or where other relief is required. The court will not give substantive relief by way of rectification of the register on an interim application in a claim⁷, nor will it rectify the register in the absence of third parties whose rights will be affected by the rectification⁸. The application to rectify must be made promptly⁹.

The proper respondents to an application to rectify the register are the company and the registered holder or holders of the shares whose registration is in question, if not the applicant¹⁰. It is not necessary to join other shareholders who are registered in respect of shares other than those in respect of which rectification is sought¹¹. Nor is it necessary to join the directors of the company where rectification is sought unless an order for costs is sought against them¹².

The right to challenge the court's exercise of discretion to make an order for rectification must depend upon the applicant having a sufficient interest in the rectification of the share register to give it a right to do so¹³.

1 As to the meaning of 'court' see PARA 212 note 1.

2 As to the register of members see PARA 335 et seq. As to the meaning of 'member of a company' see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 See the Companies Act 2006 s 125(1); and PARA 351. For instances of applications by the company see *Re Indo-China Steam Navigation Co* [1917] 2 Ch 100; *Re London Electrobus Co Ltd* (1906) 22 TLR 677; *Re Cleveland Trust plc* [1991] BCLC 424, [1991] BCC 33.

4 As to the procedure that applies to proceedings under companies legislation generally see PARA 305.

5 *Re Hoicrest, Keene v Martin* [2000] 1 WLR 414, [2000] 1 BCLC 194, CA. See also *Re National and Provincial Marine Insurance Co, ex p Parker* (1867) 2 Ch App 685; *Simpson's Case* (1869) LR 9 Eq 91; *Stewart's Case* (1866) 1 Ch App 574 at 585; *Re Gresham Life Assurance Society, ex p Penney* (1872) 8 Ch App 446 at 448; *Askew's Case* (1874) 9 Ch App 664; *Re Bagnall & Co, ex p Dick* (1875) 32 LT 536; *Re Greater Britain Insurance Corp Ltd, ex p Brockdorff* (1920) 124 LT 194, CA; *Re Greater Britain Products Development Corp Ltd* (1924) 40 TLR 488.

6 *Bloxam v Metropolitan Cab and Carriage Co* (1864) 4 New Rep 51; *Roots v Williamson* (1888) 38 ChD 485; *Moore v North Western Bank* [1891] 2 Ch 599; *Lynde v Anglo-Italian Hemp Spinning Co* [1896] 1 Ch 178; *McKeown v Boudard-Peveril Gear Co* (1896) 65 LJ Ch 735, CA.

7 *Siemens Bros & Co Ltd v Burns* [1918] 2 Ch 324 at 338 per Swinfen Eady MR.

8 *Re Greater Britain Insurance Corp Ltd, ex p Brockdorff* (1920) 124 LT 194, CA.

9 *Sewells's Case* (1868) 3 Ch App 131 at 138 per Lord Cairns LJ; *Re Isis Factors plc, Dulai v Isis Factors plc* [2003] EWHC 1653 (Ch), [2003] 2 BCLC 411 (application refused because applicant had failed to act for seven years and third party had purchased what it believed to be the company's entire share capital in ignorance of the applicant's claim to a large number of shares).

10 *Morgan v Morgan Insurance Brokers Ltd* [1993] BCLC 676 at 678 per Millett J.

11 See *Morgan v Morgan Insurance Brokers Ltd* [1993] BCLC 676.

12 In *Morgan v Morgan Insurance Brokers Ltd* [1993] BCLC 676, it was held to be unjust to order the company to pay costs where rectification was sought by a shareholder owning three-quarters of the shares following a bona fide but improper refusal by the directors to register a transfer; but an order for costs was made against the directors personally. Cf *Re Keith Prowse & Co Ltd* [1918] 1 Ch 487; *Re Copal Varnish Co Ltd* [1917] 2 Ch 349 at 355 per Eve J. See also *Re Fisher* [1894] 1 Ch 450, CA; the Senior Courts Act 1981 s 51(1); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1748.

13 *Re New Millennium Experience Co Ltd, Greenwich Millennium Exhibition Ltd v New Millennium Experience Co Ltd* [2003] EWHC 1823 (Ch), [2004] 1 All ER 687, [2004] 1 BCLC 19 (there was a distinction between a person who might be affected by something and in a loose sense, 'interested', and a person with a legitimate

interest in a matter, such as to require that person to be given notice and be heard); *Re Joint Stock Discount Co, Sichell's Case* (1867) 3 Ch App 119.

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354. Rectification after winding up.

Notwithstanding that the winding up of a company has commenced¹, the court has power to rectify the register of members² under the statutory power³. However, a strong case must be made out⁴. When giving directions as to the distribution of surplus assets in a winding up, the court may treat as members those who would be entitled to have their names placed on the register without insisting on the formality of an application to rectify the register⁵.

1 As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

2 As to the register of members see PARA 335 et seq.

3 I.e. under the Companies Act 2006 s 125(1) (as to which see PARA 351), as applied in winding up by the Insolvency Act 1986 s 148(1) (as to which see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 720): see *Re Joint Stock Discount Co, Sichell's Case* (1867) 3 Ch App 119 at 122 per Lord Cairns LJ; *Re Sussex Brick Co* [1904] 1 Ch 598, CA; *Re New Millennium Experience Co Ltd, Greenwich Millennium Exhibition Ltd v New Millennium Experience Co Ltd* [2003] EWHC 1823 (Ch), [2004] 1 All ER 687, [2004] 1 BCLC 19; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 726.

4 *Re Onward Building Society* [1891] 2 QB 463, CA. See further **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 726 et seq.

5 See *Re Baku Consolidated Oilfields Ltd* [1994] 1 BCLC 173 (liquidator sought directions under the Insolvency Act 1986 s 112 as to the distribution of funds to the members of a company, the assets of which had been seized by the Soviet government in 1920 and in respect of which compensation was paid by the Soviet authorities in 1990; the share register was necessarily incomplete, not having been maintained since 1920).

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355. Order for rectification.

In the case of a company¹ required by the Companies Act 2006² to send in its annual return a list of its members³ to the registrar of companies⁴, the court⁵, when making an order for rectification of the register of members⁶, must by its order direct notice of the rectification to be given to the registrar⁷.

Where the court orders the register to be rectified by removing a name from it, the name should not be erased, but a line should be drawn through it, and an abstract of the order signed by the secretary of the company should be added⁸.

Where a company does not rectify the register pursuant to an order of the court, the court may direct that the person by whom the order was obtained or some other person appointed by the

court may do so⁹. In ordering rectification, the court has power to fix a particular date at which the registration will become operative, even to the extent of making it retrospective; but subject, if necessary, to conditions protecting the rights of third persons¹⁰.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 le by the Companies Act 2006 s 855 (see PARA 1422) or by s 856(3) (see PARA 1423).

3 As to the meaning of 'member of a company' see PARA 321.

4 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

5 As to the meaning of 'court' see PARA 212 note 1.

6 le under the Companies Act 2006 s 125(2): see PARA 351. As to the register of members see PARA 335 et seq.

7 Companies Act 2006 s 125(4).

8 *Re Iron Ship Building Co* (1865) 34 Beav 597.

9 See the CPR Sch 1 RSC Ord 45 r 8. For orders made where the company by reason of resignations had no directors or secretary to carry out the original order of the court see *Re LL Syndicate Ltd* (1901) 17 TLR 711; *Re Manihot Rubber Plantations Ltd* (1919) 63 Sol Jo 827.

10 *Re Sussex Brick Co* [1904] 1 Ch 598, CA; *Re New Millennium Experience Co Ltd, Greenwich Millennium Exhibition Ltd v New Millennium Experience Co Ltd* [2003] EWHC 1823 (Ch), [2004] 1 All ER 687, [2004] 1 BCLC 19.

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356. Rectification of register by directors.

The directors of a company¹ may rectify the register of members² without any application to the court³, if there is no dispute, and the circumstances are such that the court would order rectification⁴; but ordinarily the protection of the court's order is essential to any rectification by the removal of the name of a registered holder of shares⁵.

1 As to a company's directors see PARA 478 et seq.

2 As to the register of members see PARA 335 et seq. As to membership of a company see PARA 321 et seq.

3 As to rectification by the court see PARA 351.

4 *Re London and Mediterranean Bank, Wright's Case* (1871) 7 Ch App 55; *Reese River Silver Mining Co v Smith* (1869) LR 4 HL 64 at 74 per Lord Hatherley LC; *Hartley's Case* (1875) 10 Ch App 157; *Smith v Brown* [1896] AC 614 at 622, PC; *First National Reinsurance Co Ltd v Greenfield* [1921] 2 KB 260 at 279 per McCardie J.

5 *Re Derham and Allen Ltd* [1946] Ch 31 at 36 per Cohen J.

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357. Rectification of issuer and operator register of securities.

A participating issuer¹ must not rectify an issuer register of securities² if such rectification would also require the rectification of an operator register of securities³ unless the rectification of an issuer register of securities is effected either with the consent of the operator or by order of a court in the United Kingdom⁴. A participating issuer who rectifies an issuer register of securities in order to give effect to an order of a court in the United Kingdom must immediately give the operator written notification of the change to the entry, if any rectification of the operator register of securities may also be required (unless the change to the issuer register is made in response to an operator-instruction)⁵.

An operator who rectifies an operator register of securities must immediately generate an operator-instruction to inform the relevant participating issuer of the change to the entry (unless the change is made in response to an issuer-instruction)⁶; and generate an operator-instruction to inform the system-members⁷ concerned of the change to the entry⁸.

1 As to the meaning of 'participating issuer' see PARA 421 note 9.

2 As to the meaning of 'issuer register of securities' see PARA 422 note 20.

3 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 25(1). As to the meaning of 'operator register of securities' see PARA 421 note 3. As to the meaning of 'operator' see PARA 421 note 1. A default in complying with, or a contravention of, reg 25(1) is actionable at the suit of a person who suffers loss as a result of the default or contravention, or who is otherwise adversely affected by it, subject to the defences and other incidents applying to claims for breach of statutory duty: reg 46(1). However, this does not affect the liability which any person may incur, nor affect any right which any person may have, apart from reg 46(1): reg 46(2).

4 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 25(2). As to the meaning of 'United Kingdom' see PARA 1 note 5.

5 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 25(3). As to the meaning of 'operator-instruction' see PARA 421 note 1.

6 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 25(4)(a). As to the meaning of 'issuer-instruction' see PARA 423 note 6.

7 As to the meaning of 'system-member' see PARA 422 note 9.

8 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 25(4)(b).

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D. OVERSEAS BRANCH REGISTER AND REGISTERS IN FOREIGN COUNTRIES

358. Overseas branch register of members.

A company¹ having a share capital² may, if it transacts business in any part of Her Majesty's dominions³ outside the United Kingdom⁴, the Channel Islands, the Isle of Man, or certain other overseas countries and territories⁵, cause to be kept there a branch register of members⁶ resident in that country or territory (an 'overseas branch register')⁷. The Secretary of State⁸ may make provision by regulations⁹ as to the circumstances in which a company is to be regarded as keeping a register in a particular country or territory¹⁰.

A company that begins to keep an overseas branch register must give notice to the registrar of companies¹¹ within 14 days of doing so, stating the country or territory in which the register is kept¹². If default is made in complying with this requirement to give notice, an offence is committed by the company and by every officer of the company who is in default¹³; and any person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹⁴ and (for continued contravention) to a daily default fine¹⁵ not exceeding one-tenth of level 3 on the standard scale¹⁶.

An overseas branch register is regarded as part of the company's register of members (the 'main register')¹⁷.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meanings of 'share capital' and 'company having a share capital' see PARA 1042.

3 As to the meaning of 'Her Majesty's dominions' see **COMMONWEALTH** vol 13 (2009) PARA 707.

4 As to the meaning of 'United Kingdom' see PARA 1 note 5.

5 The Companies Act 2006 Pt 8 Ch 3 (ss 129-135) (see also PARA 359 et seq) applies to a company which transacts business not only in any part of Her Majesty's dominions outside the United Kingdom, the Channel Islands and the Isle of Man, but also in the following countries or territories: Bangladesh, Cyprus, Dominica, the Gambia, Ghana, Guyana, The Hong Kong Special Administrative Region of the People's Republic of China, India, Ireland, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Malta, Nigeria, Pakistan, Seychelles, Sierra Leone, Singapore, South Africa, Sri Lanka, Swaziland, Trinidad and Tobago, Uganda and Zimbabwe: see s 129(1), (2).

6 As to the general duty under the Companies Act 2006 to keep a register of company members see PARA 335 et seq. As to membership of a company see PARA 321 et seq.

7 Companies Act 2006 s 129(1), (2). As to the keeping of the overseas branch register see PARA 359. Under the Companies (Consolidation) Act 1908 s 34(1) (repealed), the corresponding provision in that Act, the register was called the colonial register. References to a colonial register occurring in articles registered before 1 November 1929 (ie the date on which the consolidating act, the Companies Act 1929 (repealed), came into force) are to be read, unless the context otherwise requires, as a reference to an overseas branch register kept under the Companies Act 2006 s 129 (s 129(5)(b)). Under the Companies Act 1948 s 119 (repealed) such a register was called a dominion register. Accordingly, references in any Act or instrument (including, in particular, a company's articles) to a company's dominion register is to be read, unless the context otherwise requires, as a reference to an overseas branch register kept under the Companies Act 2006 s 129 (s 129(5)(a)). As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq. As to predecessor legislation from which the Companies Act 2006 is derived see PARA 10 et seq. As to the form of company records, their inspection and the duty to take precautions against their falsification see PARAS 674-676.

8 As to the Secretary of State see PARA 6 et seq.

9 As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 129 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 129(4), 1289. At the date at which this volume states the law, no such regulations have been made under s 129.

10 Companies Act 2006 s 129(3). See note 9.

11 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements for the proper delivery of documents to the registrar see PARA 142.

- 12 Companies Act 2006 s 130(1).
- 13 Companies Act 2006 s 130(2). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.
- 14 As to the standard scale see PARA 1622.
- 15 As to the meaning of 'daily default fine' see PARA 1622.
- 16 Companies Act 2006 s 130(3). See note 7.
- 17 Companies Act 2006 s 131(1).

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359. How the overseas branch register is kept.

The Secretary of State¹ may make provision by regulations² modifying any provision of the Companies Act 2006, so far as it relates to the main register of members³, as it applies in relation to an overseas branch register⁴. Subject to the provisions of the Companies Act 2006, a company⁵ may by its articles⁶ make such provision as it thinks fit as to the keeping of overseas branch registers⁷. A competent court in a country or territory where an overseas branch register is kept may exercise the same jurisdiction as is exercisable by a court⁸ in the United Kingdom⁹ either: (1) to rectify a register of members¹⁰; or (2) in relation to a request for inspection of, or a copy of, the register¹¹; and the offences of: (a) refusing inspection of, or failing to provide a copy of, the register¹²; and (b) making a false, misleading or deceptive statement in a request for inspection or a copy¹³, may be prosecuted summarily before any tribunal having summary criminal jurisdiction in the country or territory where the register is kept¹⁴.

A company that keeps an overseas branch register must keep available for inspection either the register¹⁵, or a duplicate of the register duly entered up from time to time¹⁶, at the place in the United Kingdom where the company's main register is kept available for inspection¹⁷. If default is made in complying with this requirement to keep the overseas branch register (or a duplicate) available for inspection in the United Kingdom, an offence is committed by the company and by every officer of the company who is in default¹⁸; and any person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹⁹ and (for continued contravention) to a daily default fine²⁰ not exceeding one-tenth of level 3 on the standard scale²¹.

Shares²² registered in an overseas branch register must be distinguished from the shares registered in the main register²³; and no transaction with respect to any shares registered in an overseas branch register may be registered in any other register²⁴.

1 As to the Secretary of State see PARA 6 et seq.

2 As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 131 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 131(3), 1289. At the date at which this volume states the law, no such regulations have been made under s 131.

3 Ie modifying any provision of the Companies Act 2006 Pt 8 Ch 2 (ss 113-128) (see PARA 335 et seq): s 131(2). As to the meaning of the 'main register' see PARA 358. As to the general duty under the Companies Act

2006 to keep a register of company members see PARA 335 et seq. As to membership of a company see PARA 321 et seq.

4 Companies Act 2006 s 131(2). See note 2. As to the meaning of 'overseas branch register' see PARA 358.

5 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

6 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

7 Companies Act 2006 s 131(4).

8 As to the meaning of 'court' see PARA 212 note 1.

9 Companies Act 2006 s 134(1). As to the meaning of 'United Kingdom' see PARA 1 note 5. As to how far Acts of Parliament of the United Kingdom extend to dominions as part of their law otherwise than by consent see **COMMONWEALTH** vol 13 (2009) PARA 867 et seq. As to the application of the provisions which govern overseas branch registers to other countries see PARA 358 notes 1-7. The Companies Act 2006 s 134 extends only to those countries and territories to which the Companies Act 1985 s 362(1), Sch 14 Pt II para 3 (repealed), which made similar provision, extended immediately before 1 October 2009 (ie immediately before the coming into force of the Companies Act 2006 Pt 8 Ch 3 (ss 129-135) (see also PARAS 358, 360 et seq): see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3(h)): Companies Act 2006 s 134(3). The Companies Act 1985 Sch 14 Pt II para 3 (repealed) provided for the extension of jurisdiction to apply only to those countries and territories where, immediately before 1 July 1985 (ie the date of the coming into force of the Companies Act 1985), provision to the same effect made under the corresponding provision of the Companies Act 1948 s 120(2) (repealed), had effect as part of the local law: see the Companies Act 1985 Sch 14 Pt II para 3(2) (repealed). The Companies Act 1948 ss 119-121 (repealed) applied in relation to the Republic of South Africa (see the South Africa Act 1962 s 2(1), Sch 2 para 4(1) (Sch 2 para 4 now substituted by SI 1986/1035)) and the whole of Malaysia (see the Companies Registers (Malaysia) Order 1964, SI 1964/931, made under the Federation of Malaya Independence Act 1957 s 2(3); and the Malaysia Act 1963 s 4(1)) as if they were parts of Her Majesty's dominions and to Pakistan as if it had not withdrawn from the Commonwealth and as if the Pakistan (Consequential Provisions) Act 1956 had not been repealed (see the Pakistan Act 1973 s 4(1), Sch 3 para 3(1) (repealed)). Such a register was under the Companies Act 1948 known as a dominion register: see s 119(1) (repealed); and PARA 358 note 7.

These statutory provisions might also apply to Kenya, Malawi, Swaziland, Zanzibar and Tanzania (formerly Tanganyika). The first four named countries were the subject matter of an Order in Council dated 26 October 1931, SR & O 1931/931, which applied the Companies Act 1929 ss 103-105 (repealed) and, if it was in force on 1 July 1948, was continued in force as if made under the Companies Act 1948: see s 459(2) (repealed). The provisions were applied to Tanganyika by the Tanganyika (Companies Dominion Register) Order in Council 1951, SI 1951/752. Both these orders were made under, or under provisions corresponding to, the Companies Act 1948 s 122 (repealed) (see PARA 12) and under the Foreign Jurisdiction Act 1890. The countries concerned all became part of the Commonwealth, and, when this happened, they were no longer such countries as are referred to in the Companies Act 1948 s 122 (repealed), more especially as they then became part of Her Majesty's dominions to which ss 119-121 (repealed) applied automatically. These orders would then presumably have lapsed, and would not automatically revive when these countries ceased to be part of Her Majesty's dominions and became independent under the Kenya Independence Act 1963, the Malawi Republic Act 1966, the Swaziland Independence Act 1968, the Zanzibar Act 1963 and the Tanganyika Independence Act 1961 respectively.

A further order made under provisions corresponding to the Companies Act 1948 s 122 (repealed), the Aden Protectorate (Application of Acts) Order 1938, SR & O 1938/1603, applied these provisions in relation to the Aden Protectorate. This order was not revoked, but is considered spent, having been overtaken by events.

The Companies Act 1948 s 122 (repealed) was applied to Pakistan: see the Pakistan Act 1973 s 4(1), Sch 3 para 3(1) (repealed).

Where a register of members of a company is kept in Bangladesh, it is not to be treated as improperly kept by reason only that, at any time after 3 February 1972 and before 1 September 1974, it included members resident in Pakistan: see the Bangladesh Act 1973 s 1(3), Schedule para 10(1).

10 Companies Act 2006 s 134(1)(a). Head (1) in the text refers to rectification of the register by the court (see s 125; and PARA 351 et seq): see s 134(1)(a). See note 9.

11 Companies Act 2006 s 134(1)(b). Head (2) in the text refers to requests for inspection of, or a copy of, the registers under s 117 (see PARAS 349-350): see s 134(1)(b). See note 9.

12 Companies Act 2006 s 134(2)(a). Head (a) in the text refers to the offence of refusing inspection of, or failing to provide a copy of, the register under s 118 (see PARA 349): see s 134(2)(a). See note 9.

- 13 Companies Act 2006 s 134(2)(b). Head (b) in the text refers to the offence of making a false, misleading or deceptive statement in a request for inspection or a copy under s 119 (see PARA 349): see s 134(2)(b). See note 9.
- 14 Companies Act 2006 s 134(2). See note 9.
- 15 Companies Act 2006 s 132(1)(a).
- 16 Companies Act 2006 s 132(1)(b). Any such duplicate is treated for all purposes of the Companies Act 2006 as part of the main register: s 132(2).
- 17 Companies Act 2006 s 132(1). As to the custody and inspection of the main register and index see PARA 347 et seq.
- 18 Companies Act 2006 s 132(3). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.
- 19 As to the standard scale see PARA 1622.
- 20 As to the meaning of 'daily default fine' see PARA 1622.
- 21 Companies Act 2006 s 132(4).
- 22 As to the meaning of 'share' see PARA 1042.
- 23 Companies Act 2006 s 133(1).
- 24 Companies Act 2006 s 133(2). As to transfers of shares see PARA 360.

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360. Transfers of shares.

An instrument of transfer of a share¹ registered in an overseas branch register² is: (1) regarded as a transfer of property situated outside the United Kingdom³; and (2) unless executed in a part of the United Kingdom, exempt from stamp duty⁴.

- 1 As to the meaning of 'share' see PARA 1042.
- 2 As to the meaning of 'overseas branch register' see PARA 358.
- 3 Companies Act 2006 s 133(3)(a). As to the meaning of 'United Kingdom' see PARA 1 note 5.
- 4 Companies Act 2006 s 133(3)(b).

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361. Ceasing to keep overseas branch register.

A company¹ may discontinue an overseas branch register². If it does so, all the entries in that register must be transferred either to some other overseas branch register kept in the same country or territory³, or to the main register⁴.

The company must give notice to the registrar of companies⁵ within 14 days of the discontinuance⁶. If default is made in complying with this requirement to give notice, an offence is committed by the company and by every officer of the company who is in default⁷; and any person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale⁸ and (for continued contravention) to a daily default fine⁹ not exceeding one-tenth of level 3 on the standard scale¹⁰.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 135(1). As to the meaning of 'overseas branch register' see PARA 358.

3 Companies Act 2006 s 135(2)(a). As to the countries or territories to which Pt 8 Ch 3 (ss 129-135) (see also PARA 358 et seq) applies see PARA 358 note 5.

4 Companies Act 2006 s 135(2)(b). As to the meaning of the 'main register' see PARA 358.

5 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements for the proper delivery of documents to the registrar see PARA 142.

6 Companies Act 2006 s 135(3). A company that begins to keep an overseas branch register must give notice to the registrar of companies stating the country or territory in which the register is kept: see s 130(1); and PARA 358. As to the application of this provision to other countries see PARA 358 notes 1-7.

7 Companies Act 2006 s 135(4). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

8 As to the standard scale see PARA 1622.

9 As to the meaning of 'daily default fine' see PARA 1622.

10 Companies Act 2006 s 135(5).

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(v) Liability of Members

362. Liability of members in general.

Merely as such, members of a company¹ are not liable to anyone except on a winding up to the extent and manner provided by the Insolvency Act 1986².

A past member is not liable to contribute (that is, he is not liable as a 'contributory'³) if he has ceased to be a member for one year or more before the commencement of the winding up⁴; nor is he liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member⁵; nor unless it appears to the court that the existing members are unable to satisfy their required contributions⁶. In the case of a company limited by shares⁷, no contribution is required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member⁸.

- 1 As to who qualifies as a member of a company see PARA 321.
- 2 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 703-743. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.
- 3 As to the meaning of 'contributory' see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 703. As to the meaning of 'contributory' under the Companies Acts see PARA 115 note 10.
- 4 See the Insolvency Act 1986 s 74(2)(a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 705.
- 5 See the Insolvency Act 1986 s 74(2)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 705.
- 6 See the Insolvency Act 1986 s 74(2)(c); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 705. As to possible liability to contribute if the member has had shares which have been purchased or redeemed by the company see PARA 366.
- 7 As to companies limited by shares generally see PARA 78.
- 8 See the Insolvency Act 1986 s 74(2)(d); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 705.

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363. Liability of members of unlimited company.

Where a company which is being wound up¹ is registered² as unlimited³, the liability of each past and present member⁴ extends to the whole amount of the company's debts and liabilities, and the expenses of its winding up⁵, subject to a right of contribution from the other solvent members ('contributories')⁶. With regard to any policy of insurance or other contract, the liability of individual members may, however, by the terms of the policy or contract be restricted, or the funds of the company alone made liable⁷. If an unlimited company has a share capital⁸, the liability on the shares may be defined by its articles of association⁹. The liability on the shares¹⁰, if any, is the only liability which may be enforced by the company whilst it is carrying on business¹¹, although there is then an unlimited liability to creditors¹².

- 1 As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.
- 2 As to company registration under the Companies Act 2006 generally see PARA 111 et seq.
- 3 As to unlimited companies generally see PARA 81.
- 4 As to who qualifies as a member of a company generally see PARA 321.
- 5 See the Insolvency Act 1986 s 74(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 704. See also *Re Mayfair Property Co, Bartlett v Mayfair Property Co* [1898] 2 Ch 28 at 36, CA, per Lindley MR. This is a liability which neither the company nor its directors may dispose of to the prejudice of the creditors: *Re Mayfair Property Co*.
- 6 See the Insolvency Act 1986 s 74(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 704. As to the meaning of 'contributory' see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 703. The right of contribution arises under the ordinary law of partnership, except so far as controlled by the company's constitution: *Robinson's Executor's Case* (1856) 6 De GM & G 572 at 588, CA, per Lord

Cranworth LC. As to the meaning of references to a company's constitution under the Companies Act 2006 see PARA 227.

7 See the Insolvency Act 1986 s 74(2)(e); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 705.

8 As to a company's share capital see PARA 1042.

9 As to a company's articles of association generally see PARA 228 et seq.

10 As to the nature of shares see PARA 1055.

11 As to the meaning of 'carry on business' generally see PARA 1 note 1.

12 *Re Mayfair Property Co, Bartlett v Mayfair Property Co* [1898] 2 Ch 28, CA.

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364. Liability of members where company is limited by guarantee.

In the case of a company limited by guarantee¹ being wound up², if the company is without a share capital³, no contribution is required from any member⁴ exceeding the amount undertaken to be contributed by him to the company's assets in the event of its being wound up⁵. The statement of guarantee required to be delivered in the case of a company that is to be limited by guarantee⁶ must state that each member undertakes that, if the company is wound up while he is a member, or within one year after he ceases to be a member, he will contribute to the assets of the company such amount as may be required for: (1) payment of the debts and liabilities of the company contracted before he ceases to be a member⁷; (2) payment of the costs, charges and expenses of winding up⁸; and (3) adjustment of the rights of the contributories among themselves⁹, not exceeding a specified amount¹⁰. If the company has a share capital¹¹, every member of it is liable (in addition to the amount so undertaken to be contributed to the assets), to contribute to the extent of any sums unpaid on any shares¹² held by him¹³; and he may further under the articles of association¹⁴, as regards his fellow members, incur an additional liability, which in the event of winding up must be enforced by bringing proceedings¹⁵.

A past member is not liable to contribute if he has ceased to be a member for one year or more before the commencement of the winding up¹⁶; nor is he liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member¹⁷; nor unless it appears to the court that the existing members are unable to satisfy their required contributions¹⁸.

1 As to companies limited by guarantee generally see PARAS 79-80.

2 As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

3 As to a company's share capital see PARA 1042.

4 As to who qualifies as a member of a company generally see PARA 321.

5 See the Insolvency Act 1986 s 74(3); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 715.

6 See the Companies Act 2006 s 11(1); and PARA 115. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

7 See the Companies Act 2006 s 11(3)(a); and PARA 115.

8 See the Companies Act 2006 s 11(3)(b); and PARA 115.

9 See the Companies Act 2006 s 11(3)(c); and PARA 115. As to the meaning of 'contributory' under the Companies Acts see PARA 115 note 10.

10 See the Companies Act 2006 s 11(3); and PARA 115.

11 With effect from 22 December 1980 (ie the date on which the corresponding provisions of the Companies Act 1980 (now repealed) came into force) a company cannot be formed as, or become, a company limited by guarantee with a share capital: see the Companies Act 2006 s 5(1), (2)(a); and PARA 79. As to the Companies Act 1980 generally see PARA 13.

12 As to the nature of shares see PARA 1055.

13 See the Insolvency Act 1986 s 74(3); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 715.

14 As to a company's articles of association generally see PARA 228 et seq. Provision similar to that made by heads (1) to (3) in the text is made by the model articles which have been made for the purposes of the Companies Act 2006 and intended for adoption by private companies limited by guarantee (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 3, Sch 2; and PARA 228 et seq). Under those model articles, the liability of each member is limited to £1, being the amount that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member or within one year after he ceases to be a member, for payment of the company's debts and liabilities contracted before he ceases to be a member, payment of the costs, charges and expenses of winding up, and adjustment of the rights of the contributories among themselves: see Sch 2 Pt 1 (art 2).

15 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 715.

16 See the Insolvency Act 1986 s 74(2)(a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 705.

17 See the Insolvency Act 1986 s 74(2)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 705.

18 See the Insolvency Act 1986 s 74(2)(c); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 705. As to possible liability to contribute if the member has had shares which have been purchased or redeemed by the company see PARA 366.

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365. Liability of members where company is limited by shares.

Save that a past member¹ of a company being wound up, which was at some former time registered as unlimited² but which has re-registered as a limited company³, who was a member of the company at the time of re-registration, is liable to contribute to the assets of the company in respect of its debts and liabilities contracted before that time if a winding up commences within three years of such re-registration⁴, the liability of a past or present member of a company limited by shares⁵ is limited to the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member⁶. A company's articles of association⁷ may, however, impose a further liability on him in relation to other members⁸. Except where the articles otherwise provide, or by the terms of some special contract, there is no liability to pay for shares even in the case of signatories to the memorandum of association⁹, except in

pursuance of calls duly made in accordance with the articles¹⁰, while the company is a going concern¹¹, or of calls duly made in the winding up of the company¹².

The liability of a past member can arise only if a winding up supervenes within 12 months of his ceasing to be a member¹³, and he is not liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member¹⁴. Nor is he liable to contribute unless it appears to the court that the existing members are unable to satisfy the required contributions¹⁵.

A person cannot become a member of a company in a representative capacity so as to be free from personal liability in respect of his shares¹⁶; but a trustee shareholder is entitled to be indemnified out of the trust estate if the shares are an investment authorised by the trust instrument or by statute¹⁷, and he is entitled to be indemnified by a beneficial owner who is sui juris, whether such owner created the trust or accepted a transfer of the beneficial ownership¹⁸.

1 As to who qualifies as a member of a company generally see PARA 321.

2 As to unlimited companies see PARA 81.

3 As to applications to re-register an unlimited company as a private limited company see PARA 178 et seq. As to private companies and limited companies generally see PARA 72 et seq.

4 See the Insolvency Act 1986 s 77(2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 706.

5 As to companies limited by shares generally see PARA 78.

6 See the Insolvency Act 1986 s 74(2)(d); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 705. Thus a shareholder in an English company carrying on business in a country where shareholders are liable for all the debts of the company cannot be made liable beyond the amount remaining payable on his shares unless he had assented to being made so liable: *Risdon Iron and Locomotive Works v Furness* [1906] 1 KB 49, CA. As to shares generally see PARA 1042 et seq.

7 As to a company's articles of association generally see PARA 228 et seq.

8 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 715. Provision similar to that made in the text and notes 5-6, ie that the liability of the members is limited to the amount, if any, unpaid on the shares held by them, is made by the model articles which have been made for the purposes of the Companies Act 2006 and intended for adoption by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 1 (art 2) (private company limited by shares); and reg 4, Sch 3 Pt 1 (art 2) (public company). As to the model articles generally see PARA 228 et seq. As to public companies generally see PARA 73 et seq.

9 As to a company's memorandum of association generally see PARA 104 et seq.

10 *Alexander v Automatic Telephone Co* [1900] 2 Ch 56, CA; *Nicol's Case*, *Tufnell and Ponsonby's Case* (1885) 29 ChD 421, CA.

11 See PARA 1112 et seq.

12 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 733 et seq.

13 See the Insolvency Act 1986 s 74(2)(a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 705. See also *Re Premier Underwriting Association Ltd* [1913] 2 Ch 29.

14 See the Insolvency Act 1986 s 74(2)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 705.

15 See the Insolvency Act 1986 s 74(2)(c); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 705. As to possible liability to contribute if the member has had shares which have been purchased or redeemed by the company see PARA 366.

16 *Re Leeds Banking Co*, *Fearnside and Dean's Case*, *Dobson's Case* (1866) 1 Ch App 231. See *Buchan's Case* (1879) 4 App Cas 549, HL (where the liability was unlimited); and PARA 434.

17 As to authorised investments and a trustee's implied indemnity see **TRUSTS** vol 48 (2007 Reissue) PARA 1005 et seq.

18 *Hardoon v Belilios* [1901] AC 118, PC. See the cases cited in PARA 343 note 10. The liability to indemnify the trustee will not be limited by the fact that the trustee is incapable of meeting the liability on the shares: *Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch 617, CA; *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476, CA.

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366. Liability of persons whose shares have been redeemed or purchased by company.

Where a company is being wound up¹ and it has made a payment out of capital in respect of the redemption or purchase of any of its own shares² (the 'relevant payment')³ and the aggregate amount of the company's assets and the amounts paid by way of contribution to its assets, apart from these provisions, are not sufficient for payment of its debts and liabilities, and the expenses of the winding up⁴, and if the winding up commenced⁵ within one year of the date on which the relevant payment was made, then⁶:

- 647 (1) the person from whom the shares were redeemed or purchased⁷; and
- 648 (2) the directors⁸ who made the statement that is required⁹ for the purposes of the redemption or purchase, except a director who shows that he had reasonable grounds for forming the opinion set out in the declaration¹⁰,

are, so as to enable that insufficiency to be met, liable to contribute to the company's assets¹¹. A person from whom any of the shares were so redeemed or purchased is liable to contribute an amount not exceeding so much of the relevant payment as was made by the company in respect of his shares; and the directors are jointly and severally liable with that person to contribute that amount¹². A person who has contributed any amount to the assets in pursuance of these provisions may apply to the court for an order directing any other person jointly and severally liable in respect of that amount to pay him such amount as the court thinks just and equitable¹³.

1 As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

2 Ie under the Companies Act 2006 Pt 18 Ch 5 (ss 709-723) (acquisition by limited company of its own shares; redemption or purchase by private company out of capital) (see PARA 1244 et seq): see the Insolvency Act 1986 s 76(1)(a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 713.

3 See the Insolvency Act 1986 s 76(1)(a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 713.

4 See the Insolvency Act 1986 s 76(1)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 713.

5 As to the commencement of the winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 489.

6 See the Insolvency Act 1986 s 76(2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 713.

7 See the Insolvency Act 1986 s 76(2)(a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 713.

8 As to a company's directors see PARA 478 et seq.

9 le under the Companies Act 2006 s 714(1) (see PARA 1246); see the Insolvency Act 1986 s 76(2)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 713.

10 See the Insolvency Act 1986 s 76(2)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 713.

11 See the Insolvency Act 1986 s 76(2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 713.

12 See the Insolvency Act 1986 s 76(3); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 713.

13 See the Insolvency Act 1986 s 76(4); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 713. Section 74 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 704 et seq) and s 75 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 717) do not apply in relation to liability accruing by virtue of s 76: see s 76(5); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 713.

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367. Effect of alterations of articles as to members' liability.

A company¹ may amend its articles of association² by special resolution³.

However, a member of a company⁴ is not bound by any such alteration to its articles after the date on which he became a member⁵, if and so far as the alteration either: (1) requires him to take or subscribe for more shares⁶ than the number held by him at the date on which the alteration is made⁷; or (2) in any way increases his liability as at that date to contribute to the company's share capital⁸ or otherwise to pay money to the company⁹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq. Amendment might be subject to certain conditions being met if the articles in question are 'entrenched provisions': see PARA 233. As to alterations to a company's articles that are required to be made when the company alters its status by means of re-registration see PARA 167 et seq.

3 See the Companies Act 2006 s 21(1); and PARA 232. As to the meaning of 'special resolution' see PARA 614. The registrar of companies must be sent a copy of the amended articles (see PARA 236); and he has power to issue a notice to comply where a company has failed to observe the procedural requirements with respect to amended articles (see PARA 237). See also PARA 145.

4 As to the meaning of 'member of a company' see PARA 321.

5 le except where the member agrees in writing, either before or after the alteration is made, to be bound by the alteration: see the Companies Act 2006 s 25(2).

6 As to the meaning of 'share' see PARA 1042.

7 Companies Act 2006 s 25(1)(a).

8 As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

9 Companies Act 2006 s 25(1)(b).

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(vi) Exercise of Members' Rights

A. MEMBERS' RIGHTS

368. Rights of members generally.

The rights of a member of a 'company'¹, as that word is defined for the purposes of the Companies Acts², are:

- 649 (1) statutory;
- 650 (2) given by the company's constitution³;
- 651 (3) given by the general law, more particularly such rules as relate to contracts⁴ and members of corporations⁵.

A shareholder⁶ seeking to enforce an individual right against the company is not entitled to an advance order for an indemnity as to costs⁷.

1 As to who qualifies as a member of a company see PARA 321.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of references to a company's constitution for the purposes of the Companies Act 2006 see PARA 227.

4 See generally **CONTRACT**.

5 See generally **CORPORATIONS**.

6 As to shareholders and membership of companies generally see PARAS 321 et seq, 1697 et seq.

7 *Re a Company (No 005136 of 1986)* [1987] BCLC 82. The principle of *Wallersteiner v Moir (No 2)* [1975] QB 373, [1975] 1 All ER 849, CA, is confined to derivative claims: see PARA 455 et seq.

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369. Statutory rights of individual members.

The statutory rights of an individual company member¹ include:

- 652 (1) his right to have his name properly inserted in the company's register of members², to make an inspection (unless the court rules otherwise) and to have copies of the register, and to have the register rectified when defective³;
- 653 (2) unless excluded or disapplied⁴, rights of pre-emption on the issue of further shares⁵;
- 654 (3) to inspect the company's registers of mortgages, charges and debentures⁶;
- 655 (4) to obtain upon request copies of the company's constitutional documents⁷;
- 656 (5) to recover compensation for misrepresentation, although not fraudulent, by directors or promoters⁸;
- 657 (6) to obtain repayment from the company of money paid in respect of shares which cannot legally be allotted⁹;
- 658 (7) to petition for a winding-up order¹⁰;
- 659 (8) to petition for relief when the affairs of the company are being conducted in a manner which is unfairly prejudicial to his interests¹¹;
- 660 (9) to take proceedings for misfeasance against directors¹² and officers¹³ of the company in a winding up¹⁴;
- 661 (10) to make application to the court in a voluntary winding up¹⁵;
- 662 (11) to require his interest to be purchased on a reconstruction of the company¹⁶;
- 663 (12) to be sent a copy of the company's annual accounts, together with a copy of the directors' report and of the auditors' report on those accounts¹⁷; and
- 664 (13) to require the company to hold an annual general meeting in a year when it has elected not to do so¹⁸, except in the case of a company without a share capital¹⁹, in any case where he has a right to attend and vote at a meeting of the company, and the right to appoint a proxy²⁰ and demand or join in demanding a poll²¹.

1 As to who qualifies as a member of a company see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the register of members see PARA 335 et seq.

3 See PARA 351.

4 See PARAS 1100, 1103.

5 See PARA 1098 et seq.

6 See PARAS 1297, 1322.

7 See PARA 242.

8 See PARAS 58, 1087.

9 See PARA 1097.

10 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 450, 454.

11 See PARA 466.

12 As to a company's directors see PARA 478 et seq.

13 As to officers of the company see PARA 607.

14 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688 et seq.

15 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1012.

16 See PARA 1438.

17 See PARA 850.

- 18 See PARA 630.
- 19 As to a company's share capital see PARA 1042 et seq.
- 20 See PARA 662.
- 21 See PARA 655.

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370. Statutory rights of members collectively.

The members of a company¹ collectively have statutory rights, some of which are exercisable by a bare majority², others by a particular majority³.

Statutory rights cannot be taken away or modified by any provisions of the company's constitution⁴.

1 As to who qualifies as a member of a company see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Eg by ordinary resolution under the Companies Act 2006 s 168 (removal of director from office; director's right to protest): see PARA 517. As to ordinary resolutions see PARA 613.

3 For example, shareholders holding an aggregate of 5% or more of the total voting rights can object to the resolution proposing re-registration as a private limited company (see the Companies Act 2006 s 98; and PARA 174); can circulate a written resolution in the case of a private company (see s 292; and PARA 625), or a resolution in the case of a general meeting of a public company (see s 338; and PARA 643); can require directors to call a general meeting (see s 303; and PARA 641); can circulate a statement to a general meeting (see s 314; and PARA 642); can demand an independent report on a poll (see s 342; and PARA 657); can prevent the deemed re-appointment of an auditor (see s 488; and PARA 915); and can publish audit concerns on a website (see s 527; and PARA 949). Shareholders holding an aggregate of 10% or more of the total voting rights can demand a poll (see s 321(1); and PARA 655); can require an audit of accounts to be made where the company would otherwise be entitled to exemption (see s 476; and PARA 906); and can require a company to exercise its powers to give notice requiring information about interests in its shares (see s 803; and PARA 450). Where the rights attached to any class of shares in a company having a share capital are varied, the holders of not less in the aggregate than 15% of the issued shares of the class in question can object to a variation of class rights (see s 633; and PARA 1061). A 'special resolution' of the members (or of a class of members) of a company, being a resolution passed by a majority of not less than 75% (see PARA 614), must be passed eg to amend a company's articles (see s 21; and PARA 232).

4 See PARAS 249, 250. As to the meaning of references to a company's constitution for the purposes of the Companies Act 2006 see PARA 227. A shareholders' agreement as to how to vote on a particular matter may effectively block the exercise of statutory rights: see PARAS 249, 251, 372.

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371. Members' rights under constitution.

Rights may be expressly conferred on the members of a company¹ by its constitution².

Some statutory rights of members may be exercised only if expressly authorised by the company's articles of association³ or may require confirmation in any case by the court⁴.

The rights usually conferred on members by the express terms of the articles include those with regard to dividends, the transfer and transmission of shares, attending and voting at meetings of the company, and appointment of directors⁵.

1 As to who qualifies as a member of a company see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Whether they are enforceable or not is another matter: see PARA 245. As to the meaning of references to a company's constitution for the purposes of the Companies Act 2006 see PARA 227. As to the necessity of registration of particulars of newly created class rights see PARA 1065.

3 See PARA 245. As to a company's articles of association generally see PARA 228 et seq.

4 Eg in the case of a reduction of capital which must be confirmed by the court: see the Companies Act 2006 s 641(1)(b); and PARA 1173.

5 As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

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372. Members' rights under the general law.

The rights of a company member¹ under the general law include the right, where he has been induced to take shares² by misrepresentation, to recover damages for misrepresentation if fraudulent or negligent³, or to obtain a rescission of his contract to take shares, and rectification of the share register, together with a return of the money paid by him on the shares⁴; and the right to restrain directors⁵ from acting ultra vires the company or in excess of their own powers or acting unfairly to the members⁶.

To supplement their rights under the company's constitution⁷ some or all of the shareholders⁸ may decide to enter into a shareholders' agreement, that is to say a separate contract apart from the articles; and shareholders who are parties to such an agreement can enforce that agreement inter se in the same manner as any other contract⁹.

1 As to who qualifies as a member of a company see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to shares generally see PARA 1042 et seq.

3 See PARA 1087.

4 See PARA 297.

5 As to a company's directors see PARA 478 et seq.

6 See PARAS 262, 455 et seq.

7 See PARA 371. As to the meaning of references to a company's constitution for the purposes of the Companies Act 2006 see PARA 227.

8 As to shareholders and membership of companies generally see PARAS 321 et seq, 1697 et seq.

9 See PARAS 249, 251.

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373. Member cannot recover reflective loss.

Proceedings may be maintained by a member of a company when the matter is one which affects his individual rights¹; and in a proper case he may obtain an injunction against the company in aid of his right². Where a company suffers loss caused by a breach of duty owed to it, only the company may undertake proceedings in respect of that loss³; and no action lies in favour of a shareholder suing in that capacity (and no other) to make good a diminution in the value of the shareholder's shareholding (by taking action against the responsible party) where that merely reflects the loss suffered by the company (the principle of 'no reflective loss')⁴.

However, a personal claim may be brought by a shareholder where he can show: (1) a breach of duty owed personally to the shareholder; and (2) a personal loss separate and distinct from any loss suffered by the company⁵. A shareholder's claim may survive also in circumstances where a defendant's wrong has disabled the company from pursuing its own claim against him⁶.

1 *Pender v Lushington* (1877) 6 ChD 70 at 80; *Edwards v Halliwell* [1950] 2 All ER 1064, CA. See also PARA 245.

2 See *Pulbrook v Richmond Consolidated Mining Co* (1878) 9 ChD 610; *Munster v Cammell Co* (1882) 21 ChD 183; *Kyshe v Alturas Gold Co* (1888) 36 WR 496; *Turnbull v West Riding Athletic Club Leeds Ltd* (1894) 70 LT 92; *Catesby v Burnett* [1916] 2 Ch 325 (where an injunction was granted restraining two former directors from continuing to act, and restraining the company from refusing to allow two duly elected directors to act as such); *Norman v Mitchell* (1854) 5 De GM & G 648; *Johnson v Lyttle's Iron Agency* (1877) 5 ChD 687, CA; *Goulton v London Architectural Brick and Tile Co* [1877] WN 141 (where an injunction was granted to restrain an illegal forfeiture of shares); *Jones v Pacaya Rubber and Produce Co Ltd* [1911] 1 KB 455, CA (forfeiture restrained pending trial of action for rescission of contract to take shares); *Lawson v Financial News Ltd* (1917) 34 TLR 52, CA (issue of debenture stock to directors and employees restrained); *Nelson v Anglo-American Land Mortgage Agency Co* [1897] 1 Ch 130 (where an injunction was granted to restrain interference by a company with shareholders and debenture holders, in the exercise of their statutory rights to inspect, at all reasonable times, the register of mortgages of the company); *Cory v Reindeer Steamship Ltd* (1915) 31 TLR 530 (where an interlocutory injunction was granted to restrain the company from acting upon resolutions which had been passed against the wishes of the majority of the shareholders); *Last v Buller & Co Ltd* (1919) 36 TLR 35; *Tatham v Palace Restaurants Ltd* (1909) 53 Sol Jo 743; *Hayes v Bristol Plant Hire Ltd* [1957] 1 All ER 685, [1957] 1 WLR 499 (action for wrongful exclusion of a director from the boardroom).

A shareholder seeking to enforce an individual right against the company is not entitled to an advance order for an indemnity as to costs: *Re a Company (No 005136 of 1986)* [1987] BCLC 82. The principle in *Wallersteiner v Moir (No 2)* [1975] QB 373, [1975] 1 All ER 849, CA, is confined to derivative claims: see PARAS 455 et seq.

3 See *Foss v Harbottle* (1843) 2 Hare 461; and PARA 462 note 4.

4 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 35, [2001] 1 All ER 481 at 503, HL, per Lord Bingham; *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 at 222-223, [1982] 1 All ER 354 at 366-367, CA. See also *Stein v Blake* [1998] 1 All ER 724, [1998] 1 BCLC 573, CA (loss sustained by a member by

a diminution in the value of his shares, by reason of the misappropriation of the company's assets, is recoverable by the company only, as the member has not suffered a distinct loss); *Ellis v Property Leeds (UK) Ltd* [2002] EWCA Civ 32, [2002] 2 BCLC 175 (director of company precluded from suing in personal capacity as his loss reflected the company's loss). The principle in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* is not precluded from applying simply because the defendant also owes fiduciary duties to the claimant, unless the defendants could show that the whole of the claimed profit reflected what the company had lost and which it had a cause of action to recover: *Shaker v Al-Bedrawi* [2002] EWCA Civ 1452, [2003] Ch 350, [2002] 4 All ER 835 (proceedings brought by a claimant not as a shareholder but as a beneficiary under a trust, against his trustee for a profit). See also *Gardner v Parker* [2004] EWCA Civ 781, [2004] 2 BCLC 554. The rule against reflective loss is not concerned with barring causes of action but with barring recovery of certain types of loss and therefore whether the cause of action lay in common law or equity and whether the remedy lay in damages or restitution makes no difference as to its applicability: *Shaker v Al-Bedrawi*; *Gardner v Parker*.

5 *Johnson v Gore Wood & Co* [2002] 2 AC 1, [2001] 1 All ER 481, HL.

Where there is a risk of double recovery created by a wrong done both to the company and to the shareholder, the shareholder's claim must give way: *Johnson v Gore Wood & Co*; *Day v Cook* [2001] EWCA Civ 592, [2002] 1 BCLC 1 (where the company's cause of action was in fact statute-barred). See also *Gardner v Parker* [2004] EWCA Civ 781, [2004] 2 BCLC 554 (since the foundation of the rule against reflective loss was the need to avoid double recovery, there was a powerful case for saying that it should be applied in a case where, in its absence, both the beneficiary and the company would be able to recover effectively the same damages from a defaulting trustee-director, even where the cause of action that may be asserted by the shareholder is different from the one that may be asserted by the company). Cf *Barings plc (in administration) v Coopers & Lybrand* [1997] 1 BCLC 427, CA. See also *Pearce v European Reinsurance* [2005] EWHC 1493 (Ch), [2005] 2 BCLC 366 (reflective loss principle did not prevent a member from bringing a claim against auditors simply because his claim involved allegations that the auditors' valuation of shares had failed to take into account in their valuation claims which the company had against a director).

6 *Giles v Rhind* [2002] EWCA Civ 1428, [2003] Ch 618, [2002] 4 All ER 977; *Perry v Day* [2004] EWHC 3372 (Ch), [2005] 2 BCLC 405. In *Gardner v Parker* [2004] EWCA Civ 781, [2004] 2 BCLC 554, where the claim was judged on the facts to have failed to fall within this exception, it was held that the mere fact that the company chose not to claim against the defendant, or settled with him on comparatively generous terms, would not, without more, justify disapplying the principle in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, [1982] 1 All ER 354, CA. Since this principle is an exclusionary rule, denying a claimant what otherwise would be his right to take action, the onus is on the defendants to establish its applicability: *Shaker v Al-Bedrawi* [2002] EWCA Civ 1452 at [83], [2003] Ch 350 at [83], [2002] 4 All ER 835 at [83] per Peter Gibson LJ.

As the law stands, the principles in *Johnson v Gore Wood & Co* [2002] 2 AC 1, [2001] 1 All ER 481, HL (see the text and notes 4-5) as qualified by the Court of Appeal in *Giles v Rhind* are binding: *Webster v Sanderson* [2009] EWCA Civ 830 at [36], [2009] All ER (D) 352 (Jul) at [36] per Lord Clarke of Stone-cum-Ebony MR (refusing to follow *Waddington Ltd v Chan Chun Hoo Thomas* [2008] HKCU 1381 at [85]-[87], [2009] 2 BCLC 82 at [85]-[87] per Lord Millett, where doubt had been expressed as to whether it was right that *Giles v Rhind* should allow the shareholder to bring an action for his own benefit, as this would entail recovery by the wrong party to the prejudice of the company and its creditors and would produce the result which was identified as unacceptable in *Johnson v Gore Wood & Co*).

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B. EXERCISE OF MEMBER'S RIGHTS BY NOMINEE

374. Provisions of articles as to enjoyment and exercise of members' rights by nominated person.

Where provision is made by a company's articles¹ enabling a member² to nominate another person or persons as entitled to enjoy or exercise all or any specified rights of the member in relation to the company³, then, so far as is necessary to give effect to that provision, anything required or authorised by any provision of the Companies Acts to be done by or in relation to

the member must instead be done (or, as the case may be, may instead be done) by or in relation to the nominated person (or each of them) as if he were a member of the company⁴. This applies, in particular, to the rights conferred in relation to the following:

- 665 (1) the right⁵ to be sent a resolution that is proposed to be moved as a written resolution⁶;
- 666 (2) the right⁷ to require circulation of a resolution that is proposed to be moved as a written resolution⁸;
- 667 (3) the right⁹ to require directors¹⁰ to call a general meeting¹¹;
- 668 (4) the right¹² to receive notice of general meetings¹³;
- 669 (5) the right¹⁴ to require circulation of a statement¹⁵;
- 670 (6) the right¹⁶ to ask questions at a meeting of a traded company¹⁷;
- 671 (7) the right¹⁸ to appoint a proxy to act at a meeting¹⁹;
- 672 (8) the right²⁰ to require circulation of a resolution for a general meeting of a public company²¹;
- 673 (9) the right²² to request a traded company to include in the business to be dealt with at an annual general meeting any matter (other than a proposed resolution) which may properly be included in the business²³; and
- 674 (10) the right²⁴ to be sent a copy of annual accounts and reports²⁵.

However, these provisions²⁶ do not confer rights enforceable against the company by anyone other than the member²⁷; nor do they affect the requirements for an effective transfer or other disposition of the whole or part of a member's interest in the company²⁸.

As regards the rights conferred by such a nomination²⁹:

- 675 (a) enjoyment by the nominated person of the rights conferred by the nomination is enforceable against the company by the member as if they were rights conferred by the company's articles³⁰; and
- 676 (b) any enactment³¹, and any provision of the company's articles, having effect in relation to communications with members has a corresponding effect (subject to any necessary adaptations) in relation to communications with the nominated person³².

The rights conferred by the nomination are in addition to the rights of the member himself³³, and they do not affect any rights exercisable by virtue of any provisions of company's articles as to the enjoyment or exercise of members' rights³⁴.

A failure to give effect to the rights conferred by the nomination does not affect the validity of anything done by or on behalf of the company³⁵.

The Secretary of State³⁶ may by regulations³⁷ amend the provisions relating to information rights³⁸ so as to extend or restrict the classes of companies to which the nomination of a person to enjoy information rights applies³⁹, so as to make other provision as to the circumstances in which such a nomination may be made, or so as to extend or restrict the rights conferred by such a nomination⁴⁰.

1 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'member of a company' see PARA 321.

3 Companies Act 2006 s 145(1).

4 Companies Act 2006 s 145(2).

- 5 Ie the rights conferred by the Companies Act 2006 s 291 (see PARA 624) or s 293 (see PARA 625): see s 145(3)(a).
- 6 Companies Act 2006 s 145(3)(a). As to the meaning of 'written resolution' see PARA 623. As to resolutions and meetings of the company generally see PARA 612 et seq.
- 7 Ie the right conferred by the Companies Act 2006 s 292 (see PARA 625): see s 145(3)(b).
- 8 Companies Act 2006 s 145(3)(b).
- 9 Ie the right conferred by the Companies Act 2006 s 303 (see PARA 641): see s 145(3)(c).
- 10 As to the meaning of 'director' see PARA 478.
- 11 Companies Act 2006 s 145(3)(c).
- 12 Ie the right conferred by the Companies Act 2006 s 310 (see PARA 635): see s 145(3)(d).
- 13 Companies Act 2006 s 145(3)(d).
- 14 Ie the right conferred by the Companies Act 2006 s 314 (see PARA 642): see s 145(3)(e).
- 15 Companies Act 2006 s 145(3)(e).
- 16 Ie the right conferred by the Companies Act 2006 s 319A (see PARA 651): see s 145(3)(ea) (added by SI 2009/1632).
- 17 Companies Act 2006 s 145(3)(ea) (as added: see note 16). As to the meaning of 'traded company' for these purposes see PARA 630 note 6.
- 18 Ie the right conferred by the Companies Act 2006 s 324 (see PARA 662): see s 145(3)(f).
- 19 Companies Act 2006 s 145(3)(f).
- 20 Ie the right conferred by the Companies Act 2006 s 338 (see PARA 643): see s 145(3)(g).
- 21 Companies Act 2006 s 145(3)(g).
- 22 Ie the right conferred by the Companies Act 2006 s 338A (see PARA 644): see s 145(3)(ga) (added by SI 2009/1632).
- 23 Companies Act 2006 s 145(3)(ga) (as added: see note 22).
- 24 Ie the right conferred by the Companies Act 2006 s 423 (see PARA 850): see s 145(3)(h).
- 25 Companies Act 2006 s 145(3)(h).
- 26 Ie the Companies Act 2006 s 145 and any such provision as is mentioned in s 145(1) (see the text and notes 1-3): see s 145(4).
- 27 Companies Act 2006 s 145(4)(a).
- 28 Companies Act 2006 s 145(4)(b).
- 29 Companies Act 2006 s 150(1). References in s 150 to the rights conferred by the nomination are to the rights referred to in s 146(3) (information rights) (see PARA 375) and, where applicable, the rights conferred by s 147(3) (right to hard copy communications) (see PARA 375) and s 149 (information as to possible voting rights) (see PARA 375): s 150(7). As to the meaning of 'information rights' see PARA 375 note 4.
- 30 Companies Act 2006 s 150(2).
- 31 As to the meaning of 'enactment' see PARA 17 note 2.
- 32 Companies Act 2006 s 150(3). In particular, where under any enactment, or any provision of the company's articles, the members of a company entitled to receive a document or information are determined as at a date or time before it is sent or supplied, the company need not send or supply it to a nominated person whose nomination was received by the company after that date or time, or if that date or time falls in a period

of suspension of his nomination (s 150(4)(a)); and where under any enactment, or any provision of the company's articles, the right of a member to receive a document or information depends on the company having a current address for him, the same applies to any person nominated by him (s 150(4)(b)). Any obligation under the Companies Acts to give a person's address is, unless otherwise expressly provided, to give a service address for that person: Companies Act 2006 s 1142. As to the service of documents on a company generally see PARA 671 et seq; and as to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq. As to the termination or suspension of a nomination to enjoy information rights see PARA 376.

33 Companies Act 2006 s 150(5)(a).

34 Companies Act 2006 s 150(5)(b). The text refers to the rights exercisable by virtue of any such provision as is mentioned in s 145 (see the text and notes 1-25): see s 150(5)(b).

35 Companies Act 2006 s 150(6).

36 As to the Secretary of State see PARA 6 et seq.

37 As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 151 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 151(3), 1290. The regulations may make such consequential modifications of any other provisions of Pt 9 (ss 145-153), or of any other enactment, as appear to the Secretary of State to be necessary: s 151(2). At the date at which this volume states the law, no such regulations had been made under s 151.

38 Ie amend the Companies Act 2006 s 150 (see the text and notes 29-35) (as well as ss 146-149: see PARAS 375, 376): see s 151(1).

39 Ie extend or restrict the classes of companies to which the Companies Act 2006 s 146 (see PARA 375) applies: see s 151(1).

40 Companies Act 2006 s 151(1).

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375. Information rights enjoyed by person nominated by member of traded company.

A member of a company¹, whose shares² are admitted to trading on a regulated market³, who holds shares on behalf of another person may nominate that person to enjoy information rights⁴. However, a company need not act on a nomination purporting to relate to certain information rights only⁵.

If the person to be nominated wishes to receive hard copy communications⁶, he must request the person making the nomination to notify the company of that fact⁷, and provide an address to which such copies may be sent⁸; and this must be done before the nomination is made⁹. If, having received such a request, the person making the nomination notifies the company that the nominated person wishes to receive hard copy communications¹⁰, and provides the company with that address¹¹, the right of the nominated person is to receive hard copy communications accordingly¹². If no such notification is given (or no address is provided), the nominated person is taken to have agreed that documents or information may be sent or supplied to him by the company by means of a website¹³. However, that agreement may be revoked by the nominated person¹⁴, and it does not affect his right¹⁵ to require a hard copy version of a document or information provided in any other form¹⁶.

Where a company sends a copy of a notice of a meeting to a person nominated to enjoy a member's information rights¹⁷, the copy of the notice must be accompanied by a statement that: (1) he may have a right under an agreement between him and the member by whom he was nominated to be appointed, or to have someone else appointed, as a proxy for the meeting¹⁸; and (2) if he has no such right or does not wish to exercise it, he may have a right under such an agreement to give instructions to the member as to the exercise of voting rights¹⁹.

1 As to the meaning of 'member of a company' see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'share' see PARA 1042.

3 As to the meaning of 'regulated market' see PARA 334 note 11.

4 Companies Act 2006 s 146(1), (2). For these purposes, 'information rights' means: (1) the right to receive a copy of all communications that the company sends to its members generally or to any class of its members that includes the person making the nomination (s 146(3)(a)); and (2) the rights conferred by s 431 or s 432 (right to require copies of accounts and reports) (see PARA 860), and s 1145 (right to require hard copy version of document or information provided in another form) (see PARA 681) (s 146(3)(b)). The reference in head (1) above to communications that a company sends to its members generally includes the company's annual accounts and reports; and as to the application of s 426 (option to provide summary financial statement) (see PARA 853) in relation to a person nominated to enjoy information rights see s 426(5): s 146(4). As to the Secretary of State's power to amend s 146 see s 151; and PARA 374. As to classes of shares and class rights see PARA 1057 et seq. As to the termination or suspension of a nomination to enjoy information rights see PARA 376.

5 Companies Act 2006 s 146(5).

6 The Companies Act 2006 s 147 applies as regards the form in which copies are to be provided to a person nominated under s 146 (see the text and notes 1-5): s 147(1). However, this is subject to the provisions of s 1144(2), Sch 5 Pt 3 (paras 5-7) (communications in electronic form) (see PARA 682) and Sch 5 Pt 4 (paras 8-13) (communications by means of a website) (see PARA 683) under which the company may take steps to enable it to communicate in electronic form or by means of a website: s 147(4). As to the Secretary of State's power to amend s 147 see s 151; and PARA 374. As to documents or information in electronic form see PARA 679.

7 Companies Act 2006 s 147(2)(a). See note 6. As to the service of documents on a company generally see PARA 671 et seq; and as to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

8 Companies Act 2006 s 147(2)(b). See note 6. Any obligation under the Companies Acts to give a person's address is, unless otherwise expressly provided, to give a service address for that person: Companies Act 2006 s 1142. A company must at all times have a registered office to which all communications and notices may be addressed: see s 86; and PARA 129.

9 Companies Act 2006 s 147(2). See note 6.

10 Companies Act 2006 s 147(3)(a). See note 6.

11 Companies Act 2006 s 147(3)(b). See note 6.

12 Companies Act 2006 s 147(3). See note 6.

13 Companies Act 2006 s 147(5). See note 6.

14 Companies Act 2006 s 147(6)(a). See note 6.

15 Ie under the Companies Act 2006 s 1145 (see PARA 681): see s 147(6)(b). See note 6.

16 Companies Act 2006 s 147(6)(b). See note 6.

17 Companies Act 2006 s 149(1). The text refers to a person nominated under s 146 (see the text and notes 1-5): see s 149(1). As to the Secretary of State's power to amend s 149 see s 151; and PARA 374.

18 Companies Act 2006 s 149(2)(a). The requirements of s 325 (notice of meeting to contain statement of member's rights in relation to appointment of proxy) (see PARA 662) do not apply to the copy, and the company

must either omit the notice required by s 325, or include it but state that it does not apply to the nominated person: s 149(3). See note 17. As to voting by proxy at meetings see PARA 662 et seq.

19 Companies Act 2006 s 149(2)(b). See notes 17, 18.

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376. Termination or suspension of nomination to enjoy information rights.

The nomination of a person to enjoy a member's information rights¹ may be terminated at the request either of the member or of the nominated person².

In any case, such a nomination ceases to have effect on the occurrence, in relation either to the member or to the nominated person, of: (1) in the case of an individual, death or bankruptcy³; or (2) in the case of a body corporate⁴, dissolution or the making of an order for the winding up of the body otherwise than for the purposes of reconstruction⁵.

The effect of any nominations made by a member is suspended at any time when there are more nominated persons than the member has shares in the company⁶; and where the member holds different classes of shares⁷ with different information rights⁸, and where there are more nominated persons than he has shares conferring a particular right⁹, the effect of any nominations made by him is suspended to the extent that they confer that right¹⁰.

Where the company inquires of a nominated person whether he wishes to retain information rights¹¹, and where the company does not receive a response within the period of 28 days beginning with the date on which the company's inquiry was sent¹², the nomination ceases to have effect at the end of that period¹³.

The termination or suspension of a nomination means that the company is not required to act on it¹⁴; but it does not prevent the company from continuing to do so, to such extent or for such period as it thinks fit¹⁵.

1 The Companies Act 2006 s 148 has effect in relation to a nomination under s 146 (see PARA 375); s 148(1). As to the Secretary of State's power to amend s 148 see s 151; and PARA 374. As to the meaning of 'information rights' see PARA 375 note 4. As to the meaning of 'member' see PARA 321.

2 Companies Act 2006 s 148(2). See note 1.

3 Companies Act 2006 s 148(3)(a). For these purposes, the reference to bankruptcy includes the sequestration of a person's estate: s 148(4)(a). See note 1.

4 As to the meaning of 'body corporate' see PARA 1 note 5.

5 Companies Act 2006 s 148(3)(b). For these purposes, the reference to the making of an order for winding up is to the making of such an order under the Insolvency Act 1986 or any corresponding proceeding under the law of a country or territory outside the United Kingdom: s 148(4)(b). See note 1. As to the meaning of 'United Kingdom' see PARA 1 note 5. As to orders for winding up made under the Insolvency Act 1986 see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 488 et seq; and as to the dissolution of a company in respect of which a winding-up order has been made see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 929 et seq. As to the making of orders to facilitate reconstruction see PARA 1436.

6 Companies Act 2006 s 148(5). See note 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'share' see PARA 1042.

7 As to classes of shares generally see PARA 1057 et seq.

- 8 Companies Act 2006 s 148(6)(a). See note 1.
- 9 Companies Act 2006 s 148(6)(b). See note 1.
- 10 Companies Act 2006 s 148(6). See note 1.
- 11 Companies Act 2006 s 148(7)(a). Such an inquiry is not to be made of a person more than once in any 12 month period: s 148(7). See note 1.
- 12 Companies Act 2006 s 148(7)(b). See note 1.
- 13 Companies Act 2006 s 148(7). See note 1.
- 14 Companies Act 2006 s 148(8). See note 1.
- 15 Companies Act 2006 s 148(8). See note 1.

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377. Exercise of members' rights where shares held on behalf of others.

Where a member¹ holds shares² in a company³ on behalf of more than one person, then rights attached to the shares⁴, and rights under any enactment⁵ exercisable by virtue of holding the shares⁶, need not all be exercised (and, if exercised, need not all be exercised in the same way)⁷. A member who exercises such rights, but does not exercise all his rights, must inform the company to what extent he is exercising the rights⁸; and a member who exercises such rights in different ways must inform the company of the ways in which he is exercising them and to what extent they are exercised in each way⁹. If a member exercises such rights without informing the company either that he is not exercising all his rights¹⁰, or that he is exercising his rights in different ways¹¹, the company is entitled to assume that he is exercising all his rights and is exercising them in the same way¹².

A company is required to act under any of the following provisions¹³:

- 677 (1) the members' power¹⁴ to require circulation of a statement¹⁵;
- 678 (2) the members' power¹⁶ to require circulation of a resolution for a general meeting of a public company¹⁷;
- 679 (3) the members' power¹⁸ to request a traded company¹⁹ to include in the business to be dealt with at an annual general meeting any matter (other than a proposed resolution) which may properly be included in the business²⁰;
- 680 (4) the members' power²¹ to require an independent report on a poll taken at a meeting²²; and
- 681 (5) the members' power²³ to require website publication of audit concerns²⁴,

if it receives a request in relation to which the following conditions are met²⁵:

- 682 (a) it is made by at least 100 persons²⁶;
- 683 (b) it is authenticated by all the persons making it²⁷;
- 684 (c) in the case of any of those persons who is not a member of the company, it is accompanied by a statement²⁸: (i) of the full name and address²⁹ of a person (the 'member') who is a member of the company and holds shares on behalf of that

- person³⁰; (ii) that the member is holding those shares on behalf of that person in the course of a business³¹; (iii) of the number of shares in the company that the member holds on behalf of that person³²; (iv) of the total amount paid up on those shares³³; (v) that those shares are not held on behalf of anyone else or, if they are, that the other person or persons are not among the other persons making the request³⁴; (vi) that some or all of those shares confer voting rights that are relevant for the purposes of making a request under the provision in question (listed in heads (1) to (5) above)³⁵; and (vii) that the person has the right to instruct the member how to exercise those rights³⁶;
- 685 (d) in the case of any of those persons who is a member of the company, it is accompanied by a statement³⁷: (i) that he holds shares otherwise than on behalf of another person³⁸; or (ii) that he holds shares on behalf of one or more other persons but those persons are not among the other persons making the request³⁹;
- 686 (e) it is accompanied by such evidence as the company may reasonably require of the matters mentioned in heads (c) and (d) above⁴⁰;
- 687 (f) the total amount of the sums paid up on⁴¹: (i) shares held as mentioned in head (c) above⁴²; and (ii) shares held as mentioned in head (d) above⁴³, divided by the number of persons making the request, is not less than £100⁴⁴;
- 688 (g) the request complies with any other requirements of the provision in question (listed in heads (1) to (5) above) as to contents, timing and otherwise⁴⁵.

1 As to the meaning of 'member' see PARA 321.

2 As to the meaning of 'share' see PARA 1042.

3 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 Companies Act 2006 s 152(1)(a). As to classes of shares and class rights see PARA 1057 et seq.

5 As to the meaning of 'enactment' see PARA 17 note 2.

6 Companies Act 2006 s 152(1)(b).

7 Companies Act 2006 s 152(1).

8 Companies Act 2006 s 152(2). A company must at all times have a registered office to which all communications and notices may be addressed: see s 86; and PARA 129. As to the service of documents on a company generally see PARA 671 et seq; and as to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

9 Companies Act 2006 s 152(3).

10 Companies Act 2006 s 152(4)(a).

11 Companies Act 2006 s 152(4)(b).

12 Companies Act 2006 s 152(4).

13 Companies Act 2006 s 153(2).

14 Ie the power contained in the Companies Act 2006 s 314 (see PARA 642): see s 153(1)(a).

15 Companies Act 2006 s 153(1)(a).

16 Ie the power contained in the Companies Act 2006 s 338 (see PARA 643): see s 153(1)(b).

17 Companies Act 2006 s 153(1)(b).

18 Ie the power contained in the Companies Act 2006 s 338A (see PARA 644): see s 153(1)(ba) (added by SI 2009/1632).

- 19 As to the meaning of 'traded company' for these purposes see PARA 630 note 6.
- 20 Companies Act 2006 s 153(1)(ba) (as added: see note 18).
- 21 Ie the power contained in the Companies Act 2006 s 342 (see PARA 657): see s 153(1)(c).
- 22 Companies Act 2006 s 153(1)(c).
- 23 Ie the power contained in the Companies Act 2006 s 527 (see PARA 949): see s 153(1)(d).
- 24 Companies Act 2006 s 153(1)(d).
- 25 Companies Act 2006 s 153(2).
- 26 Companies Act 2006 s 153(2)(a).
- 27 Companies Act 2006 s 153(2)(b). In relation to the authentication of a document under the Companies Act 2006 see s 1146; and PARA 678 et seq.
- 28 Companies Act 2006 s 153(2)(c).
- 29 Any obligation under the Companies Acts to give a person's address is, unless otherwise expressly provided, to give a service address for that person: Companies Act 2006 s 1142.
- 30 Companies Act 2006 s 153(2)(c)(i).
- 31 Companies Act 2006 s 153(2)(c)(ii).
- 32 Companies Act 2006 s 153(2)(c)(iii).
- 33 Companies Act 2006 s 153(2)(c)(iv).
- 34 Companies Act 2006 s 153(2)(c)(v).
- 35 Companies Act 2006 s 153(2)(c)(vi).
- 36 Companies Act 2006 s 153(2)(c)(vii).
- 37 Companies Act 2006 s 153(2)(d).
- 38 Companies Act 2006 s 153(2)(d)(i).
- 39 Companies Act 2006 s 153(2)(d)(ii).
- 40 Companies Act 2006 s 153(2)(e).
- 41 Companies Act 2006 s 153(2)(f).
- 42 Companies Act 2006 s 153(2)(f)(i). As to payments for shares and paid up shares see PARA 1042 et seq.
- 43 Companies Act 2006 s 153(2)(f)(ii).
- 44 Companies Act 2006 s 153(2)(f).
- 45 Companies Act 2006 s 153(2)(g).

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378. Information as to exercise of voting rights by institutional investors.

The Treasury¹ or the Secretary of State² may make provision by regulations³ requiring the institutions listed in heads (1) to (6) below to provide information about the exercise of voting rights attached to the shares⁴ listed in heads (a) and (b) below⁵.

The institutions to which this provision⁶ applies are⁷:

- 689 (1) unit trust schemes⁸ in respect of which an order declaring them to be authorised unit trust schemes⁹ is in force¹⁰;
- 690 (2) open-ended investment companies¹¹ incorporated by virtue of regulations under the Financial Services and Markets Act 2000¹²;
- 691 (3) companies¹³ approved as investment trusts¹⁴ as respects any accounting period¹⁵;
- 692 (4) pension schemes as defined in the Pension Schemes Act 1993¹⁶;
- 693 (5) undertakings authorised under the Financial Services and Markets Act 2000 to carry on long-term insurance business¹⁷;
- 694 (6) collective investment schemes that are authorised in designated countries or territories¹⁸; and

the shares to which this provision¹⁹ applies are²⁰:

- 695 (a) shares of a description traded on a specified market²¹; and
- 696 (b) shares in which the institution has, or is taken to have, an interest²².

Regulations so made²³ may require the provision of specified²⁴ information about²⁵:

- 697 (i) the exercise or non-exercise of voting rights by the institution or any person acting on its behalf²⁶;
- 698 (ii) any instructions²⁷ given by the institution or any person acting on its behalf as to the exercise or non-exercise of voting rights²⁸; and
- 699 (iii) any delegation by the institution or any person acting on its behalf of any functions in relation to the exercise or non-exercise of voting rights or the giving of such instructions²⁹.

Where instructions are given to act on the recommendations or advice of another person, the regulations may require the provision of information about what recommendations or advice were given³⁰.

The regulations may provide that an institution may discharge its obligations under the regulations by referring to information disclosed by a person acting on its behalf³¹, and that, in such a case, it is sufficient, where that other person acts on behalf of more than one institution, that the reference is to information given in aggregated form³², that is: (A) relating to the exercise or non-exercise by that person of voting rights on behalf of more than one institution³³; or (B) relating to the instructions given by that person in respect of the exercise or non-exercise of voting rights on behalf of more than one institution³⁴; or (C) relating to the delegation by that person of functions in relation to the exercise or non-exercise of voting rights, or the giving of instructions in respect of the exercise or non-exercise of voting rights, on behalf of more than one institution³⁵.

1 As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517.

2 As to the Secretary of State see PARA 6 et seq.

3 As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 1277 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 1277(6), 1290. Regulations under s 1277 may make different provision for different descriptions of institution, different descriptions of shares and for other different circumstances: s 1277(5). At the date at which this volume states the law, no such regulations had been made under s 1277.

4 As to the meaning of 'share' see PARA 1042. As to classes of shares and class rights see PARA 1057 et seq.

5 Companies Act 2006 s 1277(1). This power is exercisable in accordance with s 1278 (see the text and notes 6-18), s 1279 (see the text and notes 19-22) and s 1280 (see the text and notes 23-35): s 1277(2). The obligation imposed by regulations under s 1277 is enforceable by civil proceedings brought either by any person to whom the information should have been provided, or by a specified regulatory authority: s 1277(4). For the purposes of ss 1277-1280, 'specified' means specified in the regulations: s 1277(3)(b).

6 Ie the Companies Act 2006 s 1277 (see the text and notes 1-5): see s 1278(1).

7 Companies Act 2006 s 1278(1). Regulations under s 1277 (see the text and notes 1-5) may provide that s 1277 applies to other descriptions of institution, or provide that s 1277 does not apply to a specified description of institution: s 1278(2). As to the meaning of 'specified' see note 5. The regulations must specify by whom, in the case of any description of institution, the duty imposed by the regulations is to be fulfilled: s 1278(3).

8 Ie within the meaning of the Financial Services and Markets Act 2000 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 603): see the Companies Act 2006 s 1278(1)(a).

9 Ie an order under the Financial Services and Markets Act 2000 s 243 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 608): see the Companies Act 2006 s 1278(1)(a).

10 Companies Act 2006 s 1278(1)(a).

11 As to open-ended investment companies authorised in the United Kingdom see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 621 et seq.

12 Companies Act 2006 s 1278(1)(b). Head (2) in the text refers to open-ended investment companies incorporated by virtue of regulations under the Financial Services and Markets Act 2000 s 262 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 621): see the Companies Act 2006 s 1278(1)(b).

13 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

14 Ie approved for the purposes of the Income and Corporation Taxes Act 1988 s 842 (see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1444): see the Companies Act 2006 s 1278(1)(c).

15 Companies Act 2006 s 1278(1)(c).

16 Companies Act 2006 s 1278(1)(d). Head (4) in the text refers to pension schemes as defined in the Pension Schemes Act 1993 s 1(5): see the Companies Act 2006 s 1278(1)(d). In the Pension Schemes Act 1993 s 1(1), 'pension scheme' (except in the phrases 'occupational pension scheme', 'personal pension scheme' and 'public service pension scheme') means a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of people on retirement, on having reached a particular age, or on termination of service in an employment: see s 1(5); and **SOCIAL SECURITY AND PENSIONS**.

17 Companies Act 2006 s 1278(1)(e). Head (5) in the text refers to the activity of effecting or carrying out contracts of long-term insurance within the meaning of the Financial Services and Markets (Regulated Activities) Order 2001, SI 2001/544 (see **INSURANCE** vol 25 (2003 Reissue) PARA 21): see the Companies Act 2006 s 1278(1)(e).

18 Companies Act 2006 s 1278(1)(f). Head (6) in the text refers to collective investment schemes that are recognised by virtue of the Financial Services and Markets Act 2000 s 270 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 675): see the Companies Act 2006 s 1278(1)(f).

19 Ie the Companies Act 2006 s 1277 (see the text and notes 1-5): see s 1279(1).

20 Companies Act 2006 s 1279(1). Regulations under s 1277 (see the text and notes 1-5) may provide that s 1277 does not apply to shares of a specified description: s 1279(1). As to the meaning of 'specified' see note 5.

21 Companies Act 2006 s 1279(1)(a). As to the meaning of 'specified' see note 5.

22 Companies Act 2006 s 1279(1)(b). For this purpose, an institution has an interest in shares if the shares, or a depositary certificate in respect of them, are held by it, or on its behalf: s 1279(2). A 'depositary certificate' means an instrument conferring rights (other than options) in respect of shares held by another person, and the transfer of which may be effected without the consent of that person: s 1279(2). Where an institution has an interest in a specified description of collective investment scheme, within the meaning of the Financial Services and Markets Act 2000 (ie an open-ended investment company) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 603), or in any other specified description of scheme or collective investment vehicle, it is taken to have an interest in any shares in which that scheme or vehicle has or is taken to have an interest: Companies Act 2006 s 1279(3). For this purpose, a scheme or vehicle is taken to have an interest in shares if it would be regarded as having such an interest in accordance with s 1279(2) if it was an institution to which s 1277 applied: s 1279(4). As to the meaning of 'specified' see note 5.

23 le made under the Companies Act 2006 s 1277 (see the text and notes 1-5): see s 1280(1).

24 As to the meaning of 'specified' see note 5.

25 Companies Act 2006 s 1280(1). The regulations may require information to be provided in respect of specified occasions or specified periods (s 1280(2)) and in such manner as may be specified, and to such persons as may be specified, or to the public (or both) (s 1280(4)). As to the meaning of 'specified' see note 5.

26 Companies Act 2006 s 1280(1)(a). For these purposes, references to a person acting on behalf of an institution include any person to whom authority has been delegated by the institution to take decisions as to any matter relevant to the subject matter of the regulations, and such other persons as may be specified: s 1277(3)(a). As to the meaning of 'specified' see note 5.

27 References in the Companies Act 2006 s 1280 to instructions are to instructions of any description, whether general or specific, whether binding or not and whether or not acted upon: s 1280(6).

28 Companies Act 2006 s 1280(1)(b).

29 Companies Act 2006 s 1280(1)(c).

30 Companies Act 2006 s 1280(3).

31 Companies Act 2006 s 1280(5)(a).

32 Companies Act 2006 s 1280(5)(b).

33 Companies Act 2006 s 1280(5)(b)(i).

34 Companies Act 2006 s 1280(5)(b)(ii).

35 Companies Act 2006 s 1280(5)(b)(iii).

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(vii) Cessation of Membership

379. Cessation of membership.

Membership of a company¹ ceases:

- 700 (1) on death²;
- 701 (2) on the registration of a transfer of all the shares held by a member³;
- 702 (3) by a valid surrender or forfeiture of his shares⁴;
- 703 (4) on the registration as a member of a purchaser of shares under a sale to satisfy a lien⁵; or

704 (5) on the dissolution of the company⁶.

Provision may be made in a company's articles of association⁷ for cessation of membership in accordance with these principles⁸.

1 As to who qualifies as a member of a company see PARA 321.

2 See PARA 398. A company's articles may make provision for the transmission of shares by operation of law, including devolution by death or bankruptcy: see PARA 434.

3 See PARA 408. As to the transfer of shares see PARA 389 et seq. As to a member's liability as a past member where the company is being wound up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 705. See also PARA 362 et seq.

4 See PARAS 1213 et seq.

5 See PARA 1206.

6 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 932. As to orders for winding up made under the Insolvency Act 1986 see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 488 et seq; and as to the dissolution of a company in respect of which a winding-up order has been made see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 929 et seq.

7 As to a company's articles of association see PARA 228 et seq.

8 Under the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule Table C (which applies modified Table A articles of association to companies limited by guarantee and not having a share capital), it is specified that a member of the company may at any time withdraw from the company by giving at least seven clear days' notice to the company but membership is not transferable and it ceases on death: Schedule Table C art 4. As to the meaning of 'company limited by guarantee' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. As to 'Table A' and 'Table C', and as to the treatment of legacy articles under the Companies Act 2006, see PARA 230. Similar provision is made by the model articles which have been made for the purposes of the Companies Act 2006 and intended for adoption by private companies limited by guarantee (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 3, Sch 2; and PARA 228 et seq). Under those model articles, a member may withdraw from membership of the company by giving seven days' notice to the company in writing: Sch 2 Pt 3 art 22(1). However, membership is not transferable (Sch 2 Pt 3 art 22(2)); and a person's membership terminates when that person dies or ceases to exist (Sch 2 Pt 3 art 22(3)). As to the meaning of 'private company' see PARA 102.

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380. Bankruptcy or insolvency of member.

A company member¹ who becomes bankrupt ceases to be a member when the trustee is registered as a member in his place, as he may be, if the company's articles of association permit it², or when the trustee disclaims the share and the name of the bankrupt is removed from the register³, or when the trustee's transferee is registered⁴. Where a company is a member, its membership ceases when the transferee of the liquidator is registered or when the liquidator disclaims the shares⁵.

1 As to who qualifies as a member of a company see PARA 321.

2 *Re Bentham Mills Spinning Co* (1879) 11 ChD 900, CA; *Morgan v Gray* [1953] Ch 83 at 87, [1953] 1 All ER 213 at 217 per Danckwerts J. As to a company's articles of association generally see PARA 228 et seq; and as to such articles that make provision specifically as indicated in the text see PARAS 396, 434, 1416.

3 *Wise v Lansdell* [1921] 1 Ch 420.

4 As to a shareholder's bankruptcy generally see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 422.

5 This occurs under the Insolvency Act 1986 s 178: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 866 et seq.

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(9) CERTIFICATION AND TRANSFER OF SECURITIES

(i) Shares

A. IN GENERAL

381. Share certificates as evidence of title.

In the case of a company¹ registered in England and Wales² or Northern Ireland, a certificate under the common seal³ of the company specifying any shares⁴ held by a member⁵ is prima facie evidence of his title to the shares⁶. This provision does not, however, apply to any document issued with respect to uncertificated shares; and a document issued by or on behalf of a participating issuer purportedly evidencing title to an uncertificated unit of a participating security is not evidence of title to the unit of the security⁷.

A company has power⁸ to issue a certificate certifying that the shareholder named in the certificate is the registered holder of the shares specified in it, the object being to give shareholders the opportunity of more easily dealing with their shares in the market and at once showing a marketable title⁹. The certificate is the only documentary evidence of title in the possession of a shareholder¹⁰. It is not a negotiable instrument or a warranty of title by the company issuing it¹¹. It declares to all the world that the person who is named in it is the registered holder of certain shares in the company¹², and that the shares are paid up to the extent mentioned in it¹³; and it is given with the intention that it shall be used as such a declaration¹⁴.

Share certificates are the proper subject of interpleader proceedings¹⁵.

1 As to the meaning of 'company' see PARA 24.

2 As to the registration of companies see PARA 111. As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

3 A company may have a common seal, but need not have one: see Companies Act 2006 s 45; and PARA 283. A company that has a common seal may have an official seal for use for sealing securities issued by the company, or for sealing documents creating or evidencing securities so issued: see s 50; and PARA 291. A share certificate is not a deed within the meaning of the word as used in the Law of Property Act 1925 s 74 relating to the execution of deeds by or on behalf of corporations (see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 40-42): *South London Greyhound Racecourses Ltd v Wake* [1931] 1 Ch 496 at 503 per Clauson J. See also *R v Morton* (1873) LR 2 CCR 22.

4 As to the meaning of 'share' see PARA 1042.

5 As to the meaning of 'member of a company' see PARA 321.

6 Companies Act 2006 s 768(1). As to the equivalent provision in relation to Scotland see s 768(2). The provisions of s 768 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 12: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

While membership of a company requires entry on the register of members, a liquidator may distribute surplus assets in a winding up to the possessors of share certificates without requiring them to perfect their title by registration where the liquidator is satisfied that they are beneficially entitled to the shares to which the certificate relates; but, where certificates have been purchased by collectors for their ornamental value, the holders of those certificates are not beneficially entitled to the shares to which the certificate relates: *Re Baku Consolidated Oilfields Ltd* [1994] 1 BCLC 173.

7 See the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 38(3); and PARA 421. As to uncertificated shares generally see PARA 420 et seq.

8 A person cannot insist on having a certificate of his title as a shareholder until he has done everything required to make him a shareholder: *Wilkinson v Anglo-Californian Gold Mining Co* (1852) 18 QB 728.

9 *Re Bahia and San Francisco Rly Co* (1868) LR 3 QB 584 at 595 per Cockburn CJ.

10 *Société Générale de Paris v Walker* (1885) 11 App Cas 20 at 29, HL, per Earl of Selborne. It applies only to the legal and not to the equitable title to the shares: *Shropshire Union Railways and Canal Co v R* (1875) LR 7 HL 496 at 509 per Lord Cairns LC.

11 *Longman v Bath Electric Tramways Ltd* [1905] 1 Ch 646, CA. See also *Royal Bank of Scotland plc v Sandstone Properties Ltd* [1998] 2 BCLC 429 at 431, 432 per Tuckey J.

12 *Re Bahia and San Francisco Rly Co* (1868) LR 3 QB 584; *Shropshire Union Railways and Canal Co v R* (1875) LR 7 HL 496.

13 *Bloomenthal v Ford* [1897] AC 156, HL; *Burkinshaw v Nicolls* (1878) 3 App Cas 1004, HL; *Barrow's Case* (1880) 14 ChD 432, CA; *Waterhouse v Jamieson* (1870) LR 2 Sc & Div 29 at 33, HL, per Lord Hatherley LC. Cf *Re AW Hall & Co* (1887) 37 ChD 712.

14 *Re Bahia and San Francisco Rly Co* (1868) LR 3 QB 584; *Webb v Herne Bay Comrs* (1870) LR 5 QB 642; *Balkis Consolidated Co v Tomkinson* [1893] AC 396, HL; *Dixon v Kennaway & Co* [1900] 1 Ch 833. A company is estopped from disputing the truth of any statement in a share certificate: see PARA 387.

15 See *Robinson v Jenkins* (1890) 24 QBD 275, CA; and CPR Sch 1 RSC Ord 17 r 1 (relief available by way of interpleader for liability in respect of a debt or in respect of any money, goods or chattels). As to interpleader proceedings generally see **CIVIL PROCEDURE** vol 12 (2009) PARA 1585 et seq.

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382. Share warrants.

A company limited by shares¹ may, if so authorised by its articles², issue with respect to any fully paid shares³ a warrant (a 'share warrant') stating that the bearer of the warrant is entitled to the shares specified in it⁴. A share warrant issued under the company's common seal⁵ entitles the bearer to the shares specified in it and the shares may be transferred by delivery of the warrant⁶. A share warrant is a negotiable instrument⁷.

A company that issues a share warrant may, if so authorised by its articles, provide (by coupons or otherwise) for the payment of the future dividends on the shares included in the warrant⁸.

Unless the company's articles provide otherwise⁹, a company must, within two months¹⁰ of the surrender of a share warrant for cancellation, complete and have ready for delivery the

certificates of the shares specified in the warrant¹¹. If default is made in complying with this requirement an offence is committed by every officer¹² of the company who is in default¹³.

1 As to the meaning of 'company' see PARA 24. As to the meaning of 'limited by shares' see PARA 102. As to the meaning of 'share' see PARA 1042.

2 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to the provision made for share warrants in the model articles see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 Pt 4 (art 51) (public company). As to the model articles see PARA 228.

In *Pilkington v United Railways of the Havana and Regla Warehouses Ltd* [1930] 2 Ch 108, it was unsuccessfully contended that the corresponding provision of the Companies Act 1929 had altered the law so as to preclude the issue of warrants in respect of stock.

3 The fact that in the Companies Act 1867 s 31 (see now the Companies Act 2006 s 122; and PARA 337) each share must, so long as the share has a number, be distinguished by that number in the statement to be inserted in the register of members on the issue of a warrant is not sufficient indication of an intention that the provisions of the Act relating to share warrants do not apply to stock: see *Pilkington v United Railways of the Havana and Regla Warehouses Ltd* [1930] 2 Ch 108.

4 Companies Act 2006 s 779(1).

5 A company may have a common seal, but need not have one: see Companies Act 2006 s 45; and PARA 283. A company that has a common seal may have an official seal for use for sealing securities issued by the company, or for sealing documents creating or evidencing securities so issued: see s 50; and PARA 291.

6 Companies Act 2006 s 779(2).

7 *Webb, Hale & Co v Alexandria Water Co* (1905) 93 LT 339. Cf *Stern v R* [1896] 1 QB 211. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1618.

8 Companies Act 2006 s 779(3).

9 See the Companies Act 2006 s 780(2).

10 As to the meaning of 'month' see PARA 1625 note 10.

11 Companies Act 2006 s 780(1). As to share certificates see PARA 381. As to enforcement of the duty see PARA 384.

12 As to the meaning of 'officer' see PARA 607.

13 Companies Act 2006 s 780(3). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 780(4). As to the standard scale and as to the meaning of 'daily default fine' see PARA 1622. As to offences generally see PARA 1622 et seq.

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B. ISSUE OF CERTIFICATES ON ALLOTMENT OF SHARES

383. Issue of certificates on the allotment of shares.

A company¹ must, within two months² after the allotment of any of its shares³, complete and have ready for delivery, the certificates of the shares allotted⁴. This requirement does, however, not apply: (1) if the conditions of issue of the shares provide otherwise⁵; (2) in the

case of allotment to a financial institution⁶; or (3) in the case of an allotment of shares if, following the allotment, the company has issued a share warrant⁷ in respect of the shares⁸.

If default is made in complying with the requirement to complete and have ready for delivery the certificates of the shares allotted, an offence is committed by every officer of the company who is in default⁹. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹⁰ and (for continued contravention) a daily default fine¹¹ not exceeding one-tenth of level 3 on the standard scale¹².

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'month' see PARA 1625 note 10. As to enforcement of the duty see PARA 384.

3 As to the meaning of 'share' see PARA 1042. As to when shares are allotted see the Companies Act 2006 s 558; and PARA 1091. As to the issue of certificates on the allotment of debentures and debenture stock see PARA 410.

4 Companies Act 2006 s 769(1)(a). As to share certificates see PARA 381. As to the provision made in the model articles for the issue of share certificates see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 3 (arts 24, 25) (private company limited by shares), reg 4, Sch 3 Pt 4 (arts 46-49) (public company). As to the model articles see PARA 228.

5 Companies Act 2006 s 769(2)(a).

6 Companies Act 2006 s 769(2)(b). A company of which shares are allotted to a financial institution (s 778(1)(a)), or with which a transfer for transferring shares to a financial institution is lodged (s 778(1)(c)), is not required in consequence of that allotment or transfer to comply with s 769(1) (s 778(1)). For these purposes, a 'financial institution' means:

148 (1) a recognised clearing house acting in relation to a recognised investment exchange (s 778(2)(a)); or

149 (2) a nominee of a recognised clearing house acting in that way (s 778(2)(b)(i)), or a recognised investment exchange (s 778(2)(b)(ii)), designated for these purposes in the rules of the recognised investment exchange in question (s 778(2)(b)).

Expressions used in s 778(2) have the same meaning as in the Financial Services and Markets Act 2000 Pt 18 (ss 285-313): Companies Act 2006 s 778(3). Accordingly, 'recognised clearing house' means a clearing house in relation to which a recognition order is in force; and 'recognised investment exchange' means an investment exchange in relation to which a recognition order is in force: see the Financial Services and Markets Act 2000 ss 285(1)(b), 417(1); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 684.

The provisions of the Companies Act 2006 s 778 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 12, but as modified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

7 Ie under the Companies Act 2006 s 779: see PARA 382.

8 Companies Act 2006 s 769(2)(c).

9 Companies Act 2006 s 769(3). As to the meaning of 'officer' see PARA 607; and as to the meaning of 'officer in default' see PARA 315.

10 As to the standard scale see PARA 1622.

11 As to the meaning of 'daily default fine' see PARA 1622.

12 Companies Act 2006 s 769(4).

CERTIFICATES ON ALLOTMENT OF SHARES/384. Enforcement of issue of certificate of shares allotted.

384. Enforcement of issue of certificate of shares allotted.

If a company¹ on which a notice has been served² requiring it to make good any default in complying with the duty³ of the company to complete and have ready for delivery the certificates of shares allotted⁴, or the duty⁵ of the company as to issue of share certificates on the surrender of share warrants⁶, fails to make good the default within ten days after service of the notice, the person⁷ entitled to have the certificates delivered to him may apply to the court⁸. The court may on such an application make an order directing the company and any officer⁹ of it to make good the default within such time as may be specified in the order¹⁰; and the order may provide that all costs of and incidental to the application are to be borne by the company or by an officer of it responsible for the default¹¹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the service of documents on a company see PARA 671 et seq.

3 As to the duty under the Companies Act 2006 s 769(1) (see PARA 383): see s 782(1)(a).

4 See the Companies Act 2006 s 782(1)(a). As to the meaning of 'share' see PARA 1042.

5 As to the duty under the Companies Act 2006 s 780(1) (see PARA 382): see s 782(1)(c).

6 See the Companies Act 2006 s 782(1)(c).

7 As to the meaning of 'person' see PARA 311 note 2.

8 Companies Act 2006 s 782(1). As to the meaning of 'court' see PARA 212 note 1. As to the procedure that applies on application to the court under companies legislation generally see PARA 305.

9 As to the meaning of 'officer' see PARA 607.

10 Companies Act 2006 s 782(2).

11 Companies Act 2006 s 782(3).

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385. Split certificates.

Whether a shareholder¹ has the right to divide his shareholding and accordingly force the company to give him two or more certificates² in respect of it depends entirely on the construction of the articles of the company³.

1 As to shareholders and membership of companies generally see PARAS 321 et seq, 1697 et seq.

2 As to share certificates see PARA 381.

3 *Sharpe v Tophams Ltd* [1939] Ch 373, [1939] 1 All ER 123, CA. As to the provision made in the model articles see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 3 (art 24) (private

company limited by shares); reg 4, Sch 3 Pt 4 (arts 46-48) (public company). Similar provision is made in the Companies (Tables A to F) Regulations 1985, SI 1985/805: see Schedule, Table A art 6 (disapplied by Table C art 1 in relation to companies limited by guarantee and not having a share capital). As to the model articles see PARA 228. As to the continuing application of the Companies (Tables A to F) Regulations 1985, SI 1985/805, see PARA 230.

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386. Clean certificates.

A member¹ is entitled to a 'clean' certificate², that is one which does not contain on it any statement derogatory to his title³.

1 As to who qualifies as a member of a company see PARA 321.

2 As to share certificates see PARA 381.

3 *Re W Key & Son Ltd* [1902] 1 Ch 467. As to the order in which the names of joint holders appear in the register see PARA 335 note 4.

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387. Estoppel.

A company is estopped¹ from disputing the truth of any statement in a share certificate² as against any person not knowing that the statement is untrue, who has acted or refrained from acting on the faith of it, and has thereby altered his position to his detriment³.

Where a person, who lends money to a company on the terms of having as security fully paid shares, receives certificates of the shares as fully paid, and the shares are allotted, and he is registered accordingly⁴, the company is estopped from asserting against him any liability in respect of them⁵. The company is also estopped where an allottee accepts a certificate for fully paid shares in such circumstances that he may have reason to believe, when he accepts it, that the balance of the money due on the shares had been paid by another person⁶.

The test is whether the shares were taken honestly on the faith of the certificate, and, if so, whether the holder afterwards honestly acted on the certificate or relied on it to his detriment⁷. If a person did not take the shares on the faith of the certificate, or ought to have known that the statements in it were untrue, there is no estoppel as against the company⁸. A company may be estopped although the certificate was signed by a director in favour of a firm of which he is the partner, provided that the director can prove that he did not at the time of signing know the true facts⁹. The company is, however, estopped or liable in respect of its share certificate only where it is issued by those who have authority or apparent authority to issue it; where the certificate is a forgery, as where the secretary forges the signatures of directors, the company is not estopped¹⁰. Payment of dividends on shares does not estop the company from denying the title of the payee to the shares¹¹.

If the company is estopped from denying that a share is fully paid as against a holder without notice, such a holder can give a good title to the share as fully paid even to a transferee who has notice that the shares are not fully paid¹².

A person who by reason of the issue of a certificate is entitled to shares by estoppel, and who acts on the certificate to his detriment, may recover from the company as damages the value of the shares at the time of the refusal of the company to recognise him as a shareholder, together with interest from that date¹³. Similarly, a person who as a consequence of relying on a certificate loses his power to get redress against a third party may recover damages from the company¹⁴. If, however, he has not altered his position on the faith of the certificate, he cannot recover damages¹⁵.

1 As to the meaning of estoppel see **ESTOPPEL** vol 16(2) (Reissue) PARA 951.

2 As to share certificates see PARA 381.

3 *Balkis Consolidated Co v Tomkinson* [1893] AC 396, HL; *Bloomenthal v Ford* [1897] AC 156, HL; *Dixon v Kennaway & Co* [1900] 1 Ch 833; *Parbury's Case* [1896] 1 Ch 100; *Barrow's Case* (1880) 14 ChD 432, CA; *Burkinshaw v Nicolls* (1878) 3 App Cas 1004, HL; *Re Ottos Kopje Diamond Mines Ltd* [1893] 1 Ch 618, CA; *Shaw v Port Philip Colonial Gold Mining Co* (1884) 13 QBD 103; *Monarch Motor Car Co v Pease* (1903) 19 TLR 148. Cf *Simm v Anglo-American Telegraph Co*, *Anglo-American Telegraph Co v Spurling* (1879) 5 QBD 188, CA; *Re Railway Time Tables Publishing Co, ex p Sandys* (1889) 42 ChD 98, CA; *Re London Celluloid Co* (1888) 39 ChD 190, CA; *Markham and Darter's Case* [1899] 1 Ch 414; *Re Newport and South Wales Shipowners' Co*, *Rowland's Case* (1880) 42 LT 785, CA; *Penang Foundry Co Ltd v Gardiner* 1913 SC 1203, Ct of Sess.

The three essential elements of an estoppel by representation are: the representation that the person named in the certificate was the holder of the shares; reliance upon that representation; and detriment suffered by way of reliance: *Cadbury Schweppes Ltd v Halifax Share Dealing Ltd* [2006] EWHC 1184 (Ch) at [31], [2007] 1 BCLC 497 at [31] per Lindsay J. See also note 7.

4 As to the register of shareholders see PARA 1699.

5 *Bloomenthal v Ford* [1897] AC 156, HL. This case, together with *Christchurch Gas Co v Kelly* (1887) 3 TLR 634, *Parbury's Case* [1896] 1 Ch 100, and *Penang Foundry Co Ltd v Gardiner* 1913 SC 1203, Ct of Sess, extend the doctrine of *Burkinshaw v Nicolls* (1878) 3 App Cas 1004, HL (a case of a transferee) to the case of an original allottee.

6 *Penang Foundry Co Ltd v Gardiner* 1913 SC 1203, Ct of Sess.

7 *Hart v Frontino and Bolivia South American Gold Mining Co Ltd* (1870) LR 5 Exch 111; *Dixon v Kennaway & Co* [1900] 1 Ch 833. A detriment suffered by reliance on a share certificate arises where an innocent party puts forward a share transfer (together with the certificate) for registration to the company so becoming obliged to indemnify the company for any liability arising as a consequence of the company acting on the request for registration (as to which see *Sheffield Corp v Barclay* [1905] AC 392, HL; and PARA 431): see *Cadbury Schweppes Ltd v Halifax Share Dealing Ltd* [2006] EWHC 1184 (Ch) at [30], [2007] 1 BCLC 497 at [30] per Lindsay J. The estoppel defeats the company's claim to the indemnity in a situation where there is nothing unconscionable in raising the estoppel: *Cadbury Schweppes Ltd v Halifax Share Dealing Ltd*.

8 *Blyth's Case* (1876) 4 ChD 140, CA; *Simm v Anglo-American Telegraph Co*, *Anglo-American Telegraph Co v Spurling* (1879) 5 QBD 188, CA; *Re Vulcan Ironworks Co* [1885] WN 120.

9 *Re Coasters Ltd* [1911] 1 Ch 86.

10 *Ruben v Great Fingall Consolidated* [1906] AC 439, HL; *Dixon v Kennaway & Co* [1900] 1 Ch 833; *South London Greyhound Racecourses Ltd v Wake* [1931] 1 Ch 496. Cf *Shaw v Port Philip Colonial Gold Mining Co* (1884) 13 QBD 103. See also *Lovett v Carson Country Homes Ltd* [2009] EWHC 1143 (Ch), [2009] All ER (D) 95 (Jun), where the court sought to distinguish *Ruben v Great Fingall Consolidated* and was highly critical of *South London Greyhound Racecourses Ltd v Wake* and held that, while those authorities treat a forged share certificate as a nullity not binding on the company and not giving rise to an estoppel, the company may still be bound by a forged document if the person executing the document can be found to have ostensible authority to warrant that the formalities of execution have been properly complied with.

11 *Foster v Tyne Pontoon and Dry Docks Co and Renwick* (1893) 63 LJQB 50.

12 *Barrow's Case* (1880) 14 ChD 432, CA. Cf *Re London Celluloid Co* (1888) 39 ChD 190, CA.

13 *Re Bahia and San Francisco Rly Co* (1868) LR 3 QB 584; *Hart v Frontino and Bolivia South American Gold Mining Co Ltd* (1870) LR 5 Exch 111; *Re Ottos Kopje Diamond Mines Ltd* [1893] 1 Ch 618, CA; *Balkis Consolidated Co v Tomkinson* [1893] AC 396, HL.

14 *Dixon v Kennaway & Co* [1900] 1 Ch 833.

15 *Simm v Anglo-American Telegraph Co, Anglo-American Telegraph Co v Spurling* (1879) 5 QBD 188, CA (where the person claiming under estoppel had acted upon a forged transfer); *Platt v Rowe (t/a Chapman & Rowe) and CM Mitchell & Co* (1909) 26 TLR 49 (a transferee who paid for shares comprised in a transfer to him which were not registered in the name of the vendor recovered the purchase price as on a total failure of consideration even though the company had sent him a certificate).

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388. Note on certificate.

The usual note on a certificate, that without its production no transfer will be registered, is a mere warning to take care of it, and not a representation to or a contract with the holder of the certificate that a transfer will not be registered without its production¹.

¹ *Rainford v James Keith and Blackman Co Ltd* [1905] 1 Ch 296 per Farwell J (revsd on another ground [1905] 2 Ch 147, CA); *Guy v Waterlow Bros and Layton Ltd* (1909) 25 TLR 515. Cf *Société Générale de Paris v Walker* (1885) 11 App Cas 20, HL. As to the company's duties with regard to certificates deposited with it for the purpose of certification of transfers see PARA 405.

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C. TRANSFER OF CERTIFICATED SHARES

(A) CONTRACT OF SALE

389. Contract to sell shares.

A contract for the sale of shares¹ may be made orally². Specific performance may be ordered of a contract to sell shares³, even though the company, pending the litigation, has gone into liquidation⁴, and also of a contract to take a transfer of shares on which nothing has been paid⁵.

¹ See further PARAS 390-391.

² *Humble v Mitchell* (1839) 11 Ad & El 205; *Watson v Spratley* (1854) 10 Exch 222; *Bowlby v Bell* (1846) 3 CB 284; *Bradley v Holdsworth* (1838) 3 M & W 422.

³ *Duncuft v Albrecht* (1841) 12 Sim 189; *Poole v Middleton* (1861) 4 LT 631; *Llewellyn v Grossman* (1950) 83 Ll L Rep 462. See *Practice Direction--The Summary Disposal of Claims* PD 24 para 7; **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 826 et seq; and *Woodlands v Hind* [1955] 2 All ER 604, [1955] 1 WLR 688. See also *Langen and Wind Ltd v Bell* [1972] Ch 685, [1972] 1 All ER 296 (specific performance not granted where vendor's

equitable lien for unpaid purchase money would not be safeguarded); *Grant v Cigman* [1996] 2 BCLC 24 (on the question of specific performance of an agreement to sell shares, there was an arguable case that time was of the essence given that, due to the nature of the shares to be sold, their value was volatile). As to damages for breach of contract see **DAMAGES** vol 12(1) (Reissue) PARA 941 et seq.

4 *Paine v Hutchinson* (1868) 3 Ch App 388.

5 *Cheale v Kenward* (1858) 3 De G & J 27.

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390. Vendor's obligation.

Under an ordinary contract for sale of shares¹, made subject to the rules of the Stock Exchange, the vendor's only duty is to execute a valid transfer, hand it and the certificate to the purchaser, and do all that is necessary on his part to enable the purchaser to be registered, it being the purchaser's duty to obtain registration of the transfer². Unless registration is refused because the transferor has no right to execute the transfer, the transferee must pay the consideration for the transfer, although registration is refused³ in which case the transferor, so long as his name remains on the register, holds the shares in trust for the transferee⁴ unless the transferor annuls the bargain⁵. Unless the transferor takes this course, the transferee becomes in equity the owner of the shares⁶ and the transferor is bound not to prevent or delay the registration of the transferee as owner⁷. A vendor who contracts to sell registered shares is not entitled to complete the transaction by delivery of share warrants⁸.

For breach of the vendor's obligations, a claim for damages will lie at the suit of the purchaser⁹. Alternatively, unless the shares are freely available in the market, a claim for specific performance will lie¹⁰.

1 A sale may be subject to a special term eg 'with registration guaranteed': see *Cruse v Paine* (1869) 4 Ch App 441. As to contracts for the sale of shares see PARA 389. As to stocks see PARA 382 note 3.

2 *Neilson v James* (1882) 9 QBD 546, CA. As to the register of shareholders see PARA 1699.

3 *Stray v Russell* (1859) 1 E & E 888 (affd (1860) 1 E & E 916, Ex Ch); *Skinner v City of London Marine Insurance Corpn* (1885) 14 QBD 882, CA; *London Founders' Association v Clarke* (1888) 20 QBD 576, CA; *Re London, Hamburg and Continental Exchange Bank, Ward and Henry's Case* (1867) 2 Ch App 431 at 438 per Lord Cairns LJ. See also *East Wheel Martha Mining Co* (1863) 33 Beav 119 at 121. For the vendor's obligation where he is not the transferor see *Hichens, Harrison, Woolston & Co v Jackson & Sons* [1943] AC 266, [1943] 1 All ER 128, HL.

4 *Stevenson v Wilson* 1907 SC 445, Ct of Sess. A registered shareholder who is the vendor under an uncompleted but specifically enforceable contract for the sale of his shares is a fiduciary but not a nominee: *Michaels v Harley House (Marylebone) Ltd* [2000] Ch 104, [1999] 1 All ER 356, CA.

5 *Lyle and Scott Ltd v Scott's Trustees* [1959] AC 763, [1959] 2 All ER 661, HL.

6 *Re London, Hamburg and Continental Exchange Bank, Ward and Henry's Case* (1867) 2 Ch App 431 at 438 per Lord Cairns LJ; *Hawks v McArthur* [1951] 1 All ER 22.

7 *Hooper v Herts* [1906] 1 Ch 549, CA.

8 *Iredell v General Securities Corpn Ltd* (1916) 33 TLR 67, CA (where the contract provided that registration of transfers was to be carried out by the vendors free of charge; the company went into liquidation and the liquidator declined to register the transfer).

9 The measure of damages will be the market price at the contractual date for delivery less the contract price: *Shaw v Holland* (1846) 15 M & W 136; *Powell v Jessopp* (1856) 18 CB 336.

10 See **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARAS 814, 826-827.

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391. Purchaser's obligation.

On a sale of shares¹ the purchaser is liable on an implied promise to indemnify the vendor, so long as he remains registered, against calls, whether made while the purchaser was beneficially entitled or after the purchaser sold them to a sub-purchaser².

For breach of the purchaser's obligations in all cases a claim for damages will lie at the suit of the vendor³. Alternatively, unless the shares are freely disposable in the market, a claim for specific performance will lie⁴.

1 As to contracts for the sale of shares see PARA 389. As to the vendor's obligations on such a contract see PARA 390.

2 *Walker v Bartlett* (1856) 18 CB 845; *Kellock v Enthoven* (1874) LR 9 QB 241; *Spencer v Ashworth, Partington & Co* [1925] 1 KB 589, CA.

3 The measure of damages will be the contract price less the market price at the contractual date for completion: *AKAS Jamal v Moolla Dawood, Sons & Co* [1916] 1 AC 175, PC.

4 See **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARAS 814, 826-827.

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(B) TRANSFER IN GENERAL

392. Restrictions on transfer of shares.

The shares¹ or other interest of any member² in a company³ are transferable in accordance with the company's articles⁴. The articles of many companies contain restrictions on the right of transfer of shares⁵.

A restriction on the right to transfer shares is not repugnant to the absolute ownership of the shares, but is one of the original incidents of the shares attached to them by the contract contained in the articles⁶. Any condition precedent to transfer, such as obtaining the consent of the directors, must be observed⁷, although the consent may be inferred from entries in the company's books⁸, or from a constant disregard of the prescribed mode⁹. The rule against perpetuities has no application in such cases¹⁰.

Restrictive provisions are strictly construed¹¹ because shares, being personal property, are prima facie transferable¹². Nevertheless if the intent and existence of the restrictions are

sufficiently certain, they will not be rejected as being unworkable if a term can be implied which will give them business efficacy¹³. Articles restricting the transfer of a share are construed as restricting only a transfer of the legal title, and not as preventing the transfer of a beneficial interest therein¹⁴. Accordingly, a transfer for full consideration made in defiance of binding restrictive provisions will suffice to pass the equitable as distinct from the legal interest in the shares¹⁵, although the transferor is entitled to annul the transaction if registration cannot be effected within a reasonable time¹⁶. Depending on the context¹⁷, a restriction on transfer may include parting with the shares by way of gift¹⁸.

Where the scheme and intent of the restrictions are to accord rights of pre-emption¹⁹ to the other members of the company, if there is no substantial compliance with the procedure laid down, the shareholder denied such rights is entitled to an appropriate injunction to protect his position²⁰.

Where shares have been issued to an officer of a company, and a provision, which prohibits the transfer of the shares for a period of years, has been inserted in the articles for the protection of the company, a valid transfer may be effected in spite of the prohibition, prior to the expiration of the period, if the consent of the company is obtained²¹.

1 As to the meaning of 'share' see PARA 1042.

2 As to the meaning of 'member of a company' see PARA 321.

3 As to the meaning of 'company' see PARA 24.

4 See the Companies Act 2006 s 544(1); and PARA 1055. This provision is subject to certain requirements: see s 544(2); and PARA 1055. As to the meaning of references to a company's 'articles' see PARA 228 note 2.

5 As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

The Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 provides that directors of a private company limited by shares may refuse to register the transfer of a share, and if they do so, the instrument of transfer must be returned to the transferee with the notice of refusal unless they suspect that the proposed transfer may be fraudulent: see art 26(5).

Similarly, the directors of a public company may refuse to register the transfer of a certificated share if:

150 (1) the share is not fully paid (Sch 3 art 63(5)(a));

151 (2) the transfer is not lodged at the company's registered office or such other place as the directors have appointed (art 63(5)(b));

152 (3) the transfer is not accompanied by the certificate for the shares to which it relates, or such other evidence as the directors may reasonably require to show the transferor's right to make the transfer, or evidence of the right of someone other than the transferor to make the transfer on the transferor's behalf (art 63(5)(c));

153 (4) the transfer is in respect of more than one class of share (art 63(5)(d)); or

154 (5) the transfer is in favour of more than four transferees (art 63(5)(e)).

If the directors refuse to register the transfer of a share, the instrument of transfer must be returned to the transferee with the notice of refusal unless they suspect that the proposed transfer may be fraudulent: art 63(6). As to a company's registered office see PARA 129. As to classes of shares generally see PARA 1057 et seq.

For companies still using the 'legacy articles' (ie the Companies (Tables A to F) Regulations 1985, SI 1985/805) provision is made for the directors to refuse to register the transfer of a share which is not fully paid to a person

of whom they do not approve and they may refuse to register the transfer of a share on which the company has a lien: Table A art 24. They may also refuse to register a transfer unless:

- 155 (a) it is lodged at the office or at such other place as the directors may appoint and is accompanied by the certificate for the shares to which it relates and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer (Table A art 24(a));
- 156 (b) it is in respect of only one class of shares (Table A art 24(b)); and
- 157 (c) it is in favour of not more than four transferees (Table A art 24(c)).

If the directors refuse to register a transfer of a share, they must within two months after the date on which the transfer was lodged with the company send to the transferee notice of the refusal: Table A art 25. The registration of transfers of shares or of transfers of any class of shares may be suspended at such times and for such periods (not exceeding 30 days in any year) as the directors may determine: Table A art 26. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but arts 24-26 are applied by Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital) but are disapplied by Table C art 1 (regulations for the management of a company limited by guarantee and not having a share capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. As to the exercise by the directors of the power to refuse registration see PARA 393.

The discretion to refuse transfers of shares refers only to transfers and does not apply to a renunciation of a rights issue (*Re Pool Shipping Co* [1920] 1 Ch 251) or to an allotment of shares or a renunciation of an allotment (*System Control plc v Munro Corporate plc* [1990] BCLC 659 at 662-663 per Hoffmann J) or to a transmission of shares (*Re Bentham Mills Spinning Co* (1879) 11 ChD 900, CA; *Moodie v W and J Shepherd (Bookbinders) Ltd* [1949] 2 All ER 1044, HL). In some cases articles provide that no transfer shall be made without the consent of the directors; to comply with such an article it is not necessary to obtain their consent before executing the transfer; consent to the registration of the transfer is sufficient: *Re Copal Varnish Co Ltd* [1917] 2 Ch 349.

6 *Borland's Trustee v Steel Bros & Co Ltd* [1901] 1 Ch 279 at 289 per Farwell J.

7 *Re Royal British Bank, Nicol's Case* (1859) 3 De G & J 387; *Roots v Williamson* (1888) 38 ChD 485; *Re Dublin North City Milling Co* [1909] 1 IR 179; *Hunter v Hunter* [1936] AC 222, HL; *Lyle and Scott Ltd v Scott's Trustees* [1959] AC 763, [1959] 2 All ER 661, HL ('desire to sell' covered situation where registration of transfer was to be delayed). The secretary has no authority to pass transfers: *Chida Mines Ltd v Anderson* (1905) 22 TLR 27. Consent of directors in an article means consent to the registration of a transfer not consent to the execution of the transfer: see note 5.

8 *Re Royal British Bank, ex p Walton, ex p Hue* (1857) 26 LJ Ch 545; *Re Branksea Island Co, ex p Bentinck (No 2)* (1888) 1 Meg 23, CA.

9 *Re Vale of Neath and South Wales Brewery Co, Walter's Case* (1850) 3 De G & Sm 149; affd 19 LJ Ch 501.

10 *Witham v Vane* (1883) Challis' Real Property (3rd Edn) App V, 440, HL; *Walsh v Secretary of State for India* (1863) 10 HL Cas 367; *Borland's Trustee v Steel Bros & Co Ltd* [1901] 1 Ch 279; *A-G for Ireland v Jameson* [1905] 2 IR 218, CA. As to the rule against perpetuities see **PERPETUITIES AND ACCUMULATIONS** vol 35 (Reissue) PARA 1008.

11 See *Re Bentham Mills Spinning Co* (1879) 11 ChD 900, CA (cited in PARA 396 note 5); *Delavenne v Broadhurst* [1931] 1 Ch 234; *Greenhalgh v Mallard* [1943] 2 All ER 234, CA (where the court refused to imply a prohibition on transfers to existing members of the company which was not expressed in terms). Cf *Re Cannock and Rugeley Colliery Co, ex p Harrison* (1885) 28 ChD 363, CA. See also *Chappell's Case* (1871) 6 Ch App 902; *Re Hobson, Houghton & Co Ltd* [1929] 1 Ch 300. As to the effect of informality on transfer see *Smellie's Trustees v Smellie* (1952) 103 Ljo 139.

12 *Greenhalgh v Mallard* [1943] 2 All ER 234 at 237, CA, per Lord Greene MR; *Re Smith and Fawcett Ltd* [1942] Ch 304 at 306, [1942] 1 All ER 542 at 543, CA, per Lord Greene MR; *BWE International Ltd v Jones* [2003] EWCA Civ 298, [2004] 1 BCLC 406. The importance of the principle of protecting a shareholders' property rights is underscored by the European Convention on Human Rights First Protocol art 1 (protection of property) (as incorporated into English law by the Human Rights Act 1998 s 1(3), Sch I Pt II: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 165); *Martyn Rose Ltd v AKG Group Ltd* [2003] EWCA Civ 375 at [44]-[45], [2003] 2 BCLC 102 at [44]-[45] per Arden LJ. In the absence of special circumstances, a member of a company cannot be said to have been deprived of his property other than 'subject to the conditions provided for by law' or 'by the general principles of international law' (ie other than in accordance with the European Convention on Human Rights First Protocol art 1) if the manner and circumstances in which he is so deprived are pursuant to the very agreement under which he acquired the property, provided that those provisions are enforceable

according to the domestic law in the country concerned: *Money Markets International Stockbrokers Ltd (in liquidation) v London Stock Exchange Ltd* [2001] 2 All ER (Comm) 344 at [142], [2001] 4 All ER 223 at [142], [2002] 1 WLR 1151 per Neuberger J.

13 *Tett v Phoenix Property and Investment Co Ltd* [1986] BCLC 149, CA (provision as to giving reasonable notice to persons entitled to take the benefit of the restrictive provisions implied; notice to be given to non-members, so entitled, being family of members, sufficiently satisfied if notice given to member himself).

14 See *Safeguard Industrial Investments Ltd v National Westminster Bank Ltd* [1982] 1 All ER 449, [1982] 1 WLR 589, CA; *Theakston v London Trust plc* [1984] BCLC 390; *Re Sedgefield Steeplechase Co (1927) Ltd, Scotto v Petch* [2001] BCC 889, (2001) Times, 8 February, CA. A member's dealings go beyond dealings with the beneficial interest when nothing except registration remains to be done: *Hurst v Crompton Bros (Coopers) Ltd* [2002] EWHC 1375 (Ch) at [31], [2003] 1 BCLC 304 at [31] per Jacob J; *Re Macro (Ipswich) Ltd, Re Earliba Finance Co Ltd* [1994] 2 BCLC 354 at 402 per Arden J.

15 *Hawks v McArthur* [1951] 1 All ER 22, distinguishing *Hunter v Hunter* [1936] AC 222, HL (mortgagee not authorised to sell beneficial apart from legal interest). See also *Re Hafner, Olhausen v Powderley* [1943] IR 264.

16 *Lyle and Scott Ltd v Scott's Trustees* [1959] AC 763, [1959] 2 All ER 661, HL.

17 *Lyle and Scott Ltd v Scott's Trustees* [1959] AC 763 at 778, [1959] 2 All ER 661 at 670, HL, per Lord Reid.

18 *Hurst v Crompton Bros (Coopers) Ltd* [2002] EWHC 1375 (Ch), [2003] 1 BCLC 304.

19 As to rights of pre-emption see PARA 1098 et seq.

20 *Curtis v JJ Curtis & Co Ltd* [1986] BCLC 86, [1984] 2 NZLR 267, NZ CA. See also *Hurst v Crompton Bros (Coopers) Ltd* [2002] EWHC 1375 (Ch), [2003] 1 BCLC 304 (transfer of shares by member in breach of pre-emption requirements in articles defeasible at the suit of another member).

21 *London and Westminster Supply Association Ltd v Griffiths* (1883) Cab & El 15.

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393. Exercise of power to refuse registration of transfer of shares.

The power of refusal to register a transfer of shares¹ may be conferred on the directors of a company², and in such a case must be exercised by a decision of the board of directors³. This power must be exercised within two months of the transfer being lodged with the company⁴. Thereafter the directors will no longer be able to exercise their discretion⁵ and an application can be made to have the register rectified by the inclusion of the name of the transferee⁶. If a company⁷ refuses to register a transfer of shares⁸, it must provide the transferee with such further information about the reasons for the refusal as the transferee may reasonably request⁹. If a company fails to comply with this provision¹⁰, an offence is committed by the company, and by every officer of the company who is in default¹¹. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹² and (for continued contravention) a daily default fine¹³ not exceeding one-tenth of level 3 on the standard scale¹⁴.

The power to refuse to register a transfer is a discretionary power and must be exercised reasonably and in good faith for the company's benefit, and not arbitrarily¹⁵, although, in the absence of evidence to the contrary, the power will be presumed to have been properly exercised¹⁶. Where there are several grounds on which the power may be exercised, the directors are bound to state on which ground they act¹⁷. They need not in any case give the reasons which influenced them in exercising their discretion on that ground¹⁸, whether they do

so under an absolute power¹⁹ or under a power to refuse in specified circumstances²⁰. Where shares may be freely transferred to other members of the company, registration of a transfer to another member may not be refused because that member has entered into equitable obligations with a non-member affecting such shares²¹.

Where the directors' consent is required to a transfer, they must exercise their powers as trustees for the company and a consent given corruptly for their own benefit may be treated as a nullity²². Where their consent is necessary, they may refuse to consent to a transfer where the price payable is merely nominal, and the company is insolvent²³, but they may approve of an out-and-out transfer for a nominal consideration to the transferor's clerk if the transferor agrees to guarantee the payment of a call about to be made²⁴. It is their duty to refuse to register a transfer giving a misleadingly false description of the transferee and falsely stating the consideration²⁵.

Having given their reasons, the court will examine them, but it will not overrule the decision of the directors because it disagrees with the conclusion they reached as to the advisability of refusing the transfer²⁶. It will, however, do so if the directors have acted on a wrong principle²⁷.

As a general rule, a director is just as free to deal with his shares as any other person, although he may, by parting with his qualification shares, cease to hold office as a director²⁸. The mere fact that a transfer of shares is made in order to increase the voting power of the transferor, or in his interest, is no ground of objection to the transfer²⁹, nor is the fact that the transfer is made to avoid a prospective call³⁰. If a transfer is real, in the sense that it was intended to effect an out-and-out assignment, and there is no covert agreement or understanding to the contrary, it is immaterial that the transferee is insolvent and unable to pay any future calls³¹, but a colourable transfer, as to a clerk or other nominee of the transferor, will not discharge the transferor from liability³², nor will a transfer in a case where some benefit is reserved to the transferor³³. A purported transfer by a member in breach of the articles of the company³⁴ is defeasible at the suit of a member³⁵ and no transfer of shares so made may be registered and the board of directors is bound to refuse registration accordingly³⁶.

1 As to the power to refuse to register a transfer of shares see PARA 392.

2 As to such provision made in the model articles of association see PARA 392 note 5.

3 *Re Hackney Pavilion Ltd* [1924] 1 Ch 276. See also *Moodie v W and J Shepherd (Bookbinders) Ltd* [1949] 2 All ER 1044, 1950 SC (HL) 60, HL (right of refusal not exercised by failure to pass resolution approving transfer). See *Re Swaledale Cleaners Ltd* [1968] 3 All ER 619, [1968] 1 WLR 1710, CA (power lost by delay); *Re New Cedros Engineering Co Ltd* (1976) [1994] 1 BCLC 797 (no properly appointed directors; power not exercisable). As to meetings and decisions of a company's directors see PARA 528 et seq.

4 This period is dictated by the Companies Act 2006 s 771(1) (notice of refusal to register transfer) (see the text and notes 7-14). See also *Re Swaledale Cleaners Ltd* [1968] 3 All ER 619, [1968] 1 WLR 1710, CA. See also *Re Zinotty Properties Ltd* [1984] 3 All ER 754, [1984] 1 WLR 1249.

5 Provision to this effect is not made in the Companies Act 2006 s 771, which imposes a fine for default: see s 771(3), (4) (cited in notes 10-14); and PARA 414. However, it was accepted under the previous law, which made similar provision, that this can be the only consequence of requiring the power to be exercised within two months of the transfer being lodged with the company: see *Re Swaledale Cleaners Ltd* [1968] 3 All ER 619, [1968] 1 WLR 1710, CA. See also *Re Inverdeck Ltd* [1998] 2 BCLC 242 (directors' right to refuse to register a transfer lost after failure in their duty to register the transfer within two months or give notice of refusal to do so). Where the directors' decision is taken within the two month period, a failure to inform the transferee of the exercise of their discretion does not render the directors' decision ineffective: *Popely v Planarrive Ltd* [1997] 1 BCLC 8. Quare whether in some circumstances the company might be estopped from relying on the directors' decision: *Popely v Planarrive Ltd* above at 15 per Laddie J.

6 Ie under the Companies Act 2006 s 125: see PARA 351.

7 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

8 The Companies Act 2006 s 771 does not apply in relation to a transfer of shares if the company has issued a share warrant in respect of the shares (see s 779; and PARA 382) (s 771(5)(a)) or in relation to the transmission of shares by operation of law (see s 771(5)(b)). As to registration of share transfers see PARA 399. As to the meaning of 'share' see PARA 1042. The Companies Act 2006 s 771 applies also to a transfer of debentures of a company: see PARA 414.

9 See the Companies Act 2006 s 771(2). However, this does not include copies of minutes of meetings of directors: see s 771(2). As to the meaning of 'director' see PARA 478.

10 It fails to comply with the Companies Act 2006 s 771: see s 771(3).

11 Companies Act 2006 s 771(3). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

12 As to the 'standard scale' see PARA 1622.

13 As to the meaning of 'daily default fine' see PARA 1622.

14 Companies Act 2006 s 771(4).

15 *Re Smith and Fawcett Ltd* [1942] Ch 304, [1942] 1 All ER 542, CA; *Heron International Ltd v Grade* [1983] BCLC 244, CA; *Popely v Planarrive Ltd* [1997] 1 BCLC 8. See also *Re Coalport China Co* [1895] 2 Ch 404, CA. See also *Poole v Middleton* (1861) 29 Beav 646 at 651; *Slee v International Bank* (1868) 17 LT 425; *Shepherd's Case* (1866) 2 Ch App 16; *Re Yuruari Co Ltd* (1889) 6 TLR 119, CA; *Re South Yorkshire Wine, Spirit and Mineral Water Co* (1892) 8 TLR 413; *Re Hannan's King (Browning) Gold Mining Co Ltd* (1898) 14 TLR 314, CA; *Re Faure Electric Accumulator Co* (1888) 40 ChD 141; *Re Gresham Life Assurance Society, ex p Penney* (1872) 8 Ch App 446; *Re Bede Steam Shipping Co Ltd* [1917] 1 Ch 123, CA; *Kennedy v North British Wireless Schools Ltd* (1916) 53 SLR 543; *Mactra Properties Ltd v Morshead Mansions Ltd* [2008] EWHC 2843 (Ch), [2009] 1 BCLC 179, [2008] All ER (D) 49 (Nov).

16 *Berry v Tottenham Hotspur Football and Athletic Co Ltd* [1936] 3 All ER 554 (where evidence as to systematic rejections of transfers of shares was held to be inadmissible); *Re Smith and Fawcett Ltd* [1942] Ch 304, [1942] 1 All ER 542, CA. It is axiomatic that the onus of proof is on those challenging the exercise of the power: see also *Popely v Planarrive Ltd* [1997] 1 BCLC 8; *Village Cay Marine Ltd v Acland* [1998] 2 BCLC 327, PC. See, however, *Re Hafner, Olhausen v Powderley* [1943] IR 264 (evidence of improper motive in refusal; court entitled to draw an inference from the omission to state grounds of refusal, and to hold, in the absence of an explanation, that the refusal was not the result of a bona fide exercise of discretion); *Charles Forte Investments Ltd v Amanda* [1964] Ch 240, [1963] 2 All ER 940, CA (refusal to register does not normally give rise to a right to present a winding-up petition; other remedies are available if refusal wrongful). See also *Morgan v Morgan Insurance Brokers Ltd* [1993] BCLC 676 (where exceptionally directors were personally liable for the costs of an application to have the register of members rectified; rectification was sought by a shareholder owning three-quarters of the shares following a bona fide but improper refusal by the directors to register a transfer).

The Companies Act 2006 s 994 (petition by company member: see PARA 466) may provide an alternative remedy where this power has been exercised improperly.

17 *Berry and Stewart v Tottenham Hotspur Football and Athletic Co Ltd* [1935] Ch 718.

18 *Duke of Sutherland v British Dominions Land Settlement Corpn* [1926] Ch 746; *Berry v Tottenham Hotspur Football and Athletic Co Ltd* [1936] 3 All ER 554.

19 *Re Gresham Life Assurance Society, ex p Penney* (1872) 8 Ch App 446.

20 *Re Coalport China Co* [1895] 2 Ch 404, CA.

21 *Theakston v London Trust plc* [1984] BCLC 390.

22 *Bennett's Case* (1854) 5 De GM & G 284; *Re Mitre Assurance Co, Eyre's Case* (1862) 31 Beav 177.

23 *Taft v Harrison* (1853) 10 Hare 489.

24 *Re Bank of Hindustan, China and Japan, Harrison's Case* (1871) 6 Ch App 286 at 292 per James LJ. A transfer is not invalidated by the fact that the directors would have refused to register it if they had known all the facts, unless they have been deliberately misled by the transferor: *Re Discoverers Finance Corpn Ltd* [1910] 1 Ch 312, CA.

25 *Payne's Case* (1869) LR 9 Eq 223; *William's Case* (1869) 9 LR Eq 225n. As to false description see further *Masters' Case* (1872) 7 Ch App 292; *Re Financial Insurance Co, Bishop's Case* (1869) 7 Ch App 296n; *Re Smith,*

Knight & Co, Battie's Case (1870) 39 LJ Ch 391. See also the Companies Act 2006 s 113(2) (no provision made for entry of occupation of the members of the company on the register); and PARA 335. As to approving the transfer of a director's shares see *Re Agriculturist Cattle Insurance Co, Bush's Case* (1870) 6 Ch App 246 (affd sub nom *Murray v Bush* (1873) LR 6 HL 37); *Re London and County Assurance Co, Jessopp's Case* (1858) 2 De G & J 638; *Re Kilbricken Mines Co, Libri's Case* (1857) 30 LTOS 185; *Re Cawley & Co* (1889) 42 ChD 209, CA; *Re South London Fish Market Co* (1888) 39 ChD 324, CA.

26 *Re Bell Bros Ltd, ex p Hodgson* (1891) 65 LT 245; *Re Bede Steam Shipping Co Ltd* [1917] 1 Ch 123, CA.

27 *Re Bede Steam Shipping Co Ltd* [1917] 1 Ch 123, CA; *Robinson v Chartered Bank of India* (1865) LR 1 Eq 32 (explained in *Re Gresham Life Assurance Society, ex p Penney* (1872) 8 Ch App 446); *Moffatt v Farquhar* (1878) 7 ChD 591; *Re Stranton Iron and Steel Co* (1873) LR 16 Eq 559; *Tett v Phoenix Property and Investment Co Ltd* [1984] BCLC 599 (revsd on appeal [1986] BCLC 149, CA).

28 *Re National Provincial Marine Insurance Co, Gilbert's Case* (1870) 5 Ch App 559; *Re Cawley & Co* (1889) 42 ChD 209, CA. Cf *Re South London Fish Market Co* (1888) 39 ChD 324, CA.

29 *Re Stranton Iron and Steel Co* (1873) LR 16 Eq 559; *Cannon v Trask* (1875) LR 20 Eq 669; *Pender v Lushington* (1877) 6 ChD 70; *Moffatt v Farquhar* (1878) 7 ChD 591.

30 *Re Cawley & Co* (1889) 42 ChD 209, CA; *Re Hafod Lead Mining Co, Slater's Case* (1866) 35 Beav 391. If the making of the call has been postponed on the faith of a representation that no transfer will be made, registration of the transfer may be refused: *Re National and Provincial Marine Insurance Co, ex p Parker* (1867) 2 Ch App 685. See also *Re National Provincial Marine Insurance Co, Gilbert's Case* (1870) 5 Ch App 559.

31 *R v Lambourn Valley Rly Co* (1888) 22 QBD 463 at 465 per Pollock B; *Re Hafod Lead Mining Co, Slater's Case* (1866) 35 Beav 391; *Masters' Case* (1872) 7 Ch App 292; *Re Mexican and South American Co, De Pass Case* (1859) 4 De G & J 544; *M'Lintock v Campbell* 1916 SC 966, Ct of Sess.

32 *Re Mexican and South American Co, Hyam's Case* (1859) 1 De GF & J 75; *Re Mexican and South American Co, Costello's Case* (1860) 2 De GF & J 302. Cf *Re National and Provincial Marine Insurance Co, ex p Parker* (1867) 2 Ch App 685; *Re Bank of Hindustan, China and Japan, ex p Kintrea* (1869) 5 Ch App 95; *Re Imperial Mercantile Credit Association, Wilkinson's Case* [1869] WN 211.

33 *Re Athenaeum Life Assurance Society, Chinnocks's Case* (1860) John 714. Cf *Re Esgair Mwyn Mining Co, Alexander's Case* (1861) 3 LT 883.

34 As to a company's articles of association see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

35 *Hurst v Crampton Bros (Coopers) Ltd* [2002] EWHC 1375 (Ch), [2003] 1 BCLC 304.

36 *Tett v Phoenix Property and Investment Co Ltd* [1986] BCLC 149, CA.

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394. Provisions for compulsory transfer of shares.

Provisions made in good faith for the compulsory sale and transfer of shares at a fixed price, on the happening of a certain event, such as bankruptcy, are valid¹. It is common for the articles of

a company to grant pre-emption rights to existing members so that a member wishing to transfer may find himself obliged to offer his shares first to the existing members, and at a price to be fixed by the company's auditors, although in appropriate circumstances a member may be able to prevent the company from exercising such powers by relying on statutory provisions protecting shareholders against inequitable or unfairly prejudicial conduct².

The articles of a company often provide that such a pre-emption provision is triggered by a member 'wishing' or 'desiring' or 'intending' to transfer his shares and much will depend on whether, on a proper construction of the articles, and in the light of the conduct of the member, such an intention has been evidenced³. A shareholder who has made a contract to sell his shares and has been paid the purchase price and is ready but not asked to execute an instrument of transfer, cannot say that he does not propose to, or is not desirous of, or does not wish to, sell his shares⁴. The mere fact that a shareholder is under a duty to transfer or sell when called upon to do so does not, however, mean that he desires or proposes to transfer⁵. A conditional agreement to sell shares subject to several events occurring (which were not within the control of either party to the agreement) did not constitute a present and unequivocal desire to transfer or dispose of the shares⁶. A gift of shares will trigger a pre-emption provision arising on the 'transfer' of a share where, in the articles, the term 'transfer' has a business meaning and, properly construed, means to 'part with' or to 'hand over'⁷.

When the company has power to fix the purchase price not below a minimum stated in the articles, if it fixes the price at the minimum, which is in fact far less than the actual value of the shares, its action is not of itself fraudulent or oppressive⁸. When the value of the shares is to be ascertained by reference to the proportion of the value of the assets appearing in the books of the company to which the holders of the shares would be entitled in a winding up, deduction for depreciation of the assets is allowed⁹.

Where the value of the shares¹⁰ is to be certified by the auditors or other independent valuer¹¹, and their opinion is expressed to be final and binding for all purposes, a valuation can be questioned only where the valuer departs from his instructions in a material respect¹², though an action will lie against the auditors for making their valuation negligently¹³.

Such provisions may constitute a contract of which the transferring shareholder is entitled to the benefit, so as to force the directors to purchase his shares where the articles designate the directors as the purchasers of shares of which the holder wishes to dispose¹⁴.

1 *Borland's Trustee v Steel Bros & Co Ltd* [1901] 1 Ch 279; but see *Money Markets International Stockbrokers Ltd (in liquidation) v London Stock Exchange Ltd* [2001] 4 All ER 223, [2002] 1 WLR 1151; and see *Constable v Executive Connections Ltd* [2005] EWHC 3 (Ch), [2005] 2 BCLC 638 (regarding precisely where the line is to be drawn between those cases where the introduction of a compulsory transfer provision will be upheld and those where it will not). As to the alteration of articles by including provisions for the compulsory sale and transfer of shares see *Brown v British Abrasive Wheel Co* [1919] 1 Ch 290; *Sidebottom v Kershaw, Leese & Co Ltd* [1920] 1 Ch 154, CA; *Dafen Tinplate Co v Llanelly Steel Co (1907) Ltd* [1920] 2 Ch 124. See also *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286, [1950] 2 All ER 1120, CA. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to the alteration of articles see PARA 232 et seq.

2 See *Re Abbey Leisure Ltd, Viridi v Abbey Leisure Ltd* [1990] BCLC 342, CA (member entitled to seek winding up on the just and equitable ground under the Insolvency Act 1986 s 122(1)(g) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 444) rather than submit to transfer and valuation procedures under the articles); *Re a company (No 00330 of 1991), ex p Holden* [1991] BCLC 597 (member entitled to relief under the Companies Act 1985 s 459 (see now the Companies Act 2006 s 994; and PARA 466) rather than submit to transfer and valuation procedures under the articles).

3 On a pre-emption provision being triggered, a member is commonly required to serve a transfer notice on the existing members indicating the number of shares that he is 'wishing' or 'desiring' or 'intending' to sell. A requirement in the articles to 'specify' a price in the transfer notice and to 'state' that price in the offer notice, properly construed, is a requirement that the price must be stated in detail, wholly and completely, and the use of a formula to determine the price renders the notice invalid: *BWE International Ltd v Jones* [2003] EWCA Civ 298, [2004] 1 BCLC 406. See also *Martyn Rose Ltd v AKG Group Ltd* [2003] EWCA Civ 375, [2003] 2 BCLC 102 (an article requiring notice to indicate the price to be paid for shares, properly construed, did not allow for some or all of the price to be paid subsequent to completion and a notice to that effect was held to be invalid).

4 *Theakston v London Trust plc* [1984] BCLC 390 at 401 per Harman J; *Lyle and Scott Ltd v Scott's Trustees* [1959] AC 763, [1959] 2 All ER 661, HL. See also *Re Macro (Ipswich) Ltd*, *Re Earliba Finance Co Ltd*, *Macro v Thompson (No 2)* [1994] 2 BCLC 354 at 401-402 per Arden J.

5 *Safeguard Industrial Investments Ltd v National Westminster Bank Ltd* [1982] 1 All ER 449, [1982] 1 WLR 589; *Theakston v London Trust plc* [1984] BCLC 390.

6 *Re a company (No 005685 of 1988)*, *ex p Schwarcz (No 2)* [1989] BCLC 427.

7 *Hurst v Crompton Bros (Coopers) Ltd* [2002] EWHC 1375 (Ch), [2003] 1 BCLC 304. See also *Lyle and Scott Ltd v Scott's Trustees* [1959] AC 763 at 778, [1959] 2 All ER 661 at 668, HL, per Lord Reid.

8 *Phillips v Manufacturers' Securities Ltd* (1917) 86 LJ Ch 305 (reported on interlocutory application (1915) 31 TLR 451). This is now subject to the text to note 2.

9 *Jacobsen v Jamaica Times Ltd* (1921) 90 LJPC 100. Where shares are required by the articles to be first offered for sale to the other shareholders, the offer must be accepted or rejected as a whole: *Ocean Coal Co Ltd v Powell Duffryn Steam Coal Co Ltd* [1932] 1 Ch 654.

10 As to valuation see *Re Howie and Crawford's arbitration* [1990] BCLC 686 (where an asset was a holding of shares in a private company, the market price of that asset would normally depend on the proportion of the shares of the company comprised in the holding and on any special rights or restrictions contained in the articles of association of the company as well as on the value of the net assets of the company and its profit and dividend record). The addition of the word 'fair' (as in 'fair market value') adds nothing except to remind the valuer that the market price is to be ascertained on the assumption that no one is excluded from the bidding and to exclude the exceptional or freak price which might otherwise have to be taken into account if an agreement as to valuation refers to the 'open market price': *Re Howie and Crawford's arbitration* above.

11 The appointment by directors of auditors as valuers who are not 'independent' and who have compromised their ability to be an independent valuer as required by the articles may warrant a petition under the Companies Act 1985 s 459 (unfair prejudice) (see now the Companies Act 2006 s 994; and PARA 466): *Re Benfield Greig Group*, *Nugent v Benfield Group plc* [2001] EWCA Civ 397, [2002] 1 BCLC 65. See also *Davenport v Cream Holdings Ltd* [2008] EWCA Civ 1363, [2008] All ER (D) 89 (Dec) (shareholder not bound by accountants' valuation where he had not agreed to their appointment and the articles required his agreement). Agreed formal requirements are aimed at eliminating, or at least reducing, the risk of avoidable, time wasting and cost consuming disputes about whether or not a person has been appointed to a position and on what terms. There is, in general, more to the appointment of a person to perform any duties than simply selecting a name to fill the position. Appointment is a process which should be formal and precise: *Davenport v Cream Holdings Ltd* above at [32] per Mummery LJ.

12 *Arenson v Arenson* [1973] Ch 346 at 363, 364, [1973] 2 All ER 235 at 241, 242, CA, per Lord Denning MR (dissenting), applied in *Campbell v Edwards* [1976] 1 All ER 785, [1976] 1 WLR 403, CA; *Baber v Kenwood Manufacturing Co Ltd* [1978] 1 Lloyd's Rep 175, CA; *Re Belfield Furnishings Ltd*, *Isaacs v Belfield Furnishings Ltd* [2006] EWHC 183 (Ch), [2006] 2 BCLC 705 (where the auditor's valuation of the petitioners' shares was alleged to be tainted).

Having agreed that the expert's opinion will be conclusive and binding for all purposes, it is not sufficient to allege that the expert's opinion is mistaken; it must be shown that the expert departed from his instructions in a material respect, eg if he valued the wrong number of shares, or valued shares in the wrong company, or the wrong person had acted as valuer: *Jones v Sherwood Computer Services plc* [1992] 2 All ER 170 at 179, [1992] 1 WLR 277 at 287, CA, per Dillon LJ. In assessing the validity of a valuation there was a distinction between the identity of the object (eg shares) being valued and the attributes of that object, since only a mistake as to the object's identity could found an attack on a valuation certificate: *Doughty Hanson & Co Ltd v Roe* [2007] EWHC 2212 (Ch), [2008] 1 BCLC 404 (even if it could be shown that the valuation of the defendant's shares had been made on the basis of a hypothesis that would not be adopted by other valuers, all that would show is that, in applying a particular valuation technique, the valuers had valued the right thing but on an erroneous hypothesis, which was a mistake that an expert was permitted to make without invalidating the certificate). See also *Macro v Thompson (No 2)* [1997] 1 BCLC 626, CA (valuation open to challenge by the court when expert required to value shares in a company using the value of its assets used those of another company); *Baber v Kenwood Manufacturing Co Ltd* at 179 per Megaw LJ. In *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2001] EWCA Civ 1832 at [26], [2002] 1 All ER 703 at [26], [2002] 1 Lloyd's Rep 295, Simon Brown LJ noted that it was time that *Dean v Prince* [1954] Ch 409, [1954] 1 All ER 749, CA (a previously significant authority on these issues) received its quietus. To the same effect see also *Jones v Sherwood Computer Services plc* at 179 and 287 per Dillon LJ.

13 *Killick v PriceWaterhouseCoopers (a firm)* [2001] 1 BCLC 65; *Arenson v Casson Beckman, Rutley & Co* [1977] AC 405, [1975] 3 All ER 901, HL.

14 *Rayfield v Hands* [1960] Ch 1, [1958] 2 All ER 194.

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395. Transfer of shares where individual shareholding limited.

Where a limited number of shares only may be held by a shareholder¹, a transfer to a person already holding the prescribed number by a transferor with notice of the fact is invalid. If the transferor is a director, he is deemed to have notice, and will remain a contributory².

1 As to shareholders and membership of companies generally see PARAS 321 et seq, 1697 et seq.

2 *Re Newcastle-upon-Tyne Marine Insurance Co, ex p Brown* (1854) 19 Beav 97. As to the meaning of 'contributory' under the Companies Acts see PARA 115 note 10.

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396. Transfer of shares by a member indebted to the company.

In the absence of express power to do so¹, directors cannot decline to register transfers of shares² because calls on them are in arrear; but, if empowered to decline to register a transfer by a member³ who is indebted to the company, they may refuse to register a transfer made by a shareholder who is indebted to the company on any account whatever⁴, and whether solely or jointly with others⁵. If directors with such a power register transfers, the transfers are valid, although the directors may be liable to make good any loss thereby caused to the company⁶. The power to decline to register for indebtedness is exercisable although the company holds unmatured bills of the shareholder in respect of the debt⁷. If a company delays registration of a transfer because of indebtedness where there is no indebtedness, nominal damages are recoverable by the transferor⁸.

Where articles give a discretion to refuse registration of a transfer by a shareholder who is indebted to the company, the time for ascertaining whether he is so indebted is when the transfer is sent to the proper officer for registration, and not when it afterwards comes before a board meeting for registration⁹.

1 As to the restrictions on the transfer of shares contained in the model articles and the Companies (Tables A to F) Regulations 1985, SI 1985/805, see PARA 392. As to the model articles see PARA 228. As to the continuing application of the Companies (Tables A to F) Regulations 1985, SI 1985/805, see PARA 230.

2 As to registration of share transfers see PARA 399.

3 As to who is a member of a company see PARA 321.

4 *Ex p Stringer* (1882) 9 QBD 436.

5 *Re Bentham Mills Spinning Co* (1879) 11 ChD 900, CA. In *Re Stockton Malleable Iron Co* (1875) 2 ChD 101 the term 'indebted' as used in the articles of a company was held to mean owing a debt due and payable. Where an article provided that the company might refuse to register a transfer by a member who was indebted, and another article provided for the registration of persons becoming entitled to a share in consequence of bankruptcy, it was held that the company was not justified in refusing to register a member's trustee in bankruptcy: see *Re Bentham Mills Spinning Co* above; *Re W Key & Son Ltd* [1902] 1 Ch 467 (trustee in bankruptcy entitled to a 'clean' registration). Cf *Re Cannock and Rugeley Colliery Co, ex p Harrison* (1885) 28 ChD 363, CA (trustee in bankruptcy not 'entitled' to the share by reason of a prior charge). As to the transmission of shares see PARA 434.

6 *Re Hoylake Rly Co, ex p Littledale* (1874) 9 Ch App 257. Cf *Anderson's Case* (1869) LR 8 Eq 509 (where the registration of transfers, registered in ignorance that calls were in arrear, was cancelled).

7 *Re London, Birmingham and South Staffordshire Banking Co Ltd* (1865) 34 Beav 332; *Bank of Africa v Salisbury Gold Mining Co* [1892] AC 281, PC. Cf *Holden's Case* (1869) LR 8 Eq 444.

8 *Skinner v City of London Marine Insurance Corp*n (1885) 14 QBD 882, CA.

9 *Re Cawley & Co* (1889) 42 ChD 209, CA; *R v Inns of Court Hotel Co, ex p Rudolf* (1863) 11 WR 806.

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397. Transfer of shares when company becomes insolvent.

Where the company has stopped payment or ceased to be a going concern, although no winding up has commenced, the directors may refuse registration of transfers of shares¹ executed for the purpose of avoiding liability². The mere fact that the company is in difficulties is not, however, a ground for refusing registration³.

1 As to registration of share transfers see PARA 399.

2 *Mitchell v City of Glasgow Bank* (1879) 4 App Cas 624, HL; *Mitchell's Case* (1879) 4 App Cas 547, 567, HL. Cf *Chappell's Case* (1871) 6 Ch App 902; *Lanckester's Case* (1870) 6 Ch App 905n; *Allin's Case* (1873) LR 16 Eq 449; *Dodds v Cosmopolitan Insurance Corp*n Ltd 1915 SC 992, Ct of Sess. As to transfers made after, or not registered before, a winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 701.

3 *Re Mexican and South American Co, De Pass's Case* (1859) 4 De G & J 544; *Re Smith, Knight & Co, Battie's Case* (1870) 39 LJ Ch 391; *Nation's Case* (1866) LR 3 Eq 77; *Re Taurine Co* (1883) 25 ChD 118, CA. Cf *Re Mexican and South American Co, Hyam's Case* (1859) 1 De GF & J 75.

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398. Persons who may transfer shares.

The proper person to transfer shares is the registered holder¹ or his attorney², or such other person as is by the articles³ or by statute empowered to transfer.

An instrument of transfer of the share⁴ or other interest of a deceased member of a company⁵ may be made by his personal representative⁶ although the personal representative is not himself a member of the company⁷, and is as effective as if the personal representative had been such a member at the time of the execution of the instrument⁸.

Shares or stock registered in the name of a person who, by reason of mental disorder, is incapable of managing his affairs may only be transferred under the authority of the person having jurisdiction in relation to his affairs under the Mental Capacity Act 2005⁹. Where he is a trustee, a vesting order of shares may be made by the court¹⁰.

A transfer of shares by or to a minor is voidable during his minority or within a reasonable time after his attaining full age¹¹. Shares held by a married woman as registered holder, or one of several registered joint holders, may be transferred without the concurrence of her husband¹².

Any shares or stock belonging to a bankrupt will vest automatically in his trustee in bankruptcy and may be transferred by him accordingly¹³.

1 As to the registered holder of shares see PARA 321 et seq.

2 See *Chatenay v Brazilian Submarine Telegraph Co* (1890) 6 TLR 408; affd [1891] 1 QB 79, CA. A vesting declaration does not extend to shares or stock only transferable in the books of a company: see the Trustee Act 1925 s 40(4)(c); and **TRUSTS** vol 48 (2007 Reissue) PARA 867. As to powers of attorney see **AGENCY** vol 1 (2008) PARA 16.

3 As to the meaning of references to a company's 'articles' see PARA 228 note 2.

4 As to the meaning of 'share' see PARA 1042.

5 As to the meaning of 'member of a company' see PARA 321.

6 As to personal representatives see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 1 et seq.

7 Companies Act 2006 s 773(a).

8 Companies Act 2006 s 773(b). See also *Simpson v Molson's Bank* [1895] AC 270 at 279, PC. As to the transmission of shares on death see PARA 434.

9 See **MENTAL HEALTH** vol 30(2) (Reissue) PARA 595 et seq.

10 See the Trustee Act 1925 s 51; and **TRUSTS** vol 48 (2007 Reissue) PARA 884 et seq. As to jurisdiction in regard to mental patients see s 54; and **TRUSTS** vol 48 (2007 Reissue) PARA 851; **MENTAL HEALTH** vol 30(2) (Reissue) PARA 721 et seq.

11 See PARA 330. As to the attainment of majority at the age of 18 see the Family Law Reform Act 1969 s 1; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 1.

12 See the Law Reform (Married Women and Tortfeasors) Act 1935 s 1(a); *Re London, Bombay and Mediterranean Bank* (1881) 18 ChD 581; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 204.

13 See the Insolvency Act 1986 ss 306(1), 311(3); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 391, 397, 422.

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(C) FORMALITIES REQUIRED BY TRANSFER

399. Necessity for proper instrument of transfer of shares.

A company¹ may not register a transfer of shares² in the company unless: (1) a proper instrument of transfer has been delivered to it³; or (2) the transfer is an exempt transfer⁴ or is in accordance with regulations⁵ relating to the evidencing and transfer of title to securities without written instrument⁶. However, this does not affect any power of the company to register as shareholder a person⁷ to whom the right to any shares in the company has been transmitted by operation of law⁸. When a transfer of shares in a company has been lodged with the company⁹, the company must, as soon as practicable and in any event within two months¹⁰ after the date on which the transfer is lodged with it¹¹, either register the transfer¹², or give the transferee notice of refusal to register the transfer, together with its reasons for the refusal¹³. If a company fails to comply with these requirements, an offence¹⁴ is committed by the company¹⁵ and every officer¹⁶ of the company who is in default¹⁷.

Articles of association usually require that shares to be transferred in any usual form or any other form approved by the directors¹⁸. Registration of a transfer cannot be refused because it omits particulars which would be found in the form but are in the circumstances immaterial¹⁹; and irregularities in the form of transfer have been often condoned on such grounds as the usage of the company, lapse of time, and the acceptance of the transfer as valid²⁰.

In order to ascertain whether a transfer is valid, and whether the transferee ought to be registered, the directors must have a reasonable time to consider the matter²¹; but this is subject to the obligation to notify the transferee within two months of the transfer being lodged²². Usually the directors notify the registered holder that a transfer has been lodged for registration²³. If the registered holder does not reply to such a notification and a forged transfer is registered, he is not estopped from having the register rectified by substituting his name for that of the transferee²⁴.

On the application of the transferor of any share or interest in a company, the company must enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee²⁵. However, this does not affect the transferee's duty²⁶ to obtain registration²⁷. The transferor may enforce the registration by obtaining an order for rectification of the register²⁸.

The secretary has no implied authority from the directors or the company to register transfers²⁹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'share' see PARA 1042. As to the nature, transferability and numbering of shares see PARAS 1050, 1055 et seq. As to transfers of shares see PARA 389 et seq. As to the register of shares see PARA 1699. For restrictions on the transfer of securities by or on behalf of enemies, or to enemy subjects, see the Trading with the Enemy Act 1939 s 5; and **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 584. The Companies Act 2006 ss 770, 771 apply also to a transfer of company debentures: see PARA 414.

3 Companies Act 2006 s 770(1)(a). See *Re Greene, Greene v Greene* [1949] Ch 333, [1949] 1 All ER 167 (articles providing for automatic transfer on death invalid); and PARA 245. As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq. For the purposes of an equitable assignment of shares by way of gift, delivery of the share transfer form, though required, may be dispensed with in some circumstances, as where it would have been unconscionable for the donor to have recalled the gift: *Pennington v Waine* [2002] EWCA Civ 227, [2002] 4 All ER 215, [2002] 1 WLR 2075 (donor had intended to make an immediate gift, and gift had been perfected, but the share transfer form, though signed by the donor, had not been delivered either to the donee or to the company).

4 Companies Act 2006 s 770(1)(b)(i). An exempt transfer is one within the Stock Transfer Act 1982 (see PARA 430): see s 770(1)(b)(i).

5 Ie under the Companies Act 2006 Pt 21 Ch 2 (ss 783-790) (see PARA 420 et seq): see s 770(1)(b)(ii).

- 6 See the Companies Act 2006 s 770(1)(b)(ii).
 - 7 As to the meaning of 'person' see PARA 311 note 2.
 - 8 Companies Act 2006 s 770(2). As to transmission by operation of law see PARA 434. See also note 18.
 - 9 The Companies Act 2006 s 771 does not apply: (1) in relation to a transfer of shares if the company has issued a share warrant in respect of the shares (see s 779; and PARA 382) (s 771(5)(a)); (2) in relation to the transmission of shares by operation of law (see s 771(5)(b)).
 - 10 As to the meaning of 'month' see PARA 1625 note 10.
 - 11 Companies Act 2006 s 771(1).
 - 12 Companies Act 2006 s 771(1)(a).
 - 13 Companies Act 2006 s 771(1)(b). As to notice of refusal to register a transfer of debentures see PARA 415. As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.
 - 14 A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: Companies Act 2006 s 771(4). As to the standard scale and as to the meaning of 'daily default fine' see PARA 1622. As to offences generally see PARA 1622 et seq.
 - 15 See the Companies Act 2006 s 771(3)(a).
 - 16 As to the meaning of 'officer' generally see PARA 607.
 - 17 See the Companies Act 2006 s 771(3)(b). As to the meaning of 'officer who is in default' see PARA 315.
 - 18 As to a company's articles of association see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.
- The Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 provides that shares may be transferred by means of an instrument of transfer in any usual form or any other form approved by the directors, which is executed by or on behalf of the transferor: art 26(1). No fee may be charged for registering any instrument of transfer or other document relating to or affecting the title to any share: art 26(2). The company may retain any instrument of transfer which is registered (art 26(3)); and the transferor remains the holder of a share until the transferee's name is entered in the register of members as holder of it (art 26(4)). If title to a share passes to a transferee, the company may only recognise the transferee as having any title to that share: art 27(1). As to the register of members see PARA 335 et seq.
- The Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 provides that certificated shares may be transferred by means of an instrument of transfer in any usual form or any other form approved by the directors, which is executed by or on behalf of the transferor, and (if any of the shares is partly paid) the transferee: art 63(1). No fee may be charged for registering any instrument of transfer or other document relating to or affecting the title to any share: art 63(2). The company may retain any instrument of transfer which is registered (art 63(3)); and the transferor remains the holder of a certificated share until the transferee's name is entered in the register of members as holder of it (art 63(4)).
- For companies still using the 'legacy articles' (ie the Companies (Tables A to F) Regulations 1985, SI 1985/805), it is provided that the instrument of transfer of a share may be in any usual form or in any other form which the directors may approve and must be executed by or on behalf of the transferor and, unless the share is fully paid, by or on behalf of the transferee: Table A art 23. No fee is to be charged for the registration of any instrument of transfer or other document relating to or affecting the title to any share: Table A art 27. The company is entitled to retain any instrument of transfer which is registered, but any instrument of transfer which the directors refuse to register must be returned to the person lodging it when notice of the refusal is given: Table A art 28. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but arts 23-28 are applied by Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E

(an unlimited company having a share capital) but are disapplied by Table C art 1 (regulations for the management of a company limited by guarantee and not having a share capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

As to the power to refuse to register a transfer see PARA 392.

19 *Re Letheby and Christopher Ltd* [1904] 1 Ch 815 (where the transferor's address and the denoting number of the share were omitted).

20 *Bargate v Shortridge* (1855) 5 HL Cas 297; *Straffon's Executors' Case* (1852) 1 De GM & G 576; *Burnes v Pennell* (1849) 2 HL Cas 497; *Barrow Mutual Ship Insurance Co v Ashburner* (1885) 54 LJQB 377, CA; *Ind's Case* (1872) 7 Ch App 485 (wrong denoting number); *Feiling's and Rimington's Case* (1867) 2 Ch App 714; *Murray v Bush* (1873) LR 6 HL 37; *Re General Floating Dock Co Ltd* (1867) 15 LT 526; *Re Taurine Co* (1883) 25 ChD 118, CA; *Smellie's Trustees v Smellie* (1952) 103 LJo 139. See also *Nisbet v Shepherd* [1994] 1 BCLC 300, CA (transfer relied on for more than seven years). Errors in the dates of transfers as entered on the register were held to be immaterial in *Weikersheim's Case* (1873) 8 Ch App 831.

21 *Société Générale de Paris v Walker* (1885) 11 App Cas 20, HL; *Re Ottos Kopje Diamond Mines Ltd* [1893] 1 Ch 618, CA; *Ireland v Hart* [1902] 1 Ch 522. The directors are not entitled to refuse to register a transfer on the assumption that the transfer is a breach of trust, but should give notice to any person objecting thereto that they will register the transfer unless proceedings to restrain its registration are taken within a reasonable time: see *Grundy v Briggs* [1910] 1 Ch 444.

22 See PARA 393.

23 See *Taylor v Great Indian Peninsula Rly Co* (1859) 28 LJ Ch 285 at 288 per Wood V-C (affd 28 LJ Ch 709); *Re North British Australasian Co Ltd, ex p Swan* (1860) 7 CBNS 400 at 438-439; *Swan v North British Australasian Co* (1862) 7 H & N 603 at 631 per Wilde B (affd (1863) 2 H & C 175, Ex Ch); *Johnston v Renton* (1870) LR 9 Eq 181.

24 *Barton v London and North Western Rly Co* (1889) 24 QBD 77, CA. As to forged transfers see PARAS 431-433. As to the meaning of estoppel see **ESTOPPEL** vol 16(2) (Reissue) PARA 951.

25 Companies Act 2006 s 772. This provision does not apply in relation to the transfer of uncertificated units of a security by means of a relevant system: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 38(7) (amended by SI 2009/1889). As to the meaning of 'relevant system' see PARA 421 note 1. As to the execution of a share transfer by a personal representative see the Companies Act 2006 s 773; and PARA 398.

26 See PARA 391.

27 *Skinner v City of London Marine Insurance Corp*n (1885) 14 QBD 882, CA.

28 *Re Stranton Iron and Steel Co* (1873) LR 16 Eq 559. See also PARA 351.

29 See *Chida Mines v Anderson* (1905) 22 TLR 27; *Re Matlock Old Bath Hydropathic Co, Wheatcroft's Case* (1873) 42 LJ Ch 853.

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400. Simplified form of transfer of securities.

Certain registered securities¹ may be transferred by means of an instrument under hand in the statutory form² known as a 'stock transfer'³. The transfer is executed by the transferor only, but specifies the full name and address of the transferee⁴. Particulars of the consideration, of the description and number or amount of the securities, and of the person by whom the transfer is made are also to be specified⁵.

In the case of a transfer to a stock exchange nominee⁶ neither particulars of the consideration nor the address of the transferee need be inserted⁷. A form used to transfer securities from a stock exchange nominee which is a body corporate need not be executed under hand but will be sufficiently executed if it bears a facsimile of the corporate seal of the transferor authenticated by the signature (whether actual or facsimile) of a director or the secretary of the transferor⁸.

The execution of a stock transfer need not be attested⁹. Where a stock transfer has been executed for the purpose of a stock exchange transaction¹⁰, the particulars of the consideration and of the transferee may either be inserted in that transfer or, as the case may require, supplied by means of separate instruments in the statutory form¹¹ known as 'brokers' transfers'¹². A brokers' transfer must identify the stock transfer and specify the securities to which each instrument relates and the consideration paid for the securities¹³.

The provisions described above¹⁴ have effect in relation to a transfer of specified securities notwithstanding anything to the contrary in any enactment or instrument relating to the transfer of those securities¹⁵. However, any right to refuse to register a person as the holder of any securities on any ground (other than the form in which the securities purport to be transferred to him) is unaffected¹⁶. Also unaffected is any enactment or rule of law regulating the execution of documents by companies or other bodies corporate, or any articles of association or other instrument regulating the execution of documents by any particular company or body corporate¹⁷.

1 The securities which may be so transferred are fully paid-up registered securities of any description which are: (1) securities issued by any company as defined in the Companies Act 2006 s 1(1) (see PARA 24) except a company limited by guarantee or an unlimited company; (2) securities issued by any body (other than a company as so defined) incorporated in Great Britain by or under any enactment or by royal charter except a building society within the meaning of the Building Societies Act 1986 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1856) or a society registered under the Industrial and Provident Societies Act 1965 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2394); (3) securities issued by the government of the United Kingdom, except stock or bonds in the National Savings Stock Register, and except national savings certificates (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1335 et seq); (4) securities issued by any local authority; (5) units of an authorised unit trust scheme or a recognised scheme within the meaning of the Financial Services and Markets Act 2000 Pt XVII (ss 235-284) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 603); (6) shares issued by an open-ended investment company within the meaning of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 623); Stock Transfer Act 1963 s 1(4) (amended by the Finance Act 1964 ss 24, 26(7), Sch 8 para 10, Sch 9; the Post Office Act 1969 s 108(1)(f); the Companies Consolidation (Consequential Provisions) Act 1985 s 30, Sch 2; the Building Societies Act 1986 s 120(1), Sch 18 Pt I para 5; the Financial Services Act 1986 s 212(2), Sch 16 para 4(a); SI 2001/1228; SI 2001/3649; SI 2009/1941). For these purposes, 'securities' means shares, stock, debentures, debenture stock, loan stock, bonds, units of a collective investment scheme within the meaning of the Financial Services and Markets Act 2000 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 603), and other securities of any description: Stock Transfer Act 1963 s 4(1) (amended by the Financial Services Act 1986 Sch 16 para 4(b); SI 2001/3649). 'Registered securities' means transferable securities the holders of which are entered in a register (whether maintained in Great Britain or not): Stock Transfer Act 1963 s 4(1). As to the meaning of 'company limited by guarantee' see PARA 102. As to the meaning of 'unlimited company' see PARA 102. As to the meaning of 'company' see PARA 24. As to the meanings of 'Great Britain' and 'United Kingdom' see PARA 1 note 5. As to incorporated bodies in Great Britain generally (other than a company within the meaning of the Companies Act 2006) see PARAS 1-2. For these purposes, 'local authority' means: (a) a billing authority or a precepting authority as defined in the Local Government Finance Act 1992 s 69; (b) a fire and rescue authority in Wales constituted by a scheme under the Fire and Rescue Services Act 2004 s 2 or a scheme to which s 4 of that Act applies; (c) a levying body within the meaning of the Local Government Finance Act 1988 s 74; or (d) a body as regards which the Local Government Finance Act 1988 s 75 applies: Stock Transfer Act 1963 s 4(1) (definition amended by the Local Government Finance Act 1992 s 117(1), Sch 13 para 12; the Police and Magistrates' Courts Act 1994 s 93, Sch 9 Pt I; SI 1990/776; the Fire and Rescue Services Act 2004 s 53(1), Sch 1 para 18). As to the meaning of 'Wales' see PARA 1 note 5.

2 References in the Stock Transfer Act 1963 to the forms set out in Sch 1 and Sch 2 (see note 11) include references to forms substantially corresponding to those forms respectively: s 3(1). For the prescribed form of stock transfer see Sch 1 (amended by SI 1974/1214; SI 1996/1571). For the prescribed forms for use as alternatives where the transfer is to a stock exchange nominee or from a stock exchange nominee see the Stock Transfer Act 1963 Sch 1 (amended SI 1974/1214; SI 1990/18). 'Stock exchange' means the London Stock Exchange, and any other stock exchange (whether in Great Britain or not) which is declared by order of the

Treasury to be a recognised stock exchange for the purposes of the Stock Transfer Act 1963: s 4(1). Any such order must be made by statutory instrument, and may be varied or revoked by a subsequent order: s 4(2). As to an order so made see the Stock Transfer (Recognised Stock Exchanges) Order 1973, SI 1973/536, which specifies the Stock Exchange as being a recognised stock exchange for the purposes of the Stock Transfer Act 1963. As to the London Stock Exchange see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 75. The Treasury may by order amend the forms either by altering them as they are set out in Sch 1 or by substituting different forms for those forms or by the addition of forms for use as alternatives to those forms; and references to the forms set out in the Stock Transfer Act 1963 Sch 1 (including references in s 3) must be construed accordingly: s 3(2). Any such order must be made by statutory instrument, and may be varied or revoked by a subsequent order; and any statutory instrument so made is subject to annulment in pursuance of a resolution of either House of Parliament: s 3(4). As to the provision which may be made by any order made under s 3 see s 3(2), (3), (5) (added by the Stock Exchange (Completion of Bargains) Act 1976 s 6). As to the orders made see the Stock Transfer (Amendment of Forms) Order 1974, SI 1974/1214; the Stock Transfer (Addition of Forms) Order 1979, SI 1979/277; the Stock Transfer (Substitution of Forms) Order 1990, SI 1990/18; the Stock Transfer (Addition and Substitution of Forms) Order 1996, SI 1996/1571. As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517.

3 See the Stock Transfer Act 1963 s 1(1). Nothing in s 1 is to be construed as affecting the validity of any instrument which would otherwise be effective to transfer securities: s 1(3). Any instrument purporting to be made in any form for which the form set out in the Stock Transfer (Substitution of Forms) Order 1990, SI 1990/18, Schedule, or in any other form otherwise authorised or required for that purpose, is sufficient, whether or not it is completed in accordance with the form, if it complies with the requirements as to execution and contents which apply to a stock transfer: Stock Transfer Act 1963 s 1(3) (amended by SI 1990/18). In relation to the transfer of securities by means of a stock transfer and a brokers' transfer: (1) any reference in any enactment or instrument (including in particular the Companies Act 2006 s 770(1)(a): see PARA 399) to the delivery or lodging of an instrument, or proper instrument, of transfer, is to be construed as a reference to the delivery or lodging of the stock transfer and the brokers' transfer (Stock Transfer Act 1963 s 2(3)(a) (amended by the Companies Consolidation (Consequential Provisions) Act 1985 Sch 2; Finance Act 1999 s 139, Sch 20 Pt V(5); SI 2008/948)); and (2) any such reference to the date on which an instrument of transfer is delivered or lodged is to be construed as a reference to the date by which the later of those transfers to be delivered or lodged has been delivered or lodged (Stock Transfer Act 1963 s 2(3)(b)). Subject to this, the brokers' transfer (and not the stock transfer) is deemed to be the conveyance or transfer for stamp duty purposes: s 2(3)(c). Section 2(3)(c) is repealed, as from a day to be appointed, by the Finance Act 1990 s 132, Sch 19 Pt VI. However, at the date at which this volume states the law, no such day had been appointed.

4 See the Stock Transfer Act 1963 s 1(1). Where the transfer is executed for the purpose of a stock exchange transaction (see note 10) by the donee of a power of attorney, it is conclusively to be presumed in favour of the transferee that the power had not been revoked at the date of the instrument if a statutory declaration to that effect is made by the donee of the power on or within three months after that date: Powers of Attorney Act 1971 s 6. As to statutory declarations see the Statutory Declarations Act 1835; and **CIVIL PROCEDURE** vol 11 (2009) PARA 1024. As to the meaning of 'month' see PARA 1625 note 10. As to the position where the terms of an offer for all or any uncertificated units of a participating security provide that a person accepting the offer creates an irrevocable power of attorney in favour of the offeror, or a person nominated by the offeror, in the terms set out in the offer see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 43. As to the meaning of 'participating securities' see PARA 421. As to the transfer of uncertificated securities see PARA 420. As to uncertificated securities generally see PARA 421.

5 See the Stock Transfer Act 1963 s 1(1). Section 1 has effect: (1) subject to the amendment that a sold transfer form, and a stock transfer form used to transfer securities to a stock exchange nominee, need not specify particulars of the consideration or the address of the transferee (Stock Transfer (Addition of Forms) Order 1979, SI 1979/277, art 3(1)); and (2) in relation to the form set out in the Stock Transfer (Substitution of Forms) Order 1990, SI 1990/18, Schedule, subject to the amendment that that form need not specify particulars of the consideration or the address of the transferee (art 4).

6 For these purposes, 'stock exchange nominee' means any person whom the Secretary of State designates by order made by statutory instrument as a nominee of the Stock Exchange for the purposes of the Stock Exchange (Completion of Bargains) Act 1976: see s 7(2); and the Stock Transfer (Addition of Forms) Order 1979, SI 1979/277, art 4. As to the meaning of 'person' see PARA 311 note 2. As to the Secretary of State see PARA 6.

7 See the Stock Transfer (Addition of Forms) Order 1979, SI 1979/277, art 3(1); and note 5.

8 Stock Transfer (Addition of Forms) Order 1979, SI 1979/277, art 3(2).

9 See the Stock Transfer Act 1963 s 1(2).

10 'Stock exchange transaction' means a sale and purchase of securities in which each of the parties is a member of a stock exchange acting in the ordinary course of his business as such or is acting through the agency of such a member: Stock Transfer Act 1963 s 4(1).

11 For the prescribed form of brokers' transfer see the Stock Transfer Act 1963 Sch 2 (amended by SI 1974/1214). A form substantially corresponding to the prescribed form is permissible: see Stock Transfer Act 1963 s 3(1); and note 2.

12 See the Stock Transfer Act 1963 s 1(2). As to the prohibition of circulation of blank transfers see PARA 401.

13 See the Stock Transfer Act 1963 s 1(2).

14 See the Stock Transfer Act 1963 s 1: see the text to notes 1-13.

15 Stock Transfer Act 1963 s 2(1).

16 Stock Transfer Act 1963 s 2(1)(a).

17 Stock Transfer Act 1963 s 2(1)(b). Any enactment or instrument relating to the transfer of securities specified for the purposes of s 1 applies with any necessary modifications to a transfer authorised by s 1: see s 2(2) (amended by the Companies Consolidation (Consequential Provisions) Act 1985 Sch 2).

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401. Transfer in blank.

Where shares are transferable only by deed, a blank transfer, although executed by the shareholder, gives no security to an equitable mortgagee, because the filling in of the transferee's name would be a material alteration in the deed rendering the instrument void unless made under an authority conferred by a deed¹. The same principle is applied where blank spaces are left in the deed for the purchaser's name², the consideration and name of the transferee³, and the names of the transferees and attesting witnesses⁴. Where, as is the usual position, transfers are not required to be made by deed, an equitable mortgagee has an implied authority to complete the blank transfer for the purpose of protecting his security, and to procure it to be registered⁵, although he cannot delegate such authority to another person to be used for a different purpose⁶. If the company refuses to register a transfer so completed, the court may direct an account of what is due, and, if the borrower declines to have the account taken within the time limited, may rectify⁷ the register by substituting the name of the transferee⁸. The delivery by executors to a broker of a blank transfer signed by them with the certificates, so that the shares may be registered in their own names, does not estop them from setting up their title against persons who advance money to the broker on a deposit of the certificates, although in good faith and without notice of any fraud⁹.

Where a transfer in blank relating to registered stock of any description has been delivered, pursuant to a sale or gift to or to the order of the purchaser or any person acting on his behalf, or to the donee, any person who in Great Britain parts with possession of that transfer, or who removes it or causes or permits it to be removed from Great Britain before it has been duly completed is liable to a fine¹⁰.

1 *Société Générale de Paris v Walker* (1885) 11 App Cas 20, HL; *France v Clark* (1884) 26 ChD 257, CA; *Powell v London and Provincial Bank* [1893] 2 Ch 555, CA. Registration does not validate the transfer: *Hare v London and North Western Rly Co* (1860) John 722. Cf *Taylor v Great Indian Peninsula Rly Co* (1859) 4 De G & J 559. As to equitable mortgages see **MORTGAGE** vol 77 (2010) PARA 105. There is no requirement for share transfers to be by deed: see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 22. See also the Stock Transfer Act 1963 s 1; and PARA 400.

2 *Hibblewhite v M'Morine* (1840) 6 M & W 200.

3 *Taylor v Great Indian Peninsular Rly Co* (1859) 4 De G & J 559; *Société Générale de Paris v Walker* (1885) 11 App Cas 20, HL; *France v Clark* (1884) 26 ChD 257, CA; *Powell v London and Provincial Bank* [1893] 2 Ch 555, CA.

4 *Swan v North British Australasian Co* (1863) 2 H & C 175, Ex Ch. As to the signature of documents in blank see generally *Lloyds Bank Ltd v Cooke* [1907] 1 KB 794, CA; *Smith v Prosser* [1907] 2 KB 735, CA; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 28.

5 *Re Tahiti Cotton Co, ex p Sargent* (1874) LR 17 Eq 273; *Re Tees Bottle Co, Davies' Case* (1876) 33 LT 834. As to filling in description and number of shares after execution see *Re Barned's Banking Co, ex p Contract Corp'n* (1867) 3 Ch App 105; *Re Financial Insurance Co, Bishop's Case* (1869) 7 Ch App 296n; *Re Blakely Ordnance Co, Bailey's Case* [1869] WN 196. As to gaining priority over earlier equitable interests, of which a creditor had no notice when he advanced his money, by perfecting his security by registration even after he had notice of such prior interest see *Dodds v Hills* (1865) 2 Hem & M 424; *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 3 All ER 747, [1995] 1 WLR 978 (affd on other grounds [1996] 1 All ER 585, [1996] 1 WLR 387, CA).

6 *le* such as to secure a sub-mortgage: *France v Clark* (1884) 26 ChD 257, CA. Cf *Fox v Martin* (1895) 64 LJ Ch 473; *Fry v Smellie* [1912] 3 KB 282, CA; *Fuller v Glyn, Mills, Currie & Co* [1914] 2 KB 168.

7 *le* under the Companies Act 2006 s 125: see PARA 351.

8 *Re Tees Bottle Co, Davies' Case* (1876) 33 LT 834.

9 *Colonial Bank v Cady and Williams* (1890) 15 App Cas 267, HL; *Colonial Bank v Hepworth* (1887) 36 ChD 36; *Fox v Martin* (1895) 64 LJ Ch 473; *Fry v Smellie* [1912] 3 KB 282, CA; *Fuller v Glyn, Mills, Currie & Co* [1914] 2 KB 168; *Hutchinson v Colorado United Mining Co and Hamill* (1886) 3 TLR 265, CA.

10 See the Finance Act 1963 s 67; and **STAMP DUTIES AND STAMP DUTY RESERVE TAX** vol 44(1) (Reissue) PARA 1115. The Finance Act 1963 s 67 is repealed, as from a day to be appointed, by the Finance Act 1990 ss 109(3), 132, Sch 19 Pt VI. Such repeal will apply where the sale is made on or after the abolition day, being such day as may be appointed by the Treasury by order made by statutory instrument: see ss 109(3), 111(1). However, at the date at which this volume states the law, no such day had been appointed.

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402. Non-execution by transferee.

When a company's articles of association¹ provide that the instrument of transfer must be executed or signed both by the transferor and transferee², non-execution by the transferee only makes the transfer irregular and not a nullity; and, if it has been acted on for a long period, it cannot be impeached³. In the absence of such a provision, a transfer executed by the transferor only passes the property in the shares, subject to the transferee's right, on discovering any defect, to repudiate the shares⁴. If it is the practice of the company, the directors may decline to register a transfer where it has not been executed by the transferee⁵, and it is their duty not to permit registration of a transfer of shares on which there is any liability except when satisfied that the consent of the transferee has been given. They may refuse to register a bona fide transfer to a minor because he is unable to accept it⁶, but not a bona fide transfer to a person who is destitute⁷.

1 As to a company's articles of association generally see PARA 228 et seq.

2 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 Pt 4 art 63(1) which provides, in the case of a public company, that an instrument of transfer be executed by or on behalf of the

transferor and, if any of the shares is partly paid, the transferee. Similar provision is made in the Companies (Table A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 23. In the case of a private company the model articles provide for execution by or on behalf of the transferor only: see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 3 art 26(1). As to the provisions for simplified transfer by a stock transfer: see PARA 400. As to the model articles see PARA 228. As to the continuing application of the Companies (Tables A to F) Regulations 1985, SI 1985/805, see PARA 228.

3 *Re Taurine Co* (1883) 25 ChD 118, CA. Cf *Royal Bank of India's Case* (1869) 4 Ch App 252; *Cunningham v City of Glasgow Bank* (1879) 4 App Cas 607, HL. See also *Re Paradise Motor Co Ltd* [1968] 2 All ER 625, [1968] 1 WLR 1125, CA (transfer not signed by transferee); *Dempsey v Celtic Football and Athletic Co Ltd* [1993] BCC 514, Ct of Sess.

4 *Heritage's Case* (1869) LR 9 Eq 5; *Fitch Lovell Ltd v IRC* [1962] 3 All ER 685 at 694, [1962] 1 WLR 1325 at 1338-1339 per Wilberforce J. Cf *Standing v Bowring* (1885) 31 ChD 282, CA.

5 *Marino's Case* (1867) 2 Ch App 596. Cf the provisions for simplified transfer by a stock transfer: see PARA 400.

6 *R v Midland Counties and Shannon Junction Rly Co* (1862) 15 ICLR 514. Cf *Lumsden's Case* (1868) 4 Ch App 31. See also PARA 330. As to the attainment of majority at the age of 18 see the Family Law Reform Act 1969 s 1; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 1.

7 *R v Midland Counties and Shannon Junction Rly Co* (1862) 15 ICLR 514; *Re Discoverers' Finance Corp'n Ltd, Lindlar's Case* [1910] 1 Ch 312, CA.

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403. Position before registration of transfer of shares.

Until the instrument of transfer is registered¹, the transfer of shares is not complete²; the transferor is the legal owner of the shares, and, if they are not fully paid, he is liable to pay all the calls made on them while his name remains on the register of members³. A transferee who has accepted the transfer, although he has not executed it, is, however, liable to indemnify the transferor as from its date⁴.

1 As to the registration of shares see PARA 399.

2 See *Re Fry, Chase National Executors and Trustees Corp'n v Fry* [1946] Ch 312, [1946] 2 All ER 106. Cf *Re Rose, Rose v IRC* [1952] Ch 499, [1952] 1 All ER 1217, CA (gift complete even though delay in registration); *Pennington v Waine* [2002] EWCA Civ 227, [2002] 4 All ER 215, [2002] 1 WLR 2075 (for the purposes of an equitable assignment of shares by way of gift, delivery of the share transfer form, though required, could be dispensed with in some circumstances.). An attempted transfer will not, prima facie, be validated as a declaration of trust (see **TRUSTS** vol 48 (2007 Reissue) PARA 662), but an assignment of a chose or thing in action will be enforced, although voluntary, if everything required to be done by the donor has been done by him (see **CHOSES IN ACTION**).

3 *Sayles v Blane* (1849) 14 QB 205. Cf *Symons' Case* (1870) 5 Ch App 298 at 300 per Giffard LJ. Even after the transfer is registered, it seems that he is liable for calls already made: *Taylor, Phillips and Rickards' Cases* [1897] 1 Ch 298 at 306, CA, per Lindley LJ; *Re Hoylake Rly Co, ex p Littledale* (1874) 9 Ch App 257 at 262 per Mellish LJ. Cf *Watson v Eales* (1857) 23 Beav 294. As to the effect of delay on the part of the company in registering see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 730. He is also liable as a contributory in a winding up: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 703 et seq. As to the effect of an uncompleted contract for sale on voting rights see PARA 653.

4 *Loring v Davis* (1886) 32 ChD 625; *Levi v Ayers* (1878) 3 App Cas 842, PC. Cf *Hardoon v Belilios* [1901] AC 118, PC. The transferor must hold as a trustee all the dividends declared on the shares from that date: *Stevenson v Wilson* 1907 SC 445, Ct of Sess.

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404. Production of share certificate.

A company's articles of association¹ generally require a transfer of shares lodged for registration² to be accompanied by the certificate of such shares³. The articles generally also provide for the granting of a new certificate on proof of the loss or destruction of the old certificate, or upon a satisfactory indemnity being given⁴. Where the articles provide that transfers must be registered on presentation of the transfer accompanied by such evidence as the company may require of the transferor's title, the directors may refuse to register if the certificate is not so produced⁵.

1 As to a company's articles of association see PARA 228.

2 As to the registration of shares see PARA 399.

3 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 Pt 4 art 63(5)(c) (public company); Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 24(a). The model articles provide that no fee may be charged for registering any instrument of transfer or other document relating to or affecting the title to any share, and that the company may retain any instrument of transfer which is registered: see Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 Pt 3 art 26(2), (3) (private company), Sch 3 Pt 4 art 63(2), (3) (public company). Similar provision is made in the Companies (Tables A to F) Regulations 1985, SI 1985/805: see arts 27, 28. As to the model articles see PARA 228. As to the continuing application of the Companies (Tables A to F) Regulations 1985, SI 1985/805, see PARA 230. As to share certificates see PARA 381.

4 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 Pt 3 art 25 (private company), Sch 3 Pt 4 art 49 (public company); Companies (Tables A to F) Regulations 1985, SI 1985/805, art 7. As to the splitting of certificates see PARA 385.

5 *Re East Wheal Martha Mining Co* (1863) 33 Beav 119.

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405. Certification of transfers of shares.

Where a shareholder¹ sells some only of the shares comprised in one certificate², or sells some to one person and the rest to another, on the deposit of the transfer and certificate with the company³, the secretary⁴ generally indorses a note on the transfer or transfers that the certificate has been lodged. This practice, called 'certification of transfers', arose from the difficulty felt by members of the Stock Exchange⁵ in settling their accounts as buyers and sellers of shares where the seller's certificate does not accompany his transfer.

The certification by a company⁶ of an instrument of transfer of any shares⁷ in the company is to be taken as a representation by the company to any person acting on the faith of the certification that there have been produced to the company such documents as on their face show a prima facie title to the shares in the transferor named in the instrument⁸. The certification is not to be taken as a representation that the transferor has any title to the shares⁹. Where a person acts on the faith of a false certification by a company made negligently, the company is under the same liability to him as if the certification had been made fraudulently¹⁰.

These provisions impose very serious liabilities upon a company, which, however, is not bound to certify transfers at all.

If the company by mistake returns the share certificate to the transferor, and the transferor is thereby enabled to obtain money on another transfer of the shares, the company is not liable to the second transferee, as it has no duty to the public with regard to the custody of the certificate¹¹.

1 As to shareholders and membership of companies generally see PARAS 321 et seq, 1697 et seq.

2 As to share certificates see PARA 381.

3 As to the production of share certificates see PARA 404.

4 As to the company secretary see PARA 601 et seq.

5 As to the London Stock Exchange see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 75.

6 For these purposes: (1) an instrument of transfer is certificated if it bears the words 'certificate lodged' (or words to the like effect) (Companies Act 2006 s 775(4)(a)); (2) the certification of an instrument of transfer is made by a company if the person issuing the instrument is a person authorised to issue certificated instruments of transfer on the company's behalf (s 775(4)(b)(i)), and if the certification is signed by a person authorised to certificate transfers on the company's behalf or by an officer or employee either of the company or of a body corporate so authorised (s 775(4)(b)(ii)); (3) a certification is treated as signed by a person if it purports to be authenticated by his signature or initials (whether handwritten or not) (s 775(4)(c)(i)), and if it is not shown that the signature or initials was or were placed there neither by himself nor by a person authorised to use the signature or initials for the purpose of certificating transfers on the company's behalf (s 775(4)(c)(ii)). As to the meaning of 'company' see PARA 24. As to the meaning of 'person' see PARA 311 note 2. As to the meaning of 'officer' see PARA 607. As to the meaning of 'body corporate' see PARA 1 note 5.

7 As to the meaning of 'share' see PARA 1042. As to the transfer of shares see PARA 389 et seq. As to the transfer of debentures see PARA 412 et seq.

8 Companies Act 2006 s 775(1). See *Bishop v Balkis Consolidated Co Ltd* (1890) 25 QBD 512 at 519-520, CA.

9 Companies Act 2006 s 775(2).

10 Companies Act 2006 s 775(3). This, together with s 775(4) (see note 6) negatives the effect of *George Whitechurch Ltd v Cavanagh* [1902] AC 117, HL, and *Kleinwort, Sons & Co v Associated Automatic Machine Corp Ltd* (1934) 151 LT 1, HL, in so far as they relate to fraudulent certifications made by an agent of the company but not for the company's benefit. Cf *McKay's Case* [1896] 2 Ch 757.

11 *Longman v Bath Electric Tramways Ltd* [1905] 1 Ch 646, CA.

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406. Issue of certificates on transfer of shares.

A company¹ must, within two months² after the date on which a transfer³ of any of its shares⁴ is lodged with the company, complete and have ready for delivery the certificates of the shares transferred⁵. However, this duty does not apply:

- 705 (1) if the conditions of issue of the shares provide otherwise⁶;
- 706 (2) in the case of a transfer to a financial institution⁷;
- 707 (3) in the case of a transfer of shares if, following the transfer, the company has issued a share warrant⁸ in respect of the shares⁹; or
- 708 (4) in the case of a transfer to a person¹⁰ where he is not entitled¹¹ to a certificate or other document of or evidencing title in respect of the securities transferred¹².

If default is made in complying with this duty¹³ an offence is committed by every officer¹⁴ of the company who is in default¹⁵.

1 As to the meaning of 'company' see PARA 24.

2 As to the meaning of 'month' see PARA 1625 note 10.

3 For these purposes a 'transfer' means (1) a transfer duly stamped and otherwise valid (Companies Act 2006 s 776(2)(a)); or (2) an exempt transfer within the Stock Transfer Act 1982 (see PARA 430) (s 776(2)(b)), but does not include a transfer that the company is for any reason entitled to refuse to register and does not register (s 776(2)). As to powers to refuse to register transfers of shares see PARA 393. As to the registration of shares see PARA 399. As to the transfer of debentures see PARA 412 et seq.

4 As to the meaning of 'share' see PARA 1042.

5 Companies Act 2006 s 776(1)(a). As to share certificates see PARA 381. As to the enforcement of this duty see PARA 407.

6 Companies Act 2006 s 776(3)(a).

7 Companies Act 2006 s 776(3)(b). A company of which shares are allotted to a financial institution (see s 778(1)(a)), or with which a transfer for transferring shares to a financial institution is lodged (see s 778(1)(c)), is not required in consequence of that allotment or transfer to comply with s 776(1) (see s 778(1)). As to the meaning of 'financial institution' see PARA 383 note 6.

8 See the Companies Act 2006 s 779; and PARA 382.

9 Companies Act 2006 s 776(3)(c).

10 As to the meaning of 'person' see PARA 311 note 2.

11 Ie by virtue of regulations under the Stock Transfer Act 1982 s 3: see PARA 430.

12 See the Companies Act 2006 ss 776(4), 777(1). If in such a case the transferee subsequently becomes entitled to such a certificate or other document by virtue of any provision of those regulations (s 777(2)(a)), and gives notice in writing of that fact to the company (s 777(2)(b)), s 776 has effect as if the reference in s 776(1) (see the text to notes 1-5) to the date of the lodging of the transfer were a reference to the date of the notice (s 777(2)). As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

13 Ie with the Companies Act 2006 s 776(1): see the text to notes 1-5.

14 As to the meaning of 'officer' see PARA 607.

15 Companies Act 2006 s 776(5). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 776(6). As to the standard scale and as to the meaning of 'daily default fine' see PARA 1622. As to offences generally see PARA 1622 et seq.

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407. Enforcement of issue of certificate on transfer.

If a company¹ on which a notice has been served² requiring it to make good any default in complying with the duty³ as to the issue of certificates on the transfer of any of its shares⁴, fails to make good the default within ten days after service of the notice, the person⁵ entitled to have the certificates delivered to him may apply to the court⁶. The court may on such an application make an order directing the company and any officer⁷ of it to make good the default within such time as may be specified in the order⁸. The order may provide that all costs of and incidental to the application are to be borne by the company or by an officer of it responsible for the default⁹.

1 As to the meaning of 'company' see PARA 24.

2 As to the service of documents on a company see PARA 671.

3 Ie the duty under the Companies Act 2006 s 776(1) (see PARA 406): see s 782(1)(b).

4 See the Companies Act 2006 s 782(1)(b).

5 As to the meaning of 'person' see PARA 311 note 2.

6 Companies Act 2006 s 782(1). As to the meaning of 'court' see PARA 212 note 1. As to the procedure that applies on application to the court under companies legislation generally see PARA 305. Failure to comply with the duty under s 776(1) is also a criminal offence: see PARA 406.

7 As to the meaning of 'officer' see PARA 607.

8 Companies Act 2006 s 782(2).

9 Companies Act 2006 s 782(3).

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408. Transferor's liability after registration of transfer of shares.

When a transfer of shares has been duly registered¹, the transferor ceases to be a member of the company² in respect of the shares transferred. Thereupon he becomes a 'past member' of the company, and in case of a winding up is liable to contribute towards the payment of its debts and liabilities and the expenses of the winding up and for the adjustment of the rights of contributors among themselves³, to the extent of the amount remaining unpaid on the shares, where it appears to the court that the existing members are unable to satisfy the contributions required to be made by them under the Insolvency Act 1986⁴, unless the debt or liability was contracted after he has ceased to be a member⁵, or unless he has ceased to be a member for a year or upwards before the commencement of the winding up⁶.

Where a limited company is re-registered as unlimited⁷, a person⁸ who, at the time when the application for it to be re-registered was lodged, was a past member of the company, and did not thereafter again become a member, does not have his liability increased⁹.

Where an unlimited company is re-registered as limited¹⁰, a past member of the company who was a member of it at the time of re-registration is, if the winding up commences within a period of three years from re-registration, liable to contribute to the assets of the company without limit in respect of debts and liabilities contracted before such re-registration¹¹. Where no persons who were members of the company at that time are existing members of the company, a person who at such time was a present or past member of the company will (unless he has ceased to be a member for one year or upwards), if the winding up takes place within a period of three years from re-registration, be liable to contribute without limit notwithstanding that the existing members have satisfied the contributions required to be made by them under the Insolvency Act 1986¹².

1 As to the registration of shares see PARA 399.

2 As to who qualifies as a member of a company see PARA 321.

3 As to the liability of past and present members see the Insolvency Act 1986 s 74(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 704. As to liability for calls already made see PARA 403. As to contributories generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 703 et seq.

4 See the Insolvency Act 1986 s 74(2)(c); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 705.

5 See the Insolvency Act 1986 s 74(2)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 705.

6 See the Insolvency Act 1986 s 74(2)(a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 705.

7 See the Insolvency Act 1986 s 78(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 706. As to re-registration as an unlimited company see PARAS 176-177. As to the meanings of 'limited company' and 'unlimited company' see PARA 102.

8 As to the meaning of 'person' see PARA 311 note 2.

9 See the Insolvency Act 1986 s 78(2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 706.

10 See the Insolvency Act 1986 s 77(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 706. As to re-registration as a limited company see PARA 178.

11 See the Insolvency Act 1986 s 77(2), (4); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 706.

12 See the Insolvency Act 1986 ss 74(2)(a), 77(3); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 705-706.

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409. Stamp duty reserve tax.

Until a day to be appointed the following provisions have effect¹.

Stamp duty reserve tax is charged in respect of agreements to transfer certain securities for money or money's worth and in respect of arrangements involving depositary receipts and clearance services². The principal charge in respect of agreements is deferred and will not arise if certain conditions are satisfied³; but there is also an immediate and unconditional charge in respect of agreements to transfer chargeable securities which are constituted by or transferable by means of certain renounceable instruments as soon as they are made, without regard to whether or not the agreement is implemented by an instrument of transfer⁴. In each case, tax is imposed at the rate of 50 pence for every £100 or part of £100 of the amount or value of the consideration⁵. A higher rate charge of £1.50 per £100 or part of £100 of the amount or value of the consideration is imposed in respect of certain transactions involving depositary receipts or clearance services which do not give rise to a transfer chargeable with ad valorem stamp duty in the same amount as the tax⁶.

1 The Finance Act 1986 Pt IV (ss 86-99) is repealed by the Finance Act 1990 s 132, Sch 19 Pt VII as from a day to be appointed in accordance with s 110: see Sch 19 Pt VII; and **STAMP DUTIES AND STAMP DUTY RESERVE TAX** vol 44(1) (Reissue) PARA 1119. At the date at which this volume states the law no such day had been appointed.

2 Stamp duty reserve tax was introduced by the Finance Act 1986 Pt IV (ss 86-99): see s 86(1). As to stamp duty reserve tax generally see **STAMP DUTIES AND STAMP DUTY RESERVE TAX** vol 44(1) (Reissue) PARA 1118 et seq. As to exceptions and exemptions see **STAMP DUTIES AND STAMP DUTY RESERVE TAX** vol 44(1) (Reissue) PARA 1125 et seq.

3 See **STAMP DUTIES AND STAMP DUTY RESERVE TAX** vol 44(1) (Reissue) PARA 1120.

4 See **STAMP DUTIES AND STAMP DUTY RESERVE TAX** vol 44(1) (Reissue) PARA 1121.

5 See **STAMP DUTIES AND STAMP DUTY RESERVE TAX** vol 44(1) (Reissue) PARAS 1120-1121.

6 See **STAMP DUTIES AND STAMP DUTY RESERVE TAX** vol 44(1) (Reissue) PARAS 1122-1123.

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(ii) Debentures

A. ISSUE OF CERTIFICATES ON ALLOTMENT OF DEBENTURES ETC

410. Issue of certificates etc on allotment.

A company¹ must, within two months after the allotment of any of its debentures² or debenture stock³, complete and have ready for delivery, the debentures allotted⁴, or the certificates of the debenture stock allotted⁵. This requirement does, however, not apply: (1) if the conditions of issue of the debentures or debenture stock provide otherwise⁶; or (2) in the case of allotment to a financial institution⁷.

If default is made in complying with the requirement to complete and have ready for delivery the debentures allotted, or the certificates of the debenture stock allotted, an offence is committed by every officer of the company who is in default⁸. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale⁹ and (for continued contravention) a daily default fine¹⁰ not exceeding one-tenth of level 3 on the standard scale¹¹.

- 1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.
- 2 As to the meaning of 'debenture' see PARA 1299. As to the issue of certificates on the allotment of shares see PARA 383.
- 3 As to debenture stock see PARA 1309. As to the meaning of 'stock' generally see PARA 1163.
- 4 Companies Act 2006 s 769(1)(b). As to enforcement see PARA 411.
- 5 Companies Act 2006 s 769(1)(c). See note 4.
- 6 Companies Act 2006 s 769(2)(a).
- 7 Companies Act 2006 s 769(2)(b). A company of which debentures are (or of which debenture stock is) allotted to a financial institution (s 778(1)(a), (b)), or with which a transfer for transferring debentures or debenture stock to a financial institution is lodged (s 778(1)(c)), is not required in consequence of that allotment or transfer to comply with s 769(1) (s 778(1)). As to the meaning of 'financial institution' for these purposes see PARA 383 note 6.
- 8 Companies Act 2006 s 769(3). As to the meaning of 'officer' see PARA 607; and as to the meaning of 'officer in default' see PARA 315.
- 9 As to the standard scale see PARA 1622.
- 10 As to the meaning of 'daily default fine' see PARA 1622.
- 11 Companies Act 2006 s 769(4).

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411. Enforcement of issue of certificate.

If a company¹ on which a notice has been served² requiring it to make good any default in complying with the duty³ of that company to complete and have ready for delivery the debentures⁴ allotted, or the certificates of the debenture stock⁵ allotted⁶, fails to make good the default within ten days after service of the notice, the person entitled to have the certificates or the debentures delivered to him may apply to the court⁷. The court may on such an application make an order directing the company and any officer⁸ of it to make good the default within such time as may be specified in the order⁹; and the order may provide that all costs of and incidental to the application are to be borne by the company or by an officer of it responsible for the default¹⁰.

- 1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.
- 2 As to the service of documents on a company see PARA 671.
- 3 I.e. the duty under the Companies Act 2006 s 769(1) (see PARA 383); see s 782(1)(a).
- 4 As to the meaning of 'debenture' see PARA 1299. As to the issue of certificates on the allotment of shares see PARA 383.

- 5 As to debenture stock see PARA 1309. As to the meaning of 'stock' generally see PARA 1163.
- 6 See the Companies Act 2006 s 782(1)(a).
- 7 Companies Act 2006 s 782(1). As to the meaning of 'court' see PARA 212 note 1. As to the procedure that applies on application to the court under companies legislation generally see PARA 305.
- 8 As to the meaning of 'officer' see PARA 607.
- 9 Companies Act 2006 s 782(2).
- 10 Companies Act 2006 s 782(3).

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B. TRANSFER OF DEBENTURES

(A) TRANSFER IN GENERAL

412. Transfer of debentures by delivery.

Being a negotiable instrument¹, a bearer debenture² is transferable by delivery so as to pass the property in it to a holder for value in good faith, and entitle him, upon delivery of it to the company, to obtain payment of the principal secured when due, and to sue in his own name upon the debenture³.

1 *Bechuanaland Exploration Co v London Trading Bank* [1898] 2 QB 658; *Edelstein v Schuler & Co* [1902] 2 KB 144. Cf *Goodwin v Roberts* (1876) 1 App Cas 476, HL, apparently overruling *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 (where it was held that the company might lawfully refuse to pay the bona fide transferee for value of a stolen debenture payable to bearer, even though he had no notice of the theft). As to negotiable instruments generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1400 et seq.

2 As to debentures payable to bearer see PARA 1304. As to the meaning of 'debenture' see PARA 1299.

3 In certain cases decided before the negotiability of bearer debentures had been fully established (see note 1), the holder for value in good faith of a bearer debenture was held entitled to prove on the debentures without being subject to equities between the company and the persons to whom the debentures were originally issued: see *Re Blakely Ordnance Co, ex p New Zealand Corpn* (1867) 3 Ch App 154; *Re General Estates Co, ex p City Bank* (1868) 3 Ch App 758 (where the question arose whether the instrument was not in fact a promissory note); *Re Imperial Land Co of Marseilles, ex p Colborne and Strawbridge* (1870) LR 11 Eq 478 at 490-491, 494 per Malins V-C (question whether the instrument was a promissory note). Contrast *Re Natal Investment Co, Financial Corpn Claim* (1868) 3 Ch App 355; but see comments on this case in *Re General Estates Co, ex p City Bank* at 762 per Page Wood LJ; *Re Imperial Land Co of Marseilles, ex p Colborne and Strawbridge* at 493 per Malins V-C; *Higgs v Assam Tea Co* (1869) LR 4 Exch 387 at 395 per Bramwell B; *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 385 per Blackburn J; *Re Romford Canal Co, Pocock's Claim, Trickett's Claim, Carew's Claim* (1883) 24 ChD 85 at 91-92 per Kay J.

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413. Transfer of debentures by instrument.

According to the ordinary form, a registered debenture¹ is legally transferable only by an instrument of transfer duly executed or signed and by registration in the company's books. The conditions of registered debentures usually provide that the company must keep a register of the debentures at its registered office, containing the names, addresses and descriptions of the registered holders and particulars of the debentures held by them respectively; that every transfer must be in writing under the hand of the registered holder or his legal personal representatives; that, upon delivery of the transfer at the registered office with the prescribed fee and such evidence of identity or title as the company may reasonably require, the transfer is to be registered, and a note of the registration is to be indorsed on the debenture; and that the company will be entitled to retain the transfer². The simplified form of transfer introduced by the Stock Transfer Act 1963 applies to debentures³.

When the principal and interest secured by the debenture are to be paid to the registered holder for the time being without regard to any equities subsisting between the company and the original or any intermediate holder, and the conditions as to transfer are similar to those mentioned above, a liquidator is bound to register the transfer, even if made after the liquidation commenced, and after judgment in a claim by debenture holders, but before any notice of a claim by the company against the transferor⁴.

1 As to which see PARA 1277 et seq. As to the meaning of 'debenture' see PARA 1299.

2 Under such provisions, a person entitled by transmission is not bound to produce a transfer before registration: *Edwards v Ransomes and Rapier Ltd* (1930) 143 LT 594.

3 See the Stock Transfer Act 1963 ss 1, 4(1); and PARA 400.

4 *Re Goy & Co Ltd, Farmer v Goy & Co Ltd* [1900] 2 Ch 149. Cf *Re Palmer's Decoration and Furnishing Co* [1904] 2 Ch 743; *Re Brown and Gregory Ltd, Shephard v Brown and Gregory Ltd, Andrews v Brown and Gregory Ltd* [1904] 1 Ch 627; *Re Richard Smith & Co* [1901] 1 IR 73; *Re Rhodesia Goldfields Ltd* [1910] 1 Ch 239.

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(B) FORMALITIES REQUIRED BY TRANSFER

414. Necessity for proper instrument of transfer.

A company¹ may not register a transfer of debentures² of the company unless: (1) a proper instrument of transfer has been delivered to it³; or (2) the transfer is an exempt transfer⁴ or is in accordance with regulations⁵ relating to the evidencing and transfer of title to securities without written instrument⁶. However, this requirement⁷ does not affect any power of the company to register as debenture holder a person to whom the right to any debentures of the company has been transmitted by operation of law⁸.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'debenture' see PARA 1299. As to transfers of debentures see PARAS 412, 413. The Companies Act 2006 ss 770, 771 apply also to a transfer of shares in a company: see PARA 399. Accordingly, see also the cases cited in PARA 399.

3 Companies Act 2006 s 770(1)(a). As to the provision made for the sending of documents or information from a company (the 'company communications provisions') see PARA 678 et seq.

4 Companies Act 2006 s 770(1)(b)(i). For these purposes, an exempt transfer is one within the Stock Transfer Act 1982: see s 770(1)(b)(i). As to exempt transfers within the Stock Transfer Act 1982, which in its relation to companies affects only debentures issued by the Agricultural Mortgage Corp'n plc, the Commonwealth Development Finance Co Ltd, Finance for Industry plc and the Scottish Agricultural Securities Corp'n Ltd, see s 2, Sch 1 para 6(1); and PARA 430. See also *Re Greene, Greene v Greene* [1949] Ch 333, [1949] 1 All ER 167.

5 le under the Companies Act 2006 Pt 21 Ch 2 (ss 783-790) (see PARA 420 et seq): see s 770(1)(b)(ii).

6 See the Companies Act 2006 s 770(1)(b)(ii). As to the transfer and registration of uncertificated securities other than shares see PARA 425.

7 le the Companies Act 2006 s 770(1) (see the text and notes 1-6): see s 770(2).

8 Companies Act 2006 s 770(2). As to transmission by operation of law see PARA 434.

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415. Procedure on transfer being lodged.

When a transfer of debentures¹ of a company² has been lodged with the company³, the company must, as soon as practicable and in any event within two months after the date on which the transfer is lodged with it⁴, either register the transfer⁵, or give the transferee notice of refusal to register the transfer, together with its reasons for the refusal⁶. If a company fails to comply with these requirements⁷, an offence is committed by the company and by every officer of the company who is in default⁸. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale⁹ and (for continued contravention) a daily default fine¹⁰ not exceeding one-tenth of level 3 on the standard scale¹¹.

If the company refuses to register a transfer of debentures, it must provide the transferee with such further information about the reasons for the refusal as the transferee may reasonably request¹². If a company fails to comply with these requirements¹³, an offence is committed by the company and by every officer of the company who is in default¹⁴. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale and (for continued contravention) a daily default fine not exceeding one-tenth of level 3 on the standard scale¹⁵.

A company's articles of association¹⁶ usually require that securities are to be transferred in any usual form or any other form approved by the directors¹⁷.

1 As to the meaning of 'debenture' see PARA 1299. As to transfers of debentures see PARAS 412-413.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 The Companies Act 2006 s 771 does not apply in relation to the transmission of debentures by operation of law: see s 771(5)(b). As to the application of s 771 to a transfer of shares see PARA 399.

- 4 See the Companies Act 2006 s 771(1).
- 5 Companies Act 2006 s 771(1)(a).
- 6 Companies Act 2006 s 771(1)(b).
- 7 He fails to comply with the Companies Act 2006 s 771(1) (see the text and notes 1-6): see s 771(3).
- 8 Companies Act 2006 s 771(3). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.
- 9 As to the standard scale see PARA 1622.
- 10 As to the meaning of 'daily default fine' see PARA 1622.
- 11 Companies Act 2006 s 771(4).
- 12 Companies Act 2006 s 771(2). This does not, however, include copies of minutes of meetings of directors: s 771(2). As to the meaning of 'director' under the Companies Acts see PARA 478. As to meetings of directors see PARA 527 et seq.
- 13 He fails to comply with the Companies Act 2006 s 771(2) (see the text and note 12): see s 771(3).
- 14 Companies Act 2006 s 771(3).
- 15 Companies Act 2006 s 771(4).
- 16 As to a company's articles of association see PARA 228 et seq.
- 17 Neither the model articles of association that have been prescribed under the Companies Act 2006 (see PARA 228 et seq) nor the model articles that were prescribed under the Companies Act 1985 (the 'legacy articles', which have not been revoked: see PARA 230) make provision explicitly in relation to the transfer and registration of debentures, although such provision is made in relation to shares: see PARAS 392, 399.

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416. Transfer of debenture by way of mortgage.

The principles applicable to mortgages of shares apply to mortgages of debentures which are transferable by registration of an instrument of transfer in the company's books¹.

¹ See PARA 1212.

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417. Certification of instrument of transfer of debentures.

The certification by a company¹ of an instrument of transfer of any debentures² of the company is to be taken as a representation by the company to any person acting on the faith of the certification that there have been produced to the company such documents as on their face show a prima facie title to the debentures in the transferor named in the instrument³. The certification is not to be taken as a representation that the transferor has any title to the debentures⁴. Where a person acts on the faith of a false certification by a company made negligently, the company is under the same liability to him as if the certification had been made fraudulently⁵.

These provisions impose very serious liabilities upon a company, which, however, is not bound to certify transfers at all.

If the company by mistake returns the debenture to the transferor, and the transferor is thereby enabled to obtain money on another transfer, the company is not liable to the second transferee, as it has no duty to the public with regard to the custody of the debenture⁶.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'debenture' see PARA 1299. As to transfers of debentures see PARAS 412-416. For these purposes: (1) an instrument of transfer is certificated if it bears the words 'certificate lodged' (or words to the like effect) (Companies Act 2006 s 775(4)(a)); (2) the certification of an instrument of transfer is made by a company if the person issuing the instrument is a person authorised to issue certificated instruments of transfer on the company's behalf (s 775(4)(b)(i)), and if the certification is signed by a person authorised to certificate transfers on the company's behalf or by an officer or employee either of the company or of a body corporate so authorised (s 775(4)(b)(ii)); (3) a certification is treated as signed by a person if it purports to be authenticated by his signature or initials (whether handwritten or not) (s 775(4)(c)(i)), and if it is not shown that the signature or initials was or were placed there neither by himself nor by a person authorised to use the signature or initials for the purpose of certificating transfers on the company's behalf (s 775(4)(c)(ii)). As to the meaning of 'officer' see PARA 607. As to the meaning of 'body corporate' see PARA 1 note 5.

3 Companies Act 2006 s 775(1). See *Bishop v Balkis Consolidated Co Ltd* (1890) 25 QBD 512 at 519-520, CA.

4 Companies Act 2006 s 775(2).

5 Companies Act 2006 s 775(3). This, together with s 755(4) (see note 2) negatives the effect of *George Whitechurch Ltd v Cavanagh* [1902] AC 117, HL, and *Kleinwort, Sons & Co v Associated Automatic Machine Corp'n Ltd* (1934) 151 LT 1, HL, in so far as they relate to fraudulent certifications made by an agent of the company but not for the company's benefit. Cf *McKay's Case* [1896] 2 Ch 757.

6 *Longman v Bath Electric Tramways Ltd* [1905] 1 Ch 646, CA.

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418. Issue of certificates etc on transfer.

A company¹ must, within two months after the date on which a transfer² of any of its debentures³ or debenture stock⁴ is lodged with the company, complete and have ready for delivery, the debentures transferred⁵, or the certificates of the debenture stock transferred⁶.

However, this duty does not apply:

- 709 (1) if the conditions of issue of the debentures or debenture stock provide otherwise⁷;

- 710 (2) in the case of a transfer to a financial institution⁸;
 711 (3) in the case of a transfer to a person where he is not entitled⁹ to a certificate or other document of or evidencing title in respect of the securities transferred¹⁰.

If default is made in complying with this duty¹¹ to complete and have ready for delivery, the debentures transferred, or the certificates of the debenture stock transferred, an offence is committed by every officer of the company who is in default¹². A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹³ and (for continued contravention) a daily default fine¹⁴ not exceeding one-tenth of level 3 on the standard scale¹⁵.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 For these purposes, a 'transfer' means (1) a transfer duly stamped and otherwise valid (Companies Act 2006 s 776(2)(a)), or (2) an exempt transfer within the Stock Transfer Act 1982 (s 776(2)(b)); but does not include a transfer that the company is for any reason entitled to refuse to register and does not register (s 776(2)). As to exempt transfers within the Stock Transfer Act 1982, which in its relation to companies affects only debentures issued by the Agricultural Mortgage Corp'n plc, the Commonwealth Development Finance Co Ltd, Finance for Industry plc and the Scottish Agricultural Securities Corp'n Ltd, see s 2, Sch 1 para 6(1); and PARA 430. As to powers to refuse to register transfers of debentures see PARA 415.

3 As to the meaning of 'debenture' see PARA 1299.

4 As to debenture stock see PARA 1309. As to the meaning of 'stock' generally see PARA 1163.

5 Companies Act 2006 s 776(1)(b). As to the enforcement of this duty see PARA 419.

6 Companies Act 2006 s 776(1)(c). See note 5.

7 Companies Act 2006 s 776(3)(a).

8 Companies Act 2006 s 776(3)(b). A company of which debentures are (or of which debenture stock is) allotted to a financial institution (see s 778(1)(a), (b)), or with which a transfer for transferring debentures or debenture stock to a financial institution is lodged (see s 778(1)(c)), is not required in consequence of that allotment or transfer to comply with s 776(1) (see s 778(1)). As to the meaning of 'financial institution' for these purposes see PARA 383 note 6.

9 Ie by virtue of regulations under the Stock Transfer Act 1982 s 3 (see PARA 430): see the Companies Act 2006 ss 776(4), 777(1). The provisions of s 776(1) (see the text to notes 1-6) are subject to s 777: s 776(4).

10 See the Companies Act 2006 ss 776(4), 777(1). If in such a case the transferee subsequently becomes entitled to such a certificate or other document by virtue of any provision of those regulations (s 777(2)(a)), and gives notice in writing of that fact to the company (s 777(2)(b)), s 776 has effect as if the reference in s 776(1) (see the text to notes 1-6) to the date of the lodging of the transfer were a reference to the date of the notice (s 777(2)). As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

11 Ie in complying with the Companies Act 2006 s 776(1) (see the text to notes 1-6): see s 776(5).

12 Companies Act 2006 s 776(5). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

13 As to the standard scale see PARA 1622.

14 As to the meaning of 'daily default fine' see PARA 1622.

15 Companies Act 2006 s 776(6).

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419. Enforcement of issue of certificate on transfer.

If a company¹ on which a notice has been served² requiring it to make good any default in complying with the duty³ to complete and have ready for delivery, debentures⁴ transferred, or certificates of the debenture stock⁵ transferred⁶, fails to make good the default within ten days after service of the notice, the person entitled to have the certificates delivered to him may apply to the court⁷. The court may on such an application make an order directing the company and any officer⁸ of it to make good the default within such time as may be specified in the order⁹. The order may provide that all costs of and incidental to the application are to be borne by the company or by an officer of it responsible for the default¹⁰.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

3 I.e. the duty under the Companies Act 2006 s 776(1) (see PARA 406); see s 782(1)(b).

4 As to the meaning of 'debenture' see PARA 1299.

5 As to debenture stock see PARA 1309. As to the meaning of 'stock' generally see PARA 1163.

6 See the Companies Act 2006 s 782(1)(b).

7 Companies Act 2006 s 782(1). As to the meaning of 'court' see PARA 212 note 1. As to the procedure that applies on application to the court under companies legislation generally see PARA 305. Failure to comply with the duty under s 776(1) is also a criminal offence: see PARA 418.

8 As to the meaning of 'officer' see PARA 607.

9 Companies Act 2006 s 782(2).

10 Companies Act 2006 s 782(3).

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(iii) Uncertificated Securities

420. Provision to allow securities to be evidenced without certificate and transferred without written instrument.

Provision may be made by regulations¹ for enabling title to securities to be evidenced and transferred without a written instrument². The regulations must contain such safeguards as appear to the authority making the regulations appropriate for the protection of investors and for ensuring that competition is not restricted, distorted or prevented³. The regulations may:

- 712 (1) make provision for procedures for recording and transferring title to securities⁴, and for the regulation of those procedures and the persons⁵ responsible for or involved in their operation⁶;
- 713 (2) for the purpose of enabling or facilitating the operation of the procedures provided for by the regulations, make provision with respect to the rights and obligations of persons in relation to securities dealt with under the procedures⁷;
- 714 (3) include provision for the purpose of giving effect to (a) the transmission of title to securities by operation of law⁸; (b) any restriction on the transfer of title to securities arising by virtue of the provisions of any enactment⁹ or instrument, court order or agreement¹⁰; (c) any power conferred by any such provision on a person to deal with securities on behalf of the person entitled¹¹;
- 715 (4) make provision with respect to the persons responsible for the operation of the procedures provided for by the regulations as to the consequences of their insolvency or incapacity¹², or as to the transfer from them to other persons of their functions in relation to those procedures¹³.

Regulations¹⁴ may also make provision: (i) enabling the members of a company¹⁵ or of any designated class of companies¹⁶ to adopt, by ordinary resolution¹⁷, arrangements under which title to securities is required to be evidenced or transferred (or both) without a written instrument¹⁸; or (ii) requiring companies, or any designated class of companies, to adopt such arrangements¹⁹. Such regulations may make such provision in respect of all securities issued by a company²⁰, or in respect of all securities of a specified description²¹. The regulations may prohibit the issue of any certificate by the company in respect of the issue or transfer of securities²², require the provision by the company to holders of securities of statements (at specified intervals or on specified occasions) of the securities held in their name²³, and make provision as to the matters of which any such certificate or statement is, or is not, evidence²⁴.

Regulations under these provisions²⁵ may:

- 716 (A) modify or exclude any provision of any enactment or instrument, or any rule of law²⁶;
- 717 (B) apply, with such modifications as may be appropriate, the provisions of any enactment or instrument (including provisions creating criminal offences)²⁷;
- 718 (C) require the payment of fees, or enable persons to require the payment of fees, of such amounts as may be specified in the regulations or determined in accordance with them²⁸;
- 719 (D) empower the authority making the regulations to delegate to any person willing and able to discharge them any functions of the authority under the regulations²⁹.

Before making regulations³⁰ under these provisions³¹, or any order³² enabling or requiring arrangements to be adopted³³, the authority having power to make regulations must carry out such consultation as appears to it to be appropriate³⁴.

The Uncertificated Securities Regulations 2001³⁵ enable title to units of a security³⁶ to be evidenced otherwise than by a certificate³⁷ and transferred otherwise than by a written instrument by means of a relevant system³⁸, and make provision for certain supplementary and incidental matters³⁹. Where a title to a unit of a security is evidenced otherwise than by a certificate by virtue of these regulations, the transfer of title to such a unit of a security is subject to the regulations⁴⁰.

1 The power to make regulations under the Companies Act 2006 Pt 21 Ch 2 (ss 783-790) is exercisable by the Treasury and the Secretary of State, either jointly or concurrently (s 784(1)); and references to the authority having power to make regulations must accordingly be read as references to both or either of them, as the case

may require (s 784(2)). Any such regulations are subject to affirmative resolution procedure (ie the order must not be made unless a draft of the statutory instrument containing it has been laid before Parliament and approved by a resolution of each House of Parliament) (ss 784(3), 1290); and, before making such regulations, the authority having power to make such regulations must carry out such consultation as appears to it to be appropriate(s 789). In exercise of the powers so conferred, the Treasury has made the Companies Act 2006 (Consequential Amendments) (Uncertificated Securities) Order 2009, SI 2009/1889. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517. As to the Secretary of State see PARA 6.

2 Companies Act 2006 s 785(1). In Pt 21 Ch 2 (ss 783-790): (1) 'securities' means shares, debentures, debenture stock, loan stock, bonds, units of a collective investment scheme within the meaning of the Financial Services and Markets Act 2000 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 603) and other securities of any description (s 783(a)); (2) references to title to securities include any legal or equitable interest in securities (s 783(b)); (3) references to a transfer of title include a transfer by way of security (s 783(c)); (4) references to transfer without a written instrument include, in relation to bearer securities, transfer without delivery (s 783(d)). As to the meaning of 'share' see PARA 1042. As to the meaning of 'debenture' see PARA 1299. As to bearer securities see PARA 1304.

3 Companies Act 2006 s 785(3).

4 Companies Act 2006 s 785(2)(a).

5 As to the meaning of 'person' see PARA 311 note 2.

6 Companies Act 2006 s 785(2)(b).

7 Companies Act 2006 s 785(4).

8 Companies Act 2006 s 785(5)(a).

9 As to the meaning of 'enactment' see PARA 17 note 2.

10 Companies Act 2006 s 785(5)(b).

11 Companies Act 2006 s 785(5)(c).

12 Companies Act 2006 s 785(6)(a).

13 Companies Act 2006 s 785(6)(b).

14 Ie under the Companies Act 2006 Pt 21 Ch 2 (ss 783-790).

15 As to the meaning of 'member of a company' see PARA 321. As to the meaning of 'company' see PARA 24.

16 In the Companies Act 2006 s 786, references to a designated class of companies are to a class designated in the regulations or by order under s 787 (s 786(5)(a)); and 'specified' means specified in the regulations (s 786(5)(b)). The authority having power to make regulations may by order: (1) designate classes of companies for the purposes of s 786 (s 787(1)(a)); (2) provide that, in relation to securities of a specified description in a designated class of companies (s 787(1)(b)(i)), or in a specified company or class of companies (s 787(1)(b)(ii)), specified provisions of regulations made by virtue of s 786 either do not apply or apply subject to specified modifications (s 787(1)(b)). In this context, 'specified' means specified in the order: s 787(2). Such an order is subject to negative resolution procedure (ie the statutory instrument containing the order being subject to annulment in pursuance of a resolution of either House of Parliament)(ss 787(3), 1289); and, before making any order under s 787, the authority having power to make regulations under Pt 21 Ch 2 must carry out such consultation as appears to it to be appropriate (s 789). As to the making of orders under the Companies Act 2006 generally see ss 1288-1292. At the date at which this volume states the law, no such order had been made under s 787.

17 As to the meaning of 'ordinary resolution' see PARA 613. The Companies Act 2006 Pt 3 Ch 3 (ss 29-30) (see PARA 231) applies to a resolution passed by virtue of regulations under Pt 21 Ch 2 (ss 783-790): see s 790.

18 Companies Act 2006 s 786(1)(a). The arrangements provided for by the regulations making such provision as is mentioned in s 786(1): (1) must not be such that a person who but for the arrangements would be entitled to have his name entered in the company's register of members ceases to be so entitled (s 786(3)(a)); and (2) must be such that a person who but for the arrangements would be entitled to exercise any rights in respect of the securities continues to be able effectively to control the exercise of those rights (s 786(3)(b)). As to the register of members see PARA 335 et seq.

- 19 Companies Act 2006 s 786(1)(b). See also note 18.
- 20 Companies Act 2006 s 786(2)(a).
- 21 Companies Act 2006 s 786(2)(b).
- 22 Companies Act 2006 s 786(4)(a).
- 23 Companies Act 2006 s 786(4)(b).
- 24 Companies Act 2006 s 786(4)(c).
- 25 Ie regulations under the Companies Act 2006 Pt 21 Ch 2 (ss 783-790).
- 26 Companies Act 2006 s 788(a).
- 27 Companies Act 2006 s 788(b).
- 28 Companies Act 2006 s 788(c).
- 29 Companies Act 2006 s 788(d).
- 30 Ie regulations under the Companies Act 2006 Pt 21 Ch 2 (ss 783-790).
- 31 Companies Act 2006 s 788(a).
- 32 Ie under the Companies Act 2006 s 787: see note 16.
- 33 Companies Act 2006 s 788(b).
- 34 Companies Act 2006 s 788. As to the exercise of the duty to consult see **JUDICIAL REVIEW** vol 61 (2010) PARA 627.
- 35 Ie the Uncertificated Securities Regulations 2001, SI 2001/3755, which were made under the Companies Act 1989 s 207 (repealed) and which now have effect as if made under the Companies Act 2006 ss 784, 785, 788 (see the text to notes 1-34) by virtue of s 1297 (see PARAS 17-18).
- 36 'Unit', in relation to a security, means the smallest possible transferable unit of the security (for example a single share): Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(1).
- 37 'Certificate' means any certificate, instrument or other document of, or evidencing, title to units of a security: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(1). As to share certificates see PARA 381.
- 38 As to the meaning of 'relevant system' see PARA 421 note 1.
- 39 See the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 2(1).
- 40 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 2(1).

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421. Uncertificated shares.

Where an operator¹ permits title to shares² of the appropriate class³, or in relation to which a directors' resolution duly passed⁴ is effective, to be transferred by means of a relevant system⁵, and the company in question permits the holding of shares of that class in uncertificated form and the transfer of title to any such shares by means of a relevant system⁶, then title to shares of that class which are recorded on an operator register of members may be transferred by

means of that relevant system⁷. Such securities are known as 'participating securities'⁸; and the issuer of such a security is known as a 'participating issuer'⁹.

Any requirements in an enactment or rule of law which apply in respect of the transfer of securities otherwise than by means of a relevant system do not prevent an operator from registering a transfer of title to uncertificated units of a security¹⁰ upon settlement of a transfer of such units in accordance with his rules¹¹, or an operator-instruction from requiring a participating issuer to register a transfer of title to uncertificated units of a security¹². Notwithstanding any enactment, instrument or rule of law, a participating issuer must not issue a certificate in relation to any uncertificated units of a participating security¹³; and a document issued by or on behalf of a participating issuer purportedly evidencing title to an uncertificated unit of a participating security is not evidence of title to the unit of the security¹⁴. Any requirement in or under any enactment to endorse any statement or information on a certificate evidencing title to a unit of a security does not prohibit the conversion into, or issue of, units of the security in uncertificated form¹⁵; and, in relation to uncertificated units of the security, must be taken to be a requirement for the relevant participating issuer to provide the holder of the units with the statement or information on request by him¹⁶.

1 'Operator' means a person approved by the Treasury under the Uncertificated Securities Regulations 2001, SI 2001/3755, as operator of a relevant system: reg 3(1). As to the continuing effect of the Uncertificated Securities Regulations 2001, SI 2001/3755, see PARA 420 note 35. As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517. As to the meaning of 'person' see PARA 311 note 2. 'Relevant system' means a computer-based system, and procedures, which enable title to units of a security to be evidenced and transferred without a written instrument, and which facilitate supplementary and incidental matters: see reg 2(1). 'Relevant system' includes an 'operator-system', that is to say those facilities and procedures which are part of the relevant system, which are maintained and operated by or for an operator, by which he generates operator-instructions and receives dematerialised instructions from system-participants and by which persons change the form in which units of a participating security are held (see PARAS 422-423): reg 3(1). As to the meaning of 'securities' see PARA 420 note 2. As to the meaning of references to title to securities, to a transfer of title, and to transfer without a written instrument, see PARA 420 note 2. As to the meaning of 'unit' see PARA 420 note 36. 'Operator-instruction' means a properly authenticated dematerialised instruction attributable to an operator; and 'dematerialised instruction' means an instruction sent or received by means of a relevant system: reg 3(1). 'Instruction' includes any instruction, election, acceptance or any other message of any kind: reg 3(1). For this purpose, a dematerialised instruction is properly authenticated if it complies with the specifications referred to in reg 5(1), Sch 1 para 5(3) (reg 3(2)(a)); and a dematerialised instruction is attributable to a person if it is expressed to have been sent by that person, or if it is expressed to have been sent on behalf of that person, in accordance with the rules and specifications referred to in Sch 1 para 5(4) (reg 3(2)(b)). A dematerialised instruction may be attributable to more than one person: reg 3(2)(b). As to properly authenticated dematerialised instructions see also reg 35. As to liability for forged dematerialised instructions and induced operator-instructions see reg 36. 'System-participant', in relation to a relevant system, means a person who is permitted by an operator to send and receive properly authenticated dematerialised instructions: reg 3(1). 'Generate', in relation to an operator-instruction, means to initiate the procedures by which the operator-instruction comes to be sent: reg 3(1). The settlement service for the London Stock Exchange is provided by CRESTCo: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 75-76. Nothing in the Uncertificated Securities Regulations 2001, SI 2001/3755, prevents an operator from charging a fee for carrying out any function under Pt 3 (regs 14-34) (reg 39(1)), except that an operator may not charge a fee to a participating issuer (see note 9) for maintaining or keeping and entering up an operator register of securities (see note 3) (reg 39(2)).

2 'Share' means share (or stock) in the share capital of a company: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(1). As to the meaning of 'share' generally see PARA 1042. As to the meaning of 'share capital' see PARA 1042. As to the meaning of 'company' see PARA 24.

3 In relation to which the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 15 applies. Regulation 15 applies to a class of shares if the company's articles of association are in all respects consistent with: (1) the holding of shares of that class in uncertificated form; (2) the transfer of title to shares of that class by means of a relevant system; and (3) the Uncertificated Securities Regulations 2001, SI 2001/3755: reg 15. As to a company's articles of association see PARA 228 et seq. As to companies whose articles of association in any respect are inconsistent with these requirements see note 4. As to the provision made in the model articles as to uncertificated shares see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 Pt 4 arts 50, 64. As to the model articles see PARA 228. 'Uncertificated', in relation to a unit of a security, means (subject to the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 42: see PARA 1516) that title to the unit is recorded on the relevant operator register of securities, and may, by virtue of the Uncertificated

Securities Regulations 2001, SI 2001/3755, be transferred by means of a relevant system; and 'certificated', in relation to a unit of a security, means that the unit is not an uncertificated unit: reg 3(1). 'Operator register of securities', in relation to shares, means an operator register of members: reg 3(1). As to the meaning of 'operator register of members' see PARA 340. As to liability for induced amendments to operator registers of securities see reg 36. For the purposes of regs 15, 16 (see note 4) and 17, any shares with respect to which share warrants to bearer are issued under the Companies Act 2006 s 779 (see PARA 382) are regarded as forming a separate class of shares: see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 18 (amended by SI 2009/1889). A class of shares in relation to which, immediately before 26 November 2001 (ie the date on which the Uncertificated Securities Regulations 2001, SI 2001/3755, came into force: see reg 1), the Uncertificated Securities Regulations 1995, SI 1995/3272, reg 15 (now revoked) applied is taken to be a class of shares in relation to which the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 15 applies: reg 17(1)(a). As from 26 November 2001, a company's articles of association in relation to any such class of shares, and the terms of issue of any such class of shares, cease to apply to the extent that they are inconsistent with any provision of the Uncertificated Securities Regulations 2001, SI 2001/3755: reg 17(2).

4 In accordance with the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 16. Regulation 16 applies to a class of shares if a company's articles of association in any respect are inconsistent with: (1) the holding of shares of that class in uncertificated form; (2) the transfer of title to shares of that class by means of a relevant system; or (3) any provision of the Uncertificated Securities Regulations 2001, SI 2001/3755: reg 16(1). See also as to what constitutes a class of shares reg 18; and note 3. A company may resolve by resolution of its directors (a 'directors' resolution') that title to shares of a class issued or to be issued by it may be transferred by means of a relevant system: reg 16(2). As to the meaning of 'director' see PARA 478. Upon a directors' resolution becoming effective in accordance with its terms, and for as long as it is in force, the articles of association in relation to the class of shares which were the subject of the directors' resolution do not apply to any uncertificated shares of that class to the extent that they are inconsistent with heads (1)-(3) above: reg 16(3). Unless a company has given notice to every member of the company in accordance with its articles of association of its intention to pass a directors' resolution before the passing of such a resolution, it must give such notice within 60 days of the passing of the resolution: reg 16(4). As to who qualifies as a member of a company see PARA 321. In the event of default in complying with reg 16(4), an offence is committed by every officer of the issuer who is in default: reg 16(7) (reg 16(7) substituted, (7A) added by SI 2007/2194). A person guilty of such an offence is liable on conviction on indictment, to a fine; or on summary conviction, to a fine not exceeding the statutory maximum: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 16(7A) (as so added). As to the statutory maximum see PARA 1622. An officer of a participating issuer is in default in complying with, or in contravention of, reg 16(4) if, and only if, he knowingly and wilfully authorised or permitted the default: see reg 47(1). 'Officer', in relation to an operator or a participating issuer, includes: (a) where the operator or the participating issuer is a company, such persons as are mentioned in the Companies Act 2006 s 1173(1) (see PARA 607); (b) where the operator or the participating issuer is a partnership, a partner or, in the event that no partner is situated in the United Kingdom, a person in the United Kingdom who is acting on behalf of a partner; and (c) where the operator or the participating issuer is neither a company nor a partnership, any member of its governing body or, in the event that no member of its governing body is situated in the United Kingdom, a person in the United Kingdom who is acting on behalf of any member of its governing body: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(1) (definition amended by SI 2009/1889). As to companies and partnerships etc see PARAS 1-4. As to the meaning of 'United Kingdom' see PARA 1 note 5. Notice given by the company before 26 November 2001 (ie the date on which the Uncertificated Securities Regulations 2001, SI 2001/3755, came into force: see reg 1), of its intention to pass a directors' resolution which, if it had been given after the coming into force of the regulations would have satisfied the requirements of reg 16(4), are taken to satisfy those requirements: reg 16(5). In respect of a class of shares, the members of a company may by ordinary resolution:

- 158 (i) if a directors' resolution has not been passed, resolve that the directors of the company may not pass a directors' resolution;
- 159 (ii) if a directors' resolution has been passed but not yet come into effect in accordance with its terms, resolve that it may not come into effect;
- 160 (iii) if a directors' resolution has been passed and is effective in accordance with its terms but the class of shares has not yet been permitted by the operator to be a participating security, resolve that the directors' resolution ceases to have effect; or
- 161 (iv) if a directors' resolution has been passed and is effective in accordance with its terms and the class of shares has been permitted by the operator to be a participating security, resolve that the directors must take the necessary steps to ensure that title to shares of the class that was the subject of the directors' resolution cease to be transferable by means of a relevant system and that the directors' resolution ceases to have effect,

and the directors are bound by the terms of any such ordinary resolution: reg 16(6). The Companies Act 2006 Pt 3 Ch 3 (ss 29-30) (resolutions affecting a company's constitution: see PARA 231) applies to a directors' resolution passed by virtue of the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 16(2), or a resolution of a company passed by virtue of reg 16(6) preventing or reversing such a resolution: reg 16(8A) (added by SI

2007/2194; amended by SI 2009/1889). As to the meaning of 'ordinary resolution' see PARA 613. A company may not permit the holding of shares in such a class as is referred to in the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 16(1) in uncertificated form, or the transfer of title to shares in such a class by means of a relevant system, unless in relation to that class of shares a directors' resolution is effective: reg 16(8). A default in complying with, or a contravention of, reg 16(8) is actionable at the suit of a person who suffers loss as a result of the default or contravention, or who is otherwise adversely affected by it, subject to the defences and other incidents applying to claims for breach of statutory duty: reg 46(1). However, this does not affect the liability which any person may incur, nor affect any right which any person may have, apart from reg 46(1): reg 46(2). As to breach of statutory duty see **TORT** vol 45(2) (Reissue) PARA 395 et seq. Regulation 16 must not be taken to exclude the right of the members of a company to amend the articles of association of the company, in accordance with the articles, to allow the holding of any class of its shares in uncertificated form and the transfer of title to shares in such a class by means of a relevant system: reg 16(9). A class of shares in relation to which, immediately before 26 November 2001, the Uncertificated Securities Regulations 1995, SI 1995/3272, reg 16 (revoked) applied is taken to be a class of shares in relation to which a directors' resolution passed in accordance with the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 16 is effective: reg 17(1)(b).

5 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 14(a).

6 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 14(b).

7 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 14. References in any enactment or rule of law to a proper instrument of transfer or to a transfer with respect to securities, or any expression having like meaning, is taken to include a reference to an operator-instruction to a participating issuer to register a transfer of title on the relevant issuer register of securities in accordance with the operator-instruction: reg 37. As to the meaning of 'issuer register of securities' see PARA 422 note 20. As to the transfer and registration of uncertificated securities other than shares see PARA 425.

8 'Participating security' means a security title to units of which is permitted by an operator to be transferred by means of a relevant system: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(1). Where the terms of issue of a participating security which is a share, or the articles of association of the company in question, provide that its units may only be held in uncertificated form, and title to them may only be transferred by means of a relevant system, that security is known as a 'wholly dematerialised security': reg 3(1). As to the conversion of securities into certificated form, by means of a rematerialisation notice, see PARA 422. As to the conversion of securities into uncertificated form see PARA 423.

9 'Participating issuer' means, subject to certain provisions relating to general public sector securities (ie the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(3)), a person who has issued a security which is a participating security: reg 3(1).

10 As to the transfer of uncertificated shares see PARA 420.

11 'Settlement', in relation to a transfer of uncertificated units of a security between two system-members by means of a relevant system, means the delivery of those units to the transferee and, where appropriate, the creation of any associated obligation to make payments, in accordance with the rules and practices of the operator; and 'settle' is to be construed accordingly: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(1). 'Rules', in relation to an operator, means rules made or conditions imposed by him with respect to the provision of the relevant system: reg 3(1). As to the meaning of 'system-member' see PARA 422 note 9.

12 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 38(1).

13 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 38(2). This provision is expressed to be subject to reg 32(7): see PARA 422 note 21.

14 See the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 38(3). In particular, the Companies Act 2006 s 768 (see PARA 381) does not apply to any document issued with respect to uncertificated shares: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 38(3)(a) (amended by SI 2009/1889). Nor do the provisions of the Law of Property Act 1925 s 53(1)(c) (see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 24) or s 136 (see **CHOSES IN ACTION** vol 13 (2009) PARA 72 et seq) (which impose requirements for certain dispositions and assignments to be in writing) apply, if they would otherwise do so, to any transfer of title to uncertificated units of a security by means of a relevant system; and any disposition or assignment of an interest in uncertificated units of a security title to which is held by a relevant nominee: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 38(5). For this purpose, 'relevant nominee' means a subsidiary undertaking of an operator designated by him as a relevant nominee in accordance with his rules and practices: reg 38(6). As to the requirements to be met by an operator's rules and practices see Sch 1 paras 25-27.

15 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 38(4)(a).

16 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 38(4)(b).

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422. Conversion of uncertificated securities into certificated form.

Except as provided for by the Uncertificated Securities Regulations 2001¹, a unit of a participating security² must not be converted from uncertificated³ form into certificated⁴ form unless an operator⁵ generates an operator-instruction⁶ (known as a 'rematerialisation notice') to notify the relevant participating issuer⁷ that a conversion event has occurred⁸. A conversion event occurs:

- 720 (1) where such a conversion is permitted by the operator's conversion rules⁹; or
- 721 (2) following receipt by an operator of a system-member instruction¹⁰ requiring the conversion into certificated form of uncertificated units of a participating security registered in the name of the system-member¹¹; or
- 722 (3) following receipt by an operator of written notification from a participating issuer which is a company¹² requiring the conversion into certificated form of uncertificated units of a participating security, issued by that participating issuer and registered in the name of a system-member, and containing a statement that the conversion is required to enable the participating issuer to deal with the units in question in accordance with provisions in that participating issuer's memorandum or articles¹³ or in the terms of issue of the units in question¹⁴.

An operator may generate a rematerialisation notice following a conversion event occurring in the circumstances specified in head (1) above¹⁵; he must generate such a notice following a conversion event occurring in the circumstances specified in head (2) above unless the participation in the relevant system, by the system-member in whose name the uncertificated units in question are registered, has been suspended pursuant to the operator's rules¹⁶; and he must also generate such a notice following a conversion event occurring in the circumstances specified in head (3) above¹⁷.

On the generation of a rematerialisation notice, the operator must delete any entry in an operator register of securities¹⁸ which shows the relevant system-member as the holder of the unit or units specified in the rematerialisation notice¹⁹.

On receipt of a rematerialisation notice, the participating issuer to whom the rematerialisation notice is addressed must, where relevant, enter the name of the system-member on an issuer register of securities²⁰ as the holder of the unit or units specified in the rematerialisation notice²¹. Such sanctions as apply to a company and its officers in the event of a default in complying with the provisions of the Companies Act 2006 if a company refuses to register a transfer of shares or debentures²² apply to an operator and his officers in the event of a default in complying with the above requirement²³ to delete entries in an operator register of securities²⁴, and apply to a participating issuer and his officers in the event of a default in complying with the above requirement²⁵ to enter the name of the system-member on an issuer register of securities²⁶.

During any period between the required deletion of any entry in an operator register of securities and the required making of the entry in an issuer register of securities, the relevant system-member retains title to the units of the security specified in the rematerialisation notice

notwithstanding the deletion of any entry in the operator register of securities²⁷; and, where those units are shares, the relevant system-member is deemed to continue to be a member of the company²⁸.

1 ie by the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 42: see PARA 1516. As to the continuing effect of the Uncertificated Securities Regulations 2001, SI 2001/3755, see PARA 420 note 35.

2 As to the meaning of 'participating security' see PARA 421 note 8. As to the meaning of 'unit' see PARA 420 note 36. As to the meaning of 'securities' see PARA 420 note 2.

3 As to the meaning of 'uncertificated' see PARA 421 note 3.

4 As to the meaning of 'certificated' see PARA 421 note 3.

5 As to the meaning of 'operator' see PARA 421 note 1.

6 As to the meaning of 'operator-instruction' see PARA 421 note 1.

7 As to the meaning of 'participating issuer' see PARA 421 note 9.

8 See the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32(1). Nothing in the Uncertificated Securities Regulations 2001, SI 2001/3755, requires an operator or participating issuer, or their officers, to take any action to change a unit of a wholly dematerialised security from uncertificated form to certificated form or vice versa: reg 45(b). As to the meaning of 'officer' (in relation to an operator or a participating issuer) see PARA 421 note 4. As to the meaning of 'wholly dematerialised security' see PARA 421 note 8.

9 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32(2)(a). 'Operator's conversion rules' means the rules made and practices instituted by the operator in order to comply with Sch 1 para 18: reg 3(1). As to the meaning of 'rules' (in relation to an operator) see PARA 421 note 11. A relevant system must enable system-members: (1) to change the form in which they hold units of a participating security; and (2) where appropriate, to require participating issuers to issue certificates relating to units of a participating security held or to be held by them: Sch 1 para 18. As to the meaning of 'relevant system' see PARA 421 note 1. 'System-member', in relation to a relevant system, means a person who is permitted by an operator to transfer by means of that system title to uncertificated units of a security held by him, and includes, where relevant, two or more persons who are jointly so permitted: reg 3(1). As to the meaning of 'certificate' see PARA 420 note 37. As to the meaning of 'person' see PARA 311 note 2. As to the meaning of references to title to securities, and to a transfer of title see PARA 420 note 2.

10 'System-member instruction' means a properly authenticated dematerialised instruction attributable to a system-member: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(1). As to the meaning of 'dematerialised instruction' see PARA 421 note 1.

11 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32(2)(b).

12 As to the meaning of 'company' see PARA 24.

13 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to the meaning of 'memorandum of association' see PARA 104.

14 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32(2)(c).

15 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32(3)(a).

16 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32(3)(b).

17 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32(3)(c).

18 As to the meaning of 'operator register of securities' see PARA 421 note 3.

19 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32(4).

20 'Issuer register of securities', in relation to shares, means an issuer register of members: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(1). As to the meaning of 'issuer register of members' see PARA 340.

21 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32(5). A default in complying with, or a contravention of, reg 32(5) is actionable at the suit of a person who suffers loss as a result of the default or contravention, or who is otherwise adversely affected by it, subject to the defences and other incidents applying to claims for breach of statutory duty: see reg 46(1). However, this does not affect the liability which any person may incur, nor affect any right which any person may have, apart from reg 46(1): reg 46(2). As to breach of statutory duty see **TORT** vol 45(2) (Reissue) PARA 395 et seq. Following the making of an entry in an issuer register of securities in accordance with reg 32(5) or registration of a transfer of title to units of a security in accordance with reg 28 (see PARA 427), the relevant participating issuer must, where the terms of issue of the security in question provide for a certificate to be issued, issue a certificate in respect of the units of the security to the relevant person: reg 32(7). The Companies Act 2006 s 776(1) (duty of company as to issue of certificates: see PARA 406) applies in relation to the issue of a certificate by a participating issuer pursuant to the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32(7) as it applies in relation to the completion and having ready for delivery by a company of share certificates, debentures or certificates of debenture stock: reg 32(8) (amended by SI 2009/1889). The reference in the Companies Act 2006 s 776(1)(b) (as it so applies) to the date on which a transfer is lodged with the company is a reference to the date on which the participating issuer receives the relevant rematerialisation notice in accordance with the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32, or the relevant operator-instruction in accordance with reg 27(7) (see PARA 426): reg 32(8) (as so amended). Such sanctions as apply to a company and its officers in the event of a default in complying with the Companies Act 2006 s 776(1) (see PARA 406) apply to a participating issuer and his officers in the event of a default in complying with the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32(7) in accordance with the requirements laid down in reg 32(8): reg 32(10) (amended by SI 2009/1889). For the purposes of the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32(10), an officer of a participating issuer is in default in complying with the Companies Act 2006 s 776(1) if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 47(1). However, reg 32(9) (see the text to notes 22-26), (10) does not apply to any of the following or its officers: (1) the Crown; (2) any person acting on behalf of the Crown; (3) the Bank of England; (4) the Registrar of Government Stock; (5) any previous Registrar of Government Stock; or (6) in respect of a security which immediately before it became a participating security was transferable by exempt transfer within the meaning of the Stock Transfer Act 1982 (see PARA 430), a participating issuer: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 48 (amended by SI 2004/1662). As to the Bank of England see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 793 et seq. As to the Registrar of Government Stock see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1336.

22 Ie the Companies Act 2006 s 771(1), (2) (see PARA 415): see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32(9) (amended by SI 2009/1889).

23 Ie the requirement contained in the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32(4): see the text to notes 18-19.

24 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32(9)(a). For these purposes, an officer of an operator is in default in complying with the provision mentioned in that regulation if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: see reg 47(2). See also reg 48; and note 21.

25 Ie the requirement contained in the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32(5): see the text to notes 20-21.

26 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32(9)(b). For these purposes, an officer of a participating issuer is in default if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 47(1). See also reg 48; and note 21.

27 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32(6)(a).

28 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 32(6)(b). As to the meaning of 'member of a company' see PARA 321.

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423. Conversion of certificated securities into uncertificated form.

A unit of a participating security¹ must not be converted from certificated² form into uncertificated³ form unless the participating issuer⁴ notifies the operator⁵ by means of an issuer-instruction⁶ (referred to as a 'dematerialisation notice') that any of the following circumstances have arisen⁷, namely that:

- 723 (1) where the unit of the participating security is held by a system-member⁸, the participating issuer:
- 29
52. (a) has received a request in writing from the system-member in the form required by the operator's conversion rules⁹ that the unit be converted from certificated form to uncertificated form¹⁰; and
53. (b) has received the certificate¹¹ relating to that unit¹²; or
- 30
- 724 (2) where the unit of the participating security is to be registered on an operator register of securities¹³ in the name of a system-member following a transfer of the unit to him, the participating issuer:
- 31
54. (a) has received (by means of the operator-system¹⁴ unless the operator's conversion rules permit otherwise) a proper instrument of transfer in favour of the system-member relating to the unit to be transferred¹⁵;
55. (b) has received (by means of the operator-system unless the operator's conversion rules permit otherwise) the certificate relating to that unit¹⁶; and
56. (c) may accept by virtue of the operator's conversion rules that the system-member to whom the unit is to be transferred wishes to hold it in uncertificated form¹⁷.
- 32

Upon giving a dematerialisation notice, a participating issuer must delete any entry in any issuer register of securities¹⁸ which evidences title to the unit or units of the participating security in question¹⁹; and following receipt of a dematerialisation notice, an operator must enter the name of the relevant system-member on an operator register of securities as the holder of the relevant unit or units of the participating security in question²⁰.

When a dematerialisation notice is given, the relevant system-member, or the transferor of the unit or units of the security in question, as the case may be, retains (without prejudice to any equitable interest which the transferee may have acquired in the unit or units in question) title²¹ to the units of the security specified in the dematerialisation notice notwithstanding the deletion of any entry in any issuer register of securities that is required²² to be made²³ and, where those units are shares²⁴, is deemed to continue to be a member of the company²⁵. Where a dematerialisation notice is given in the circumstances specified in head (2) above, such title is retained, and (where appropriate) such membership is deemed to continue, until the time at which the operator enters²⁶ the name of the relevant system-member on an operator register of securities²⁷.

Within two months²⁸ of receiving a dematerialisation notice, an operator must generate an operator-instruction²⁹ informing the participating issuer whether an entry has been made in an operator register of securities in response to the dematerialisation notice³⁰.

Such sanctions as apply to a company and its officers in the event of a default in complying with the provisions of the Companies Act 2006 if a company refuses to register a transfer of shares or debentures³¹ apply, in the event of a default, to a participating issuer and his officers³² or to an operator and his officers³³ (as the case may be)³⁴.

1 As to the meaning of 'participating security' see PARA 421 note 8. As to the meaning of 'unit' see PARA 420 note 36.

- 2 As to the meaning of 'certificated' see PARA 421 note 3.
- 3 As to the meaning of 'uncertificated' see PARA 421 note 3.
- 4 As to the meaning of 'participating issuer' see PARA 421 note 9.
- 5 As to the meaning of 'operator' see PARA 421 note 1.
- 6 'Issuer-instruction' means a properly authenticated dematerialised instruction attributable to a participating issuer: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(1). As to the meaning of 'dematerialised instruction' see PARA 421 note 1. As to the continuing effect of the Uncertificated Securities Regulations 2001, SI 2001/3755, see PARA 420 note 35.
- 7 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(1). Subject to reg 33(3) (see note 15) and reg 33(4) (see note 12), a participating issuer must not give a dematerialisation notice except in the circumstances specified in reg 33(2) (see the text to notes 8-17): reg 33(5). A default in complying with, or a contravention of, reg 33(5) is actionable at the suit of a person who suffers loss as a result of the default or contravention, or who is otherwise adversely affected by it, subject to the defences and other incidents applying to claims for breach of statutory duty: see reg 46(1). However, this does not affect the liability which any person may incur, nor affect any right which any person may have, apart from reg 46(1): reg 46(2). As to breach of statutory duty see **TORT** vol 45(2) (Reissue) PARA 395 et seq. Nothing in the Uncertificated Securities Regulations 2001, SI 2001/3755, requires an operator or participating issuer, or their officers, to take any action to change a unit of a wholly dematerialised security from uncertificated form to certificated form or vice versa: reg 45(b). As to the meaning of 'officer' (in relation to an operator or a participating issuer) see PARA 421 note 4. As to the meaning of 'wholly dematerialised security' see PARA 421 note 8.
- 8 As to the meaning of 'system-member' see PARA 422 note 9.
- 9 As to the meaning of 'operator's conversion rules' see PARA 422 note 9.
- 10 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(2)(a)(i).
- 11 As to the meaning of 'certificate' see PARA 420 note 37.
- 12 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(2)(a)(ii). The requirements in reg 33(2)(a)(ii) and reg 33(2)(b)(ii) (see head (2)(b) in the text) that the participating issuer must have received a certificate relating to the unit of the participating security does not apply in a case where the system-member or transferor (as the case may be) does not have a certificate in respect of the unit to be converted into uncertificated form because no certificate has yet been issued to him or is due to be issued to him in accordance with the terms of issue of the relevant participating security: reg 33(4).
- 13 As to the meaning of 'operator register of securities' see PARA 421 note 3.
- 14 As to the meaning of 'operator-system' see PARA 421 note 1.
- 15 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(2)(b)(i). The requirement in reg 33(2)(b)(i) that the participating issuer must have received an instrument of transfer relating to the unit of the participating security does not apply in a case where for a transfer of a unit of that security no instrument of transfer is required: reg 33(3).
- 16 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(2)(b)(ii). See also note 12.
- 17 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(2)(b)(iii).
- 18 As to the meaning of 'issuer register of securities' see PARA 422 note 20.
- 19 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(6).
- 20 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(7). This obligation is subject to reg 27 (see PARA 426) if the notice was given in the circumstances specified in reg 33(2)(b) (see heads (2)(a)-(c) in the text): see reg 33(7).
- 21 As to the meaning of references to title to securities see PARA 420 note 2.
- 22 It is required to be made by the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(6): see the text to notes 18-19.

- 23 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(8)(a).
- 24 As to the meaning of 'share' see PARA 421 note 2.
- 25 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(8)(b). As to the meaning of 'member of a company' see PARA 321.
- 26 Is in accordance with the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(7): see the text and note 20.
- 27 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(9).
- 28 As to the meaning of 'month' see PARA 1625 note 10.
- 29 As to the meaning of 'operator-instruction' see PARA 421 note 1.
- 30 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(10).
- 31 Is the Companies Act 2006 s 771(1), (2) (see PARA 415): see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(11) (amended by SI 2009/1889).
- 32 Is in the event of a default in complying with the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(6) (see the text to notes 18-19): see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(11)(a).
- 33 Is in the event of a default in complying with the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(7) (see the text and note 20) or reg 33(10) (see the text to notes 28-30): see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(11)(b).
- 34 See the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(11) (as amended: see note 31). For the purposes of reg 33(11), an officer of a participating issuer, or an officer of an operator, is in default if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 47(1), (2). However, reg 33(11) does not apply to any of the following or its officers: (1) the Crown; (2) any person acting on behalf of the Crown; (3) the Bank of England; (4) the Registrar of Government Stock; (5) any previous Registrar of Government Stock; or (6) in respect of a security which immediately before it became a participating security was transferable by exempt transfer within the meaning of the Stock Transfer Act 1982 (see PARA 430), a participating issuer: see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 48 (amended by SI 2004/1662). As to the Bank of England see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 793 et seq. As to the Registrar of Government Stock see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1336.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(9) CERTIFICATION AND TRANSFER OF SECURITIES/(iii) Uncertificated Securities/424. New issues in uncertificated form.

424. New issues in uncertificated form.

For the purposes of an issue of units of a participating security¹, a participating issuer² may require the operator³ to enter the name of a person in an operator register of securities⁴ as the holder of new units of that security in uncertificated⁵ form if, and only if, that person is a system-member⁶; and compliance with any such requirement is subject to the rules of the operator⁷. Such a requirement made by a participating issuer may be made by means of an issuer-instruction⁸ and must specify the names of the persons to be entered in the operator register of securities as the holders of new uncertificated units of the security, and the number of such units to be issued to each of those persons⁹.

An operator who receives such a requirement made by a participating issuer must notify the participating issuer, by operator-instruction¹⁰ or in writing, if he has not entered the name of any one or more of the persons in question in the operator register of securities as the holder of new units of the security¹¹.

- 1 As to the meaning of 'participating security' see PARA 421 note 8. As to the meaning of 'unit' see PARA 420 note 36. 'Issue', in relation to a new unit of a security, means to confer title to a new unit on a person: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(1). As to the meaning of references to title to securities see PARA 420 note 2. As to the meaning of 'person' see PARA 311 note 2. As to the continuing effect of the Uncertificated Securities Regulations 2001, SI 2001/3755, see PARA 420 note 35.
- 2 As to the meaning of 'participating issuer' see PARA 421 note 9.
- 3 As to the meaning of 'operator' see PARA 421 note 1.
- 4 As to the meaning of 'operator register of securities' see PARA 421 note 3.
- 5 As to the meaning of 'uncertificated' see PARA 421 note 3.
- 6 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 34(1). As to the meaning of 'system-member' see PARA 422 note 9. For the purposes of calculating the number of new units to which a system-member is entitled, a participating issuer may treat a system-member's holdings of certificated and uncertificated units of a security as if they were separate holdings: reg 34(2). As to the meaning of 'certificated' see PARA 421 note 3.
- 7 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 34(1). As to the meaning of 'rules' see PARA 421 note 11.
- 8 As to the meaning of 'issuer-instruction' see PARA 423 note 6.
- 9 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 34(3).
- 10 As to the meaning of 'operator-instruction' see PARA 421 note 1.
- 11 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 34(4).

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(9) CERTIFICATION AND TRANSFER OF SECURITIES/(iii) Uncertificated Securities/425. Transfer and registration of uncertificated securities.

425. Transfer and registration of uncertificated securities.

Where an operator¹ permits title to a security² other than a share³ to be transferred by means of a relevant system⁴, and the issuer permits the holding of units⁵ of that security in uncertificated⁶ form and the transfer of title to units of that security by means of a relevant system⁷, title to units of that security which are recorded on an operator register of securities⁸ may be transferred by means of that relevant system⁹. However, in relation to any security other than a share, if the law under which it is constituted is not the law of England and Wales¹⁰, Northern Ireland or Scotland, or if the current terms of its issue¹¹ are in any respect inconsistent with:

- 725 (1) the holding of title to units of that security in uncertificated form¹²;
- 726 (2) the transfer of title to units of that security by means of a relevant system¹³;
- or
- 727 (3) the Uncertificated Securities Regulations 2001¹⁴,

an issuer of that security must not permit the holding of units of that security in uncertificated form, or the transfer of title to units of that security by means of a relevant system¹⁵.

Where a participating issuer¹⁶ is required by or under an enactment¹⁷ or instrument to maintain in the United Kingdom¹⁸ a register of persons¹⁹ holding securities (other than shares, general public sector securities²⁰ or eligible debt securities²¹) issued by him²², then in so far as the register in question relates to any class of security which is a participating security²³:

- 728 (a) the operator must maintain a register (an 'operator register of corporate securities'²⁴); and
- 729 (b) the participating issuer must not maintain the register to the extent that it relates to securities held in uncertificated form²⁵, but must maintain a record of the entries made in any operator register of corporate securities (a 'record of uncertificated corporate securities')²⁶.

Where an operator of a relevant system is required to maintain an operator register of corporate securities, that register must comprise, and the operator must enter on it, the names and addresses of the persons holding units of the relevant participating security in uncertificated form and how many units of that security each such person holds in that form²⁷. The same particulars must be entered in a record of uncertificated corporate securities by a participating issuer, so far as practicable²⁸, and he must, unless it is impracticable to do so by virtue of circumstances beyond his control, ensure that the record of uncertificated corporate securities is regularly reconciled with the operator register of corporate securities²⁹.

Where a participating issuer is not required by or under an enactment or instrument to maintain in the United Kingdom in respect of a participating security (other than an eligible debt security) issued by him a register of persons holding units of that participating security, the operator must maintain a register in respect of that participating security and record in that register the names and addresses of the persons holding units of that security in uncertificated form, and how many units of that security each such person holds in that form³⁰.

In respect of every participating security which is an eligible debt security, the operator must maintain a register (an 'operator register of eligible debt securities') and record in that register the names and addresses of the persons holding units of that security and how many units of that security each such person holds³¹.

1 As to the meaning of 'operator' see PARA 421 note 1.

2 As to the meaning of 'securities' see PARA 420 note 2. As to the meaning of references to title to securities, and to a transfer of title, see PARA 420 note 2.

3 As to the meaning of 'share' see PARA 421 note 2. As to the transfer of uncertificated shares see PARA 420. As to entries to be made in registers regarding uncertificated shares see PARA 340. As to the power to make regulations relating to the evidencing and transfer of title to securities without a written instrument see the Companies Act 2006 Pt 21 Ch 2 (ss 783-790); and PARA 420 et seq.

4 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 19(1)(a). As to the meaning of 'relevant system' see PARA 421 note 1. As to the continuing effect of the Uncertificated Securities Regulations 2001, SI 2001/3755, see PARA 420 note 35.

5 As to the meaning of 'unit' see PARA 420 note 36.

6 As to the meaning of 'uncertificated' see PARA 421 note 3.

7 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 19(1)(b).

8 As to the meaning of 'operator register of securities' see PARA 421 note 3.

9 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 19(1).

10 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

11 On 26 November 2001 (ie the coming into force of the Uncertificated Securities Regulations 2001, SI 2001/3755: see reg 1), the current terms of issue of a relevant participating security ceased to apply to the extent that they were inconsistent with any provision of the regulations: see reg 19(3). For these purposes, a relevant participating security is a participating security (other than a share) the terms of issue of which, immediately before 26 November 2001 (ie the coming into force of the regulations), were in all respects consistent with the Uncertificated Securities Regulations 1995, SI 1995/3272 (revoked); and the terms of issue of a security is taken to include the terms prescribed by the issuer on which units of the security are held and title to them is transferred: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 19(4). As to the meaning of 'participating security' see PARA 421 note 8.

12 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 19(2)(a).

13 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 19(2)(b).

14 Ie the Uncertificated Securities Regulations 2001, SI 2001/3755: see reg 19(2)(c).

15 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 19(2) (amended by SI 2003/1633).

16 As to the meaning of 'participating issuer' see PARA 421 note 9.

17 As to the meaning of 'enactment' see PARA 17 note 2.

18 As to the meaning of 'United Kingdom' see PARA 1 note 5.

19 As to the meaning of 'person' see PARA 311 note 2.

20 'General public sector security' means a public sector security that is not an eligible debt security (see note 21): Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(1). 'Public sector securities' means UK Government securities and local authority securities; and 'UK Government security' means a security issued by Her Majesty's Government in the United Kingdom or by a Northern Ireland department: reg 3(1). 'Local authority security' means a security which is either (1) a security other than an eligible debt security which, when held in certificated form is transferable in accordance with the Local Authority (Stocks and Bonds) Regulations 1974, SI 1974/519, reg 7(1) and title to which must be registered in accordance with reg 5 of those Regulations; or (2) an eligible debt security issued by a local authority: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(1) (definition substituted by SI 2003/1633; and amended by SI 2004/2044). As to the meaning of 'certificated' see PARA 421 note 3. 'Local authority', in relation to a security referred to in head (1) of the definition of 'local authority security', has the same meaning as in the Local Authority (Stocks and Bonds) Regulations 1974, SI 1974/519; and in relation to a security referred to in head (2) of that definition has the same meaning as in the Local Government Act 2003 s 23 (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 23): Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(1) (definition added by SI 2003/1633; and amended by SI 2004/2044). As to the registration of general public sector securities see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 21 (amended by SI 2003/1633; SI 2004/1662; SI 2004/2044; SI 2009/1889). Notwithstanding the repeal of the enabling authority, ie the Local Government Act 1972 Sch 13 para 4(1), by the Local Government and Housing Act 1989 s 194(2), Sch 12 Pt I, the Local Authority (Stocks and Bonds) Regulations 1974, SI 1974/519 continue in force in relation to stock issued before 1 April 1990, by virtue of the Local Government and Housing Act 1989 (Commencement No 5 and Transitional Provisions) Order 1990, SI 1990/431, art 4, Sch 1 para 3.

21 'Eligible debt security' means: (1) a security that is constituted by an order, promise, engagement or acknowledgement to pay on demand, or at a determinable future time, a sum in money to, or to the order of, the holder of one or more units of the security and the current terms of issue of the security provide that its units may only be held in uncertificated form and title to them may only be transferred by means of a relevant system; (2) an eligible Northern Ireland Treasury Bill; or (3) an eligible Treasury Bill: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(1) (definition added by SI 2003/1633). 'Eligible Northern Ireland Treasury Bill' means a security constituted by a Northern Ireland Treasury Bill issued in accordance with the Exchequer and Financial Provisions Act (Northern Ireland) 1950 (as modified by the Uncertificated Securities (Amendment) (Eligible Debt Securities) Regulations 2003, SI 2003/1633, Sch 1 Pt 2) and whose current terms of issue provide that its units may only be held in uncertificated form and title to them may only be transferred by means of a relevant system: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(1) (definition added by SI 2003/1633). 'Eligible Treasury Bill' means a security constituted by a Treasury Bill issued in accordance with the Treasury Bills Act 1877 and the Treasury Bills Regulations 1968, SI 1968/414 (as modified by the Uncertificated Securities (Amendment) (Eligible Debt Securities) Regulations 2003, SI 2003/1633, Sch 1 Pt 1) and whose current terms of issue provide that its units may only be held in uncertificated form and title to them may only be transferred by means of a relevant system: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(1) (definition added by SI 2003/1633). As to Treasury Bills see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 730.

22 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 22(1) (amended by SI 2003/1633).

23 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 22(2).

24 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 22(2)(a)(i). The operator register of corporate securities must be kept and entered up in accordance with Sch 4 para 14 (see the text to note 27); reg 22(2)(a)(ii). Such sanctions as apply to a company and its officers in the event of a default in complying with the Companies Act 2006 s 113 (see PARA 335) apply to an operator and his officers in the event of a default in complying with the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 22(2)(a)(i); reg 22(4) (amended by SI 2003/1633; SI 2009/1889). As to the meaning of 'officer' for these purposes see PARA 421 note 4.

25 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 22(2)(b)(i).

26 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 22(2)(b)(ii). The record of uncertificated corporate securities must be kept and entered up in accordance with Sch 4 para 15: reg 22(2)(b)(iii). In the case of a participating issuer which is a company, the record of uncertificated corporate securities must be kept at the same place as the part of any register of debenture holders maintained by the company would be required to be kept: Sch 4 para 15(4). As to the meaning of 'company' see PARA 24. As to the keeping of the register of debenture holders see PARA 1321. The Companies Act 2006 ss 744(1)-(4), 746 (see PARA 1322) apply in relation to a record of uncertificated corporate securities maintained by a participating issuer which is a company, so far as that record relates to debentures, as they apply or would apply to any register of debenture holders maintained by the company; and references to the Companies Act 2006 in the Companies (Fees for Inspection and Copying of Company Records) Regulations 2007, SI 2007/2612, and in the Companies (Fees for Inspection of Company Records) Regulations 2008, SI 2008/3007 must be construed accordingly: Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 15(5) (amended by SI 2009/1889). Any provision of an enactment or instrument which requires a register of persons holding securities (other than shares or public sector securities) to be open to inspection also applies to the record of uncertificated corporate securities relating to any units of those securities which are participating securities: Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 15(6). Such sanctions as apply in the event of a default in complying with the requirement to maintain a register imposed by the relevant enactment or instrument referred to in reg 22(1) (see the text to notes 16-22) apply to a participating issuer and his officers in the event of a default in complying with reg 22(2)(b)(ii): reg 22(5). In reg 22(5), an officer of a participating issuer is in default in complying with, or in contravention of, the provision mentioned there if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: reg 47(1). Such sanctions as apply in the event of a default in complying with the requirement to maintain a register imposed by the relevant enactment or instrument referred to in reg 22(1) apply to:

162 (1) a participating issuer other than a company;

163 (2) a participating issuer which is a company, in relation to so much of the record of uncertificated corporate securities as does not relate to debentures,

and to his officers in the event of a default in complying with Sch 4 para 15: Sch 4 para 19(3). However, this provision does not apply to any of the following or its officers: (a) the Crown; (b) any person acting on behalf of the Crown; (c) the Bank of England; (d) the Registrar of Government Stock; (e) any previous Registrar of Government Stock; or (f) in respect of a security which immediately before it became a participating security was transferable by exempt transfer within the meaning of the Stock Transfer Act 1982 (see PARA 430), a participating issuer: Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 19(4) (amended by SI 2004/1662). As to the Bank of England see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 793 et seq. As to the Registrar of Government Stock see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1336. An officer of a participating issuer is in default in complying with, or in contravention of Sch 4 para 15 if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: Sch 4 para 20.

27 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 14(1). The Companies Act 2006 ss 743-748 (see PARAS 1321-1323) do not apply to any part of an operator register of corporate securities: Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 14(2) (amended by SI 2009/1889). An entry on a register of corporate securities which records a person as holding units of a security in uncertificated form is evidence of such title to the units as would be evidenced if the entry on that register were an entry on the part maintained by the participating issuer of such register as is mentioned in the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 22(1) (see the text to notes 16-22), and, where appropriate, related to units of that security held in certificated form: reg 24(6). This is subject to the proviso that any purported registration of a transfer of title to an uncertificated unit of a security other than in accordance with regs 27, 28 (see PARAS 426-427) is of no effect: regs 24(6), 29. Such sanctions as apply to a company and its officers in the event of a default in complying with the Companies Act 2006 s 113 (see PARA 335) apply also to an operator and his officers in the event of a default in complying with the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 14: Sch 4 para 19(1) (amended by SI 2009/1889). An officer of an operator is in default in complying with, or in contravention of, the provisions referred to in the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 19(1) if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: Sch 4 para 21.

28 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 15(1).

29 Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 15(2). Provided that it has complied with Sch 4 para 15(2), a participating issuer is not liable in respect of any act or thing done or omitted to be done by it or on its behalf in reliance upon the assumption that the particulars entered in any record of uncertificated corporate securities which the participating issuer is required to keep by the Uncertificated Securities Regulations 2001, SI 2001/3755, accord with particulars entered in any operator register of corporate securities relating to it: Sch 4 para 15(3).

30 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 22(3) (amended by SI 2003/1633). Subject to the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 29 (see note 27), an entry on a register maintained by virtue of reg 22(3) is (where the units are capable of being held in certificated form) prima facie evidence, and in Scotland sufficient evidence unless the contrary is shown, that the person to whom the entry relates has such title to the units of the security which he is recorded as holding in uncertificated form as he would have if he held the units in certificated form: reg 24(7). Such sanctions as apply to a company and its officers in the event of a default in complying with the Companies Act 2006 s 113 (see PARA 335) apply to an operator and his officers in the event of a default in complying with the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 22(3): reg 22(4) (amended by SI 2003/1633; SI 2009/1889). In the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 22(4), an officer of an operator is in default in complying with, or in contravention of, the provision mentioned in that regulation if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: reg 47(2).

31 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 22(3A) (added by SI 2003/1633). Subject to the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 29 (see note 27), an entry on an operator register of eligible debt securities is prima facie evidence, and in Scotland sufficient evidence unless the contrary is shown, of any matters which are by those regulations directed or authorised to be inserted in it: reg 24(8) (added by SI 2003/1633). Such sanctions as apply to a company and its officers in the event of a default in complying with the Companies Act 2006 s 113 (see PARA 335) apply to an operator and his officers in the event of a default in complying with the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 22(3A): reg 22(4) (amended by SI 2003/1633; SI 2009/1889).

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426. Registration by an operator of transfers of uncertificated securities.

Except where relevant units of a security¹ are transferred by means of a relevant system² to a person³ who is to hold them thereafter in certificated form⁴ (and subject to the provisions relating to refusal of registration⁵), an operator⁶ must register on the relevant operator register of securities⁷ the transfer of title⁸ to those units of that security⁹:

730 (1) upon settlement of a transfer of uncertificated units of a security in accordance with his rules¹⁰;

731 (2) following receipt of an issuer-instruction¹¹ notifying him that the circumstances allowing conversion of securities into uncertificated form¹² have arisen in respect of a transfer of units of a participating security¹³; or

732 (3) following receipt of an issuer-instruction informing him of the name of the transferee¹⁴.

An operator must refuse to register a transfer of title to units of a participating security in accordance with a system-member instruction¹⁵ or an issuer-instruction (as the case may be) if he has actual notice that the transfer is¹⁶:

733 (a) prohibited by order of a court in the United Kingdom¹⁷;

734 (b) prohibited or avoided by or under an enactment¹⁸;

- 735 (c) a transfer to a deceased person¹⁹; or
 736 (d) where the participating issuer²⁰ is constituted under the law of Scotland, prohibited by or under an arrestment²¹.

Notwithstanding that an operator has received such notice in respect of a transfer of title to units of a participating security, the operator may register that transfer of title on the relevant operator register of securities if at the time that he received the actual notice it was not practicable for him to halt the process of registration²².

Without prejudice to his rules, an operator may refuse to register a transfer of title to units of a participating security in accordance with a system-member instruction or an issuer-instruction (as the case may be) if the instruction requires a transfer of units:

- 737 (i) to an entity which is not a natural or legal person²³;
 738 (ii) to a minor (which, in relation to a participating issuer constituted under the law of Scotland, means a person under 16 years of age)²⁴;
 739 (iii) to be held jointly in the names of more persons than is permitted under the terms of the issue of the security²⁵; or
 740 (iv) where, in relation to the system-member instruction or the issuer-instruction (as the case may be), the operator has actual notice of any specified²⁶ matters²⁷.

An operator must not register a transfer of title to uncertificated units of a security on an operator register of securities otherwise than in accordance with the provisions described above²⁸ unless he is required to do so by order of a court in the United Kingdom or by or under an enactment²⁹; however, this must not be taken to prevent an operator from entering on an operator register of securities a person who is a system-member to whom title to uncertificated units of a security has been transmitted by operation of law³⁰.

Immediately upon:

- 741 (A) the registration by an operator of the transfer of title to units of a participating security in accordance with the above provisions³¹, or an order of a court in the United Kingdom³², or a requirement arising by or under an enactment³³; or
 742 (B) the making or deletion by an operator of an entry on an operator register of securities following the transmission of title to uncertificated units of a security by operation of law³⁴, or upon the transfer of uncertificated units of a security to a person who is to hold them thereafter in certificated form³⁵,

the operator must generate an operator-instruction³⁶ to inform the relevant participating issuer of the registration, or of the making or deletion of the entry (as the case may be); and where appropriate the participating issuer must register³⁷ the transfer or transmission of title to those units on an issuer register of securities³⁸.

If an operator refuses to register a transfer of securities in any of the circumstances specified above³⁹, the operator must, within two months of the date on which the relevant system-member instruction or issuer-instruction (as the case may be) was received by the operator, send an operator-instruction, or written notification, informing the relevant system-member or participating issuer (as the case may be) of the refusal⁴⁰.

1 As to the meaning of 'securities' see PARA 420 note 2. As to the meaning of 'unit' see PARA 420 note 36.

2 As to the meaning of 'relevant system' see PARA 421 note 1.

3 As to the meaning of 'person' see PARA 311 note 2.

- 4 As to the meaning of 'certificated' see PARA 421 note 3. As to the registration of the transfer of uncertificated securities to certificated form see PARA 427.
- 5 le subject to the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(2)-(4): see the text to notes 16-27.
- 6 As to the meaning of 'operator' see PARA 421 note 1.
- 7 As to the meaning of 'operator register of securities' see PARA 421 note 3.
- 8 As to the meaning of references to title to securities, and to a transfer of title, see PARA 420 note 2.
- 9 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(1). Any purported registration of a transfer of title to an uncertificated unit of a security other than in accordance with reg 27 or reg 28 (see PARA 427) is of no effect: reg 29. See also PARA 346. As to the meaning of 'uncertificated' see PARA 421 note 3. As to the transfer of uncertificated securities see PARA 420. As to the continuing effect of the Uncertificated Securities Regulations 2001, SI 2001/3755, see PARA 420 note 35.
- 10 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(1)(a). As to the meaning of 'rules' see PARA 421 note 11. As to the requirements to be met by an operator's rules and practices see reg 5(1), Sch 1 paras 25-27 (Sch 1 para 25 amended by SI 2003/1633). The operator must make transparent and non-discriminatory rules, based on objective criteria, governing access to his settlement facilities: see the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 1 para 28 (added by SI 2007/124).
- 11 As to the meaning of 'issuer-instruction' see PARA 423 note 6.
- 12 le the circumstances specified in the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 33(2)(b): see PARA 423.
- 13 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(1)(b). As to the meaning of 'participating security' see PARA 421 note 8.
- 14 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(1)(c). The issuer-instruction referred to in the text is one given under reg 42(8)(b) (see PARA 1516).
- 15 As to the meaning of 'system-member instruction' see PARA 422 note 10.
- 16 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(2). For the purpose of determining under these regulations whether a person has actual notice of a fact, matter or thing, that person must not under any circumstances be taken to be concerned to establish whether or not it exists or has occurred: reg 44.
- 17 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(2)(a). As to the meaning of 'United Kingdom' see PARA 1 note 5.
- 18 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(2)(b). As to the meaning of 'enactment' see PARA 17 note 2.
- 19 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(2)(c).
- 20 As to the meaning of 'participating issuer' see PARA 421 note 9.
- 21 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(2)(d).
- 22 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(3).
- 23 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(4)(a).
- 24 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(4)(b). As to the meaning of 'minor' see the Family Law Reform Act 1969 s 1; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 1.
- 25 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(4)(c).
- 26 le the matters specified in the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 35(5)(a)(i)-(iii), namely that he was a person other than a participating issuer or a sponsoring system-participant receiving properly authenticated dematerialised instructions on behalf of a participating issuer, and he had actual notice: (1) that any information contained in it was incorrect (reg 35(5)(a)(i)); (2) that the system-participant or the operator (as the case may be) expressed to have sent the instruction did not send the instruction (reg 35(5)(a)

(ii)); or (3) where relevant, that the person on whose behalf it was expressed to have been sent had not given to the operator or the sponsoring system-participant (as the case may be), identified in the properly authenticated dematerialised instruction as having sent it, his authority to send the properly authenticated dematerialised instruction on his behalf (reg 35(5)(a)(iii)). 'Sponsoring system-participant' means a system-participant who is permitted by an operator to send properly authenticated dematerialised instructions attributable to another person and to receive properly authenticated dematerialised instructions on another person's behalf: reg 3(1). As to the meanings of 'dematerialised instruction' and 'system-participant' see PARA 421 note 1.

27 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(4)(d).

28 In accordance with the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(1): see the text to notes 1-14.

29 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(5).

30 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(6).

31 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(7)(a)(i). The provisions referred to in the text are those of reg 27(1): see the text to notes 1-14.

32 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(7)(a)(ii).

33 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(7)(a)(iii).

34 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(7)(b)(i).

35 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(7)(b)(ii).

36 As to the meaning of 'operator-instruction' see PARA 421 note 1.

37 In accordance with the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 28: see PARA 427.

38 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(7) (amended by SI 2003/1633). This provision does not apply in relation to units of an eligible debt security: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(7A) (added by SI 2003/1633). As to the meaning of 'issuer register of securities' see PARA 422 note 20. As to the meaning of 'eligible debt security' see PARA 425 note 21.

39 In any of the circumstances specified in the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(2) (see the text to notes 15-21) and reg 27(4) (see the text to notes 23-27): see reg 27(8) (substituted by SI 2009/1889).

40 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(8) (as substituted: see note 39). Such sanctions as apply to a company and its officers in the event of a default in complying with the Companies Act 2006 s 771(1), (2) (see PARA 415) apply to an operator and his officers in the event of a default in complying with that provision as applied by the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(8): reg 27(9) (amended by SI 2009/1889). For the purposes of the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(9), an officer of an operator is in default if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 47(2). As to the meaning of 'officer' (in relation to an operator or a participating issuer) see PARA 421 note 4.

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427. Registration of transfers of uncertificated securities to be held in certificated form.

Where uncertificated units of a security¹ are transferred by means of a relevant system² to a person³ who is to hold them thereafter in certificated form⁴, a participating issuer⁵ must (where

appropriate) register a transfer of title⁶ to uncertificated units of a security on an issuer register of securities⁷ in accordance with an operator-instruction⁸ unless he has actual notice⁹ that the transfer is:

- 743 (1) prohibited by order of a court in the United Kingdom¹⁰;
- 744 (2) prohibited or avoided by or under an enactment¹¹;
- 745 (3) a transfer to a deceased person¹²; or
- 746 (4) where the participating issuer is constituted under the law of Scotland, prohibited by or under an arrestment¹³.

A participating issuer may refuse to register a transfer of title to uncertificated units of a security in accordance with an operator-instruction if the instruction requires a transfer of units:

- 747 (a) to an entity which is not a natural or legal person¹⁴;
- 748 (b) to a minor (which in relation to a participating issuer constituted under the law of Scotland means a person under 16 years of age)¹⁵;
- 749 (c) to be held jointly in the names of more persons than is permitted under the terms of the issue of the security¹⁶; or
- 750 (d) where, in relation to the operator-instruction, the participating issuer has actual notice from the operator of any of the specified¹⁷ matters¹⁸.

A participating issuer must notify the operator by issuer-instruction¹⁹ whether he has registered a transfer in response to an operator-instruction to do so²⁰. A participating issuer must not register a transfer of title to uncertificated units of a security on an issuer register of securities unless he is required to do so by an operator-instruction²¹, an order of a court in the United Kingdom²², or by or under an enactment²³.

1 The units of a security that, immediately before the transfer in question, were held by the transferor in uncertificated form: see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 28(7). As to the meaning of 'securities' see PARA 420 note 2. As to the meaning of 'unit' see PARA 420 note 36. As to the meaning of 'uncertificated' see PARA 421 note 3. As to the continuing effect of the Uncertificated Securities Regulations 2001, SI 2001/3755, see PARA 420 note 35.

2 As to the meaning of 'relevant system' see PARA 421 note 1.

3 As to the meaning of 'person' see PARA 311 note 2.

4 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 28(1). As to the meaning of 'certificated' see PARA 421 note 3.

5 As to the meaning of 'participating issuer' see PARA 421 note 9.

6 As to the meaning of references to title to securities, and to a transfer of title, see PARA 420 note 2.

7 As to the meaning of 'issuer register of securities' see PARA 422 note 20.

8 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 28(2). Any purported registration of a transfer of title to an uncertificated unit of a security other than in accordance with reg 27 (see PARA 426) or reg 28 is of no effect: reg 29. See also PARA 346. As to the meaning of 'operator-instruction' see PARA 421 note 1. As to the meaning of 'operator' see PARA 421 note 1. If a participating issuer refuses to register under reg 28(2) a transfer of securities in any of the circumstances specified in reg 28(3) and reg 28(4), the participating issuer must, within two months of the date on which the Operator-instruction was received by the participating issuer, send to the transferee notice of the refusal: reg 28(8) (substituted by SI 2009/1889). Such sanctions as apply to a company and its officers in the event of a default in complying with the Companies Act 2006 s 771(1), (2) (see PARA 415) apply to a participating issuer and his officers in the event of default in complying with that provision as applied by the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 28(8): reg 28(9) (amended by SI 2009/1889). For the purposes of the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 28(9), an officer of a participating issuer is in default if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 47(1). However, reg

28(9) does not apply to any of the following or its officers: (1) the Crown; (2) any person acting on behalf of the Crown; (3) the Bank of England; (4) the Registrar of Government Stock; (5) any previous Registrar of Government Stock; or (6) in respect of a security which immediately before it became a participating security was transferable by exempt transfer within the meaning of the Stock Transfer Act 1982 (see PARA 430), a participating issuer: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 48 (amended by SI 2004/1662). As to the meaning of 'share' see PARA 421 note 2. As to the meaning of 'officer' (in relation to an operator or a participating issuer) see PARA 421 note 4. As to the Bank of England see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 793 et seq. As to the Registrar of Government Stock see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1336.

9 As to actual notice see PARA 426 note 16.

10 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 28(3)(a). As to the meaning of 'United Kingdom' see PARA 1 note 5.

11 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 28(3)(b). As to the meaning of 'enactment' see PARA 17 note 2.

12 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 28(3)(c).

13 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 28(3)(d).

14 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 28(4)(a).

15 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 28(4)(b). As to the meaning of 'minor' see the Family Law Reform Act 1969 s 1; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 1.

16 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 28(4)(c).

17 In the matters specified in the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 35(5)(a)(i)-(iii): see PARA 426 note 26.

18 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 28(4)(d).

19 As to the meaning of 'issuer-instruction' see PARA 423 note 6.

20 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 28(5). A default in complying with, or a contravention of, reg 28(5) or reg 28(6) (see the text to notes 21-23) is actionable at the suit of a person who suffers loss as a result of the default or contravention, or who is otherwise adversely affected by it, subject to the defences and other incidents applying to claims for breach of statutory duty: reg 46(1). However, this does not affect the liability which any person may incur, nor affect any right which any person may have, apart from reg 46(1): reg 46(2). As to breach of statutory duty see **TORT** vol 45(2) (Reissue) PARA 395 et seq.

21 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 28(6)(a). See also note 20.

22 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 28(6)(b). See also note 20.

23 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 28(6)(c). See also note 20.

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428. Registration of linked transfers of uncertificated securities.

Where an operator¹ receives two or more system-member instructions² requesting him to register two or more transfers of title³ to uncertificated⁴ units of a security⁵, and it appears to the operator⁶:

751 (1) either that there are fewer units of the security registered on an operator register of securities⁷ in the name of a person⁸ identified in any of the system-

- member instructions as a transferor than the number of units to be transferred from him under those system-member instructions⁹, or that it has not been established¹⁰, in relation to any of the transfers taken without regard to the other transfers, that a settlement bank has agreed to make a payment¹¹; and
- 752 (2) that registration of all of the transfers would result in each of the persons identified in the system-member instructions as a transferor having title to a number of uncertificated units of a security equal to or greater than nil¹²; and
- 753 (3) that the combined effect of all the transfers taken together would result in the necessary condition¹³ being satisfied¹⁴,

the operator may either register the combined effect of all the transfers taken together¹⁵, or register all the transfers simultaneously¹⁶, unless: (a) one or more of those transfers may not be registered by virtue of the fact that the operator has actual notice¹⁷ of any of the circumstances specified¹⁸; or (b) one or more of those transfers is to be¹⁹ refused registration²⁰.

Notwithstanding that an operator has received such actual notice, in respect of two or more such system-member instructions as are referred to in head (1), (2) or (3) above, the operator may register all the transfers in question or their combined effect if at the time that he received the actual notice it was not practicable for him to halt the process of registration²¹.

1 As to the meaning of 'operator' see PARA 421 note 1.

2 As to the meaning of 'system-member instruction' see PARA 422 note 10.

3 As to the meaning of references to title to securities, and to a transfer of title, see PARA 420 note 2. As to the transfer of uncertificated securities see PARA 420.

4 As to the meaning of 'uncertificated' see PARA 421 note 3.

5 As to such requests for registration see PARAS 426-427. As to the meaning of 'securities' see PARA 420 note 2. As to the meaning of 'unit' see PARA 420 note 36.

6 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 30(1). As to the continuing effect of the Uncertificated Securities Regulations 2001, SI 2001/3755, see PARA 420 note 35.

7 As to the meaning of 'operator register of securities' see PARA 421 note 3.

8 As to the meaning of 'person' see PARA 311 note 2.

9 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 30(1)(a)(i).

10 In accordance with the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 1 para 21(1)(c). A relevant system must comprise procedures which provide that an operator only registers a transfer of title to uncertificated units of a security or generates an operator-instruction requiring a participating issuer to register such a transfer, and only generates an operator-instruction informing a settlement bank of its payment obligations in respect of such a transfer, if (in the case of a transfer to a system-member for value) it has established that a settlement bank has agreed to make payment in respect of the transfer, whether alone or taken together with another transfer for value: Sch 1 para 21(1)(c). As to the meaning of 'relevant system' see PARA 421 note 1. As to the meaning of 'operator-instruction' see PARA 421 note 1. As to the meaning of 'participating issuer' see PARA 421 note 9. 'Settlement bank', in relation to a relevant system, means a person who has contracted to make payments in connection with transfers of title to uncertificated units of a security by means of that system: reg 3(1). As to the meaning of 'system-member' see PARA 422 note 9.

11 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 30(1)(a)(ii).

12 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 30(1)(b).

13 In the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 1 para 21(1)(c): see note 10.

14 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 30(1)(c).

15 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 30(2)(a).

- 16 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 30(2)(b).
- 17 As to actual notice see PARA 426 note 16.
- 18 Ie specified in the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(2): see PARA 426.
- 19 Ie by virtue of the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(4): see PARA 426.
- 20 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 30(2).
- 21 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 30(3).

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429. Position of a transferee prior to entry on an issuer register of securities.

When an operator¹ deletes an entry on an operator register of securities² in consequence of which:

- 754 (1) the operator must generate³ an operator-instruction⁴; and
- 755 (2) by virtue of that instruction a participating issuer⁵ must register, on an issuer register of securities⁶, a transfer of title to units of a participating security⁷ constituted under the law of England and Wales⁸ or Northern Ireland⁹,

then, subject to any enactment¹⁰ or rule of law, the transferor¹¹, notwithstanding the deletion of the entry in the operator register of securities, retains title to the requisite number of units of the relevant participating security until the transferee¹² is entered on the relevant issuer register of securities as the holder thereof¹³, and the transferee acquires an equitable interest in the requisite number of units of that security¹⁴.

When an operator deletes an entry on an operator register of securities in consequence of which:

- 756 (a) the operator must generate¹⁵ an operator-instruction¹⁶; and
- 757 (b) by virtue of that instruction a participating issuer must register, on an issuer register of securities, a transfer of title to units of a participating security constituted under the law of Scotland¹⁷,

then, subject to any enactment or rule of law, the transferor, notwithstanding the deletion of the entry in the operator register of securities, retains title to the requisite number of units of the relevant participating security until the transferee is entered on the relevant issuer register of securities as the holder thereof¹⁸, and the transferor holds the requisite number¹⁹ of units of that security on trust for the benefit of the transferee²⁰.

These provisions have effect notwithstanding that the units to which the deletion of the entry in the operator register of securities relates, or in which an interest arises by virtue of these provisions²¹, or any of them, may be unascertained²². Subject thereto, these provisions must not be construed as conferring a proprietary interest²³ in units of a security if the conferring of such an interest at the time specified²⁴ would otherwise be void by or under any enactment or rule of law²⁵.

- 1 As to the meaning of 'operator' see PARA 421 note 1.
- 2 As to the meaning of 'operator register of securities' see PARA 421 note 3.
- 3 le in accordance with the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(7): see PARA 426.
- 4 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 31(1)(a). As to the meaning of 'operator-instruction' see PARA 421 note 1. As to the continuing effect of the Uncertificated Securities Regulations 2001, SI 2001/3755, see PARA 420 note 35.
- 5 As to the meaning of 'participating issuer' see PARA 421 note 9.
- 6 As to the meaning of 'issuer register of securities' see PARA 422 note 20.
- 7 As to the meaning of 'participating security' see PARA 421 note 8. As to the meaning of 'unit' see PARA 420 note 36. As to the meaning of references to title to securities, and to a transfer of title, see PARA 420 note 2.
- 8 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.
- 9 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 31(1)(b).
- 10 As to the meaning of 'enactment' see PARA 17 note 2.
- 11 'Transferor' means the person to be identified in the operator-instruction as the transferor: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 31(9)(b). As to the meaning of 'person' see PARA 311 note 2.
- 12 'Transferee' means the person to be identified in the operator-instruction as the transferee: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 31(9)(a).
- 13 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 31(2)(a).
- 14 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 31(2)(b). As to equitable interests in personal property see **EQUITY** vol 16(2) (Reissue) PARA 608.
- 15 le in accordance with the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(7): see PARA 426.
- 16 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 31(3)(a).
- 17 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 31(3)(b).
- 18 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 31(4)(a).
- 19 For these purposes, the requisite number is the number of units which are to be specified in the operator-instruction which the operator must generate in accordance with the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 27(7) (see PARA 426): reg 31(5).
- 20 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 31(4)(b).
- 21 le by virtue of the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 31(2)(b) (see the text to note 14) or reg 31(4)(b) (see the text to notes 19-20).
- 22 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 31(6). As to the position in Scotland see reg 31(7).
- 23 le whether of the kind referred to in the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 31(2)(b) (see the text to note 14) or reg 31(4)(b) (see the text to notes 19-20), or of any other kind.
- 24 le in the Uncertificated Securities Regulations 2001, SI 2001/3755.
- 25 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 31(8).

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(iv) Special Provisions relating to Certain Transfers

430. Computerised transfer of certain government and public authority securities.

In the exercise of the appropriate power¹, provision may be made permitting a transfer in certain cases of specified securities² to which the power extends through the medium of a computer-based system to be established by the Bank of England and the London Stock Exchange³. Such a transfer effected in this way is referred to as an 'exempt transfer'⁴. However, no provision may be made, in the exercise of the appropriate power, for the application of the procedure of an exempt transfer to any securities or securities of any class except with the agreement of the person issuing the securities or, as the case may be, securities of that class or, if the liability for those securities or securities of that class has vested in another person, of that other person⁵.

The Treasury may by regulations made by statutory instrument make provision in connection with the operation of such a system⁶. Such regulations may provide⁷:

- 758 (1) that, for the purposes of any provision made by or under any enactment or contained in any prospectus or other document and requiring or relating to the lodging or deposit of any instrument of transfer, notification of an exempt transfer in the manner required by the regulations is to be regarded as lodging or depositing an instrument of the transfer concerned⁸; and
- 759 (2) that, in such circumstances as may be specified in the regulations, certificates or other documents of or evidencing title to specified securities are or are not to be issued to persons who (by virtue of their participation in the system) are or have been able to transfer such securities by exempt transfers⁹.

The Secretary of State¹⁰ may by order made by statutory instrument repeal or amend any provision of any local Act (including an Act confirming a provisional order), or any order or other instrument made under a local Act, if it appears to him that the provision has become unnecessary or requires alteration in consequence of any of the provisions described above¹¹.

1 'Appropriate power' means the power to make regulations or orders under:

164 (1) the Finance Act 1942 s 47 (government stock: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1335) or the Exchequer and Financial Provisions Act (Northern Ireland) 1950 s 11(1)(c) (Northern Ireland Exchequer stock) (Stock Transfer Act 1982 s 1(3)(a)); or

165 (2) the Local Government (Scotland) Act 1975 Sch 3 para 5 or the Local Government Act (Northern Ireland) 1972 s 70 (local authority stocks) (Stock Transfer Act 1982 s 1(3)(b) (amended by the Local Government Act 2003 s 127(1), (2), Sch 7 para 6, Sch 8 Pt 1)).

With respect to any specified securities to which none of the provisions referred to in heads (1) and (2) above apply, the Treasury may make the provision referred to in the Stock Transfer Act 1982 s 1(1) (see the text to note 3) by regulations made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 1(3)(e), (4). In exercise of this power, the Treasury has made the Stock Transfer (Gilt-edged Securities) (Exempt Transfer) Regulations 1985, SI 1985/1145; the Stock Transfer (Gilt-edged Securities) (Exempt Transfer) Regulations 1987, SI 1987/1294; the Stock Transfer (Gilt-edged Securities) (Exempt Transfer) Regulations 1988, SI 1988/232; the Stock Transfer (Gilt-edged Securities) (Exempt Transfer) Regulations 1989, SI 1989/880; the Stock Transfer (Gilt-edged Securities) (Exempt Transfer) Regulations 1990, SI 1990/1211; the Stock Transfer (Gilt-edged Securities) (Exempt Transfer) (No 2) Regulations 1990, SI 1990/2547; the Stock

Transfer (Gilt-edged Securities) (Exempt Transfer) Regulations 1991, SI 1991/1145; and the Stock Transfer (Gilt-edged Securities) (Exempt Transfer) (Amendment) Regulations 1999, SI 1999/1210. As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517.

2 For these purposes, 'specified securities' means:

- 166 (1) securities issued by Her Majesty's government in the United Kingdom or the government of Northern Ireland, not being excluded securities (ie securities in respect of which a stock certificate issued under the National Debt Act 1870 Pt V (ss 26-42) (repealed) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1338)) is for the time being outstanding; or any other bearer securities; or any securities for the time being registered on the National Savings Stock Register (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1347) (Stock Transfer Act 1982 s 2(1), Sch 1 para 1);
- 167 (2) securities the payment of interest on which is guaranteed by Her Majesty's government in the United Kingdom or the government of Northern Ireland (Sch 1 para 2);
- 168 (3) securities issued in the United Kingdom by any public authority or nationalised industry or undertaking in the United Kingdom (Sch 1 para 3);
- 169 (4) securities issued in the United Kingdom by the government of any overseas territory, being securities registered in the United Kingdom, where 'overseas territory' means any territory or country outside the United Kingdom and where the reference to the government of any overseas territory includes a reference to a government constituted for two or more overseas territories, and to any authority established for the purpose of providing or administering services which are common to, or relate to matters of common interest to, two or more such territories (Sch 1 para 4 (amended by the International Development Act 2002 s 19(1), Sch 3 para 8));
- 170 (5) securities issued in the United Kingdom by the International Bank for Reconstruction and Development, the Inter-American Development Bank, the European Investment Bank or the European Coal and Steel Community, being, in each case, securities registered in the United Kingdom (Stock Transfer Act 1982 Sch 1 para 5);
- 171 (6) debentures (including debenture stock and bonds, whether constituting a charge on assets or not, and loan stock or notes) issued by the Agricultural Mortgage Corp'n plc, the Commonwealth Development Finance Co Ltd, Finance for Industry plc or the Scottish Agricultural Securities Corp'n Ltd (Sch 1 para 6);
- 172 (7) securities issued by: (a) any local authority in the United Kingdom; (b) any authority all or the majority of the members of which are appointed or elected by one or more local authorities in the United Kingdom; or (c) any police authority established under the Police Act 1996 s 3 (see **POLICE** vol 36(1) (2007 Reissue) PARA 139) (Stock Transfer Act 1982 Sch 1 para 7(1) (amended by the Police and Magistrates' Courts Act 1994 s 43, Sch 4 Pt II para 56; the Police Act 1996 s 103, Sch 7 para 1(2)(t); the Police Act 1997 s 134(1), Sch 9 para 44; the Greater London Authority Act 1999 ss 392(1), (2), 423, Sch 34 Pt I; the Serious Organised Crime and Police Act 2005 ss 59, 174(2), Sch 4 para 41, Sch 17, Pt 2));
- 173 (8) securities issued in the United Kingdom by the African Development Bank, the Asian Development Bank, Caisse Centrale de Coopération Economique, Crédit Foncier de France, Electricité de France (EDF), Service National or Hydro-Québec, being, in each case, securities registered in the United Kingdom (Stock Transfer Act 1982 Sch 1 para 8 (added by SI 1988/231));
- 174 (9) securities issued in the United Kingdom by the European Bank for Reconstruction and Development, being securities registered in the United Kingdom (Stock Transfer Act 1982 Sch 1 para 9 (added by SI 1991/340)).

Notwithstanding that a security may at any time be so specified, it is not at that time a specified security for the purposes of the Stock Transfer Act 1982 if, on a transfer of it at that time effected by a written instrument, that instrument would be liable to stamp duty: s 2(2). The Treasury may from time to time, after consultation with the Bank of England, by order either add a security or class of securities to those listed above or remove a security or class of securities from that list (whether the security or class of securities was included in the list as originally enacted or was so added): s 2(3). The power to make such an order is exercisable by statutory instrument which must be laid before Parliament after being made: s 2(4). As to the orders made see the Stock Transfer (Specified Securities) Order 1988, SI 1988/231; Stock Transfer (Specified Securities) Order 1991, SI 1991/340. As to the meaning of 'United Kingdom' see PARA 1 note 5. As to the Bank of England see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 793 et seq. As to the International Bank for Reconstruction and Development see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1391. As to the Agricultural Mortgage Corporation see **AGRICULTURAL LAND** vol 1 (2008) PARA 618. For the purposes of head (7) above, 'local authority' means:

- 175 (i) the Greater London Authority, a county council, a district council, a London borough council, the Common Council of the City of London, a functional body within the meaning of the Greater London Authority Act 1999 (see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 213 et seq), a joint authority established by the Local Government Act 1985 Pt IV (ss 23-42), an authority established for an area in England by an order under the Local Government and Public Involvement in Health Act 2007 s 207 (joint waste authorities) or the Council of the Isles of Scilly;
- 176 (ii) any council constituted under the Local Government etc (Scotland) Act 1994 s 2; or
- 177 (iii) a council within the meaning of the Local Government Act (Northern Ireland) 1972,

and any reference to a security issued by a local authority includes a reference to a security the liability for which is for the time being vested in a local authority (being a security issued by an authority which has ceased to exist): Stock Transfer Act 1982 Sch 1 para 7(2) (amended by the Local Government Act 1985 ss 84, 102, Sch 14 para 62, Sch 17; the Education Reform Act 1988 s 237, Sch 13 Pt I; the Local Government etc (Scotland) Act 1994 s 180(1), Sch 13 para 127; the Greater London Authority Act 1999 s 392(1), (3)(a), (b); the Local Government and Public Involvement in Health Act 2007 s 209(2), Sch 13 Pt 2, para 39). As to the meaning of 'England' see PARA 1 note 5. As to local authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. As to administrative areas and authorities in London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 29 et seq. As to joint authorities see **LOCAL GOVERNMENT** vol 69 (2009) PARA 47 et seq.

3 Stock Transfer Act 1982 s 1(1). The responsibility for operating the CGO Service (ie the computer-based system established to facilitate the transfer of gilt-edged securities) was transferred from the Bank of England to CRESTCo Ltd on 24 May 1999: see the Stock Transfer (Gilt-edged Securities) (CGO Service) (Amendment) Regulations 1999, SI 1999/1208. As to the functions and duties of the London Stock Exchange and recognised clearing houses such as CRESTCo see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 75-76.

4 Stock Transfer Act 1982 s 1(2). Notwithstanding anything in any enactment or in any prospectus or other document relating to the terms of issue, holding or transfer of specified securities, an exempt transfer is effective without the need for an instrument in writing: s 1(2).

5 Stock Transfer Act 1982 s 1(5). As to the meaning of 'person' see PARA 311 note 2.

6 Stock Transfer Act 1982 s 3(1). A statutory instrument made in the exercise of the power conferred by s 3(1) is subject to annulment in pursuance of a resolution of either House of Parliament: s 3(5). In exercise of the power conferred under s 3(1), (2) (see the text to note 7), the Treasury has made the Stock Transfer (Gilt-edged Securities) (CGO Service) Regulations 1985, SI 1985/1144; the Stock Transfer (Gilt-edged Securities) (CGO Service) (Amendment) Regulations 1987, SI 1987/1293; the Stock Transfer (Gilt-Edged Securities) (CGO Service) (Amendment) Regulations 1997, SI 1997/1329; the Stock Transfer (Gilt-edged Securities) (CGO Service) (Amendment) Regulations 1999, SI 1999/1208.

7 Stock Transfer Act 1982 s 3(2). Such regulations are without prejudice to the generality of s 3(1) (see the text to note 6), but are subject to any express provision made by or by virtue of any amendment contained in s 3(3), Sch 2 (which amends the Forged Transfers Act 1891 s 1, the Finance Act 1942 s 47 and the Colonial Stock Act 1948 s 1): Stock Transfer Act 1982 s 3(2).

8 Stock Transfer Act 1982 s 3(2)(a).

9 Stock Transfer Act 1982 s 3(2)(b).

10 As to the Secretary of State see PARA 6.

11 Stock Transfer Act 1982 s 3(4). A statutory instrument made in exercise of the power conferred by s 3(4) is subject to annulment in pursuance of a resolution of either House of Parliament: s 3(5). At the date at which this volume states the law, no order had been made under s 3(4).

UPDATE

430 Computerised transfer of certain government and public authority securities

NOTE 2--Definition of 'local authority' in Stock Transfer Act 1982 Sch 1 para 7(2) further amended: Local Democracy, Economic Development and Construction Act 2009 Sch 6 para 57.

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(v) Forged Transfers

431. Forged transfers of shares.

The company owes a duty to each of its shareholders not to take his shares out of his name unless he has executed a valid transfer of them, and this duty involves the corresponding obligation not to give effect to a forged transfer¹. If, however, the forged transfer is registered, the true owner of the shares may sue the company jointly with the transferee for rectification of the register of shareholders by striking out the name of the transferee and restoring his own². Where this remedy is no longer possible (as in the case of the intervention of third party rights) he may sue the company alone for an order that the company purchase and register in his name the necessary shares³. The period of limitation⁴ does not begin to run against him in favour of the company until the company resists his claim, as his cause of action is not the invalid transfer of his shares but the company's refusal, when the forgery is made known, to treat him as the shareholder⁵. Negligence on the part of the shareholder does not create an estoppel disentitling him to succeed, unless it is the proximate cause of what the company has done⁶.

The mere registration of the transferee does not entitle him to compel the company to recognise him as the holder of the shares⁷, since registration only gives effect to a prior valid transfer⁸. Nor is the company necessarily estopped from disputing, as against the transferee, the validity of the transfer⁹. The only duty which the company owes to the transferee is to consult the register¹⁰; but, even where such reference would have shown that the alleged transferor was not on the register, the company is not ipso facto liable by estoppel to the transferee¹¹. However, the issue of a certificate for the shares in favour of the transferee can undoubtedly create an estoppel in favour of the transferee himself, or any third party, if he acts to his detriment on the faith of it¹².

A person who, innocently, and even without negligence, brings about the transfer is bound to indemnify the company against any liability to the owner of the shares who has been displaced by a forged transfer¹³.

The provisions of the Forged Transfers Acts 1891 and 1892 apply to shares¹⁴.

1 *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188 at 214, CA, per Cotton LJ.

2 *Re Bahia and San Francisco Rly Co* (1868) LR 3 QB 584; *Barton v London North Western Rly Co* (1889) 24 QBD 77, CA. Cf *Midland Rly Co v Taylor* (1862) 8 HL Cas 751 at 756 per Lord Westbury LC.

3 *Barton v London and North Western Rly Co* (1888) 38 ChD 144 at 149, CA, per Cotton LJ, and at 152 per Lindley LJ; *Johnston v Renton* (1870) LR 9 Eq 181 at 188 per James V-C; *Welch v Bank of England* [1955] Ch 508, [1955] 1 All ER 811.

4 See under the Limitation Act 1980 s 2: see **LIMITATION PERIODS** vol 68 (2008) PARA 979.

5 *Barton v North Staffordshire Rly Co* (1888) 38 ChD 458 at 463 per Kay J; *Welch v Bank of England* [1955] Ch 508, [1955] 1 All ER 811.

6 *Mayor, Constables & Co of Merchants of the Staple of England v Governor & Co of Bank of England* (1887) 21 QBD 160 at 173, CA, per Lord Esher MR, and at 174 per Bowen LJ. Cf *Swan v North British Australasian Co* (1863) 2 H & C 175, Ex Ch. Failure to reply to an intimation by the company that the transfer is about to be

made unless objected to is not negligence on the part of the shareholder: *Barton v London and North Western Rly Co* (1889) 24 QBD 77, CA; *Welch v Bank of England* [1955] Ch 508, [1955] 1 All ER 811.

7 *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188, CA.

8 *France v Clark* (1884) 26 ChD 257, CA; *Barton v London and North Western Rly Co* (1888) 38 ChD 144 at 149, CA, per Cotton LJ.

9 *Waterhouse v London and South Western Rly Co* (1879) 41 LT 553. Cf *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188, CA. As to estoppel see further PARA 387.

10 *Balkis Consolidated Co v Tomkinson* [1893] AC 396 at 412-413, HL, per Lord Field; *Dixon v Kennaway & Co* [1900] 1 Ch 833.

11 *Balkis Consolidated Co v Tomkinson* [1893] AC 396, HL; *Dixon v Kennaway & Co* [1900] 1 Ch 833 (following *Knights v Wiffen* (1870) LR 5 QB 660); *Platt v Rowe (t/a Chapman & Rowe) and CM Mitchell & Co* (1909) 26 TLR 49. Cf *Foster v Tyne Pontoon and Dry Docks Co and Renwick* (1893) 63 LJQB 50 at 55 per Collins J (where it was held that the fact that the fraudulent person had been insolvent from the first precluded the plaintiff from getting damages from the company).

12 See PARA 387.

13 *Sheffield Corpn v Barclay* [1905] AC 392, HL. See also *Yeung Kai Yung v Hong Kong and Shanghai Banking Corpn* [1981] AC 787, [1980] 2 All ER 599, PC. As to the liability of a stockbroker who, without fraud on his part, by acting on a forged transfer or by identification of a forger brings about a transfer, see *Starkey v Bank of England* [1903] AC 114, HL; *Bank of England v Cutler* [1908] 2 KB 208, CA. A stockbroker is liable to indemnify a company or its registrar against the expense of restoring the true owner of shares to his previous position not only where the stockbroker requests the company or registrar to register a false transfer of shares but also where the broker makes the request for transfer after the company or registrar had issued a duplicate share certificate which a fraudster used to sell the shares through the broker: *Royal Bank of Scotland plc v Sandstone Properties Ltd* [1998] 2 BCLC 429 (the indemnity is sought against the consequence of complying with the request contained in the transfer form and/or for breach of a warranty that the form was genuine, without relying on anything which happened before that to establish the claim). *Royal Bank of Scotland plc v Sandstone Properties Ltd* was distinguished in *Cadbury Schweppes Ltd v Halifax Share Dealing Ltd* [2006] EWHC 1184 (Ch), [2007] 1 BCLC 497, on the basis that the company's claim for an indemnity in the latter case was defeated by the estoppel arising from the issue of the certificates (see also PARA 387).

As to costs of third parties see *Welch v Bank of England* [1955] Ch 508 at 548, [1955] 1 All ER 811 at 830 per Harman J.

14 See PARA 433.

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432. Forged transfers of debentures.

If the company registers a forged transfer of debentures, the true owner may obtain a cancellation of the registration and the delivery of the debentures¹; and if the debentures are redeemed by the company and the sums secured are paid to the transferee under a forged transfer, the company is primarily liable to the true owner for the sums so paid, without prejudice to any rights it may have against the transferee².

The provisions of the Forged Transfers Acts 1891 and 1892 apply to the debentures and debenture stock of a company, as well as to shares³.

1 *Cottam v Eastern Counties Rly Co* (1860) 1 John & H 243 (where one of three trustees forged the signatures of his co-trustees).

2 See the cases relating to transfers of shares and stock cited in PARA 431.

3 See PARA 433.

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433. Compensation for loss under forged transfers of shares.

A company may impose such reasonable restrictions on the transfer of its shares, stock or securities, or with respect to powers of attorney for the transfer of such, as it may consider requisite for guarding against losses arising from forgery¹. Out of its funds it may grant compensation for losses caused by forged instruments² or transfers under forged powers of attorney³, and may, if it thinks fit, charge a fee at a rate not exceeding five pence on every £100 transferred, with a minimum charge equal to that for £25, to provide for such compensation⁴; and it also may borrow on the security of its property to meet claims for such compensation⁵. Compensation may be paid whether the person receiving compensation or any person through whom he claims has or has not paid any fee or otherwise contributed to any fund out of which compensation is paid⁶. Where the company pays compensation, it is subrogated to the rights of the person compensated against the person liable for the loss⁷.

1 Forged Transfers Act 1891 s 1(4). As to forgery generally see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 346 et seq. The manner in which shares may be transferred is governed by the articles of the company and the general law: see PARA 399. As to restrictions in the articles of a company on the transfer of shares see PARA 392. As to forged transfers see PARA 431.

2 As to the meaning of 'instrument' for these purposes see the Forgery and Counterfeiting Act 1981 s 8; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 346 (definition applied by the Forged Transfers Act 1891 s 1(1A) (added by the Stock Transfer Act 1982 s 3, Sch 2)).

3 See the Forged Transfers Act 1891 s 1(1) (amended by the Stock Transfer Act 1982 Sch 2).

4 See the Forged Transfers Act 1891 s 1(2) (amended by the Forged Transfers Act 1892 ss 2, 3; and the Decimal Currency Act 1969 s 11(1)). This provision is obsolete in practice.

5 See the Forged Transfers Act 1891 s 1(3) (amended by SI 1990/1285).

6 See the Forged Transfers Act 1891 s 1(1) (amended by the Forged Transfers Act 1892 ss 2, 3; Stock Transfer Act 1982 Sch 2; Statute Law (Repeals) Act 2004).

7 See the Forged Transfers Act 1891 s 1(5). These provisions apply to all companies incorporated by or in pursuance of any Act of Parliament or by royal charter or amalgamated with such a company: s 2; Forged Transfers Act 1892 s 4.

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(vi) Transmission of Securities

434. Transmission of securities on death etc.

In the model articles¹, and in articles of association generally², the word 'transmission' is used in relation to shares in contradistinction to the word 'transfer'; the former means transmission by operation of law, including devolution by death or bankruptcy³, and the latter a transfer by the act of a member⁴. Unless the articles otherwise provide, the survivors or survivor of registered joint holders of shares⁵ are alone entitled to and liable upon such shares⁶, even where one of the joint holders is a corporation⁷.

Upon the death of the sole holder of shares, the title to his shares devolves upon his personal representatives⁸, who, subject to any provisions in the articles of association, may transfer his shares without being registered as shareholders⁹, or, in the absence of any right of veto conferred on the company by its articles, may have their names entered on the register¹⁰. The production to a company¹¹ of any document that is by law sufficient evidence of the grant of probate of the will of a deceased person¹², letters of administration of the estate of a deceased person¹³, or confirmation as executor of a deceased person¹⁴, must be accepted by the company as sufficient evidence of the grant¹⁵. The personal representatives are liable for calls only in their representative capacity until they are registered as members with their consent; but after registration they become personally liable¹⁶. It is the duty of the representatives to give notice of the member's death as soon as possible¹⁷. Where executors are entitled to be registered as members, they are entitled to have their names inserted in such order as they please and the company cannot state on the register that they are executors¹⁸. On the death of a shareholder domiciled abroad the company may act only upon a grant of probate or administration in this country¹⁹. If, therefore, the company registers the name of or a transfer by any person who has not obtained such a grant or pays dividends to any such person, it becomes an executor without authority, and is liable to penalties and to pay such duties as would have been payable on a grant of probate²⁰.

When new shares are offered to the members in proportion to their holdings while the name of a deceased member is on the register, the executors may claim their testator's proportion²¹. They must, however, be registered themselves as members in respect of the new shares, and become liable to the company as individuals²², though as between them and the beneficiaries they hold the shares as part of the estate and have a right of indemnity against the estate²³.

On a registered member having a person appointed as trustee of his estate in bankruptcy, the right to transfer his shares will vest in the trustee in bankruptcy²⁴.

1 As to the model articles see PARA 288.

2 As to a company's articles of association generally see PARA 288 et seq.

3 *Barton v London and North Western Rly Co* (1889) 24 QBD 77 at 88, CA, per Lindley LJ. As to the provision made in respect of the transmission of shares in the model articles see the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 Pt 3 arts 27-29 (private company), Sch 3 Pt 4 arts 65-68 (public company). Similar provision is made in the Companies (Tables A to F) Regulations 1985, SI 1985/805: see Schedule, Table A arts 29-31. As to the continuing application of the Companies (Tables A to F) Regulations 1985, SI 1985/805, see PARA 230.

4 *Re Bentham Mills Spinning Co* (1879) 11 ChD 900 at 904, CA, per Jessel MR; *Moodie v W and J Shepherd (Bookbinders) Ltd* [1949] 2 All ER 1044 at 1054, HL, per Lord Reid; *Stothers v William Steward (Holdings) Ltd* [1994] 2 BCLC 266 at 273, CA, per Peter Gibson LJ. The distinction between transfer and transmission is also recognised by the Companies Act 2006 s 770(2), which permits a company to register as shareholder or debenture holder a person to whom the right to any shares in or debentures of the company has been transmitted by operation of law: see PARA 399. As to the transfer of shares generally see PARA 389 et seq.

5 As to shareholders and membership of companies generally see PARAS 321 et seq, 1697 et seq.

6 *Re Maria Anna and Steinbank Coal and Coke Co, Maxwell's Case, Hill's Case* (1875) LR 20 Eq 585. It is usually so provided in the articles: see the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 Pt 3 art 27 (private company), Sch 3 Pt 4 art 65 (public company), the latter of which also provides that nothing in

the articles releases the estate of a deceased member from any liability in respect of a share solely or jointly held by that member. The Companies (Tables A to F) Regulations 1985, SI 1985/805, makes similar provision: see Schedule, Table A art 29.

7 See the Bodies Corporate (Joint Tenancy) Act 1899 s 1 (passed in consequence of *Law Guarantee and Trust Society Ltd and Hunter v Governor & Co of Bank of England* (1890) 24 QBD 406); and *Re Thompson's Settlement Trusts, Thompson v Alexander* [1905] 1 Ch 229. As to companies and corporations generally see PARA 2. As to corporations as joint tenants under the Bodies Corporate (Joint Tenancy) Act 1899 see **REAL PROPERTY** vol 39(2) (Reissue) PARA 192.

8 See *Re Greene, Greene v Greene* [1949] Ch 333, [1949] 1 All ER 167. As to the meaning of 'personal representative' see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 4.

9 See the Companies Act 2006 s 773; Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 Pt 3 art 27 (private company), Sch 3 Pt 4 art 66 (public company); the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A arts 29-31; and PARA 398. See also *Stothers v William Steward (Holdings) Ltd* [1994] 2 BCLC 266, CA (articles properly construed permitted transfers by personal representatives to the same extent as transfers to privileged relations were permitted by members while alive; hence the personal representatives were able to transfer the shares of the deceased member to his widow (a privileged relation) without obtaining the consent of the directors to the transfer). As to voting by a person entitled by transmission see PARA 653.

10 *Scott v Frank F Scott (London) Ltd* [1940] Ch 794, [1940] 3 All ER 508, CA. As to the register of members see PARA 335 et seq.

11 As to the meaning of 'company' see PARA 24.

12 Companies Act 2006 s 774(a). As to the grant of probate see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 103 et seq.

13 Companies Act 2006 s 774(b). As to letters of administration see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 155 et seq.

14 Companies Act 2006 s 774(c). As to appointment as executor see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 6 et seq.

15 Companies Act 2006 s 774.

16 *Duff's Executors' Case* (1886) 32 ChD 301, CA; *Buchan's Case* (1879) 4 App Cas 549, 583, HL. As to the personal representatives being put on the list of contributories see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 711.

17 *New Zealand Gold Extraction Co (Newberg-Vautin Process) v Peacock* [1894] 1 QB 622 at 632-633, CA, per Davey LJ.

18 *Re TH Saunders & Co Ltd* [1908] 1 Ch 415; *Edwards v Ransomes and Rapier Ltd* (1930) 143 LT 594. As to the exclusion of trusts from the register see the Companies Act 2006 s 126; and PARA 343.

19 See *Commercial Bank Corp'n of India and the East, Fernandes' Executors' Case* (1870) 5 Ch App 314. As to the resealing of dominion and colonial grants see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 245 et seq. As to foreign domicile grants see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 252 et seq.

20 *New York Breweries Co v A-G* [1899] AC 62, HL. See also *Re Baku Consolidated Oilfields Ltd* [1994] 1 BCLC 173 at 176 per Chadwick J (liquidator not bound to insist on an English grant being obtained if satisfied that the personal representatives would be so entitled and can distribute a deceased member's share of surplus assets without the formality of an English grant; he may seek a suitable indemnity to protect himself against liability as an executor de son tort). As to an executor without authority (formerly an 'executor de son tort') see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 53 et seq.

21 *James v Buena Ventura Nitrate Grounds Syndicate Ltd* [1896] 1 Ch 456, CA.

22 *Re Leeds Banking Co, Fearnside and Dean's Case, Dobson's Case* (1866) 1 Ch App 231; *Duff's Executors' Case* (1886) 32 ChD 301, CA.

23 *Duff's Executors' Case* (1886) 32 ChD 301 at 309, CA, per Cotton LJ, and at 310 per Fry LJ.

24 See the Insolvency Act 1986 ss 306, 311(3); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 391, 397, 422.

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(10) DISCLOSURE OF INTERESTS IN SHARES OF PUBLIC COMPANIES

(i) In general

435. Interaction between the Companies Act 2006 and rules made under the Financial Services and Markets Act 2000.

Although the Companies Act 2006 makes provision in relation to the disclosure of information about interests in public company shares¹, the rules that have been made under the Financial Services and Markets Act 2000 for the purposes of the Transparency Obligations Directive² also have effect³. Of particular relevance in this context are the provisions contained in those chapters of the Disclosure Rules and Transparency Rules which set out: (1) the notification obligations of issuers, persons discharging managerial responsibilities (PDMRs) and their connected persons in respect of transactions conducted on their own account in shares of the issuer, or derivatives or any other financial instrument relating to those shares⁴; and (2) the notification obligations that a person must make to an issuer of the percentage of its voting rights he holds as shareholder or holds or is deemed to hold through his direct or indirect holding of financial instruments, if (subject to certain exemptions) the percentage of those voting rights reaches, exceeds or falls below certain thresholds as a result of an acquisition or disposal of shares or certain financial instruments, or reaches, exceeds or falls below an applicable threshold as a result of events changing the breakdown of voting rights and on the basis of information disclosed by the issuer⁵.

1 See the Companies Act 2006 Pt 22 (ss 791-828); and **PARA 437 et seq.**

2 I.e. European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38) relating to the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) **PARA 415 et seq.**

3 See the Financial Services and Markets Act 2000 s 89A; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) **PARA 415**. Rules under the Financial Services and Markets Act 2000 s 89A are referred to as 'transparency rules': see s 89A(5), s 103(1); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) **PARA 415**. See also the Financial Services Authority's Handbook of Rules and Guidance (including Listing, Disclosure and Prospectus Rules). As to the Financial Services Authority see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) **PARA 4 et seq.**

4 See DTR 3.1.

5 See DTR 5.1, especially DTR 5.1.2. A notification given in accordance with DTR 5.1.2 must include the following information: the resulting situation in terms of voting rights; the chain of controlled undertakings through which voting rights are effectively held, if applicable; the date on which the threshold was reached or crossed; and the identity of the shareholder, even if that shareholder is not entitled to exercise voting rights under the conditions laid down in DTR 5.2.1 and of the person entitled to exercise voting rights on behalf of that shareholder: see DTR 5.8.1.

A notification required of voting rights arising from the holding of financial instruments must include the following information: (1) the resulting situation in terms of voting rights (see DTR 5.8.2(1)(a)); (2) if applicable,

the chain of controlled undertakings through which financial instruments are effectively held (see DTR 5.8.2(1)(b)); (3) the date on which the threshold was reached or crossed (see DTR 5.8.2(1)(c)); (4) for instruments with an exercise period, an indication of the date or time period where shares will or can be acquired, if applicable (see DTR 5.8.2(1)(d)); (5) date of maturity or expiration of the instrument (see DTR 5.8.2(1)(e)); (6) identity of the holder (see DTR 5.8.2(1)(f)); and (7) name of the underlying issuer (see DTR 5.8.2(1)(g)).

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(ii) Interests in Public Company Shares

436. Information about interests in public company shares.

The Companies Act 2006 makes specific provision¹ in relation to the disclosure of information about interests in public company shares². References in those provisions to a company's shares are to the company's issued shares of a class carrying rights to vote in all circumstances at general meetings of the company³ (including any shares held as treasury shares)⁴. The temporary suspension of voting rights in respect of any shares does not affect the application of the statutory provisions in relation to interests in those or any other shares⁵.

1 See the Companies Act 2006 Pt 22 (ss 791-828) (see PARA 437 et seq).

2 See the Companies Act 2006 s 791. As to the meaning of 'public company' see PARA 102. The repeal of the Companies Act 1985 ss 198-210, 220 does not affect any obligation to which a person became subject under s 198 before 20 January 2007: see the Companies Act 2006 (Commencement No 1, Transitional Provisions and Savings) Order 2006, SI 2006/3428, art 8(1), Sch 5 para 2(1).

3 As to meetings of members see PARA 629 et seq. As to voting at meetings see PARA 653 et seq.

4 Companies Act 2006 s 792(1). As to treasury shares see PARA 1251. As to the power of the Secretary of State to amend the definition of shares see PARA 437.

5 Companies Act 2006 s 792(2).

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437. Secretary of State's power to make further provision.

The Secretary of State¹ may by regulations² amend:

- 760 (1) the definition of shares³ to which the statutory provisions relating to interests in a public company's shares⁴ apply⁵;
- 761 (2) the provisions as to notice by a company requiring information about interests in its shares⁶; and
- 762 (3) the provisions as to what is taken to be an interest in shares⁷.

The regulations may amend, repeal or replace those provisions and make such other consequential amendments or repeals of provisions as appear to the Secretary of State to be appropriate⁸.

1 As to the Secretary of State see PARA 6.

2 Regulations under the Companies Act 2006 s 828 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see the Companies Act 2006 ss 828(3), 1290. At the date at which this volume states the law, no such regulations had been made.

3 Ie the definition set out in the Companies Act 2006 s 792 (see PARA 436).

4 Ie the Companies Act 2006 Pt 22 (ss 791-828). As to the meaning of 'public company' see PARA 102.

5 Companies Act 2006 s 828(1)(a).

6 Companies Act 2006 s 828(1)(b). The provisions as to notice are set out in s 793 (see PARA 442).

7 Companies Act 2006 s 828(1)(c). The provisions as to what is taken to be an interest in shares are set out in ss 820, 821 (see PARA 438).

8 Companies Act 2006 s 828(2).

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438. Determining whether a person has a disclosable interest.

The following provisions apply to determine¹ whether a person has an interest in public company shares². For this purpose³, a reference to an interest in shares includes an interest of any kind whatsoever in the shares, and any restraints or restrictions to which the exercise of any right attached to the interest is or may be subject are to be disregarded⁴.

Where an interest in shares is comprised in property held on trust, every beneficiary of the trust is treated as having an interest in the shares⁵.

A person is treated as having an interest in shares if: (1) he enters into a contract to acquire them; or (2) not being the registered holder, he is entitled to exercise any right conferred by the holding of the shares, or to control the exercise of any such right⁶.

A person is treated as having an interest in shares if: (a) he has a right to call for delivery of the shares to himself or to his order; or (b) he has a right to acquire an interest in shares or is under an obligation to take an interest in shares⁷. This applies whether the right or obligation is conditional or absolute⁸.

Persons having a joint interest are treated as each having that interest⁹.

It is immaterial that shares in which a person has an interest are unidentifiable¹⁰.

1 Ie for the purposes of the Companies Act 2006 Pt 22 (ss 791-828).

2 Companies Act 2006 s 820(1). See s 791; and PARA 436. As to the meaning of 'public company' see PARA 102. The repeal of the Companies Act 1985 ss 212-220 (power of public company to require disclosure of interests in shares) does not affect the operation of those provisions in relation to a notice issued by a company

under s 212 before 20 January 2007: see the Companies Act 2006 (Commencement No 1, Transitional Provisions and Savings) Order 2006, SI 2006/3428, art 8(1), Sch 5 para 2(2).

3 le for the purposes of the Companies Act 2006 Pt 22 (ss 791-828).

4 Companies Act 2006 s 820(2). The provisions of s 793 (notice by company requiring information about interests in its shares) (see PARA 442) apply in relation to a person who has, or previously had, or is or was entitled to acquire, a right to subscribe for shares in the company as it applies in relation to a person who is or was interested in shares in that company; and references in s 793 to an interest in shares are to be read accordingly: s 821(1), (2).

5 Companies Act 2006 s 820(3).

6 Companies Act 2006 s 820(4). A person is entitled to exercise or control the exercise of a right conferred by the holding of shares if he: (1) has a right (whether subject to conditions or not) the exercise of which would make him so entitled; or (2) is under an obligation (whether subject to conditions or not) the fulfilment of which would make him so entitled: s 820(5).

7 Companies Act 2006 s 820(6).

8 Companies Act 2006 s 820(6).

9 Companies Act 2006 s 820(7).

10 Companies Act 2006 s 820(8).

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439. Family and corporate interests.

A person is taken¹ to be interested in public company shares² in which his spouse or civil partner, or any infant child or step-child of his, is interested³.

A person is taken⁴ to be interested in public company shares⁵ if a body corporate⁶ is interested in them and: (1) the body or its directors are accustomed to act in accordance with his directions or instructions; or (2) he is entitled to exercise or control the exercise of one-third or more of the voting power at general meetings of the body⁷.

1 le for the purposes of the Companies Act 2006 Pt 22 (ss 791-828).

2 See PARA 436. As to the meaning of 'public company' see PARA 102.

3 Companies Act 2006 s 822(1).

4 le for the purposes of the Companies Act 2006 Pt 22 (ss 791-828).

5 See PARA 436.

6 As to the meaning of 'body corporate' see PARA 1 note 5.

7 Companies Act 2006 s 823(1). As to meetings of members see PARA 629 et seq. As to voting at meetings see PARA 653 et seq. For the purposes of s 823, a person is treated as entitled to exercise or control the exercise of voting power if: (1) another body corporate is entitled to exercise or control the exercise of that voting power; and (2) he is entitled to exercise or control the exercise of one-third or more of the voting power at general meetings of that body corporate: s 823(2). A person is also treated as entitled to exercise or control the exercise of voting power if: (a) he has a right (whether or not subject to conditions) the exercise of which would make him so entitled; or (b) he is under an obligation (whether or not subject to conditions) the fulfilment of which would make him so entitled: s 823(3).

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440. Agreement to acquire interests in a particular public company.

An interest in public company shares¹ may arise² from an agreement³ between two or more persons that includes provision for the acquisition by any one or more of them of interests in shares of a particular public company (the 'target company' for that agreement)⁴.

An interest arises in relation to such an agreement if:

- 763 (1) the agreement includes provision imposing obligations or restrictions on any one or more of the parties to it with respect to their use⁵, retention or disposal of their interests in the shares of the target company acquired in pursuance of the agreement (whether or not together with any other interests of theirs in the company's shares to which the agreement relates)⁶; and
- 764 (2) an interest in the target company's shares is in fact acquired by any of the parties in pursuance of the agreement⁷.

Once an interest in shares in the target company has been acquired in pursuance of the agreement, then the interest continues so long as the agreement continues to include provisions of any description mentioned in heads (1) and (2)⁸. This applies irrespective of: (a) whether or not any further acquisitions of interests in the company's shares take place in pursuance of the agreement; (b) any change in the persons who are for the time being parties to it; (c) any variation of the agreement⁹.

An interest does not arise in relation to an agreement that is not legally binding unless it involves mutuality in the undertakings, expectations or understandings of the parties to it¹⁰. Nor does it arise in relation to an agreement to underwrite or sub-underwrite an offer of shares in a company, provided the agreement is confined to that purpose and any matters incidental to it¹¹.

1 See PARA 436. As to the meaning of 'public company' see PARA 102.

2 See for the purposes of the Companies Act 2006 Pt 22 (ss 791-828).

3 'Agreement' includes any agreement or arrangement: Companies Act 2006 s 824(5)(a). References to provisions of an agreement include: (1) undertakings, expectations or understandings operative under an arrangement; and (2) any provision whether express or implied and whether absolute or not: s 824(5)(b). References elsewhere in Pt 22 to an agreement to which s 824 applies have a corresponding meaning: s 824(5).

4 Companies Act 2006 s 824(1).

5 The reference in head (1) in the text to the use of interests in shares in the target company is to the exercise of any rights or of any control or influence arising from those interests (including the right to enter into an agreement for the exercise, or for control of the exercise, of any of those rights by another person): Companies Act 2006 s 824(3).

6 Companies Act 2006 s 824(2)(a).

7 Companies Act 2006 s 824(2)(b).

8 Companies Act 2006 s 824(4). References in s 824(4) to the agreement include any agreement having effect (whether directly or indirectly) in substitution for the original agreement: s 824(4).

9 Companies Act 2006 s 824(4).

10 Companies Act 2006 s 824(6)(a).

11 Companies Act 2006 s 824(6)(b). As to underwriting see PARA 1151 et seq.

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441. Extent of obligation in case of share acquisition agreement.

Each party to a share acquisition agreement¹ is treated² for the purposes of disclosure³ as interested in all shares in the target company⁴ in which any other party to the agreement is interested apart from the agreement⁵ (whether or not the interest of the other party was acquired, or includes any interest that was acquired, in pursuance of the agreement)⁶. Accordingly, any such interest of the person (apart from the agreement) includes for those purposes any family or corporate interest treated as his⁷ in relation to any other agreement with respect to shares in the target company to which he is a party⁸.

A notification with respect to his interest in shares in the target company made to the company⁹ by a person who is for the time being a party to a share acquisition agreement must¹⁰:

- 765 (1) state that the person making the notification is a party to such an agreement¹¹;
- 766 (2) include the names and (so far as known to him) the addresses of the other parties to the agreement, identifying them as such¹²; and
- 767 (3) state whether or not any of the shares to which the notification relates are shares in which he is interested¹³ and, if so, the number of those shares¹⁴.

1 ie an agreement to which the Companies Act 2006 s 824 applies (see PARA 440).

2 ie for the purposes of the Companies Act 2006 Pt 22 (ss 791-828).

3 See PARA 442.

4 See PARA 440.

5 For these purposes, an interest of a party to such an agreement in shares in the target company is an interest apart from the agreement if he is interested in those shares otherwise than by virtue of the application of the Companies Act 2006 s 824 (see PARA 440) (and s 825) in relation to the agreement: s 825(2).

6 Companies Act 2006 s 825(1).

7 ie under the Companies Act 2006 s 822 or s 823 (see PARA 439) or by the application of s 824 (see PARA 440) (and s 825).

8 Companies Act 2006 s 825(3).

9 ie under the Companies Act 2006 Pt 22 (ss 791-828).

10 Companies Act 2006 s 825(4).

- 11 Companies Act 2006 s 825(4)(a).
- 12 Companies Act 2006 s 825(4)(b).
- 13 Ie by virtue of the Companies Act 2006 s 824 (see PARA 440) (and s 825).
- 14 Companies Act 2006 s 825(4)(c).

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(iii) Company Notice requiring Information about Interests in Shares

442. Notice by company requiring information about interests.

A public company¹ may give notice² to any person whom the company knows or has reasonable cause to believe: (1) to be interested in the company's shares³; or (2) to have been so interested at any time during the three years immediately preceding the date on which the notice is issued⁴. The notice may require the person: (a) to confirm that fact or (as the case may be) to state whether or not it is the case; and (b) if he holds, or has during that time held, any such interest, to give such further information as may be required by the notice⁵. The notice may require:

- 768 (i) the person to whom it is addressed to give particulars⁶ of his own present or past interest in the company's shares (held by him at any time during the three years immediately preceding the date on which the notice is issued)⁷;
- 769 (ii) the person to whom it is addressed, where his interest is a present interest and another interest in the shares subsists, or another interest in the shares subsisted during that three year period at a time when his interest subsisted, to give, so far as lies within his knowledge, such particulars with respect to that other interest as may be required by the notice⁸;
- 770 (iii) the person to whom it is addressed, where his interest is a past interest, to give (so far as lies within his knowledge) particulars of the identity of the person who held that interest immediately upon his ceasing to hold it⁹.

The information required by the notice must be given within such reasonable time as may be specified in the notice¹⁰.

1 As to the meaning of 'public company' see PARA 102.

2 Ie under the Companies Act 2006 s 739.

3 The provisions of the Companies Act 2006 s 793 (notice by company requiring information about interests in its shares) apply in relation to a person who has, or previously had, or is or was entitled to acquire, a right to subscribe for shares in the company as they apply in relation to a person who is or was interested in shares in that company; and references to an interest in shares are to be read accordingly: s 821.

4 Companies Act 2006 s 793(1). Under the Financial Services Authority's Disclosure Rules and Transparency Rules (DTR), an issuer must notify a Regulatory Information Service (RIS) of any information notified to it in accordance with the Companies Act 2006 s 793 to the extent that it relates to the interests of a director or, as far as the issuer is aware, any connected person: see DTR 3.1.4(c). As to the meaning of 'Regulatory

Information Service' under the Listing Rules see PARA 483 note 8. See further the rules governing obligations of notification and disclosure regarding interests in voting rights under the DTR: especially see DTR 5; and PARA 435. As to the rules made by the Financial Services Authority generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385.

5 Companies Act 2006 s 793(2).

6 The particulars referred to in heads (i) and (ii) in the text include: (1) the identity of persons interested in the shares in question; and (2) whether persons interested in the same shares are or were parties to (a) an agreement to which the Companies Act 2006 s 824 applies (certain share acquisition agreements) (see PARA 440); or (b) an agreement or arrangement relating to the exercise of any rights conferred by the holding of the shares: s 793(5).

7 Companies Act 2006 s 793(3). See note 6.

8 Companies Act 2006 s 793(4). See note 6.

9 Companies Act 2006 s 793(6).

10 Companies Act 2006 s 793(7).

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443. Persons exempted from obligation to comply with notice by company.

A person is not obliged to comply with a notice requiring information about interests in public company shares¹ if he is for the time being exempted² by the Secretary of State³. The Secretary of State must not grant any such exemption unless he has consulted the Governor of the Bank of England⁴, and he (the Secretary of State) is satisfied that, having regard to any undertaking given by the person in question with respect to any interest held or to be held by him in any shares, there are special reasons why that person should not be subject to the obligation to comply with the notice⁵.

1 I.e a notice under the Companies Act 2006 s 793 (see PARA 442). As to the meaning of 'public company' see PARA 102.

2 I.e exempted from the operation of the Companies Act 2006 s 793 (see PARA 442).

3 Companies Act 2006 s 796(1). As to the Secretary of State see PARA 6.

4 As to the Governor of the Bank of England see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 793.

5 Companies Act 2006 s 796(2).

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444. Failure to comply: offences.

An offence is committed by a person who: (1) fails to comply with a notice requiring information about interests in public company shares¹; or (2) in purported compliance with such a notice makes a statement that he knows to be false in a material particular, or recklessly makes a statement that is false in a material particular². However, a person does not commit an offence under head (1) if he proves that the requirement to give information was frivolous or vexatious³.

1 le a notice under the Companies Act 2006 s 793 (see PARA 442). As to the meaning of 'public company' see PARA 102.

2 Companies Act 2006 s 795(1). A person guilty of an offence under s 795 is liable: (1) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine (or both); (2) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or both: s 795(3). As to the statutory maximum see PARA 1622. In relation to an offence committed before the coming into force of the Criminal Justice Act 2003 s 154(1) (not yet in force), the maximum term of imprisonment on summary conviction is six months: see the Companies Act 2006 s 1131.

3 Companies Act 2006 s 795(2).

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445. Failure to comply: order imposing restrictions on shares.

Where a notice requiring information about interests in a public company's shares¹ is served by a company on a person who is or was interested in shares in the company, and that person fails to give the company the information required by the notice within the time specified in it, the company may apply to the court for an order directing that the shares in question be subject to restrictions².

If the court is satisfied that such an order may unfairly affect the rights of third parties in respect of the shares, the court may, for the purpose of protecting those rights and subject to such terms as it thinks fit, direct that such acts by such persons or descriptions of persons and for such purposes as may be set out in the order are not to constitute a breach of the restrictions³.

On an application, the court may make an interim order⁴. Any such order may be made unconditionally or on such terms as the court thinks fit⁵.

1 le a notice under the Companies Act 2006 s 793 (see PARA 442). As to the meaning of 'public company' see PARA 102.

2 Companies Act 2006 s 794(1). For the effect of such an order see s 797 (see PARA 446): s 794(1). The Secretary of State may by regulations made by statutory instrument make such amendments of the provisions of s 794 relating to orders imposing restrictions on shares as appear to him necessary or expedient, for enabling orders to be made in a form protecting the rights of third parties, or with respect to the circumstances in which restrictions may be relaxed or removed, or with respect to the making of interim orders by a court: Companies Act 1989 s 135(1), (2) (amended by SI 2008/948). The regulations may make different provision for different cases and may contain such transitional and other supplementary and incidental provisions as appear to the Secretary of State to be appropriate (Companies Act 1989 s 135(3)); but such regulations are not to be made unless a draft of the regulations has been laid before Parliament and approved by resolution of each House of Parliament (s 135(4)). As to the Secretary of State see PARA 6. At the date at which this volume states

the law, no such regulations had been made in relation to the Companies Act 2006 s 794. As from a day to be appointed under the Companies Act 2006 s 1300(2), the Companies Act 1989 s 135 is to be repealed: see the Companies Act 2006 s 1295, Sch 16. However, at the date at which this volume states the law, no such day had been appointed.

3 Companies Act 2006 s 794(2).

4 Companies Act 2006 s 794(3). Further provision about orders under s 794 is made in ss 798-802 (see PARAS 447-449): s 794(4).

5 Companies Act 2006 s 794(3).

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446. Effect of order imposing restrictions.

The effect of an order¹ that public company shares are subject to restrictions is as follows²:

- 771 (1) any transfer of the shares, or agreement to transfer the shares, is void³;
- 772 (2) no voting rights are exercisable in respect of the shares⁴;
- 773 (3) no further shares may be issued in right of the shares or in pursuance of an offer made to their holder⁵;
- 774 (4) except in a liquidation, no payment may be made of sums due from the company on the shares, whether in respect of capital or otherwise⁶.

Where shares are subject to the restriction in head (3) or head (4), an agreement to transfer any right to be issued with other shares in right of those shares, or to receive any payment on them (otherwise than in a liquidation), is void⁷.

The provisions set out above are subject to any directions for the protection of third parties⁸, and to the terms of any interim order⁹.

1 Ie an order under the Companies Act 2006 s 794 (see PARA 445).

2 Companies Act 2006 s 797(1). As to the meaning of 'public company' see PARA 102.

3 Companies Act 2006 s 797(1)(a), (2). As to the transfer of shares see PARA 389 et seq. The provisions of s 797 do not apply to an agreement to transfer the shares on the making of an order under s 800 made by virtue of s 800(3)(b) (removal of restrictions in case of court-approved transfer) (see PARA 448): s 797(2).

4 Companies Act 2006 s 797(1)(b). As to voting rights see PARA 653 et seq.

5 Companies Act 2006 s 797(1)(c). As to the issue of shares see PARAS 1045, 1092.

6 Companies Act 2006 s 797(1)(d). As to the appointment of a liquidator where a company goes into voluntary liquidation see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 950.

7 Companies Act 2006 s 797(3). This does not apply to an agreement to transfer any such right on the making of an order under s 800 made by virtue of s 800(3)(b) (removal of restrictions in case of court-approved transfer) (see PARA 448): s 797(3).

8 Ie any directions under the Companies Act 2006 s 794(2) (see PARA 445) or s 799(3) (see PARA 448).

9 Companies Act 2006 s 797(4). An interim order is made under s 794(3) (see PARA 445).

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447. Penalty for attempted evasion of restrictions on shares.

Where public company shares are subject to restrictions by virtue of an order¹, a person commits an offence if he²:

- 775 (1) exercises or purports to exercise any right to dispose of shares that to his knowledge are for the time being subject to restrictions, or to dispose of any right to be issued with any such shares³;
- 776 (2) votes in respect of any such shares (whether as holder or proxy), or appoints a proxy to vote in respect of them⁴; or
- 777 (3) being the holder of any such shares, fails to notify of their being subject to those restrictions a person whom he does not know to be aware of that fact but does know to be entitled (apart from the restrictions) to vote in respect of those shares whether as holder or as proxy⁵; or
- 778 (4) being the holder of any such shares, or being entitled to a right to be issued with other shares in right of them, or to receive any payment on them (otherwise than in a liquidation), enters into an agreement which is void⁶.

If shares in a company are issued in contravention of the restrictions, an offence is committed by the company and by every officer of the company who is in default⁷.

The provisions set out above are subject to directions for the protection of third parties⁸, or any directions as to the relaxation or removal of restrictions⁹, and to the terms of any interim order¹⁰.

1 Ie an order under the Companies Act 2006 s 794 (see PARA 445). As to the meaning of 'public company' see PARA 102.

2 Companies Act 2006 s 798(1), (2).

3 Companies Act 2006 s 798(2)(a).

4 Companies Act 2006 s 798(2)(b).

5 Companies Act 2006 s 798(2)(c).

6 Companies Act 2006 s 798(2)(d). An agreement is void under s 797(2) or (3) (see PARA 446).

7 Companies Act 2006 s 798(3). A person guilty of such an offence is liable on conviction on indictment, to a fine, and, on summary conviction, to a fine not exceeding the statutory maximum: s 798(4). As to the statutory maximum see PARA 1622.

8 Ie any directions under the Companies Act 2006 s 794(2) (see PARA 445).

9 Ie any directions under the Companies Act 2006 s 799 (see PARA 448) or s 800 (see PARA 448).

10 Companies Act 2006 s 798(5). An interim order is made under s 794(3) (see PARA 445).

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448. Relaxation and removal of restrictions on shares.

An application may be made to the court on the ground that an order directing that public company shares are to be subject to restrictions unfairly affects the rights of third parties in respect of the shares¹. An application may be made by the company or by any person aggrieved². If the court is satisfied that the application is well founded, it may, for the purpose of protecting the rights of third parties in respect of the shares, and subject to such terms as it thinks fit, direct that such acts by such persons or descriptions of persons and for such purposes as may be set out in the order do not constitute a breach of the restrictions³.

An application may also be made to the court for an order directing that the shares cease to be subject to restrictions⁴. An application may be made by the company or by any person aggrieved⁵. The court must not make such an order unless: (1) it is satisfied that the relevant facts about the shares have been disclosed to the company and no unfair advantage has accrued to any person as a result of the earlier failure to make that disclosure⁶; or (2) the shares are to be transferred for valuable consideration and the court approves the transfer⁷.

1 Companies Act 2006 s 799(1). As to the meaning of 'public company' see PARA 102. In the High Court, such an application must be made by the issue of a CPR Pt 8 claim form (as to which see **CIVIL PROCEDURE** vol 11 (2009) PARAS 117, 127 et seq): see *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 5. For cases illustrating the adverse effect restrictions can have on third parties see *Re Geers Gross plc* [1988] 1 All ER 224, [1987] 1 WLR 1649, CA; *Re Lonrho plc (No 3)* [1989] BCLC 480; *Re Lonrho plc (no 2)* [1990] Ch 695, sub nom *Re Lonrho plc (No 4)* [1990] BCLC 151.

2 Companies Act 2006 s 799(2).

3 Companies Act 2006 s 799(3).

4 Companies Act 2006 s 800(1).

5 Companies Act 2006 s 800(2).

6 Companies Act 2006 s 800(3)(a). Once the information to which the company is entitled is supplied, the order imposing the restrictions should be discharged; a desire to produce evidence of new failures is no ground for adjournment of the hearing or continuation of the restrictions: *Re Ricardo Group plc* [1989] BCLC 566. Cf *Re Lonrho plc* [1988] BCLC 53 (the provision empowers the court to free shares subject to a restriction but does not require the court to do so, particularly where it appears that the applicant to have the restriction lifted has not disclosed information reasonably required in relation to other shares of the company). See also *Re Ricardo Group plc (No 3)* [1989] BCLC 771 (restrictions released without disclosure of information where their continuation would prevent a take-over bid from going ahead to the prejudice of those shareholders who wanted to accept the bid).

7 Companies Act 2006 s 800(3)(b). An order made by virtue of s 800(3)(b) may continue, in whole or in part, the restrictions on issue of further shares or making of payments mentioned in s 797(1)(c), (d) (see PARA 446 heads (3), (4)) so far as they relate to a right acquired or offer made before the transfer: s 800(4). Where any restrictions continue in force under s 800(4): (1) an application may be made under s 800 for an order directing that the shares are to cease to be subject to those restrictions; and (2) s 800(3) does not apply in relation to the making of such an order: s 800(5).

As to the type of circumstances requiring the maintenance of any restrictions see *Re TR Technology Investment Trust plc* [1988] BCLC 256. In exercising its discretion whether to approve a sale, the court is entitled to take into account the refusal to disclose relevant facts: *Re Geers Gross plc* [1988] 1 All ER 224, [1987] 1 WLR 1649, CA.

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449. Order for sale of shares subject to restrictions.

The court may order that the public company shares subject to restrictions be sold, subject to the court's approval as to the sale¹. An application for such an order may only be made by the company². Where the court has made an order, it may make such further order relating to the sale or transfer of the shares as it thinks fit³. An application for a further order may be made by the company, by the person appointed by or in pursuance of the order to effect the sale, or by any person interested in the shares⁴. On making an order or a further order, the court may order that the applicant's costs be paid out of the proceeds of sale⁵.

Where shares are sold in pursuance of an order of the court⁶, the proceeds of the sale, less the costs of the sale, must be paid into court for the benefit of the persons who are beneficially interested in the shares⁷. A person who is beneficially interested in the shares may apply to the court for the whole or part of those proceeds to be paid to him⁸. On such an application the court must order the payment to the applicant of the whole of the proceeds of sale together with any interest on them⁹, unless another person had a beneficial interest in the shares at the time of their sale, in which case the court must order the payment of such proportion of the proceeds and interest as the value of the applicant's interest in the shares bears to the total value of the shares¹⁰. However, if the court has ordered¹¹ that the costs of an applicant are to be paid out of the proceeds of sale, the applicant is entitled to payment of his costs out of those proceeds before any person interested in the shares receives any part of those proceeds¹².

1 Companies Act 2006 s 801(1). As to the meaning of 'public company' see PARA 102.

2 Companies Act 2006 s 801(2). In the High Court such an application must be made by the issue of a CPR Pt 8 claim form (see **CIVIL PROCEDURE** vol 11 (2009) PARAS 117, 127 et seq): *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 5.

3 Companies Act 2006 s 801(3).

4 Companies Act 2006 s 801(4).

5 Companies Act 2006 s 801(5).

6 *Ie* under the Companies Act 2006 s 801 (see the text and notes 1-5).

7 Companies Act 2006 s 802(1).

8 Companies Act 2006 s 802(2).

9 Companies Act 2006 s 802(3)(a).

10 Companies Act 2006 s 802(3)(b).

11 *Ie* under the Companies Act 2006 s 801(5) (see the text to note 5).

12 Companies Act 2006 s 802(4).

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(iv) Requisition by Members

450. Power of members to require company to act.

The members of a public company¹ may require it to exercise its powers² to give notice requiring information about interests in shares³. A company is required to do so once it has received requests (to the same effect) from members of the company holding at least 10 per cent of such of the paid-up capital⁴ of the company as carries a right to vote at general meetings of the company⁵ (excluding any voting rights attached to any shares in the company held as treasury shares)⁶.

A request may be in hard copy form or in electronic form⁷. It must: (1) state that the company is requested to exercise its powers to give notice requiring information about interests in shares⁸; (2) specify the manner in which the company is requested to act; and (3) give reasonable grounds for requiring the company to exercise those powers in the manner specified⁹. The request must be authenticated by the person or persons making it¹⁰.

A company that is required¹¹ to exercise its powers to give notice requiring information about interests in shares must exercise those powers in the manner specified in the requests¹². If default is made in complying with this requirement, an offence is committed by every officer of the company who is in default¹³.

1 As to the meaning of 'public company' see PARA 102. As to who qualifies as a member of a company see PARA 321.

2 *Ie* under the Companies Act 2006 s 793 (see PARA 442).

3 Companies Act 2006 s 803(1).

4 As to the meaning of 'paid up capital' see PARA 1048.

5 As to meetings of members see PARA 629 *et seq.* As to voting at meetings see PARA 653 *et seq.*

6 Companies Act 2006 s 803(2). As to treasury shares see PARA 1251.

7 Companies Act 2006 s 803(3)(a). As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form (or by electronic means) see PARA 679.

8 See note 2.

9 Companies Act 2006 s 803(3)(b).

10 Companies Act 2006 s 803(3)(c).

11 *Ie* under the Companies Act 2006 s 803 (see the text and notes 1-10).

12 Companies Act 2006 s 804(1).

13 Companies Act 2006 s 804(2). A person guilty of such an offence is liable on conviction on indictment, to a fine, and, on summary conviction, to a fine not exceeding the statutory maximum: s 804(3). As to the statutory maximum see PARA 1622.

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451. Report by company to members on outcome of investigation.

On the conclusion of an investigation carried out by a public company¹ in pursuance of a requirement of the members² the company must cause a report of the information received in pursuance of the investigation to be prepared³. The report must be made available for inspection within a reasonable period, of not more than 15 days⁴, after the conclusion of the investigation⁵.

Where a company undertakes an investigation and the investigation is not concluded within three months after the date on which the company became subject to the requirement, the company must cause to be prepared in respect of that period, and in respect of each succeeding period of three months ending before the conclusion of the investigation, an interim report of the information received during that period in pursuance of the investigation⁶. Each such report must be made available for inspection within a reasonable period, of not more than 15 days, after the end of the period to which it relates⁷.

The reports must be retained by the company for at least six years from the date on which they are first made available for inspection and must be kept available for inspection during that time at the company's registered office⁸, or at the company's alternative inspection location⁹. The company must give notice to the registrar¹⁰ of the place at which the reports are kept available for inspection and of any change in that place, unless they have at all times been kept at the company's registered office¹¹. The company must within three days of making any report prepared available for inspection, notify the members who made the requests¹² where the report is so available¹³.

If default is made in complying with the above provisions¹⁴, an offence is committed by every officer of the company who is in default¹⁵.

Any report prepared¹⁶ must be open to inspection by any person without charge¹⁷. Any person is entitled, on request and on payment of such fee as may be prescribed¹⁸, to be provided with a copy of any such report or any part of it¹⁹. The copy must be provided within ten days after the request is received by the company²⁰.

In the case of any refusal of an inspection or default in providing a copy of a report, the court may by order compel an immediate inspection or, as the case may be, direct that the copy required be sent to the person requiring it²¹.

1 As to the meaning of 'public company' see PARA 102.

2 Ie under the Companies Act 2006 s 803 (see PARA 450). As to who qualifies as a member of a company see PARA 321.

3 Companies Act 2006 s 805(1). Information in respect of which a company is for the time being entitled to any exemption conferred by regulations under s 409(3) (information about related undertakings to be given in notes to accounts: exemption where disclosure harmful to company's business) (see PARA 755) must not be included in a report under s 805: s 826(1)(a). Where any such information is omitted from a report under s 805, that fact must be stated in the report: s 826(2).

4 Where the period allowed by any provision of the Companies Act 2006 Pt 22 (ss 791-828) for fulfilling an obligation is expressed as a number of days, any day that is not a working day is to be disregarded in reckoning that period: s 827. As to the meaning of 'working day' see PARA 145 note 16.

5 Companies Act 2006 s 805(1). For the purposes of s 805, an investigation carried out by a company in pursuance of a requirement under s 803 (see PARA 450) is concluded when: (1) the company has made all such

inquiries as are necessary or expedient for the purposes of the requirement; and (2) in the case of each such inquiry a response has been received by the company, or the time allowed for a response has elapsed: s 805(7).

6 Companies Act 2006 s 805(2).

7 Companies Act 2006 s 805(3).

8 As to a company's registered office see PARA 129.

9 Companies Act 2006 ss 805(4), 1136(2); Companies (Company Records) Regulations 2008, SI 2008/3006, reg 3. As to inspection of company records see PARA 676.

10 As to the registrar see PARA 131 et seq.

11 Companies Act 2006 s 805(5). If default is made for 14 days in complying with s 805(5) (notice to registrar of place at which reports made available for inspection) an offence is committed by the company, and by every officer of the company who is in default: s 806(1). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 806(2). As to the standard scale see PARA 1622. As to the meaning of 'officer' see PARA 607.

12 Ie under the Companies Act 2006 s 803 (see PARA 450).

13 Companies Act 2006 s 805(6).

14 Ie any provision of the Companies Act 2006 s 805 apart from s 805(5) (see note 11).

15 Companies Act 2006 s 806(3). A person guilty of an offence under s 806(3) is liable on conviction on indictment, to a fine, and on summary conviction, to a fine not exceeding the statutory maximum: s 806(4). As to the statutory maximum see PARA 1622.

16 Ie under the Companies Act 2006 s 805 (see the text and notes 1-13).

17 Companies Act 2006 s 807(1). If an inspection required under s 807(1) is refused, or default is made in complying with s 807(2) (see the text and notes 18-20), an offence is committed by the company, and every officer of the company who is in default: s 807(3). A person guilty of an offence under s 807 is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 807(4).

18 The fee prescribed is: (1) 10 pence per 500 words or part thereof copied; and (2) the reasonable costs incurred by the company in delivering the copy of the company record to the person entitled to be provided with that copy: Companies (Fees for Inspection and Copying of Company Records) Regulations 2007, SI 2007/2612, reg 4.

19 Companies Act 2006 s 807(2). See note 17.

20 Companies Act 2006 s 807(2). See note 17.

21 Companies Act 2006 s 807(5).

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(v) Register of Interests Disclosed

452. Register of interests disclosed following notice requiring information.

A public company¹ must keep a register of information received by it in pursuance of a notice requiring information about interests in company's shares². A company which receives any such

information must, within three days³ of the receipt, enter in the register: (1) the fact that the requirement was imposed and the date on which it was imposed; and (2) the information received in pursuance of the requirement⁴. The information must be entered against the name of the present holder of the shares in question or, if there is no present holder or the present holder is not known, against the name of the person holding the interest⁵. The register must be made up so that the entries against the names entered in it appear in chronological order⁶. If default is made in complying with these requirements, an offence is committed by the company, and by every officer⁷ of the company who is in default⁸.

The company is not by virtue of anything done for the purposes of the provisions set out above affected with notice of, or put upon inquiry as to, the rights of any person in relation to any shares⁹.

Unless the register¹⁰ is kept in such a form as itself to constitute an index, the company must keep an index of the names entered in it¹¹. The company must make any necessary entry or alteration in the index within ten days after the date on which any entry or alteration is made in the register¹². The index must contain, in respect of each name, a sufficient indication to enable the information entered against it to be readily found¹³. The index must be at all times kept available for inspection at the same place as the register¹⁴. If default is made in complying with these requirements, an offence is committed by the company, and by every officer of the company who is in default¹⁵.

If a company ceases to be a public company, it must continue to keep any register and any associated index, until the end of the period of six years after it ceased to be such a company¹⁶. If default is made in complying with this requirement, an offence is committed by the company, and by every officer of the company who is in default¹⁷.

1 As to the meaning of 'public company' see PARA 102.

2 Companies Act 2006 s 808(1). Information is received in pursuance of a requirement imposed under s 793 (see PARA 442).

3 Where the period allowed by any provision of the Companies Act 2006 Pt 22 (ss 791-828) for fulfilling an obligation is expressed as a number of days, any day that is not a working day is to be disregarded in reckoning that period: s 827. As to the meaning of 'working day' see PARA 145 note 16.

4 Companies Act 2006 s 808(2).

5 Companies Act 2006 s 808(3).

6 Companies Act 2006 s 808(4).

7 As to the meaning of 'officer' see PARA 607.

8 Companies Act 2006 s 808(5). A person guilty of an offence under s 808 is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 808(6). As to the standard scale see PARA 1622.

9 Companies Act 2006 s 808(7).

10 Ie the register kept under the Companies Act 2006 s 808 (see the text and notes 1-9).

11 Companies Act 2006 s 810(1).

12 Companies Act 2006 s 810(2).

13 Companies Act 2006 s 810(3).

14 Companies Act 2006 s 810(4).

15 Companies Act 2006 s 810(5). A person guilty of an offence under s 810 is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 810(6).

16 Companies Act 2006 s 819(1).

17 Companies Act 2006 s 819(2). A person guilty of an offence under s 819 is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 819(3).

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453. Rights to inspect and require copy of entries.

The register of interests disclosed¹ must be kept available for inspection at the company's registered office², or at the company's alternative inspection location³. A public company⁴ must give notice to the registrar of companies⁵ of the place where the register is kept available for inspection and of any change in that place⁶. No such notice is required if the register has at all times been kept available for inspection at the company's registered office⁷. If default is made in complying with the requirement to keep the register available for inspection, or a company makes default for 14 days⁸ in giving notice to the registrar, an offence is committed by the company, and by every officer⁹ of the company who is in default¹⁰.

The register of interests disclosed, and any associated index, must be open to inspection by any person without charge¹¹. Any person is entitled, on request and on payment of such fee as may be prescribed¹², to be provided with a copy of any entry in the register¹³. A person seeking to exercise either of these rights must make a request to the company to that effect¹⁴, containing the following information: (1) in the case of an individual, his name and address; (2) in the case of an organisation, the name and address of an individual responsible for making the request on behalf of the organisation; (3) the purpose for which the information is to be used; and (4) whether the information will be disclosed to any other person, and if so (a) where that person is an individual, his name and address; (b) where that person is an organisation, the name and address of an individual responsible for receiving the information on its behalf; and (c) the purpose for which the information is to be used by that person¹⁵.

Where a company receives a request¹⁶ to inspect or require a copy of the register, it must comply with the request if it is satisfied that it is made for a proper purpose, or refuse the request if it is not so satisfied¹⁷. If the company refuses the request, it must inform the person making the request, stating the reason why it is not satisfied¹⁸. A person whose request is refused may apply to the court¹⁹. If an application is made to the court, the person who made the request must notify the company, and the company must use its best endeavours to notify any persons whose details would be disclosed if the company were required to comply with the request²⁰. If the court is not satisfied that the inspection or copy is sought for a proper purpose, it must direct the company not to comply with the request²¹. If the court makes such a direction and it appears to the court that the company is or may be subject to other requests made for a similar purpose (whether made by the same person or different persons), it may direct that the company is not to comply with any such request²². If the court does not direct the company not to comply with the request, the company must comply with the request immediately upon the court giving its decision or, as the case may be, the proceedings being discontinued²³.

If an inspection of the register is refused or default is made in providing a copy required, otherwise than in accordance with an order of the court, an offence is committed by the

company, and by every officer of the company who is in default²⁴. In the case of any such refusal or default the court may by order compel an immediate inspection or, as the case may be, direct that the copy required be sent to the person requesting it²⁵.

It is an offence for a person knowingly or recklessly to make, in a request to inspect or require a copy of the register of interests, a statement that is misleading, false or deceptive in a material particular²⁶. It is also an offence for a person in possession of information obtained by exercise of the right to inspect or require a copy of the register to do anything that results in the information being disclosed to another person, or to fail to do anything with the result that the information is disclosed to another person, knowing, or having reason to suspect, that person may use the information for a purpose that is not a proper purpose²⁷.

- 1 le the register kept under the Companies Act 2006 s 808 (see PARA 452).
- 2 As to a company's registered office see PARA 129.
- 3 Companies Act 2006 ss 809(1), 1136(2); Companies (Company Records) Regulations 2008, SI 2008/3006, reg 3. As to inspection of company records see PARA 676.
- 4 As to the meaning of 'public company' see PARA 102.
- 5 As to the registrar see PARA 131 et seq.
- 6 Companies Act 2006 s 809(2).
- 7 Companies Act 2006 s 809(3).
- 8 Where the period allowed by any provision of the Companies Act 2006 Pt 22 (ss 791-828) for fulfilling an obligation is expressed as a number of days, any day that is not a working day is to be disregarded in reckoning that period: s 827. As to the meaning of 'working day' see PARA 145 note 16.
- 9 As to the meaning of 'officer' see PARA 607.
- 10 Companies Act 2006 s 809(4). A person guilty of an offence under s 809 is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 809(5). As to the standard scale see PARA 1622.
- 11 Companies Act 2006 s 811(1). Information in respect of which a company is for the time being entitled to any exemption conferred by regulations under s 409(3) (information about related undertakings to be given in notes to accounts: exemption where disclosure harmful to company's business) (see PARA 755) must not be made available under s 811: s 826(1)(b).
- 12 The prescribed fee is: (1) £1 for each of the first five entries, £30 for the next 95 entries or part thereof, £30 for the next 900 entries or part thereof, £30 for the next 99,000 entries or part thereof and £30 for the remainder of the entries in the register or part thereof; and (2) the reasonable costs incurred by the company in delivering the copy of the entries to the person entitled to be provided with that copy: Companies (Fees for Inspection and Copying of Company Records) Regulations 2007, SI 2007/2612, reg 3.
- 13 Companies Act 2006 s 811(2).
- 14 Companies Act 2006 s 811(3).
- 15 Companies Act 2006 s 811(4).
- 16 le a request under the Companies Act 2006 s 811 (see the text and notes 11-15).
- 17 Companies Act 2006 s 812(1). Compare the situation under s 117, by virtue of which, where a company receives a request to inspect the company's register of members and/or the index of members' names, a company must within five working days either comply with the request, or apply to the court: see PARA 349.
- 18 Companies Act 2006 s 812(2).
- 19 Companies Act 2006 s 812(3).
- 20 Companies Act 2006 s 812(4).

21 Companies Act 2006 s 812(5).

22 Companies Act 2006 s 812(6). The order must contain such provision as appears to the court appropriate to identify the requests to which it applies: s 812(6).

23 Companies Act 2006 s 812(7).

24 Companies Act 2006 s 813(1). A person guilty of an offence under s 813 is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 813(2).

25 Companies Act 2006 s 813(3).

26 Companies Act 2006 s 814(1). A person guilty of an offence under s 814 is liable: (1) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine (or both); (2) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or both): s 814(3).

27 Companies Act 2006 s 814(2). As to the penalty see note 26.

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454. Entries not to be removed from the register or adjusted except in accordance with statute.

Entries in the register of interests disclosed¹ must not be deleted² unless:

- 779 (1) more than six years have elapsed since the entry was made³;
- 780 (2) there is an incorrect entry relating to a third party⁴.

If an entry is wrongly deleted, the company must restore it as soon as reasonably practicable⁵. If default is made in complying with these requirements, an offence is committed by the company, and by every officer⁶ of the company who is in default⁷.

If a person who is identified in the register of interests disclosed as being a party to a share acquisition agreement⁸ ceases to be a party to the agreement, he may apply to the company for the inclusion of that information in the register⁹. If the company is satisfied that he has ceased to be a party to the agreement, it must record that information (if not already recorded) in every place where his name appears in the register as a party to the agreement¹⁰. If an application is refused (otherwise than on the ground that the information has already been recorded), the applicant may apply to the court for an order directing the company to include the information in question in the register, and the court may make such an order if it thinks fit¹¹.

1 The register kept under the Companies Act 2006 s 808 (see PARA 452).

2 Companies Act 2006 s 815(1).

3 Companies Act 2006 s 816.

4 Where, in pursuance of an obligation imposed by a notice under the Companies Act 2006 s 793 (notice requiring information about interests in company's shares) (see PARA 442), a person gives to a company the

name and address of another person as being interested in shares in the company, that other person may apply to the company for the removal of the entry from the register: s 817(1), (2). If the company is satisfied that the information in pursuance of which the entry was made is incorrect, it must remove the entry: s 817(3). If an application is refused, the applicant may apply to the court for an order directing the company to remove the entry in question from the register; and the court may make such an order if it thinks fit: s 817(4).

5 Companies Act 2006 s 815(2).

6 As to the meaning of 'officer' see PARA 607.

7 Companies Act 2006 s 815(3). A person guilty of an offence under s 815 is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention of the duty to restore a entry wrongly deleted, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 815(4). As to the standard scale see PARA 1622.

8 Ie an agreement to which the Companies Act 2006 s 824 applies (see PARA 440).

9 Companies Act 2006 s 818(1).

10 Companies Act 2006 s 818(2).

11 Companies Act 2006 s 818(3).

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(11) DERIVATIVE CLAIMS ETC BY MEMBERS

455. Statutory basis for bringing derivative claims.

Provision is made in the Companies Act 2006¹ applying to proceedings (a 'derivative claim') by a member of a company²:

- 781 (1) in respect of a cause of action vested in the company³; and
- 782 (2) seeking relief on behalf of the company⁴.

A derivative claim under the provision so made⁵ may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company⁶. The cause of action may be against the director or another person (or both)⁷. It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company⁸.

A derivative claim may only be brought either under the Companies Act 2006 provisions⁹ or in pursuance of an order of the court in proceedings¹⁰ for the protection of members against unfair prejudice¹¹.

1 Ie the Companies Act 2006 Pt 11 Ch 1 (ss 260-264) (derivative claims in England and Wales or Northern Ireland) (see also PARA 457 et seq): see s 260(1). As to the relationship between the statutory provisions which govern derivative claims and the substantive common law principles upon which the statute is based see PARA 462.

The provisions in the Companies Act 2006 Pt 11 Ch 1, supplemented by Civil Procedure Rules (see CPR 19.9-19.9F; and PARA 456 et seq), introduce a two-stage procedure for permission to continue a derivative claim: (1) the applicant is required to make a prima facie case for permission to continue a derivative claim and the court is required to consider the issue on the basis of the evidence filed by the applicant only, without requiring evidence from the defendant (see PARA 457 et seq); (2) before the substantive action begins, the court may

require evidence to be provided by the company, and the matters which the court must take into account in considering whether to give permission and the circumstances in which the court is bound to refuse permission are set out (see also PARA 460 et seq). There is a need for judicial control of all stages of a derivative action and the requirement for permission is not a mere technicality: *Portfolios of Distinction Ltd v Laird* [2004] EWHC 2071 (Ch), [2004] 2 BCLC 741.

Where either a body corporate to which the Companies Act 2006 Pt 11 Ch 1 does not apply, or a trade union, is alleged to be entitled to a remedy (CPR 19.9C(1)(a)), and either a claim is made by a member for it to be given that remedy, or a member of the body corporate or trade union seeks to take over a claim already started, by the body corporate or trade union or one or more of its members, for it to be given that remedy (CPR 19.9C(1)(b)), the member who starts, or seeks to take over, the claim must apply to the court for permission to continue the claim (CPR 19.9C(2)). The application for permission must be made by an application notice in accordance with CPR Pt 23 (as to which see **CIVIL PROCEDURE** vol 11 (2009) PARA 303 et seq): CPR 19.9C(3). The procedure for applications in relation to companies under the Companies Act 2006 s 261 (see PARA 457), s 262 (see PARA 458) or s 264 (see PARA 459), as the case requires, applies to the permission application as if the body corporate or trade union were a company (CPR 19.9C(4)); and CPR 19.9A (except for CPR 19.9A(1)) (see PARAS 457, 458, 459) and CPR 19.9B (see PARAS 458, 459) apply to the permission application as if the body corporate or trade union were a company (CPR 19.9C(5)). See also note 11.

If a derivative claim, except such a claim in pursuance of an order under the Companies Act 2006 s 996 (see PARA 475), arises in the course of other proceedings, then, in the case of a derivative claim under the Companies Act 2006 Pt 11 Ch 1, CPR 19.9A or CPR 19.9B applies, as the case requires, and, in any other case, CPR 19.9C applies: CPR 19.9D.

2 Companies Act 2006 s 260(1). For these purposes, references to a member of a company include a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law: s 260(5). As to the meaning of 'member of a company' under the Companies Act 2006 generally see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'share' see PARA 1042. As to the transfer and transmission of shares generally see PARA 389 et seq.

3 Companies Act 2006 s 260(1)(a). As to the arguments regarding whether an action, such as may be brought by a member of a company, may be brought by a member of its parent or ultimate holding company in cases where a subsidiary (or sub-subsidiary) has caused loss (a 'multiple derivative action') see *Waddington Ltd v Chan Chun Hoo Thomas* [2008] HKCU 1381, [2009] 2 BCLC 82.

Derivative claims must be seen in the context of the principle that a company has a legal personality that is separate and distinct from that of its members, with the consequence that proceedings deriving from rights that are vested in the company can be commenced only in the company's name: see PARA 120 text and note 16. As to the company's name in litigation see PARA 301.

4 Companies Act 2006 s 260(1)(b). See note 3.

5 le under the Companies Act 2006 Pt 11 Ch 1 (see also PARA 457 et seq): see s 260(3).

6 Companies Act 2006 s 260(3). For these purposes, 'director' includes a former director and a shadow director is treated as a director: s 260(5). As to the meaning of 'director' see PARA 478; and as to the meaning of 'shadow director' see PARA 479. As to the material meaning of the word 'default' in the term 'negligence, default, breach of duty or breach of trust' see *Customs and Excise Comrs v Hedon Alpha Ltd* [1981] QB 818, [1981] 2 All ER 697, CA (considering the Companies Act 1948 s 448).

Directors of a company, as well as owing duties at common law, deriving eg from their fiduciary duties as trustees of the company's property (see PARA 539), have duties under the Companies Act 2006 which are stated to be owed by a director of a company to the company alone (see s 170; and PARAS 532-533). Specifically, these duties are to act in accordance with the company's constitution, and to only exercise powers for the purposes for which they are conferred (see s 171; and PARA 540); to promote the success of the company (see s 172; and PARA 544); to exercise independent judgment (see s 173; and PARA 547); to exercise reasonable care, skill and diligence (see s 174; and PARA 548); to avoid conflicts of interest (see s 175; and PARA 550); not to accept benefits from third parties (see s 176; and PARA 553); and to declare any interest in any proposed transaction or arrangement (see s 177; and PARA 555). A cause of action arising from an actual or proposed act or omission involving a breach of duty includes (but is not limited to) an alleged breach of any or all of the general statutory duties contained in Pt 10 Ch 2 (ss 170-181) (as to which see PARA 532 et seq).

The statutory basis for derivative claims, as it is provided for under the Companies Act 2006, allows a company member to claim against a wider range of conduct than previously. As to the position that pertained prior to the 2006 Act see eg *Pavlides v Jensen* [1956] Ch 565, [1956] 2 All ER 518, a claim for negligence, on the allegation that directors had been guilty of gross negligence in effecting a sale of a valuable asset of the company at a price greatly below its true market value, was held not to fall within the admitted exceptions to the common law rule in *Foss v Harbottle* (1843) 2 Hare 461 (as to which see PARA 462 note 4), and, accordingly, was not

maintainable. Although a claim under the Companies Act 2006 lies in negligence, negligence is ratifiable (see s 263(2)(c); and PARA 460), and actual ratification will bar a claim (see *Pavlides v Jensen*).

7 Companies Act 2006 s 260(3).

8 Companies Act 2006 s 260(4).

If, or to the extent that, the claim arises from acts or omissions that occurred before 1 October 2007 (ie the date on which Pt 11 Ch 1 was commenced: see the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, art 2(1)(e)), the court must exercise its powers under the Companies Act 2006 Pt 11 Ch 1 so as to secure that the claim is allowed to proceed as a derivative claim only if, or to the extent that, it would have been allowed to proceed as a derivative claim under the law in force immediately before that date: see the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, art 9, Sch 3 para 20(3).

9 Ie under the Companies Act 2006 Pt 11 Ch 1 (see also PARA 457 et seq): see s 260(2). See, however, s 370 which allows a statutory derivative action to be brought by an authorised group of members of the company to make a director or former director of a company account for improper political donations; and see PARA 691.

10 Ie an order of the court under the Companies Act 2006 Pt 30 (ss 994-999) (see PARA 466 et seq): see s 260(2). See also s 996; and PARA 475.

11 Companies Act 2006 s 260(2). Neither CPR 19.9 nor *Practice Direction-Derivative Claims* PD 19C applies to a derivative claim made pursuant to an order of the court under the Companies Act 2006 s 996 (see PARA 475): see CPR 19.9(1)(b); *Practice Direction-Derivative Claims* PD 19C para 1(b); and PARA 456 note 2. See also PARA 463. It is clear that the law relating to derivative claims will continue to develop henceforth under the Companies Act 2006 Pt 11 alone.

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456. Procedure for starting a statutory derivative claim.

A derivative claim¹ must be started by a claim form², headed 'Derivative claim'³.

The company (or body corporate or trade union) for the benefit of which a remedy is sought must be made a defendant to the claim⁴. If the claimant seeks an order that the defendant company or other body concerned indemnify the claimant against liability for costs incurred in the permission application or the claim, this should be stated in the permission application or claim form or both, as the case requires⁵.

After the issue of the claim form, the claimant must not take any further step in the proceedings without the permission of the court, other than a step permitted or required by the rules governing derivative claims⁶, or to make an urgent application for interim relief⁷.

1 As to the statutory basis for derivative claims that is provided for under the Companies Act 2006 see PARA 455; and as to the relationship between those statutory provisions and the substantive common law principles upon which the statute is based see PARA 462. See also note 2.

2 CPR 19.9(2). CPR 19.9 applies to a derivative claim (where a company, other body corporate or trade union is alleged to be entitled to claim a remedy, and a claim is made by a member of it for it to be given that remedy), whether under the Companies Act 2006 Pt 11 Ch 1 (ss 260-264) (see PARAS 455, 457 et seq) or otherwise: CPR 19.9(1)(a). However, CPR 19.9 does not apply to a claim made pursuant to an order of the court under the Companies Act 2006 s 996 (see PARA 475): CPR 19.9(1)(b). *Practice Direction-Derivative Claims* PD 19C also applies to derivative claims, whether under the Companies Act 2006 Pt 11 Ch 1 or otherwise, as well as to applications for permission to continue or take over such claims (see PARA 457 et seq): *Practice Direction-Derivative Claims* PD 19C para 1(a). However, that practice direction does not apply to a claim made pursuant

to an order of the court under the Companies Act 2006 s 996: *Practice Direction-Derivative Claims* PD 19C para 1(b).

There is no reason in principle to restrict CPR 19.9 to English companies, and the court could entertain a derivative claim in the case of a company incorporated abroad, but the courts of the place of incorporation would almost invariably be the most appropriate forum for the resolution of issues that related to the internal management of a company (including the right of shareholders to sue on behalf of the company): *Konamaneni v Rolls-Royce Industrial Power (India) Ltd* [2002] 1 All ER 979, [2002] 1 WLR 1269; *Reeves v Sprecher* [2007] EWHC 117 (Ch), [2007] 2 BCLC 614.

3 *Practice Direction-Derivative Claims* PD 19C para 2(1). When the claim form for a derivative claim is issued, the claimant must file an application notice under CPR Pt 23 (as to which see **CIVIL PROCEDURE** vol 11 (2009) PARA 303 et seq) for permission to continue the claim (CPR 19.9A(2)(a)); and the written evidence on which the claimant relies in support of the permission application (CPR 19.9A(2)(b)). For these purposes, 'derivative claim' means a derivative claim under the Companies Act 2006 Pt 11 Ch 1 (see PARAS 455, 457 et seq); and 'permission application' means an application referred to in s 261(1) (see PARA 457), s 262(2) (see PARA 458) or s 264(2) (see PARA 459), as the case may be: CPR 19.9A(1).

4 CPR 19.9(3). As to claims by one or more persons on behalf of all persons having the same interest see *Duke of Bedford v Ellis* [1901] AC 1, HL; *Wood v McCarthy* [1893] 1 QB 775; CPR 19.6; and **CIVIL PROCEDURE** vol 11 (2009) PARA 229. See further PARAS 303-304.

5 *Practice Direction-Derivative Claims* PD 19C para 2(2). As to liability for costs incurred in derivative claims see PARA 308.

6 CPR 19.9(4)(a). The text refers specifically to any step permitted or required by CPR 19.9A (derivative claims: application for permission) (see PARAS 457, 458, 459) or CPR 19.9C (derivative claims: other bodies corporate and trade unions) (see PARAS 457, 458, 459): see CPR 19.9(4)(a).

7 CPR 19.9(4)(b).

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457. Application to court for permission to continue statutory derivative claim.

A member of a company¹ who brings a statutory derivative claim² must apply to the court³ for permission to continue it⁴. The claimant must not make the company⁵ a respondent to the permission application⁶, but must notify the company of the claim and permission application by sending to the company as soon as reasonably practicable after the claim form is issued⁷: (1) a notice in the prescribed form⁸, to which is attached a copy of the provisions of the Companies Act 2006 required by that form⁹; (2) copies of the claim form and the particulars of claim¹⁰; (3) the application notice¹¹; and (4) a copy of the evidence filed by the claimant in support of the permission application¹². However, where notifying the company of the permission application would be likely to frustrate some party of the remedy sought, the court may, on application by the claimant, order that the company need not be notified for such period after the issue of the claim form as the court directs¹³.

If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a prima facie case for giving permission¹⁴, the court must dismiss the application¹⁵, and may make any consequential order it considers appropriate¹⁶. Where the court dismisses the claimant's permission application without a hearing, the court must notify the claimant and (unless the court orders otherwise) the company of that decision¹⁷; and the claimant may ask for an oral hearing to reconsider the decision to dismiss the permission application¹⁸. However, the claimant: (a) must make the request to the court in writing within seven days of being notified of the decision¹⁹; and (b) must notify the company in writing, as soon as reasonably practicable, of that request unless the court orders otherwise²⁰. Where the

court dismisses the permission application at a hearing in this way²¹, it must notify the claimant and the company of its decision²².

If the application is not so dismissed²³: (i) the court may give directions as to the evidence to be provided by the company²⁴, and may adjourn the proceedings to enable the evidence to be obtained²⁵; and (ii) the court must order that the company and any other appropriate party must be made respondents to the permission application²⁶, and give directions for the service on the company and any other appropriate party of the application notice and the claim form²⁷.

On hearing the application, the court may give permission to continue the claim on such terms as it thinks fit²⁸, refuse permission and dismiss the claim²⁹, or adjourn the proceedings on the application and give such directions as it thinks fit³⁰. As a condition of granting permission to continue a derivative claim, the court may order that the claim is not to be discontinued, settled or compromised without the court's permission³¹.

1 As to the meaning of 'member of a company' see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie under the Companies Act 2006 Pt 11 Ch 1 (ss 260-264) (see PARAS 455, 458 et seq); see s 261(1). As to the relationship between the statutory provisions which govern derivative claims and the substantive common law principles upon which the statute is based see PARA 462.

3 As to the meaning of 'court' see PARA 212 note 1; and see note 4.

4 Companies Act 2006 s 261(1). Where a permission application to continue a derivative claim is made in the High Court it will be assigned to the Chancery Division and decided by a High Court judge: *Practice Direction-Derivative Claims* PD 19C para 6(1). Where such an application is made in a county court it will be decided by a circuit judge: para 6(2). When the claim form for a derivative claim is issued (as to which see PARA 456), the claimant must file an application notice under CPR Pt 23 (as to which see **CIVIL PROCEDURE** vol 11 (2009) PARA 303 et seq) for permission to continue the claim, and the written evidence on which the claimant relies in support of the permission application: see CPR 19.9A(2); and PARA 456. For these purposes, 'permission application' means an application referred to in the Companies Act 2006 s 261(1): CPR 19.9A(1). As to the meaning of 'derivative claim' see PARA 456 note 3.

Where either a body corporate to which the Companies Act 2006 Pt 11 Ch 1 does not apply, or a trade union, is alleged to be entitled to a remedy (CPR 19.9C(1)(a)), and a claim is made by a member for it to be given that remedy (CPR 19.9C(1)(b)), the member who starts the claim must apply to the court for permission to continue the claim (CPR 19.9C(2)). The application for permission must be made by an application notice in accordance with CPR Pt 23: CPR 19.9C(3). The procedure for applications in relation to companies under the Companies Act 2006 s 261 applies to the permission application as if the body corporate or trade union were a company (CPR 19.9C(4)); and CPR 19.9A (except for CPR 19.9A(1)) applies to the permission application as if the body corporate or trade union were a company (CPR 19.9C(5)).

If a derivative claim, except such a claim in pursuance of an order under the Companies Act 2006 s 996 (see PARA 475), arises in the course of other proceedings, then, in the case of a derivative claim under the Companies Act 2006 Pt 11 Ch 1, CPR 19.9A or CPR 19.9B (see PARAS 458, 459) applies, as the case requires, and, in any other case, CPR 19.9C applies: CPR 19.9D.

5 For these purposes, 'company' means the company for the benefit of which the derivative claim is brought: CPR 19.9A(1).

6 CPR 19.9A(3).

7 CPR 19.9A(4). The claimant may send the notice and documents required by CPR 19.9A(4) to the company by any method permitted by CPR Pt 6 (as to which see **CIVIL PROCEDURE** vol 11 (2009) PARA 138 et seq) as if the notice and documents were being served on the company: CPR 19.9A(5). The claimant must file a witness statement confirming that the claimant has notified the company in accordance with CPR 19.9A(4): CPR 19.9A(6).

8 Ie in the form set out in the practice direction supplementing CPR 19.9A (ie *Practice Direction-Derivative Claims* PD 19C): see CPR 19.9A(4)(a). The form required by CPR 19.9A(4)(a) to be sent to the defendant company or other body is set out at the end of *Practice Direction-Derivative Claims* PD 19C (see Notice in relation to derivative claim): para 4. There are separate versions of the form for claims involving a company, and claims involving a body corporate of another kind or a trade union: see para 4. As to the application of *Practice Direction-Derivative Claims* PD 19C see PARA 456 note 2.

9 CPR 19.9A(4)(a). The provisions of the Companies Act 2006 s 263(1)-(4) (as to which see PARA 460) must be attached to the form: see *Practice Direction-Derivative Claims* PD 19C (Notice in relation to derivative claim).

10 CPR 19.9A(4)(b).

11 CPR 19.9A(4)(c).

12 CPR 19.9A(4)(d).

13 CPR 19.9A(7). If the applicant seeks an order under CPR 19.9A(7) delaying notice to the defendant company or other body concerned, the applicant must also state in the application notice the reasons for the application, and file with it any written evidence in support of the application: *Practice Direction-Derivative Claims* PD 19C para 3. An application under CPR 19.9A(7) may be made without notice: CPR 19.9A(8).

14 Companies Act 2006 s 261(2). The decision whether the claimant's evidence discloses a prima facie case will normally be made without submissions from or (in the case of an oral hearing to reconsider such a decision reached pursuant to CPR 19.9A(9) (see the text and note 17)) attendance by the company: *Practice Direction-Derivative Claims* PD 19C para 5. If without invitation from the court the company volunteers a submission or attendance, the company will not normally be allowed any costs of that submission or attendance: see para 5. At common law, where those seeking to bring a minority shareholders' action in fact control the company, such that they are in a position to cause the company to bring the claim, the action is wholly misconceived: *Watts v Midland Bank plc* [1986] BCLC 15 (action against receiver for alleged improper discharge of his duties; no obstacle to company bringing the action itself). It remains to be seen whether the court will regard such a situation as not disclosing a prima facie case, so that permission to proceed should be refused.

15 Companies Act 2006 s 261(2)(a).

16 Companies Act 2006 s 261(2)(b).

17 CPR 19.9A(9).

18 CPR 19.9A(10).

19 CPR 19.9A(10)(a).

20 CPR 19.9A(10)(b).

21 *le* pursuant to CPR 19.9A(10) (see the text and notes 18-20): see CPR 19.9A(11).

22 CPR 19.9A(11).

23 *le* is not dismissed under the Companies Act 2006 s 261(2) (see the text and notes 14-16): see s 261(3).

24 Companies Act 2006 s 261(3)(a).

25 Companies Act 2006 s 261(3)(b).

26 CPR 19.9A(12)(a).

27 CPR 19.9A(12)(b).

28 Companies Act 2006 s 261(4)(a).

29 Companies Act 2006 s 261(4)(b).

30 Companies Act 2006 s 261(4)(c). The court may allow the matter to stand so that a company meeting may be held to decide whether proceedings should continue in the company's name: see *Danish Mercantile Co Ltd v Beaumont* [1951] Ch 680 at 687, [1951] 1 All ER 925 at 930, CA, per Jenkins LJ; *SBA Properties Ltd v Cradock* [1967] 2 All ER 610, [1967] 1 WLR 716 (application adjourned pending hearing of winding-up petition); *Alexander Ward & Co Ltd v Samyang Navigation Co Ltd* [1975] 2 All ER 424, [1975] 1 WLR 673, HL (company without directors; two individuals brought proceedings on company's behalf to recover debt without authority; acts of individuals subsequently ratified by liquidator). At such a meeting, the votes of the persons complained of cannot be excluded (*Mason v Harris* (1879) 11 ChD 97 to 107, CA, per Jessel MR), unless the meeting purports to ratify their wrongdoing (see the Companies Act 2006 s 239; and PARA 593).

31 CPR 19.9F; *Practice Direction-Derivative Claims* PD 19C para 7. Such a condition may be appropriate where any future proposal to discontinue or settle might not come to the attention of members who might have an interest in taking over the claim: see para 7.

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458. Application for permission to continue company claim as a statutory derivative claim.

Where a company¹ has brought a claim², and where the cause of action on which the claim is based could be pursued as a derivative claim³, a member of the company⁴ may apply to the court for permission to continue the claim as a derivative claim⁵ on the ground that:

- 783 (1) the manner in which the company commenced or continued the claim amounts to an abuse of the process of the court⁶;
- 784 (2) the company has failed to prosecute the claim diligently⁷; and
- 785 (3) it is appropriate for the member to continue the claim as a derivative claim⁸.

The person who seeks to take over the claim must not make the company a respondent to the permission application⁹, but must notify the company of the claim and permission application by sending to the company as soon as reasonably practicable after the claim form is issued¹⁰: (a) a notice in the prescribed form¹¹, to which is attached a copy of the provisions of the Companies Act 2006 required by that form¹²; (b) the application notice¹³; and (c) a copy of the evidence filed by the person who seeks to take over the claim in support of the permission application¹⁴. However, where notifying the company of the permission application would be likely to frustrate some party of the remedy sought, the court may, on application by the person who seeks to take over the claim, order that the company need not be notified for such period after the issue of the claim form as the court directs¹⁵.

If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a prima facie case for giving permission¹⁶, the court must dismiss the application¹⁷, and may make any consequential order it considers appropriate¹⁸. Where the court dismisses without a hearing the permission application of the person who seeks to take over the claim, the court must notify the person who seeks to take over the claim and (unless the court orders otherwise) the company of that decision¹⁹; and the person who seeks to take over the claim may ask for an oral hearing to reconsider the decision to dismiss the permission application²⁰. However, the person who seeks to take over the claim: (i) must make the request to the court in writing within seven days of being notified of the decision²¹; and (ii) must notify the company in writing, as soon as reasonably practicable, of that request unless the court orders otherwise²². Where the court dismisses the permission application at a hearing in this way²³, it must notify the person who seeks to take over the claim and the company of its decision²⁴.

If the application is not so dismissed²⁵, the court may give directions as to the evidence to be provided by the company²⁶, and may adjourn the proceedings to enable the evidence to be obtained²⁷.

On hearing the application, the court may give permission to continue the claim as a derivative claim on such terms as it thinks fit²⁸, refuse permission and dismiss the application²⁹, or adjourn the proceedings on the application and give such directions as it thinks fit³⁰. As a condition of granting permission to continue a derivative claim, the court may order that the claim is not to be discontinued, settled or compromised without the court's permission³¹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 262(1)(a).

3 Companies Act 2006 s 262(1)(b). The text refers to a claim which could be pursued as a derivative claim under Pt 11 Ch 1 (ss 260-264) (see PARAS 455, 457, 459, 460): see s 262(1)(b). As to the relationship between the statutory provisions which govern derivative claims and the substantive common law principles upon which the statute is based see PARA 462.

4 As to the meaning of 'member of a company' see PARA 321.

5 Companies Act 2006 s 262(2). Where a permission application to continue a derivative claim is made in the High Court it will be assigned to the Chancery Division and decided by a High Court judge: *Practice Direction-Derivative Claims* PD 19C para 6(1). Where such an application is made in a county court it will be decided by a circuit judge: para 6(2). As to the meaning of 'court' generally see PARA 212 note 1. The application for permission under the Companies Act 2006 s 262(1) (see the text and notes 1-3) must be made by an application notice in accordance with CPR Pt 23 (as to which see **CIVIL PROCEDURE** vol 11 (2009) PARA 303 et seq): CPR 19.9B(1), (2). CPR 19.9A, except for CPR 19.9A(1), (2), (4)(b), and CPR 19.9A(12)(b) so far as it applies to the claim form, applies to an application under CPR 19.9B: CPR 19.9B(3). (Note, however, that CPR 19.9A(12) applies only to the dismissal of an application under the Companies Act 2006 s 261(2) (see PARA 457): see CPR 19.9A(12); and PARA 457). References to the claimant in CPR 19.9A are to be read as references to the person who seeks to take over the claim: see CPR 19.9B(3).

Where either a body corporate to which the Companies Act 2006 Pt 11 Ch 1 does not apply, or a trade union, is alleged to be entitled to a remedy (CPR 19.9C(1)(a)), and a member of the body corporate or trade union seeks to take over a claim already started, by the body corporate or trade union or one or more of its members, for it to be given that remedy (CPR 19.9C(1)(b)), the member who seeks to take over the claim must apply to the court for permission to continue the claim (CPR 19.9C(2)). The application for permission must be made by an application notice in accordance with CPR Pt 23: CPR 19.9C(3). The procedure for applications in relation to companies under the Companies Act 2006 s 262 applies to the permission application as if the body corporate or trade union were a company (CPR 19.9C(4)); and CPR 19.9A (except for CPR 19.9A(1)) and CPR 19.9B apply to the permission application as if the body corporate or trade union were a company (CPR 19.9C(5)).

If a derivative claim, except such a claim in pursuance of an order under the Companies Act 2006 s 996 (see PARA 475), arises in the course of other proceedings, then, in the case of a derivative claim under the Companies Act 2006 Pt 11 Ch 1, CPR 19.9A or CPR 19.9B applies, as the case requires, and, in any other case, CPR 19.9C applies: CPR 19.9D.

6 Companies Act 2006 s 262(2)(a).

7 Companies Act 2006 s 262(2)(b).

8 Companies Act 2006 s 262(2)(c).

9 CPR 19.9A(3). See note 5.

10 CPR 19.9A(4). The person who seeks to take over the claim may send the notice and documents required by CPR 19.9A(4) to the company by any method permitted by CPR Pt 6 (as to which see **CIVIL PROCEDURE** vol 11 (2009) PARA 138 et seq) as if the notice and documents were being served on the company: CPR 19.9A(5). The person who seeks to take over the claim must file a witness statement confirming that he has notified the company in accordance with CPR 19.9A(4): CPR 19.9A(6). See note 5.

11 It is in the form set out in the practice direction supplementing CPR 19.9A (ie *Practice Direction-Derivative Claims* PD 19C): see CPR 19.9A(4)(a). See note 5. The form required by CPR 19.9A(4)(a) to be sent to the defendant company or other body is set out at the end of *Practice Direction-Derivative Claims* PD 19C (see Notice in relation to derivative claim): para 4. There are separate versions of the form for claims involving a company, and claims involving a body corporate of another kind or a trade union: see para 4. As to the application of *Practice Direction-Derivative Claims* PD 19C see PARA 456 note 2.

12 CPR 19.9A(4)(a). See note 5. The provisions of the Companies Act 2006 s 263(1)-(4) (as to which see PARA 460) must be attached to the form: see *Practice Direction-Derivative Claims* PD 19C (Notice in relation to derivative claim).

13 CPR 19.9A(4)(c). See note 5.

14 CPR 19.9A(4)(d). See note 5.

15 CPR 19.9A(7). If the applicant seeks an order under CPR 19.9A(7) delaying notice to the defendant company or other body concerned, the applicant must also state in the application notice the reasons for the application, and file with it any written evidence in support of the application: see *Practice Direction-Derivative Claims* PD 19C para 3. An application under CPR 19.9A(7) may be made without notice: CPR 19.9A(8). See note 5.

16 The decision whether the claimant's evidence discloses a prima facie case will normally be made without submissions from or (in the case of an oral hearing to reconsider such a decision reached pursuant to CPR 19.9A(9) (see the text and note 19)) attendance by the company: *Practice Direction-Derivative Claims* PD 19C para 5. If without invitation from the court the company volunteers a submission or attendance, the company will not normally be allowed any costs of that submission or attendance: see para 5.

17 Companies Act 2006 s 262(3)(a).

18 Companies Act 2006 s 262(3)(b).

19 CPR 19.9A(9). See note 5.

20 CPR 19.9A(10). See note 5.

21 CPR 19.9A(10)(a). See note 5.

22 CPR 19.9A(10)(b). See note 5.

23 Ie pursuant to CPR 19.9A(10) (see the text and notes 20-22): see CPR 19.9A(11).

24 CPR 19.9A(11). See note 5.

25 Ie under the Companies Act 2006 s 262(3) (see the text and notes 16-18): see s 262(4)(a).

26 Companies Act 2006 s 262(4)(a).

27 Companies Act 2006 s 262(4)(b).

28 Companies Act 2006 s 262(5)(a).

29 Companies Act 2006 s 262(5)(b).

30 Companies Act 2006 s 262(5)(c).

31 CPR 19.9F; *Practice Direction-Derivative Claims* PD 19C para 7. Such a condition may be appropriate where any future proposal to discontinue or settle might not come to the attention of members who might have an interest in taking over the claim: see para 7. See note 5.

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459. Application for permission to continue statutory derivative claim brought by another member.

Where a member of a company¹ (the 'claimant') has brought a derivative claim², or has continued as a derivative claim a claim brought by the company³, or has continued a derivative claim brought by another member⁴, another member of the company (the 'applicant') may apply to the court for permission to continue the claim⁵ on the ground that:

786 (1) the manner in which the proceedings have been commenced or continued by the claimant amounts to an abuse of the process of the court⁶;

787 (2) the claimant has failed to prosecute the claim diligently⁷; and

788 (3) it is appropriate for the applicant to continue the claim as a derivative claim⁸.

The person who seeks to take over the claim must not make the company a respondent to the permission application⁹, but must notify the company of the claim and permission application by sending to the company as soon as reasonably practicable after the claim form is issued¹⁰: (a) a notice in the prescribed form¹¹, to which is attached a copy of the provisions of the Companies Act 2006 required by that form¹²; (b) the application notice¹³; and (c) a copy of the evidence filed by the person who seeks to take over the claim in support of the permission application¹⁴. However, where notifying the company of the permission application would be likely to frustrate some party of the remedy sought, the court may, on application by the person who seeks to take over the claim, order that the company need not be notified for such period after the issue of the claim form as the court directs¹⁵.

If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a prima facie case for giving permission¹⁶, the court must dismiss the application¹⁷, and may make any consequential order it considers appropriate¹⁸. Where the court dismisses without a hearing the permission application of the person who seeks to take over the claim, the court must notify the person who seeks to take over the claim and (unless the court orders otherwise) the company of that decision¹⁹; and the person who seeks to take over the claim may ask for an oral hearing to reconsider the decision to dismiss the permission application²⁰. However, the person who seeks to take over the claim: (i) must make the request to the court in writing within seven days of being notified of the decision²¹; and (ii) must notify the company in writing, as soon as reasonably practicable, of that request unless the court orders otherwise²².

Where the court dismisses the permission application at a hearing²³, it must notify the person who seeks to take over the claim and the company of its decision²⁴.

If the application is not dismissed²⁵, the court may give directions as to the evidence to be provided by the company²⁶, and may adjourn the proceedings to enable the evidence to be obtained²⁷.

On hearing the application, the court may give permission to continue the claim on such terms as it thinks fit²⁸, may refuse permission and dismiss the application²⁹, or may adjourn the proceedings on the application and give such directions as it thinks fit³⁰. As a condition of granting permission to continue a derivative claim, the court may order that the claim is not to be discontinued, settled or compromised without the court's permission³¹.

1 As to the meaning of 'member of a company' see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 264(1)(a). As to the statutory basis for bringing a derivative claim see PARA 455 et seq.

3 Companies Act 2006 s 264(1)(b). As to applications for permission to continue another claim as a derivative claim see PARA 458.

4 Companies Act 2006 s 264(1)(c). The text refers to a derivative claim that has been continued under s 264: see s 264(1)(c).

5 Companies Act 2006 s 264(2). Where a permission application to continue a derivative claim is made in the High Court it will be assigned to the Chancery Division and decided by a High Court judge: *Practice Direction-Derivative Claims* PD 19C para 6(1). Where such an application is made in a county court it will be decided by a circuit judge: para 6(2). As to the meaning of 'court' generally see PARA 212 note 1. The application for permission under the Companies Act 2006 s 264(1) must be made by an application notice in accordance with CPR Pt 23 (as to which see **CIVIL PROCEDURE** vol 11 (2009) PARA 303 et seq): CPR 19.9B(1), (2). CPR 19.9A, except for CPR 19.9A(1), (2), (4)(b), and CPR 19.9A(12)(b) so far as it applies to the claim form, applies to an application under CPR 19.9B: CPR 19.9B(3). (Note, however, that CPR 19.9A(12) applies only to the dismissal of an application under the Companies Act 2006 s 261(2) (see PARA 457): see CPR 19.9A(12); and PARA 457). References to the claimant in CPR 19.9A are to be read as references to the person who seeks to take over the claim: see CPR 19.9B(3).

Where either a body corporate to which the Companies Act 2006 Pt 11 Ch 1 does not apply, or a trade union, is alleged to be entitled to a remedy (CPR 19.9C(1)(a)), and a member of the body corporate or trade union seeks to take over a claim already started, by the body corporate or trade union or one or more of its members, for it to be given that remedy (CPR 19.9C(1)(b)), the member who seeks to take over the claim must apply to the court for permission to continue the claim (CPR 19.9C(2)). The application for permission must be made by an application notice in accordance with CPR Pt 23: CPR 19.9C(3). The procedure for applications in relation to companies under the Companies Act 2006 s 264 applies to the permission application as if the body corporate or trade union were a company (CPR 19.9C(4)); and CPR 19.9A (except for CPR 19.9A(1)) and CPR 19.9B apply to the permission application as if the body corporate or trade union were a company (CPR 19.9C(5)).

If a derivative claim, except such a claim in pursuance of an order under the Companies Act 2006 s 996 (see PARA 475), arises in the course of other proceedings, then, in the case of a derivative claim under the Companies Act 2006 Pt 11 Ch 1, CPR 19.9A or CPR 19.9B applies, as the case requires, and, in any other case, CPR 19.9C applies: CPR 19.9D.

6 Companies Act 2006 s 264(2)(a).

7 Companies Act 2006 s 264(2)(b).

8 Companies Act 2006 s 264(2)(c).

9 CPR 19.9A(3). See note 5.

10 CPR 19.9A(4). The person who seeks to take over the claim may send the notice and documents required by CPR 19.9A(4) to the company by any method permitted by CPR Pt 6 (as to which see **CIVIL PROCEDURE** vol 11 (2009) PARA 138 et seq) as if the notice and documents were being served on the company: CPR 19.9A(5). The person who seeks to take over the claim must file a witness statement confirming that he has notified the company in accordance with CPR 19.9A(4): CPR 19.9A(6). See note 5.

11 The form in the form set out in the practice direction supplementing CPR 19.9A (ie *Practice Direction-Derivative Claims* PD 19C): see CPR 19.9A(4)(a). See note 5. The form required by CPR 19.9A(4)(a) to be sent to the defendant company or other body is set out at the end of *Practice Direction-Derivative Claims* PD 19C (see Notice in relation to derivative claim): para 4. There are separate versions of the form for claims involving a company, and claims involving a body corporate of another kind or a trade union: see para 4. As to the application of *Practice Direction-Derivative Claims* PD 19C see PARA 456 note 2.

12 CPR 19.9A(4)(a). See note 5. The provisions of the Companies Act 2006 s 263(1)-(4) (as to which see PARA 460) must be attached to the form: see *Practice Direction-Derivative Claims* PD 19C (Notice in relation to derivative claim).

13 CPR 19.9A(4)(c). See note 5.

14 CPR 19.9A(4)(d). See note 5.

15 CPR 19.9A(7). If the applicant seeks an order under CPR 19.9A(7) delaying notice to the defendant company or other body concerned, the applicant must also state in the application notice the reasons for the application, and file with it any written evidence in support of the application: see *Practice Direction-Derivative Claims* PD 19C para 3. An application under CPR 19.9A(7) may be made without notice: CPR 19.9A(8). See note 5.

16 The decision whether the evidence of the person who seeks to take over the claim discloses a prima facie case will normally be made without submissions from or, in the case of an oral hearing to reconsider such a decision reached pursuant to CPR 19.9A(9) (see the text and note 19) attendance by the company: *Practice Direction-Derivative Claims* PD 19C para 5. If without invitation from the court the company volunteers a submission or attendance, the company will not normally be allowed any costs of that submission or attendance: see para 5.

17 Companies Act 2006 s 264(3)(a).

18 Companies Act 2006 s 264(3)(b).

19 CPR 19.9A(9). See note 5.

20 CPR 19.9A(10). See note 5.

21 CPR 19.9A(10)(a). See note 5.

22 CPR 19.9A(10)(b). See note 5.

- 23 le pursuant to CPR 19.9A(10) (see the text and notes 20-22): see CPR 19.9A(11).
- 24 CPR 19.9A(11). See note 5.
- 25 le under the Companies Act 2006 s 264(3) (see the text and notes 16-18): see s 264(4)(a).
- 26 Companies Act 2006 s 264(4)(a).
- 27 Companies Act 2006 s 264(4)(b).
- 28 Companies Act 2006 s 264(5)(a). In deciding whether to give permission in this instance, s 263, which governs applications for permission under s 261 and s 262, does not apply: see s 263(1); and PARA 460.
- 29 Companies Act 2006 s 264(5)(b).
- 30 Companies Act 2006 s 264(5)(c).
- 31 CPR 19.9F; *Practice Direction-Derivative Claims* PD 19C para 7. Such a condition may be appropriate where any future proposal to discontinue or settle might not come to the attention of members who might have an interest in taking over the claim: see para 7. See note 5.

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460. Whether permission to continue a statutory derivative claim may be given.

Where a member of a company¹ applies for permission either to continue a derivative claim² or to continue another claim as a derivative claim³, permission must be refused if the court⁴ is satisfied⁵:

- 789 (1) that a person acting in accordance with a director's statutory duty to promote the success of the company⁶ would not seek to continue the claim⁷; or
- 790 (2) where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company⁸; or
- 791 (3) where the cause of action arises from an act or omission that has already occurred, that the act or omission either was authorised by the company before it occurred⁹ or has been ratified by the company since it occurred¹⁰.

In considering whether to give permission, the court must take into account, in particular¹¹:

- 792 (a) whether the member is acting in good faith in seeking to continue the claim¹²;
- 793 (b) the importance that a person acting in accordance with a director's statutory duty to promote the success of the company¹³ would attach to continuing it¹⁴;
- 794 (c) where the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be, either authorised by the company before it occurs¹⁵, or ratified by the company after it occurs¹⁶;
- 795 (d) where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company¹⁷;
- 796 (e) whether the company has decided not to pursue the claim¹⁸;
- 797 (f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company¹⁹.

In considering whether to give permission, the court must have particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter²⁰.

The Secretary of State²¹ may by regulations²² amend heads (1) to (3) above so as to alter or add to the circumstances in which permission is to be refused²³, and amend heads (a) to (f) above so as to alter or add to the matters that the court is required to take into account in considering whether to give permission²⁴.

1 As to the meaning of 'member of a company' see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie under the Companies Act 2006 s 261 (see PARA 457): see s 263(1).

3 Ie under the Companies Act 2006 s 262 (see PARA 458): see s 263(1).

4 As to the meaning of 'court' see PARA 212 note 1.

5 Companies Act 2006 s 263(1), (2). See *Mission Capital plc v Sinclair* [2008] EWHC 1339 (Ch), [2008] All ER (D) 225 (Mar) (the basis for the mandatory refusal of permission to continue the defendants' derivative claim under the Companies Act 2006 s 263(2) not made out).

6 Ie in accordance with the Companies Act 2006 s 172 (see PARA 544): see s 263(2)(a).

7 Companies Act 2006 s 263(2)(a). The circumstance described in head (1) in the text was considered in dismissing an application for permission to continue a derivative action in *Franbar Holdings Ltd v Patel* [2008] EWHC 1534 (Ch), [2009] 1 BCLC 1 (there was room for more than one view and it had not been shown that the hypothetical director acting in accordance with the Companies Act 2006 s 172 (see PARA 544) would have concluded that the case advanced was sufficiently cogent to justify continuation of the claim). See also *Stimpson v Southern Landlords Association* [2009] All ER (D) 193 (May) (hypothetical director acting reasonably in the interests of members would not continue with claim).

8 Companies Act 2006 s 263(2)(b).

9 Companies Act 2006 s 263(2)(c)(i).

10 Companies Act 2006 s 263(2)(c)(ii).

11 Companies Act 2006 s 263(3).

12 Companies Act 2006 s 263(3)(a). At common law, persons who were themselves parties to the wrongful act could not raise the question by bringing proceedings (*Whitwam v Watkin* (1898) 78 LT 188 (where the plaintiffs became shareholders for the purpose of bringing the action)); and a shareholder who knowingly received and retained the proceeds of an act ultra vires the company is not a proper person to sue (*Towers v African Tug Co* [1904] 1 Ch 558, CA), unless he was proposing to restrain future ultra vires acts (*Mosely v Koffyfontein Mines Ltd* [1911] 1 Ch 73, CA (distinguishing *Towers v African Tug Co* [1904] 1 Ch 558, CA); affd on another point sub nom *Koffyfontein Mines Ltd v Mosely* [1911] AC 409, HL). See also *Barrett v Duckett* [1995] 1 BCLC 243, CA (a derivative claim should not be allowed to proceed where the claimant has an ulterior motive which makes him or her an inappropriate person to bring the proceedings). Similarly, if for any other reason it was inequitable to allow the claimant to bring such a claim, the defendant might raise the claimant's conduct as a defence to it: *Nurcombe v Nurcombe* [1985] 1 All ER 65, [1985] 1 WLR 370, CA (plaintiff had proceeded in matrimonial proceedings against her husband on the basis that a profit he had made as a director of the company belonged to him and not the company). As to acts ultra vires the company see PARA 259 et seq.

13 Ie in accordance with the Companies Act 2006 s 172 (see PARA 544): see s 263(3)(b).

14 Companies Act 2006 s 263(3)(b). It is not for the court to assert its own view of what it would do if it was the board but merely to be satisfied that a reasonable independent board could take the view that it was appropriate to bring the proceedings: see *Airey v Cordell* [2006] EWHC 2728 (Ch), [2006] All ER (D) 111 (Aug). The factor set out in head (b) in the text has been considered in *Mission Capital plc v Sinclair* [2008] EWHC 1339 (Ch), [2008] All ER (D) 225 (Mar) (see also notes 5, 19); and *Franbar Holdings Ltd v Patel* [2008] EWHC 1534 (Ch) at [37], [2009] 1 BCLC 1 at [37] (see also notes 7, 19).

15 Companies Act 2006 s 263(3)(c)(i).

16 Companies Act 2006 s 263(3)(c)(ii). As to the limits of ratification see PARAS 463, 464.

17 Companies Act 2006 s 263(3)(d). See note 16.

18 Companies Act 2006 s 263(3)(e).

19 Companies Act 2006 s 263(3)(f). See *Franbar Holdings Ltd v Patel* [2008] EWHC 1534 (Ch), [2009] 1 BCLC 1 (considerable weight had to be given to the fact that the claimant could achieve all that it could properly want through its petition made under the Companies Act 2006 s 994 (see PARA 466) and shareholders' action); *Jafari-Fini v Skillglass* [2005] EWCA Civ 356, [2005] All ER (D) 274 (Mar), [2005] BCC 842 (court saw no need for a derivative claim if the company was added as a defendant to the claimant's personal action so as to be bound by the result); *Airey v Cordell* [2006] EWHC 2728 (Ch), [2006] All ER (D) 111 (Aug) (application for permission to proceed adjourned to allow the majority shareholder-directors to put forward a proposal which afforded adequate protection for the claimant *vice* the company); *Mission Capital plc v Sinclair* [2008] EWHC 1339 (Ch), [2008] All ER (D) 225 (Mar) (the alternative remedy available through claimant's petition under the Companies Act 2006 s 994 would achieve all that was required).

20 Companies Act 2006 s 263(4). The provision made by s 263(4), in relation to the views of independent members, accords with *Smith v Croft (No 2)* [1988] Ch 114, [1987] 3 All ER 909 (it was proper to have regard to the views of the independent shareholders, and their votes should be disregarded only if the court was satisfied that they would be cast in favour of the defendant directors in order to support them rather than for the benefit of the company, or if there was a substantial risk of that happening).

21 As to the Secretary of State see PARA 6.

22 Regulations made under the Companies Act 2006 s 263 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 263(7), 1290. Before making any such regulations the Secretary of State must consult such persons as he considers appropriate: s 263(6). As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. At the date at which this volume states the law, no such regulations had been made under s 263.

23 Companies Act 2006 s 263(5)(a).

24 Companies Act 2006 s 263(5)(b).

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461. Liability for costs in derivative claims.

The court may order the company (or body corporate or trade union) for the benefit of which a derivative claim is brought¹ to indemnify the claimant against liability for costs incurred in the permission application or in the derivative claim or both².

Such an order will not be made unless the claim is for the benefit of shareholders³; and such an order does not amount to a lien for unrecovered costs on the company's assets or assets recovered as a result of the action⁴.

1 As to the statutory basis for bringing a derivative claim see PARA 455 et seq. As to the relationship between the statutory provisions which govern derivative claims and the substantive common law principles upon which the statute is based see PARA 462.

2 CPR 19.9E. This rule reflects the court's power, at common law, where a shareholder had, in good faith and on reasonable grounds, sued as claimant in a minority shareholder's action (the benefit of which, if successful, would accrue to the company and only indirectly to the claimant as a member of the company) to order the company to pay the claimant's costs: see *Wallersteiner v Moir (No 2)* [1975] QB 373, [1975] 1 All ER 849, CA; *Jaybird Group Ltd v Greenwood* [1986] BCLC 319. See also *Smith v Croft* [1986] 2 All ER 551, [1986] 1 WLR 580

(for subsequent proceedings see [1988] Ch 114, [1987] BCLC 355). The Civil Procedure Rules ('CPR') do not indicate the basis on which the court may exercise its discretion and the common law approach must now be considered in the context of the statutory basis for derivative claims set out in the Companies Act 2006 Pt 11 Ch 1 (ss 260-264) (derivative claims in England and Wales or Northern Ireland) (see PARA 455 et seq). However, *Wallersteiner v Moir (No 2)* is likely to continue to guide the court in the exercise of its discretion, given the absence of statutory guidance.

The relief for costs is available only in a permission application or derivative claim; it is not available to a shareholder whose individual rights have been infringed: *Re a Company (No 005136 of 1986)* [1987] BCLC 82.

3 *Watts v Midland Bank plc* [1986] BCLC 15 (order refused; company hopelessly insolvent). An indemnity order was refused also in *Halle v Trax BW Ltd* [2000] BCC 1020, [2001] All ER (D) 51 (Jan) (effect would be for company to fund dispute between two partners in a joint venture); and *Mumbray v Lapper* [2005] EWHC 1152 (Ch), [2005] BCC 990, (2005) Times, 31 May (indemnity would have been inappropriate to what was essentially a partnership break-up).

4 *Qayoumi v Oakhouse Property Holdings plc* [2002] EWHC 2547 (Ch), [2003] 1 BCLC 352.

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462. Relationship between the statutory derivative claim and substantive common law principles.

The statutory provisions governing the bringing of a derivative claim under the Companies Act 2006¹ do not supplant the substantive common law principles underlying derivative claims², but provide a new procedure with flexible and accessible criteria for determining whether a shareholder can pursue a derivative claim³.

Accordingly, the common law principle, that the proper claimant in respect of a wrong allegedly done to a company is *prima facie* the company⁴, is maintained. However, the other fundamental principle established at common law, that no individual member of the company is allowed to maintain an action in respect of an alleged wrong which might be made binding on the company by a simple majority of the members⁵, has been modified by the statute⁶. At common law, the possibility of ratification sufficed to bar a member's claim on behalf of the company⁷. Under the statute, the alleged wrong must have been authorised or ratified in order to bar a claim⁸; otherwise, whether the alleged wrong would be likely to be authorised or ratified is merely a matter which the court must take into account in considering whether to give permission to continue a derivative claim or continue a company claim as a derivative claim⁹. Whether the alleged wrong is capable of ratification remains a matter for the common law¹⁰, but ratification of conduct by a director amounting to negligence, default, breach of duty or breach of trust must be in accordance with the statutory requirements excluding certain votes¹¹.

1 *Ie* the Companies Act 2006 Pt 11 Ch 1 (ss 260-264): see PARA 455 et seq.

2 As to which see PARA 463 et seq.

3 See the Explanatory Notes to the Companies Act 2006 para 491. The derivative claim itself was described at common law as a mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress: see *Burland v Earle* [1902] AC 83 at 93, PC; and PARA 463.

4 See *Foss v Harbottle* (1843) 2 Hare 461 (where the allegation was that no board was in existence). See also *Mozley v Alston* (1847) 1 Ph 790 (where the election of directors was said to be invalid); *Morris v Morris* [1877] WN 6; *Bainbridge v Smith* (1889) 41 ChD 462, CA; *Marshall's Valve Gear Co Ltd v Manning, Wardle & Co Ltd* [1909] 1 Ch 267; *Quin & Axtens Ltd v Salmon* [1909] AC 442, HL. See also the statement of the rule in

Edwards v Halliwell [1950] 2 All ER 1064 at 1066, CA, per Jenkins LJ; and PARA 269 et seq. As to a company only suing or being sued in its corporate name see PARA 301. As to loss suffered by an individual member as a result of a wrong done to the company see PARA 373.

Derivative claims must be seen in the context of the principles that a company has a legal personality that is separate and distinct from that of its members (see PARA 120); and that a director's duty is to the company alone and not to individual members or third parties (a position now set down in the Companies Act 2006: see s 170; and PARA 532 et seq).

5 See *MacDougall v Gardiner* (1875) 1 ChD 13, CA; *Wall v London and Northern Assets Corpn* [1898] 2 Ch 469 at 483, CA, per Chitty LJ; *Burland v Earle* [1902] AC 83, PC.

6 See, especially, the criteria according to which a statutory derivative claim may be brought under the Companies Act 2006 s 260 (see PARA 455) and the principles according to which a derivative claim must be refused, which are contained in s 263 (cited in PARA 460).

7 See note 5; and as to the limits of ratification see PARAS 463, 464.

8 See the Companies Act 2006 s 263(2)(b), (c); and PARA 460.

9 See the Companies Act 2006 s 263(1), (3)(c), (d); and PARA 460.

10 See PARAS 463, 464.

11 See the Companies Act 2006 s 293; and PARA 625.

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463. Acts which may not be made binding by simple majority of members.

At common law, a derivative claim¹ lay only if, inter alia, the alleged wrong could not be made binding on the company by a simple majority of the members² as where the act complained of is of a fraudulent character³ or oppressive or is ultra vires the company⁴, or is criminal⁵; or where the wrongdoers control the majority of votes⁶; or where the result would otherwise be that the company was carrying out by an ordinary resolution something which could be properly carried out only by a special resolution⁷, or by any other resolution requiring a prescribed majority⁸. It remains the case that such conduct cannot be ratified and a derivative claim lies, subject to the permission of the court to continue the claim being obtained⁹. Examples of unratifiable conduct where the court has allowed a claim to be brought include¹⁰:

- 798 (1) to prevent a fraudulent sale by a promoter to the company¹¹; or
- 799 (2) to prevent fraud on a minority¹², as where an arrangement is being carried out beneficial only to the majority of shareholders¹³; or
- 800 (3) where, without fraud, the directors and majority shareholders are guilty of a breach of duty which not only harms the company but benefits those shareholders¹⁴; or
- 801 (4) where resolutions have been passed for altering a company's articles of association¹⁵ in the interest of a majority to enable them to expropriate a minority¹⁶; or
- 802 (5) where a resolution has been passed for the transfer of a controlling interest in a company which may involve a complete transformation of the company¹⁷; or
- 803 (6) where directors are withholding payment of calls on their own shares while making calls on those of other persons¹⁸; or
- 804 (7) where the directors have sold the company's land at an undervalue to one of their number¹⁹; or

- 805 (8) where the company is existing only for the purpose of being wound up and gratuities are voted to its employees and directors²⁰; or
- 806 (9) where a resolution has been passed by the votes of the holder of the majority of the shares which has the effect of appropriating to his own use a contract which belongs in equity to the company²¹, or stifling proceedings by the company against him²²; or
- 807 (10) where resolutions have been passed on winding up purporting to divide the assets in fraud of a class of shareholders²³; or
- 808 (11) where the chairman of a meeting has improperly rejected votes²⁴; or
- 809 (12) where a proper notice of the purpose of a meeting involving payments to directors has not been given²⁵; or
- 810 (13) where shares are being issued to secure a majority of votes²⁶; or
- 811 (14) where the majority of directors exclude the minority from meetings of the board or a committee of it²⁷; or
- 812 (15) where the company is conducting its business in an illegal way²⁸.

1 As to the relationship between the statutory procedure governing the bringing of derivative claims and the substantive common law principles see PARA 462.

2 See PARA 462 note 5. As to membership of a company generally see PARA 321 et seq.

3 *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, [1982] 1 All ER 354, CA. See also *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246, [1985] 3 All ER 52, CA (fraud on the company's creditors).

4 *Burland v Earle* [1902] AC 83 at 93, PC; *Edwards v Halliwell* [1950] 2 All ER 1064 at 1067, CA, per Jenkins LJ. As to acts ultra vires the company see *Trevor v Whitworth* (1887) 12 App Cas 409, HL.

5 *Cockburn v Newbridge Sanitary Steam Laundry Co Ltd and Llewellyn* [1915] 1 IR 237 at 249, CA.

6 *Russell v Wakefield Waterworks Co* (1875) LR 20 Eq 474 at 482 per Jessel MR; *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, [1982] 1 All ER 354, CA. As to the procedure for striking out such proceedings see *Smith v Croft (No 2)* [1988] Ch 114, [1987] 3 All ER 909.

7 *Baillie v Oriental Telephone and Electric Co Ltd* [1915] 1 Ch 503, CA. As to the meaning of 'ordinary resolution' see PARA 613. As to special resolutions see PARA 614.

8 See *Edwards v Halliwell* [1950] 2 All ER 1064, CA.

9 See PARA 460.

10 This list is not exhaustive.

11 *Atwool v Merryweather* (1867) LR 5 Eq 464n; *Duckett v Gover* (1877) 6 ChD 82; *Mason v Harris* (1879) 11 ChD 97, CA. As to promoters generally see PARA 49.

12 *Gray v Lewis* (1873) 8 Ch App 1035; *Spokes v Grosvenor Hotel Co* [1897] 2 QB 124, CA; *Daniels v Daniels* [1978] Ch 406, [1978] 2 All ER 89. As to the court's statutory powers where the company's affairs are being conducted in a manner unfairly prejudicial to minorities see the Companies Act 2006 Pt 30 (ss 994-999); and PARA 466 et seq.

13 *Menier v Hooper's Telegraph Works* (1874) 9 Ch App 350. Cf *Castello v London General Omnibus Co Ltd* (1912) 107 LT 575, CA; *North-West Transportation Co Ltd and Beatty v Beatty* (1887) 12 App Cas 589, PC; *Dominion Cotton Mills Ltd v Amyot* [1912] AC 546, PC; *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286, [1950] 2 All ER 1120, CA; *Clemens v Clemens Bros Ltd* [1976] 2 All ER 268. Cf *Rights and Issues Investment Trust Ltd v Stylo Shoes Ltd* [1965] Ch 250, [1964] 3 All ER 628 (alteration of voting rights held in good faith for benefit of company as a whole).

14 *Daniels v Daniels* [1978] Ch 406, [1978] 2 All ER 89.

15 As to a company's articles of association generally see PARA 228 et seq.

16 *Brown v British Abrasive Wheel Co* [1919] 1 Ch 290. See also PARA 235.

17 *Clark v Workman* [1920] 1 IR 107.

18 *Alexander v Automatic Telephone Co* [1900] 2 Ch 56, CA. As to a company's directors see PARA 478 et seq. As to calls made on shares see PARA 1132 et seq.

19 *Daniels v Daniels* [1978] Ch 406, [1978] 2 All ER 89.

20 *Hutton v West Cork Rly Co* (1883) 23 ChD 654, CA; *Stroud v Royal Aquarium and Summer and Winter Garden Society Ltd* (1903) 89 LT 243; *Parke v Daily News Ltd* [1962] Ch 927, [1962] 2 All ER 929. As to the director's power to provide for employees on the cessation or transfer of business if the proper steps are taken see the Companies Act 2006 s 247; and PARA 546. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

21 *Cook v Deeks* [1916] 1 AC 554, PC. Such appropriation as is mentioned in the text could now be authorised by independent directors under the Companies Act 2006: see s 175(4)(b); and PARA 550.

22 *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 All ER 437, [1982] 1 WLR 2 (the actions of the GLC were designed to prevent the other shareholders from ever acquiring voting rights and stultifying the purpose for which the company was formed).

23 *Griffith v Paget* (1877) 5 ChD 894. As to class rights of members see PARA 1057 et seq.

24 *Pender v Lushington* (1877) 6 ChD 70; *Marks v Financial News Ltd* (1919) 35 TLR 681.

25 *Kaye v Croydon Tramways Co* [1898] 1 Ch 358, CA; *Clarkson v Davies* [1923] AC 100, PC. See also PARA 556.

26 *Fraser v Whalley* (1864) 2 Hem & M 10; *Punt v Symons & Co Ltd* [1903] 2 Ch 506; *Piercy v S Mills & Co* [1920] 1 Ch 77. Cf *Hogg v Cramphorn Ltd* [1967] Ch 254, [1966] 3 All ER 420 (majority given opportunity to sanction shares purported to have been issued improperly by directors); *Bamford v Bamford* [1970] Ch 212, [1969] 1 All ER 969, CA (same point).

27 See PARA 537. As to meetings of directors generally see PARA 528 et seq.

28 See *Powell v Kempton Park Racecourse Co Ltd* [1897] 2 QB 242, CA.

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464. Acts which may be made binding by simple majority of members.

At common law, where proceedings are brought by shareholders complaining in their own names and on behalf of the others¹, the claimants have no larger right to relief than the company would have if it were the claimant and cannot complain of acts which are valid if done with the approval of the majority of shareholders, or are capable of being confirmed by the majority, as mere irregularity or informality which may be remedied is insufficient². Thus directors will not be restrained³:

813 (1) from making or enforcing calls in good faith⁴; or

814 (2) from applying the proceeds in a particular manner⁵; or

815 (3) from applying the proceeds of the issue of new shares to purposes other than those for which the issue was made⁶; or

816 (4) from cancelling unissued shares⁷; or

817 (5) from otherwise applying the funds of the company within its powers⁸,

and they will not be interfered with as regards the manner in which profits are ascertained⁹, or as to distributing profits while debts are unpaid¹⁰, or as regards selecting the place where a general meeting of the company is to be held¹¹, or as regards drawing up the accounts in accordance with their business judgment exercised in good faith¹². Under the Companies Act 2006, the acts or omissions complained of must be actually approved by the majority in order to defeat a derivative claim¹³; otherwise, the likelihood of authorisation or ratification is merely a matter which the court must take into account in considering whether to give permission to continue a derivative claim or continue a company claim as a derivative claim¹⁴. Ratification of conduct by a director amounting to negligence, default, breach of duty or breach of trust must be in accordance with the statutory requirements excluding certain votes¹⁵.

1 See PARA 463. As to shares and shareholders generally see PARAS 1042 et seq, 1697 et seq. As to the relationship between the statutory procedure governing the bringing of derivative claims and the substantive common law principles see PARA 462. As to control of a company's litigation generally see PARA 302.

2 *Burland v Earle* [1902] AC 83, PC; *Menier v Hooper's Telegraph Works* (1874) 9 Ch App 350; *MacDougall v Gardiner* (1875) 1 ChD 13 at 25, CA, per Mellish LJ; *Normandy v Ind, Coope & Co Ltd* [1908] 1 Ch 84; *Hoole v Great Western Rly Co* (1867) 3 Ch App 262. See also *Clinch v Financial Corp'n* (1868) 4 Ch App 117 (action to restrain irregular amalgamation); *Atwool v Merryweather* (1867) LR 5 Eq 464n; *Hope v International Financial Society* (1876) 4 ChD 327, CA; *Mason v Harris* (1879) 11 ChD 97, CA; *Pavlidis v Jensen* [1956] Ch 565, [1956] 2 All ER 518 (negligence on the part of the directors may be ratified).

3 This list is not exhaustive.

4 *Bailey v Birkenhead, Lancashire and Cheshire Junction Rly Co* (1850) 12 Beav 433; *Anglo-Universal Bank v Baragnot* (1881) 45 LT 362, CA. As to calls made on shares see PARA 1132 et seq.

5 *Cooper v Shropshire Union Railway and Canal Co* (1849) 6 Ry & Can Cas 136.

6 *Yetts v Norfolk Rly Co* (1849) 3 De G & Sm 293. As to whether the majority may sanction shares purported to have been issued by directors for an improper purpose see *Hogg v Cramphorn Ltd* [1967] Ch 254, [1966] 3 All ER 420; *Bamford v Bamford* [1970] Ch 212, [1969] 1 All ER 969, CA. Cf *Fraser v Whalley* (1864) 2 Hem & M 10; *Punt v Symons & Co Ltd* [1903] 2 Ch 506; *Piercy v S Mills & Co* [1920] 1 Ch 77.

7 *Re Swindon Town Football Co Ltd* [1990] BCLC 467 (a company would only be prevented from cancelling shares (see PARAS 1200-1204) where a person had entered into a contract to take the shares in question; where a person had unilaterally consented to take shares, the shares had not been 'agreed to be taken').

8 *Taunton v Royal Insurance Co* (1864) 2 Hem & M 135; *Bank of Turkey v Ottoman Co* (1866) LR 2 Eq 366.

9 *Stevens v South Devon Rly Co* (1851) 9 Hare 313; *Browne v Monmouthshire Rly and Canal Co* (1851) 13 Beav 32; *Lambert v Neuchatel Asphalte Co Ltd* (1882) 51 LJ Ch 882.

10 *Re Mercantile Trading Co, Stringer's Case* (1869) 4 Ch App 475. See also *Lord v Governor & Co of Copper Miners* (1848) 2 Ph 740 at 751 per Lord Cottenham LC; and the cases cited in note 8. As to the interference by the court as to dividends see further PARA 1412.

11 *Martin v Walker* (1918) 145 LT Jo 377. As to meetings of members see PARA 629 et seq.

12 *Devlin v Slough Estates Ltd* [1983] BCLC 497.

13 See the Companies Act 2006 s 263(2)(b), (c); and PARA 460.

14 See the Companies Act 2006 s 263(1), (3)(c), (d); and PARA 460.

15 See the Companies Act 2006 s 293; and PARA 625.

465. Effect of liquidation on bringing derivative claim.

At common law, once a company has gone into liquidation, it is no longer possible for a derivative or minority shareholders' claim to be brought¹. (The reason such a claim is allowed in the first place depends upon the impossibility of the claimants' obtaining relief in any other manner). Once the company has gone into liquidation, the right to bring a claim in the name of the company passes to the liquidator², and, if he is unwilling to bring any claim which the minority shareholders consider ought to be brought, they may apply to the court for assistance³. This may take the form of an order that the liquidator does himself bring proceedings in the name of the company, or that the minority shareholders themselves be given leave to bring proceedings in the name of the company. In all cases, permission will normally be given only on terms that the liquidator, and the assets of the company, are completely indemnified against the consequences of an unfavourable outcome of the litigation⁴.

Alternatively, in so far as any of the proposed defendants are persons who have taken part in the formation or promotion of the company, or any past or present director or officer of the company, any contributory⁵ or a liquidator may obtain relief directly against him under the misfeasance provisions of the Insolvency Act 1986⁶.

1 *Ferguson v Wallbridge* [1935] 3 DLR 66, PC; *Fargro Ltd v Godfroy* [1986] 3 All ER 279, [1986] 1 WLR 1134. It is arguable that the introduction of a statutory procedure that does not expressly rule out claims on a company going into liquidation allows the court to consider a different approach to this question. As to the relationship between the statutory procedure governing the bringing of derivative claims and the substantive common law principles that underlie it see PARA 462.

2 As to the appointment of liquidators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 950 et seq.

3 *Ie* in a voluntary winding up under the Insolvency Act 1986 s 112 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1012) and in a compulsory liquidation under s 167(3) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 580). See also *Ferguson v Wallbridge* [1935] 3 DLR 66 at 83, PC.

4 See *Cape Breton Co v Fenn* (1881) 17 ChD 198 at 200, CA, per Malins V-C, and at 208 per Cotton LJ.

5 As to the meaning of 'contributory' see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 703.

6 *Ie* under the Insolvency Act 1986 s 212: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688 et seq. See also *Ferguson v Wallbridge* [1935] 3 DLR 66 at 83-84, PC.

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(12) PROTECTION OF COMPANY'S MEMBERS AGAINST UNFAIR PREJUDICE

466. Petition by company members and others in respect of unfair prejudice.

A member of a company¹ may apply to the court² by petition³ for an order⁴ on the ground⁵:

- 818 (1) that the company's affairs are being or have been conducted⁶ in a manner that is unfairly prejudicial to the interests of its members generally or of some part of its members⁷ (including at least himself)⁸; or
- 819 (2) that an actual or proposed act⁹ or omission of the company (including an act or omission on its behalf) is or would be so prejudicial¹⁰.

The provisions of Part 30 of the Companies Act 2006¹¹ apply also to a person who is not a member of a company but to whom shares¹² in the company have been transferred¹³ or transmitted by operation of law¹⁴ as they apply to a member of the company¹⁵.

There is no hard and fast rule about who should be made respondent to a petition for an order on either of the grounds set out in heads (1) and (2) above but the company is made a respondent as a matter of course¹⁶.

1 As to the meaning of 'member of a company' see PARA 321. For these purposes and, so far as applicable for the purposes of the Companies Act 2006 s 994 in the other provisions of Pt 30 (ss 994-999) (see also PARA 467 et seq), 'company' means any company within the meaning of the Companies Act 2006 or any company which is not such a company but is a statutory water company within the meaning of the Statutory Water Companies Act 1991 (see **WATER AND WATERWAYS**): Companies Act 2006 s 994(3). As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

See also *Re Nuneaton Borough Association Football Club Ltd* [1989] BCLC 454, 5 BCC 792, CA (a person whose name is entered on the register of members with his consent is a member despite the absence of a binding contract between him and the company until the register is rectified by removal of his name). As to whether a majority shareholder can petition under the Companies Act 2006 s 994 see *Re Baltic Real Estate Ltd* [1993] BCLC 498 at 501, [1992] BCC 629 at 632 per Knox J (it was arguable that a majority shareholder had a right to present a petition); *Re Baltic Real Estate Ltd (No 2)* [1993] BCLC 503 at 506-507, [1992] BCC 629 at 635-636 per Knox J (a majority shareholder could put an end to unfair prejudice by removing the directors from office and did not need the assistance of the court); *Re Legal Costs Negotiators Ltd* [1999] 2 BCLC 171, CA (majority shareholders can usually obtain redress through voting). See also *Alvona Developments Ltd v Manhattan Loft Corp'n (AC) Ltd* [2005] EWHC 1567 (Ch), [2005] All ER (D) 252 (Jul) (company deadlocked and majority shareholder could not obtain order convening shareholders' meeting); and PARA 468 note 5.

Although there is some latitude in the range of respondents who can properly be joined under the Companies Act 2006 s 994 (see the text and note 16), including room for nominal defendants in certain types of proceedings (see PARA 473), there is no such latitude in the joinder of petitioners; and a procedural provision such as CPR 19.2(2)(a) (see **CIVIL PROCEDURE** vol 11 (2009) PARA 213) cannot expand the class of claimants on whom a cause of action is conferred by primary legislation: *Atlasview Ltd v Brightview Ltd* [2004] EWHC 1056 (Ch), [2004] 2 BCLC 191 (right of nominee shareholders to present a petition).

2 As to the meaning of 'court' see PARA 212 note 1. The statutory right conferred on shareholders to apply to the Companies Court for relief at any stage under the Companies Act 2006 s 994 is inalienable and cannot be diminished or removed by contract or otherwise: *Exeter City AFC Ltd v Football Conference Ltd* [2004] EWHC 831 (Ch), [2004] 4 All ER 1179, [2005] 1 BCLC 238 (accordingly, the court was not compelled either by the Arbitration Act 1996 s 9 (as to which see **ARBITRATION** vol 2 (2008) PARA 1222), or under the inherent jurisdiction of the court, to stay proceedings under the Companies Act 2006 s 994, even in the face of an agreement between the parties that the matter complained of was to be referred to arbitration).

3 The court has no jurisdiction, under CPR 3.10 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 257) or otherwise, to dispense with the requirement that such proceedings should be by way of petition: *Bamber v Eaton* [2004] EWHC 2437 (Ch), [2005] 1 All ER 820, sub nom *Re Osea Road Camp Sites* [2005] 1 WLR 760.

The power under the Insolvency Act 1986 s 411 (as to which see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1041) to make rules applies, so far as it relates to a winding-up petition, for the purposes of a petition under the Companies Act 2006 Pt 30 (see also PARA 467 et seq): s 997. As to the rules that have been made in exercise of the power conferred by the Insolvency Act 1986 s 411 see the Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469; and PARA 472.

4 Ie under the Companies Act 2006 Pt 30 (see also PARA 467 et seq): see s 994(1). As to the powers that are available to the court to protect members against unfair prejudice see PARA 475 et seq. As to applications to the court by petition for an order under Pt 30 by the Secretary of State see PARA 467.

5 Companies Act 2006 s 994(1).

6 Past conduct is clearly encompassed, even if remedied by the date of the petition or the date of the hearing (*Re Kenyon Swansea Ltd* [1987] BCLC 514, 3 BCC 259; and see *Re a Company (No 001761 of 1986)* [1987] BCLC 141 at 143 per Harman J; *Re a Company (No 00314 of 1989), ex p Estate Acquisition and Development Ltd* [1991] BCLC 154, [1990] BCC 221; *Lloyd v Casey* [2002] 1 BCLC 454); but, if the conduct has been remedied, this may render useless a claim for relief (*Re Estate Acquisition and Development Ltd* [1995] BCC 338 at 352); and see *Re Legal Costs Negotiators Ltd* [1999] 2 BCLC 171, CA. A petitioner for relief under the Companies Act 2006 s 994 could support his petition by relying on conduct which took place before he was registered as a shareholder, since s 994 applied to unfairly prejudicial conduct which was not only continuing but which had occurred in the past, as was shown by the reference to the company's affairs which 'have been' conducted in a manner which is unfairly prejudicial: *Lloyd v Casey*. The fact that a shareholder had prior knowledge before purchasing shares of the grounds later complained of in the petition does not render the petition inadmissible: *Bermuda Cablevision Ltd v Colica Trust Co Ltd* [1998] AC 198, [1998] 1 BCLC 1, PC. Laches may bar relief under a petition under the Companies Act 2006 s 994: *Re a Company (No 005134 of 1986), ex p Harries* [1989] BCLC 383, sub nom *Re DR Chemicals Ltd* 5 BCC 39; *Re a Company* [1986] BCLC 362 at 366, sub nom *Re a Company (No 007623 of 1984)* 2 BCC 99, 191 at 99, 195 per Hoffmann J. As to examples where a company's affairs have been conducted in an unfairly prejudicial manner see PARA 468 et seq.

7 For the purposes of head (1) in the text, a removal of the company's auditor from office either on grounds of divergence of opinions on accounting treatments or audit procedures, or on any other improper grounds, is to be treated as being unfairly prejudicial to the interests of some part of the company's members: Companies Act 2006 s 994(1A) (added by SI 2007/3494).

8 Companies Act 2006 s 994(1)(a). See eg *Re Phoenix Office Supplies Ltd, Phoenix Office Supplies Ltd v Larvin* [2002] EWCA Civ 1740, [2003] 1 BCLC 76 (the Companies Act 2006 s 994 did not provide the means for a member of a quasi-partnership company (as to which see PARA 469), who wished voluntarily to sever his connection with the company, to force the other members to purchase his shareholding at its full undiscounted value when he had no contractual right to do so and he had not shown that he had been unfairly prejudiced by the conduct of the other members). In *Baker v Potter* [2004] EWHC 1422 (Ch), [2004] All ER (D) 174 (Jun), the petitioner had, by agreeing to sell his share in the company converted his interest in the company into a right to receive the purchase price, and it followed that financial relief was not appropriate in respect of the alleged unfairly prejudicial acts or conduct which had taken place after the agreement. See also the text and notes 11-15.

9 Threatened future conduct is included: *Re Whyte, Petitioner* (1984) 1 BCC 99, 044, Ct of Sess; *Re a Company* [1986] BCLC 362, sub nom *Re a Company (No 007623 of 1984)* (1986) 2 BCC 99, 191; *Re Kenyon Swansea Ltd* [1987] BCLC 514, 3 BCC 259; *Re Blue Arrow plc* [1987] BCLC 585, 3 BCC 618; *Re a Company (No 00314 of 1989), ex p Estate Acquisition and Development Ltd* [1991] BCLC 154, [1990] BCC 221; *Re Astec (BSR) plc* [1998] 2 BCLC 556. The petition must not, however, be premature: see *Re Gorwyn Holdings Ltd* (1985) 1 BCC 99, 479; *Re a Company (No 005685 of 1988), ex p Schwarcz (No 2)* [1989] BCLC 427 at 451, sub nom *Re Ringtower Holdings plc* 5 BCC 82 at 103 per Peter Gibson J; *Re Astec (BSR) Ltd* (there must be some proposed act or omission by or on behalf of the company).

10 Companies Act 2006 s 994(1)(b).

A predecessor provision to the Companies Act 2006 s 994, ie the Companies Act 1980 s 75 (now repealed) replaced a more restrictive provision, the Companies Act 1948 s 210 (repealed), which provided relief for members where the company's affairs were being conducted in an oppressive, ie burdensome, harsh and wrongful, manner: see *Elder v Elder and Watson Ltd* 1952 SC 49, Ct of Sess; *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, [1958] 3 All ER 66, HL; *Re HR Harmer Ltd* [1958] 3 All ER 689, [1959] 1 WLR 62, CA; *Re Lundie Bros Ltd* [1965] 2 All ER 692, [1965] 1 WLR 1051; *Re Five Minute Car Wash Service Ltd* [1966] 1 All ER 242, [1966] 1 WLR 745; *Re Jermyn St Turkish Baths Ltd* [1971] 3 All ER 184, [1971] 1 WLR 1042, CA.

11 Ie the Companies Act 2006 Pt 30 (ss 994-999) (see also PARA 467 et seq): see s 994(2).

12 As to the meaning of 'share' see PARA 1042.

13 See *Re a Company* [1986] BCLC 391, 2 BCC 99, 276 ('transferred' requires at least that a proper instrument of transfer should have been executed and delivered to the transferee or the company; an agreement to transfer is insufficient). See also *Re a Company (No 007828 of 1985)* (1985) 2 BCC 98, 951; *Re Quickdome Ltd* [1988] BCLC 370, 4 BCC 296.

14 Ie personal representatives or a trustee in bankruptcy: see PARA 434. See *Re a Company (No 007828 of 1985)* (1985) 2 BCC 98, 951 (the existence of an alleged constructive trust over shares does not amount to a transmission by operation of law). See also *Murray's Judicial Factor v Thomas Murray & Sons (Ice Merchants) Ltd* [1993] BCLC 1437, Ct of Sess (a judicial factor appointed in place of the executor dative is entitled to be treated as a person to whom the shares of the deceased were transmitted).

15 Companies Act 2006 s 994(2). It is arguable that the 'interests' of a nominee shareholder under s 994 are capable of including the economic and contractual interests of the beneficial owners of shares but not the

interests of the nominee shareholder: *Atlasview Ltd v Brightview Ltd* [2004] EWHC 1056 (Ch), [2004] 2 BCLC 191. There is no general proposition that every member of a company who had sold his shares but remained registered as a member would inevitably be unable to show prejudice to his interests; a transferee had to have standing to petition for a period after the time of the transfer but before registration, otherwise the Companies Act 2006 s 994(2) would have no effect: *Re McCarthy Surfacing Ltd* [2006] EWHC 832 (Ch), [2006] All ER (D) 193 (Apr).

16 As to who may be made respondents to the petition see PARA 473.

UPDATE

466 Petition by company members and others in respect of unfair prejudice

NOTES 1-8--See *Amin v Amin; Amin v Amin* [2009] EWHC 3356 (Ch), [2009] All ER (D) 186 (Dec).

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467. Petitions by the Secretary of State.

If it appears to the Secretary of State¹, in the case of a company² in respect of which³:

- 820 (1) the Secretary of State has received an inspectors' report⁴ following an investigation⁵;
- 821 (2) the Secretary of State has exercised his powers at any time, having had good reason to do so, to require the production of documents and information⁶ or to enter and search premises⁷;
- 822 (3) the Secretary of State or the Financial Services Authority⁸ has exercised his or its powers under the Financial Services and Markets Act 2000⁹ with respect to information gathering and investigations¹⁰; or
- 823 (4) the Secretary of State has received a report from an investigator appointed by him or by the Financial Services Authority under the Financial Services and Markets Act 2000¹¹,

that: (a) the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members¹² generally or of some part of its members¹³; or (b) an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial¹⁴, then he may apply to the court¹⁵ by petition for an order¹⁶ to protect the members against unfair prejudice¹⁷.

The Secretary of State may do this in addition to, or instead of, presenting a petition for the winding up of the company¹⁸.

1 As to the Secretary of State see PARA 6.

2 In the Companies Act 2006 s 995, and so far as applicable for the purposes of s 995 in the other provisions of Pt 30 (ss 994-999) (see also PARAS 466, 468 et seq), 'company' means any body corporate that is liable to be wound up under the Insolvency Act 1986: Companies Act 2006 s 995(4). As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5. As to the companies which may be wound up under the Insolvency Act 1986 see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 435.

- 3 See the Companies Act 2006 s 995(1), (2).
- 4 le under the Companies Act 1985 s 437 (see PARA 1554): see the Companies Act 2006 s 995(1)(a).
- 5 Companies Act 2006 s 995(1)(a).
- 6 le under the Companies Act 1985 s 447 (see PARA 1558): see the Companies Act 2006 s 995(1)(b).
- 7 Companies Act 2006 s 995(1)(b). The text refers to the Secretary of State's power to enter and search premises under the Companies Act 1985 s 448 (see PARA 1559): see the Companies Act 2006 s 995(1)(b).
- 8 As to the Financial Services Authority see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 4 et seq.
- 9 le under the Financial Services and Markets Act 2000 Pt XI (ss 165-177) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 447 et seq): see the Companies Act 2006 s 995(1)(c).
- 10 Companies Act 2006 s 995(1)(c).
- 11 Companies Act 2006 s 995(1)(d). Head (4) in the text refers to an investigator appointed by the Secretary of State or by the Financial Services Authority under the Financial Services and Markets Act 2000 Pt XI (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 447 et seq): see the Companies Act 2006 s 995(1)(d).
- 12 As to the meaning of 'member of a company' see PARA 321. As to the application of the Companies Act 2006 Pt 30 (see also PARAS 466, 475 et seq) to persons who are not members see s 994(2); and PARA 466.
- 13 Companies Act 2006 s 995(2)(a).
- 14 Companies Act 2006 s 995(2)(b).
- 15 As to the meaning of 'court' see PARA 212 note 1.
- 16 le under the Companies Act 2006 Pt 30 (see also PARAS 466, 468 et seq): see s 995(2). As to the powers that are available to the court to protect members against unfair prejudice see PARA 475 et seq.
The power under the Insolvency Act 1986 s 411 (as to which see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1041) to make rules applies, so far as it relates to a winding-up petition, for the purposes of a petition under the Companies Act 2006 Pt 30: s 997. As to the rules that have been made in exercise of the power conferred by the Insolvency Act 1986 s 411 see the Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469; and PARA 472.
- 17 Companies Act 2006 s 995(2). In practice, this power is never used. As to examples where a company's affairs have been conducted in an unfairly prejudicial manner see PARA 468 et seq.
- 18 Companies Act 2006 s 995(3). As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

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468. Conduct of the company's affairs in an unfairly prejudicial manner.

In a petition for an order¹ to protect the members of a company² against unfair prejudice, the conduct complained of must relate to the conduct of the affairs of the company³ of which the petitioner is a member, and a remedy is not available where the conduct complained of is merely that of an individual shareholder⁴ acting in a personal capacity⁵; the act must be done by the company or by those authorised to act as its organs⁶.

The test of whether the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the petitioner is an objective, and not a subjective, test⁷. It is accordingly unnecessary for the petitioner to show that the persons controlling the company

have acted deliberately in bad faith, or with a conscious intent to treat him unfairly⁸. Conduct may be unfair without being prejudicial, or prejudicial without being unfair, and it is not sufficient if the conduct satisfies only one of these tests⁹.

In deciding what is fair or unfair for these purposes, it must be borne in mind that fairness is being used in the context of a commercial relationship¹⁰, the contractual terms of which are set out in the articles of association¹¹. The starting point is to ask whether the conduct of which the shareholder complains is in accordance with the articles and the powers which the shareholders have entrusted to the board¹². However, a finding that conduct was not in accordance with the articles does not necessarily render it unfair, as trivial or technical infringements of the articles will not give rise to relief¹³. Conduct may also be unfair without being unlawful where it does not accord with the understandings upon which the shareholders are associated¹⁴.

1 le under the Companies Act 2006 Pt 30 (ss 994-999): see PARAS 466 et seq, 469 et seq.

2 As to the meaning of 'member of a company' see PARA 321. As to the meaning of 'company' for these purposes, where a petition is presented by a member of a company, see PARA 466 note 1; and, where a petition is presented by the Secretary of State, see PARA 467 note 2. As to the application of the Companies Act 2006 Pt 30 (see PARAS 466 et seq, 469 et seq) to persons who are not members see s 994(2); and PARA 466.

3 *Re a Company (No 005685 of 1988), ex p Schwarcz (No 2)* [1989] BCLC 427 at 437, sub nom *Re Ringtower Holdings plc* 5 BCC 82 at 90 per Peter Gibson J. See also *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, [1994] BCC 475, CA. As to the meaning of a company's affairs see *Re Stewarts (Brixton) Ltd* [1985] BCLC 4 (decided under the Companies Act 1948 s 210 (now repealed): see PARA 466 note 10); *Re a Company (No 001761 of 1986)* [1987] BCLC 141; *Re Castleburn Ltd* [1991] BCLC 89, 5 BCC 652; *Re Unisoft Group Ltd (No 3)* [1994] 1 BCLC 609 (the acts of the members themselves are not acts of the company nor are they part of the affairs of the company); *Re Estate Acquisition and Development Ltd* [1995] BCC 338 (offer by one shareholder to another to purchase his shares cannot be treated as part of the conduct of the company's affairs); *Re Leeds United Holdings plc* [1996] 2 BCLC 545 (an expectation that a shareholder would not sell his shares without the consent of the other shareholders did not relate to the company's affairs); *Re Astec (BSR) plc* [1998] 2 BCLC 556, [1999] BCC 59 (inaccurate prognoses by the majority shareholder could not amount to conduct of the company's affairs); *Oak Investment Partners XII v Boughtwood* [2009] EWHC 176 (Ch), [2009] 1 BCLC 453 (conduct of a shareholder or a person employed as a senior manager in a business, even if not a director, would be capable, in principle, of amounting to conduct of the company's affairs for this purpose, although not the conduct of the board of a company, or even of an individual director). The affairs of a company are to be liberally determined for the purposes of the Companies Act 2006 s 994 (PARA 466), and they extended beyond all matters which might come before its board for consideration, and might not be limited to those that actually did come before the board, for such matters are capable of being part of its affairs: *Hawkes v Cuddy, Re Neath Rugby Ltd* [2009] EWCA Civ 291, [2009] All ER (D) 42 (Apr) (revsg in part *Re Neath Rugby Ltd, Hawkes v Cuddy* [2007] EWHC 2999 (Ch), [2008] BCC 390), [2008] All ER (D) 252 (Nov).

The withholding of sums due by a parent company to its subsidiary was an act in the conduct of the affairs of the subsidiary when the sums were withheld by the parent as part of the exercise of its general control of the affairs of the subsidiary: see *Nicholas v Soundcraft Electronics Ltd* [1993] BCLC 360 at 366, sub nom *Re a Company (No 002470 of 1988), ex p Nicholas* [1992] BCC 895 at 903, CA, per Fox LJ. Equally, the expression 'the affairs of the company' could include the affairs of a subsidiary's holding company, especially where the directors of the holding company also represented a majority of the directors of the subsidiary: see *Re Citybranch Group, Gross v Rackind* [2004] EWCA Civ 815, [2004] 4 All ER 735, [2005] 1 WLR 3505. See also *Re Ravenhart Service (Holdings) Ltd, Reiner v Gershinson* [2004] EWHC 76 (Ch), [2004] 2 BCLC 376; and *Irvine v Irvine* [2006] EWHC 406 (Ch), [2007] 1 BCLC 349. As to the test to be applied before one company can be said to have control over the affairs of another see *Re Grandactual Ltd, Hough v Hardcastle* [2005] EWHC 1415 (Comm), [2005] All ER (D) 313 (Apr).

4 As to shareholders and membership of companies generally see PARAS 321 et seq, 1697 et seq.

5 See *Re a Company (No 001761 of 1986)* [1987] BCLC 141 (acquisition by shareholder of charge held by bank no cause of complaint); *Re Kenyon Swansea Ltd* [1987] BCLC 514 at 520 per Vinelott J; *Re Unisoft Group Ltd (No 3)* [1994] 1 BCLC 609 (allegations concerned activities of shareholders and alleged breach of shareholders' agreement); *Re Estate Acquisition and Development Ltd* [1995] BCC 338 (offer by one shareholder to another to purchase his shares cannot be treated as part of the conduct of the company's affairs); *Re Legal Costs Negotiators Ltd* [1999] 2 BCLC 171, CA (the refusal of a minority shareholder to sell his shares is a private matter not involving the conduct of the company's affairs). See also *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 167 (majority shareholders' loan to the company at more than the commercial interest rate did not relate to the conduct of the company's affairs). Nevertheless, it is not always necessary, in

order to found a claim under the Companies Act 2006 s 994 (see PARA 466), for the petitioner to show that the culpable shareholders were in the majority or that they be joined as respondents: *Re Ravenhart Service (Hastings) Ltd* [2004] EWHC 76 (Ch), [2004] 2 BCLC 377.

6 *Re Legal Costs Negotiators Ltd* [1999] 2 BCLC 171, CA. See, however, *Oak Investment Partners XII v Boughtwood* [2009] EWHC 176 (Ch), [2009] 1 BCLC 453 (the exertion of managerial powers by a shareholder or director who acts in breach of his fiduciary duty in the carrying out of the company's affairs (but not through use of any company organ) would be capable in principle of attracting relief under the Companies Act 2006 s 994); and see PARA 470.

7 *Re RA Noble & Sons (Clothing) Ltd* [1983] BCLC 273, applying *Re Bovey Hotel Ventures Ltd* (31 July 1981, unreported). See also *Re a Company (No 005134 of 1986)*, ex p *Harries* [1989] BCLC 383, sub nom *Re DR Chemicals Ltd* 5 BCC 39; *Re Sam Weller & Sons Ltd* [1990] Ch 682, [1989] 3 WLR 923; *Re Elgindata Ltd* [1991] BCLC 959; *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354, [1994] BCC 781; *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, [1994] BCC 475, CA; *Re Little Olympian Each-Ways Ltd (No 3)* [1995] 1 BCLC 636; *Re Guidezone Ltd* [2000] 2 BCLC 321.

8 See the cases cited in note 7.

9 *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, [1994] BCC 475, CA; *Re RA Noble & Sons (Clothing) Ltd* [1983] BCLC 273; *Re a Company (No 005685 of 1988)*, ex p *Schwarcz (No 2)* [1989] BCLC 427 at 437, sub nom *Re Ringtower Holdings plc* (1989) 5 BCC 82 at 90 per Peter Gibson J; *Re Elgindata Ltd* [1991] BCLC 959; *Nicholas v Soundcraft Electronics Ltd* [1993] BCLC 360 at 366, sub nom *Re a Company (No 002470 of 1988)*, ex p *Nicholas* [1992] BCC 895 at 903, CA, per Fox LJ; *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354, [1994] BCC 781.

10 However, conduct which was fair between competing businessmen might not always be fair between members of a family, where it does not accord with the understandings upon which the shareholders are associated (see also the text and note 14): *Brownlow v GH Marshall Ltd* [2000] 2 BCLC 655 (parties consisted of brother and sisters who were equal shareholders in, and directors of a family company). See also *Rahman v Malik* [2008] EWHC 959 (Ch), [2008] 2 BCLC 403 (dispute was to be determined according to what would be regarded as unfair and unconscionable, or contrary to good faith, in the context and background of a Bangladeshi family tied by blood, religion, culture and tradition and running a family business).

11 *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, [1994] BCC 475, CA. As to a company's articles of association see PARA 288 et seq. See also PARA 469. See further *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354 at 404, [1994] BCC 781 at 832 per Arden J (the concept of unfairness involves the balancing of many considerations); *Re BSB Holdings Ltd (No 2)* [1996] 1 BCLC 155; *CAS (Nominees) Ltd v Nottingham Forest FC plc* [2002] 1 BCLC 613 (investing controlling interest in company in single individual, to the detriment of other shareholders, as result of genuine desire to raise capital for company not unfairly prejudicial). A corollary of the test of unfairness is that the court would take into account any agreement, understanding or clearly established pattern of acquiescence on the part of a member which could have led those in control of the company to depart from strict adherence to the company's articles of association: *Fisher v Cadman* [2005] EWHC 377 (Ch), [2006] 1 BCLC 499. On the other hand, if that was the case, the minority shareholder was entitled to give notice that he or she would no longer acquiesce in a departure from the terms of the articles, in which case those in control of the company were thereafter required to adhere to the articles as drafted: *Fisher v Cadman*.

12 See the cases cited in note 11.

13 *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 18, [1994] BCC 475 at 489, CA, per Hoffmann LJ.

14 *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 19, [1994] BCC 475 at 489, CA, per Hoffmann LJ.

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469. Conduct unfairly prejudicial to the interests of the members.

In a petition for an order¹ to protect the members of a company² against unfair prejudice, not only must the conduct of the company's affairs complained of be unfairly prejudicial³, but the conduct complained of must be unfairly prejudicial to the interests of the petitioner in his

capacity as a member of the company⁴ as opposed to any other interests which he might possess⁵.

The court takes a broad view of what might properly be regarded as the petitioner's interests as a member of the company⁶. The word 'unfairly', like the words 'just and equitable' in the context of winding up⁷, enables the court to have regard to wider equitable considerations⁸ and to recognise that behind a limited company, or amongst it, are individuals with rights, expectations and obligations inter se which are not necessarily submerged in the company structure⁹.

For the purposes of the Companies Act 2006¹⁰, a member of a company would not ordinarily be entitled to complain of unfairness unless:

- 824 (1) there has been some breach of the rules on which he had agreed that the company's affairs should be conducted¹¹; or
- 825 (2) these rules have been used in a manner which equity would regard as contrary to good faith, that is to say cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers¹².

In most cases, the basis of association will be adequately and exhaustively laid down in the articles¹³, but cases in which further equitable considerations might arise will typically present one, or probably more, of the following features:

- 826 (a) a personal relationship between the shareholders involving mutual confidence;
- 827 (b) an agreement that some or all should participate in the management of the company; and
- 828 (c) restrictions on the transfer of shares which would prevent a member from realising his investment¹⁴.

The case of a member's rights under the articles being subject to equitable considerations arises typically in what is commonly called a 'quasi-partnership', an entity based on understandings when the company was formed, or which develop subsequently, that members will participate in the management and profits of the company which it may be unfair for other members to ignore¹⁵. Where a company forms (or develops) on such a basis, equitable considerations may disentitle the majority shareholders from exercising their strict legal powers, such as removing a minority shareholder from office as a director without making a fair offer at a fair value for the minority's shares¹⁶. Where a fair offer is made, the exclusion of the petitioner from participation in the management of the company will not be unfairly prejudicial and the respondent will be entitled to have the petition struck out because a fair offer gives the shareholder everything that he could hope to obtain from the court¹⁷.

This is not to say that the application of the statutory remedy¹⁸ is confined to cases where the company is a quasi-partnership¹⁹; but, where the company is not a quasi-partnership, it is unlikely that equitable considerations have arisen which restrict the exercise by a member of his strict legal rights²⁰. If no such equitable considerations arise, then a petitioner must show some abuse by directors of their powers or an infringement of the member's strict legal rights under the company's constitution or the companies legislation²¹. Nor are remedies for unfair prejudice limited to situations where the value of the share or shares held by the applicant member would be enhanced by the grant of the relief sought; an unfair prejudice petition can be used in limited circumstances by shareholders to protect their interests as creditors and to seek a creditors' remedy²².

1 le under the Companies Act 2006 Pt 30 (ss 994-999): see PARAS 466 et seq, 470 et seq.

2 As to the meaning of 'member of a company' see PARA 321. As to the meaning of 'company' for these purposes, where a petition is presented by a member of a company, see PARA 466 note 1; and, where a petition is presented by the Secretary of State, see PARA 467 note 2. As to the application of the Companies Act 2006 Pt 30 (see PARAS 466 et seq, 470 et seq) to persons who are not members see s 994(2); and PARA 466.

3 See PARA 468.

4 *Re a Company (No 004475 of 1982)* [1983] Ch 178 at 189, [1983] 2 All ER 36 at 44 per Lord Grantchester; *Re a Company* [1986] BCLC 376; *Re a Company (No 003843 of 1986)* [1987] BCLC 562, 3 BCC 624; *Re a Company (No 005685 of 1988), ex p Schwarcz (No 2)* [1989] BCLC 427, sub nom *Re Ringtower Holdings plc* 5 BCC 82; *Re a Company (No 00314 of 1989), ex p Estate Acquisition and Development Ltd* [1991] BCLC 154, [1990] BCC 221; *Jaber v Science and Information Technology Ltd* [1992] BCLC 764; *Re Unisoft Group Ltd (No 3)* [1994] 1 BCLC 609 at 626 per Harman J; *R & H Electric Ltd v Haden Bill Electrical Ltd, Re Haden Bill Electrical Ltd* [1995] 2 BCLC 280, sub nom *R & H Electrical Ltd v Haden Bill Electrical Ltd* [1995] BCC 958; *Re a Company (No 00709 of 1992), O'Neill v Phillips* [1999] 2 All ER 961, [1999] 1 WLR 1092, HL. See also *Gamlestaden Fastigheter AB v Baltic Partners Ltd* [2007] UKPC 26, [2007] 4 All ER 164, [2008] 1 BCLC 468.

5 See *Re a Company (No 003843 of 1986)* [1987] BCLC 562, 3 BCC 624 (petitioner complained in capacity as a creditor or consultant pursuant to an agreement with the company); *Re JE Cade & Son Ltd* [1992] BCLC 213, [1991] BCC 360 (petitioner protecting his interests as a freeholder of a farm, not as a member of the company); *Re Unisoft Group Ltd (No 3)* [1994] 1 BCLC 609 at 626 per Harman J (allegations concerned relationship as landlord and tenant); *Re Estate Acquisition and Development Ltd* [1995] BCC 338 (director seeking the disclosure of management information cannot show conduct which is unfairly prejudicial to his interests as a member).

6 See *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, [1994] BCC 475, CA; *O'Neill v Phillips* [1999] 2 All ER 961, [1999] 1 WLR 1092, HL; and *Gamlestaden Fastigheter AB v Baltic Partners Ltd* [2007] UKPC 26, [2007] 4 All ER 164, [2008] 1 BCLC 468.

7 le a winding up on the just and equitable ground under the Insolvency Act 1986 s 122(1)(g): see *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, [1972] 2 All ER 492, HL; and note 9. As to the scope of the just and equitable ground for winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 433, 448-449. However, Parliament would not have used such different wording in the Companies Act 2006 s 994 (see PARA 466) and in the Insolvency Act 1986 s 122(1)(g) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 444) if the jurisdictions had been intended to be coterminous: *Hawkes v Cuddy, Re Neath Rugby Ltd* [2009] EWCA Civ 291, [2009] All ER (D) 42 (Apr) (many, if not most, cases might give rise to both jurisdictions but there might be cases which satisfied the requirements of one jurisdiction but not the other, and a winding up might be ordered on the 'just and equitable' ground where no unfair conduct was alleged), overruling *Re Guidezone Ltd* [2000] 2 BCLC 321 on this point. As to the relationship between remedies available under the Insolvency Act 1986 and the unfairly prejudicial provision available under the Companies Act 2006 see PARA 477.

8 *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, [1994] BCC 475, CA. Equitable considerations have no application where the parties' entire relationship is governed by the articles of association or a separate shareholders' agreement (or both): *Re a Company* [1986] BCLC 376; *Re Posgate & Denby (Agencies) Ltd* [1987] BCLC 8, 2 BCC 99, 352; *Re Blue Arrow plc* [1987] BCLC 585, 3 BCC 618; *Re a Company (No 005685 of 1988), ex p Schwarcz (No 2)* [1989] BCLC 427, sub nom *Re Ringtower Holdings plc* 5 BCC 82; *Re Tottenham Hotspur plc* [1994] 1 BCLC 655.

9 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at 379, [1972] 2 All ER 492 at 500, HL, per Lord Wilberforce. This same reasoning has been applied to the concept of unfairness in the Companies Act 2006 s 994 (see PARA 466): *Re a Company (No 00709 of 1992), O'Neill v Phillips* [1999] 2 All ER 961 at 967, [1999] 1 WLR 1092 at 1099, HL, per Lord Hoffmann. Where the parties had an agreement or understanding as to the petitioner's participation in profits, a failure to make a distribution where a company has made losses is not unfair unless the petitioner can show that the losses should not have been made: *Re Metropolis Motorcycles Ltd, Hale v Waldock* [2006] EWHC 364 (Ch), [2007] 1 BCLC 520.

10 le for the purposes of the Companies Act 2006 s 994: see PARA 466.

11 *Re a Company (No 00709 of 1992), O'Neill v Phillips* [1999] 2 All ER 961 at 967, [1999] 1 WLR 1092 at 1098-1099, HL, per Lord Hoffmann. See PARA 470.

12 *Re a Company (No 00709 of 1992), O'Neill v Phillips* [1999] 2 All ER 961 at 967, [1999] 1 WLR 1092 at 1099, HL, per Lord Hoffmann. See the text and notes 15-21. Any form of unfairness based upon established equitable principles might apply; for instance, it may be unfair to ignore later promises whether made by word

or conduct and regardless of whether such promises are independently enforceable as a matter of contract: *Re a Company (No 00709 of 1992)*, *O'Neill v Phillips* at 969-970 and 1101-1102 per Lord Hoffmann.

13 As to a company's articles of association see PARA 228 et seq. See also PARA 468.

14 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at 379, [1972] 2 All ER 492 at 500, HL, per Lord Wilberforce; *Re a Company (No 00709 of 1992)*, *O'Neill v Phillips* [1999] 2 All ER 961, [1999] 1 WLR 1092, HL. Companies which reflect these features are often referred to as quasi-partnerships: see *Ebrahimi v Westbourne Galleries Ltd*. Where a company's business had previously been run as a partnership it is relatively easy to answer the question whether the company was a quasi-partnership: *Strahan v Wilcock* [2006] EWCA Civ 13, [2006] 2 BCLC 555. The same applies where a group of persons who are known to each other form a company in which it is anticipated that they will all work together: *Strahan v Wilcock*. See also *Re a Company (No 005134 of 1986)*, *ex p Harries* [1989] BCLC 383, sub nom *Re DR Chemicals Ltd* 5 BCC 39 (company began as a quasi-partnership but relationship changed to a more commercial footing so ending any expectations as to participation in management); *Irvine v Irvine* [2006] EWHC 583 (Ch), [2006] 4 All ER 102, [2007] 1 BCLC 445 (quasi-partnership not found). Equity will hold majority shareholders to the agreement, promise or understanding underlying a quasi-partnership if the minority has acted in reliance on it: *Re Guidezone Ltd* [2000] 2 BCLC 321. As to the meaning of 'just and equitable' in the context of partnership law see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 448.

15 *Re Posgate & Denby (Agencies) Ltd* [1987] BCLC 8 at 14, 2 BCC 99, 352 at 99, 357 per Hoffmann J. The existence of service agreements between directors and the company does not prevent a company having the characteristics of a quasi-partnership and does not prevent equitable considerations from arising under the Companies Act 2006 s 994 (see PARA 466): *Quinlan v Essex Hinge Co Ltd* [1996] 2 BCLC 417. See also *Brownlow v GH Marshall Ltd* [2000] 2 BCLC 655 (terms of service agreements did not override equitable considerations with respect to a company in which considerations of a personal character arose out of the relationships between family shareholders); *Fisher v Cadman* [2005] EWHC 377 (Ch), [2006] 1 BCLC 499 (where members had agreed to conduct the affairs of the company on an informal basis, including an understanding that directors would not be paid remuneration, unfairness had to be assessed against what the members had actually agreed). The situation might be different if the whole relationship is spelt out in detail as this might indicate a more commercial basis rather than a quasi-partnership: *Re a Company (No 005685 of 1988)*, *ex p Schwarcz (No 2)* [1989] BCLC 427, sub nom *Re Ringtower Holdings plc* (1989) 5 BCC 82. Understandings as to participation in management etc should not be described as 'legitimate expectations' of the petitioner: *Re a Company (No 00709 of 1992)*, *O'Neill v Phillips* [1999] 2 All ER 961 at 970, [1999] 1 WLR 1092 at 1102, HL, per Lord Hoffmann (earlier use of the term 'legitimate expectations' was probably a mistake).

Where an agreement between members of a company did not cover a change in circumstances which arose in relation to the management of the company's business, the conduct of the affairs of the company could be unfairly prejudicial within the meaning of the Companies Act 2006 s 994 (see PARA 466), notwithstanding the absence of prior arrangements, and the court could intervene, so long as the change in circumstances was such that it was not reasonable or fair to require the former association to remain as it had been, and such that the court's intervention was required to adjust matters: *Re Metropolis Motorcycles Ltd*, *Hale v Waldo* [2006] EWHC 364 (Ch), [2007] 1 BCLC 520.

16 *Re a Company (No 00709 of 1992)*, *O'Neill v Phillips* [1999] 2 All ER 961, [1999] 1 WLR 1092, HL; *Brownlow v GH Marshall Ltd* [2000] 2 BCLC 655; and see *Quinlan v Essex Hinge Co Ltd* [1996] 2 BCLC 417.

17 *Re a Company (No 00709 of 1992)*, *O'Neill v Phillips* [1999] 2 All ER 961 at 967, [1999] 1 WLR 1092 at 1099, HL, per Lord Hoffmann. The elements of a fair offer include an offer: (1) to purchase the shares at a fair value which will ordinarily be a value representing an equivalent proportion of the total issued share capital, that is without a discount for its being a minority holding; (2) to have the value, if not agreed, determined by a competent expert; (3) to have the value determined by the expert as an expert; (4) to provide for 'equality of arms' between the parties; and (5) in some cases, to include costs (while giving the majority shareholder a reasonable time to make the offer before his conduct is treated as unfair): *Re a Company (No 00709 of 1992)*, *O'Neill v Phillips* [1999] 2 All ER 961 at 975-976, [1999] 1 WLR 1092 at 1107-1108, HL, per Lord Hoffmann. See also *Allmark v Burnham* [2005] EWHC 2717 (Ch), [2006] 2 BCLC 437 (purported 'offer' was not fair in that it failed to offer petitioner a satisfactory alternative remedy); *Rahman v Malik* [2008] 2 BCLC 403 (not a fair offer).

Nevertheless, the Companies Act 2006 s 994 (see PARA 466) does not imbue a quasi-partnership with a right for a company member to a 'put-option' that would require other members to purchase his shares on his departure at will: *Re Phoenix Office Supplies Ltd*, *Phoenix Office Supplies Ltd v Larvin* [2002] EWCA Civ 1740, [2003] 1 BCLC 76. Where there had been a breakdown in trust and confidence between the members of a quasi-partnership company, it did not constitute relevant unfairness for one party to refuse to accept a sealed bid procedure to effect the compulsory sale of one party's shares to the other in order to resolve the dispute between the parties: *Jayflex Construction*, *McKee v O'Reilly* [2004] 2 BCLC 145.

18 In the Companies Act 2006 s 994: see PARA 466.

19 See *Re a Company (No 00314 of 1989), ex p Estate Acquisition and Development Ltd* [1991] BCLC 154 at 161, [1990] BCC 221 at 227 per Mummery J. As to the meaning of 'quasi-partnership' see the text and note 15.

20 See *Re Posgate & Denby (Agencies) Ltd* [1987] BCLC 8, 2 BCC 99, 352; *Re Blue Arrow plc* [1987] BCLC 585, 3 BCC 618 (listed public company; whole of parties' relationship in the articles and the companies legislation); *Re a Company (No 005685 of 1988), ex p Schwarcz (No 2)* [1989] BCLC 427, sub nom *Re Ringtower Holdings plc* 5 BCC 82 (public company; parties' relationship had been reduced to detailed agreements); *Re Elgindata Ltd* [1991] BCLC 959 (relationship negotiated at arm's length); *Re Tottenham Hotspur plc* [1994] 1 BCLC 655 (listed public company; no understandings beyond the company's constitution); *Re Estate Acquisition and Development Ltd* [1995] BCC 338; *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, [1994] BCC 475, CA.

21 *Re a Company (No 00709 of 1992), O'Neill v Phillips* [1999] 2 All ER 961, [1999] 1 WLR 1092, HL; *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, [1994] BCC 475, CA.

22 *Gamlestaden Fastigheter AB v Baltic Partners Ltd* [2007] UKPC 26, [2007] 4 All ER 164, [2008] 1 BCLC 468, [2007] 5 LRC 500 (insolvency of company not necessarily a bar to relief).

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(12) PROTECTION OF COMPANY'S MEMBERS AGAINST UNFAIR PREJUDICE/470. Types of unfairly prejudicial conduct.

470. Types of unfairly prejudicial conduct.

The categories of conduct which may amount to unfairly prejudicial conduct are not closed¹.

For the purposes of Part 30 of the Companies Act 2006², a member of a company³ will be able to bring himself within its provisions if he can show that the value of his shareholding has been seriously diminished or at least seriously jeopardised by a course of conduct on the part of those in control of the company, although the provisions are not limited to such cases⁴.

Typical examples of what in most cases will constitute unfairly prejudicial conduct are:

- 829 (1) exclusion from management when the company has been formed or developed on the understanding of such participation without an offer being made to purchase the petitioner's shares at fair value⁵;
- 830 (2) the diversion of business to another company in which the majority shareholder holds a greater interest⁶;
- 831 (3) the awarding by the majority shareholder to himself of excessive financial benefits⁷;
- 832 (4) abuses of power and breaches of the articles of association⁸;
- 833 (5) the destruction of the basis of a relationship⁹.

A rights issue of shares, even one made on a pro rata basis at an advantageous price¹⁰, is nevertheless capable of amounting to unfairly prejudicial conduct if it is known that the objecting member did not have sufficient funds to take up the offer, and it was made for that reason, or where the objecting member was engaged in litigation with the majority, and the offer was designed to deplete the resources available to him to finance such litigation¹¹. An allotment of shares secretly made in breach of the statutory provisions governing allotments¹² for the improper purpose of increasing the majority's holding and decreasing that of the minority is unfairly prejudicial conduct¹³; and so are calls made not in the interests of the company but for the purpose of putting pressure on a petitioner¹⁴.

The passing of a special resolution to alter the company's articles of association¹⁵ may be unfairly prejudicial conduct (for example, where an alteration will affect the petitioner's understanding that he would control the management of the company), and even a proposal

that such a resolution be passed may amount to unfairly prejudicial conduct¹⁶. However, in the absence of such special circumstances involving an abuse of the rights of the majority, a change in the articles is one of the ordinary incidents to which a member of a company cannot validly object¹⁷.

Where an extraordinary general meeting of shareholders has been requisitioned by the members and there is unreasonable delay in convening the meeting, this will entitle the requisitioning members to present a petition on the grounds of unfairly prejudicial conduct¹⁸.

Repeated failures to hold annual general meetings¹⁹ and to lay accounts before the members depriving members of their right to know and consider the state of the company's affairs is conduct unfairly prejudicial to their interests; as is holding an extraordinary general meeting on incorrect notice so invalidating an allotment of shares made at the meeting²⁰.

Although it is open to the court to find that serious mismanagement of a company's business constitutes conduct that is unfairly prejudicial to the interests of the shareholders²¹, the court will normally be very reluctant to accept that managerial decisions can amount to unfairly prejudicial conduct²².

A failure by the company to propound a scheme of arrangement²³ which would enable the petitioner to dispose of his shares, or to purchase his shares under the statutory powers in that behalf, cannot be unfairly prejudicial, as a member has no recognisable interest in having any such scheme propounded; the provisions of the Companies Act 2006²⁴ have not been enacted with a view to enabling a locked-in shareholder to require the company to buy him out at a price which he considers adequately to reflect the value of the underlying assets of the company²⁵. In the absence of some contractual agreement, there is no right to exit at will under the statutory provisions protecting the company's members against unfair prejudice²⁶.

1 *Re BSB Holdings Ltd (No 2)* [1996] 1 BCLC 155. As to examples where a company's affairs have been conducted in an unfairly prejudicial manner see PARAS 468, 469.

2 *Re the Companies Act 2006 Pt 30 (ss 994-999):* see PARAS 466 et seq, 471 et seq.

3 As to the meaning of 'member of a company' see PARA 321. As to the meaning of 'company' for these purposes, where a petition is presented by a member of a company, see PARA 466 note 1; and, where a petition is presented by the Secretary of State, see PARA 467 note 2. As to the application of the Companies Act 2006 Pt 30 (see PARAS 466 et seq, 471 et seq) to persons who are not members see s 994(2); and PARA 466.

4 *Re RA Noble & Sons (Clothing) Ltd* [1983] BCLC 273; *Re Bovey Hotel Ventures Ltd* (31 July 1981, unreported). See *McGuinness v Bremner plc* [1988] BCLC 673, Ct of Sess; *Re Elgindata Ltd* [1991] BCLC 959; *Re Little Olympian Each-Ways Ltd (No 3)* [1995] 1 BCLC 636.

5 See *R & H Electric Ltd v Haden Bill Electrical Ltd*, *Re Haden Bill Electrical Ltd* [1995] 2 BCLC 280, sub nom *R & H Electrical Ltd v Haden Bill Electrical Ltd* [1995] BCC 958. See also *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, [1972] 2 All ER 492, HL; *Re a Company* [1986] BCLC 376; *Re Cumana Ltd* [1986] BCLC 430, CA; *Re Ghyll Beck Driving Range Ltd* [1993] BCLC 1126; *Re Full Cup International Trading Ltd*, *Antoniades v Wong* [1995] BCC 682; *Quinlan v Essex Hinge Co Ltd* [1996] 2 BCLC 417; *Re a Company (No 00709 of 1992)*, *O'Neill v Phillips* [1999] 2 All ER 961, [1999] 1 WLR 1092, HL; *Brownlow v GH Marshall Ltd* [2000] 2 BCLC 655; *Parkinson v Eurofinance Group Ltd* [2001] 1 BCLC 720; *Allmark v Burnham* [2005] EWHC 2717 (Ch), [2006] 2 BCLC 437. In the absence of such an expectation, every director is subject to the possibility of removal and has no right to remain in office: *Re Estate Acquisition and Development Ltd* [1995] BCC 338; *Re a Company (No 005134 of 1986)*, *ex p Harries* [1989] BCLC 383, sub nom *Re DR Chemicals Ltd* 5 BCC 39 (company changed from a quasi-partnership to commercial footing so ending expectation as to participation); *Re a Company (No 005685 of 1988)*, *ex p Schwarcz (No 2)* [1989] BCLC 427, sub nom *Re Ringtower Holdings plc* 5 BCC 82. See also *Re Blue Arrow plc* [1987] BCLC 585, 3 BCC 618 (no expectation to remain as company president); *Re Tottenham Hotspur plc* [1994] 1 BCLC 655 (no expectation as to continued role as chief executive). Justified removal from office does not amount to conduct of the company's affairs in an unfairly prejudicial manner: *Mears v R Mears & Co (Holdings) Ltd* [2002] 2 BCLC 1; *Blackmore v Richardson, Capital Cabs Ltd v Blackmore* [2005] EWCA Civ 1356, [2006] BCC 276, [2005] All ER (D) 345 (Nov) (exclusion not justified); *Grace v Biagioli* [2005] EWCA Civ 1222, [2006] 2 BCLC 70 (exclusion justified).

6 *Re Cumana Ltd* [1986] BCLC 430, CA; *Re London School of Electronics Ltd* [1986] Ch 211, [1985] 3 WLR 474; *Re Little Olympian Each-Ways Ltd (No 3)* [1995] 1 BCLC 636 (directors disposed of business at substantial

undervalue to another company as part of transaction from which they benefited significantly); *Re Brenfield Squash Racquets Club Ltd* [1996] 2 BCLC 184; *Parkinson v Eurofinance Group Ltd* [2001] 1 BCLC 720; *Lloyd v Casey* [2002] 1 BCLC 454. Cf *Rock (Nominees) Ltd v RCO Holdings Ltd* [2004] EWCA Civ 118, [2004] 1 BCLC 439 (sale of company assets to a company associated with the majority shareholder at the best price reasonable obtainable is not unfairly prejudicial conduct; however, unusual facts apply to this case). Where directors' misconduct is the basis of a petition, the misconduct must be such that it evinces mismanagement that is unfairly prejudicial: *Wilkinson v West Coast Capital Ltd* [2005] EWHC 3009 (Ch), [2005] All ER (D) 346 (Dec) at [234]-[244].

7 *Re Cumana Ltd* [1986] BCLC 430, CA; *Re Elgindata Ltd* [1991] BCLC 959 (using company assets for personal benefit of majority shareholder). See also *Irvine v Irvine* [2006] EWHC 406 (Ch), [2007] 1 BCLC 349. The payment of excessive contributions to the respondent's pension fund may amount to unfairly prejudicial conduct: *Lloyd v Casey* [2002] 1 BCLC 454; *Clark v Cutland* [2003] EWCA Civ 810, [2003] 4 All ER 733, [2004] 1 WLR 783; *Fisher v Cadman* [2005] EWHC 377 (Ch), [2006] 1 BCLC 499 (directors taking remuneration when the understanding was that they would not be paid).

It is arguable, where the company has substantial reserves and the majority shareholders are benefiting from directors' fees, that the non-payment of dividends may be unfairly prejudicial conduct: see *Quinlan v Essex Hinge Co Ltd* [1996] 2 BCLC 417; *Re a Company (No 004415 of 1996)* [1997] 1 BCLC 479. See also *Re a Company (No 00370 of 1987)*, ex p *Glossop* [1988] BCLC 570, 4 BCC 506; *Re Sam Weller & Sons Ltd* [1990] Ch 682, [1989] 3 WLR 923; *Grace v Biagioli* [2005] EWCA Civ 1222, [2006] 2 BCLC 70; *Irvine v Irvine*; cf *Re Metropolis Motorcycles Ltd*, *Hale v Waldoock* [2006] EWHC 364 (Ch), [2007] 1 BCLC 520. The mere absence of the payment of dividends to shareholders could not of itself constitute unfair prejudice, but the court should consider whether the directors had genuinely taken a decision on the payment of dividends, and should consider whether the reasons subsequently advanced for not having done so had genuinely been the rationale for the decision at the time: *Re McCarthy Surfacing Ltd* [2008] EWHC 2279 (Ch), [2009] 1 BCLC 622.

8 *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, [1994] BCC 475, CA. As to a company's articles of association see PARA 228 et seq; and see PARAS 468, 469. See also *Re Whyte, Petitioner* (1984) 1 BCC 99, 044, Ct of Sess (majority shareholders wanted to change composition of board with a probable view to compromising litigation which the company had commenced against a party associated with the majority); *Re a Company* [1986] BCLC 382 (board had an interest in one of two rival takeover bids for the company); *Re Baumler (UK) Ltd*, *Gerrard v Koby* [2004] EWHC 7673 (Ch), [2005] 1 BCLC 92; *Re Coloursource Ltd*, *Dalby v Bodilly* [2004] EWHC 3078 (Ch), [2005] BCC 627, [2004] All ER (D) 43 (Dec) (improper allotment).

9 *Re a Company (No 00709 of 1992)*, *O'Neill v Phillips* [1999] 2 All ER 961, [1999] 1 WLR 1092, HL. See also *Re Baumler (UK) Ltd*, *Gerrard v Koby* [2004] EWHC 7673 (Ch), [2005] 1 BCLC 92; *Re Metropolis Motorcycles Ltd*, *Hale v Waldoock* [2006] EWHC 364 (Ch), [2007] 1 BCLC 520; but see *Hawkes v Cuddy*, *Re Neath Rugby Ltd* [2009] EWCA Civ 291, [2009] All ER (D) 42 (Apr) (deadlock and the inability of the company to conduct its business as originally contemplated do not, without more, satisfy the requirements needed to invoke the unfairly prejudicial jurisdiction).

10 As to the allotment of equity shares on a pre-emptive basis see PARA 1098 et seq.

11 *Re a Company (No 002612 of 1984)*, [1985] BCLC 80, 1 BCC 99, 263, CA; *Re Cumana Ltd* [1986] BCLC 430, CA (where there was no good financial reason for making a rights issue which the minority shareholder could not take up before capitalising profits). Cf *Re a Company* [1986] BCLC 362, sub nom *Re a Company (No 007623 of 1984)* 2 BCC 99, 191 (where the rights issue was motivated by a genuine desire to raise needed capital); *CAS (Nominees) Ltd v Nottingham Forest FC plc* [2002] 1 BCLC 613 (scheme devised to avoid need for rights issue but also out of genuine desire to raise capital).

12 Ie the Companies Act 2006 Pt 17 Ch 3 (ss 560-577): see PARAS 1098-1107.

13 *Re a Company (No 005134 of 1986)*, ex p *Harries* [1989] BCLC 383, sub nom *Re DR Chemicals Ltd* 5 BCC 39; *Re Regional Airports Ltd* [1999] 2 BCLC 30 (proposed allotment intended to strengthen hand of majority and force minority to sell). It is irrelevant for these purposes that no dividend is declared on any of the additional shares or that no use is made of the additional shareholding: *Re Coloursource Ltd*, *Dalby v Bodilly* [2004] EWHC 3078 (Ch), [2005] BCC 627, [2004] All ER (D) 43 (Dec) (undisclosed allotment made by company's sole director and 50% shareholder had the effect of diluting the other 50% shareholder to 5% shareholder).

14 *Re Hailey Group Ltd* [1993] BCLC 459, sub nom *Re a Company (No 008126 of 1989)* [1992] BCC 542; *Pettie v Thomson Pettie Tube Products Ltd* 2001 SLT 473, OH (allotment of shares at par and substantially below their proper value to other shareholders was unfairly prejudicial to petitioner's interests).

15 As to alterations in a company's articles of association by special resolution see PARA 232 et seq.

16 *Re Kenyon Swansea Ltd* [1987] BCLC 514, 3 BCC 259. Cf *Re Blue Arrow plc* [1987] BCLC 585, 3 BCC 618 (no such understanding existed). Quaere whether an alteration which involved the adoption of the provisions of the model articles could ever be unfairly prejudicial to the members' interests for these purposes: *Re Estate*

Acquisition and Development Ltd [1995] BCC 338. As to proposed acts see PARA 466 note 9. As to the model articles of association generally see PARA 228 et seq.

17 *Re Estate Acquisition and Development Ltd* [1995] BCC 338; *Re a Company (No 005685 of 1988)*, ex p *Schwarz (No 2)* [1989] BCLC 427, sub nom *Re Ringtower Holdings plc* 5 BCC 82.

18 *McGuinness v Bremner plc* [1988] BCLC 673, Ct of Sess.

19 Private companies are no longer required to hold annual general meetings: see the Companies Act 2006 s 336; and PARA 630.

20 *Re a Company (No 00789 of 1987)*, ex p *Shooter* [1990] BCLC 384.

21 See *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354, [1994] BCC 781 (specific acts of mismanagement repeated over many years causing financial loss to the company).

22 *Re Elgindata Ltd* [1991] BCLC 959 at 993-994 per Warner J; *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354, [1994] BCC 781; *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, [1994] BCC 475, CA; *Fisher v Cadman* [2005] EWHC 377 (Ch), [2006] 1 BCLC 499 (management of company in accordance with company policy did not constitute mismanagement). It is insufficient that the mere quality of management turns out to be poor: *Re Elgindata Ltd* at 993-994 per Warner J. The exertion of managerial powers by a shareholder or director who acts in breach of his fiduciary duty in the carrying out of the company's affairs (but not through use of any company organ) would be capable in principle of attracting relief under the Companies Act 2006 s 994: *Oak Investment Partners XII v Boughtwood* [2009] EWHC 176 (Ch), [2009] 1 BCLC 453 (but see PARA 468).

23 As to schemes of arrangement see PARA 1425 et seq.

24 Ie the Companies Act 2006 Pt 30: see PARAS 466 et seq, 471 et seq.

25 *Re a Company (No 004475 of 1982)* [1983] Ch 178, [1983] 2 All ER 36; *Re Estate Acquisition and Development Ltd* [1995] BCC 338 at 346.

26 *Re a Company (No 00709 of 1992)*, *O'Neill v Phillips* [1999] 2 All ER 961 at 973, [1999] 1 WLR 1092 at 1105, HL. See also *Re Phoenix Office Supplies Ltd*, *Larvin v Phoenix Office Supplies Ltd* [2002] EWCA Civ 1740, [2003] 1 BCLC 76.

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471. Conduct of petitioner seeking protection against unfair prejudice.

While there is no overriding requirement that it should be just and equitable to grant relief under a petition¹ to protect the members of a company² against unfair prejudice, or that the petitioner come with clean hands³, the conduct of the petitioner may be relevant in a number of ways, as where the conduct complained of is found to be prejudicial but not unfair in the light of the petitioner's conduct⁴. The petitioner's conduct may also affect the relief granted by the court⁵, although the mere fact that the petitioner may have behaved in a way that was open to criticism does not necessarily constitute a bar to relief⁶.

If the real object of the petition is to exert pressure to achieve a collateral purpose, this will be treated as an abuse of the process of the court and no order will be made⁷.

1 Ie pursuant to the Companies Act 2006 Pt 30 (ss 994-999): see PARAS 466 et seq, 472 et seq.

2 As to the meaning of 'member of a company' see PARA 321. As to the meaning of 'company' for these purposes, where a petition is presented by a member of a company, see PARA 466 note 1; and, where a petition is presented by the Secretary of State, see PARA 467 note 2. As to the application of the Companies Act 2006 Pt 30 (see PARAS 466 et seq, 472 et seq) to persons who are not members see s 994(2); and PARA 466.

3 *Re London School of Electronics Ltd* [1986] Ch 211, [1985] 3 WLR 474 (petitioner himself took wrongful action prompted by unfairly prejudicial conduct of majority). Cf *Nurcombe v Nurcombe* [1985] 1 All ER 65, [1985] 1 WLR 370, CA (a minority shareholders' action where the plaintiff had indirectly participated in the financial consequences of the act complained of, and could not therefore maintain the action); *Barrett v Duckett* [1995] 1 BCLC 243, CA.

4 *Re RA Noble & Sons (Clothing) Ltd* [1983] BCLC 273 (exclusion from participation not unfair in view of the petitioner's disinterest in the business).

5 See under the Companies Act 2006 s 996: see PARA 475. See also *Re London School of Electronics Ltd* [1986] Ch 211, [1985] 3 WLR 474; *Re Bird Precision Bellows Ltd* [1986] Ch 658, [1985] 3 All ER 523, CA (affg [1984] Ch 419, [1984] 3 All ER 444).

6 *Re London School of Electronics Ltd* [1986] Ch 211, [1985] BCLC 273. See also *Grace v Biagioli* [2005] EWCA Civ 1222, [2006] 2 BCLC 70 (judge had been right to find that the petitioner's conduct had justified his dismissal as a director but he was nevertheless entitled to relief); *Blackmore v Richardson, Capital Cabs Ltd v Blackmore* [2005] EWCA Civ 1356, [2005] All ER (D) 345 (Nov), [2006] BCC 276 (petitioner's conduct in forging a letter that was admitted in evidence was neither sufficiently serious nor sufficiently closely related to the respondents' unfairly prejudicial conduct to make it appropriate for the court to refuse to grant the petitioner a remedy which it would otherwise grant). Cf *Re Jayflex Construction Ltd, McKee v O'Reilly* [2003] EWHC 2008 (Ch), [2004] 2 BCLC 145; *Re Adlink Ltd* [2006] All ER (D) 198 (Oct).

7 *Re Bellador Silk Ltd* [1965] 1 All ER 667. See also *Rock (Nominees) Ltd v RCO Holdings Ltd* [2004] EWCA Civ 118, [2004] 1 BCLC 439.

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472. Procedure on petition for protection against unfair prejudice.

The following procedural rules¹ apply in relation to petitions for protection against unfair prejudice presented to the court² by a member of a company³, or by a person treated as a member⁴ or by the Secretary of State⁵.

Except so far as inconsistent with the Companies Act 2006 and the following procedural rules, the Civil Procedure Rules⁶ apply to such proceedings⁷ with any necessary modifications⁸.

The petition must be in the prescribed form⁹ with such variations, if any, as the circumstances may require¹⁰. The petition must specify the grounds on which it is presented and the nature of the relief which is sought by the petitioner, and must be delivered to the court for filing with sufficient copies for service¹¹. Permission is required for service of the petition out of the jurisdiction¹².

The court must fix a hearing for a day (the 'return day') on which, unless the court otherwise directs, the petitioner and any respondent, including the company, must attend before the registrar or district judge for directions to be given in relation to the procedure on the petition¹³. On fixing the return day, the court must return to the petitioner sealed copies of the petition for service, each indorsed with the return day and the time of hearing¹⁴.

The petitioner must, at least 14 days before the return day, serve a sealed copy of the petition on the company¹⁵. In the case of a petition by a member of the company¹⁶, the petitioner must also, at least 14 days before the return day, serve a sealed copy of the petition on every respondent named in the petition¹⁷.

On the return day, or at any time after it, the court must give such directions as it thinks appropriate with respect to the following matters¹⁸:

- 834 (1) service of the petition on any person, whether in connection with the time, date and place of a further hearing, or for any other purpose¹⁹;
- 835 (2) whether points of claim and defence are to be delivered²⁰;
- 836 (3) whether, and if so by what means, the petition is to be advertised²¹;
- 837 (4) the manner in which any evidence is to be adduced at any hearing before the judge and in particular, but without prejudice to the generality of the above, as to: (a) the taking of evidence wholly or in part by witness statement or orally²²; (b) the cross-examination of any persons making a witness statement²³; and (c) the matters to be dealt with in evidence²⁴;
- 838 (5) any other matter affecting the procedure on the petition or in connection with the hearing and disposal of the petition²⁵; and
- 839 (6) such orders, if any, including a stay for any period, as the court thinks fit, with a view to mediation or other alternative dispute resolution²⁶.

If complaint is made in respect of the conduct of the affairs of a number of companies which neither form a group nor have a common holding company, separate petitions should be presented in respect of each company²⁷.

If the court considers that the order should be advertised, it must give directions as to the manner and time of advertisement²⁸.

To protect the company's position and that of the petitioner pending the hearing of the petition alleging unfair prejudice, interim relief may be available in some circumstances²⁹, but the court has no jurisdiction to award an interim remedy which presupposes that unfair prejudice will be found at trial³⁰.

The court should examine allegations in a petition with a critical eye, although the threshold for summary disposal remains high³¹.

1 Ie the Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469: see r 2(1).

2 Ie under the Companies Act 2006 Pt 30 (ss 994-999) (see PARAS 466 et seq, 473 et seq): see the Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 2(1).

3 Ie under the Companies Act 2006 s 994(1) (see PARA 466): see the Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 2(1). As to the case management of proceedings under the Companies Act 2006 s 994 see *Re a Company (No 004415 of 1996)* [1997] 1 BCLC 479 at 493-494 per Sir Richard Scott V-C; *North Holdings Ltd v Southern Tropics Ltd* [1999] 2 BCLC 625 at 638, CA, per Aldous LJ; *Re Rotadata Ltd* [2000] 1 BCLC 122 at 124 per Neuberger J.

4 Ie treated as a member under the Companies Act 2006 s 994(2) (see PARA 466): see the Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 2(1).

5 Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 2(1). The text refers to the Secretary of State's power to present a petition under the Companies Act 2006 s 995 (see PARA 467): see the Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 2(1). As to the Secretary of State see PARA 6 et seq.

6 As to the Civil Procedure Rules generally see **CIVIL PROCEDURE**.

7 Ie proceedings under the Companies Act 2006 Pt 30 (see PARAS 466 et seq, 473 et seq): see the Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 2(2).

8 Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 2(2).

9 Ie in the form set out in the Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 3(1), Schedule (petition on ground that members unfairly prejudiced).

10 Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 3(1).

- 11 Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 3(2). The text refers to service under r 4 (see the text and notes 15-17): see r 3(2).
- 12 *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72, [1991] 4 All ER 334, CA. See also *Re Baltic Real Estate Ltd (No 2)* [1993] BCLC 503, [1992] BCC 629 (permission for service out of the jurisdiction may be granted where the relief sought could result in respondents outside the jurisdiction having to deliver the relevant transfer and share certificates to the petitioner within the jurisdiction; on the facts, petition refused because the petitioner did not have a good arguable case).
- 13 Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 3(3).
- 14 Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 3(4).
- 15 Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 4(1).
- 16 In the case of a petition based upon the Companies Act 2006 s 994 (see PARA 466): see the Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 4(2).
- 17 Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 4(2). As to the proper respondents see PARA 473.
- 18 Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 5.
- 19 Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 5(a).
- 20 Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 5(b).
- 21 Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 5(c). There is normally no advertisement of the petition: see *Re a Company (No 00687 of 1991)* [1992] BCLC 133, [1991] BCC 210. As to the principles to be applied where there is an abuse of the rules relating to the advertisement of a petition see *Re a Company (No 002015 of 1996)* [1997] 2 BCLC 1.
- 22 Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 5(d)(i).
- 23 Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 5(d)(ii).
- 24 Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 5(d)(iii).
- 25 Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 5(e).
- 26 Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 5(f).
- 27 *Re a Company* [1984] BCLC 307. If necessary, appropriate directions may be given for the separate petitions to be heard together or consecutively: *Re a Company*. In these proceedings, before disclosure can be ordered in relation to documents belonging to a corporate entity which is not a respondent to the petition, it must be shown that the corporation is so under the control of the respondents as to be their alter ego: *Re Tecnion Investments Ltd* [1985] BCLC 434, CA.
- 28 Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 6.
- 29 See *Re a Company (No 002612 of 1984)* [1985] BCLC 80, 1 BCC 99, 263; *Re Posgate & Denby (Agencies) Ltd* [1987] BCLC 8, (1986) 2 BCC 99, 352; *Re a Company (No 00596 of 1986)* [1987] BCLC 133, 2 BCC 99, 063; *Jaber v Science and Information Technology Ltd* [1992] BCLC 764 at 784; *Re Mountforest Ltd* [1993] BCC 565; *Re a Company (No 003061 of 1993)*, *Safina v Comet Enterprises Ltd* [1994] BCC 883. See also *Re X Ltd (a Company)* (2001) Times, 5 June; and *Davies v Jenkins* [2003] All ER (D) 94 (May).
- 30 *Re a Company (No 004175 of 1986)* [1987] 1 WLR 585, [1987] BCLC 574. In *Pringle v Callard* [2007] EWCA Civ 1075, [2008] 2 BCLC 505, the Court of Appeal held that when considering the grant of an interim remedy on a petition under the Companies Act 2006 s 994, the court must consider: (1) whether there is a serious issue to be tried; and (2) if there is, then whether there is an adequate remedy for the petitioner (case decided under the Companies Act 1985 s 459, where the interim relief sought was an injunction to prevent one of the directors being removed from her position). See also *Re Ravenhart Service (Holdings) Ltd, Reiner v Gershinson* [2004] EWHC 76 (Ch), [2004] 2 BCLC 376; *Hawkes v Cuddy* [2007] EWCA Civ 1072, [2007] BPIR 1217, [2007] All ER (D) 250 (Oct) (revsg [2007] EWHC 1789 (Ch), [2008] 1 BCLC 527, [2007] All ER (D) 27 (Aug)).
- 31 See *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, [1994] BCC 475, CA (where the notoriously burdensome nature of such proceedings was noted). The general test is whether the claimant or defendant has

'no real prospect' of success: see CPR 24.2; and **CIVIL PROCEDURE** vol 11 (2009) PARA 524. See also *Hawkes v Cuddy* [2007] EWCA Civ 1072, [2007] BPIR 1217, [2007] All ER (D) 250 (Oct) (revsg in part *Hawkes v Cuddy* [2007] EWHC 1789 (Ch), [2008] 1 BCLC 527, [2007] All ER (D) 27 (Aug)).

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473. Respondents to the petition.

The statutory provisions relating to petitions for relief against unfair prejudice by a company member¹ do not indicate who may be, who has to be, or who cannot be respondents; it is a matter for the court². However, the company is made a respondent to the petition as a matter of course³. All members of the company whose interests would have been affected by the misconduct alleged or who would be affected by an order made by the court under its wide powers to give relief⁴ should be made respondents to a petition or served with it⁵. This is so even if the members are not alleged to have been concerned in the alleged unfairly prejudicial conduct and are members against whom no relief is directly sought⁶. In circumstances where there are large numbers of inactive investors, it may, however, be sufficient to give them notice of the petition⁷. A former member may also properly be joined as a respondent where relief is sought against that person⁸.

A third party, not a member of the company in respect of which the alleged unfairly prejudicial conduct occurred, should also be joined if he might be affected by the relief sought or was directly involved in the transactions which are said to be unfairly prejudicial⁹.

If, however, the likelihood of the court's discretion being exercised so as to lead to relief against, or relief having any material effect upon, a given respondent can be seen to be so remote as to be perfectly hopeless, it would be abusive to require the respondent to remain as such or to be added as such¹⁰.

1 Ie the Companies Act 2006 s 994: see PARA 466. As to the meaning of 'member of a company' for these purposes see PARA 321. As to the meaning of 'company' for these purposes, where a petition is presented by a member of a company, see PARA 466 note 1; and, where a petition is presented by the Secretary of State, see PARA 467 note 2. As to the application of the Companies Act 2006 Pt 30 (ss 994-999) (see PARAS 466 et seq, 474 et seq) to persons who are not members see s 994(2); and PARA 466.

2 *Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420 at 425, sub nom *Supreme Travels Ltd v Little Olympian Each-Ways Ltd* [1994] BCC 947 per Lindsay J.

3 See the Companies (Unfair Prejudice Applications) Proceedings Rules 2009, SI 2009/2469, r 4(1); and PARA 472. The company may be affected by the petition in a number of ways: eg the composition of the corporators who are the embodiment of the company may change (see *Re BSB Holdings Ltd* [1993] BCLC 246 at 254, [1992] BCC 915 at 921-922 per Vinelott J); it may have to give disclosure of documents (see *Re Hydrosan Ltd* [1991] BCLC 418, [1991] BCC 19), even advice and guidance created or added to by lawyers if it related to a disputed transaction (*CAS (Nominees) Ltd v Nottingham Forest plc* [2001] 1 All ER 954), or financial records for the purpose of determining the reasonableness of directors' remuneration (*Arrow Trading and Investments Est 1920 v Edwardian Group Ltd* [2004] EWHC 1319 (Ch), [2005] 1 BCLC 696); and it may itself be affected by the relief sought such as an order to buy back the shares which are in issue (see *Re a Company (No 004502 of 1988)*, ex p *Johnson* [1992] BCLC 701 at 703, [1991] BCC 234 at 235 per Harman J). As to costs incurred by the company see PARA 474.

4 Ie under the Companies Act 2006 s 996: see PARA 475.

5 *Re a Company (No 007281 of 1986)* [1987] BCLC 593, 3 BCC 375; and see *Atlasview Ltd v Brightview Ltd* [2004] EWHC 1056 (Ch) at [56], [2004] 2 BCLC 191 at [56] (anyone against whom there is an arguable claim for relief from unfair prejudice can be included in the list of respondents).

6 *Re a Company (No 007281 of 1986)* [1987] BCLC 593, 3 BCC 375. A member against whom no allegation is made and against whom no relief is sought need not take an active part in the proceedings: see *Re BSB Holdings Ltd* [1993] BCLC 246 at 253, [1992] BCC 915 at 921 per Vinelott J.

7 *Re a Company (No 007281 of 1986)* [1987] BCLC 593 at 599, 3 BCC 375 at 381 per Vinelott J. In cases of doubt, the court can give directions as to service of the petition on any person who has not been made a respondent: *Re a Company (No 007281 of 1986)*.

8 *Re a Company* [1986] 2 All ER 253, [1986] 1 WLR 281. Cf *Re Baltic Real Estate Ltd* [1993] BCLC 498, [1992] BCC 629 (former shareholders not proper parties); but see *Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420 at 429, sub nom *Supreme Travels Ltd v Little Olympian Each-Ways Ltd* [1994] BCC 947 at 954 per Lindsay J.

9 *Re BSB Holdings Ltd* [1993] BCLC 246, [1992] BCC 915. See also *Lowe v Fahey* [1996] 1 BCLC 262. It is not sufficient reason, in itself, for the joinder of a person as a further party that an existing respondent is owned or controlled by that person: *Re Baltic Real Estate Ltd* [1993] BCLC 498, [1992] BCC 629; *Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420 at 430, sub nom *Supreme Travels Ltd v Little Olympian Each-Ways Ltd* [1994] BCC 947 at 955 per Lindsay J. In *Re Belfield Furnishings Ltd, Isaacs v Belfield Furnishings Ltd* [2006] EWHC 183 (Ch), [2006] 2 BCLC 705, an auditor's valuation of the petitioners' shares was alleged to be tainted, and the court approved the joinder of the firm of accountants which undertook the valuation, even though they were not members, directors or otherwise involved in the management of the company.

10 *Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420, sub nom *Supreme Travels Ltd v Little Olympian Each-Ways Ltd* [1994] BCC 947.

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474. Costs.

The procedure whereby a shareholder who in good faith and on reasonable grounds brings a derivative action to remedy a wrong to the company is entitled to apply for an indemnity as to costs from the company¹ does not apply to petitions for relief on the grounds of unfairly prejudicial conduct where the substance of the complaint is a wrong done to the shareholder and not to the company².

It is a general principle of company law that the company's money should not be expended on disputes which are in substance between shareholders³. There is, however, no rule that in all cases active participation by a company in proceedings commenced by petition on the ground of unfair prejudice⁴ is improper⁵. The test of whether such participation and expenditure is proper is whether it is necessary or expedient in the interests of the company as a whole; and only in cases of the most compelling circumstances proven by cogent evidence will advance approval of such participation and expenditure be given⁶.

A respondent may seek security for costs where the petitioner is a limited company⁷.

1 The procedure devised in *Wallersteiner v Moir (No 2)* [1975] QB 373, [1975] 1 All ER 849, CA (see PARA 461 note 2).

2 *Re a Company (No 005136 of 1986)* [1987] BCLC 82. But see *Clark v Cutland* [2003] EWCA Civ 810 at [35], [2003] 4 All ER 733 at [35], [2004] 1 WLR 783 at [35] per Arden LJ (although the relief sought was claimed under the unfairly prejudicial jurisdiction, it was being sought for the benefit of the company and it was open to the petitioner to seek an order against the company for payment to him of costs incurred). The question of the petitioner's costs is a matter for the discretion of the court: see *Re Elgindata Ltd (No 2)* [1993] 1 All ER 232, [1993] 1 WLR 1207, CA (petitioner deprived of part of his costs where he had caused a significant increase in the length of the proceedings).

3 *Re Crossmore Electrical and Civil Engineering Ltd* [1989] BCLC 137, 5 BCC 37, applying *Pickering v Stephenson* (1872) LR 14 Eq 322. See also *Re Kenyon Swansea Ltd* [1987] BCLC 514, 3 BCC 259; *Re Hydrosan Ltd* [1991] BCLC 418 at 420, [1991] BCC 19 at 20 per Harman J; *Re Elgindata Ltd* [1991] BCLC 959; *Re a Company (No 004502 of 1988), ex p Johnson* [1992] BCLC 701, [1991] BCC 234; *Re Milgate Developments Ltd, Re Kent and Provincial Investment plc* [1993] BCLC 291, [1991] BCC 24; *Re a Company (No 001126 of 1992)* [1994] 2 BCLC 146, [1993] BCC 325.

4 le a petition under the Companies Act 2006 s 994 (petition by company members and others): see PARA 466.

5 *Re a Company (No 001126 of 1992)* [1994] 2 BCLC 146, [1993] BCC 325. There may be cases (although unlikely nowadays) where active participation by the company would be ultra vires in the strict sense: *Re a Company (No 001126 of 1992)*. As to the meaning of 'ultra vires' see PARA 259.

6 *Re a Company (No 001126 of 1992)* [1994] 2 BCLC 146, [1993] BCC 325. There is a heavy onus on a company which has actively participated or has so incurred costs, to satisfy the court of the necessity or expedience of having done so: *Re a Company (No 001126 of 1992)*. The company can properly incur costs in preparing its list for disclosure and on attendance by the company at the judgment so as to ensure that the company is able to contribute to framing an appropriate order: *Re a Company (No 001126 of 1992)*; *Re a Company (No 004502 of 1988), ex p Johnson* [1992] BCLC 701, [1991] BCC 234.

7 *Re Unisoft Group Ltd* [1993] BCLC 1292, CA; affg [1993] BCLC 528 (a limited company which is a petitioner under the Companies Act 2006 s 994 (see PARA 466) was 'a plaintiff' in 'other legal proceedings' for the purpose of the Companies Act 1985 s 726 (repealed) (see PARA 308)). See also *Re Unisoft Group Ltd (No 2)* [1993] BCLC 532 (applicant for security must show that the company would be unable, and not may be unable, to meet its debts when an order for costs is made against it).

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475. Powers of court in general.

If the court¹ is satisfied that a petition for an order to protect the members of a company² against unfair prejudice³ is well founded⁴, it may make such order as it thinks fit for giving relief in respect of the matters complained of⁵.

Without prejudice to the generality of this power, the court's order may⁶:

- 840 (1) regulate the conduct of the company's affairs in the future⁷;
- 841 (2) require the company to refrain from doing or continuing an act complained of by the petitioner⁸, or to do an act that the petitioner has complained it has omitted to do⁹;
- 842 (3) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct¹⁰;
- 843 (4) require the company not to make any, or any specified, alterations in its articles¹¹ without the leave of the court¹²;
- 844 (5) provide for the purchase of the shares¹³ of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, for the reduction of the company's capital accordingly¹⁴.

The court's discretion as to the relief it may order extends to the refusal of specific relief where the court is unable to devise relief which would constitute an appropriate remedy or where some other course of action seems to be preferable¹⁵. The court is not limited to putting right the conduct which justifies the order, but can cure for the future the unfair prejudice suffered¹⁶.

Where an order of the court¹⁷ either alters the company's constitution¹⁸, or gives leave for the company to make any, or any specified, alterations to its constitution¹⁹, the company must deliver a copy of the order to the registrar of companies²⁰; and it must do so within 14 days from the making of the order or such longer period as the court may allow²¹. If a company makes default in complying with this requirement²², an offence is committed by the company, and by every officer of the company who is in default²³; and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale²⁴ and, for continued contravention, a daily default fine²⁵ not exceeding one-tenth of level 3 on the standard scale²⁶.

Where such an order²⁷ alters a company's constitution²⁸, and where it amends either the company's articles²⁹, or a resolution or agreement which affects the company's constitution³⁰, the copy of the order delivered to the registrar by the company³¹ must be accompanied by a copy of the company's articles, or the resolution or agreement in question, as amended³². Every copy of a company's articles issued by the company after the order is made must be accompanied by a copy of the order, unless the effect of the order has been incorporated into the articles by amendment³³. If a company makes default in complying with this requirement³⁴, an offence is committed by the company, and by every officer of the company who is in default³⁵; and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale³⁶.

If a petition is compromised, there is no reason why such compromise should not follow the usual form³⁷; but the petitioner should undertake to apply to dismiss the petition when the terms of the compromise have been fully implemented³⁸.

Remedies for unfair prejudice are not limited to situations where the value of the share or shares held by the applicant member would be enhanced by the grant of the relief sought and an unfair prejudice petition can be used in limited circumstances by shareholders to protect their interests as creditors and to seek a creditors' remedy³⁹.

1 As to the meaning of 'court' see PARA 212 note 1.

2 As to the meaning of 'member of a company' see PARA 321. As to the meaning of 'company' for these purposes, where a petition is presented by a member of a company, see PARA 466 note 1; and, where a petition is presented by the Secretary of State, see PARA 467 note 2. As to the application of the Companies Act 2006 Pt 30 (ss 994-999) (see PARAS 466 et seq, 476 et seq) to persons who are not members see s 994(2); and PARA 466.

3 I.e a petition under the Companies Act 2006 Pt 30 (see PARAS 466 et seq, 476 et seq): see s 996(1). As to petitions, in particular, by company members and others see s 994; and PARA 466. As to petitions by the Secretary of State see s 995; and PARA 467.

4 There must be a finding of unfair prejudice before the court can make any order for relief: *Re Bird Precision Bellows Ltd* [1986] Ch 658, [1985] 3 All ER 523, CA; *Re a Company* [1986] BCLC 362, sub nom *Re a Company (No 007623 of 1984)* 2 BCC 99, 191; *Re a Company (No 004175 of 1986)* [1987] 1 WLR 585, [1987] BCLC 574; *Re a Company (No 004502 of 1988)*, ex p *Johnson* [1992] BCLC 701, [1991] BCC 234. In the case of a quasi-partnership (see PARA 469) the fact that a breach of duty by one participant was not causative of loss to the company did not preclude a finding of unfair prejudice as such conduct could lead to a loss of confidence on the part of other participants which would justify relief under the Companies Act 2006 s 996: *Re Baumler (UK) Ltd, Gerrard v Koby* [2004] EWHC 7673 (Ch), [2005] 1 BCLC 92, [2004] All ER (D) 139 (Jul).

5 Companies Act 2006 s 996(1). As to interim relief see PARA 472. As to the respondents against whom relief might be ordered see PARA 473. The court has repeatedly emphasised the width of the discretion conferred by s 996: see *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031, [2002] 1 WLR 1024, [2002] 1 BCLC 141 (the wide discretion conferred on the court includes a power to award the equivalent of interest when making an order for the purchase of a petitioner's shares but it is a power which should be exercised with great caution); *Clark v Cutland* [2003] EWCA Civ 810, [2003] 4 All ER 733, [2004] 1 WLR 783 (court could order that company's liability to respondent's pension fund could be set off against the company's claim for unauthorised payments to that fund, which payments amounted to unfairly prejudicial conduct). See also *Gamlestaden Fastigheter AB v Baltic Partners Ltd* [2007] UKPC 26, [2007] 4 All ER 164, [2008] 1 BCLC 468 (court could order relief even if it did not benefit the member *qua* member, so long as some real financial benefit to him accrued). Where the unfairly prejudicial conduct alleged involved the diversion of company funds, a petitioner was entitled as a matter of jurisdiction to seek an order for payment to the company itself not only against members, former

members or directors allegedly involved in the unlawful diversion, but also against third parties who had knowingly received or improperly assisted in the wrongful diversion: *Lowe v Fahey* [1996] 1 BCLC 262. However, where the only substantive relief being sought was a claim on behalf of the company against such third party the court would not necessarily allow the claimant to proceed by petition instead of by derivative action: *Lowe v Fahey*. See also the text and note 15. As to derivative actions see PARA 455 et seq; and as to the relationship between remedies available under unfair prejudice provisions and other remedies see PARA 477.

In all cases, the petitioner should clearly state in his petition the relief to which he considers himself entitled (*Re Antigen Laboratories Ltd* [1951] 1 All ER 110n); and the petition should include a prayer for such other order as the court thinks fit (*Re JE Cade & Son Ltd* [1992] BCLC 213 at 223, [1991] BCC 360 at 368 per Warner J). However, the terms of the petition, to the extent that they specify the order being sought by the petitioner, do not fetter the court's discretion in making an order under the Companies Act 2006 s 996 as to what relief should be granted: *Hawkes v Cuddy, Re Neath Rugby Ltd* [2009] EWCA Civ 291, [2009] All ER (D) 42 (Apr) (per curiam) (the unacceptability to the petitioner of the relief that the court otherwise considers appropriate is doubtless a major consideration to be taken into account when deciding whether to grant that relief, but it goes to the exercise of the discretion of the court, not to the power of the court to make such order as it thinks fit).

The court will consider such order as is appropriate at the time of the hearing and not at the time of the presentation of the petition: *Re Hailey Group Ltd* [1993] BCLC 459, sub nom *Re a Company (No 008126 of 1989)* [1992] BCC 542; *Re Little Olympian Each-Ways Ltd (No 3)* [1995] 1 BCLC 636. Relief need not be directed solely towards remedying the particular things that have happened: see *Re Hailey Group Ltd; Re a Company (No 00789 of 1987), ex p Shooter* [1990] BCLC 384 at 394 per Harman J. See also *Re Worldhams Park Golf Course Ltd, Whidbourne v Troth* [1998] 1 BCLC 554 (court had power to order a receiver's remuneration to be borne primarily by director whose gross misconduct required the appointment of a receiver in the first place); *Re Coloursource Ltd, Dalby v Bodilly* [2004] EWHC 3078 (Ch), [2005] BCC 627, [2004] All ER (D) 43 (Dec) (petitioner entitled to purchase order rather than order merely curing the wrongdoing to date). The interests of creditors of a company are clearly relevant when the court makes an order under the Companies Act 2006 s 996, and may be decisive in deciding what order should be so made, although the weight to be given to their interests will depend on the circumstances: *Hawkes v Cuddy, Re Neath Rugby Ltd* (per curiam). As to whether an order might be made where insolvency supervenes between the presentation of the petition and the hearing see *Re Hailey Group Ltd*; and PARA 476.

6 Companies Act 2006 s 996(2).

7 Companies Act 2006 s 996(2)(a). See *R & H Electric Ltd v Haden Bill Electrical Ltd, Re Haden Bill Electrical Ltd* [1995] 2 BCLC 280, sub nom *R & H Electrical Ltd v Haden Bill Electrical Ltd* [1995] BCC 958 (where the court ordered that the petitioner should cease to be chairman and a director, that his shares be purchased by the majority shareholders and that the company repay as soon as possible loans made to it by the petitioner). In *Hawkes v Cuddy, Re Neath Rugby Ltd* [2009] EWCA Civ 291, [2009] All ER (D) 42 (Apr), a request to order a sale of shares or the removal of the director against whom some findings of unfair prejudice had been made out was considered to be disproportionate to the scale of the misdeeds and the spirit of the original working arrangement between the two directors (who had fallen out) was preserved by sanctioning the order made at trial which provided a mechanism for changes to be made at the board level of the two companies involved.

8 Companies Act 2006 s 996(2)(b)(i).

9 Companies Act 2006 s 996(2)(b)(ii). See *McGuinness v Bremner plc* [1988] BCLC 673, Ct of Sess (directors delayed in convening meeting; court ordered extraordinary general meeting to be held on set date).

10 Companies Act 2006 s 996(2)(c). A derivative claim (see PARA 455 et seq) may be brought in pursuance of an order of the court under the Companies Act 2006 Pt 30: see s 260(2); and PARA 455.

11 As to the meaning of references to a company's 'articles' see PARA 228 note 2.

12 Companies Act 2006 s 996(2)(d). As to the ordinary power of a company to alter its articles see PARA 232 et seq.

13 As to the meaning of 'share' see PARA 1042. The most commonly sought relief is a purchase order, usually requiring the respondents to purchase the shares of the petitioners: see PARA 476. As to the circumstances in which an order under the Companies Act 2006 s 996 requiring the compulsory purchase of a company's shares by a party found to have acted in an unfairly prejudicial manner may be inappropriate see *Antoniades v Wong* [1997] 2 BCLC 419, CA (company had been dormant and solvency in doubt).

14 Companies Act 2006 s 996(2)(e). As to reduction of capital see PARA 1173 et seq.

15 See *Re Hailey Group Ltd* [1993] BCLC 459, sub nom *Re a Company (No 008126 of 1989)* [1992] BCC 542 (purchase order refused where company had gone into administrative receivership between presentation and hearing of petition; in the circumstances no substantive relief granted); *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354, [1994] BCC 781 (purchase order made but appointment of additional directors refused as it might

exacerbate not resolve the disputes between the parties); *Vujnovich v Vujnovich* [1990] BCLC 227, PC (winding up more appropriate remedy).

16 *Re Bird Precision Bellows Ltd* [1986] Ch 658, [1985] 3 All ER 523, CA; *Grace v Biagioli* [2005] EWCA Civ 1222, [2006] 2 BCLC 70.

17 *Ie* under the Companies Act 2006 Pt 30 (see PARAS 466 et seq, 476 et seq): see s 998(1).

18 Companies Act 2006 s 998(1)(a). As to the meaning of references to a company's constitution see PARA 227. As to the ordinary power of a company to alter its constitution see PARA 232 et seq.

19 Companies Act 2006 s 998(1)(b).

20 Companies Act 2006 s 998(1). As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

21 Companies Act 2006 s 998(2).

22 *Ie* in complying with the Companies Act 2006 s 998 (see the text and notes 17-21): see s 998(3).

23 Companies Act 2006 s 998(3). As to the meaning of 'officer' see PARA 607; and as to the meaning of 'officer in default' see PARA 315.

24 As to the standard scale see PARA 1622.

25 As to the meaning of 'daily default fine' see PARA 1622.

26 Companies Act 2006 s 998(4).

27 *Ie* an order under the Companies Act 2006 Pt 30 (see PARAS 466 et seq, 476 et seq): see s 999(1).

28 Companies Act 2006 s 999(1).

29 Companies Act 2006 s 999(2)(a).

30 Companies Act 2006 s 999(2)(b). The text refers to any resolution or agreement to which Pt 3 Ch 3 (ss 29-30) applies (see PARA 231): see s 999(2)(b).

31 *Ie* under the Companies Act 2006 s 998 (see the text and notes 17-26): see s 999(2).

32 Companies Act 2006 s 999(2).

33 Companies Act 2006 s 999(3). As to the issue of constitutional documents by the company see PARA 241.

34 *Ie* in complying with the Companies Act 2006 s 999 (see the text and notes 27-33): see s 999(4).

35 Companies Act 2006 s 999(4).

36 Companies Act 2006 s 999(5).

37 *Ie* a 'Tomlin' order (as to which see **CIVIL PROCEDURE** vol 12 (2009) PARA 1141).

38 *Re a Company* [1981] 2 All ER 1007n, sub nom *Re a Company (No 003324 of 1979)* [1981] 1 WLR 1059n (decided under the Companies Act 1948 s 210 (now repealed) (see PARA 466 note 10)).

39 *Gamlestaden Fastigheter AB v Baltic Partners Ltd* [2007] UKPC 26, [2007] 4 All ER 164, [2008] 1 BCLC 468, [2007] 5 LRC 500 (insolvency of company not necessarily a bar to relief).

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(12) PROTECTION OF COMPANY'S MEMBERS AGAINST UNFAIR PREJUDICE/476. Orders for purchase of shares.

476. Orders for purchase of shares.

Where, as is often the case, a petition for an order to protect the members of a company¹ against unfair prejudice² results in an order that the petitioner's shareholding should be bought out by the majority shareholders or by the company, there is no universal rule as to the appropriate method of³, or date for⁴, the calculation of the purchase price. Prima facie, the shares should be valued at the date of the order for purchase⁵, but, depending on the circumstances of the case, the valuation may be directed to take place at an earlier date⁶, such as at the date the date of the presentation of the petition⁷ or even at a date before such presentation⁸. The court is concerned that the valuation should be unaffected by any diminution to the company's value caused by the unfair conduct complained of⁹. In determining what is the proper price, there is a wide discretion in the court to do what is fair and equitable in the circumstances¹⁰.

Where the shares in a company which is the subject of an unfair prejudice petition is (or is alleged to be) a quasi-partnership, then the overriding requirement is that the price to be paid, where a buy-out order is made, should be fair and, as a general rule, the correct course would be to fix the price pro rata according to the value of the totality of the shares in question, without any discount to reflect the fact that the shares constitute a minority holding¹¹. However, a minority shareholding, even where the extent of the minority was slight, was to be valued as a minority shareholding unless a good reason existed to attribute to it a pro rata share of the overall value of the company¹². Nevertheless, there may be cases in which the petitioner has acted in such a way as to merit, to some extent, the conduct of which he complains. In these cases it would be correct to treat him as if he had elected to sell his shares, and a suitable discount from the pro rata basis would be appropriate¹³.

In some circumstances, it may be appropriate for the court to order that the majority shareholder transfer his shares to the petitioner¹⁴. Where the order is for the purchase by the petitioning shareholder of the shares of the offending majority, it is not normally proper to reflect the value of majority control by the award of a premium¹⁵.

Conditions may be attached to a purchase order¹⁶, and the width of the court's jurisdiction¹⁷ means that it is possible for the court to make an order for the equivalent of interest to be paid where the shares are valued at a relatively early date but that jurisdiction should be exercised with great caution¹⁸. Where the order is that the petitioner's shares should be bought by the majority shareholder, it is not correct, as a matter of principle, to include an escape clause¹⁹ in the event of the majority shareholder being unable to complete the purchase, as the order represents compensation for wrongs inflicted which should not be affected by the impecuniosity of the majority shareholder²⁰.

A purchase order made when the company is insolvent is tantamount to a fine but there may be circumstances in which, despite the company's insolvency at the time of the hearing, the court would feel it necessary to impose an obligation to purchase the petitioner's shares²¹.

A purchase order may be refused where such relief is inappropriate²².

When assessing the reasonableness of competing offers by two equal shareholders to buy out the other, the court must consider which party is more likely to be able to meet the price fixed by the independent valuer, as well as which party is more actively involved in the management of the company²³.

Remedies for unfair prejudice are not limited to situations where the value of the share or shares held by the applicant member would be enhanced by the grant of the relief sought and an unfair prejudice petition can be used in limited circumstances by shareholders to protect their interests as creditors and to seek a creditors' remedy²⁴.

1 As to the meaning of 'member of a company' see PARA 321. As to the meaning of 'company' for these purposes, where a petition is presented by a member of a company, see PARA 466 note 1; and, where a petition is presented by the Secretary of State, see PARA 467 note 2. As to the application of the Companies Act 2006 Pt 30 (ss 994-999) (see PARAS 466 et seq, 477) to persons who are not members see s 994(2); and PARA 466.

2 le a petition under the Companies Act 2006 Pt 30 (see PARAS 466 et seq, 477): see s 996(1). As to petitions, in particular, by company members and others see s 994; and PARA 466. As to petitions by the Secretary of State see s 995; and PARA 467.

3 *Re Bird Precision Bellows Ltd* [1986] Ch 658 at 669, [1985] 3 All ER 523 at 529, CA, per Oliver LJ (the merits of the case must determine the terms of the purchase). Where the shareholders of a company have fallen out it will be an abuse of process for a minority shareholder to proceed with a Companies Act 2006 s 994 petition (see note 2) in the face of an offer by the majority to acquire his shares as valued by an independent professional to whom the parties can make submissions: *Isaacs v Belfield Furnishings Ltd* [2006] EWHC 183 (Ch), [2006] 2 BCLC 705 (this position applies with particular force where the petitioner has contractually bound himself to sell his stake in given circumstances and agreed a particular method for ascertaining its fair value).

4 *Re London School of Electronics Ltd* [1986] Ch 211, [1985] 3 WLR 474.

5 See *Re London School of Electronics Ltd* [1986] Ch 211, [1985] 3 WLR 474; *Re a Company (No 005134 of 1986)*, ex p *Harries* [1989] BCLC 383, sub nom *Re DR Chemicals Ltd* 5 BCC 39; *Re Elgindata Ltd* [1991] BCLC 959; *Re Ghyll Beck Driving Range Ltd* [1993] BCLC 1126. As a general rule, the value of share capital in a going concern should be assessed at the time of the order to purchase: *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031, [2002] 1 WLR 1024, [2002] 1 BCLC 141. See also *Re Adlink Ltd* [2006] All ER (D) 198 (Oct); and *Strahan v Wilcock* [2006] EWCA Civ 13, [2006] 2 BCLC 555 (where a claimant's involuntary departure from the company had prevented him from benefiting from any increase in the value of those shares by contributing to the company's profitability, fairness demanded that he should be entitled to claim back not merely the cost of acquiring the shares but their value at the date of the buy-out order).

6 See *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031 at [61], [2002] 1 WLR 1024 at [61], [2002] 1 BCLC 141 at [61], where the following guidance was given: (1) where a company has been deprived of its business, an early valuation date (and compensating adjustments) may be required in fairness to the claimant; (2) where a company has been reconstructed or its business has changed significantly, so that it has a new economic identity, an early valuation date may be required in fairness to one or both parties (but an improper alteration in the issued share capital, unaccompanied by any change in the business, will not necessarily have that outcome); and (3) where a minority shareholder has a petition on foot and there is a general fall in the market, the court may in fairness to the claimant have the shares valued at an early date, especially if it strongly disapproves of the majority shareholder's prejudicial conduct. However, the court will not direct an early valuation date simply to give the claimant the most advantageous exit from the company, especially where severe prejudice has not been made out; and all these points may be heavily influenced by the parties' conduct in making and accepting or rejecting offers either before or during the course of the proceedings: *Profinance Trust SA v Gladstone*.

7 *Re London School of Electronics Ltd* [1986] Ch 211, [1985] 3 WLR 474 (unfair to value shares at the date of judgment); *Re Cumana Ltd* [1986] BCLC 430, CA.

8 See *Re Cumana Ltd* [1986] BCLC 430 at 436, CA, per Lawton LJ (date before petition might be permissible where wrongdoers took steps to depreciate shares in anticipation of presentation of petition). See also *Re a Company (No 002567 of 1982)* [1983] 2 All ER 854 at 862-863, [1983] 1 WLR 927 at 937 per Vinelott J; *Re OC (Transport) Services Ltd* [1984] BCLC 251; *Re London School of Electronics Ltd* [1986] Ch 211, [1985] 3 WLR 474; *R & H Electric Ltd v Haden Bill Electrical Ltd*, *Re Haden Bill Electrical Ltd* [1995] 2 BCLC 280, sub nom *R & H Electrical Ltd v Haden Bill Electrical Ltd* [1995] BCC 958.

9 *Re Little Olympian Each-Ways Ltd (No 3)* [1995] 1 BCLC 636 at 673 per Evans-Lombe J. See notes 6-7. It may be difficult to place a value on the loss suffered by a company or the value the company would have had if the wrongdoing had not occurred: see *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354 at 409, [1994] BCC 781 at 837 per Arden J. As to the particular difficulties regarding valuation where the company is a football club see *Re a Company (No 00789 of 1987)*, ex p *Shooter* [1990] BCLC 384; *Re a Company (No 00789 of 1987)*, ex p *Shooter (No 2)* [1991] BCLC 267, sub nom *Re Nuneaton Borough AFC Ltd (No 2)* [1991] BCC 44.

10 *Re Bird Precision Bellows Ltd* [1986] Ch 658, [1985] 3 All ER 523, CA (affg [1984] Ch 419, [1984] 3 All ER 444); *Re Elgindata Ltd* [1991] BCLC 959; *Re Little Olympian Each-Ways Ltd (No 3)* [1995] 1 BCLC 636. See also *Re Planet Organic Ltd*, *Elliot v Planet Organic Ltd* [2000] 1 BCLC 366 (factors to be taken into account in valuing shares in private company trading profitably with potential to exploit name); *Brownlow v GH Marshall Ltd* [2000] 2 BCLC 655 (family relationship to be taken into account when assessing whether majority shareholders were entitled to remove minority shareholder from office without making a reasonable offer); *Bonham v Crow* [2001] EWCA Civ 1931, [2001] All ER (D) 409 (Dec) (the petitioner was entitled to have a shareholder's agreement

taken into account and to be put in the position he would have been in had the respondents fulfilled their obligations under it).

11 *Re Bird Precision Bellows Ltd* [1986] Ch 658, [1985] 3 All ER 523, CA (affg [1984] Ch 419, [1984] 3 All ER 444); *Re London School of Electronics Ltd* [1986] Ch 211, [1985] 3 WLR 474; *Re Ghyll Beck Driving Range Ltd* [1993] BCLC 1126. Cf *Re a Company (No 005134 of 1986), ex p Harries* [1989] BCLC 383, sub nom *Re DR Chemicals Ltd* 5 BCC 39 (pro rata valuation not appropriate where the relationship started as a quasi-partnership (see PARA 469) but subsequently changed to a more commercial footing; discounted basis of valuation appropriate). See also *Strahan v Wilcock* [2006] EWCA Civ 13 at [17], [2006] 2 BCLC 555 at [17], [2006] All ER (D) 106 (Jan) at [17], obiter, per Arden LJ (shares are generally ordered to be purchased on the basis of their valuation on a non-discounted basis where the party against whom the order is made has acted in breach of the obligation of good faith applicable to the parties' relationship by analogy with partnership law, that is to say where a 'quasi-partnership' relationship has been found to exist). The offer should be on a pro rata basis because the matter should be approached as a sale of the whole business to an outside purchaser: *CVC/Opportunity Equity Partners Ltd v Almeida* [2002] UKPC 16 at [41]-[42], [2002] 2 BCLC 108 at [41]-[42] per Lord Millett.

12 *Irvine v Irvine* [2006] EWHC 583 (Ch), [2006] 4 All ER 102, [2007] 1 BCLC 445 (short of a quasi-partnership or some other exceptional circumstance, there was no reason to accord to the company a quality which it lacked and shares would be valued on a discounted basis). See also *Strahan v Wilcock* [2006] EWCA Civ 13 at [17], [2006] 2 BCLC 555 at [17], [2006] All ER (D) 106 (Jan) at [17], obiter, per Arden LJ; and see *Re McCarthy Surfacing Ltd* [2008] EWHC 2279 (Ch), [2009] 1 BCLC 622 (original quasi-partnership had ceased to be; discount appropriate). Where a minority shareholding is acquired as an investment, the price fixed will normally be discounted to reflect the fact that it is a minority holding: *Re Elgindata Ltd* [1991] BCLC 959; *Re Bird Precision Bellows Ltd* [1984] Ch 419 at 430, [1984] 3 All ER 444 at 450 per Nourse J (cited in notes 10, 11). See also *Re a Company (No 005134 of 1986), ex p Harries* [1989] BCLC 383, sub nom *Re DR Chemicals Ltd* 5 BCC 39 (cited in note 11); *Re Planet Organic Ltd, Elliot v Planet Organic Ltd* [2000] 1 BCLC 366 (shareholders who were investors rather than active participants bought out at discount).

13 *Re Bird Precision Bellows Ltd* [1984] Ch 419 at 430-431, [1984] 3 All ER 444 at 450 per Nourse J (cited in notes 10, 11). See *Re Planet Organic Ltd, Elliot v Planet Organic Ltd* [2000] 1 BCLC 366 (court may order persons responsible for conduct to sell to petitioner).

14 See *Re a Company (No 00789 of 1987), ex p Shooter* [1990] BCLC 384 (majority shareholder had shown himself to be unfit); *Re Brenfield Squash Racquets Club Ltd* [1996] 2 BCLC 184.

15 *Re Bird Precision Bellows Ltd* [1984] Ch 419 at 430, [1984] 3 All ER 444 at 450 per Nourse J (cited in notes 10, 11).

16 See *Re a Company (No 00789 of 1987), ex p Shooter* [1990] BCLC 384 (purchaser to repay or procure the repayment to the vendor of sums paid by the vendor to the company).

17 Ie under the Companies Act 2006 s 996: see PARA 475.

18 *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031, [2002] 1 BCLC 141.

19 Ie a provision which would enable the court to make some other order if the respondent is unable to raise the money.

20 *Re Cumana Ltd* [1986] BCLC 430, CA.

21 *Re Hailey Group Ltd* [1993] BCLC 459, sub nom *Re a Company (No 008126 of 1989)* [1992] BCC 542. For example, where the unfairly prejudicial conduct had prevented the petitioner from selling his shares at a proper price prior to the onset of insolvency; or where the purchase order was sought at a time when the company was solvent: see *Re Hailey Group Ltd* at 473 and 555 per Arden J (purchase order refused, having been sought only at eleventh hour).

22 *Re Hailey Group Ltd* [1993] BCLC 459, sub nom *Re a Company (No 008126 of 1989)* [1992] BCC 542 (purchase order would not be granted where the company had gone into administrative receivership between the petition and the hearing; no substantive relief was granted) (cited in note 21). See also PARA 475.

23 *West v Blanchet* [2000] 1 BCLC 795.

24 *Gamlestaden Fastigheter AB v Baltic Partners Ltd* [2007] UKPC 26, [2007] 4 All ER 164, [2008] 1 BCLC 468, [2007] 5 LRC 500 (insolvency of company not necessarily a bar to relief). The exceptional circumstances, where a member's interests as a creditor can be taken into account, are those that applied in *R & H Electric Ltd v Haden Bill Electrical Ltd, Re Haden Bill Electrical Ltd* [1995] 2 BCLC 280, sub nom *R & H Electrical Ltd v Haden*

Bill Electrical Ltd [1995] BCC 958, and in *Gamlestaden Fastigheter AB v Baltic Partners Ltd* (joint ventures where parties indifferent as to whether capital should be provided in form of shares or loans).

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(12) PROTECTION OF COMPANY'S MEMBERS AGAINST UNFAIR PREJUDICE/477. Relationship between remedies available under unfair prejudice provisions and other remedies.

477. Relationship between remedies available under unfair prejudice provisions and other remedies.

The existence of circumstances which would warrant a petition on the unfairly prejudicial ground¹ does not by itself preclude a petitioner from seeking a winding up on the just and equitable ground². It is, however, undesirable to include, as a matter of course, a petition for winding up as an alternative to a petition under the unfairly prejudicial provision³; and the jurisdiction to make a winding-up order on the just and equitable ground⁴ and the jurisdiction to grant relief based on grounds of unfairly prejudicial conduct are not coterminous⁵.

A statutory derivative claim⁶ may be brought in pursuance of an order of the court in proceedings⁷ for the protection of members against unfair prejudice⁸. The mere fact that circumstances exist which would allow a petitioner to bring a derivative claim with respect to alleged conduct does not preclude his seeking relief on the same facts under the unfairly prejudicial provision⁹. Where, however, a majority shareholder could remove from office the directors who are allegedly conducting the company's affairs in a manner unfairly prejudicial to that shareholder's interests, he should not seek the assistance of the court¹⁰.

A petition will be struck out where a petitioner seeks to have his shares valued pursuant to a court order under the unfairly prejudicial provision¹¹ rather than rely on a fair valuation provision in the articles of association¹² or accept a reasonable offer for his shares; either process will give him all the relief he could realistically expect to obtain on the petition¹³. Likewise, a petitioner will be acting unreasonably in seeking to have the company wound up rather than accept a fair offer open to him¹⁴ or if other considerations have effect¹⁵.

The mere existence of a petition alleging unfairly prejudicial conduct, although it is a matter which bears upon the discretion of the court, is not an inevitable bar to the statutory power¹⁶ of the court to call a meeting¹⁷.

1 I.e. a petition under the Companies Act 2006 Pt 30 (ss 994-999) (see PARA 466 et seq): see s 996(1). As to petitions, in particular, by company members and others see s 994; and PARA 466. As to petitions by the Secretary of State see s 995; and PARA 467.

2 *Re a Company (No 001363 of 1988), ex p S-P* [1989] BCLC 579, 5 BCC 18. As to winding up on the just and equitable ground see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 448-449. See also PARA 475.

3 I.e. under the Companies Act 2006 s 994: see PARA 466. See *Clark v Utility Consultancy Services Ltd* [2009] EWHC 315 (Comm), [2009] All ER (D) 127 (Feb), an admittedly unusual case in which the trial judge raised (but did not discuss) the issue of whether and in what circumstances it might be proper to grant relief for unfair prejudice when the petition for relief was issued only after the making of a compulsory winding-up order.

4 I.e. under the Insolvency Act 1986 s 122(1)(g): see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 444.

5 *Hawkes v Cuddy, Re Neath Rugby Ltd* [2009] EWCA Civ 291, [2009] All ER (D) 42 (Apr) (Parliament would not have used such different wording in the Companies Act 2006 s 994 (see PARA 466) and in the Insolvency Act 1986 s 122(1)(g) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 444) if the

jurisdictions had been intended to be coterminous). Many, if not most, cases might give rise to both jurisdictions but there might be cases which satisfied the requirements of one jurisdiction but not the other, and a winding up might be ordered on the 'just and equitable' ground where no unfair conduct was alleged: *Hawkes v Cuddy, Re Neath Rugby Ltd*. The decision by the Court of Appeal on this point overruled *Re Guidezone Ltd* [2000] 2 BCLC 321 (applying *Re a Company (No 00709 of 1992)*, *O'Neill v Phillips* [1999] 2 All ER 961, [1999] 1 WLR 1092, HL; and doubting *Re RA Noble & Sons (Clothing) Ltd* [1983] BCLC 273 on this point), which held that the jurisdiction to make a winding-up order on the just and equitable ground was not wider than the jurisdiction to grant relief based on grounds of unfairly prejudicial conduct and, accordingly, if the conduct complained of did not amount to unfairly prejudicial conduct, it could not found a case for a winding-up order on the just and equitable ground.

6 le under the Companies Act 2006 Pt 11 Ch 1 (ss 260-264) (derivative claims in England and Wales or Northern Ireland) (see PARA 455 et seq): see s 260(2). As to derivative actions generally see PARA 455 et seq.

7 le an order of the court under the Companies Act 2006 Pt 30 (see PARA 466 et seq): see s 260(2).

8 See the Companies Act 2006 s 260(2); and PARA 455. Neither CPR 19.9 nor *Practice Direction-Derivative Claims* PD 19C applies to a derivative claim made pursuant to an order of the court under the Companies Act 2006 s 996 (see PARA 475): see CPR 19.9(1)(b); *Practice Direction-Derivative Claims* PD 19C para 1(b); and PARA 456 note 2.

9 *Re a Company (No 005287 of 1985)* [1986] 1 WLR 281, [1986] BCLC 68; *Re Little Olympian Each-Ways Ltd (No 3)* [1995] 1 BCLC 636 at 665 per Evans-Lombe J; *Lowe v Fahey* [1996] 1 BCLC 262 (where the company is claiming relief against a third party, the court will not necessarily allow the claim to proceed by way of petition rather than by derivative action). However, where the derivative action and the action under the Companies Act 2006 s 994 (see PARA 466) raise the same issues, the court may order them to be consolidated under s 994: *Cooke v Cooke* [1997] 2 BCLC 28 (derivative action stayed and proceedings continued under the Companies Act 1985 s 459 (repealed: see now the Companies Act 2006 s 994)). Vice versa, the court may refuse permission to continue a derivative claim when there is the possibility of alternative relief being available under the Companies Act 2006 s 994: see PARA 460.

10 *Re Baltic Real Estate Ltd (No 2)* [1993] BCLC 503, [1992] BCC 629.

11 le under the Companies Act 2006 s 996: see PARA 475.

12 As to a company's articles of association generally see PARA 228 et seq.

13 *Re a Company (No 00836 of 1995)* [1996] 2 BCLC 192. As to what would constitute a fair offer in the circumstances see *Re a Company (No 00709 of 1992)*, *O'Neill v Phillips* [1999] 2 All ER 961 at 975, 976, [1999] 1 WLR 1092 at 1107, HL, per Lord Hoffman. See also *Re a Company (No 00330 of 1991)*, *ex p Holden* [1991] BCLC 597, [1991] BCC 241, applying *Virdi v Abbey Leisure Ltd* [1990] BCLC 342, sub nom *Re Abbey Leisure Ltd* [1990] BCC 60, CA; *Re a Company* [1986] BCLC 362, sub nom *Re a Company (No 007623 of 1984)* 2 BCC 99, 191; *Re a Company (No 004377 of 1986)* [1987] BCLC 94, sub nom *Re XYZ Ltd* 2 BCC 99, 520; *Re a Company (No 003843 of 1986)* [1987] BCLC 562, 3 BCC 624; *Re a Company (No 003096 of 1987)* (1987) 4 BCC 80; *Re a Company (No 006834 of 1988)*, *ex p Kremer* [1989] BCLC 365, 5 BCC 218; *Re Boswell & Co (Steels) Ltd (Re a Company No 001567 of 1987)* (1988) 5 BCC 145; *Re Castleburn Ltd* [1991] BCLC 89, 5 BCC 652; *Allmark v Burnham* [2005] EWHC 2717 (Ch), [2006] 2 BCLC 437 (purported 'offers' did not offer petitioner a satisfactory alternative remedy); *Pringle v Callard* [2007] EWCA Civ 1075, [2008] 2 BCLC 505 (whether an appropriate offer had been made was a contested matter; judge had been entitled to restrain proceedings alleging unfairly prejudicial conduct). See also *Virdi v Abbey Leisure Ltd* at 348-349 and 67 per Balcombe LJ. In *Music Sales Ltd v Shapiro Bornstein & Co Inc* [2005] EWHC 759 (Ch), [2006] 1 BCLC 371, it was held that the court had jurisdiction to strike out a petition where it appeared that a reasonable offer had been made in the context of litigation (rather than on the basis of valuation) and it was therefore an abuse for there to be further insistence by the petitioner on the prosecution of the petition.

14 *Fuller v Cyracuse Ltd, Fuller v Realtime Partner UK Ltd* [2001] 1 BCLC 187. See also *Virdi v Abbey Leisure Ltd* [1990] BCLC 342 at 349, sub nom *Re Abbey Leisure Ltd* [1990] BCC 60 at 67, CA, per Balcombe LJ; *Re a Company (Nos 004413, 004415, 004416 of 1996)* [1997] 1 BCLC 479.

15 In *Hawkes v Cuddy, Re Neath Rugby Ltd* [2009] EWCA Civ 291, [2009] All ER (D) 42 (Apr), the spirit of the original working arrangement between the two directors (who had fallen out) was preserved by sanctioning the order made at trial (which provided a mechanism for changes to be made at the board level of the two companies involved) and this was considered to be a preferable outcome to ordering a demerger or sanctioning a winding-up order on the 'just and equitable' ground. On the other hand, where there was a dispute between members and relief was being sought under the Companies Act 2006 s 994 (see PARA 466), the court adjourned a petition presented by some of the directors under the Insolvency Act 1986 s 124 (application for winding up) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 450 et seq) as the dispute was an internal dispute not involving creditors and the Companies Act 2006 s 994 was more appropriate to deal with

this issue: *Re Minrealm Ltd* [2007] EWHC 3078 (Ch), [2008] 2 BCLC 141, [2007] All ER (D) 320 (Dec) (the company was cash flow insolvent; the court would have considered the petition differently if it had been presented by a creditor).

16 le under the Companies Act 2006 s 306 (see PARA 639).

17 *Re Whitchurch Insurance Consultants Ltd* [1993] BCLC 1359, [1994] BCC 51. See also *Re Opera Photographic Ltd* [1989] 1 WLR 634, [1989] BCLC 763 (no subsisting petition under the Companies Act 2006 s 994). Cf *Re Sticky Fingers Restaurant Ltd* [1992] BCLC 84, [1991] BCC 754 (subsisting petition; meeting ordered by the court but members restrained from removing petitioner from the board pending outcome of the petition).

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(13) DIRECTORS

(i) Types of Director

478. Meaning of 'director' under the Companies Acts.

In the Companies Acts¹, 'director' includes any person occupying the position of director, by whatever name called². This term is defined in almost identical words for the purposes of the Company Directors Disqualification Act 1986³ and for the purposes of the Insolvency Act 1986⁴ and the case law that has built up in relation to the term is often 'read across' in the different statutory contexts⁵. Directors may be of three kinds⁶: (1) *de jure* directors, that is to say, those who have been validly appointed to the office⁷; (2) *de facto* directors (or 'directors in fact'), that is to say, directors who assume to act as directors without having been appointed validly or at all⁸; and (3) shadow directors, a term which is defined by statute for the purposes of both companies and insolvency legislation⁹.

1 As to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 250. The meaning of 'director' may vary according to the context in which it is to be found: see *Re Lo-Line Electric Motors Ltd* [1988] Ch 477, [1988] 2 All ER 692; and see the text and notes 3-9.

3 See the Company Directors Disqualification Act 1986 s 22; and PARA 1575.

4 See the Insolvency Act 1986 s 251; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 5.

5 The law as to what constitutes a *de facto* director, for instance (see head (2) in the text) has developed largely in the context of decisions relating to applications under the Company Directors Disqualification Act 1986: see PARA 1577.

6 As to this formulation, and the categorisation given in heads (1) to (3) in the text, see *Re Hydroadam (Corby) Ltd* [1994] 2 BCLC 180 at 182, [1994] BCC 161 at 162. *Re Hydroadam (Corby) Ltd* was decided under the Insolvency Act 1986 s 214 (declaration of liability for wrongful trading) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 914) in reliance upon the definition of 'shadow director' given in s 251 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 5) whose terms are identical to the definition of 'shadow director' given for the purposes of the Company Directors Disqualification Act 1986 s 22 (see PARA 1576) and that given for the purposes of the Companies Acts (see the Companies Act 2006 s 251; and PARA 479).

7 See *Re Hydroadam (Corby) Ltd* [1994] 2 BCLC 180 at 182, [1994] BCC 161 at 162. See note 6. As to the appointment of directors see PARA 483 et seq. Persons properly and formally appointed as directors (*de jure* directors) owe fiduciary duties to the company: see PARA 544 et seq. The Companies Act 2006 contains for the

first time a statutory statement of the general duties of directors (including the extent to which they apply to shadow directors: see s 170(5); and PARA 533): see Pt 10 Ch 2 (ss 170-181); and PARA 532 et seq.

8 See *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 at 182, [1994] BCC 161 at 162. See note 6. It has been held for the purposes of the Companies Acts that, since the definition of 'director' is inclusive and not exhaustive, it is capable of including de facto directors but may not do so; the meaning of 'director' varies according to the context in which it is to be found: see *Re Lo-Line Electric Motors Ltd* [1988] Ch 477 at 489, [1988] 2 All ER 692 at 699 per Sir Nicolas Browne-Wilkinson V-C (decided under the Companies Act 1985 s 300 (repealed), which was a predecessor of the Company Directors Disqualification Act 1986 but in more limited terms) (see PARA 1575)). Thus, in the Companies Acts, the word 'director' must be referring to de jure directors alone for the purposes of specifying eg a minimum number of directors (see PARA 483), or in relation to the register of directors (see PARA 499 et seq): see *Re Lo-Line Electric Motors Ltd*; also see *John Morley Building Co v Barras* [1891] 2 Ch 386. On the other hand, in some contexts, the word 'director' must include a person who is not a de jure director, eg where the acts of a person acting as a director are deemed to be valid notwithstanding that it is afterwards discovered that there was a defect in his appointment (see PARA 486): see *Re Lo-Line Electric Motors Ltd*. A de facto director owes the same fiduciary duties as a de jure director: *Re Canadian Land Reclaiming and Colonizing Co, Coventry and Dixon's Case* (1880) 14 ChD 660 at 670 (decided under the Companies Act 1862); *Ultraframe (UK) Ltd v Fielding, Northstar Systems Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1257], [2005] All ER (D) 397 (Jul) at [1257]; *Primlake Ltd v Matthew Associates* [2006] EWHC 1227 (Ch) at [284], [2007] 1 BCLC 666 at [284]. However, a person acting as director but not in fact duly appointed to that office is not liable under a penal enactment as a director of the company: *Dean v Hiesler* [1942] 2 All ER 340, DC. As to the relationship between de facto directors and 'shadow directors' as defined for the purposes of the Companies Acts see PARA 479. As to de facto directors under the Company Directors Disqualification Act 1986 see PARA 1577.

9 See *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 at 182, [1994] BCC 161 at 162. See note 6.

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479. Meaning of 'shadow director' under the Companies Acts.

In the Companies Acts¹, 'shadow director', in relation to a company², means a person in accordance with whose directions or instructions the directors³ of the company are accustomed to act⁴. However, a person is not to be regarded as a shadow director by reason only that the directors act on advice given by him in a professional capacity⁵. The term is defined in almost identical words for the purposes of the Company Directors Disqualification Act 1986⁶ and for the purposes of the Insolvency Act 1986⁷ and the case law that has built up in relation to the term is often 'read across' in the different statutory contexts⁸.

A body corporate⁹ is not to be regarded as a shadow director of any of its subsidiary¹⁰ companies for the purposes of those provisions of the Companies Act 2006 which govern: (1) the general duties of directors¹¹; (2) transactions requiring members' approval¹²; or (3) contracts with a sole member who is also a director¹³, by reason only that the directors of the subsidiary are accustomed to act in accordance with its directions or instructions¹⁴.

The mere fact that a person falls within the statutory definition of 'shadow director' is not enough to impose upon him the same fiduciary duties to the relevant company as are owed by a de jure or de facto director¹⁵. A person is unlikely to be a de facto director and a shadow director simultaneously, although he may be both in succession¹⁶.

1 As to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 As to the meaning of 'director' under the Companies Acts see PARA 478.

4 Companies Act 2006 s 251(1). For these purposes, the mere giving of instructions is not sufficient; the board must act upon those instructions for the person to be regarded as a shadow director: *Ultraframe (UK) Ltd v Fielding, Northstar Systems Ltd v Fielding* [2005] EWHC 1638 (Ch), [2005] All ER (D) 397 (Jul). In construing the phrase 'the directors of the company', the policy underlying the definition (ie that a person who effectively controlled the activities of a company is to be subject to the same statutory liabilities and disabilities as a person who is a de jure director) must be taken into account and, since a de jure director was subject to those liabilities and disabilities even if he was non-executive (or even inactive) it would undermine the policy of the definition if the fact that an inactive director did not act on the instructions of an alleged shadow director (because he did not act at all) could prevent that person from being a shadow director, even though in reality he controlled the activities of the company: see *Ultraframe (UK) Ltd v Fielding, Northstar Systems Ltd v Fielding* at [1272] (a person at whose direction a governing majority of the board was accustomed to act was capable of being a shadow director). As to de jure directors see PARA 478.

The Companies Act 2006 contains for the first time a statutory statement of directors' duties (including the extent to which they apply to shadow directors: see s 170(5); and PARA 533): see Pt 10 Ch 2 (ss 170-181); and PARA 532 et seq.

5 Companies Act 2006 s 251(2).

6 See the Company Directors Disqualification Act 1986 s 22; and PARA 1576.

7 See the Insolvency Act 1986 s 251; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 5.

8 The law as to what constitutes a de facto director, for instance (see the text and notes 15-16) has developed largely in the context of decisions relating to applications under the Company Directors Disqualification Act 1986: see PARA 1577.

9 As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5.

10 As to the meaning of 'subsidiary' see PARA 25.

11 Ie for the purposes of the Companies Act 2006 Pt 10 Ch 2 (see PARA 532 et seq): see s 251(3).

12 Ie for the purposes of the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) (see PARA 561 et seq): see s 251(3).

13 Ie for the purposes of the Companies Act 2006 Pt 10 Ch 6 (s 231) (see PARA 584): see s 251(3).

14 Companies Act 2006 s 251(3).

15 See *Ultraframe (UK) Ltd v Fielding, Northstar Systems Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1289], [2005] All ER (D) 397 (Jul) at [1289] (the indirect influence exerted by a paradigm shadow director who did not directly deal with, or claim the right to deal directly with, the company's assets would not usually be sufficient to impose fiduciary duties upon him, although the case for this position was the stronger where the shadow director had been acting throughout in furtherance of his own, rather than the company's, interests). As to de facto directors, and the duties which they owe, see PARA 478 note 8.

16 *Ultraframe (UK) Ltd v Fielding, Northstar Systems Ltd v Fielding* [2005] EWHC 1638 (Ch), [2005] All ER (D) 397 (Jul) (a de facto director is held out to be a director but a shadow director will not be held out as having authority to act and directs activities only through the properly appointed board). As to the development of discussion on this point in relation to applications under the Company Directors Disqualification Act 1986 see PARA 1576 note 10.

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480. Nominee directors.

The position of a nominee director, that is, a director of a company who is nominated by a shareholder of that company to represent his interests¹, is not immediately clear, especially in relation to whom he owes his duties when the interests of all concerned in the arrangement are

not in harmony². The fact that a director of a company was nominated to that office by a shareholder does not, of itself, impose any duty on the director owed to his nominator³. The director might owe duties to his nominator if he were an employee or officer of the nominator, or by reason of a formal or informal agreement with his nominator⁴, but such duties could not detract from his duty to the company of which he was a director when he was acting as such⁵. An appointed director, without being in breach of his duties to the company, could take the interests of his nominator into account, provided that his decisions as a director were in what he genuinely considered to be the best interests of the company; but that was a very different thing from his being under a duty to his nominator by reason of his appointment by it⁶.

1 See *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 at 626, [1963] 1 All ER 716 at 723, CA, per Lord Denning MR.

2 The position of a nominee director has been summarised in *Re Southern Counties Fresh Foods Ltd* [2008] EWHC 2810 (Ch) at [67], [2008] All ER (D) 195 (Nov) at [67] per Warren J. It is clear that the nominee cannot do his duty to all parties when there is conflict within the nominee arrangement but if he agrees to subordinate the interests of the company to the interests of his patron, it is conduct oppressive to the other shareholders for which the patron can be made answerable: *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, [1958] 3 All ER 66, HL. See also *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187, [1990] 3 All ER 404, PC (in the performance of their duties as directors, the nominees were bound to ignore the interests and wishes of their employer). Cf *Re Broadcasting Station 2 GB Pty Ltd* [1964-5] NSW 1648, NSW SC (it is consistent with a director's duty for the director to follow the wishes of a particular interest which has brought about his appointment, without the need for a close personal analysis of the issues, unless the director is of the view that in doing so he or she is not acting in the best interests of the company as a whole); *Re News Corp Ltd* (1987) 70 ALR 419 at 437, per Bowen CJ (nominee directors will follow the interests of the company which appointed them subject to the qualification that they will not so act if of the view that their acts would not be in the interests of the company as a whole); *CanWest Global Communications Corp v Australian Broadcasting Authority* (1997) 24 ACSR 405, Aust FC (directors usually act in accordance with the wishes and interests of a party that has brought about their appointment and on whose goodwill their continuation in office depends unless that places them in breach of their duties).

3 *Hawkes v Cuddy, Re Neath Rugby Ltd* [2009] EWCA Civ 291 at [32], [2009] All ER (D) 42 (Apr) at [32] per Stanley Burnton LJ. See also *Re Neath Rugby Ltd, Hawkes v Cuddy* [2007] EWHC 2999 (Ch), [2008] BCC 390, [2008] All ER (D) 252 (Nov).

4 In which was the case on the facts of *Hawkes v Cuddy, Re Neath Rugby Ltd* [2009] EWCA Civ 291, [2009] All ER (D) 42 (Apr); *Re Neath Rugby Ltd, Hawkes v Cuddy* [2007] EWHC 2999 (Ch), [2008] BCC 390, [2008] All ER (D) 252 (Nov).

5 *Hawkes v Cuddy, Re Neath Rugby Ltd* [2009] EWCA Civ 291 at [32], [2009] All ER (D) 42 (Apr) at [32] per Stanley Burnton LJ. See also *Re Neath Rugby Ltd, Hawkes v Cuddy* [2007] EWHC 2999 (Ch), [2008] BCC 390, [2008] All ER (D) 252 (Nov).

6 *Hawkes v Cuddy, Re Neath Rugby Ltd* [2009] EWCA Civ 291 at [33], [2009] All ER (D) 42 (Apr) at [33] per Stanley Burnton LJ, citing with approval the Australian cases cited in note 2. See also *Re Neath Rugby Ltd, Hawkes v Cuddy* [2007] EWHC 2999 (Ch), [2008] BCC 390, [2008] All ER (D) 252 (Nov).

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481. Meaning of references to persons 'connected' with director or director 'connected' with person.

For the purposes of the Companies Act 2006 provisions¹ that govern the directors² of a company³, the meaning of references to a person being 'connected' with a director of a company (or to a director being 'connected' with a person) has been defined⁴.

Accordingly, the following persons (and only those persons) are 'connected' with a director of a company⁵:

- 845 (1) members of the director's family⁶;
- 846 (2) a body corporate⁷ with which the director is connected⁸;
- 847 (3) a person acting in his capacity as trustee of a trust⁹: (a) the beneficiaries of which include the director or a person who by virtue of head (1) or head (2) above is connected with him¹⁰; or (b) the terms of which confer a power on the trustees that may be exercised for the benefit of the director or any such person¹¹, other than a trust for the purposes of an employees' share scheme¹² or a pension scheme¹³;
- 848 (4) a person acting in his capacity as partner¹⁴, either of the director¹⁵, or of a person who, by virtue of head (1), head (2) or head (3) above, is connected with that director¹⁶;
- 849 (5) a firm¹⁷ that is a legal person under the law by which it is governed and in which¹⁸: (a) the director is a partner¹⁹; (b) a partner is a person who, by virtue of head (1), head (2) or head (3) above, is connected with the director²⁰; or (c) a partner is a firm in which the director is a partner or in which there is a partner who, by virtue of head (1), head (2) or head (3) above, is connected with the director²¹.

1 le the Companies Act 2006 Pt 10 (ss 154-259) (see PARAS 478 et seq, 482 et seq): see s 252(1).

2 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'company' under the Companies Acts see PARA 24.

4 Companies Act 2006 s 252(1).

5 Companies Act 2006 s 252(2). References in Pt 10 (see PARAS 478 et seq, 482 et seq) to a person connected with a director of a company do not include a person who is himself a director of the company: s 252(3). The references in Pt 10 to a person connected with a director apply also for the purposes of s 41 (transactions involving director or person connected with director): see s 41(7)(b); and PARA 264. It is implicit in s 239(5) (ratification of acts giving rise to liability) (see PARA 593), which excludes s 252(3), that the definition given in the text applies also to define who is a member 'connected with' a director for the purposes of s 239: see PARA 593.

6 Companies Act 2006 s 252(2)(a). The meaning of references in Pt 10 (see PARAS 478 et seq, 482 et seq) to members of a director's family is defined by s 253: see ss 252(2)(a), 253(1). Accordingly, for the purposes of Pt 10, the members of a director's family are:

- 178 (1) the director's spouse or civil partner (s 253(2)(a));
- 179 (2) any other person (whether of a different sex or the same sex) with whom the director lives as partner in an enduring family relationship (s 253(2)(b));
- 180 (3) the director's children or step-children (s 253(2)(c));
- 181 (4) any children or step-children of a person within head (2) above (and who are not children or step-children of the director) who live with the director and have not attained the age of 18 (s 253(2)(d));
- 182 (5) the director's parents (s 253(2)(e)).

However, head (2) above does not apply if the other person is the director's grandparent or grandchild, sister, brother, aunt or uncle, or nephew or niece: s 253(3).

7 As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5.

8 Companies Act 2006 s 252(2)(b). The meaning of references in Pt 10 (see PARAS 478 et seq, 482 et seq) to a director being 'connected with' a body corporate is defined by s 254 (see PARA 482): see ss 252(2)(b), 254(1).

- 9 Companies Act 2006 s 252(2)(c).
- 10 Companies Act 2006 s 252(2)(c)(i).
- 11 Companies Act 2006 s 252(2)(c)(ii).
- 12 As to the meaning of 'employees' share scheme' see PARA 169 note 20.
- 13 Companies Act 2006 s 252(2)(c).
- 14 Companies Act 2006 s 252(2)(d).
- 15 Companies Act 2006 s 252(2)(d)(i).
- 16 Companies Act 2006 s 252(2)(d)(ii).
- 17 As to the meaning of 'firm' see PARA 112 note 14.
- 18 Companies Act 2006 s 252(2)(e).
- 19 Companies Act 2006 s 252(2)(e)(i).
- 20 Companies Act 2006 s 252(2)(e)(ii).
- 21 Companies Act 2006 s 252(2)(e)(iii).

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482. Meaning of references to director 'connected' with or 'controlling' body corporate.

A director¹ is 'connected with' a body corporate² if, but only if, he and the persons connected with him together either³: (1) are interested in shares⁴ comprised in the equity share capital⁵ of that body corporate of a nominal value⁶ equal to at least 20 per cent of that share capital⁷; or (2) are entitled to exercise or control the exercise of more than 20 per cent of the voting power at any general meeting of that body⁸.

A director of a company is taken to 'control' a body corporate⁹ if, but only if: (a) he or any person connected with him is interested in any part of the equity share capital of that body¹⁰, or is entitled to exercise or control the exercise of any part of the voting power at any general meeting of that body¹¹; and (b) he, the persons connected with him, and the other directors of that company, together are interested in more than 50 per cent of that share capital¹², or together are entitled to exercise or control the exercise of more than 50 per cent of that voting power¹³.

For these purposes, a reference to an interest in shares includes any interest of any kind whatsoever in shares¹⁴. Any restraints or restrictions to which the exercise of any right attached to the interest is or may be subject must be disregarded¹⁵.

A person is taken to have an interest in shares if: (i) he enters into a contract to acquire them¹⁶; or (ii) he has a right to call for delivery of the shares to himself or to his order¹⁷; or he has a right to acquire an interest in shares or is under an obligation to take an interest in shares¹⁸, whether the right or obligation is conditional or absolute¹⁹. A person ceases²⁰ to have an interest in shares for these purposes: (A) on the shares being delivered to another person at his order²¹, either in fulfilment of a contract for their acquisition by him²², or in satisfaction of a right of his

to call for their delivery²³; (B) on a failure to deliver the shares in accordance with the terms of such a contract or on which such a right falls to be satisfied²⁴; (C) on the lapse of his right to call for the delivery of shares²⁵.

A person is taken to have an interest in shares if, not being the registered holder, he is entitled either to exercise any right conferred by the holding of the shares²⁶, or to control the exercise of any such right²⁷. For this purpose, a person is taken to be entitled to exercise or control the exercise of a right conferred by the holding of shares if he has a right (whether subject to conditions or not) the exercise of which would make him so entitled²⁸, or if he is under an obligation (whether or not so subject) the fulfilment of which would make him so entitled²⁹. A person is not³⁰ so taken to be interested in shares by reason only that he has been appointed a proxy to exercise any of the rights attached to the shares³¹, or by reason only that he has been appointed by a body corporate to act as its representative at any meeting of a company or of any class of its members³².

A person is taken to be interested in shares if a body corporate is interested in them³³, and if either the body corporate or its directors are accustomed to act in accordance with his directions or instructions³⁴, or he is entitled to exercise or control the exercise of more than one-half of the voting power at general meetings of the body corporate³⁵.

Where an interest in shares is comprised in property held on trust, every beneficiary of the trust is taken to have an interest in shares³⁶. This is subject to the proviso that, so long as a person is entitled to receive, during the lifetime of himself or another, income from trust property comprising shares, an interest in the shares in reversion or remainder must be disregarded³⁷. Further, a person is treated as not interested in shares if and so long as he holds them, under the law in force in any part of the United Kingdom³⁸, as a bare trustee or as a custodian trustee³⁹. Any interest of a person subsisting by virtue of an authorised unit trust scheme⁴⁰, local authority investment schemes⁴¹, common investment schemes⁴², or the Church Funds Investment Scheme⁴³ is to be disregarded⁴⁴.

1 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5. For the avoidance of circularity in the application of the Companies Act 2006 s 252 (meaning of 'connected person') (see PARA 481): (1) a body corporate with which a director is connected is not treated for the purposes of s 254 as connected with him unless it is also connected with him by virtue of s 252(2)(c) or s 252(2)(d) (connection as trustee or partner) (see PARA 481) (s 254(6)(a)); and (2) a trustee of a trust the beneficiaries of which include (or may include) a body corporate with which a director is connected is not treated for the purposes of s 254 as connected with a director by reason only of that fact (s 254(6)(b)).

The repeal of the Companies Act 1985 s 346, Sch 13 (meaning of 'connected person') (see now the Companies Act 2006 ss 252-255, Sch 1) does not affect the Industrial and Provident Societies Act 1965 s 7E and s 7F(3) (application to person being connected with a committee member, or to a committee member being associated with a company) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2433) or the Financial Services and Markets Act 2000 s 96B(2)(a) (disclosure rules: responsibility for compliance: meaning of person connected with person having managerial responsibilities within an issuer) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 390): see the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, art 9, Sch 3 para 50.

3 Companies Act 2006 s 254(2).

4 The provisions of the Companies Act 2006 s 254(3), Sch 1 (see the text and notes 14-44) have effect for the interpretation of references in s 254 to an interest in shares or debentures: Sch 1 para 1(1). The provisions are expressed in relation to shares but apply to debentures as they apply to shares: Sch 1 para 1(2). However, shares in a company held as treasury shares, and any voting rights attached to such shares (see head (2) in the text), are disregarded for the purposes of s 254: s 254(5). As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'share' see PARA 1042. As to the meaning of 'debenture' see PARA 1299. As to treasury shares see PARA 1251.

5 As to the meaning of 'equity share capital' see PARA 1148 note 6.

6 As to the meaning of 'nominal' see PARA 1042.

7 Companies Act 2006 s 254(2)(a).

8 Companies Act 2006 s 254(2)(b). References in s 254 to voting power the exercise of which is controlled by a director include voting power whose exercise is controlled by a body corporate controlled by him: s 254(4). As to company meetings see PARA 629 et seq.

9 The meaning of references in the Companies Act 2006 Pt 10 (ss 154-259) (see PARAS 478 et seq, 482 et seq) to a director 'controlling' a body corporate is defined by s 255: s 255(1). For the avoidance of circularity in the application of s 252 (meaning of 'connected person') (see PARA 481): (1) a body corporate with which a director is connected is not treated for the purposes of s 255 as connected with him unless it is also connected with him by virtue of s 252(2)(c) or s 252(2)(d) (connection as trustee or partner) (see PARA 481) (s 255(6)(a)); and (2) a trustee of a trust the beneficiaries of which include (or may include) a body corporate with which a director is connected is not treated for the purposes of s 255 as connected with a director by reason only of that fact (s 255(6)(b)).

10 Companies Act 2006 s 255(2)(a)(i). The provisions of s 255(3), Sch 1 (see the text and notes 14-44) have effect for the interpretation of references in s 255 to an interest in shares or debentures: Sch 1 para 1(1). The provisions are expressed in relation to shares but apply to debentures as they apply to shares: Sch 1 para 1(2). However, shares in a company held as treasury shares, and any voting rights attached to such shares (see the text and notes 11, 13), are disregarded for the purposes of s 255: s 255(5).

11 Companies Act 2006 s 255(2)(a)(ii). References in s 255 to voting power the exercise of which is controlled by a director include voting power whose exercise is controlled by a body corporate controlled by him: s 255(4).

12 Companies Act 2006 s 255(2)(b)(i).

13 Companies Act 2006 s 255(2)(b)(ii).

14 Companies Act 2006 Sch 1 para 2(1). It is immaterial that the shares in which a person has an interest are not identifiable: Sch 1 para 2(3). Persons having a joint interest in shares are deemed each of them to have that interest: Sch 1 para 2(4).

15 Companies Act 2006 Sch 1 para 2(2).

16 Companies Act 2006 Sch 1 para 3(1).

17 Companies Act 2006 Sch 1 para 3(2)(a).

18 Companies Act 2006 Sch 1 para 3(2)(b).

19 Companies Act 2006 Sch 1 para 3(2). Rights or obligations to subscribe for shares are not to be taken for the purposes of Sch 1 para 3(2) to be rights to acquire or obligations to take an interest in shares: Sch 1 para 3(3).

20 Ie by virtue of the Companies Act 2006 Sch 1 para 3: see Sch 1 para 3(4).

21 Companies Act 2006 Sch 1 para 3(4)(a).

22 Companies Act 2006 Sch 1 para 3(4)(a)(i).

23 Companies Act 2006 Sch 1 para 3(4)(a)(ii).

24 Companies Act 2006 Sch 1 para 3(4)(b).

25 Companies Act 2006 Sch 1 para 3(4)(c).

26 Companies Act 2006 Sch 1 para 4(1)(a).

27 Companies Act 2006 Sch 1 para 4(1)(b).

28 Companies Act 2006 Sch 1 para 4(2)(a).

29 Companies Act 2006 Sch 1 para 4(2)(b).

30 Ie by virtue of the Companies Act 2006 Sch 1 para 4: see Sch 1 para 4(3).

- 31 Companies Act 2006 Sch 1 para 4(3)(a). As to class rights associated with certain shares see **PARA 1057**. As to voting by proxy see **PARA 662** et seq.
- 32 Companies Act 2006 Sch 1 para 4(3)(b). As to who qualifies as a member of a company see **PARA 321**.
- 33 Companies Act 2006 Sch 1 para 5(1).
- 34 Companies Act 2006 Sch 1 para 5(1)(a). See also the case law cited in **PARA 479** note 4, which relates to the equivalent wording in s 251(1).
- 35 Companies Act 2006 Sch 1 para 5(1)(b). For the purposes of Sch 1 para 5(1)(b), where: (1) a person is entitled to exercise or control the exercise of more than one-half of the voting power at general meetings of a body corporate (Sch 1 para 5(2)(a)); and (2) that body corporate is entitled to exercise or control the exercise of any of the voting power at general meetings of another body corporate (Sch 1 para 5(2)(b)), the voting power mentioned in head (2) above is taken to be exercisable by that person (Sch 1 para 5(2)).
- 36 Companies Act 2006 Sch 1 para 6(1).
- 37 Companies Act 2006 Sch 1 para 6(2).
- 38 As to the meaning of 'United Kingdom' see **PARA 1** note 5.
- 39 Companies Act 2006 Sch 1 para 6(3)(a). See also **TRUSTS** vol 48 (2007 Reissue) **PARAS 792-797**.
- 40 I.e. within the meaning of the Financial Services and Markets Act 2000 s 237 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) **PARA 603**): see the Companies Act 2006 Sch 1 para 4(a).
- 41 I.e. a scheme made under the Trustee Investments Act 1961 s 11 (see **LOCAL GOVERNMENT**): see the Companies Act 2006 Sch 1 para 4(b).
- 42 I.e. a scheme made under the Charities Act 1960 s 22 (repealed), s 22A (repealed), the Charities Act 1993 s 24 or s 25 (see **CHARITIES** vol 8 (2010) **PARA 419**), or the Administration of Justice Act 1982 s 42 (see **CIVIL PROCEDURE** vol 12 (2009) **PARA 1563**): see the Companies Act 2006 Sch 1 para 4(b).
- 43 I.e. the scheme set out in the Church Funds Investment Measure 1958 Schedule (see **ECCLESIASTICAL LAW** vol 14 **PARA 1249**): see the Companies Act 2006 Sch 1 para 4(c).
- 44 Companies Act 2006 Sch 1 para 6(4). Also to be disregarded is any interest of the Church of Scotland General Trustees or of the Church of Scotland Trust in shares or debentures held by them, or of any other person in shares or debentures held by those Trustees or that Trust otherwise than as simple trustees: see Sch 1 para 6(5). The 'Church of Scotland General Trustees' are the body incorporated by the order confirmed by the Church of Scotland (General Trustees) Order Confirmation Act 1921; and the 'Church of Scotland Trust' is the body incorporated by the order confirmed by the Church of Scotland Trust Order Confirmation Act 1932: see the Companies Act 2006 Sch 1 para 6(5).

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(ii) Appointment and Removal of Directors

A. REQUIREMENT TO HAVE DIRECTORS

483. Requirement of directors.

The affairs of a company¹ are conducted by directors², whether under that name or some other name (such as 'trustees', 'members of the council', or 'governors')³.

A private company⁴ must have at least one director⁵. A public company⁶ must have at least two directors⁷.

If it appears to the Secretary of State⁸ that a company is in breach of the requirements as to the minimum number of directors it must have⁹, the Secretary of State may give the company a direction¹⁰, which must specify:

- 850 (1) the statutory requirement the company appears to be in breach of¹¹;
- 851 (2) what the company must do in order to comply with the direction¹²; and
- 852 (3) the period within which it must do so¹³.

The direction must also inform the company of the consequences of failing to comply¹⁴.

Where the company is in breach of the requirements as to the minimum number of directors¹⁵, it must comply with the direction by making the necessary appointment or appointments¹⁶, and by giving notice of them¹⁷, before the end of the period specified in the direction¹⁸. If the company has already made the necessary appointment or appointments (or so far as it has done so), it must comply with the direction by giving notice of them¹⁹ before the end of the period specified in the direction²⁰.

If a company fails to comply with a direction so given²¹, an offence is committed by the company, and by every officer of the company who is in default²². A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 5 on the standard scale²³ and (for continued contravention) a daily default fine²⁴ not exceeding one-tenth of level 5 on the standard scale²⁵.

A provision requiring or authorising a thing to be done by or to a director and the secretary²⁶ is not satisfied by its being done by or to the same person acting both as director and as, or in place of, the secretary²⁷.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'director' under the Companies Acts see PARA 478.

3 As to the restrictions on classes of persons acting as directors see PARA 491 et seq.

4 As to the meaning of 'private company' see PARA 102.

5 Companies Act 2006 s 154(1). By virtue of s 155(1), at least one director must be a natural person (and hence capable of being held accountable for company actions): see PARA 491.

The model articles of association that have been prescribed under the Companies Act 2006 (as to which see PARA 228 et seq) make no provision for the number of directors. However, the default articles that were prescribed for the purposes of the Companies Act 1985, ie the Companies (Tables A to F) Regulations 1985, SI 1985/805 (which have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230) provide that the number of directors (other than alternate directors), unless otherwise determined by ordinary resolution, is not subject to any maximum but must be not less than two: see the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A art 64. Table A provides regulations for the management of a company limited by shares but art 64 is applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital). As to the meanings of 'company limited by shares', 'company limited by guarantee', 'limited company' and 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. As to the meaning of 'ordinary resolution' see PARA 613. As to alternate directors see PARA 489.

6 As to the meaning of 'public company' see PARA 102.

7 Companies Act 2006 s 154(2). See note 5.

A company which has obtained admission to the official list of the UK Listing Authority must notify a Regulatory Information Service (RIS) of any change to the board including: (1) the appointment of a new director (stating the appointee's name and whether the position is executive, non-executive or chairman and the nature of any specific function or responsibility of the position); (2) the resignation, removal or retirement of a director (unless the director retires by rotation and is re-appointed at a general meeting of the listed company's shareholders); (3) important changes to the role, functions or responsibilities of a director; and (4) the effective date of the change if it is not with immediate effect, as soon as possible and in any event by the end of the business day following the decision or receipt of notice about the change by the company: see the Listing Rules r 9.6.11. A listed company also must notify a RIS of the following information in respect of any new director appointed to the board as soon as possible following the decision to appoint the director and in any event within five business days of the decision: (a) details of all directorships held by the director in any other publicly quoted company at any time in the previous five years, indicating whether or not he is still a director; (b) any unspent convictions in relation to indictable offences; (c) details of any receiverships, compulsory liquidations, creditors voluntary liquidations, administrations, company voluntary arrangements or any composition or arrangement with its creditors generally or any class of its creditors of any company where the director was an executive director at the time of, or within the 12 months preceding, such events; (d) details of any compulsory liquidations, administrations or partnership voluntary arrangements of any partnerships where the director was a partner at the time of, or within the 12 months preceding, such events; (e) details of receiverships of any asset of such person or of a partnership of which the director was a partner at the time of, or within the 12 months preceding, such event; and (f) details of any public criticisms of the director by statutory or regulatory authorities (including designated professional bodies) and whether the director has ever been disqualified by a court from acting as a director of a company or from acting in the management or conduct of the affairs of any company: see the Listing Rules r 9.6.13. A listed company must, in respect of any current director, notify a RIS as soon as possible of any changes in the information set out in heads (b) to (f) above and any new directorships held by the director in any other publicly quoted company: see the Listing Rules r 9.6.14. A regulatory information service (or RIS) is a Regulatory Information Service that is approved by the FSA as meeting the Primary Information Provider criteria and that is on the list of Regulatory Information Services maintained by the FSA: see the Listing Rules Appendix 1.1. As to the Financial Services Authority's Listing Rules generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385. As to the retirement and re-appointment of directors see PARA 515. As to directors and executive offices see PARA 538.

8 As to the Secretary of State see PARA 6.

9 In breach of the Companies Act 2006 s 154 (see the text and notes 4-7): see s 156(1).

10 Companies Act 2006 s 156(1). The direction referred to in the text is a direction under s 156: see s 156(1)

11 Companies Act 2006 s 156(2)(a).

12 Companies Act 2006 s 156(2)(b).

13 Companies Act 2006 s 156(2)(c). The period mentioned in the text must be not less than one month or more than three months after the date on which the direction is given: see s 156(2).

14 Companies Act 2006 s 156(3).

15 In breach of the Companies Act 2006 s 154 (see the text and notes 4-7): see s 156(4).

16 Companies Act 2006 s 156(4)(a).

17 Companies Act 2006 s 156(4)(b). The text refers to the giving of notice under s 167 (duty to notify registrar of changes) (see PARA 514): see s 156(4)(b).

18 Companies Act 2006 s 156(4).

19 In under the Companies Act 2006 s 167 (duty to notify registrar of changes) (see PARA 514): see s 156(5).

20 Companies Act 2006 s 156(5).

21 In a direction under the Companies Act 2006 s 156 (see the text and notes 8-20): see s 156(6).

22 Companies Act 2006 s 156(6). For these purposes, a shadow director is treated as an officer of the company: s 156(6). As to the meaning of 'shadow director' see PARA 478. As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

23 As to the meaning of 'standard scale' see PARA 1622 note 5.

24 As to the meaning of 'daily default fine' see PARA 1622.

- 25 Companies Act 2006 s 156(7).
- 26 As to the company secretary and other officers see PARA 601 et seq.
- 27 See the Companies Act 2006 s 280; and PARA 601.

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B. APPOINTMENT

(A) PROCEDURE

484. Appointment of first directors.

The person or persons named in the statement of proposed officers¹ as directors² of the company³, is or are, as from the date of the company's incorporation⁴, deemed to have been appointed to that office⁵.

- 1 As to the statement of proposed officers see PARA 112. As to the meaning of 'officer' see PARA 112 note 1.
- 2 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.
- 3 As to the meaning of 'company' under the Companies Acts see PARA 24.
- 4 I.e. the date mentioned in the certificate of incorporation, following the registration of a company: see PARA 119 note 7. As to incorporation by registration under the Companies Act 2006 see PARA 111 et seq.
- 5 See the Companies Act 2006 s 16(1), (6); and PARA 120. See also *Re Great Northern Salt and Chemical Works, ex p Kennedy* (1890) 44 ChD 472 (as the subscribers to the memorandum of association had all concurred in appointing the first directors of the company, the fact that they had not met together for the purpose of coming to their determination did not invalidate their act).

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485. Procedure for subsequent appointments.

Under the model articles of association¹, any person who is willing to act as a director², and is permitted by law to do so, may be appointed to be a director, either by ordinary resolution³, or by a decision of the directors⁴. It is not competent for the directors to enter into contracts restricting the right of the company to appoint its own directors⁵.

At a general meeting of a public company⁶, a motion for the appointment of two or more persons as directors of the company by a single resolution must not be made unless a resolution that it should be so made has first been agreed to by the meeting without any vote being given against it⁷. A resolution moved in contravention of this restriction is void, whether

or not its being so moved was objected to at the time⁸. Although the acts of any directors so appointed will be valid⁹ in such circumstances, no provision for the automatic reappointment of retiring directors in default of another appointment¹⁰ will apply¹¹.

Sometimes provision is made for an outside body, for example debenture holders¹², to appoint a director; under such a provision, the court will not enforce the appointment of a person who is objectionable to the company¹³.

The company is not entitled to rely against other persons on any change among the company's directors unless certain conditions are met¹⁴.

1 As to model articles of association that have been prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

2 For these purposes, 'director' means a director of the company, and includes any person occupying the position of director, by whatever name called: see the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 Pt 1 (art 1); Sch 2 Pt 1 (art 1); Sch 3 Pt 1 (art 1). This wording is in almost identical terms to that used for the purposes of the Companies Acts: see PARA 478. As to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'company' under the Companies Acts see PARA 24; definition applied by the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 Pt 1 (art 1); Sch 2 Pt 1 (art 1); Sch 3 Pt 1 (art 1). As to the appointment of first directors see PARA 484; and as to casual vacancies see PARA 487.

3 As to the meaning of 'ordinary resolution' see PARA 613; definition applied by the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 Pt 1 (art 1); Sch 2 Pt 1 (art 1); Sch 3 Pt 1 (art 1).

4 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 17(1); Sch 2 art 17(1); Sch 3 art 20. No further provision in the model articles is made in relation to a public company but in relation to a private company it is provided that in any case where, as a result of death, the company has no members (or, in the case of a company limited by shares, no shareholders) and no directors, the personal representatives of the last member (or shareholder) to have died have the right, by notice in writing, to appoint a person to be a director: see Sch 1 art 17(2); Sch 2 art 17(2). For these purposes, where two or more members (or shareholders) die in circumstances rendering it uncertain who was the last to die, a younger member (or shareholder) is deemed to have survived an older member (or shareholder): see Sch 1 art 17(3); Sch 2 art 17(3). For companies that are still using legacy articles of association (ie the Companies (Tables A to F) Regulations 1985, SI 1985/805: see note 1), provision for the appointment of directors is made in reg 2, Schedule, Table A arts 78, 79, subject to Table A arts 73-77 (arts 73-75 revoked, arts 76-79 amended in relation to a private company limited by shares by SI 2007/2541). See further *Transport Ltd v Schonberg* (1905) 21 TLR 305; and *Catesby v Burnett* [1916] 2 Ch 325. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but arts 73-79 are applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

5 *James v Eve* (1873) LR 6 HL 335. Cf *Stace and Worth's Case* (1869) 4 Ch App 682.

6 As to meetings of the company see PARA 629 et seq.

7 Companies Act 2006 s 160(1). For the purposes of s 160, a motion to approve a person's appointment, or to nominate a person for appointment, is to be treated as a motion for his appointment: s 160(3). Nothing in s 160 applies to a resolution amending the company's articles (as to which see PARA 228 et seq): s 160(4). The precise effect of this saving is obscure. As to the meaning of references in the Companies Acts to a company's 'articles' see PARA 228 note 2.

8 Companies Act 2006 s 160(2).

9 See the Companies Act 2006 s 161; and PARA 486.

10 le such as in accordance with the provision made under the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 80 (revoked in relation to a private company limited by shares by SI 2007/2541) (see note 4); and see PARA 515.

11 Companies Act 2006 s 160(2).

12 As to the meaning of 'debenture' see PARA 1299.

13 *British Murac Syndicate Ltd v Alperton Rubber Co Ltd* [1915] 2 Ch 186. Cf *Plantations Trust Ltd v Bila (Sumatra) Rubber Lands Ltd* (1916) 85 LJ Ch 801 (where the power was one of nomination and not appointment, and the court would not force the company to appoint the person nominated).

14 See the Companies Act 2006 s 1079(2)(b); and PARA 145.

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486. Defect in appointment of person acting as director.

If the company¹ has caused proper minutes of all proceedings at meetings of its directors² or of its general meetings³ to be recorded⁴ then, until the contrary is proved, all appointments made at either such meeting are deemed to be valid⁵. The acts of a person acting as a director are valid⁶ notwithstanding that it is afterwards discovered⁷: (1) that there was a defect in his appointment⁸; (2) that he was disqualified from holding office⁹; (3) that he had ceased to hold office¹⁰; (4) that he was not entitled to vote on the matter in question¹¹. This presumption as to validity applies only to cases where there has been an appointment, albeit an invalid one¹²; it has no application to cases where in fact there has never been any appointment or where there has been a fraudulent usurpation of authority¹³.

This deemed validity operates not only as between the company and outsiders, but also as between the company and its members¹⁴, as where, for example, de facto directors make a call¹⁵, summon meetings of the company¹⁶, elect other directors¹⁷, or allot shares¹⁸. A de facto director may be ordered to furnish a statement of affairs in a winding up¹⁹. Directors cannot take advantage of any informality in company proceedings in which they have themselves participated; they are estopped as between themselves and the company²⁰; they are also estopped from saying they have been improperly appointed, if they have acted after their appointment²¹. Persons dealing with them who know of the invalidity are likewise estopped²².

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'director' under the Companies Acts see PARA 478. As to meetings of directors generally see PARA 528 et seq.

3 As to meetings of the company see PARA 629 et seq.

4 le in accordance with the Companies Act 2006 s 248 (directors' meetings) (see PARA 530) or s 355 (general meetings) (see PARA 668), as the case may be.

5 See the Companies Act 2006 s 249 (directors' meetings) (see PARA 530) or s 356 (general meetings) (see PARA 668), as the case may be. However, a person having notice that there is an irregularity or invalidity cannot avail himself of this provision: *Re Staffordshire Gas and Coke Co, ex p Nicholson* (1892) 66 LT 413; *Re Bridport Old Brewery Co* (1867) 2 Ch App 191; *Woolf v East Nigel Gold Mining Co Ltd* (1905) 21 TLR 660. A subsequent meeting may effectually ratify and confirm the acts of an irregularly constituted meeting: *Re Portuguese Consolidated Copper Mines Ltd, ex p Badman, ex p Bosanquet* (1890) 45 ChD 16, CA. An injunction may be obtained to restrain improperly appointed directors from acting: *Cheshire v Gordon Hotels* (1953) Times, 13

February. A director need not be appointed at the company's office: *Smith v Paringa Mines Ltd* [1906] 2 Ch 193. Cf *Barron v Potter* [1914] 1 Ch 895. As to the company's registered office see PARA 129.

6 The liabilities incurred by persons acting as director are also as great as if they had been properly appointed: *Western Bank of Scotland v Bairds' Trustees* (1872) 11 M 96. As to directors' liabilities generally see PARA 559. See also *Briton Medical, General and Life Association v Jones (2)* (1889) 61 LT 384; *Coventry and Dixon's Case* (1880) 14 ChD 660, CA; *Re Western Counties Steam Bakeries and Milling Co* [1897] 1 Ch 617, CA.

For companies that are still using the default articles that were prescribed originally for the purposes of the Companies Act 1985 ('legacy articles') (ie the Companies (Tables A to F) Regulations 1985, SI 1985/805: see PARA 230), Schedule, Table A art 92 provides that all acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, are, notwithstanding that it is afterwards discovered that there was a defect in the appointment of any such director, or that any of them were disqualified from holding office, or had vacated office, or were not entitled to vote, as valid as if every such person had been duly appointed and was qualified and had continued to be a director and had been entitled to vote. The reference to subsequent discovery of a defect means a discovery that there is a defect, not a discovery of the facts which cause the defect: *British Asbestos Co Ltd v Boyd* [1903] 2 Ch 439 at 444 per Farwell J; *Channel Collieries Trust Ltd v Dover, St Margaret's and Martin Mill Light Rly Co* [1914] 2 Ch 506, CA; *Albert Gardens (Manly) Pty Ltd v Mercantile Credits Ltd* (1973) 9 ALR 653, Aust HC. As to the limitations upon the effectiveness of this article see also *Morris v Kanssen* [1946] AC 459, [1946] 1 All ER 586, HL. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but art 92 is applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company' and 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. As to the extent to which directors may delegate powers, including to committees, see PARA 537.

7 Companies Act 2006 s 161(1). A defect that the person appointed had no share qualification was held to have been 'afterwards discovered' in *Albert Gardens (Manly) Pty Ltd v Mercantile Credits Ltd* (1973) 9 ALR 653, Aust HC. If the holding of a share qualification is required, this is not a condition of the power of appointment; if it is not complied with, there will still be an appointment, although it will be defective. As to qualification shares see PARA 495 et seq.

8 Companies Act 2006 s 161(1)(a). The provisions of s 161 apply even if the resolution to appoint is void under s 160 (as to which see PARA 485): s 161(2). A company which has put forward a resolution as being validly passed cannot, at any rate after lapse of considerable time, repudiate it as invalid: *Montreal and St Lawrence Light and Power Co v Robert* [1906] AC 196, PC.

9 Companies Act 2006 s 161(1)(b). As to company directors' disqualification generally see PARA 1575 et seq.

10 Companies Act 2006 s 161(1)(c). As to the retirement or removal of directors see PARA 515 et seq.

11 Companies Act 2006 s 161(1)(d). The provisions of s 161 are worded more broadly than their predecessor provisions, the Companies Act 1985 s 285 (repealed).

12 *Albert Gardens (Manly) Pty Ltd v Mercantile Credits Ltd* (1973) 9 ALR 653, Aust HC. See also notes 7, 8.

13 *Morris v Kanssen* [1946] AC 459, [1946] 1 All ER 586, HL; *Re New Cedos Engineering Co Ltd* [1994] 1 BCLC 797 at 812-813 per Oliver J; *Tyne Mutual Steamship Insurance Association v Brown* (1896) 74 LT 283 at 285 per Lord Russell CJ.

14 *Dawson v African Consolidated Land and Trading Co* [1898] 1 Ch 6, CA, doubting *Howbeach Coal Co Ltd v Teague* (1860) 5 H & N 151. See also *Channel Collieries Trust Ltd v Dover, St Margaret's and Martin Mill Light Rly Co* [1914] 2 Ch 506, CA, following *Dawson v African Consolidated Land and Trading Co*. As to who qualifies as a member of a company see PARA 321.

15 *Dawson v African Consolidated Land and Trading Co* [1898] 1 Ch 6, CA; *Briton Medical, General, and Life Association v Jones (2)* (1889) 61 LT 384. As to calls see PARA 1132 et seq. As to de facto directors, and the duties which they owe, see PARA 478 note 9; and as to de facto directors under the Company Directors Disqualification Act 1986 see PARA 1577.

16 *Southern Counties Deposit Bank v Rider and Kirkwood* (1895) 73 LT 374, CA. As to the convening of meetings see PARA 632 et seq.

17 *British Asbestos Co Ltd v Boyd* [1903] 2 Ch 439. See also *Transport Ltd v Schonberg* (1905) 21 TLR 305.

18 *Channel Collieries Trust Ltd v Dover, St Margaret's and Martin Mill Light Rly Co* [1914] 2 Ch 506, CA; *Ellett v Sternberg* (1910) 27 TLR 127. As to allotment of shares see PARA 1088 et seq.

19 *Re New Par Consols* [1898] 1 QB 573.

20 *Faure Electric Accumulator Co v Phillipart* (1888) 58 LT 525; *Murray v Bush* (1873) LR 6 HL 37; *Bank of Hindustan, China and Japan Ltd v Alison* (1871) LR 6 CP 222. Cf *Re Miller's Dale and Ashwood Dale Lime Co* (1885) 31 ChD 211, CA; *Morris v Kanssen* [1946] AC 459, [1946] 1 All ER 586, HL; *Re New Cedos Engineering Co Ltd* [1994] 1 BCLC 797. Likewise, although the expression 'person dealing with the company' in the Companies Act 1985 s 35A(1) (see now the Companies Act 2006 s 40(1); and PARA 263) was wide enough to include a director of the company and, accordingly, might have allowed him to rely upon the protection so afforded, that provision did not apply to a director seeking to rely on his own mistake: *Smith v Henniker-Major & Co (a firm)* [2002] EWCA Civ 762, [2003] Ch 182, [2002] 2 BCLC 655.

21 *Tyne Mutual Steamship Insurance Association v Brown* (1896) 74 LT 283; *York Tramways Co v Willows* (1882) 8 QBD 685, CA (following *Harward's Case* (1871) LR 13 Eq 30 and *Fowler's Case* (1872) LR 14 Eq 316, and dissenting on this point from *Howbeach Coal Co Ltd v Teague* (1860) 5 H & N 151).

22 *Re New Cedos Engineering Co Ltd* [1994] 1 BCLC 797. It is not sufficient to establish that they knew of the facts giving rise to the defect; it is necessary in addition to prove that they were aware that these facts gave rise to an invalidity: *Channel Collieries Trust Ltd v Dover, St Margaret's and Martin Mill Light Rly Co* [1914] 2 Ch 506 at 512, CA, per Lord Cozens-Hardy MR; *AM Spicer & Son Pty Ltd* (1931) 47 CLR 151 at 176 per Starke J (with whom Evatt J concurred), Aust HC; *Albert Gardens (Manly) Pty Ltd v Mercantile Credits Ltd* (1973) 9 ALR 653 at 659, Aust HC, per Gibbs J. See further PARAS 266-268.

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487. Casual vacancies.

A power to fill vacancies may be vested in the continuing directors¹. If any such vacancy is not filled before a general meeting, it may be filled then, and if not, the power of filling the casual vacancy remains in the continuing directors². If a qualified person must be appointed, he must hold the qualification shares at the time of appointment³.

1 As to a company's directors see PARA 478 et seq. For companies that are still using model articles of association that were prescribed originally for the purposes of the Companies Act 1985 ('legacy articles') (ie the Companies (Tables A to F) Regulations 1985, SI 1985/805; see PARA 230), Schedule, Table A art 79 (amended in relation to a private company limited by shares by SI 2007/2541) (cited in PARA 485 note 5) carries a proviso that the director so appointed is to hold office only during the natural term of office of the retiring director or until the next annual general meeting of the company and will not be taken into account in determining the directors who are to retire by rotation at the meeting. If not reappointed at such an annual general meeting, he must vacate office at the conclusion of that meeting. See further *Eyre v Milton Pty Ltd* [1936] Ch 244, CA. As to the requirement to hold an annual general meeting see PARA 630. Where the articles provide that only qualified persons, ie persons with the requisite share qualification, may be appointed, a person is not qualified until he is registered as the holder of the necessary number of shares: *Channel Collieries Trust Ltd v Dover, St Margaret's and Martin Mill Light Rly Co* [1914] 2 Ch 506, CA; *Spencer v Kennedy* [1926] Ch 125; *Pollock v Garrett* 1957 SLT (Notes) 8. As to qualification shares see PARA 495. As to a company's articles of association generally see PARA 228 et seq.

2 *Munster v Cammell Co* (1882) 21 ChD 183 at 187 per Fry J (where casual vacancies are referred to as vacancies occurring otherwise than by retirement in rotation); *Bennett Bros (Birmingham) v Lewis* (1903) 20 TLR 1, CA.

If the number of directors is reduced below a quorum for a directors' meeting, a company's articles of association usually prescribe measures that must be taken to appoint the required number: see the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule Table A art 90; the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 11(3), Sch 2 art 11(3), Sch 3 art 11; and PARA 529. The provisions of what is now the Companies Act 2006 s 161 (see PARA 486) would not seem to apply: see *Morris v Kanssen* [1946] AC 459, [1946] 1 All ER 586, HL. Appointments may be validly made without duly complying with the

formalities required by the articles of association: *Smith v Paringa Mines Ltd* [1906] 2 Ch 193. Cf *Barron v Potter* [1914] 1 Ch 895. Whether a person was appointed to fill a casual vacancy or as an additional director may depend on the determination of the question whether or not a vacancy was treated by the company as still subsisting at the time when the appointment was made: see *Zimmers Ltd v Zimmer* (1951) 95 Sol Jo 803. As to the requirement of official notification see PARA 485. As to the quorum required for a meeting of directors see PARA 529.

3 See *Pollock v Garrett* 1957 SLT (Notes) 8.

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488. Additional directors.

The directors of a company¹ may be invested with the power of appointing additional directors². In face of such a provision, a company cannot usurp the power entrusted to the directors³, unless it is shown that the power could not be exercised by the directors owing to dissension or deadlock⁴. Where the appointment of an additional director is desired to resolve a company deadlocked both at general meeting level and at board level, the court⁵ may make an order under its statutory powers⁶ convening a meeting for the single act of enabling the appointment of a new director to be considered and voted on⁷.

1 As to a company's directors see PARA 478 et seq.

2 For companies that are still using model articles of association that were prescribed originally for the purposes of the Companies Act 1985 ('legacy articles') (ie the Companies (Tables A to F) Regulations 1985, SI 1985/805: see PARA 230), Schedule, Table A art 79 (amended in relation to a private company limited by shares by SI 2007/2541) (cited in PARA 485 note 4) provides (inter alia) that the directors may appoint any person who is willing to act to be a director as an additional director, provided that the appointment does not cause the number of directors to exceed any number fixed by or in accordance with the articles as the maximum number of directors. A director so appointed holds office only until the next following annual general meeting and, if not reappointed at such a meeting, he must vacate his office. As to the requirement of official notification see PARA 485. As to a company's articles of association generally see PARA 228 et seq.

3 *Blair Open Hearth Furnace Co v Reigart* (1913) 29 TLR 449. There may be a concurrent power: see *Isaacs v Chapman* (1916) 32 TLR 237, CA; *Worcester Corsetry Ltd v Witting* [1936] Ch 640, CA (where similar provisions to those in note 2 were held not to exclude the inherent power of the company to appoint directors).

4 *Barron v Potter* [1914] 1 Ch 895. See also *Monnington v Easier plc* [2005] EWHC 2578 (Ch), [2006] 2 BCLC 283 (court had no jurisdiction to order an extraordinary general meeting of the company to be convened for the purpose of considering the replacement of board members where it had not become impracticable to call or to conduct such a meeting in the manner prescribed by the company's articles and by the Companies Acts).

5 As to the meaning of 'court' see PARA 212 note 1; and see note 4.

6 Ie under what is now the Companies Act 2006 s 306 (see PARA 639).

7 *Union Music Ltd v Watson* [2003] EWCA Civ 180, [2003] 1 BCLC 453 (order made even though only one member would be present at the meeting so convened). However, the court will not exercise its powers where to do so would override class rights (*Harman v BML Group Ltd* [1994] 1 WLR 893, [1994] 2 BCLC 674, CA), or where the deadlock has arisen as a result of a division of power within the company which had been agreed to by the parties (*Ross v Telford* [1998] 1 BCLC 82, CA; *Alvona Developments Ltd v Manhattan Loft Corporation (AC) Ltd* [2005] EWHC 1567 (Ch), [2005] All ER (D) 252 (Jul), [2006] BCC 119). As to classes of shares and class rights see PARA 1057 et seq.

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489. Alternate directors.

A company's articles of association¹ may permit the appointment of alternate directors². Such an alternate may be another director, or a third person, depending upon the provisions of the articles. Normally, such a person has the same rights and responsibilities, in relation to any directors' meeting or directors' written resolution, as the alternate's appointor³. His appointment cannot outlast the directorship of the person to whom he is an alternate, but may be made to continue notwithstanding such person's retirement by rotation and reappointment⁴. Whilst the alternate is acting as a director, he stands in a fiduciary position in relation to the company, and accordingly owes the company all the same duties as are owed by a director⁵.

1 As to a company's articles of association generally see PARA 228 et seq.

2 As to a company's directors generally see PARA 478 et seq. Under the model articles of association prescribed for the purposes of the Companies Act 2006 for use by public companies (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3), art 25(1) provides that any director (the 'appointor') may appoint as an alternate any other director, or any other person approved by resolution of the directors, to exercise that director's powers, and to carry out that director's responsibilities, in relation to the taking of decisions by the directors in the absence of the alternate's appointor. Any appointment or removal of an alternate must be effected by notice in writing to the company signed by the appointor, or in any other manner approved by the directors: Sch 3 art 25(2). The notice must identify the proposed alternate and, in the case of a notice of appointment, contain a statement signed by the proposed alternate that the proposed alternate is willing to act as the alternate of the director giving the notice: Sch 3 art 25(3). Other types of company apart from public companies may have alternates if they choose to make such provision in their articles. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. Under those articles, Table A art 65 provides that any director (other than an alternate director) may appoint any other director, or any other person approved by resolution of the directors and willing to act, to be an alternate director and may remove from office an alternate director so appointed by him; and art 68 provides that any appointment or removal of an alternate director must be by notice to the company signed by the director making or revoking the appointment or in any other manner approved by the directors. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but arts 65-69 (see also notes 3, 4) are applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'public company' and 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

3 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 26(1). Except as the articles specify otherwise, alternate directors are deemed for all purposes to be directors, are liable for their own acts and omissions, are subject to the same restrictions as their appointors, and are not deemed to be agents of or for their appointors: Sch 3 art 26(2). A person who is an alternate director but not a director may be counted as participating for the purposes of determining whether a quorum is participating (but only if that person's appointor is not participating), and may sign a written resolution (but only if it is not signed or to be signed by that person's appointor): Sch 3 art 26(3). However, no alternate may be counted as more than one director for such purposes: see Sch 3 art 26(3). An alternate director is not entitled to receive any remuneration from the company for serving as an alternate director except such part of the alternate's appointor's remuneration as the appointor may direct by notice in writing made to the company: Sch 3 art 26(4). As to the quorum required for a meeting of directors see PARA 529. As to board meetings of directors generally see PARA 528. As to the extent to which directors may delegate powers, including to committees, see PARA 537.

Under the 'legacy articles' (ie the Companies (Tables A to F) Regulations 1985, SI 1985/805: see note 2), Table A art 66 provides that an alternate director is entitled to receive notice of all meetings of directors and of all meetings of committees of directors of which his appointor is a member, to attend and vote at any such meeting at which the director appointing him is not personally present and generally to perform all the functions of his appointor as a director in his absence but is not entitled to receive any remuneration from the

company for his services as an alternate director. However, it is not necessary to give notice of a meeting to an alternate director who is absent from the United Kingdom: see art 66. Save as otherwise provided in the articles, an alternate director is deemed for all purposes to be a director and is alone responsible for his own acts and defaults and must not be deemed to be the agent of the director appointing him: art 69. There are thus obvious advantages in appointing a person who is already a director as an alternate. A director who is also an alternate director is entitled in the absence of his appointor to a separate vote on behalf of his appointor in addition to his own vote: see art 88; and PARA 528.

4 Under the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 27, an alternate director's appointment as an alternate terminates: (1) when the alternate's appointor revokes the appointment by notice to the company in writing specifying when it is to terminate (see Sch 3 art 27(a)); (2) on the occurrence in relation to the alternate of any event which, if it occurred in relation to the alternate's appointor, would result in the termination of the appointor's appointment as a director (see Sch 3 art 27(b)); (3) on the death of the alternate's appointor (see Sch 3 art 27(c)); or (4) when the alternate's appointor's appointment as a director terminates, except that an alternate's appointment as an alternate does not terminate when the appointor retires by rotation at a general meeting and is then re-appointed as a director at the same general meeting (see Sch 3 art 27(d)). As to the rotation and reappointment of directors see PARA 515.

Under the 'legacy articles' (ie the Companies (Tables A to F) Regulations 1985, SI 1985/805: see note 2), Table A art 67 provides that an alternate director must cease to be an alternate director if his appointor ceases to be a director; however, if a director retires by rotation or otherwise but is reappointed or deemed to have been reappointed at the meeting at which he retires, any appointment of an alternate director made by him which was in force immediately prior to his retirement continues after his reappointment.

5 See PARA 478 et seq. As to the fiduciary duties owed by a director see PARA 547.

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490. Continuing directors after expiry of term.

When the first board of directors¹ or any subsequent board² continues to act after the period for which the directors were appointed has expired, or where the directors are due to retire and no valid appointment of new directors has been made³, the acting directors (as de facto directors) can continue to act⁴, and the validity of their acts cannot be challenged on the ground that they have ceased to hold office⁵.

1 As to the appointment of first directors see PARA 484. As to the meaning of 'director' under the Companies Acts see PARA 478. As to board meetings of directors see PARA 528.

2 As to the procedure for appointment of directors other than first directors or directors to fill casual vacancies see PARA 485.

3 As to the retirement of directors see PARA 515.

4 *Muir v Forman's Trustee* (1903) 5 F 546, Ct of Sess. Cf *Tyne Mutual Steamship Insurance Association v Brown* (1896) 74 LT 283; *Garden Gully United Quartz Mining Co v McLister* (1875) 1 App Cas 39, PC. As to a company's articles of association generally see PARA 228 et seq.

5 See the Companies Act 2006 s 161; and PARA 486.

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(B) RESTRICTIONS ON APPOINTMENT

491. Requirement for at least one natural person.

A company¹ must have at least one director² who is a natural person³. This requirement is met if the office of director is held by a natural person as a corporation sole⁴ or otherwise by virtue of an office⁵; and, subject to this requirement, a limited company may be appointed to perform the duties and exercise the powers usually performed and exercised by individuals appointed as directors⁶.

If it appears to the Secretary of State⁷ that a company is in breach of this requirement to have at least one director who is a natural person⁸, the Secretary of State may give the company a direction⁹, which must specify:

- 853 (1) the statutory requirement the company appears to be in breach of¹⁰;
- 854 (2) what the company must do in order to comply with the direction¹¹; and
- 855 (3) the period within which it must do so¹².

The direction must also inform the company of the consequences of failing to comply¹³.

Where the company is in breach of the requirement to have at least one director who is a natural person¹⁴, it must comply with the direction by making the necessary appointment¹⁵, and by giving the required notice¹⁶, before the end of the period specified in the direction¹⁷. If the company has already made the necessary appointment (or so far as it has done so), it must comply with the direction by giving the required notice¹⁸ before the end of the period specified in the direction¹⁹.

If a company fails to comply with a direction so given²⁰, an offence is committed by the company, and by every officer of the company who is in default²¹. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 5 on the standard scale²² and (for continued contravention) a daily default fine²³ not exceeding one-tenth of level 5 on the standard scale²⁴.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'director' under the Companies Acts see PARA 478.

3 Companies Act 2006 s 155(1). This provision is intended to ensure that every company will have at least one individual who can, if necessary, be held to account for the company's actions; it is also consistent with the increased thrust being placed on the importance of directors understanding their statutory duties: see White Paper *Company Law Reform* (Cm 6456) (2005) para 3.3.

4 As to corporations sole see **CORPORATIONS** vol 9(2) (2006 Reissue) PARAS 1111-1112.

5 Companies Act 2006 s 155(2).

6 *Re Bulawayo Market and Offices Co Ltd* [1907] 2 Ch 458. See also *Bank of Ireland v Cogry Flax Spinning Co* [1900] 1 IR 219. As to nominee directors see PARA 480.

7 As to the Secretary of State see PARA 6.

8 ie in breach of the Companies Act 2006 s 155 (see the text and notes 1-5): see s 156(1).

9 Companies Act 2006 s 156(1). The direction referred to in the text is a direction under s 156: see s 156(1)

10 Companies Act 2006 s 156(2)(a).

- 11 Companies Act 2006 s 156(2)(b).
- 12 Companies Act 2006 s 156(2)(c). The period mentioned in the text must be not less than one month or more than three months after the date on which the direction is given: see s 156(2).
- 13 Companies Act 2006 s 156(3).
- 14 Ie in breach of the Companies Act 2006 s 155 (see the text and notes 1-5): see s 156(4).
- 15 Companies Act 2006 s 156(4)(a). As to the appointment of directors see PARA 484 et seq.
- 16 Companies Act 2006 s 156(4)(b). The text refers to the giving of notice under s 167 (duty to notify registrar of changes) (see PARA 514): see s 156(4)(b).
- 17 Companies Act 2006 s 156(4).
- 18 Ie under the Companies Act 2006 s 167 (duty to notify registrar of changes) (see PARA 514): see s 156(5).
- 19 Companies Act 2006 s 156(5).
- 20 Ie a direction under the Companies Act 2006 s 156 (see the text and notes 6-18): see s 156(6).
- 21 Companies Act 2006 s 156(6). For these purposes, a shadow director is treated as an officer of the company: s 156(6). As to the meaning of 'shadow director' see PARA 478. As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.
- 22 As to the meaning of 'standard scale' see PARA 1622 note 5.
- 23 As to the meaning of 'daily default fine' see PARA 1622.
- 24 Companies Act 2006 s 156(7).

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492. Minimum age requirement.

A person may not be appointed a director¹ of a company² unless he has attained the age of 16 years³. However, this does not affect the validity of an appointment that is not to take effect until the person appointed attains that age⁴. Where the office of director of a company is held by a corporation sole, or otherwise by virtue of another office, the appointment to that other office of a person who has not attained the age of 16 years is not effective also to make him a director of the company until he attains the age of 16 years⁵. Any appointment made in contravention of the minimum age requirement⁶ is void⁷ but any liability of a person under any provision of the Companies Acts is not affected⁸ if he purports to act as director⁹, or if he acts as a shadow director¹⁰, although he could not, by virtue of the minimum age requirement¹¹, be validly appointed as a director¹².

The Secretary of State¹³ may make provision by regulations¹⁴ for cases in which a person who has not attained the age of 16 years may be appointed a director of a company¹⁵. The regulations must specify the circumstances in which, and any conditions subject to which, the appointment may be made¹⁶. If the specified circumstances cease to obtain, or any specified conditions cease to be met, a person who was appointed by virtue of the regulations and who has not since attained the age of 16 years ceases to hold office¹⁷.

1 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16. As to the appointment of directors see PARA 484 et seq.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 Companies Act 2006 s 157(1). The provisions of s 157 have effect subject to s 158 (see the text and notes 13-17): s 157(6). Where a person appointed a director of a company before 1 October 2008 (ie before s 157 came into force: see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, art 5(1)(c)) has not attained the age of 16 on that date or where the office of director of a company is held by a corporation sole, or otherwise by virtue of another office, and the person appointed to that other office has not attained the age of 16 years on that date, and the case is not one excepted from the Companies Act 2006 s 157 by regulations under s 158, that person ceases to be a director as from that date (ie 1 October 2008): see s 159(1), (2); and see also s 159(3), (4). As to corporations sole see **CORPORATIONS** vol 9(2) (2006 Reissue) PARAS 1111-1112.

4 Companies Act 2006 s 157(2). See note 3.

5 Companies Act 2006 s 157(3). See note 3.

6 Ie in contravention of the Companies Act 2006 s 157: see s 157(4).

7 Companies Act 2006 s 157(4). See note 3.

8 Ie by anything in the Companies Act 2006 s 157: see s 157(5).

9 Companies Act 2006 s 157(5)(a). See note 3.

10 Companies Act 2006 s 157(5)(b). See note 3. As to the meaning of 'shadow director' see PARA 478.

11 Ie by virtue of the Companies Act 2006 s 157: see s 157(5).

12 Companies Act 2006 s 157(5). See note 3.

13 As to the Secretary of State see PARA 6 et seq.

14 As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 158 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 158(5), 1289. Without prejudice to the general power to make different provision for different cases, the regulations may make different provision for different parts of the United Kingdom: see s 158(4). At the date at which this volume states the law, no such regulations have been made under s 158. As to the meaning of 'United Kingdom' see PARA 1 note 5.

15 Companies Act 2006 s 158(1).

16 Companies Act 2006 s 158(2).

17 Companies Act 2006 s 158(3).

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493. Restriction on undischarged bankrupt acting as director.

If a person acts as director¹ of a company² or directly or indirectly takes part in or is concerned in the promotion, formation or management of a company, without the leave of the court³, at a time when⁴: (1) he is an undischarged bankrupt⁵; (2) a moratorium period under a debt relief order applies in relation to him⁶; or (3) a bankruptcy restrictions order or a debt relief restrictions order is in force in respect of him⁷, he commits an offence⁸. The offence is one of strict liability⁹.

A person who acts in contravention of these provisions is also personally responsible for all the relevant debts of the company incurred whilst he was involved in its management¹⁰.

In England and Wales¹¹, the leave of the court may not be given unless notice of intention to apply for it has been served on the official receiver¹²; and it is the latter's duty, if he is of the opinion that it is contrary to the public interest that the application should be granted, to attend on the hearing of the application and oppose it¹³.

1 As to the meaning of 'director' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1575.

2 As to the meaning of 'company' for these purposes see PARA 1590 note 2.

3 As to the meaning of 'court' for these purposes see PARA 1590 note 4.

4 See the Company Directors Disqualification Act 1986 s 11(1); and PARA 1590.

5 See the Company Directors Disqualification Act 1986 s 11(1)(a); and PARA 1590. As to discharge from bankruptcy see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 629 et seq.

6 See the Company Directors Disqualification Act 1986 s 11(1)(aa); and PARA 1590.

7 See the Company Directors Disqualification Act 1986 s 11(1)(b); and PARA 1590. A reference in an enactment to a person in respect of whom a bankruptcy restrictions order has effect (or who is 'the subject of' a bankruptcy restrictions order) includes a reference to a person in respect of whom a bankruptcy restrictions undertaking has effect: see the Insolvency Act 1986 s 281A, Sch 4A para 8; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**. As to bankruptcy orders see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 195 et seq.

8 See the Company Directors Disqualification Act 1986 s 11(1); and PARA 1590. A person guilty of such an offence is liable (on conviction on indictment) to imprisonment for a term not exceeding two years or a fine or to both or (on summary conviction) to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both: see s 13; and PARA 1590. As to the meaning of 'statutory maximum' see PARA 1622 note 6.

9 See *R v Brockley* [1994] 1 BCLC 606, CA.

10 See the Company Directors Disqualification Act 1986 s 15(1)(a); and PARA 1616.

11 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

12 As to the meaning of reference in the Company Directors Disqualification Act 1986 to the official receiver, in relation to the winding up of a company or the bankruptcy of an individual, see PARA 1590 note 13.

13 See the Company Directors Disqualification Act 1986 s 11(3); and PARA 1590.

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494. Persons subject to disqualification orders.

In circumstances that are specified under statute¹, the court² may, and in some circumstances must, make a disqualification order³ against a person, to the effect that for a period specified in the order:

856 (1) he must not be a director of a company⁴; or

857 (2) he must not act as receiver of a company's property⁵; or

858 (3) he must not in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company⁶,

unless (in each case) he has the leave of the court⁷; nor may he act as an insolvency practitioner⁸.

The court may make such an order:

- 859 (a) where a person is convicted of certain indictable offences⁹;
- 860 (b) where a person has been persistently in default in relation to provisions of the companies legislation¹⁰;
- 861 (c) if, in the course of the winding up of a company, it appears that a person has been guilty of fraudulent trading¹¹ or, while an officer or liquidator of the company, receiver of the company's property or administrative receiver of the company, of any fraud in relation to the company or of any breach of his duty¹²;
- 862 (d) where a person is convicted of certain summary offences related to the contravention of, or failure to comply with, any provision of the companies legislation¹³;
- 863 (e) where, on an application by the Secretary of State following an investigation, the court is satisfied, and it is expedient in the public interest, that a person's conduct in relation to the company makes him unfit to be concerned in the management of a company¹⁴;
- 864 (f) where a person is the subject of a court declaration under the fraudulent trading provisions¹⁵ or under the wrongful trading provisions¹⁶ which makes that person liable to make a contribution to a company's assets¹⁷.

It is the duty of the court to make such an order in any case where, on application, it is satisfied:

- 865 (i) that a person is or has been a director of a company which has at any time become insolvent, whether while he was a director or subsequently¹⁸; and
- 866 (ii) that his conduct as a director of that company, either taken alone or taken together with his conduct as a director of any other company or companies, makes him unfit to be concerned in the management of a company¹⁹.

The court must also make a disqualification order against a person if:

- 867 (A) an undertaking which is a company of which he is a director commits a breach of competition law²⁰; and
- 868 (B) the court considers that his conduct as a director makes him unfit to be concerned in the management of a company²¹.

1 le in the circumstances specified in the Company Directors Disqualification Act 1986: see PARA 1575 et seq.

2 As to the meaning of 'court' for these purposes see PARA 1578 note 1.

3 As to disqualification orders generally see PARA 1575 et seq.

4 See the Company Directors Disqualification Act 1986 s 1(1)(a); and PARA 1578. As to the meaning of 'director' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1575; and as to the meaning of 'company' see PARA 1576 note 1.

5 See the Company Directors Disqualification Act 1986 s 1(1)(a); and PARA 1578. As to the construction of references to receivers for these purposes see PARA 1578 note 5. As to administrative receivers generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 380 et seq.

- 6 See the Company Directors Disqualification Act 1986 s 1(1)(a); and PARA 1578. See also PARA 1578 notes 6-8.
- 7 See the Company Directors Disqualification Act 1986 s 1(1)(a); and PARA 1578.
- 8 See the Company Directors Disqualification Act 1986 s 1(1)(b); and PARA 1578. As to the meaning of references to acting as an insolvency practitioner for these purposes see PARA 1578 note 9.
- 9 See the Company Directors Disqualification Act 1986 s 2; and PARA 1580.
- 10 See the Company Directors Disqualification Act 1986 s 3; and PARA 1581.
- 11 Is an offence for which he is liable under the Companies Act 2006 s 993 (see PARA 316), whether he has been convicted or not: see the Company Directors Disqualification Act 1986 s 4; and PARA 1582.
- 12 See the Company Directors Disqualification Act 1986 s 4; and PARA 1582.
- 13 See the Company Directors Disqualification Act 1986 s 5; and PARA 1583.
- 14 See the Company Directors Disqualification Act 1986 s 8; and PARA 1584.
- 15 Is under the Insolvency Act 1986 s 213 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 911).
- 16 Is under the Insolvency Act 1986 s 214 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 914).
- 17 See the Company Directors Disqualification Act 1986 s 10; and PARA 1589.
- 18 See the Company Directors Disqualification Act 1986 s 6(1)(a); and PARA 1592.
- 19 See the Company Directors Disqualification Act 1986 s 6(1)(b); and PARA 1592.
- 20 See the Company Directors Disqualification Act 1986 s 9A(1), (2); and PARA 1585. See also ss 9B-9E; and PARAS 1585-1588.
- 21 See the Company Directors Disqualification Act 1986 s 9A(1), (3); and PARA 1585. See also ss 9B-9E; and PARAS 1585-1588.

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C. QUALIFICATION SHARES

495. Whether a share qualification is required.

Whether or not a company director¹ is required to possess any shareholding² at all in the company depends on the provisions of the company's articles of association³. Where such a qualification is so specified, the holding of shares as one of several joint holders constitutes good qualification⁴.

The acts of a director or manager are valid if done before he is bound by law or by the articles to acquire his qualification⁵, or notwithstanding that a defect may afterwards be discovered in his share qualification⁶.

¹ As to a company's directors see PARA 478 et seq.

2 As to share capital generally see PARA 1042 et seq.

3 *Re British Provident Life And Guarantee Association, De Ruvigne's Case* (1877) 5 ChD 306 at 321, CA, per James LJ, at 323 per Brett JA, and at 326 per Amphlett JA. As to a company's articles of association generally see PARA 228 et seq. No such qualification as is mentioned in the text is specified as being required either under the model articles of association which have been prescribed for the purposes of the Companies Act 2006 (see PARA 228 et seq) or under the default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles') (ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, which have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230). Where such a qualification is, however, specified, and a time limit on acquiring the qualification is also specified, as was the case under the Companies Act 1985 s 291 (repealed), time runs, when the election of directors is determined by a poll, only when the result of the poll is ascertained: *Holmes v Lord Keyes* [1959] Ch 199, [1958] 2 All ER 129, CA. Where the share qualification is increased, an existing director does not thereby cease to hold that larger qualification, but has a reasonable time in which to acquire it: *Molineaux v London, Birmingham and Manchester Insurance Co* [1902] 2 KB 589, CA. Under the Companies Act 1985 s 291 (repealed), criminal sanctions could be imposed on a person who acted as director without meeting the qualification requirement. See also *Re Barry and Staines Linoleum Ltd* [1934] Ch 227; *Re Gilt Edge Safety Glass Ltd* [1940] Ch 495, [1940] 2 All ER 237.

4 *Re Glory Paper Mills Co, Dunster's Case* [1894] 3 Ch 473 at 480, CA, per Lindley LJ; *Grundy v Briggs* [1910] 1 Ch 444.

5 *Re International Cable Co, ex p Official Liquidator* (1892) 66 LT 253.

6 See the Companies Act 2006 s 161; and PARA 486.

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496. Liability for qualification shares.

If a company director¹ resigns² before the time fixed as the date after which, unless already qualified, he is under the articles of association³ to be deemed to have agreed to take his qualification shares from the company⁴, he is not liable in respect of the shares to the company, although he acted as director without qualification⁵. If, however, he does not resign until after that date, he is liable, although he has never acted after accepting office⁶.

A director who is bound by the articles to acquire a qualification, but who has not expressly agreed to take the shares from the company, is under no obligation to take the shares from the company⁷, at any rate where it is possible for him to acquire his shares elsewhere⁸.

Where a director applies for his qualification shares, but no allotment is made and the company does not undertake the business for which it was incorporated, or any other business, within the period during which he is to qualify or else be deemed bound, he cannot be put on the list of contributories⁹. Again, if his appointment as director is void, and the only agreement to take shares as qualification shares consists in his acting as director and the registration of shares in his name, the acting director is not liable on them¹⁰.

If shares sufficient to qualify a director are registered in his name before his resignation, even without his knowledge, he will be liable to pay for them unless he has acquired other shares before the time when he was bound to qualify; for as director he must be taken to know the contents of the register and therefore that the shares have been registered in his name¹¹.

A transfer of qualification shares with a view to avoid liability may be void for fraud¹².

1 As to a company's directors see PARA 478 et seq.

2 As to resignation by a director see PARA 516.

3 As to a company's articles of association generally see PARA 228 et seq.

4 As to whether a director requires a share qualification see PARA 495. As to share capital generally see PARA 1042 et seq. A time limit on acquiring a share qualification was specified under the Companies Act 1985 s 291 (repealed): see PARA 495.

5 *Re Pandora Theatre Co* (1884) 28 Sol Jo 238; *Karuth's Case* (1875) LR 20 Eq 506; *Green's Case* (1874) LR 18 Eq 428; *Re Self-Acting Sewing Machine Co* (1886) 54 LT 676 (where the conduct of the director was held equivalent to refusal to act or to resignation); *Austin's Case* (1866) LR 2 Eq 435; *Re Imperial Land Credit Corp'n Ltd, ex p Eve* (1868) 37 LJ Ch 844; *Salisbury-Jones and Dale's Case* [1894] 3 Ch 356, CA.

6 *Re Hercynia Copper Co* [1894] 2 Ch 403, CA; *Isaacs' Case* [1892] 2 Ch 158, CA.

7 *Re Printing, Telegraph and Construction Co of the Agence Havas, ex p Cammell* [1894] 2 Ch 392, CA (where shares were allotted to a director without his knowledge before his resignation, and registered afterwards); *Re Wheal Buller Consols* (1888) 38 ChD 42, CA; *Brown's Case* (1873) 9 Ch App 102 at 105 per Lord Selborne LC; *Green's Case* (1874) LR 18 Eq 428; *Austin's Case* (1866) LR 2 Eq 435; *Karuth's Case* (1875) LR 20 Eq 506 at 511; *Re Colombia Chemical Factory, Manure and Phosphate Works, Hewitt's Case, Brett's Case* (1883) 25 ChD 283, CA. See, however, *Harward's Case* (1871) LR 13 Eq 30; *Re Esparto Trading Co* (1879) 12 ChD 191. In *Re Bread Supply Association, Konrath's Case* (1893) 62 LJ Ch 376, Kekewich J held that the mere acting as director obliged him to qualify, and to do so by buying shares from the company, if he did not buy them elsewhere within a reasonable time, following, it was said, *Isaacs' Case* [1892] 2 Ch 158, CA, which case, however, is clearly distinguishable, as the clause ran 'he shall be deemed to have agreed to take his qualification shares from the company'. It seems that *Re Bread Supply Association, Konrath's Case* is not consistent with *Re Medical Attendance Association, Onslow's Case* (1887) 57 LJ Ch 338n, CA, and *Re Wheal Buller Consols*.

8 *Hamley's Case* (1877) 5 ChD 705. It may be different where he cannot obtain them elsewhere: see *Hamley's Case* at 707 per Jessel MR.

9 *Re Youde's Billposting Ltd, Clayton's Case* (1902) 18 TLR 656, 731, CA. See also *General International Agency Co, Chapman's Case* (1866) LR 2 Eq 567 (where an allotment of a qualification was refused); *Tothill's Case* (1865) 1 Ch App 85 (where a smaller number was allotted); *Re Medical Attendance Association, Onslow's Case* (1887) 57 LJ Ch 338n, CA (where a smaller number of shares than the original qualification applied for was allotted, the company shortly afterwards reducing the required number to the same figure). As to the meaning of 'contributory' see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 703.

10 *Stace and Worth's Case* (1869) 4 Ch App 682; *Re Wheal Buller Consols* (1888) 38 ChD 42, CA. See also *Hamley's Case* (1877) 5 ChD 705; and the other cases cited in PARA 498 note 3. Acting as a director without qualification is not a misfeasance under the Insolvency Act 1986 s 212: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688 et seq. See also *Coventry and Dixon's Case* (1880) 14 ChD 660, CA.

11 *Re Portuguese Consolidated Copper Mines Ltd, ex p Lord Inchiquin* [1891] 3 Ch 28, CA; *Leeke's Case* (1871) 6 Ch App 469; *Molineaux v London, Birmingham and Manchester Insurance Co* [1902] 2 KB 589, CA. See also *Re Esparto Trading Co* (1879) 12 ChD 191 at 203 per Hall V-C (where the shares were not registered, but the calls were debited and the director was held to have assented to the entries); *Harward's Case* (1871) LR 13 Eq 30 (where the allotment committee was said to be the agent of the director to make an allotment to him); *Fowler's Case* (1872) LR 14 Eq 316 (where a director applied for further shares in ignorance that the qualifying number had been allotted to him). See also *Duke's Case* (1876) 1 ChD 620, doubting *Fowler's Case*.

12 *Gilbert's Case* (1870) 5 Ch App 559; *Re South London Fish Market Co* (1888) 39 ChD 324 at 331 per Kay J. See also PARA 399.

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497. Qualification shares held as trustee etc.

A company director¹ who is bound to hold his qualification shares² 'in his own right' is properly qualified if he holds in his name shares of which he is trustee³; and, if he is not bound to acquire his qualification shares from the company, is properly qualified if he holds shares which he receives as a present from the promoter by transfer or allotment⁴. In the latter case he may, however, be liable for misfeasance, and may be ordered to pay to the company the value of the shares⁵.

Although a director fulfils the requirement of holding shares 'in his own right' if he holds shares as trustee, in spite of the beneficial interest being elsewhere, it is not sufficient if they are registered as held by the director in a representative capacity, as, for example, where he is registered as trustee in bankruptcy or as executor or as liquidator⁶; nor is it sufficient where he is bankrupt and his shares have, therefore, vested in his trustee, after which the company may no longer deal with the shares as the director's own⁷. No notice of any trust, expressed, implied or constructive may, however, be entered on the register⁸ and the persons holding shares in a representative capacity are entitled to have a clean entry⁹.

1 As to a company's directors see PARA 478 et seq.

2 As to whether a director requires a share qualification see PARA 495. As to share capital generally see PARA 1042 et seq. A time limit on acquiring a share qualification was specified under the Companies Act 1985 s 291 (repealed); see PARA 495.

3 *Pulbrook v Richmond Consolidated Mining Co* (1878) 9 ChD 610; *Cooper v Griffin* [1892] 1 QB 740, CA; *Howard v Sadler* [1893] 1 QB 1; *Bainbridge v Smith* (1889) 41 ChD 462 at 475, CA, per Lindley LJ; *Re Bainbridge, Reeves v Bainbridge* [1889] WN 228; *Sutton v English and Colonial Produce Co* [1902] 2 Ch 502.

4 *Brown's Case* (1873) 9 Ch App 102; *Carling, Hespeler and Walsh's Cases* (1875) 1 ChD 115, CA. See also *Miller's Case* (1877) 5 ChD 70, CA (where by the articles of association the qualification was to be provided by the company, and was forfeited on retirement, and the director was held not liable as shareholder). If shares are allotted and paid for out of money of the company fraudulently obtained by a promoter, they will be treated as unpaid although the director is innocent: *Leeke's Case* (1871) 6 Ch App 469; *Hay's Case* (1875) 10 Ch App 593. See also PARA 65.

5 *De Ruvigne's Case* (1877) 5 ChD 306, CA; *Pearson's Case* (1877) 5 ChD 336, CA; *Re Great Northern and Midland Coal Co*, *Currie's Case* (1863) 3 De GJ & Sm 367; *Re London and South Western Canal Ltd* [1911] 1 Ch 346. See PARA 54; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688 et seq.

6 *Boschoek Pty Co Ltd v Fuke* [1906] 1 Ch 148 (in which instances the company could not deal with the shares as those of the registered holder). The articles of association may, however, contemplate that a person may be a director in a representative capacity: *Grundy v Briggs* [1910] 1 Ch 444 at 451 per Eve J.

7 *Sutton v English and Colonial Produce Co* [1902] 2 Ch 502 (where registration of subsequently acquired shares was enforced, the trustee not objecting). As to the restriction on undischarged bankrupts acting as directors see PARA 493.

8 See the Companies Act 2006 s 126; and PARA 343. As to the register of members see PARA 335 et seq. As to express, implied or constructive trusts etc see **TRUSTS** vol 48 (2007 Reissue) PARA 624 et seq.

9 *Re TH Saunders & Co* [1908] 1 Ch 415. See also PARA 352.

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498. Condition precedent to holding office.

If the holding of shares is a condition precedent to becoming a director of a company¹, the director must actually be registered as the holder of qualification shares before he is

appointed², otherwise his election is void³; but, where it is not a condition precedent, he may be appointed and act before he qualifies⁴.

1 As to a company's directors see PARA 478 et seq. As to whether a director requires a share qualification see PARA 495.

2 *Channel Collieries Trust Ltd v Dover, St Margaret's and Martin Mill Light Rly Co* [1914] 2 Ch 506, CA; *Spencer v Kennedy* [1926] Ch 125. A time limit on acquiring a shares qualification was specified under the Companies Act 1985 s 291 (repealed): see PARA 495.

3 *Hamley's Case* (1877) 5 ChD 705; *Re Elham Valley Rly Co, Biron's Case* (1878) 26 WR 606; *Barber's Case* (1877) 5 ChD 963, CA; *Jenner's Case* (1877) 7 ChD 132, CA; cf *Stace and Worth's Case* (1869) 4 Ch App 682.

4 *Re International Cable Co Ltd* (1892) 66 LT 253; *Re Portuguese Consolidated Copper Mines Ltd* (1889) 42 ChD 160, CA.

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D. REGISTERS TO BE KEPT

(A) REGISTER OF DIRECTORS

499. The register of directors.

Every company¹ must keep a register of its directors².

The register must contain the required particulars³ of each person who is a director of the company⁴. Accordingly, a company's register of directors must contain the following particulars in the case of an individual⁵:

- 869 (1) name⁶ and any former name⁷;
- 870 (2) a service address⁸;
- 871 (3) the country or state (or part of the United Kingdom⁹) in which he is usually resident¹⁰;
- 872 (4) nationality¹¹;
- 873 (5) business occupation (if any)¹²;
- 874 (6) date of birth¹³.

In the case of a body corporate¹⁴, or a firm¹⁵ that is a legal person under the law by which it is governed, a company's register of directors must contain the following particulars¹⁶:

- 875 (a) corporate or firm name¹⁷;
- 876 (b) registered or principal office¹⁸;
- 877 (c) in the case of an EEA company¹⁹ to which the First Company Law Directive²⁰ applies, particulars of²¹: (i) the register in which the company file²² is kept (including details of the relevant state)²³; and (ii) the registration number in that register²⁴;
- 878 (d) in any other case, particulars of²⁵: (i) the legal form of the company or firm and the law by which it is governed²⁶; and (ii) if applicable, the register in which it is entered (including details of the state) and its registration number in that register²⁷.

The register must be kept available for inspection either at the company's registered office²⁸, or at a place specified in regulations²⁹. The company must give notice to the registrar of companies³⁰ of the place at which the register is kept available for inspection³¹, and of any change in that place³², unless it has at all times been kept at the company's registered office³³. The register must be open to the inspection of any member of the company³⁴ without charge³⁵, and to the inspection of any other person on payment of such fee as may be prescribed³⁶.

If default is made in complying with the requirements to keep a register³⁷, or to maintain the required particulars to be contained therein³⁸, or to keep the register available for inspection³⁹, or if default is made for 14 days in complying with the giving of notice to the registrar of the place where inspection may be made⁴⁰, or if an inspection⁴¹ is refused, an offence is committed by the company, and by every officer of the company who is in default⁴². A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 5 on the standard scale⁴³ and (for continued contravention) a daily default fine⁴⁴ not exceeding one-tenth of level 5 on the standard scale⁴⁵. In the case of a refusal of inspection of the register, the court⁴⁶ may by order compel an immediate inspection of it⁴⁷.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 162(1). As to the meaning of 'director' under the Companies Acts see PARA 478. On and after 1 October 2009, the register of directors and secretaries kept by a company under the Companies Act 1985 s 288(1) (repealed) is to be treated as two separate registers, namely a register of directors kept under and for the purposes of the Companies Act 2006 s 162, and a register of secretaries kept under and for the purposes of s 275 (see PARA 605): see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 25. As to the register of directors' residential addresses see PARA 500 et seq.

The provisions of the Companies Act 2006 ss 162-164, 166 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 6, but with the Companies Act 2006 s 162 as modified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Ie as specified in the Companies Act 2006 s 163 (particulars of directors to be registered: individuals) (see the text and notes 5-13), s 164 (particulars of directors to be registered: corporate directors and firms) (see the text and notes 14-27) and s 166 (particulars of directors to be registered: power to make regulations): see s 162(2). The Secretary of State may make provision by regulations amending s 163 or s 164, so as to add to or remove items from the particulars required to be contained in a company's register of directors: s 166(1). As to the Secretary of State see PARA 6. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 166 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 166(2), 1290. At the date at which this volume states the law, no such regulations had been made under s 166.

The statement of proposed officers that is required to be delivered in accordance with the Companies Act 2006 s 9(1), (4) (see PARA 111) to the registrar of companies must contain the required particulars (ie the particulars that are required to be stated in the company's register of directors and register of directors' residential addresses) of the person who is, or persons who are, to be the first director or directors of the company: see s 12; and PARA 112. As to the appointment of first directors see PARA 484.

4 Companies Act 2006 s 162(2).

5 Companies Act 2006 s 163(1). See note 3.

6 For these purposes, 'name' means a person's Christian name (or other forename) and surname, except that in the case of a peer, or an individual usually known by a title, the title may be stated instead of his Christian name (or other forename) and surname or in addition to either or both of them: Companies Act 2006 s 163(2). See note 3.

7 Companies Act 2006 s 163(1)(a). For these purposes, a 'former name' means a name by which the individual was formerly known for business purposes; and, where a person is or was formerly known by more than one such name, each of them must be stated: s 163(3). However, it is not necessary for the register to contain particulars of a former name in the following cases: (1) in the case of a peer or an individual normally known by a British title, where the name is one by which the person was known previous to the adoption of or succession to the title (s 163(4)(a)); (2) in the case of any person, where the former name either was changed

or disused before the person attained the age of 16 years, or has been changed or disused for 20 years or more (s 163(4)(b)). See note 3.

8 Companies Act 2006 s 163(1)(b). A person's service address may be stated to be 'The company's registered office': s 163(5). See note 3. As to a company's registered office see PARA 129. As to requirements relating to service addresses generally see PARA 673.

In the case of an existing company, the relevant existing address of a director is deemed, on and after 1 October 2009, to be a service address, and any entry in the company's register of directors stating that address is treated, on and after that date, as complying with the obligation in the Companies Act 2006 s 163(1)(b) to state a service address: Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 27(1). The relevant existing address is the address that immediately before 1 October 2009 appeared in the company's register of directors and secretaries as having been notified to the company under the Companies Act 1985 s 289(1A) (repealed) (service address notified by individual applying for confidentiality order in respect of usual residential address) or, if no such address appeared, the address that immediately before that date appeared in the company's register of directors and secretaries as the director's usual residential address: Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 27(2). Any notification of a change of a relevant existing address occurring before 1 October 2009 that is received by the company on or after that date is treated as being or, as the case may be, including notification of a change of service address: Sch 2 para 27(3). However, the operation of Sch 2 para 27 does not give rise to any duty to notify the registrar under the Companies Act 2006 s 167 (duty to notify registrar of changes in particulars contained in register) (see PARA 514): Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 27(4). As to the meaning of 'existing company' for these purposes see PARA 18 note 2. As to the company's register of directors and secretaries see note 2.

The registrar of companies may make such entries in the register of companies as appear to be appropriate having regard to Sch 2 para 27 and the information appearing on the register immediately before 1 October 2009 or notified to the registrar in accordance with Sch 2 para 31(2) (effect of repealed provisions): Sch 2 para 32(1). In particular, the registrar may record as a service address a relevant existing address (within the meaning of Sch 2 para 27) or, in the case of a company formed and registered on an application to which Sch 2 para 2(3) applies (see PARA 24 note 4), an address notified to the registrar in connection with that application as a director's usual residential address: Sch 2 para 32(2). Any notification of a change of a relevant existing address occurring before 1 October 2009 that is received by the registrar on or after that date is treated as being or, as the case may be, including notification of a change of service address: Sch 2 para 32(4). As to the registrar of companies see PARA 131 et seq. As to the register of companies see PARA 146 et seq.

9 As to the meaning of 'United Kingdom' see PARA 1 note 5.

10 Companies Act 2006 s 163(1)(c). See note 3.

11 Companies Act 2006 s 163(1)(d). See note 3.

12 Companies Act 2006 s 163(1)(e). See note 3.

13 Companies Act 2006 s 163(1)(f). See note 3.

14 As to the meaning of 'body corporate' see PARA 1 note 5.

15 As to the meaning of 'firm' see PARA 112 note 14.

16 Companies Act 2006 s 164. See note 3. It seems that for these purposes 'director' does not include a de facto director: see *Re Lo-Line Electric Motors Ltd* [1988] Ch 477 at 489, [1988] 2 All ER 692 at 699, obiter, per Sir Nicholas Browne-Wilkinson. As to de facto directors, and the duties which they owe, see PARA 478 note 8; and as to de facto directors under the Company Directors Disqualification Act 1986 see PARA 1577.

17 Companies Act 2006 s 164(a). See note 3.

18 Companies Act 2006 s 164(b). See note 3.

19 As to the meaning of 'EEA company' see PARA 29.

20 The EC Council Directive 68/151 (OJ L65, 14.3.68, p 8) on co-ordination of safeguards which, for the protection of the interests of members and others, are required by member states of companies, with a view to making such safeguards equivalent throughout the Community (see PARA 23): see the Companies Act 2006 s 164(c). See note 3.

21 Companies Act 2006 s 164(c). See note 3.

22 le the company file mentioned in EC Council Directive 68/151 (OJ L65, 14.3.68, p 8) art 3 (which provides that, in each member state, a file must be opened in a central register, commercial register or companies register, for each of the companies registered therein: see art 3(1); and see PARA 141 note 16): see the Companies Act 2006 s 164(c)(i). See note 3.

23 Companies Act 2006 s 164(c)(i). See note 3.

24 Companies Act 2006 s 164(c)(ii). See note 3.

25 Companies Act 2006 s 164(d). See note 3.

26 Companies Act 2006 s 164(d)(i). See note 3.

27 Companies Act 2006 s 164(d)(ii). See note 3. As to a company's registered number see ss 1066, 1067; and PARAS 139-140.

28 Companies Act 2006 s 162(3)(a).

29 Companies Act 2006 s 162(3)(b). The text refers to a place specified in regulations made under s 1136 (see PARA 676): see s 162(3)(b).

30 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements for the proper delivery of documents to the registrar see PARA 142. As to a company's general duty to notify the registrar of changes relating to directors or their particulars see PARA 514.

31 Companies Act 2006 s 162(4)(a).

32 Companies Act 2006 s 162(4)(b).

33 Companies Act 2006 s 162(4).

34 As to the meaning of 'member of the company' see PARA 321.

35 Companies Act 2006 s 162(5)(a).

36 Companies Act 2006 s 162(5)(b). In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: s 1167. In exercise of the powers conferred by s 162(5)(b), the Secretary of State has made the Companies (Fees for Inspection of Company Records) Regulations 2008, SI 2008/3007. Accordingly, for the purpose of the Companies Act 2006 s 162(5)(b), the fee prescribed is £3.50 for each hour or part thereof during which the right of inspection is exercised: Companies (Fees for Inspection of Company Records) Regulations 2008, SI 2008/3007, reg 2.

37 le in complying with the Companies Act 2006 s 162(1) (see the text and notes 1-2): see s 162(6).

38 le in complying with the Companies Act 2006 s 162(2) (see the text and notes 3-4): see s 162(6).

39 le in complying with the Companies Act 2006 s 162(3) (see the text and notes 28-29): see s 162(6).

40 le in complying with the Companies Act 2006 s 162(4) (see the text and notes 30-33): see s 162(6).

41 le an inspection required under the Companies Act 2006 s 162(5) (see the text and notes 34-36): see s 162(6).

42 Companies Act 2006 s 162(6). For these purposes, a shadow director is treated as an officer of the company: s 162(6). As to the meaning of 'shadow director' see PARA 478. As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

43 As to the meaning of 'standard scale' see PARA 1622 note 5.

44 As to the meaning of 'daily default fine' see PARA 1622.

45 Companies Act 2006 s 162(7).

46 As to the meaning of 'court' see PARA 212 note 1.

47 Companies Act 2006 s 162(8). See also PARA 349 note 30. As to the procedure for making claims and applications to the court under companies legislation see PARA 305.

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(B) REGISTER OF DIRECTORS' RESIDENTIAL ADDRESSES

500. The register of directors' residential addresses.

Every company¹ must keep a register of directors' residential addresses².

The register must state the usual residential address of each of the company's directors³.

If default is made in complying with this requirement to keep such a register⁴, an offence is committed by the company, and by every officer of the company who is in default⁵. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 5 on the standard scale⁶ and (for continued contravention) a daily default fine⁷ not exceeding one-tenth of level 5 on the standard scale⁸.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 165(1). The provisions of s 165 apply only to directors who are individuals, not where the director is a body corporate or a firm that is a legal person under the law by which it is governed: s 165(6). As to the meaning of 'director' under the Companies Acts see PARA 478. As to the meaning of 'body corporate' see PARA 1 note 5. As to the meaning of 'firm' see PARA 112 note 14. As to the requirement for a company to keep a register of directors see PARA 499.

The Secretary of State may make provision by regulations amending the Companies Act 2006 s 165, so as to add to or remove items from the particulars required to be contained in a company's register of directors' residential addresses: s 166(1). As to the Secretary of State see PARA 6. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 166 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 166(2), 1290. At the date at which this volume states the law, no such regulations had been made under s 166.

The provisions of the Companies Act 2006 ss 165-166 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 6: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Companies Act 2006 s 165(2). If a director's usual residential address is the same as his service address (as stated in the company's register of directors), the register of directors' residential addresses need only contain an entry to that effect: s 165(3). However, this does not apply if his service address is stated to be 'The company's registered office': s 165(3). See note 2. As to addresses on the register that are not to be made available by the registrar for public inspection see s 1088; and PARA 151 et seq. As to requirements relating to service addresses generally see PARA 673.

4 In complying with the Companies Act 2006 s 165 (see the text and notes 1-3): see s 165(4).

5 Companies Act 2006 s 165(4). For these purposes, a shadow director is treated as an officer of the company: s 165(4). See note 2. As to the meaning of 'shadow director' see PARA 478. As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

6 As to the meaning of 'standard scale' see PARA 1622 note 5.

7 As to the meaning of 'daily default fine' see PARA 1622.

8 Companies Act 2006 s 165(5). See note 2.

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501. Protection from disclosure: meaning of 'protected information'.

Provision is made¹ for protecting, in the case of a company director² who is an individual³, information as to his usual residential address⁴, and the information that his service address⁵ is his usual residential address⁶. That information is referred to for these purposes⁷ as 'protected information'⁸. Information does not cease to be protected information on the individual ceasing to be a director of the company⁹.

1 In the Companies Act 2006 Pt 10 Ch 8 (ss 240-246) (see also PARA 501 et seq): see s 240(1). Where regulations under s 1046 require an overseas company to register particulars of an individual's usual residential address, they must contain provision corresponding to that made by Pt 10 Ch 8: see s 1055; and PARA 1826. As to the meaning of 'overseas company' see PARA 1824.

The provisions of the Companies Act 2006 s 240 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 7: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of 'director' under the Companies Acts see PARA 478. As to the meaning of the 'Companies Acts' see PARA 16.

3 See the Companies Act 2006 s 240(1).

4 Companies Act 2006 s 240(1)(a). As to the circumstances in which the registrar of companies may put a director's usual residential address on the public record see PARA 513.

5 As to requirements relating to service addresses generally see PARA 673; and see PARA 499 note 8.

6 Companies Act 2006 s 240(1)(b).

7 In the Companies Act 2006 Pt 10 Ch 8 (see also PARA 501 et seq): see s 240(2).

8 Companies Act 2006 s 240(2). As to the use or disclosure of protected information see PARA 502 et seq.

Where a director's usual residential address appears as a service address in the company's register of directors by virtue of the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 27 (see PARA 499 note 8), or in the register of companies by virtue of Sch 2 para 32 (see PARA 499 note 8), that address is not protected information for the purposes of the Companies Act 2006 Pt 10 Ch 8 (see also PARA 501 et seq): see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 33. As to the registrar of companies see PARA 146 et seq.

9 Companies Act 2006 s 240(3). References in Pt 10 Ch 8 (see also PARA 501 et seq) to a director include, to that extent, a former director: s 240(3).

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502. Restrictions on use or disclosure of protected information.

A company¹ must not use or disclose protected information² about any of its directors³, except: (1) for communicating with the director concerned⁴; (2) in order to comply with any requirement of the Companies Acts as to particulars to be sent to the registrar of companies⁵; or (3) in accordance with the provisions governing the disclosure of such information under court order⁶.

The registrar must omit protected information from the material on the register⁷ that is available for inspection⁸ both where it is contained in a document delivered to him in which such information is required to be stated⁹ and, in the case of a document having more than one part, where it is contained in a part of the document in which such information is required to be stated¹⁰. However, the registrar is not obliged to check other documents or (as the case may be) other parts of the document to ensure the absence of protected information¹¹, or to omit from the material that is available for public inspection anything registered before the protected information provisions¹² came into force¹³.

The registrar himself must not use or disclose protected information except as permitted¹⁴ or in accordance with the provisions governing the disclosure of such information under court order¹⁵.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'protected information' for these purposes see PARA 501.

3 Companies Act 2006 s 241(1). The provisions of s 241(1) do not prohibit any use or disclosure of protected information with the consent of the director concerned: s 241(2). As to the meaning of 'director' under the Companies Acts see PARA 478. Where regulations under s 1046 require an overseas company to register particulars of an individual's usual residential address, they must contain provision corresponding to that made by Pt 10 Ch 8 (ss 240-246): see s 1055; and PARA 1826. As to the meaning of 'overseas company' see PARA 1824.

The provisions of the Companies Act 2006 ss 241, 242 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 7: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 2006 s 241(1)(a).

5 Companies Act 2006 s 241(1)(b). As to the meaning of 'registrar of companies' see PARA 131 note 2.

6 Companies Act 2006 s 241(1)(c). Head (3) in the text refers to the use or disclosure of protected information in accordance with s 244 (see PARA 512): see s 241(1)(c).

7 As to the meaning of the 'register' see PARA 146.

8 Companies Act 2006 s 242(1). Protected information within s 242(1) must not be made available by the registrar of companies for public inspection: see s 1087(1)(b); and PARA 150. As to the circumstances in which the registrar of companies may put a director's usual residential address on the public record see PARA 513.

9 Companies Act 2006 s 242(1)(a). See note 8.

10 Companies Act 2006 s 242(1)(b). See note 8.

11 Companies Act 2006 s 242(2)(a).

12 Ie the Companies Act 2006 Pt 10 Ch 8 (see also PARAS 501 et seq): see s 242(2)(b).

13 Companies Act 2006 s 242(2)(b). The provisions of Pt 10 Ch 8 came into force on 1 October 2009: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3(i).

14 Ie as permitted by the Companies Act 2006 s 243 (see PARA 503): see s 242(3).

15 Companies Act 2006 s 242(3). The text refers to the use or disclosure of protected information in accordance with s 244 (see PARA 512): see s 242(3).

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503. Permitted use or disclosure of protected information by the registrar.

The registrar of companies¹ may use protected information² for communicating with the director³ in question⁴.

The registrar may disclose protected information to a public authority⁵ specified for these purposes⁶ by regulations made by the Secretary of State⁷, or to a credit reference agency⁸.

The Secretary of State may make provision by regulations: (1) specifying conditions for the disclosure of protected information⁹, and providing for the charging of fees¹⁰; or (2) requiring the registrar, on application, to refrain from disclosing protected information relating to a director to a credit reference agency¹¹.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2.

2 As to the meaning of 'protected information' for these purposes see PARA 501.

3 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

4 Companies Act 2006 s 243(1). The registrar must not use or disclose protected information except as permitted by s 243 or in accordance with s 244 (see PARA 512); see s 242(3); and PARA 502. As to the circumstances in which the registrar of companies may put a director's usual residential address on the public record see PARA 513. Where regulations under s 1046 require an overseas company to register particulars of an individual's usual residential address, they must contain provision corresponding to that made by Pt 10 Ch 8 (ss 240-246): see s 1055; and PARA 1826. As to the meaning of 'overseas company' see PARA 1824.

The provisions of the Companies Act 2006 s 243 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 7, but with the Companies Act 2006 s 243 as modified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 For these purposes, 'public authority' includes any person or body having functions of a public nature: see the Companies Act 2006 s 243(7).

6 As specified for the purposes of the Companies Act 2006 s 243: see s 243(2)(a). The public authorities specified for the purposes of s 243(2) are set out in the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 2(5), Sch 1: see note 7; and PARA 504.

7 Companies Act 2006 s 243(2)(a). See notes 4, 6. As to the Secretary of State see PARA 6. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 243 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 243(8), 1289. In exercise of the power conferred by s 243(2)-(6) (see also the text and notes 8-11), the Secretary of State has made the Companies (Disclosure of Address) Regulations 2009, SI 2009/214: see PARA 504 et seq.

8 Companies Act 2006 s 243(2)(b). For these purposes, 'credit reference agency' means a person carrying on a business comprising the furnishing of information relevant to the financial standing of individuals, being information collected by the agency for that purpose: see s 243(7). See notes 4, 7.

9 As in accordance with the Companies Act 2006 s 243: see s 243(3). See notes 4, 7.

10 Companies Act 2006 s 243(3). See notes 4, 7. In exercise of the powers conferred by s 243(3), the Secretary of State has made the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101. Accordingly, in respect of the performance of the registrar's functions in relation to the inspection of the register and the provision of copies of material on the

register, where that material is protected information to which the Companies Act 2006 s 242(1) applies (see PARA 502), the fees so payable are those specified in the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 5, Sch 3.

11 Companies Act 2006 s 243(4). Regulations under s 243(4) may make provision as to:

- 183 (1) who may make an application (s 243(5)(a));
- 184 (2) the grounds on which an application may be made (s 243(5)(b));
- 185 (3) the information to be included in and documents to accompany an application (s 243(5)(c)); and
- 186 (4) how an application is to be determined (s 243(5)(d)).

Provision under head (4) above may in particular confer a discretion on the registrar or provide for a question to be referred to a person other than the registrar for the purposes of determining the application: s 243(6). See notes 4, 7.

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504. Permitted disclosure by registrar to specified public authorities.

The registrar of companies¹ may disclose protected information² to a specified public authority³ where the following conditions⁴ are satisfied⁵:

- 879 (1) the specified public authority has delivered to the registrar a statement that it intends to use the protected information only for the purpose of facilitating the carrying out by that specified public authority of a public function⁶ (the 'permitted purpose')⁷;
- 880 (2) the specified public authority ('the authority') has delivered to the registrar a statement that it will, where it supplies a copy of the protected information to a processor⁸ for the purpose of processing the information for use in respect of the permitted purpose⁹: (a) ensure that the processor is one who carries on business in the European Economic Area¹⁰; (b) require that the information is not transmitted outside the European Economic Area by the processor¹¹; and (c) require that the processor does not disclose the information except to the authority or an employee of the authority¹².

A specified public authority must deliver to the registrar such information or evidence as he may direct for the purpose of enabling him to determine¹³ whether to disclose protected information¹⁴; and the registrar may require such information or evidence to be verified in such manner as he may direct¹⁵.

The specified public authority must inform the registrar immediately of any change in respect of any statement so delivered to the registrar¹⁶ or information or evidence provided for the purpose of enabling the registrar to determine whether to disclose protected information¹⁷.

1 As to the registrar of companies see PARA 131 et seq.

2 As to the meaning of 'protected information' for the purposes of the Companies Act 2006 Pt 10 Ch 8 (ss 240-246) (see PARAS 501 et seq, 512 et seq), under which the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, have been made, see PARA 501.

3 For these purposes, 'specified public authority' means any public authority specified in the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 2(5), Sch 1, which sets out the public authorities that are specified for the purposes of the Companies Act 2006 s 243(2) (see PARA 503): see regs 1(2), 2(5).

4 Ie the conditions specified in the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 2(1), Sch 2 paras 2, 3 (see heads (1), (2) in the text): see reg 2(1). The provisions of Sch 2 paras 2, 3 set out the conditions specified for the disclosure of protected information by the registrar to a specified public authority: Sch 2 para 1.

5 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 2(1).

6 For these purposes, 'public function' includes any function conferred by or in accordance with any provision contained in any enactment, any function conferred by or in accordance with any provision contained in the Community Treaties or any Community instrument, any similar function conferred on persons by or under provisions having effect as part of the law of a country or territory outside the United Kingdom, and any function exercisable in relation to the investigation of any criminal offence or for the purpose of any criminal proceedings: see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 11(1). In Sch 2, any reference to the disclosure for the purpose of facilitating the carrying out of a public function includes disclosure in relation to, and for the purpose of, any proceedings whether civil, criminal or disciplinary in which the specified public authority engages while carrying out its public functions: see Sch 2 para 11(2)(b).

7 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

8 For these purposes, 'processor' means any person who provides a service which consists of putting information into data form or processing information in data form and any reference to a processor includes a reference to his employees: see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 11(1). In Sch 2, any reference to an employee of any person who has access to protected information is deemed to include any person working or providing services for the purposes of that person or employed by or on behalf of, or working for, any person who is so working or who is supplying such a service: see Sch 2 para 11(2)(a).

9 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 3. The provisions of Sch 2 para 3 are subject to the provisions of Sch 2 para 4: see Sch 2 para 3. Accordingly, Sch 2 para 3 does not apply where the specified public authority is the Secret Intelligence Service, Security Service or Government Communications Headquarters: Sch 2 para 4. As to the Government Communications Headquarters see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 473; as to the Secret Intelligence Service see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 472; and as to the Security Service see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 471.

10 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 3(a). See note 9.

11 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 3(b). See note 9.

12 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 3(c). See note 9.

13 Ie in accordance with the Companies (Disclosure of Address) Regulations 2009, SI 2009/214: see reg 2(2).

14 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 2(2).

15 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 2(3).

16 Ie delivered pursuant to the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 (see the text and notes 4-12): see reg 2(4).

17 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 2(4).

TO BE KEPT/(B) Register of Directors' Residential Addresses/505. Permitted disclosure by registrar to credit reference agencies.

505. Permitted disclosure by registrar to credit reference agencies.

The registrar of companies¹ must refrain from disclosing protected information² to a credit reference agency³ if such information relates to a section 243 beneficiary⁴ or a section 243 applicant⁵.

However, subject to this restriction, the registrar may disclose protected information to a credit reference agency where the following conditions⁶ are satisfied⁷:

- 881 (1) the credit reference agency:
- 33
57. (a) is carrying on in the United Kingdom⁸ or in another EEA State a business comprising the furnishing of information relevant to the financial standing of individuals, being information collected by the agency for that purpose⁹;
58. (b) maintains appropriate procedures: (i) to ensure that an independent person can investigate and audit the measures maintained by the agency for the purposes of ensuring the security of any protected information disclosed to that agency¹⁰; and (ii) for the purposes of ensuring that it complies with its obligations under the Data Protection Act 1998¹¹ or, where the agency carries on business in a EEA State other than the United Kingdom, with its obligations under legislation implementing European Parliament and EC Council Directive 95/46¹² of 24 October 1995¹³;
59. (c) has not been found guilty of an offence under the Companies Act 2006 provisions which prohibit the making of false statements to the registrar¹⁴ or under the false representation provisions of the Fraud Act 2006¹⁵ or under the provisions of the Data Protection Act 1998 which govern a failure to comply with an enforcement notice, an information notice or a special information notice¹⁶ in circumstances where it has used the protected information for purposes other than those described in heads (2)(a) to (2)(e) below¹⁷;
- 34
- 882 (2) the credit reference agency has delivered to the registrar a statement that it intends to use the protected information only for the purposes of¹⁸:
- 35
60. (a) providing an assessment of the financial standing of a person¹⁹;
61. (b) meeting any obligations contained in money laundering rules²⁰ or in any legislation of another EEA State implementing European Parliament and EC Council Directive 2005/60²¹ of 26 October 2005²²;
62. (c) conducting conflict of interest checks required or made necessary by any enactment²³;
63. (d) the provision of protected information to either a specified public authority²⁴ or to a credit reference agency²⁵ which has satisfied the relevant requirements²⁶ necessary before the registrar can disclose protected information to it²⁷; or
64. (e) conducting checks for the prevention and detection of crime and fraud²⁸;
- 36
- 883 (3) the credit reference agency has delivered to the registrar a statement that it intends to take delivery of and to use the protected information only in the United Kingdom or in another EEA State²⁹;
- 884 (4) the credit reference agency has delivered to the registrar a statement that it will, where it supplies a copy of the protected information to a processor³⁰ for the

- purpose of processing the information for use in respect of the purposes referred to in head (2) above³¹;
- 37
- 65. (a) ensure that the processor is one who carries on business in the European Economic Area³²;
 - 66. (b) require that the information is not transmitted outside the European Economic Area by the processor³³; and
 - 67. (c) require that the processor does not disclose the information except to the credit reference agency or an employee of the credit reference agency³⁴; and
- 38
- 885 (5) the credit reference agency has delivered to the registrar a statement that it meets the conditions set out in head (1) above³⁵.

A credit reference agency must³⁶ deliver to the registrar such information or evidence, in addition to the statement required by head (5) above, as he may direct for the purpose of enabling him to determine³⁷ whether to disclose protected information³⁸; and the registrar may require such information or evidence to be verified in such manner as he may direct³⁹.

The credit reference agency must inform the registrar immediately of any change in respect of any statement so delivered to the registrar⁴⁰ or information or evidence provided for the purpose of enabling the registrar to determine whether to disclose protected information⁴¹.

1 As to the registrar of companies see PARA 131 et seq.

2 As to the meaning of 'protected information' for the purposes of the Companies Act 2006 Pt 10 Ch 8 (ss 240-246) (see PARAS 501 et seq, 512 et seq), under which the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, have been made, see PARA 501.

3 As to the meaning of 'credit reference agency' for the purposes of the Companies Act 2006 Pt 10 Ch 8 (see PARAS 501 et seq, 512 et seq) see PARA 503 note 8.

4 As to the meaning of 'section 243 beneficiary' see PARA 152.

5 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 4. For these purposes, 'section 243 applicant' means an individual by whom or in respect of whom a section 243 application has been made but in respect of which application the registrar either has not made a determination, or has made a determination, not being a section 243 decision, and any appeal to the court in respect of that application under reg 14 (see PARA 511) has not been determined by the court: see reg 1(2). As to the meanings of 'section 243 application' and 'section 243 decision' see PARA 152.

6 Ie the conditions specified in the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 3(1), Sch 2 paras 6-10 (see heads (1)-(5) in the text): see reg 3(1). The provisions of Sch 2 paras 6-10 set out the conditions specified for the disclosure of protected information by the registrar to a credit reference agency: Sch 2 para 5.

7 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 3(1).

8 As to the meaning of 'United Kingdom' see PARA 1 note 5.

9 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 6(a).

10 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 6(b)(i).

11 As to a person's obligations under the Data Protection Act 1998 generally see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 503 et seq.

12 Ie EC Council Directive 95/46 (OJ L281, 23.11.95, p 31) on the protection of individuals with regard to the processing of personal data and on the free movement of such data (as to which see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 503 et seq): see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 6(b)(ii).

13 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 6(b)(iii).

14 Ie the Companies Act 2006 s 1112 (general offence of making false statements to registrar) (see PARA 137): see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 6(c)(i).

15 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 6(c)(i). The text refers to an offence under the Fraud Act 2006 s 2 (fraud by false representation) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 309): see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 6(c)(i).

16 Ie under the Data Protection Act 1998 s 47 (see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 566): see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 6(c)(ii). As to enforcement notices see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 559; as to information notices see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 562; and as to special information notices see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 563.

17 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 6(c)(ii).

18 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 7. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

19 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 7(a).

20 Ie obligations contained in the Money Laundering Regulations 2007, SI 2007/2157 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 539 et seq), or any rules made pursuant to the Financial Services and Markets Act 2000 s 146 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 30): see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 7(b).

21 Ie European Parliament and EC Council Directive 2005/60 (OJ L309, 25.11.2005, p 15) on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (as to which see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 539 et seq): see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 7(b).

22 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 7(b).

23 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 7(c).

24 Ie a public authority specified in the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 2(5), Sch 1 (see PARA 504 note 3): see Sch 2 para 7(d)(i).

25 See the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 7(d)(ii).

26 Ie, in relation to a specified public authority, satisfied the requirements of the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 2(1), Sch 2 paras 2, 3 (see PARA 504) and, in relation to a credit reference agency, satisfied the requirements of Sch 2 Pt 2 (paras 5-10) (see the text and notes 6-35): see Sch 2 para 7(d)(i), (ii).

27 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 7(d)(i), (ii).

28 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 7(e).

29 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 8.

30 As to the meaning of 'processor' for these purposes see PARA 504 note 8.

31 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 9.

32 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 9(a).

33 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 9(b).

34 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 9(c). As to the meaning of references to 'employee' for these purposes see PARA 504 note 8.

35 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 para 10. The registrar may rely on a statement delivered to him by a credit reference agency under Sch 2 para 10 as sufficient evidence of the matters stated in it: reg 3(2).

- 36 le notwithstanding the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 3(2) (see note 35): see reg 3(3).
- 37 le in accordance with the Companies (Disclosure of Address) Regulations 2009, SI 2009/214: see reg 3(3).
- 38 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 3(3).
- 39 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 3(4).
- 40 le delivered pursuant to the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, Sch 2 (see the text and notes 8-35): see reg 3(5).
- 41 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 3(5).

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506. Application by individual to withhold protected information relating to a director.

A section 243 application¹ may be made to the registrar of companies² by an individual who is, or proposes to become, a director³. The grounds on which such an application may be made are that the individual making the application⁴:

- 886 (1) considers that there is a serious risk that he, or a person who lives with him, will be subjected to violence or intimidation as a result of the activities of at least one of⁵: (a) the companies of which he is, or proposes to become, a director⁶; (b) the companies of which he was a director⁷; (c) the overseas companies⁸ of which he is or has been a director, secretary or permanent representative⁹; or (d) the limited liability partnerships¹⁰ of which he is or has been a member¹¹; or
- 887 (2) is or has been employed by a relevant organisation¹².

The application must contain:

- 888 (i) a statement of the grounds on which the application is made¹³;
- 889 (ii) the name and any former name of the applicant¹⁴;
- 890 (iii) the date of birth of the applicant¹⁵;
- 891 (iv) the usual residential address of the applicant¹⁶;
- 892 (v) where the registrar has allocated a unique identifier to the applicant, that unique identifier¹⁷;
- 893 (vi) the name and registered number of each company of which the applicant is, or proposes to become, a director¹⁸;
- 894 (vii) where the grounds of the application are those described in head (1)(b), head (1)(c) or head (1)(d) above, the name and registered number of the company, overseas company or limited liability partnership¹⁹.

The application must be accompanied by evidence which, where the grounds of the application are those described in head (1) above, supports the applicant's statement of the grounds of the application²⁰ or, where the grounds of the application are those described in head (2) above, establishes that the applicant is or has been employed by a relevant organisation²¹. The

registrar may direct that additional information or evidence should be delivered to him, what such information or evidence should be and how it should be verified²².

The registrar may refer to a relevant body any question relating to an assessment of, where the grounds of the application are those described in head (1) above, the nature and extent of any risk of violence or intimidation considered by the applicant to arise in relation to himself, or to a person who lives with him²³ or, where the grounds of the application are those described in head (2) above, whether the applicant is or has been employed by a relevant organisation²⁴.

The registrar must determine the application²⁵ and send the applicant to his usual residential address, as stated in his application, notice of his determination on the section 243 application within five working days of that determination being made²⁶.

The registrar must not make available for public inspection any section 243 application²⁷ or any documents provided in support of that application²⁸.

1 As to the meaning of 'section 243 application' see PARA 152.

2 As to the registrar of companies see PARA 131 et seq.

3 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(1). As to a company's directors see PARA 478 et seq. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

4 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(2).

5 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(2)(a).

6 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(2)(a)(i).

7 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(2)(a)(ii).

8 As to overseas companies see PARAS 32, 1824 et seq.

9 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(2)(a)(iii). As to the meaning of 'permanent representative' for these purposes see PARA 152 note 11.

10 For these purposes, 'limited liability partnership' means a limited liability partnership incorporated under the Limited Liability Partnerships Act 2000 (see **PARTNERSHIP** vol 79 (2008) PARA 234 et seq): see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 1(2).

11 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(2)(a)(iv).

12 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(2)(b). As to the meaning of 'relevant organisation' for these purposes see PARA 152 note 12.

13 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(3)(a)(i).

14 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(3)(a)(ii). As to the meaning of 'name' for these purposes see PARA 152 note 23; and as to the meaning of 'former name' for these purposes see PARA 152 note 24.

15 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(3)(a)(iii).

16 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(3)(a)(iv).

17 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(3)(a)(v). As to the allocation of unique identifiers see PARA 148.

18 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(3)(a)(vi). As to company names and trading names generally see PARA 196 et seq. As to a company's registered number see PARAS 139-140.

19 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(3)(a)(vii).

20 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(3)(b)(i).

- 21 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(3)(b)(ii).
- 22 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 8(1).
- 23 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(4)(a).
- 24 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(4)(b).
- 25 For the purpose of determining any section 243 application, the registrar may accept any answer to a question referred in accordance with the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(4) (see the text and notes 23-24) as providing sufficient evidence (where the grounds of the application are those described in head (1) in the text) of the nature and extent of any risk relevant to the applicant, or to persons who live with the applicant, or of whether an applicant is or has been employed by a relevant organisation: reg 8(3).
- 26 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(5).
- 27 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 8(2)(a).
- 28 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 8(2)(b).

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507. Application by company to withhold protected information relating to its directors.

A section 243 application¹ may be made to the registrar of companies² by a company on behalf of any of its directors who are individuals³. The grounds on which such an application may be made are that the company making the application considers that there is a serious risk that the director on behalf of whom the application is made, or a person who lives with that director, will be subjected to violence or intimidation as a result of the activities of the company making the application⁴.

The application must contain:

- 895 (1) a statement of the grounds on which the application is made⁵;
- 896 (2) the name and registered number of the applicant⁶;
- 897 (3) the name and any former name⁷ of each director on behalf of whom the application is made⁸;
- 898 (4) the date of birth of each such director⁹;
- 899 (5) the usual residential address of each such director¹⁰;
- 900 (6) where the registrar has allocated a unique identifier to any such director, that unique identifier¹¹;
- 901 (7) the name and registered number of each company of which each such director is a director¹².

The application must be accompanied by evidence which supports the applicant's statement of the grounds of the application¹³. The registrar may direct that additional information or evidence should be delivered to him, what such information or evidence should be and how it should be verified¹⁴.

The registrar may refer to a relevant body any question relating to an assessment of the nature and extent of any risk of violence or intimidation considered by the applicant to arise in relation to its directors on behalf of whom the application is made or to persons who live with those directors as a result of any of its activities¹⁵.

The registrar must determine the application¹⁶ and send the applicant (to its registered office)¹⁷ and each director on behalf of whom the application was made (to his usual residential address as stated in the application)¹⁸, notice of his determination on the section 243 application within five working days of that determination being made¹⁹.

The registrar must not make available for public inspection any section 243 application²⁰ or any documents provided in support of that application²¹.

1 As to the meaning of 'section 243 application' see PARA 152.

2 As to the registrar of companies see PARA 131 et seq.

3 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 6(1). As to a company's directors see PARA 478 et seq. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

4 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 6(2).

5 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 6(3)(a)(i).

6 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 6(3)(a)(ii). As to company names and trading names generally see PARA 196 et seq. As to a company's registered number see PARAS 139-140.

7 As to the meaning of 'name' for these purposes see PARA 152 note 23; and as to the meaning of 'former name' for these purposes see PARA 152 note 24.

8 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 6(3)(a)(iii).

9 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 6(3)(a)(iv).

10 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 6(3)(a)(v).

11 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 6(3)(a)(vi). As to the allocation of unique identifiers see PARA 148.

12 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 6(3)(a)(vii).

13 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 6(3)(b).

14 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 8(1).

15 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 6(4).

16 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 6(5). For the purpose of determining any section 243 application, the registrar may accept any answer to a question referred in accordance with the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 6(4) (see the text and note 15) as providing sufficient evidence (where the grounds of the application are those described in reg 6(2) (see the text and note 4)) of the nature and extent of any risk relevant to the directors on behalf of whom the application is made, or to persons who live with any such director: reg 8(3).

17 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 6(5)(a). As to a company's registered office see PARA 129.

18 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 6(5)(b).

19 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 6(5).

20 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 8(2)(a).

21 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 8(2)(b).

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508. Application on behalf of proposed directors to withhold protected information.

A section 243 application¹ may be made to the registrar of companies² by a subscriber to a memorandum of association³ on behalf of any of the proposed directors⁴ of a proposed company who are individuals⁵. The grounds on which such an application may be made are that the subscriber making the application considers that there is a serious risk that the proposed directors of the proposed company on behalf of whom the application is made, or persons who live with them, will be subjected to violence or intimidation as a result of the proposed activities of that proposed company⁶.

The application must contain:

- 902 (1) a statement of the grounds on which the application is made⁷;
- 903 (2) the name of the applicant⁸;
- 904 (3) the address of the applicant⁹;
- 905 (4) the name of the proposed company¹⁰;
- 906 (5) the name and any former name¹¹ of each of the proposed directors on behalf of whom the application is made¹²;
- 907 (6) the date of birth of each such proposed director¹³;
- 908 (7) the usual residential address of each such proposed director¹⁴;
- 909 (8) the name and registered number of each company of which each such proposed director is a director¹⁵.

The application must be accompanied by evidence which supports the applicant's statement of the grounds of the application¹⁶. The registrar may direct that additional information or evidence should be delivered to him, what such information or evidence should be and how it should be verified¹⁷.

The registrar may refer to a relevant body any question relating to an assessment of the nature and extent of any risk of violence or intimidation considered by the applicant to arise in relation to its proposed directors on behalf of whom the application is made or to persons who live with those proposed directors as a result of any of the proposed activities of the proposed company¹⁸.

The registrar must determine the application¹⁹ and send the applicant (to the address stated in the application)²⁰ and each of the proposed directors on behalf of whom the application was made (to their usual residential address as stated in the application)²¹, notice of his determination on the section 243 application within five working days of that determination being made²².

The registrar must not make available for public inspection any section 243 application²³ or any documents provided in support of that application²⁴.

1 As to the meaning of 'section 243 application' see PARA 152.

2 As to the registrar of companies see PARA 131 et seq.

- 3 As to a company's memorandum of association and its subscribers see PARA 104 et seq.
- 4 As to a company's directors see PARA 478 et seq.
- 5 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 7(1). As to company formation and registration under the Companies Act 2006 see PARA 102 et seq. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.
- 6 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 7(2).
- 7 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 7(3)(a)(i).
- 8 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 7(3)(a)(ii). As to the meaning of 'name' for these purposes see PARA 152 note 23.
- 9 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 7(3)(a)(iii).
- 10 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 7(3)(a)(iv). As to company names and trading names generally see PARA 196 et seq.
- 11 As to the meaning of 'former name' for these purposes see PARA 152 note 24.
- 12 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 7(3)(a)(v).
- 13 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 7(3)(a)(vi).
- 14 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 7(3)(a)(vii).
- 15 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 7(3)(a)(viii). As to a company's registered number see PARAS 139-140.
- 16 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 7(3)(b).
- 17 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 8(1).
- 18 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 7(4).
- 19 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 7(5). For the purpose of determining any section 243 application, the registrar may accept any answer to a question referred in accordance with the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 7(4) (see the text and note 18) as providing sufficient evidence (where the grounds of the application are those described in reg 7(2) (see the text and note 6)) of the nature and extent of any risk relevant to the proposed directors on behalf of whom the application is made, or to persons who live with any such proposed director: reg 8(3).
- 20 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 7(5)(a).
- 21 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 7(5)(b).
- 22 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 7(5).
- 23 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 8(2)(a).
- 24 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 8(2)(b).

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509. Duration of successful decision to withhold protected information.

A section 243 decision¹ continues to have effect until²: (1) either the section 243 beneficiary³, or his personal representative⁴, has notified the registrar of companies⁵ in writing that he wishes the section 243 decision to cease to apply⁶; or (2) the registrar has made a revocation decision⁷ in relation to that beneficiary⁸, whichever first occurs⁹.

1 As to the meaning of 'section 243 decision' see PARA 152.

2 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 15(1).

3 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 15(1)(a)(i). As to the meaning of 'section 243 beneficiary' see PARA 152.

4 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 15(1)(a)(ii). For these purposes, 'personal representative' means the executor, original or by representation, or administrator for the time being of a deceased person: reg 15(3). See further **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 4.

5 As to the registrar of companies see PARA 131 et seq. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

6 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 15(1)(a).

7 For these purposes, 'revocation decision' in relation to a section 243 decision means a determination by the registrar to revoke that decision in accordance with the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16 (see PARA 510): see reg 15(3).

8 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 15(1)(b).

9 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 15(1).

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510. Revocation of decision to withhold protected information.

The registrar of companies¹ may revoke a section 243 decision² at any time if he is satisfied that the section 243 beneficiary³ or any other person, in purported compliance with any provision of the Disclosure of Address Regulations⁴, is found guilty of an offence of making false statements to the registrar⁵ (a 'revocation decision')⁶.

If the registrar proposes to make a revocation decision, he must send the beneficiary notice of his intention⁷. The notice must: (1) inform the beneficiary that he may, within the period of 28 days beginning with the date of the notice, deliver representations in writing to the registrar⁸; and (2) state that, if representations are not received by the registrar within that period, the revocation decision will be made at the expiry of that period⁹. If, within the period so specified¹⁰, the beneficiary delivers representations as to why the revocation decision should not be made, the registrar must have regard to the representations in determining whether to make the revocation decision, and must, within five working days of making his decision, send notice of it to the beneficiary¹¹.

Any communication by the registrar in respect of a revocation decision or proposed revocation decision must be sent to the beneficiary¹²: (a) in the case of an individual, to his usual residential address¹³; (b) in the case of a company, to its registered office¹⁴; or (c) in the case of a partnership¹⁵, to the address specified in its section 243 application¹⁶.

- 1 As to the registrar of companies see PARA 131 et seq.
- 2 As to the meaning of 'section 243 decision' see PARA 152.
- 3 For these purposes, 'section 243 beneficiary' includes where the section 243 decision was made following an application under the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 6 (as to which see PARA 507) or reg 7 (as to which see PARA 508), the applicant: reg 16(6). As to the meaning of 'section 243 beneficiary' generally see PARA 152.
- 4 In purported compliance with any provision of the Companies (Disclosure of Address) Regulations 2009, SI 2009/214 (as to which see PARA 504 et seq): see reg 16(1).
- 5 In under the Companies Act 2006 s 1112 (false statements made to registrar) (see PARA 137): see the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(1).
- 6 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(1).
- 7 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(2). As to the service of documents on a company generally see PARA 671 et seq; and as to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.
- 8 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(3)(a). As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.
- 9 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(3)(b).
- 10 In within the period specified in the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(3) (see the text and notes 8-9): see reg 16(4).
- 11 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(4). As to the meaning of 'working day' for these purposes see PARA 152 note 46.
- 12 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(5).
- 13 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(5)(a).
- 14 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(5)(b). As to a company's registered office see PARA 129.
- 15 As to the meaning of 'partnership' for these purposes see PARA 157 note 15.
- 16 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 16(5)(c). As to the meaning of 'section 243 application' see PARA 152.

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511. Appeal of unsuccessful application to withhold protected information.

An applicant who has received notice¹ that his section 243 application² has been unsuccessful may appeal to the High Court on the grounds that the decision is unlawful³, is irrational or unreasonable⁴, or has been made on the basis of a procedural impropriety or otherwise contravenes the rules of natural justice⁵. However, no such appeal may be brought unless the permission of the court has been obtained⁶.

An applicant must bring an appeal within 21 days of the date of the notice or, with the court's permission, after the end of such period, but only if the court is satisfied (where permission is sought before the end of that period) that there is good reason for the applicant being unable to bring the appeal in time⁷ or (where permission is sought after that time) that there was a good reason for the applicant's failure to bring the appeal in time and for any delay in applying for permission⁸.

The court determining an appeal may either dismiss the appeal⁹ or quash the decision¹⁰. Where the court quashes a decision, it may refer the matter to the registrar of companies¹¹ with a direction to reconsider it and make a determination in accordance with the findings of the court¹².

1 le under the Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 5(5) (as to which see PARA 506), reg 6(5) (as to which see PARA 507) or reg 7(5) (as to which see PARA 508): see reg 14(1).

2 As to the meaning of 'section 243 application' see PARA 152.

3 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 14(1)(a).

4 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 14(1)(b).

5 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 14(1)(c). As to procedural fairness and the rules of natural justice see **JUDICIAL REVIEW** vol 61 (2010) PARAS 625 et seq, 629 et seq.

6 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 14(2).

7 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 14(3)(a).

8 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 14(3)(b).

9 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 14(4)(a).

10 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 14(4)(b).

11 As to the registrar of companies see PARA 131 et seq.

12 Companies (Disclosure of Address) Regulations 2009, SI 2009/214, reg 14(4).

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512. Disclosure under court order.

The court¹ may make an order for the disclosure of protected information² by the company³ or by the registrar of companies⁴, if:

910 (1) there is evidence that service of documents at a service address other than the director's usual residential address⁵ is not effective to bring them to the notice of the director⁶; or

911 (2) it is necessary or expedient for the information to be provided in connection with the enforcement of an order or decree of the court⁷,

and the court is otherwise satisfied that it is appropriate to make the order⁸.

An order for disclosure by the registrar is to be made only if the company does not have the director's usual residential address, or has been dissolved⁹.

The order may be made on the application of a liquidator¹⁰, creditor or member of the company¹¹, or any other person appearing to the court to have a sufficient interest¹².

The order must specify the persons to whom, and purposes for which, disclosure is authorised¹³.

1 As to the meaning of 'court' see PARA 212 note 1.

2 As to the meaning of 'protected information' for these purposes see PARA 501.

3 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 Companies Act 2006 s 244(1). The registrar must not use or disclose protected information except as permitted by s 243 (see PARA 503) or in accordance with s 244: see s 242(3); and PARA 502. As to the meaning of 'registrar of companies' see PARA 131 note 2. Where regulations under s 1046 require an overseas company to register particulars of an individual's usual residential address, they must contain provision corresponding to that made by Pt 10 Ch 8 (ss 240-246): see s 1055; and PARA 1826. As to the meaning of 'overseas company' see PARA 1824.

The provisions of the Companies Act 2006 s 244 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 7: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 As to requirements relating to service addresses generally see PARA 673; and see PARA 499 note 8. As to the meaning of 'director' under the Companies Acts see PARA 478.

6 Companies Act 2006 s 244(1)(a).

7 Companies Act 2006 s 244(1)(b).

8 Companies Act 2006 s 244(1).

9 Companies Act 2006 s 244(2). As to the dissolution of a company see PARA 1521 et seq.

10 As to the appointment of liquidators generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 950 et seq.

11 As to the meaning of 'member of the company' see PARA 321.

12 Companies Act 2006 s 244(3). Cf the wording in s 1029(2) ('any other person appearing to the court to have an interest in the matter') (regarding applications to the court for restoration to the register): see PARA 1535. In relation to an application for an order under s 244, the claimant must notify the director concerned of the application: *Practice Direction 49--Applications Under the Companies Acts and Related Legislation* PD 49 para 9.

13 Companies Act 2006 s 244(4).

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513. Circumstances in which registrar may put address on the public record.

The registrar of companies¹ may put a director's² usual residential address on the public record³, if:

- 912 (1) communications sent by the registrar to the director and requiring a response within a specified period remain unanswered⁴; or
- 913 (2) there is evidence that service of documents at a service address provided in place of the director's usual residential address is not effective to bring them to the notice of the director⁵.

The registrar must give notice of the proposal to the director⁶, and to every company⁷ of which the registrar has been notified that the individual is a director⁸. The notice must state the grounds on which it is proposed to put the director's usual residential address on the public record⁹, and specify a period within which representations may be made before that is done¹⁰. It must be sent to the director at his usual residential address, unless it appears to the registrar that service at that address may be ineffective to bring it to the individual's notice, in which case it may be sent to any service address provided in place of that address¹¹.

The registrar must take account of any representations received within the specified period¹².

The registrar, on so deciding¹³ that a director's usual residential address is to be put on the public record, must proceed as if notice of a change of registered particulars had been given¹⁴, stating that address as the director's service address¹⁵, and stating that the director's usual residential address is the same as his service address¹⁶. The registrar must give notice of having done so to the director¹⁷, and to the company¹⁸.

On receipt of the notice, the company must enter the director's usual residential address in its register of directors¹⁹ as his service address²⁰, and state in its register of directors' residential addresses²¹ that his usual residential address is the same as his service address²². If the company has been notified by the director in question of a more recent address as his usual residential address, it must enter that address in its register of directors as the director's service address²³, and give notice to the registrar as on a change of registered particulars²⁴.

If a company fails to comply with the requirement to make such entries in the register or to give such notice²⁵, an offence is committed by the company, and by every officer of the company who is in default²⁶. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 5 on the standard scale²⁷ and (for continued contravention) a daily default fine²⁸ not exceeding one-tenth of level 5 on the standard scale²⁹.

A director whose usual residential address has been put on the public record by the registrar in this way³⁰ may not register a service address other than his usual residential address for a period of five years from the date of the registrar's decision³¹.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2.

2 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

3 Companies Act 2006 s 245(1). What is meant by putting the address on the public record is explained in s 246 (see the text and notes 13-31): s 245(6). A director's usual residential address is included in the definition of 'protected information' which the registrar must not otherwise use or disclose except as permitted by s 243 (see PARA 503) or in accordance with s 244 (see PARA 512): see s 242(3); and PARA 502. Where regulations under s 1046 require an overseas company to register particulars of an individual's usual residential address, they must contain provision corresponding to that made by Pt 10 Ch 8 (ss 240-246): see s 1055; and PARA 1826. As to the meaning of 'overseas company' see PARA 1824.

The provisions of the Companies Act 2006 ss 245, 246 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 7: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 2006 s 245(1)(a).

5 Companies Act 2006 s 245(1)(b). As to requirements relating to service addresses generally see PARA 673; and see PARA 499 note 8.

- 6 Companies Act 2006 s 245(2)(a).
- 7 As to the meaning of 'company' under the Companies Acts see PARA 24.
- 8 Companies Act 2006 s 245(2)(b).
- 9 Companies Act 2006 s 245(3)(a).
- 10 Companies Act 2006 s 245(3)(b).
- 11 Companies Act 2006 s 245(4).
- 12 Companies Act 2006 s 245(5).
- 13 Ie in accordance with the Companies Act 2006 s 245 (see the text and notes 1-12): see s 246(1).
- 14 Companies Act 2006 s 246(1). As to the notice to be given of a change of registered particulars see PARA 514.
- 15 Companies Act 2006 s 246(1)(a).
- 16 Companies Act 2006 s 246(1)(b).
- 17 Companies Act 2006 s 246(2)(a).
- 18 Companies Act 2006 s 246(2)(b).
- 19 As to the requirement for a company to keep a register of directors see PARA 499.
- 20 Companies Act 2006 s 246(3)(a).
- 21 As to the register of directors' residential addresses see PARA 500 et seq.
- 22 Companies Act 2006 s 246(3)(b).
- 23 Companies Act 2006 s 246(4)(a).
- 24 Companies Act 2006 s 246(4)(b).
- 25 Ie fails to comply with the Companies Act 2006 s 246(3) or s 246(4) (see the text and notes 19-24): see s 246(5).
- 26 Companies Act 2006 s 246(5). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.
- 27 As to the meaning of 'standard scale' see PARA 1622 note 5.
- 28 As to the meaning of 'daily default fine' see PARA 1622.
- 29 Companies Act 2006 s 246(6).
- 30 Ie under the Companies Act 2006 s 246 (see the text and notes 13-29): see s 246(7).
- 31 Companies Act 2006 s 246(7).

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(C) CHANGES TO REGISTERS

514. Company's duty to notify registrar of changes relating to directors or particulars.

A company¹ must, within the period of 14 days from²: (1) a person becoming or ceasing to be a director³; or (2) the occurrence of any change in the particulars contained in its register of directors⁴ or its register of directors' residential addresses⁵, give notice to the registrar of companies⁶ of the change and of the date on which it occurred⁷.

Notice of a person having become a director of the company must contain a statement of the particulars of the new director that are required to be included in the company's register of directors and its register of directors' residential addresses⁸, and must be accompanied by a consent, by that person, to act in that capacity⁹.

Where a company gives notice of a change of a director's service address¹⁰ as stated in the company's register of directors¹¹, and where the notice is not accompanied by notice of any resulting change in the particulars contained in the company's register of directors' residential addresses¹², the notice must be accompanied by a statement that no such change is required¹³.

If default is made in complying with these requirements¹⁴, an offence is committed by the company, and by every officer of the company who is in default¹⁵. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 5 on the standard scale¹⁶ and (for continued contravention) a daily default fine¹⁷ not exceeding one-tenth of level 5 on the standard scale¹⁸.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 167(1).

The provisions of the Companies Act 2006 s 167 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 6: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Companies Act 2006 s 167(1)(a). As to the meaning of 'director' under the Companies Acts see PARA 478.

4 As to the requirement for a company to keep a register of directors see PARA 499.

5 Companies Act 2006 s 167(1)(b). As to the register of directors' residential addresses see PARA 500 et seq.

6 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements for the proper delivery of documents to the registrar see PARA 142.

7 Companies Act 2006 s 167(1). Notifications of any change among the company's directors, or of any change in the particulars of directors required to be delivered to the registrar, are subject to the 'Directive disclosure requirements' and public notice by the registrar must be given of the receipt of such documents: see PARA 144.

8 Companies Act 2006 s 167(2)(a). The Secretary of State may make provision by regulations requiring a statement or notice sent to the registrar of companies under s 167(2) that relates (wholly or partly) to a person disqualified under Pt 40 (ss 1182-1191) (see PARA 1618) or a person who is subject to a disqualification order or disqualification undertaking under the Company Directors Disqualification Act 1986 (see PARA 1578 et seq) to be accompanied by an additional statement stating that the person has obtained permission from a court to act in the capacity in question: see the Companies Act 2006 s 1189; and PARA 1621.

9 Companies Act 2006 s 167(2)(b). See note 8.

10 As to requirements relating to service addresses generally see PARA 673; and see PARA 499 note 8.

11 Companies Act 2006 s 167(3)(a). As to the statement of a director's service address see s 163(1)(b); and PARA 499.

12 Companies Act 2006 s 167(3)(b).

- 13 Companies Act 2006 s 167(3).
- 14 le in complying with the Companies Act 2006 s 167 (see the text and notes 1-13): see s 167(4).
- 15 Companies Act 2006 s 167(4). For these purposes, a shadow director is treated as an officer of the company: s 167(4). As to the meaning of 'shadow director' see PARA 478. As to the meaning of 'officer who is in default' see PARA 315 note 4. As to the meaning of 'officer' generally see PARA 607.
- 16 As to the meaning of 'standard scale' see PARA 1622 note 5.
- 17 As to the meaning of 'daily default fine' see PARA 1622.
- 18 Companies Act 2006 s 167(5).

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E. RETIREMENT AND REMOVAL OF DIRECTORS

515. Provision in articles as to termination of a director's appointment etc.

A company's articles of association¹ usually contain full provisions as to the termination of a director's appointment². Provision is usually made for vacation of office by a director in all or some of the following cases³, that is to say if he:

- 914 (1) fails to acquire or ceases to hold his qualification shares⁴; or
- 915 (2) becomes bankrupt⁵ or insolvent⁶; or
- 916 (3) becomes of unsound mind⁷; or
- 917 (4) is concerned or participates in the profits of any contract with the company⁸;
or
- 918 (5) continually absents himself for more than the prescribed period from the meetings of the board without leave⁹; or
- 919 (6) is convicted of an indictable offence¹⁰; or
- 920 (7) resigns his office¹¹; or
- 921 (8) reaches an age limit¹².

The articles may also provide for vacation of office by any director who holds any other office of profit under the company except that of managing director or manager¹³.

The wording of the articles is usually such that the office is automatically vacated by any of the acts specified, and the board of directors cannot waive the vacation¹⁴; but each case depends upon the true construction of the articles.

If the articles provide for the director to vacate office if he is so requested by all his co-directors, although the power of removal is fiduciary, the office will be vacated immediately if the director receives a notice in writing signed by all the other directors, even if one or more of them had acted for ulterior reasons¹⁵.

If, as the result of the operation of any such articles, there are no directors of the company acting as such, no valid decisions may be taken which are required by the articles to be taken by the directors¹⁶, but where a person continues to act as a director, though he has vacated

office under the articles, the statutory presumption as to validity applies, notwithstanding that he has ceased to hold office¹⁷.

Provision may be made in the articles for the retirement of directors by rotation¹⁸.

Where the statutes of a company provide for the removal of directors for reasonable cause, the criterion of reasonableness is that which is reasonable in the eyes of a meeting of the company¹⁹.

1 As to a company's articles of association see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

2 The Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 Pt 2 (art 18), Sch 2 Pt 2 (art 18), Sch 3 Pt 2 (art 22) provide that a person ceases to be a director as soon as: (1) that person ceases to be a director by virtue of any provision of the Companies Act 2006 or is prohibited from being a director by law (eg under the Company Directors Disqualification Act 1986 (see PARA 1578 et seq)); (2) a bankruptcy order is made against that person; (3) a composition is made with that person's creditors generally in satisfaction of that person's debts; (4) a registered medical practitioner who is treating that person gives a written opinion to the company stating that that person has become physically or mentally incapable of acting as a director and may remain so for more than three months; (5) by reason of that person's mental health, a court makes an order which wholly or partly prevents that person from personally exercising any powers or rights which that person would otherwise have; (6) notification is received by the company from the director that the director is resigning from office, and such resignation has taken effect in accordance with its terms. As to bankruptcy orders generally see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 195 et seq. As to compositions generally see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 81 et seq. As to a company's directors generally see PARA 478 et seq.

The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 81 makes very similar provision but with the inclusion of an additional ground, namely where the director is absent for more than six consecutive months without permission of the directors from meetings of directors held during that period and the directors resolve that his office be vacated (see also head (5) in the text). The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but art 81 is applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

3 These examples may expand upon or supplement the provision made by the model articles cited in note 2.

4 See PARA 495. Where the article declared the office of director vacated 'if he cease to hold the due qualification', it was held that the article did not apply to a case in which the qualification had never been held (*Salton v New Beeston Cycle Co* [1899] 1 Ch 775; *Dent's Case, Forbes's Case* (1873) 8 Ch App 768 at 775 per Lord Selborne LC); but it was otherwise if the words were 'if he does not acquire etc'. Where the amount of qualification is increased, an existing director does not thereby cease to hold the requisite qualification, but must obtain the larger qualification within a reasonable time: *Molineaux v London, Birmingham and Manchester Insurance Co Ltd* [1902] 2 KB 589, CA.

5 Being already a bankrupt is not becoming bankrupt: *Dawson v African Consolidated Land and Trading Co* [1898] 1 Ch 6, CA. See also note 2. As to undischarged bankrupts, persons subject to bankruptcy restrictions orders and persons subject to bankruptcy restrictions undertakings acting as directors see PARA 493.

6 A director is 'insolvent' where his creditors pass a resolution accepting a composition of their claims (*Harold Sissons & Co Ltd v Sissons* (1910) 54 Sol Jo 802), or where he makes offers of a composition to them (*James v Rockwood Colliery Co* (1912) 106 LT 128), or where there are a number of bankruptcy petitions which are withdrawn in order to give the director time to pay (*London and Counties Assets Co Ltd v Brighton Grand Concert Hall and Picture Palace Ltd* [1915] 2 KB 493, CA). See also note 2.

7 See also note 2.

8 See also PARAS 558, 529.

9 As to the meaning of 'absents himself' see *McConnell's Claim* [1901] 1 Ch 728; *Re London and Northern Bank, Mack's Claim* [1900] WN 114 (both these cases showing that the absence must be voluntary and not accidental). See also *Willsmore v Willsmore and Tibbenham Ltd* (1965) 109 Sol Jo 699 (injunction granted on balance of convenience to restrain directors from treating plaintiff as having vacated office, it being alleged that the absences of the plaintiff, who owned half the shares, were in part involuntary and in part with the informal consent of the other directors). The absence dates from the first meeting which the director fails to attend: *McConnell's Claim*; *Re London and Northern Bank, Mack's Claim*. See also note 2.

10 'Indictable offence' in such an article means an offence which is capable of being dealt with on indictment: *Hastings and Folkestone Glassworks Ltd v Kalson* [1949] 1 KB 214, [1948] 2 All ER 1013, CA.

11 As to resignation see PARA 516 et seq.

12 This requirement used to be obligatory, in relation to public companies, under the Companies Act 1985 s 293 (repealed). However, a company which imposes age limits in its articles of association must give effect, where relevant, to the requirements of the Employment Equality (Age) Regulations 2006, SI 2006/1031: see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 754 et seq.

13 This provision is not included in any of the model articles (as to which see notes 1, 2). The holding of the office of unpaid secretary is not holding another office of profit (*Iron Ship Coating Co v Blunt* (1868) LR 3 CP 484); but the paid trusteeship of a debenture trust deed is a place of profit, although it is not, strictly speaking, held under the company (*Astley v New Tivoli Ltd* [1899] 1 Ch 151). A solicitor does not hold an office of profit (*Re Harper's Ticket Issuing and Recording Machine Ltd* [1912] WN 263), unless he has a fixed salary and certain obligations (*Re Liberator Permanent Benefit Building Society* (1894) 71 LT 406, DC). As to the secretary and manager and other officers see PARA 607 et seq.

14 *Re Bodega Co Ltd* [1904] 1 Ch 276. As to the statutory presumption validating any act by any person acting as director notwithstanding disqualification or defect in appointment see the Companies Act 2006 s 161; and PARA 486.

15 *Samuel Tak Lee v Chou Wen Hsien* [1984] 1 WLR 1202, [1985] BCLC 45, PC.

16 *Re Zinotty Properties Ltd* [1984] 3 All ER 754, [1984] 1 WLR 1249.

17 See the Companies Act 2006 s 161; and PARA 486.

18 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 Pt 2 (art 21) (applying to public companies only: see note 1), which provides that, at the first annual general meeting all the directors must retire from office (see Sch 3 art 21(1)); and that, at every subsequent annual general meeting, any directors who have been appointed by the directors since the last annual general meeting, or who were not appointed or reappointed at one of the preceding two annual general meetings, must retire from office and may offer themselves for reappointment by the members (see Sch 3 art 21(2)). As to the requirement to hold an annual general meeting see PARA 630. As to membership of a company generally see PARA 321 et seq.

Similar, but more prescriptive, provision for retirement is made by the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A arts 73-75, 80 (arts 73-75, 80 revoked in relation to a private company limited by shares by SI 2007/2541, affecting companies registered after 1 October 2007). The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but arts 73-75, 80 are applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital). The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 73 does not apply to an extraordinary meeting (*Lord Claud Hamilton's Case* (1873) 8 Ch App 548), or to signatories of the memorandum (*John Morley Building Co v Barras* [1891] 2 Ch 386), or to de facto directors (*John Morley Building Co v Barras*). As to the meaning of 'extraordinary meeting' see PARA 1793. As to a company's memorandum of association and its subscribers see PARA 104 et seq. As to the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 73 see also *Walker v Kenns Ltd* [1937] 1 All ER 566, CA (effect of vacation of office on service agreement providing for ipso facto determination); *Re David Moseley & Sons Ltd* [1939] Ch 719, [1939] 2 All ER 791 (article providing number 'nearest to but not exceeding one-third' inapplicable when only two directors). Under a special Act, it was held that directors had no power to retire until the first ordinary meeting: see *Re South London Fish Market Co* (1888) 39 ChD 324, CA. As to the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 74 see *Eyre v Milton Pty Ltd* [1936] Ch 244, CA (use of 'by lot' or 'by ballot'). The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 75 (if the company, at the meeting at which a director retires by rotation, does not fill the vacancy) was designed in part to avoid the position arising in *Grundt v Great Boulder Pty Gold Mines Ltd* [1948] Ch 145, [1948] 1 All ER 21 (approving *Holt v Catterall* (1931) 47 TLR 332, and disapproving *Robert Batcheller & Sons Ltd v Batcheller* [1945] Ch 169, [1945] 1 All ER 522), where provisions for automatic re-election were held to apply even though

the director had in fact been refused such re-election. See also *Re Great Northern Salt and Chemical Works, ex p Kennedy* (1890) 44 ChD 472. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 75 does not apply if at an adjourned meeting the place is filled: *Spencer v Kennedy* [1926] Ch 125. Nor does the article apply to signatories of the memorandum: *John Morley Building Co v Barras* [1891] 2 Ch 386. See also *Bennett Bros (Birmingham) Ltd v Lewis* (1903) 20 TLR 1, CA.

19 *Inderwick v Snell* (1850) 2 Mac & G 216. Where a company in regular meeting has resolved on the removal of directors, the court will not, in the absence of fraud, review the considerations which might have affected the passing of the resolution: *Inderwick v Snell*. For a case where the validity of a non-fiduciary power vested in life directors to remove other directors was upheld see *Bersel Manufacturing Co Ltd v Berry* [1968] 2 All ER 552, HL. As to the retirement and removal of directors see also PARAS 515 et seq. As to the obligation of a company which has obtained admission to the official list of the UK Listing Authority to notify a Regulatory Information Service of board changes see PARA 483 note 7.

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516. Resignation.

Where, by the articles of association¹, a director² has power to resign at any time³, his resignation takes effect independently of acceptance by the other directors or the company⁴. Where the articles of association of a company provide that the office of a director is to be vacated ipso facto if by notice in writing to the company a director resigns office, an oral resignation, if accepted by the company, is valid⁵.

1 As to a company's articles of association see PARA 228 et seq.

2 As to a company's directors generally see PARA 478 et seq.

3 As allowed for under the model articles of association prescribed for the purposes of the Companies Act 2006, namely the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 2 (art 18), reg 3, Sch 2 Pt 2 (art 18), reg 4, Sch 3 Pt 2 (art 22), and under the default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), which have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006, namely the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 81 (as to which see PARA 515 note 2). As to the model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq; and as to the 'legacy articles' see PARA 230.

4 *Glossop v Glossop* [1907] 2 Ch 370; *Transport Ltd v Schonberg* (1905) 21 TLR 305 (where it was also held that the other directors accepted the resignation); *Re Montrotier Asphalte Co, Perry's Case* (1876) 34 LT 716. Cf *Municipal Freehold Land Co v Pollington* (1890) 59 LJ Ch 734. Where the resignation of a director has been concealed from the shareholders, the director is not liable for statements made in the report with his name on it if he has not taken part in the concealment: see *Re National Bank of Wales Ltd* [1899] 2 Ch 629 at 667, CA, per Lindley MR.

5 *Latchford Premier Cinema Ltd v Ennion* [1931] 2 Ch 409.

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517. Removal from office; director's right to protest.

A company¹ may by ordinary resolution at a meeting² remove a director³ before the expiration of his period of office⁴, notwithstanding anything in any agreement between it and him⁵. Special notice is required⁶ of such a resolution to remove a director, or to appoint somebody instead of a director so removed at the meeting at which he is removed⁷. On receipt of notice of an intended resolution so to remove a director⁸, the company must forthwith send a copy of it to the director concerned⁹; and the director is entitled to be heard on the resolution at the meeting (whether or not he is a member of the company)¹⁰. Where notice is given of any such intended resolution to remove a director¹¹, and the director concerned makes with respect to it representations in writing (not exceeding a reasonable length¹²) to the company and requests their notification to members of the company, the company must, unless the representations are received by it too late for it to do so¹³:

- 922 (1) in any notice of the resolution given to members of the company, state the fact of the representations having been made¹⁴; and
- 923 (2) send a copy of such representations to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representations by the company)¹⁵.

If a copy of the representations is not sent as required¹⁶ because it was received too late, or because of the company's default, the director may (without prejudice to his right to be heard orally) require that the representations be read out at the meeting¹⁷.

Copies of the representations need not be sent out, however, nor need the representations be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the court¹⁸ is satisfied that the director's right to protest¹⁹ is being abused²⁰. The court may order the company's costs on such an application to be paid in whole or in part by the director, notwithstanding that he is not a party to the application²¹.

Where directors attempt to avoid removal under the statutory provisions by failing to call a meeting and then omitting to attend a requisitioned general meeting, so as to avoid the presence of a quorum, the court will convene a meeting in exercise of its statutory powers²².

A vacancy created by the removal of a director under the statutory powers²³, if not filled at the meeting at which he is removed, may be filled as a casual vacancy²⁴; and a person appointed director in place of a person so removed is treated, for the purpose of determining the time at which he or any other director is to retire, as if he had become director on the day on which the person in whose place he is appointed was last appointed a director²⁵.

The administrator²⁶ of a company has power to remove any director of the company and to appoint any person to be a director of it, whether to fill a vacancy or otherwise²⁷.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to resolutions of the company see PARA 617 et seq. As to the meaning of 'ordinary resolution' see PARA 613.

3 As to the meaning of 'director' under the Companies Acts see PARA 478.

4 As to the appointment of directors see PARA 484 et seq.

5 Companies Act 2006 s 168(1). A resolution under s 168 removing a director before the expiration of his period of office may not be passed as a written resolution: see s 288(2); and PARA 623. In addition to the statutory right of removal, provision as to the termination of a director's appointment may be made in the company's articles of association: see PARA 515.

By a suitable loading of voting rights in favour of a director threatened with removal, the statutory provisions governing removal may be effectively nullified: *Bushell v Faith* [1970] AC 1099, [1970] 1 All ER 53, HL. Before 1948, it was impossible to remove directors who had been appointed for a definite period, unless the original

articles, or the articles as altered by special resolution, gave power to do so (*Re Imperial Hydropathic Hotel Co, Blackpool v Hampson* (1882) 23 ChD 1, CA); nor could they resign (*Re South London Fish Market Co* (1888) 39 ChD 324, CA); but an alteration of the articles made in good faith for the benefit of the company which enabled a permanent director to be removed was (and still would be) valid (*Shuttleworth v Cox Bros & Co (Maidenhead) Ltd* [1927] 2 KB 9, CA; and see *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701, [1940] 2 All ER 445, HL). The court would not have enforced an agreement that a director should be irremovable; and, if the company had in general meeting resolved that a director must retire, the court would not have compelled it to allow him to act (*Bainbridge v Smith* (1889) 41 ChD 462, CA; *Harben v Phillips* (1883) 23 ChD 14, CA; *Browne v La Trinidad* (1887) 37 ChD 1, CA), even if there had been irregularities of procedure, provided that the final result was not in doubt (*Bentley-Stevens v Jones* [1974] 2 All ER 653, [1974] 1 WLR 638; cf *Hall v British Essence Co Ltd* (1946) 62 TLR 542). See also the text and note 22. As to a company's articles of association generally see PARA 228 et seq.

The provision made by the Companies Act 2006 s 168 is not to be taken as depriving a person removed under it of compensation or damages payable to him in respect of the termination of his appointment as director (or of any appointment terminating with that as director), or as derogating from any power to remove a director that may exist apart from s 168: s 168(5). A director appointed for a fixed term who was removed from office before the termination of his period of office under a power introduced by a change of the articles after his appointment was held in *Southern Foundries (1926) Ltd v Shirlaw* to be entitled to damages for breach of contract. Exactly similar principles would be applicable to removal under the Companies Act 2006 s 168. Conditions of appointment of a director may, however, authorise his removal without the giving of reasonable notice: see *Read v Astoria Garage (Streatham) Ltd* [1952] Ch 637, [1952] 2 All ER 292, CA; and PARA 538. While a company may have a statutory right conferred on it by the Companies Act 2006 to remove a director, exercise of that right may result, in an appropriate case, in the dismissed director petitioning for relief on the grounds that his removal from office amounted to conduct unfairly prejudicial to his interests as a member: see PARA 470.

6 As to the special notice required see PARA 617.

7 Companies Act 2006 s 168(2). See note 5.

8 Is an intended resolution so to remove a director under the Companies Act 2006 s 168 (see the text and notes 1-7): see s 169(1). As to the service of documents on a company generally see PARA 671 et seq.

9 Companies Act 2006 s 169(1). As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

10 Companies Act 2006 s 169(2). As to the meaning of 'member of a company' see PARA 321. There is no necessity for a director to be a shareholder: see PARA 491 et seq. Neither the model articles of association prescribed for the purposes of the Companies Act 2006 (ie the Companies (Model Articles) Regulations 2008, SI 2008/3229: see PARA 228 et seq) nor the default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles') (ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule: see PARA 230) contain such a requirement, but they do provide that a director, whether or not he is not a member, is entitled to attend and speak at any general meeting: see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 4 (art 40), reg 3, Sch 2 Pt 3 (art 26), reg 4, Sch 3 Pt 3 (art 32), the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A art 81; and see PARA 645. As to shareholders and membership of companies generally see PARA 321 et seq.

11 Is under the Companies Act 2006 s 168 (see the text and notes 1-7): see s 169(3).

12 Presumably 1,000 words would be reasonable in a normal case: cf the Companies Act 2006 s 314(1) (cited in PARA 642).

13 Companies Act 2006 s 169(3).

14 Companies Act 2006 s 169(3)(a).

15 Companies Act 2006 s 169(3)(b).

16 Is as required by the Companies Act 2006 s 169(3) (see the text and notes 11-15): see s 169(4).

17 Companies Act 2006 s 169(4).

18 As to the meaning of 'court' see PARA 212 note 1.

19 Is the rights conferred by the Companies Act 2006 s 169 (see the text and notes 8-17): see s 169(5).

20 Companies Act 2006 s 169(5). In relation to an application for an order under s 169(5), the claimant must notify the director concerned of the application: *Practice Direction-Applications under the Companies Acts and*

Related Legislation PD 49 para 8. As to the procedure that applies to applications etc made under companies legislation generally see PARA 305.

21 Companies Act 2006 s 169(6).

22 *Re Whitchurch Insurance Consultants Ltd* [1993] BCLC 1359, [1994] BCC 51; *Re Opera Photographic Ltd* [1989] 1 WLR 634, [1989] BCLC 763; *Re El Sombrero Ltd* [1958] Ch 900, [1958] 3 All ER 1. However, the court will not convene a meeting where to do so would override class rights: *Harman v BML Group Ltd* [1994] 1 WLR 893, [1994] 2 BCLC 674, CA (class rights designed to protect a member from removal as director). Nor will a meeting be convened to resolve a deadlock where a potential deadlock was a matter which must be taken to have been agreed on with the consent and for the protection of each of the parties: *Ross v Telford* [1998] 1 BCLC 82, CA; *Alvona Developments Ltd v Manhattan Loft Corporation (AC) Ltd* [2005] EWHC 1567 (Ch), [2005] All ER (D) 252 (Jul), [2006] BCC 119. As to the court's power to convene meetings see PARA 639. As to the quorum required for a meeting of directors see PARA 529.

23 le under the Companies Act 2006 s 168 (see the text and notes 1-7): see s 168(3).

24 Companies Act 2006 s 168(3). See note 5. As to casual vacancies see PARA 487.

25 Companies Act 2006 s 168(4). See note 5.

26 As to administrators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 158 et seq.

27 See the Insolvency Act 1986 s 8, Sch B1 para 61; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 312. See also **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 163.

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(iii) Remuneration of Directors

A. IN GENERAL

518. Right to remuneration.

In the absence of provision in a company's constitution¹ providing for their being paid for their services, a company's directors² are not entitled to be paid any remuneration³, nor may they recover anything on a quantum meruit basis⁴. A person whose appointment as a director turns out to be a nullity may, however, recover on a quantum meruit for services rendered and accepted after the date of his purported appointment⁵. Where a company's articles of association⁶ provide that the remuneration of a managing director is to be determined by the board of directors, and where no such determination is made, a managing director who claims remuneration on a quantum meruit basis will be unsuccessful⁷. The right to remuneration is based on an inference of law imposed on the parties where work has been done or goods have been delivered under what purports to be a binding contract, but is not so in fact⁸. Provided that there has been a genuine exercise of the company's power to award remuneration, the court will be reluctant to hold that the payments have been improper, but payments made where no services have in fact been rendered cannot properly be classified as remuneration⁹. Sums improperly received as remuneration may be recovered¹⁰. As the remuneration of a director is a payment for services rendered, the fact that a director holds his qualification shares as a trustee does not make him accountable for this remuneration to the beneficiary¹¹, unless the opportunity to gain that remuneration was gained as a result of a discretion vested in the director as a trustee¹². Even if that opportunity was so gained, the terms of the trust instrument may render the trustees not accountable for their remuneration as directors¹³.

The right to remuneration may be waived¹⁴; but a mere promise by the directors to forgo their remuneration, even if made in open meeting, is not enforceable¹⁵. Where there is an agreement not to claim remuneration which is supported by consideration, the agreement may be enforced by any party to it and would bar any claim by a director to remuneration¹⁶. Breach of an understanding between shareholders in a quasi-partnership that remuneration would not be paid to the directors constitutes grounds for a petition alleging unfairly prejudicial conduct¹⁷.

A company owning shares in a second company, which are transferred to one of its own directors in order to qualify him as director of the second company to represent the interests of the first company, is not entitled to claim from the director his remuneration as director of the second company¹⁸.

1 As to the meaning of references to a company's constitution for the purposes of the Companies Act 2006 Pt 10 (ss 154-259) (see PARA 478 et seq) see PARA 540 note 4.

2 As to a company's directors generally see PARA 478 et seq.

3 *Dunston v Imperial Gas Light Co* (1831) 3 B & Ad 125; *Young v Naval, Military and Civil Service Co-operative Society of South Africa* [1905] 1 KB 687 (where travelling and hotel expenses were disallowed); *Re French Protestant Hospital* [1951] Ch 567, [1951] 1 All ER 938 (body corporate incorporated by royal charter; improper for directors to alter byelaws to enable payment to be made to them where constitution did not give right to remuneration). See *York and North Midland Rly Co v Hudson* (1853) 16 Beav 485; but see also *Marmor Ltd v Alexander* 1908 SC 78, Ct of Sess; *Re Whitehall Court Ltd* (1887) 3 TLR 402; *Re Liverpool Household Stores Association* (1890) 59 LJ Ch 616; *Kerr v Marine Products Ltd* (1928) 44 TLR 292 (where the remuneration was under the articles to be determined by the company; and, no remuneration having been fixed, it was held that the directors were not entitled to pay a salary to a man appointed as overseas director under an article empowering the directors to appoint officers abroad and to fix their salary). Remuneration need not take the form of direct payments constituting a regular wage, salary cheque or credit but may take the form of payments made to third parties or commissions, fees or bonuses: *Currencies Direct v Ellis* [2002] EWCA Civ 779, [2002] 2 BCLC 482. As to provision that may be made in a company's constitution for the remuneration of directors to be fixed see PARA 519.

4 *Hutton v West Cork Rly Co* (1883) 23 ChD 654 at 671, CA, per Bowen LJ; *Re George Newman & Co* [1895] 1 Ch 674, CA; *Re Bodega Co Ltd* [1904] 1 Ch 276 (where a director continued to act as such after his office was vacated); *Re Consolidated Nickel Mines Ltd* [1914] 1 Ch 883 (where directors failed to convene the annual meeting at which they would have vacated office and they were held not entitled to remuneration after the date on which it should have been convened). See also *Guinness plc v Saunders* [1990] 2 AC 663, [1990] 1 All ER 652, HL (in the absence of a binding contract, the appellant-director was not entitled to claim reasonable remuneration on a quantum meruit based on an implied contract). As to quantum meruit see **RESTITUTION** vol 40(1) (2007 Reissue) PARAS 7, 113 et seq.

5 *Craven-Ellis v Canons Ltd* [1936] 2 KB 403, [1936] 2 All ER 1066, CA. Cf *Brown and Green Ltd v Hays* (1920) 36 TLR 330.

6 As to a company's articles of association generally see PARA 228 et seq.

7 *Re Richmond Gate Property Co Ltd* [1964] 3 All ER 936, [1965] 1 WLR 335 (where there was a valid contract and no room for an implied contract or a contract imposed by law; and it appears from the judgment that there was an understanding that no remuneration should be paid to the managing director until the company got on its feet, which it never did), distinguishing *Craven-Ellis v Canons Ltd* [1936] 2 KB 403, [1936] 2 All ER 1066, CA.

8 *Craven-Ellis v Canons Ltd* [1936] 2 KB 403 at 410, [1936] 2 All ER 1066 at 1072, CA, per Greer LJ.

9 *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016.

10 *Re George Newman & Co* [1895] 1 Ch 674, CA; *Re Bodega Co Ltd* [1904] 1 Ch 276; *Re Oxford Benefit Building and Investment Society* (1886) 35 ChD 502; *Brown and Green Ltd v Hays* (1920) 36 TLR 330; *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 (sums paid to wife of main shareholder who took no part in the business recoverable). They will be ordered jointly and severally to repay with interest as on a breach of trust: *Re Oxford Benefit Building and Investment Society*; *Leeds Estate Building and Investment Co v Shepherd* (1887) 36 ChD 787 (where remuneration was payable only if a dividend had been paid). Cf *Re Whitehall Court Ltd* (1887) 56 LT 280 at 281 per Kay J. As to recovery, in a winding up, by misfeasance proceedings see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688 et seq.

11 *Re Dover Coalfield Extension Ltd* [1908] 1 Ch 65, CA; explained, and dictum of Warrington J (as reported at first instance in [1907] 2 Ch 76 at 83) criticised, in *Re Gee, Wood v Staples* [1948] Ch 284, [1948] 1 All ER 498. See also *Re Lewis, Lewis v Lewis* (1910) 103 LT 495.

12 *Re Macadam, Dallow and Moscrop v Codd* [1946] Ch 73, [1945] 2 All ER 664. See also *Williams v Barton* [1927] 2 Ch 9.

13 *Re Llewellyn's Will Trusts, Griffiths v Wilcox* [1949] Ch 225, [1949] 1 All ER 487.

14 *Re Arigna Iron Mining Co* (1853) 1 Eq Rep 269.

15 *Lambert v Northern Railway of Buenos Ayres Co Ltd* (1869) 18 WR 180 (no evidence that shares had been purchased on the strength of the promise).

16 *West Yorkshire Darracq Agency v Coleridge* [1911] 2 KB 326 (agreement to which liquidator representing the company was party; consideration found in mutual forbearance to sue); *Re William Porter & Co Ltd* [1937] 2 All ER 361 (resolution of directors forgoing fees intended to be acted on by company).

17 *Fisher v Cadman* [2005] EWHC 377 (Ch), [2006] 1 BCLC 499. As to the protection of a company's members against unfair prejudice see PARA 466 et seq.

18 *Re Dover Coalfield Extension Ltd* [1908] 1 Ch 65, CA. Cf *Re Macadam, Dallow v Codd* [1946] Ch 73, [1945] 2 All ER 664. See also PARA 556.

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519. How company directors' remuneration may be fixed.

The remuneration of a company's directors¹ may be fixed by the company's articles of association² or the articles may provide that the remuneration is to be fixed by the company in some manner³. If fixed by the articles, it is subject to alteration by special resolution⁴. If dependent on a resolution of the company, it may be altered and the company may by ordinary resolution discriminate between the directors as to the amount of their remuneration⁵. If, under the company's articles, remuneration for the directors must be authorised by the company, and there is no such authorisation, any payments made to the directors are void and not merely voidable⁶.

When a share qualification is required, the date when remuneration commences depends on whether the director was empowered to act before acquiring the qualification⁷. When once fixed by authorisation, the remuneration runs from that time, unless the resolution is otherwise expressed; a reference in the subsequent balance sheet to a sum charged from an earlier date will not bind the company⁸. The fact that the duties of directors are diminished as the result of a sale of the undertaking and assets of the company does not disentitle them from receiving the same remuneration as before⁹.

Where articles provide that the board of directors may fix the remuneration of the directors, and may in addition grant special remuneration to any director who serves on any committee or who devotes special attention to the business of the company or who otherwise performs special services, it is only the board as a whole which can fix or grant the remuneration; and this is so even where there is an article which defines the board as the directors of the company for the time being (or a quorum of such directors assembled at a meeting of directors duly convened) or any committee authorised by the board to act on its behalf¹⁰.

1 As to a company's directors generally see PARA 478 et seq.

2 The company cannot refuse to pay on the ground that the fees stated in the articles are excessive: *Re Anglo-Greek Steam Co* (1866) LR 2 Eq 1. See also *Re George Newman & Co* [1895] 1 Ch 674, CA (where all the shareholders agreed, but not at a meeting). The articles may be looked at to see the terms of the contract of service, though not forming the actual contract: *Re Peruvian Guano Co, ex p Kemp* [1894] 3 Ch 690 at 701 per Wright J. See also PARA 245. As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

3 The Companies (Model Articles) Regulations 2008, SI 2008/3229, provide that directors may undertake any services for the company that the directors decide (see Sch 1 art 19(1); Sch 2 art 19(1); Sch 3 art 23(1)); and that directors are entitled to such remuneration as the directors determine both for their services to the company as directors, and for any other service which they undertake for the company (see Sch 1 art 19(2); Sch 2 art 19(2); Sch 3 art 23(2)). Unless the directors decide otherwise, directors are not accountable to the company for any remuneration which they receive as directors or other officers or employees of the company's subsidiaries or of any other body corporate in which the company is interested: see Sch 1 art 19(5); Sch 2 art 19(5); Sch 3 art 23(5).

The Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A art 82 provides merely that the directors are entitled to such remuneration as the company may by ordinary resolution determine. As to the meaning of 'ordinary resolution' see PARA 613. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but art 82 is applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

4 *Boschoek Pty Co Ltd v Fuke* [1906] 1 Ch 148. As to the meaning of 'special resolution' see PARA 614.

5 *Foster v Foster* [1916] 1 Ch 532.

6 *Clark v Cutland* [2003] EWCA Civ 810, [2003] 4 All ER 733, [2004] 1 WLR 783; *Guinness plc v Saunders* [1990] 2 AC 663, [1990] 1 All ER 652, HL. If the shareholders are asked to sanction any extra remuneration, the notice of the meeting must point out the matter very clearly to them: *Normandy v Ind, Coope & Co Ltd* [1908] 1 Ch 84. A statement in a balance sheet of remuneration paid is not sufficient ratification: *Re London Gigantic Wheel Co Ltd* (1908) 24 TLR 618, CA. See also *Baillie v Oriental Telephone and Electric Co Ltd* [1915] 1 Ch 503, CA. The absence of a formal resolution for approval will not, however, be fatal, if the shareholders have applied their minds to the question: *Re Duomatic Ltd* [1969] 2 Ch 365, [1969] 1 All ER 161, applying *Parker & Cooper Ltd v Reading* [1926] Ch 975. See also PARA 666.

As to special remuneration and expenses etc see PARA 522.

7 *Re International Cable Co Ltd, ex p Official Liquidator* (1892) 66 LT 253; *Salton v New Beeston Cycle Co* [1899] 1 Ch 775; *Ex p European Central Rly Co, Walford's Case* (1869) 20 LT 74.

8 *Re London Gigantic Wheel Co Ltd* (1908) 24 TLR 618, CA.

9 *Re Consolidated Nickel Mines Ltd* [1914] 1 Ch 883.

10 *Guinness plc v Saunders* [1990] 2 AC 663, [1990] 1 All ER 652, HL. See also *Currencies Direct Ltd v Ellis* [2002] EWCA Civ 779, [2002] 2 BCLC 482 (no requirement for a specific agreement as to amount or form of remuneration). As to the quorum required for a meeting of directors see PARA 529.

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520. How remuneration is payable.

A company's articles of association¹ may make provision as to how a director's² remuneration is payable³.

Unless otherwise stated, the remuneration is payable although no profits are made⁴. A fixed remuneration may be sued for, or proved for in a winding up, although there is no resolution of the board that it should be paid⁵. A statement in a balance sheet signed by the directors that a sum is due to those directors as remuneration is not effective as an acknowledgment⁶ so as to prevent a claim in respect of that remuneration being barred by lapse of time⁷.

Subject to any contrary express agreement of the parties, salary payable to a director is subject to apportionment, so that service for less than a whole year will entitle a director to a proportionate part⁸; it is apportionable if the remuneration is payable 'at the rate of' a fixed sum per annum⁹.

Directors who are remunerated by a percentage of the net profits¹⁰ or by commission on the sum available for distribution¹¹ are entitled to compute their remuneration on the profits before corporation tax is deducted¹².

Where the remuneration of the directors is a lump sum to be divided as they think fit, no director may sue for remuneration until a division has taken place¹³, unless it is in addition provided that in default of agreement the remuneration should be equally divided, and there has been no agreement¹⁴. A director cannot obtain a mandatory injunction to compel the remaining directors to fix his remuneration¹⁵. Where directors are given a discretion to determine the time for payment of a director's remuneration, no claim will lie until they have so determined¹⁶.

A special resolution of the company¹⁷ altering directors' remuneration cannot alter the contractual rights of the directors¹⁸ as regards remuneration actually earned.

1 As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

2 As to a company's directors generally see PARA 478 et seq.

3 The Companies (Model Articles) Regulations 2008, SI 2008/3229, provide that, subject to the articles, a director's remuneration may take any form (see Sch 1 art 19(3); Sch 2 art 19(3); Sch 3 art 23(3)); and that, unless the directors decide otherwise, directors' remuneration accrues from day to day (see Sch 1 art 19(4); Sch 2 art 19(4); Sch 3 art 23(4)). The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 82 merely provides that, unless the ordinary resolution which determines directors' remuneration (as to which see PARA 519 note 3) provides otherwise, such remuneration will be deemed to accrue from day to day. As to the meaning of 'ordinary resolution' see PARA 613. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but art 82 is applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

As to how company directors' remuneration may be fixed see PARA 519.

4 *Re Lundy Granite Co Ltd, Lewis's Case* (1872) 26 LT 673. There is no general presumption to the contrary: *Nell v Atlanta Gold and Silver Consolidated Mines* (1895) 11 TLR 407, CA.

5 *Re New British Iron Co, ex p Beckwith* [1898] 1 Ch 324; *Nell v Atlanta Gold and Silver Consolidated Mines* (1895) 11 TLR 407, CA. As to proof in winding up see PARA 521; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 749 et seq.

6 le within the meaning of the Limitation Act 1980 s 30 (see **LIMITATION PERIODS** vol 68 (2008) PARA 1185).

7 *Re Coliseum (Barrow) Ltd* [1930] 2 Ch 44; *Re Transplanters (Holding Co) Ltd* [1958] 2 All ER 711, [1958] 1 WLR 822. As to the limitation period see the Limitation Act 1980 ss 5, 8; and **LIMITATION PERIODS** vol 68 (2008) PARA 956 et seq.

8 *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2005] 2 BCLC 91; and see the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 82; and the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 19(3), (4), Sch 2 art 19(3), (4), Sch 3 art 23(3), (4) (cited in note 3).

Remuneration at a fixed sum per annum or for each year had been held not to be apportionable: see *McConnell's Claim* [1901] 1 Ch 728; *Inman v Ackroyd & Best Ltd* [1901] 1 KB 613, CA; *Salton v New Beeston Cycle Co* [1899] 1 Ch 775; and see the text and note 9. In *Moriarty v Regent's Garage Co* [1921] 1 KB 423, these decisions were strongly criticised and stated to be good law on the basis only that the payment to the directors in the two last-named cases was in the form of a lump sum, and that until a decision as to the division of the lump sum had been made no claim would lie, and it was held that the remuneration of a director was apportionable under the Apportionment Act 1870. Although *Moriarty v Regent's Garage Co* was overruled in the Court of Appeal (see [1921] 2 KB 766), the appeal was not decided on the applicability of the Apportionment Act 1870, the court holding that this question could not then be raised as it had not been raised in the county court. Cf *Boschoek Pty Co Ltd v Fuke* [1906] 1 Ch 148; *Re Central De Kaap Gold Mines* (1899) 69 LJ Ch 18; *Kempf v Offin River Gold Estates Ltd* (1908) Times, 10 April; *Swabey v Port Darwin Gold Mining Co* (1889) 1 Meg 385, CA; *Re Shaws, Bryant & Co* (1901) 45 Sol Jo 580. A term that the remuneration is apportionable was implied in *Swabey v Port Darwin Gold Mining Co*; but cf *Inman v Ackroyd & Best Ltd* [1901] 1 KB 613, CA; *Moriarty v Regent's Garage Co*. Where it is provided that the directors are entitled to a share in profits by way of additional remuneration and that in default of agreement it should be divided equally, then, in the event of there being no agreement, a director who ceased to hold office during the year is entitled to a proportionate part: *Diamond v English Sewing Cotton Co Ltd* [1922] WN 237, CA.

9 *Gilman v Gülcher Electric Light Co* (1886) 3 TLR 133, CA; *Re AM Wood's Ships' Woodite Protection Co* (1890) 62 LT 760; *Swabey v Port Darwin Gold Mining Co* (1889) 1 Meg 385, CA. See also **RENTCHARGES AND ANNUITIES** vol 39(2) (Reissue) PARA 839.

10 *Johnston v Chestergate Hat Manufacturing Co Ltd* [1915] 2 Ch 338.

11 *Edwards v Saunton Hotel Co Ltd* [1943] 1 All ER 176.

12 As to corporation tax see **INCOME TAXATION**.

13 *Morrell v Oxford Portland Cement Co Ltd* (1910) 26 TLR 682; *Joseph v Sonora (Mexico) Land and Timber Co Ltd* (1918) 34 TLR 220. Continuing directors with power to divide remuneration among the directors may thus entirely deprive a retiring director of remuneration: *Gilman v Gülcher Electric Light Co* (1886) 3 TLR 133, CA. See also *Moriarty v Regent's Garage Co* [1921] 1 KB 423 (on appeal [1921] 2 KB 766, CA).

14 *Diamond v English Sewing Cotton Co Ltd* [1922] WN 237, CA (where the remuneration sued for was additional remuneration by way of a share in profits at a fixed rate).

15 *Dashwood v Cornish* (1897) 13 TLR 337, CA. As to mandatory orders see **JUDICIAL REVIEW** vol 61 (2010) PARA 703 et seq

16 *Caridad Copper Mining Co v Swallow* [1902] 2 KB 44, CA.

17 As to the meaning of 'special resolution' see PARA 614.

18 *Swabey v Port Darwin Gold Mining Co* (1889) 1 Meg 385, CA.

COMPANIES ACTS/(13) DIRECTORS/(iii) Remuneration of Directors/A. IN GENERAL/521. Proof in winding up; execution.

521. Proof in winding up; execution.

Remuneration is not due to the director in his character of a member of the company¹. It may, therefore, be proved as a debt on winding up in competition with ordinary creditors²; and this will be in addition to remuneration earned in any other capacity, such as receiver and manager in a debenture holders' claim³.

Directors who are paid by a percentage of the amount paid by way of dividend may prove for this in the winding up after creditors have been paid, if it was not unreasonable at the time to propose such dividend⁴. If, however, they are paid by a percentage on 'net profits', this refers to the company as a going concern and does not entitle them to a proportion of its assets on a sale of the undertaking⁵; and similarly, where the only contract between the director and the company is contained in the articles, his employment ceases automatically upon the winding up of the company⁶.

A receiver by way of equitable execution will not be appointed in respect of directors' fees⁷.

1 As to the director's right to remuneration see PARA 518 et seq. As to membership of a company see PARA 321 et seq.

2 *Re New British Iron Co, ex p Beckwith* [1898] 1 Ch 324; *Re Dale and Plant Ltd* (1889) 43 ChD 255; *Re Commercial and General Life Assurance etc Association, ex p Johnson* (1857) 27 LJ Ch 803; *Re Lundy Granite Co Ltd, Lewis's Case* (1872) 26 LT 673; *Re A1 Biscuit Co* (1899) 43 Sol Jo 657. Since it was expressly disapproved in Northern Ireland (see *Re Cinnamon Park & Co Ltd* [1930] NI 47), *Re Leicester Club and County Racecourse Co, ex p Cannon* (1885) 30 ChD 629 cannot now be regarded as law. Remuneration which has been waived by a director cannot be recovered if the company gave consideration (such as deciding to continue its business) for the waiver: *Re William Porter & Co Ltd* [1937] 2 All ER 361. As to proof of debts in winding up generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 749 et seq.

3 *Re South Western of Venezuela (Barquisimeto) Rly Co* [1902] 1 Ch 701. A debenture often gives power to appoint a receiver or manager on the occurrence of specified events: see PARA 1340. As to the meaning of 'debenture' see PARA 1299. As to the construction of references to receivers and managers for these purposes see PARA 1336.

4 *Re Peruvian Guano Co, ex p Kemp* [1894] 3 Ch 690; *Re Mercantile Trading Co, Stringer's Case* (1869) 4 Ch App 475.

5 *Frames v Bultfontein Mining Co* [1891] 1 Ch 140.

6 *Re TN Farrer Ltd* [1937] Ch 352, [1937] 2 All ER 505 (as employment was conditional upon the continued existence of the company, there was no compensation for loss of office on winding up).

7 *Hamilton v Brogden* [1891] WN 36. Such an appointment would probably destroy the security. Past fees not paid may be attached: *Hamilton v Brogden*. As to the appointment of a receiver by way of equitable execution see **CIVIL PROCEDURE** vol 12 (2009) PARA 1497 et seq.

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522. Special remuneration and expenses; pension.

Apart from special provision in the company's articles of association¹, directors² are not entitled to claim travelling or other expenses³; and, where they have power to pay a co-director for extra services, the latter must prove the services and the agreement to pay for them⁴. As a matter of account the payment must not be attributed to capital expenditure⁵.

Where a power of altering remuneration is reserved to the company, it may not grant a 'pension' to a managing director who retires as manager but not as director⁶. It was formerly not competent for a company which had ceased to carry on business to vote gratuitous remuneration to its officers and employees⁷, but there is now an express statutory power to do so⁸.

The special provisions for taxation of expenses, allowances and benefits in kind in relation to directors are discussed elsewhere⁹.

1 As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

2 As to a company's directors generally see PARA 478 et seq.

3 *Young v Naval, Military and Civil Service Co-operative Society of South Africa* [1905] 1 KB 687; *Marmor Ltd v Alexander* 1908 SC 78, Ct of Sess. As to the director's right to remuneration generally see PARA 518 et seq.

The Companies (Model Articles) Regulations 2008, SI 2008/3229, provide that the company may pay any reasonable expenses which the directors properly incur in connection with their attendance at meetings of directors or committees of directors, general meetings, or (except in the case of a private company limited by guarantee) separate meetings of the holders of any class of shares or (in all cases) separate meetings of the holders of debentures of the company, or otherwise in connection with the exercise of their powers and the discharge of their responsibilities in relation to the company: Sch 1 Pt 2 (art 20); Sch 2 Pt 2 (art 20); Sch 3 Pt 2 (art 24). As to the meaning of 'debenture' see PARA 1299. As to shareholders generally see PARA 321 et seq. As to meetings of the company generally see PARA 629 et seq. As to meetings of directors see PARA 528 et seq. As to the extent to which directors may delegate powers, including to committees, see PARA 537.

The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 83 provides that directors may be paid all travelling, hotel, and other expenses properly incurred by them in connection with their attendance at meetings of directors or committees of directors or general meetings or separate meetings of the holders of any class of shares or of debentures of the company or otherwise in connection with the discharge of their duties. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but art 83 is applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital). However, Table C modifies Table A art 83 to the extent that the words 'of any class of shares or' are omitted: see Table C art 9. As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

4 *Lockhart v Moldacot Pocket Sewing Machine Co Ltd* (1889) 5 TLR 307. See also *Boschoek Pty Co Ltd v Fuke* [1906] 1 Ch 148 at 163 per Swinfen Eady J. Where a director's expense claims are made in a manner proper at the time and settled, it would be oppressive to make an order for account on the grounds that a subsequent retroactive memorandum requires such claims to be strictly documented: *Nelberg v Woking Shipping Co Ltd and Konnel Steamship Co Ltd* [1958] 2 Lloyd's Rep 560; *Guinness plc v Saunders* [1990] 2 AC 663, [1990] 1 All ER 652, HL.

5 *Ashton & Co Ltd v Honey* (1907) 23 TLR 253.

6 *Normandy v Ind, Coope & Co Ltd* [1908] 1 Ch 84. As to compensation for loss of office see PARA 579 et seq.

The Companies (Model Articles) Regulations 2008, SI 2008/3229, provide that, subject to the articles, a director's remuneration may include any arrangements in connection with the payment of a pension, allowance

or gratuity, or any death, sickness or disability benefits, to or in respect of that director: see Sch 1 art 19(3); Sch 2 art 19(3); Sch 3 art 23(3).

Under the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 87, directors may provide benefits, whether by the payment of gratuities or pensions or by insurance or otherwise, for any director who has held but no longer holds any executive office or employment with the company or with any body corporate which is or has been a subsidiary of the company or a predecessor in business of the company or of any such subsidiary, and for any member of his family (including a spouse and a former spouse) or any person who is or was dependent on him, and may (as well before as after he ceases to hold such office or employment) contribute to any fund and pay premiums for the purchase or provision of any such benefit. Table A art 87 is applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital).

7 *Stroud v Royal Aquarium and Summer and Winter Garden Society* (1903) 89 LT 243, following *Hutton v West Cork Rly Co* (1883) 23 ChD 654, CA; *Parke v Daily News Ltd* [1962] Ch 927, [1962] 2 All ER 929. Cf *Cowan v Seymour (Inspector of Taxes)* [1920] 1 KB 500, CA (where the payments were made by the shareholders).

8 See the Companies Act 2006 s 247; and PARA 546.

9 See the Income Tax (Earnings and Pensions) Act 2003; and **INCOME TAXATION**.

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523. Particulars of directors' remuneration to be given in accounts, reports etc.

The following information about directors' remuneration¹ must be given in notes to a company's annual accounts²:

- 924 (1) gains made by directors on the exercise of share options³;
- 925 (2) benefits received or receivable by directors under long-term incentive schemes⁴;
- 926 (3) payments for loss of office⁵;
- 927 (4) benefits receivable, and contributions for the purpose of providing benefits, in respect of past services of a person as director or in any other capacity while director⁶;
- 928 (5) consideration paid to or receivable by third parties for making available the services of a person as director or in any other capacity while director⁷.

Details of advances and credits granted by a company to its directors, and of guarantees of any kind entered into by the company on behalf of its directors, also must be shown in the notes to its individual accounts⁸.

The directors of a quoted company⁹ must prepare a directors' remuneration report for each financial year of the company¹⁰. The members must by resolution approve the directors' remuneration report for the financial year¹¹, although no director's entitlement to remuneration is made conditional on the resolution being passed for this purpose¹².

1 As to a company's directors generally see PARA 478 et seq. As to the directors' right to remuneration generally see PARA 518 et seq.

2 See the Companies Act 2006 s 412(1); and PARA 767. As to a company's annual accounts see PARA 714 et seq.

- 3 See the Companies Act 2006 s 412(2)(a); and PARA 767.
- 4 See the Companies Act 2006 s 412(2)(b); and PARA 767.
- 5 See the Companies Act 2006 s 412(2)(c); and PARA 767.
- 6 See the Companies Act 2006 s 412(2)(d); and PARA 767.
- 7 See the Companies Act 2006 s 412(2)(e); and PARA 767.
- 8 See the Companies Act 2006 s 413; and PARA 773.
- 9 As to the meaning of 'quoted company' in the Companies Act 2006 see PARA 77.
- 10 See the Companies Act 2006 s 420; and PARA 834 et seq.
- 11 See the Companies Act 2006 s 439; and PARA 849.
- 12 See the Companies Act 2006 s 439(5); and PARA 849.

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B. DIRECTORS' SERVICE CONTRACTS

524. Directors' long-term service contracts.

In relation to any provision under which the guaranteed term of a director's employment with the company of which he is a director¹, or (where he is the director of a holding company²) within the group consisting of that company and its subsidiaries³, is, or may be, longer than two years⁴, the company may not agree to such provision unless it has been approved⁵: (1) by resolution⁶ of the members of the company⁷; and (2) in the case of a director of a holding company, by resolution of the members of that company⁸.

1 As to the guaranteed term of a director's employment see PARA 563 note 1. As to the meaning of 'company' under the Companies Acts see PARA 24; as to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'holding company' see PARA 25.

3 As to the meaning of 'subsidiary' see PARA 25.

4 See the Companies Act 2006 s 188(1); and see PARA 563.

5 See the Companies Act 2006 s 188(2); and see PARA 563. As to exceptions see s 188(6); and PARA 563.

6 As to resolutions and meetings of members see PARA 629 et seq. As to voting at meetings see PARA 652 et seq.

7 See the Companies Act 2006 s 188(2)(a); and see PARA 563. As to the meaning of 'member of a company' see PARA 321.

8 See the Companies Act 2006 s 188(2)(b); and see PARA 563.

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525. Duty to keep directors' service contracts available for inspection.

A company¹ must keep available for inspection²: (1) a copy of every director's³ service contract⁴ with the company or with a subsidiary of the company⁵; or (2) if the contract is not in writing, a written memorandum setting out the terms of the contract⁶. All the copies and memoranda must be kept available for inspection either at the company's registered office⁷, or at a place specified in regulations⁸.

The copies and memoranda must be retained by the company for at least one year from the date of termination or expiry of the contract and must be kept available for inspection during that time⁹.

The company must give notice to the registrar of companies¹⁰: (a) of the place at which the copies and memoranda are kept available for inspection¹¹; and (b) of any change in that place¹², unless they have at all times been kept at the company's registered office¹³.

If default is made in complying with any of the requirements so to keep directors' service contracts etc available for inspection¹⁴, or to keep them available in the proper place¹⁵, or to retain them for the proper length of time¹⁶, or if default is made for 14 days in complying with the requirement to give notice to the registrar of companies¹⁷, an offence is committed by every officer of the company who is in default¹⁸. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹⁹ and (for continued contravention) a daily default fine²⁰ not exceeding one-tenth of level 3 on the standard scale²¹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 228(1). See notes 3-5. The provisions of s 1138 (duty to take precautions against falsification) do not apply to the documents required to be kept under s 228: see PARA 675.

3 As to the meaning of 'director' under the Companies Acts see PARA 478. A shadow director is treated as a director for the purposes of the provisions of the Companies Act 2006 Pt 10 Ch 5 (ss 227-230) (see also PARA 525-526): s 230. As to the meaning of 'shadow director' see PARA 479.

4 For the purposes of the Companies Act 2006 Pt 10 (ss 154-259) (see PARAS 478 et seq) a director's 'service contract', in relation to a company, means a contract under which: (1) a director of the company undertakes personally to perform services (as director or otherwise) for the company, or for a subsidiary of the company (s 227(1)(a)); or (2) services (as director or otherwise) that a director of the company undertakes personally to perform are made available by a third party to the company, or to a subsidiary of the company (s 227(1)(b)). The provisions of Pt 10 relating to directors' service contracts apply to the terms of a person's appointment as a director of a company (and are not restricted to contracts for the performance of services outside the scope of the ordinary duties of a director): see s 227(2). As to the meaning of 'subsidiary' see PARA 25. As to the requirement of members' approval for directors' long-term service contracts see PARA 563.

5 Companies Act 2006 s 228(1)(a). See notes 3-4. The provisions of s 228 apply to a variation of a director's service contract as they apply to the original contract: s 228(7). As to the right of a member to inspect and request a copy of any director's service contracts etc see PARA 526.

6 Companies Act 2006 s 228(1)(b). See notes 3-5.

7 Companies Act 2006 s 228(2)(a). See notes 3-5. As to a company's registered office see PARA 129.

8 Companies Act 2006 s 228(2)(b). The text refers to a place specified in regulations made under s 1136 (see PARA 676): see s 228(2)(b). See notes 3-5.

9 Companies Act 2006 s 228(3). See notes 3-5.

- 10 Companies Act 2006 s 228(4). See notes 3-5. As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements for the proper delivery of documents to the registrar see PARA 142.
- 11 Companies Act 2006 s 228(4)(a). See notes 3-5.
- 12 Companies Act 2006 s 228(4)(b). See notes 3-5.
- 13 Companies Act 2006 s 228(4). See notes 3-5.
- 14 In complying with the Companies Act 2006 s 228(1) (see the text and notes 1-6): see s 228(5).
- 15 In complying with the Companies Act 2006 s 228(2) (see the text and notes 7-8): see s 228(5).
- 16 In complying with the Companies Act 2006 s 228(3) (see the text and note 9): see s 228(5).
- 17 In complying with the Companies Act 2006 s 228(4) (see the text and notes 10-13): see s 228(5).
- 18 Companies Act 2006 s 228(5). See notes 3-5. As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.
- 19 As to the meaning of 'standard scale' see PARA 1622 note 5.
- 20 As to the meaning of 'daily default fine' see PARA 1622.
- 21 Companies Act 2006 s 228(6). See notes 3-5.

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526. Members' right to inspect and request copy of directors' service contracts.

Every copy or memorandum that is required to be kept pursuant to a company's¹ duty to keep directors'² service contracts³ available for inspection⁴ must be open to inspection by any member of the company⁵ without charge⁶.

Any member of the company is entitled also, on request and on payment of such fee as may be prescribed⁷, to be provided with a copy of any such copy or memorandum⁸. The copy must be provided within seven days after the request is received by the company⁹.

If an inspection so required by a member of a company¹⁰ is refused, or if default is made in so providing a member with such a copy or memorandum¹¹, an offence is committed by every officer of the company who is in default¹². A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹³ and (for continued contravention) a daily default fine¹⁴ not exceeding one-tenth of level 3 on the standard scale¹⁵.

In the case of any such refusal or default, the court¹⁶ may by order compel an immediate inspection or, as the case may be, direct that the copy required be sent to the person requiring it¹⁷.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'director' under the Companies Acts see PARA 478; and see PARA 525 note 3.

3 As to the meaning of a director's 'service contract', in relation to a company, for the purposes of the Companies Act 2006 Pt 10 (ss 154-259) (see PARAS 478 et seq) see PARA 525 note 4.

- 4 le under the Companies Act 2006 s 228 (see PARA 525): see s 229(1).
- 5 As to the meaning of 'member of the company' see PARA 321.
- 6 Companies Act 2006 s 229(1).
- 7 In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6. In exercise of the powers conferred by s 229(2), the Secretary of State has made the Companies (Fees for Inspection and Copying of Company Records) Regulations 2007, SI 2007/2612. See further note 8.
- 8 Companies Act 2006 s 229(2). For the purposes of s 229(2), the fee prescribed is 10 pence per 500 words or part thereof copied and the reasonable costs incurred by the company in delivering the copy of the company record to the person entitled to be provided with that copy: Companies (Fees for Inspection and Copying of Company Records) Regulations 2007, SI 2007/2612, reg 4. As to the provisions made for company communications generally see PARA 678 et seq.
- 9 Companies Act 2006 s 229(2).
- 10 le under the Companies Act 2006 s 229(1) (see the text and notes 1-6): see s 229(3).
- 11 le in complying with the Companies Act 2006 s 229(2) (see the text and notes 7-8): see s 229(3).
- 12 Companies Act 2006 s 229(3). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.
- 13 As to the meaning of 'standard scale' see PARA 1622 note 5.
- 14 As to the meaning of 'daily default fine' see PARA 1622.
- 15 Companies Act 2006 s 229(4).
- 16 As to the meaning of 'court' see PARA 212 note 1.
- 17 Companies Act 2006 s 229(5). As to the procedure for making claims and applications to the court under companies legislation see PARA 305. See also PARA 499 note 47.

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(iv) Meetings of Directors

527. Decision-making by directors.

A company's articles of association¹ usually contain provisions as to the way in which directors² at their meetings³ may conduct business and make decisions, including allowance for decisions to be taken instead by way of directors' written resolutions⁴. Directors may validly act only when assembled at a board meeting⁵, unless the articles otherwise provide⁶, and subject to the qualification that the directors (provided they are unanimous) may determine matters within their jurisdiction by informal means⁷. The model articles of association⁸ provide that any decision of the directors of a private company must be taken either by a majority decision at a meeting or by a decision taken unanimously⁹; and that decisions of the directors of a public company may be taken either at a directors' meeting, or in the form of a directors' written resolution¹⁰. In any case, under the articles, if the numbers of votes for and against a proposal at any directors' meeting are equal, the chairman or other director chairing the meeting has a casting vote, unless, in accordance with the articles, the chairman or other director is not to be

counted as participating in the decision-making process for quorum or voting purposes¹¹. Subject to the articles, the directors may make any rule which they think fit about how they take decisions, and about how such rules are to be recorded or communicated to directors¹².

At properly convened meetings of a company's directors, at which there is the prescribed quorum¹³, directors may transact all business within their powers though no notice has been given to the members of the board that any special business is to be transacted¹⁴. They may take the items of business in such order as they think proper, and not necessarily in the order on the agenda paper¹⁵.

If a power is given to directors by an article of association, the decision of the directors to exercise it should, it seems, be unanimous unless on the true construction of the article of association a majority decision is enough¹⁶ (as is the case under the model articles)¹⁷. A subsequent meeting may ratify the business done at an informal meeting¹⁸, and may ratify an unauthorised act of an agent of the company¹⁹.

1 As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

2 As to a company's directors see PARA 478 et seq.

3 As to meetings of a company's directors see PARA 528 et seq.

4 Under the Companies (Model Articles) Regulations 2008, SI 2008/3229, a decision of the directors of a private company may be taken in accordance with Sch 1 art 8 or Sch 2 art 8, as the case may be (see note 9), when all eligible directors (ie directors who would have been entitled to vote on the matter had it been proposed as a resolution at a directors' meeting) indicate to each other by any means that they share a common view on a matter: Sch 1 art 8(1), (3); Sch 2 art 8(1), (3). Such a decision may take the form of a resolution in writing, copies of which have been signed by each eligible director or to which each eligible director has otherwise indicated agreement in writing: Sch 1 art 8(2); Sch 2 art 8(2). However, a decision may not be taken in accordance with Sch 1 art 8 or Sch 2 art 8 (as the case may be) if the eligible directors would not have formed a quorum at such a meeting: Sch 1 art 8(4); Sch 2 art 8(4).

Any director of a public company may propose a directors' written resolution (Sch 3 art 17(1)); and the company secretary must propose a directors' written resolution if a director so requests (Sch 3 art 17(2)). See note 10. A directors' written resolution is proposed by giving notice of the proposed resolution to the directors: Sch 3 art 17(3). Such notice must indicate the proposed resolution and the time by which it is proposed that the directors should adopt it (Sch 3 art 17(4)); and it must be given in writing to each director (Sch 3 art 17(5)). Any decision which a person giving notice of a proposed directors' written resolution takes regarding the process of adopting that resolution must be taken reasonably in good faith: Sch 3 art 17(6). A proposed directors' written resolution is adopted when all the directors who would have been entitled to vote on the resolution at a directors' meeting have signed one or more copies of it, provided that those directors would have formed a quorum at such a meeting: Sch 3 art 18(1). It is immaterial whether any director signs the resolution before or after the time by which the notice proposed that it should be adopted: Sch 3 art 18(2). Once a directors' written resolution has been adopted, it must be treated as if it had been a decision taken at a directors' meeting in accordance with the articles: Sch 3 art 18(3). As to the company secretary see PARA 601 et seq; and as to the requirement to keep records of resolutions etc see PARA 530.

Under the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 93, a resolution in writing signed by all the directors entitled to receive notice of a meeting of directors or of a committee of directors will be as valid and effectual as if it has been passed at a meeting of directors or (as the case may be) a committee of directors duly convened and held and may consist of several documents in the like form each signed by one or more directors; but a resolution signed by an alternate director need not also be signed by his appointor and, if it is signed by a director who has appointed an alternate director, it need not be signed by the alternate director in that capacity. As to the extent to which directors may delegate powers, including to committees, see PARA 537. The written resolution procedure is intended to facilitate the transaction of business but not to make fundamental changes to quorum requirements; hence a written resolution, passed in

accordance with art 93 but signed by only one director, where the quorum fixed under art 89 (see PARA 529) for the transaction of any business is two directors, is invalid notwithstanding that the sole co-director is absent from the United Kingdom and not entitled to notice of a directors' meeting by virtue of art 88 (see note 8): *Hood Sailmakers Ltd v Axford* [1996] 4 All ER 830, [1997] 1 WLR 625, which was decided under equivalent provisions of the Companies Act 1948 Sch 1, Table A (see PARA 18). As to the meaning of 'United Kingdom' see PARA 1 note 5. Under the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 96, the company may by ordinary resolution suspend or relax to any extent, either generally or in respect of any particular matter, any provision of the articles prohibiting a director from voting at a meeting of directors or of a committee of directors; and Table A art 98 provides that, if a question arises at a meeting of directors or of a committee of directors as to the right of a director to vote, the question may, before the conclusion of the meeting, be referred to the chairman of the meeting and his ruling in relation to any director other than himself is final and conclusive. Table A art 97 provides that where proposals are under consideration concerning the appointment of two or more directors to offices or employments with the company or any body corporate in which the company is interested, the proposals may be divided and considered in relation to each director separately and (provided he is not for another reason precluded from voting) each of the directors concerned is entitled to vote and be counted in the quorum in respect of each resolution except that concerning his own appointment. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A arts 93, 96-98 are applied by Table C, Table D Pt III, and Table E.

5 *Re Athenaeum Life Assurance Society, ex p Eagle Insurance Co* (1858) 4 K & J 549 at 558-559 per Page Wood V-C; *D'Arcy v Tamar, Kit Hill and Callington Rly Co* (1867) LR 2 Exch 158; *Bosanquet v Shortridge* (1850) 4 Exch 699; *Re Haycraft Gold Reduction and Mining Co* [1900] 2 Ch 230. Cf *Re Liverpool Household Stores Association Ltd* (1890) 59 LJ Ch 616.

6 See the text and notes 8-12.

7 *Runciman v Walter Runciman plc* [1992] BCLC 1084 at 1092, [1993] BCC 223 at 230 per Simon Brown J; *Municipal Mutual Insurance Ltd v Harrop* [1998] 2 BCLC 540 at 551 per Rimer J; *Re Bonelli's Telegraph Co, Collie's Claim* (1871) LR 12 Eq 246 at 258-259 per Bacon V-C. See also PARA 256 et seq. As to the position of persons dealing with the company without notice of any defects in procedure see PARAS 266, 531.

8 In the model articles of association prescribed for the purposes of the Companies Act 2006 (see note 1). Under the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 88, questions arising at a meeting must be decided by a majority of votes and, in the case of an equality of votes, the chairman has a second or casting vote. A director who is also an alternate director is entitled, in the absence of his appointor, to a separate vote on behalf of his appointor in addition to his own vote: see Table A art 88. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but art 88 is applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

9 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 7(1); Sch 2 art 7(1). Any such decision must be taken in accordance with Sch 1 art 8 or Sch 2 art 8, as the case may be: see note 4. If the company only has one director, and no provision of the articles requires it to have more than one director, the general rule does not apply, and the director may take decisions without regard to any of the provisions of the articles relating to directors' decision-making: Sch 1 art 7(2); Sch 2 art 7(2).

10 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 7. Any such decision must be taken in accordance with Sch 3 arts 17, 18: see note 4. Subject to the articles: (1) a decision is taken at such a directors' meeting by a majority of the votes of the participating directors (Sch 3 art 13(1)); (2) each director participating in a directors' meeting has one vote (Sch 3 art 13(2)); and (3) if a director has an interest in an actual or proposed transaction or arrangement with the company: (a) that director and that director's alternate may not vote on any proposal relating to it (Sch 3 art 13(3)(a)); but (b) this does not preclude the alternate from voting in relation to that transaction or arrangement on behalf of another appointor who does not have such an interest (Sch 3 art 13(3)(b)). A director who is also an alternate director has an additional vote on behalf of each appointor who is not participating in a directors' meeting, and who would have been entitled to vote if they were participating in it: Sch 3 art 15. As to alternate directors see PARA 489.

11 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 13(1), (2); Sch 2 art 13(1), (2); Sch 3 art 14(1), (2). As to chairing a directors' meeting see PARA 528. As to the quorum required for a meeting of directors see PARA 529; and see note 4.

A director's participation in a meeting for voting or quorum purposes may be restricted in relation to a resolution on which he is not entitled to vote: see PARA 555.

Subject to the articles, any notice or document to be sent or supplied to a director in connection with the taking of decisions by directors may also be sent or supplied by the means by which that director has asked to be sent

or supplied with such notices or documents for the time being: Sch 1 art 48(2); Sch 2 art 34(2); Sch 3 art 79(2). A director may agree with the company that notices or documents sent to that director in a particular way are to be deemed to have been received within a specified time of their being sent, and for the specified time to be less than 48 hours: Sch 1 art 48(3); Sch 2 art 34(3); Sch 3 art 79(3). As to the provisions made for company communications generally see PARA 678 et seq.

12 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 16; Sch 2 art 16; Sch 3 art 19.

13 As to the quorum see PARA 529. See, however, *Re Peruvian Rlys Co, ex p International Contract Co* (1868) 19 LT 803 (on appeal (1869) 4 Ch App 322); *Southern Counties Deposit Bank Ltd v Rider and Kirkwood* (1895) 73 LT 374, CA (where the court refused to declare a resolution invalid, which was passed at a meeting of the company called by less than a quorum of directors, the number having been the acting quorum for six years); *Boschoek Pty Co Ltd v Fuke* [1906] 1 Ch 148 at 162 per Swinfen Eady J (where a meeting called by de facto directors was held to be well called and the confirmation there passed was sufficient). As to de facto directors, and the duties which they owe, see PARA 478 note 8. An informal meeting may not be sufficient to bind members (*Bottomley's Case* (1880) 16 ChD 681; *Re Scottish Petroleum Co* (1883) 23 ChD 413, CA) apart from such an article as the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 93 (cited in note 4). See also PARA 528.

14 *Compagnie de Mayville v Whitley* [1896] 1 Ch 788, CA; *A-G v Davy* (1741) 2 Atk 212.

15 *Re Cawley & Co* (1889) 42 ChD 209, CA.

16 *Perrott and Perrott Ltd v Stephenson* [1934] Ch 171 (where Bennett J considered that the rule of corporation law that, when a duty is delegated to a body of persons, those persons may act by a majority, has no application to companies incorporated under the Companies Acts, but applies to cases where a corporation is entrusted with a duty of a public nature).

17 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 7, Sch 2 art 7, Sch 3 art 13, or the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 88 (cited in the note 8).

18 *Re Portuguese Consolidated Copper Mines Ltd, ex p Badman, ex p Bosanquet* (1890) 45 ChD 16, CA (allotment); *Re Phosphate of Lime Co, Austin's Case* (1871) 24 LT 932; cf *Briton Medical, General and Life Association v Jones (2)* (1889) 61 LT 384; *Hooper v Kerr, Stuart & Co Ltd* (1900) 83 LT 729; *Re Kinward Holdings* (1962) Guardian, 28 February (resolution to present petition for winding up of debtor company); *Municipal Mutual Insurance Ltd v Harrop* [1998] 2 BCLC 540 (signing of minutes of invalid meeting at later validly convened board meeting ratified resolutions passed at earlier meeting).

19 *Molineaux v London, Birmingham and Manchester Insurance Co Ltd* [1902] 2 KB 589, CA. As to companies and agency see PARA 269 et seq.

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528. Meetings of directors.

A company's articles of association¹ usually contain provisions as to meetings of directors², which may cover such matters as the proper calling of, and participation in, such a meeting³, and the chairing of such a meeting⁴.

A meeting of directors is not duly convened unless due notice has been given to all the directors entitled to receive it⁵. At a meeting not duly convened, proceedings are irregular and invalid⁶, although the court will decline to interfere where the irregularity could be cured at any moment by going through the proper process⁷.

Whether or not there was a regular board meeting is immaterial for purposes of binding the company if all the shareholders consent to what is done⁸. It is not necessary to give notice of an adjourned meeting⁹. If no fixed period of notice is required by the articles, the notice must be fair and reasonable¹⁰.

Where the only two directors of a company meet casually, one director cannot treat the meeting as a board meeting against the wishes of the other¹¹.

1 As to a company's articles of association generally see PARA 228 et seq. As to the model articles of association that have been prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

2 See eg the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 Pt 2 (arts 7-16), Sch 2 Pt 2 (arts 7-16), Sch 3 Pt 2 (arts 7-19); the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A arts 88-98; and see also PARA 529 et seq. As to the extent to which directors may delegate powers, including to committees, see PARA 537; and as to the validity of acts notwithstanding defects in appointment see PARA 486.

3 Accordingly, under the Companies (Model Articles) Regulations 2008, SI 2008/3229, any director may call a directors' meeting by giving notice of the meeting to the directors: Sch 1 art 9(1); Sch 2 art 9(1); Sch 3 art 8(1), (3). Such a meeting may be called alternatively by authorising the company secretary (if any) to give such notice (see Sch 1 art 9(1); Sch 2 art 9(1)) or, in the case of a public company only, by a director requesting the company secretary to do so, and thereby obliging the secretary to call such a meeting (see Sch 3 art 8(2)). Notice of any directors' meeting must indicate its proposed date and time, where it is to take place and (if it is anticipated that directors participating in the meeting will not be in the same place) how it is proposed that they should communicate with each other during the meeting: Sch 1 art 9(2); Sch 2 art 9(2); Sch 3 art 8(4). Notice of a directors' meeting must be given to each director: Sch 1 art 9(3); Sch 2 art 9(3); Sch 3 art 8(5). However, such notice need not be in writing (Sch 1 art 9(3); Sch 2 art 9(3); Sch 3 art 8(5)); and need not be given to directors who waive their entitlement to notice of that meeting, by giving notice to that effect to the company not more than seven days after the date on which the meeting is held (Sch 1 art 9(4); Sch 2 art 9(4); Sch 3 art 8(6)). Where such notice is given after the meeting has been held, that does not affect the validity of the meeting, or of any business conducted at it: see Sch 1 art 9(4); Sch 2 art 9(4); Sch 3 art 8(6). As to the company secretary see PARA 601 et seq.

Subject to the articles, anything sent or supplied by or to the company under the articles may be sent or supplied in any way in which the Companies Act 2006 provides for documents or information which are authorised or required by any provision of that Act to be sent or supplied by or to the company (as to which see PARA 678 et seq): Sch 1 art 48(1); Sch 2 art 34(1); Sch 3 art 79(1). A director may agree with the company that notices or documents sent to that director in a particular way are to be deemed to have been received within a specified time of their being sent, and for the specified time to be less than 48 hours: Sch 1 art 48(3); Sch 2 art 34(3); Sch 3 art 79(3). Subject to the articles, directors participate in a directors' meeting, or part of a directors' meeting, when the meeting has been called and takes place in accordance with the articles, and they can each communicate to the others any information or opinions they have on any particular item of the business of the meeting: Sch 1 art 10(1); Sch 2 art 10(1); Sch 3 art 9(1). In determining whether directors are participating in a directors' meeting, it is irrelevant where any director is or how they communicate with each other: Sch 1 art 10(2); Sch 2 art 10(2); Sch 3 art 9(2). If all the directors participating in a meeting are not in the same place, they may decide that the meeting is to be treated as taking place wherever any of them is: Sch 1 art 10(3); Sch 2 art 10(3); Sch 3 art 9(3).

Under the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 88, subject to the provisions of the articles, the directors may regulate their proceedings as they think fit; and a director may (and the secretary, at the request of a director, must) call a meeting of the directors: Table A art 88. It is not necessary to give notice of a meeting to a director who is absent from the United Kingdom: Table A art 88. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but art 88 is applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. As to the meaning of 'United Kingdom' see PARA 1 note 5.

See also the text and notes 8-12. As to the quorum required for a meeting of directors see PARA 529. A director's participation in a meeting may be restricted in relation to a resolution on which he is not entitled to vote: see PARA 555.

4 Under the Companies (Model Articles) Regulations 2008, SI 2008/3229, the directors may appoint a director to chair their meetings (Sch 1 art 12(1); Sch 2 art 12(1); Sch 3 art 12(1)); and the person so appointed for the time being is known as the chairman (Sch 1 art 12(2); Sch 2 art 12(2); Sch 3 art 12(2)). The directors may terminate the chairman's appointment at any time: Sch 1 art 12(3); Sch 2 art 12(3); Sch 3 art 12(4). If the chairman is not participating in a directors' meeting within ten minutes of the time at which it was to start, the participating directors must appoint one of themselves to chair it: Sch 1 art 12(4); Sch 2 art 12(4); Sch 3 art 12(5). In the case of a public company, the directors may appoint other directors as deputy or assistant chairmen to chair directors' meetings in the chairman's absence: Sch 3 art 12(3). Accordingly, the directors may terminate the appointment of the deputy or assistant chairman at any time (see Sch 3 art 12(4)); and Sch 3 art 12(5) applies if neither the chairman nor any director appointed generally to chair directors' meetings in the chairman's absence is participating in a meeting within ten minutes of the time at which it was to start (see Sch 3 art 12(5)).

The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 91 provides that the directors may appoint one of their number to be the chairman of the board of directors and may at any time remove him from that office; and, unless he is unwilling to do so, the director so appointed will preside at every meeting of directors at which he is present; but, if there is no director holding that office, or if the director holding it is unwilling to preside or is not present within five minutes after the time appointed for the meeting, the directors present may appoint one of their number to be chairman of the meeting. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 100 is applied by Table C, Table D Pt III, and Table E. Where a chairman is elected for an unspecified period, he is not entitled to remain chairman so long as he is a director: see *Foster v Foster* [1916] 1 Ch 532. Where a director is appointed chairman irregularly, it has been held that acquiescence for a long period does not regularise his appointment: see *Clark v Workman* [1920] 1 IR 107.

A chairman's participation in a meeting may be restricted in relation to a resolution on which he is not entitled to vote: see PARA 555.

5 *Young v Ladies' Imperial Club* [1920] 2 KB 523, CA; *Re Portuguese Consolidated Copper Mines Ltd* (1889) 42 ChD 160, CA; *Moore v Hammond* (1827) 6 B & C 456; cf *Smyth v Darley* (1849) 2 HL Cas 789. The question whether a meeting has been duly convened if notice is dispatched to a director but not received, where the articles are silent on the point, is undecided: *Leary v National Union of Vehicle Builders* [1971] Ch 34 at 53, [1970] 2 All ER 713 at 723-724 per Megarry J. In the absence of special circumstances, every director who is within reach ought to have notice; residence abroad may amount to special circumstances; a director who is travelling about with no known address may be out of reach: see *Halifax Sugar Refining Co v Francklyn* (1890) 59 LJ Ch 591. See also note 3.

6 *Re Homer District Consolidated Gold Mines, ex p Smith* (1888) 39 ChD 546.

7 *Browne v La Trinidad* (1887) 37 ChD 1 at 17, CA; *Bentley-Stevens v Jones* [1974] 2 All ER 653, [1974] 1 WLR 638.

8 *Re Express Engineering Works Ltd* [1920] 1 Ch 466, CA. See also PARA 531. As to shareholders and membership of companies generally see PARA 321 et seq. As to company meetings see PARA 629 et seq.

9 *Wills v Murray* (1850) 4 Exch 843.

10 *Re Homer District Consolidated Gold Mines, ex p Smith* (1888) 39 ChD 546. Cf *Browne v La Trinidad* (1887) 37 ChD 1, CA.

11 *Barron v Potter* [1914] 1 Ch 895.

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529. Quorum for directors' meetings.

A quorum for a meeting of a company's directors¹ means the minimum number of directors who are authorised to act as a board² at a duly convened board meeting³. Each director of the quorum must be qualified to act, and, if by the withdrawal of those directors who are disqualified from voting on the ground of interest or otherwise there would be no quorum, no

business may be transacted⁴. Where some of the directors are interested in a contract and are not permitted by the company's articles of association to be counted for quorum or for voting purposes⁵, a reduction in the quorum for the purpose of authorising the contract is invalid⁶; and, where a transaction is really one transaction, the necessary quorum cannot be obtained by dividing the transaction into two⁷. Where no quorum is specified in the articles, the number who usually act will constitute a quorum⁸. Although one director cannot constitute a 'meeting'⁹, the articles may permit one director to constitute a quorum¹⁰. Unless so provided by the articles, there cannot be a quorum competent to act where the number of directors is not filled up to the minimum number¹¹.

Even though a quorum is specified in the articles, the court may refuse to declare illegal resolutions passed by a number of directors less than that required to constitute the quorum, if that lesser number has been acting as a quorum for a number of years¹².

1 As to meetings of a company's directors see PARA 527 et seq. As to a company's directors see PARA 478 et seq.

2 As to the conduct of business at such meetings see PARA 527 et seq.

3 As to the calling of meetings of directors see PARA 528. As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

Under the Companies (Model Articles) Regulations 2008, SI 2008/3229, the quorum for directors' meetings may be fixed from time to time by a decision of the directors, but it must never be less than two and, unless otherwise fixed, it is two: Sch 1 art 11(2); Sch 2 art 11(2); Sch 3 art 10(2). At a directors' meeting, unless a quorum is participating, no proposal is to be voted on, except a proposal to call another meeting: Sch 1 art 11(1); Sch 2 art 11(1); Sch 3 art 10(1). If the total number of directors for the time being is less than the quorum required, then:

187 (1) in the case of a private company, the directors must not take any decision other than a decision either to appoint further directors, or to call a general meeting so as to enable the shareholders (or, in the case of a company limited by guarantee, to enable its members) to appoint further directors (Sch 1 art 11(3); Sch 2 art 11(3)); and

188 (2) in the case of a public company: (a) if there is only one director, that director may appoint sufficient directors to make up a quorum or call a general meeting to do so (Sch 3 art 11(1), (2)); or (b) if there is more than one director: (i) a directors' meeting may take place, if it is called in accordance with the articles and at least two directors participate in it, with a view to appointing sufficient directors to make up a quorum or calling a general meeting to do so (Sch 3 art 11(1), (3)(a)); and (ii) if a directors' meeting is called but only one director attends at the appointed date and time to participate in it, that director may appoint sufficient directors to make up a quorum or call a general meeting to do so (Sch 3 art 11(1), (3)(b)).

Further to head (2) above, if a public company has fewer than two directors, and the director (if any) is unable or unwilling to appoint sufficient directors to make up a quorum or to call a general meeting to do so, then two or more members may call a general meeting (or instruct the company secretary to do so) for the purpose of appointing one or more directors: see Sch 3 Pt 3 (art 28); and PARA 641. As to shareholders and membership of companies generally see PARA 321 et seq.

The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 89 provides that the quorum necessary for the transaction of the business of the directors may be fixed by the directors and, unless so fixed at any other number, will be two. A person who holds office only as an alternate director is, if his appointor is not present, to be counted in the quorum: see Table A art 89. The continuing directors or a sole continuing director may act notwithstanding any vacancies in their number, but, if the number of directors is less than the number fixed as the quorum, the continuing director or directors may act only for the purpose of filling vacancies or of calling a general meeting: Table A art 90. As to alternate directors see PARA 489. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but arts 89, 90 are applied by Table C (regulations for the

management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

See also the text and notes 4-12.

A director's participation in a meeting may be restricted for voting or quorum purposes in relation to a resolution on which he is not entitled to vote: see PARA 555.

4 *Re Greymouth-Point Elizabeth Railway and Coal Co Ltd*, *Yuill v Greymouth-Point Elizabeth Railway and Coal Co Ltd* [1904] 1 Ch 32; *Cox v Dublin City Distillery (No 2)* [1915] 1 IR 345, CA; *Re Olderfleet Shipbuilding and Engineering Co Ltd* [1922] 1 IR 26. Where a director who is an essential constituent of the quorum of a board meeting is shown in retrospect to have acted in breach of his fiduciary duty in voting on a resolution, he should be treated as having been incapable of voting on the business before the board and therefore should not be taken into account for the purpose of ascertaining whether a quorum of directors was present: see *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd*, *Eaton Bray Ltd v Palmer* [2002] EWHC 2748 (Ch), [2003] 2 BCLC 153 (per curiam). The court will, however, rectify the register of a company by registering a transferee of shares if one of two directors refuses to attend a board meeting to pass the transfer and so prevents it being effected: *Re Copal Varnish Co Ltd* [1917] 2 Ch 349. Cf *Lubin v Draeger* (1918) 144 LT Jo 274. As to provision made for the conduct of business at directors' meetings see PARA 527.

5 See eg the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 Pt 2 (art 14); Sch 2 Pt 2 (art 14); Sch 3 Pt 2 (art 16); the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A arts 85-86, 94-95; and PARAS 550, 555, 558. However, the articles may provide that, in the case of certain contracts or arrangements, a director may be permitted to participate for quorum or for voting purposes notwithstanding the fact that otherwise he would have been disqualified on grounds of conflicts of interest: see eg the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 Pt 2 (art 14); Sch 2 Pt 2 (art 14); Sch 3 Pt 2 (art 16); the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A arts 85, 94; and PARAS 550, 555, 558. For a case where a director was entitled to vote if he declared his interest but failed to do so and so was not entitled to vote see *Rolled Steel Products (Holdings) Ltd v British Steel Corpn* [1986] Ch 246, [1985] 3 All ER 52, CA. As to directors' interests in contracts generally see PARAS 558, 560 et seq.

6 *Re North Eastern Insurance Co* [1919] 1 Ch 198.

7 *Re North Eastern Insurance Co* [1919] 1 Ch 198.

8 *Lyster's Case* (1867) LR 4 Eq 233 (where a forfeiture was good although ordered by a meeting of two out of six directors). See also *Re English etc Rolling Stock Co*, *Lyon's Case* (1866) 35 Beav 646 (allotment); *Re Regent's Canal Iron Co* [1867] WN 79; *Re Portuguese Consolidated Copper Mines Ltd* (1889) 42 ChD 160, CA; *York Tramways Co v Willows* (1882) 8 QBD 685 at 698, CA, per Brett LJ.

9 Cf *Sharp v Dawes* (1876) 2 QBD 26, CA; and *Re London Flats Ltd* [1969] 2 All ER 744, [1969] 1 WLR 711. However, see also *Re Fireproof Doors Ltd* [1916] 2 Ch 142.

10 *Re Fireproof Doors Ltd* [1916] 2 Ch 142. See also PARA 646.

11 *Re Scottish Petroleum Co* (1883) 23 ChD 413 at 431, CA, per Baggallay LJ; *Re Sly, Spink & Co Ltd* [1911] 2 Ch 430; *Faure Electric Accumulator Co v Phillipart* (1888) 58 LT 525; *Bottomley's Case* (1880) 16 ChD 681; *Kirk v Bell* (1851) 16 QB 290. However, see also *Thames-Haven Dock and Rly Co v Rose* (1842) 4 Man & G 552. Cf *Owen and Ashworth's Claim*, *Whitworth's Claim* [1901] 1 Ch 115, CA.

12 See the cases cited in note 8; and see PARA 527.

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530. Records of decisions of directors.

Every company¹ must cause minutes of all proceedings at meetings of its directors² to be recorded³; and the records must be kept for at least ten years from the date of the meeting⁴. If

a company fails so to comply⁵, an offence is committed by every officer of the company who is in default⁶. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale⁷ and (for continued contravention) a daily default fine⁸ not exceeding one-tenth of level 3 on the standard scale⁹.

Minutes recorded in accordance with these requirements¹⁰, if purporting to be authenticated by the chairman of the meeting or by the chairman of the next directors' meeting¹¹, are evidence of the proceedings at the meeting¹²; and, where minutes have been so made¹³ of the proceedings of a meeting of directors, then, until the contrary is proved, the meeting is deemed duly held and convened¹⁴, all proceedings at the meeting are deemed to have duly taken place¹⁵, and all appointments at the meeting are deemed valid¹⁶.

The signature by the chairman of an entry in the record of a resolution accepting an agreement is a sufficient signature for the purposes of a memorandum required by the Statute of Frauds¹⁷. It is not necessary to prove that the person signing as chairman was in fact the chairman¹⁸. An entry of an allotment of shares to a director then present, who signed the minutes at the next meeting, is sufficient evidence of his agreement to take shares¹⁹, but not where he was not present at either meeting and denies all knowledge²⁰.

In the absence of a minute other evidence may be given²¹; and, if the books of a company show a record of a transaction, as, for example, the forfeiture of shares, which would not be valid without a resolution of the directors, the court will, in the absence of other evidence, presume that such a resolution has been passed²².

A company's articles of association²³ usually make provision for records to be kept (and retained) of directors' decisions²⁴ and of their written resolutions²⁵.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'director' under the Companies Acts see PARA 478. As to meetings of a company's directors see PARA 528 et seq.

3 Companies Act 2006 s 248(1). See also the text and notes 23-25. As to general provisions relating to company records see PARA 674 et seq.

4 Companies Act 2006 s 248(2). See also the text and notes 23-25.

5 It fails to comply with the Companies Act 2006 s 248 (see the text and notes 1-4): see s 248(3).

6 Companies Act 2006 s 248(3). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

7 As to the meaning of 'standard scale' see PARA 1622 note 5.

8 As to the meaning of 'daily default fine' see PARA 1622.

9 Companies Act 2006 s 248(4).

10 It is in accordance with the Companies Act 2006 s 248 (see the text and notes 1-4): see s 249(1).

11 As to the chairing of a directors' meeting see PARA 528.

12 Companies Act 2006 s 249(1). It is, however, only prima facie evidence: *Re Indian Zoedone Co* (1884) 26 ChD 70, CA; *Re Pyle Works (No 2)* [1891] 1 Ch 173 at 184 per Stirling J; *Re Leicester Mortgage Co Ltd* (1894) 38 Sol Jo 531, 564.

13 It is made in accordance with the Companies Act 2006 s 248 (see the text and notes 1-4): see s 249(2).

14 Companies Act 2006 s 249(2)(a). As to the calling of, and participation in, meetings of a company's directors see PARA 528.

15 Companies Act 2006 s 249(2)(b). As to provision made for the conduct of business at a directors' meeting see PARA 527.

16 Companies Act 2006 s 249(2)(c). As to the invalidity etc of appointments made of directors see PARA 531.

17 Ie the Statute of Frauds (1677) s 4 (which now relates only to contracts of guarantee) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1052 et seq); and see *Jones v Victoria Graving Dock Co* (1877) 2 QBD 314, CA.

18 *Sheffield, Ashton-under-Lyne and Manchester Rly Co v Woodcock* (1841) 7 M & W 574.

19 *Re Llanharry Hematite Iron Ore Co Ltd, Roney's Case, Stock's Case* (1864) 4 De GJ & Sm 426.

20 *Tothill's Case* (1865) 1 Ch App 85.

21 *Re Pyle Works (No 2)* [1891] 1 Ch 173.

22 *Knight's Case* (1867) 2 Ch App 321; *Re Fireproof Doors Ltd* [1916] 2 Ch 142.

23 As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

24 Under the Companies (Model Articles) Regulations 2008, SI 2008/3229, the directors of a private company must ensure that the company keeps a record, in writing, for at least ten years from the date of the decision recorded, of every unanimous or majority decision taken by the directors (ie whether taken at a meeting or otherwise): Sch 1 art 15; Sch 2 art 15. Under the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 100, the directors must cause minutes to be made in books kept for the purpose of all appointments of officers made by the directors, and of all proceedings at meetings of the company, of the holders of any class of shares in the company, and of the directors, and of committees of directors, including the names of the directors present at each such meeting. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but art 100 is applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital). However, Table C modifies Table A art 100 by causing the words 'of the holders of any class of shares in the company' to be omitted: see Table C art 11. As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

Where, under the articles, a contract can stand only if a minute of the directors approving it is entered in the record, the entry must be made within a reasonable time: *Toms v Cinema Trust Ltd* [1915] WN 29. The right of the beneficiaries of trust shares held by directors on their behalf to inspect a company's documents is not greater than the right conferred on shareholders by statute or by the articles: see *Butt v Kelson* [1952] Ch 197, sub nom *Re Butt, Butt v Kelson* [1952] 1 All ER 167, CA; and **TRUSTS** vol 48 (2007 Reissue) PARA 962. As to shareholders and membership of companies generally see PARA 321 et seq.

25 Under the Companies (Model Articles) Regulations 2008, SI 2008/3229, the secretary of a public company must ensure that the company keeps a record, in writing, of all directors' written resolutions for at least ten years from the date of their adoption: Sch 3 art 18(4). As to the company secretary see PARA 601 et seq.

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531. Invalidity of appointment and irregularity.

The acts of a person acting as a director are valid notwithstanding that it is afterwards discovered¹: (1) that there was a defect in his appointment²; (2) that he was disqualified from holding office³; (3) that he had ceased to hold office⁴; (4) that he was not entitled to vote on the matter in question⁵.

In the case of irregularity or informality in the proceedings of directors, where a shareholder has changed his position in reliance upon the acts of the directors being regular, the company cannot set up the irregularity of the proceedings to his detriment⁶; nor may it rely on the absence of a required authority given by general meeting⁷. Persons dealing with the company are, however, protected at common law from the consequences of any internal irregularities if they have acted without notice⁸, and are protected more broadly, by statute, where a transaction is ultra vires the company or beyond the authority of the directors⁹.

1 See the Companies Act 2006 s 161(1); and PARA 486.

2 See the Companies Act 2006 s 161(1)(a); and PARA 486.

3 See the Companies Act 2006 s 161(1)(b); and PARA 486. As to company directors' disqualification generally see PARA 1575 et seq.

4 See the Companies Act 2006 s 161(1)(c); and PARA 486. As to the retirement or removal of directors see PARA 515 et seq.

5 See the Companies Act 2006 s 161(1)(d); and PARA 486.

6 *Bargate v Shortridge* (1855) 5 HL Cas 297. Cf *Morris v Kanssen* [1946] AC 459, [1946] 1 All ER 586, HL (where this doctrine did not assist the invalidly appointed director himself).

7 *Re British Provident Life and Fire Assurance Society, Grady's Case* (1863) 1 De GJ & Sm 488 (where shares had been transferred and registered). As to meetings of the company see PARA 629 et seq.

8 See *Royal British Bank v Turquand* (1856) 6 E & B 327; and PARA 266.

9 As to the protection afforded persons dealing with the company in good faith under the Companies Act 2006 ss 39-42, which modify the common law 'ultra vires' rule, see PARAS 256, 265-264. As to the meaning of 'ultra vires' for these purposes see PARA 259.

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(v) General Duties of Directors

A. IN GENERAL

532. Scope and nature of general duties.

The Companies Act 2006 specifies¹ the general duties that are owed by a director² of a company³ to the company⁴. Except as otherwise provided, more than one of the general duties may apply in any given case⁵.

The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director⁶. The general duties must be interpreted and applied in the same way as common law rules or equitable principles, and regard must be had to the corresponding common law rules and equitable principles in interpreting and applying

the general duties⁷. The principles and rules which govern directors' fiduciary duties may be regarded as straightforward applications of ordinary principles of equity concerning fiduciary duties⁸.

1 In the Companies Act 2006 ss 171-177 (see PARA 540 et seq): see s 170(1).

2 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'company' under the Companies Acts see PARA 24.

4 Companies Act 2006 s 170(1). As to the application and effect of the general duties see PARA 533. Although s 170(1) restates the common law formula that directors' duties are owed to the company (see PARA 534 et seq), remedies for their breach (or threatened breach) have not been codified under the Companies Act 2006. However, s 178 provides that the consequences of breach (or threatened breach) of ss 171-177 (see PARA 540 et seq) are the same as would apply if the corresponding common law rule or equitable principle applied; and those duties, except for s 174, which reflects the common law duty of care and skill (see PARA 548 et seq), are, accordingly, enforceable in the same way as any other fiduciary duty owed to a company by its directors: see PARA 559. The three main ways in which a company can take legal action against a director (or a former director) for breach of duty are: (1) if the board of directors decides to commence proceedings (see PARA 541 et seq); (2) through a derivative claim brought by one or more members to enforce a right which is vested in the company (see PARA 455 et seq); or (3) if a liquidator or administrator (following the commencement of a formal insolvency procedure such as liquidation or administration) decides to commence proceedings (see **COMPANY AND PARTNERSHIP INSOLVENCY**). See also PARA 533.

5 Companies Act 2006 s 179.

6 Companies Act 2006 s 170(3). See note 7.

7 Companies Act 2006 s 170(4). When discussing this provision, and its interaction with s 170(3) (see the text and note 6), at the Bill stage, Lord Goldsmith (Attorney-General) stated that: (1) the court should be left to interpret the words that Parliament passes; (2) the wording of s 170(3) is intended to explain the origins of the general duties later set out [. . .] so that, once the Act is passed, one will go to the statutory statement of duties to identify the duty that the director owed; and (3) the wording of s 170(4) deals with the interpretation of those duties . . . [and it does] two things. It would point the courts towards existing case law on those common law rules and equitable principles [ie that are now replaced by the statutory duties]. It will also allow the law to develop so that relevant case law after the duties come into force should also be taken into account [especially in having regard to the development in common law rules and equitable principles as they apply to other relationships, such as trustees and agents]: 678 HL Official Report (5th series), 6 Feb 2006, GC cols 243-244.

8 See *Shepherds Investments Ltd v Walters* [2006] EWHC 836 (Ch) at [132], [2007] 2 BCLC 202 at [132] per Etherton J. 'Fiduciary' is defined generally in *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1998] Ch 1 at 18, [1996] 4 All ER 698 at 711, CA, per Millett LJ ('a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence'). See also *Henderson v Merrett Syndicates* [1995] 2 AC 145 at 206, [1994] 3 All ER 506 at 543, HL, per Lord Browne-Wilkinson (no single set of fiduciary duties applicable to all); and **EQUITY** vol 16(2) (Reissue) PARA 854.

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533. Application and effect of general duties.

The general duties that the Companies Act 2006 sets out¹ as being owed by a director² of a company³ to the company⁴:

- 929 (1) have effect subject to any rule of law enabling the company to give authority, specifically or generally, for anything to be done (or omitted) by the directors, or any of them, that would otherwise be a breach of duty⁵; and
- 930 (2) where the company's articles contain provisions for dealing with conflicts of interest⁶, are not infringed by anything done (or omitted) by the directors, or any of them, in accordance with those provisions⁷.

Otherwise, the general duties have effect (except as otherwise provided or the context otherwise requires) notwithstanding any enactment⁸ or rule of law⁹.

The application of the general duties is not affected by the fact that the case also falls within the provisions that govern transactions requiring the approval of members¹⁰; and compliance with the general duties does not remove the need for approval under any provision that is so applicable in relation to such transactions¹¹.

The general duties apply to shadow directors¹² where, and to the extent that, the corresponding common law rules or equitable principles so apply¹³.

A person who ceases to be a director¹⁴ continues to be subject: (a) to the duty to avoid conflicts of interest¹⁵ as regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director¹⁶; and (b) to the duty not to accept benefits from third parties¹⁷ as regards things done or omitted by him before he ceased to be a director¹⁸; and, to that extent, those duties apply to a former director as to a director, subject to any necessary adaptations¹⁹.

In their application to a company that is a charity, the Companies Act 2006 provisions that set out the general duties of directors²⁰ have effect with modifications²¹.

1 lie in the Companies Act 2006 ss 171-177: see also PARA 540 et seq. As to the scope and nature of the directors' general duties see PARA 532.

2 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'company' under the Companies Acts see PARA 24.

4 Companies Act 2006 s 180(4).

5 Companies Act 2006 s 180(4)(a).

6 As to the general duty to avoid conflicts of interest see PARA 550 et seq.

7 Companies Act 2006 s 180(4)(b). This provision should be read in conjunction with s 232(4) (which provides that nothing in s 232 prevents a company's articles from making such provision as has previously been lawful for dealing with conflicts of interest) (see PARA 594).

8 As to the meaning of 'enactment' see PARA 17 note 2.

9 Companies Act 2006 s 180(5).

10 See the Companies Act 2006 s 180(2); and PARA 562. The text refers to the provisions of Pt 10 Ch 4 (ss 188-226) (transactions with directors requiring approval of members) (see PARA 561 et seq), except that where Pt 10 Ch 4 applies and approval is given under Pt 10 Ch 4, or where the matter is one as to which it is provided that approval is not needed, it is not necessary also to comply with s 175 (duty to avoid conflicts of interest) (see PARA 550 et seq) or s 176 (duty not to accept benefits from third parties) (see PARA 553 et seq): see s 180(2); and PARA 562. As to the meaning of 'member' see PARA 321.

11 See the Companies Act 2006 s 180(3); and PARA 562. The text refers to the need for approval under any applicable provision of Pt 10 Ch 4: see s 180(3); and PARA 562.

12 As to the meaning of 'shadow director' see PARA 479.

- 13 Companies Act 2006 s 170(5).
- 14 As to the retirement and re-appointment of directors see PARA 515 et seq.
- 15 Ie the duty in the Companies Act 2006 s 175 (see PARA 550 et seq): see s 170(2)(a).
- 16 Companies Act 2006 s 170(2)(a).
- 17 Ie the duty in the Companies Act 2006 s 176 (see PARA 553 et seq): see s 170(2)(b).
- 18 Companies Act 2006 s 170(2)(b).
- 19 Companies Act 2006 s 170(2).
- 20 Ie the Companies Act 2006 Pt 10 Ch 2 (ss 170-181) (see PARA 540 et seq): see s 181(1).
- 21 See the Companies Act 2006 s 181(1). The main modifications involve the substitution of s 175(3), (5) (see PARAS 550-551), amending the Charities Act 1993 s 26 (see **CHARITIES** vol 8 (2010) PARAS 381 et seq) and modifying the application of the Companies Act 2006 s 180(2)(b) (see PARA 562): see s 181(2)-(4).

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534. Duties owed to the company.

In general, directors do not, solely by virtue of the office of director, owe fiduciary duties to shareholders¹, either collectively or individually²; directors owe their duties to the company³. However, duties owed by directors to shareholders may arise if there is a special factual relationship between the directors and the shareholders in the particular case capable of generating fiduciary obligations⁴. Likewise, directors do not owe fiduciary duties to the company's creditors, collectively or individually⁵.

1 As to shareholders and membership of companies generally see PARA 321 et seq.

2 As to the role of nominee directors and their duties, if any, to their appointor see PARA 480.

3 This position is restated in the Companies Act 2006 s 170: see PARA 532. See also *Percival v Wright* [1902] 2 Ch 421; *Peskin v Anderson* [2001] 1 BCLC 372, CA. If the company in turn owes fiduciary duties to a client, it is possible for a director of the company also to owe fiduciary duties to that client: see *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All ER 652, [1999] 1 BCLC 385, CA (fiduciary duty owed by way of contractual and equitable obligations; duty breached when information offered to a third party); and *JD Wetherspoon plc v Van de Berg & Co Ltd* [2007] EWHC 1044 (Ch), [2007] All ER (D) 82 (May).

4 *Peskin v Anderson* [2001] 1 BCLC 372, CA. See also *Coleman v Myers* [1977] 2 NZLR 225. This might include a duty of disclosure where directors are purchasing shares in the company from shareholders: *Re Chez Nico (Restaurants) Ltd* [1992] BCLC 192 at 208 per Browne-Wilkinson V-C. See also *Platt v Platt* [1999] 2 BCLC 745 (where a director acquired shares from two shareholders who were his brothers on the basis of misrepresentation and in breach of the fiduciary relationship owed to them); affd on the basis of misrepresentation only [2001] 1 BCLC 698, CA.

5 *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258 at 288, [1983] 2 All ER 563 at 585, CA, per Dillon LJ; *Yukong Lines Ltd of Korea v Rendsburg Investments Corp of Liberia, The Rialto (No 2)* [1998] 4 All ER 82 at 99, [1998] 1 WLR 294 at 312 per Toulson J. A director has an obligation, however, to have regard to creditors' interests in certain circumstances: see PARA 545.

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535. Powers of directors to manage the business.

The true position of directors¹ is that of agents for the company². As such, they are clothed with the powers and duties of carrying on the whole of its business³, subject, however, to the restrictions imposed by statute and by the company's constitution⁴. The intention of the company may be established by its directors, even if acting informally, depending upon the nature of the matter under consideration, the relative positions of the directors in the company, and generally all the circumstances of the case⁵.

Articles of association⁶ generally give directors very wide powers as to the control and management of the company and its affairs⁷; the powers given by the default or model articles⁸ are sometimes amplified by special articles which enumerate the powers of the directors.

Where powers are delegated by the company to the directors⁹, and the directors owing to dissensions and quarrels between them are unwilling or unable to act, the powers may be exercised by the company¹⁰. If, owing to disputes amongst the directors, they are unable to act and the affairs of the company cannot be carried on, the court will interfere by injunction and by the appointment of a receiver and manager of the undertaking and assets of the company until the management of the company is restored to a proper footing¹¹. The court may also order a meeting of the company so that additional directors may be appointed¹².

The question of the limitation of the powers of directors has often arisen in connection with powers of borrowing and mortgaging¹³. Where the directors have a power to mortgage¹⁴, they may exercise it to secure a past debt¹⁵, provided that this does not constitute a preference, or to secure sums owing upon a bill of exchange given by directors for a debt of the company¹⁶, or to secure a guarantee or by way of indemnity¹⁷. They may issue debentures to satisfy the creditors of a purchased business or in payment of the vendor¹⁸. Special rights may by suitable language be conferred on individual directors for their own personal benefits, in which case they may be used as they think fit¹⁹.

Any power conferred on the company, or its officers, whether by the Companies Acts, or the Insolvency Act 1986, or by its constitution, which could be exercised in such a way as to interfere with the exercise by an administrator of his powers is not exercisable except with the consent of the administrator (which may be given either generally or in relation to particular cases)²⁰.

1 As to a company's directors see PARA 478 et seq.

2 *Re Faure Electric Accumulator Co* (1888) 40 ChD 141. As to the liability of the company for the acts of its agents see PARA 269 et seq. Directors are not ipso facto agents for the shareholders: *Gramophone and Typewriter Ltd v Stanley* [1908] 2 KB 89 at 106, CA, per Buckley LJ; *Charitable Corp'n v Sutton* (1742) 2 Atk 400; *Salmon v Quin & Axtens Ltd* [1909] 1 Ch 311 at 319, CA, per Farwell LJ (affd sub nom *Quin & Axtens Ltd v Salmon* [1909] AC 442, HL); *Re Olderfleet Shipbuilding and Engineering Co Ltd* [1922] 1 IR 26. Cf *Briess v Woolley* [1954] AC 333, [1954] 1 All ER 909, HL (when there was an agency in fact). They have also been called 'servants' (*Smith v Anderson* (1880) 15 ChD 247 at 276, CA) and 'managing partners' (*Re Forest of Dean Coal Mining Co* (1878) 10 ChD 450 at 451 per Jessel MR; *York and North-Midland Rly Co v Hudson* (1853) 16 Beav 485; *London Financial Association v Kelk* (1884) 26 ChD 107 at 143 per Bacon V-C; *Re Lands Allotment Co* [1894] 1 Ch 616 at 637, CA, per Kay LJ; *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunningham* [1906] 2 Ch 34 at 45, CA, per Cozens-Hardy LJ). Cf *Sputz v Broadway Engineering Co Ltd* (1944) 171 LT 50. Such expressions indicate useful points of view, but are not exhaustive: *Re Imperial Hydropathic Hotel Co, Blackpool v Hampson* (1882) 23 ChD 1 at 12-13, CA, per Bowen LJ. They have also been called 'the directing mind and will of the company': *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 at 172, [1956] 3 All ER 624 at 630, CA, per Denning LJ. (See also PARA 312).

3 Directors may bring a claim in the name of the company (*Compagnie de Mayville v Whitley* [1896] 1 Ch 788 at 803, CA, per Lindley LJ); they may petition in bankruptcy (*Re JG Tomkins & Co* [1901] 1 KB 476, CA); they may give gratuities to the employees (*Hampson v Price's Patent Candle Co* (1876) 45 LJ Ch 437); without interference by a meeting of the company itself, they may issue negotiable instruments, if the company has that power (*Peruvian Ry Co v Thames and Mersey Marine Insurance Co, Re Peruvian Ry Co* (1867) 2 Ch App 617); if they are directors of an insurance company, they may pay losses beyond those insured against (*Taunton v Royal Insurance Co* (1864) 2 Hem & M 135); they may grant pensions to the family of a manager (*Henderson v Bank of Australasia* (1888) 40 ChD 170; but cf *Re Lee, Behrens & Co Ltd* [1932] 2 Ch 46, where a grant of a pension to the widow of a managing director was held ultra vires; *Re W & M Roith Ltd* [1967] 1 All ER 427, [1967] 1 WLR 432, where a service agreement providing for a similar pension to a widow was held invalid as not having been entered into bona fide for the benefit of and to promote the prosperity of the company (but as to the authority of these latter two cases see further *PARA 261*)) or to old retired employees or officers (*Cyclists' Touring Club v Hopkinson* [1910] 1 Ch 179); they may borrow and give security (*Gibbs and West's Case* (1870) LR 10 Eq 312; *Re Pyle Works (No 2)* [1891] 1 Ch 173 at 186 per Stirling J; *General Auction Estate and Monetary Co v Smith* [1891] 3 Ch 432); they may issue debentures at a discount (*Re Anglo-Danubian Steam Navigation and Colliery Co* (1875) LR 20 Eq 339 at 341 per Jessel MR); and without special authorisation, and subject to any reservation contained in the articles, they may make calls (*Ambergate, Nottingham and Boston and Eastern Junction Ry Co v Mitchell* (1849) 4 Exch 540) or enter into a compromise (*Bath's Case* (1878) 8 ChD 334, CA). Directors may pay reasonable brokerage on the issue of shares: *Metropolitan Coal Consumers' Association v Scrimgeour* [1895] 2 QB 604, CA. As to paying promotion expenses see *PARA 63*. Directors with very extensive powers were held justified in acquiring an estate for another company to build the Alexandra Palace and in promoting a subsidiary company (*London Financial Association v Kelk* (1884) 26 ChD 107), and in advancing on speculative building etc (*Sheffield and South Yorkshire Permanent Building Society v Aizlewood* (1889) 44 ChD 412; and see *Butler v Northern Territories Mines of Australia Ltd* (1906) 96 LT 41).

4 As to the meaning of references to a company's constitution for the purposes of the Companies Act 2006 Pt 10 (ss 154-259) (see *PARA 478 et seq*) see *PARA 540* note 4. As to the ceasing of powers of directors in a compulsory winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) *PARA 490*; and as to the ceasing of their powers in a voluntary winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) *PARA 997*.

5 *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159, [1956] 3 All ER 624, CA (determination of company's intention for purposes of the Landlord and Tenant Act 1954 s 30 (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) *PARA 734 et seq*)). Where a company gave an undertaking to the court to act in a way which required the consent of the company in general meeting, the court held that the directors were bound to convene a meeting and issue a circular inviting a favourable response, but that they had the same unrestricted right of voting at the meeting as they would have done if they were not directors: *Northern Counties Securities Ltd v Jackson & Steeple Ltd* [1974] 2 All ER 625, [1974] 1 WLR 1133.

6 As to a company's articles of association generally see *PARA 228 et seq*.

7 As to the powers of management that are usually conferred by articles of association see *PARA 541*.

8 See *PARA 541* note 4. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see *PARA 228 et seq*. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see *PARA 230*.

9 As to the extent to which directors may delegate powers, including to committees, see *PARA 537*.

10 *Barron v Potter* [1914] 1 Ch 895 (appointment of additional directors); *Foster v Foster* [1916] 1 Ch 532 (appointment of a managing director). As to resolutions of the company generally see *PARA 617 et seq*.

11 *Featherstone v Cooke* (1873) LR 16 Eq 298; *Trade Auxiliary Co v Vickers* (1873) LR 16 Eq 303; *Stanfield v Gibbon* [1925] WN 11.

12 See *PARA 488*. The power of the court referred to in the text is exercised under the Companies Act 2006 s 306 (see *PARA 639*).

13 The delegation of borrowing powers to the directors does not restrict the general power of the company to borrow, and it may exercise this power through agents so long as this is not prohibited by the memorandum or articles: *Mercantile Bank of India Ltd v Chartered Bank of India, Australia and China and Strauss & Co Ltd* [1937] 1 All ER 231. As to the directors' exercise of a company's powers for a proper purpose see *PARA 543*.

14 For companies formed under the Companies Act 1985 and its predecessor legislation (as to which see *PARA 16 et seq*), directors' powers were limited by the objects expressed in the company's memorandum (see *PARA 240* note 3). For companies formed under the Companies Act 2006, unless the articles specifically restrict

the objects of a company, its objects are unrestricted (see s 31; and PARA 240) and, accordingly, the directors' powers, including the power to borrow and mortgage, are unrestricted, unless they are restricted by the constitution.

15 *Shears v Jacob* (1866) LR 1 CP 513; *Re Inns of Court Hotel Co* (1868) LR 6 Eq 82; *Re Patent File Co, ex p Birmingham Banking Co* (1870) 6 Ch App 83; *Australian Auxiliary Steam Clipper Co v Mounsey* (1858) 4 K & J 733.

16 *Scott v Colburn* (1858) 26 Beav 276.

17 *Re Pyle Works (No 2)* [1891] 1 Ch 173 at 186 per Stirling J.

18 *Salomon v A Salomon & Co Ltd* [1897] AC 22 at 39, HL, per Lord Watson.

19 *Bersel Manufacturing Co Ltd v Berry* [1968] 2 All ER 552, HL (power in life directors to remove other directors).

20 See the Insolvency Act 1986 s 8, Sch B1 para 64; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 313. See also **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 163. As to administrators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 158 et seq.

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536. Directors' right of indemnity for expenditure incurred.

A company's directors¹ are entitled to be indemnified by the company for all debts, expenses, and liabilities incurred in the ordinary course of business, and for money borrowed and applied for those purposes², together, in the case of an actual expenditure, with simple interest³. If they guarantee a secured loan, they have, on paying off the loan, the usual right of a surety to subrogation⁴.

The right to indemnity is limited to expenditure which has been incurred or an obligation adopted by directors on behalf of the company and in subjection to the special purposes of the company in accordance with its constitution⁵. Accordingly, directors may not use the funds of the company in payment of their own costs of legal proceedings, although these would not have been incurred if they had not been directors, unless incurred on behalf of the company or for its benefit⁶.

In the absence of special provision to the contrary, the directors are not entitled to their expenses in travelling to and from board meetings⁷.

If directors are holders on behalf of the company of unpaid shares which it has power to hold, they are entitled to be indemnified⁸. If, however, there is no such power, as where, for example, the shares are in the same company, they are liable for calls without any right of indemnity, even when all the shareholders have consented to the purchase⁹; but they are not liable in a winding up as contributories in respect of the amounts unpaid on shares transferred to them as trustees by way of security on the terms that the transfer is to be registered only with their consent, if they have given no consent to its registration¹⁰.

If, although acting in the ordinary course of business, the directors exceed their borrowing powers, they cannot claim an indemnity from the company unless the borrowing is within the powers of the company and is ratified¹¹.

1 As to a company's directors see PARA 478 et seq.

2 As eg in respect of holding as lessees (*Re Pooley Hall Colliery Co* (1869) 21 LT 690); or as shareholders in other companies (see the text and notes 8-10); or in respect of contracts for the benefit of the company (*Gleadow v Hull Glass Co* (1849) 19 LJ Ch 44; *Poole, Jackson and Whyte's Case* (1878) 9 ChD 322, CA; *Gray v Seckham* (1872) 7 Ch App 680); or money advanced (*Re International Life Assurance Society, ex p Certain Directors* (1870) 39 LJ Ch 271; *Re Court Grange Silver-Lead Mining Co, ex p Sedgwick* (1856) 2 Jur NS 949; *Lowndes v Garnett and Moseley Gold Mining Co of America Ltd* (1864) 33 LJ Ch 418; *Baker's Case* (1860) 1 Drew & Sm 55). See also *Re German Mining Co, ex p Chippendale* (1853) 4 De GM & G 19; *Re Norwich Yarn Co, ex p Bignold* (1856) 22 Beav 143; *Troup's Case* (1860) 29 Beav 353; *Re Electric Telegraph Co of Ireland, Hoare's Case* (1861) 30 Beav 225. As to dividends paid out of capital with the knowledge of the shareholders and the directors' right of indemnity against them in such a case see PARA 1407.

3 *Re Norwich Yarn Co, ex p Bignold* (1856) 22 Beav 143 (the rate then allowed was 5% per annum). As to interest see generally **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1303 et seq.

4 *Gibbs and West's Case* (1870) LR 10 Eq 312. Cf *Owen and Ashworth's Claim, Whitworth's Claim* [1901] 1 Ch 115, CA. It is a proper proceeding to give a charge on future calls in order to indemnify directors: *Re Pyle Works (No 2)* [1891] 1 Ch 173. As to subrogation see generally **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1138.

5 *Pickering v Stephenson* (1872) LR 14 Eq 322 at 340 per Sir John Wickens V-C.

6 *Pickering v Stephenson* (1872) LR 14 Eq 322 (costs of prosecution for libel on themselves); *Studdert v Grosvenor* (1886) 33 ChD 528. Cf *Tomlinson v Scottish Amalgamated Silks Ltd (Liquidators)* 1935 SC (HL) 1. These costs they must repay (*Cullerne v London and Suburban General Permanent Building Society* (1890) 25 QBD 485 at 490, CA, per Lindley LJ, effectively overruling *Pickering v Stephenson* on this point; *Re Liverpool Household Stores Association* (1890) 59 LJ Ch 616); but costs of a prosecution for libel on the company itself, if properly incurred, must be paid by the company (*Studdert v Grosvenor* (1886) 33 ChD 538; but see *Kernaghan v Williams* (1868) LR 6 Eq 228). Directors cannot charge the company with the costs of an unsuccessful petition to wind up, presented by themselves, or of an unsuccessful appeal (*Smith v Duke of Manchester* (1883) 24 ChD 611) although authorised by the articles to take proceedings etc. If the directors are to be indemnified under a provision in the articles, it must be established that the provision has been incorporated in the contract between the company and a director; and relatively little may be required to incorporate the articles by implication: *Globalink Telecommunications Ltd v Wilmbury Ltd* [2002] EWHC 1988 (QB), [2003] 1 BCLC 145; *John v Price Waterhouse (t/a PricewaterhouseCoopers)* [2002] 1 WLR 953 at 960 per Ferris J. See also *Re Crossmore Electrical and Civil Engineering Ltd* [1989] BCLC 137; *Re a Company (No 004502 of 1988), ex p Johnson* [1992] BCLC 701. As to the right of an auditor to have costs that were incurred on behalf of the company assessed on an indemnity basis see *John v Price Waterhouse (t/a PricewaterhouseCoopers)*.

Nevertheless, a company may provide a director of the company or of its holding company with funds to meet expenditure incurred or to be incurred by him in defending himself either in an investigation by a regulatory authority, or against action proposed to be taken by a regulatory authority, in connection with any alleged negligence, default, breach of duty or breach of trust by him in relation to the company or an associated company, or to enable any such director to avoid incurring such expenditure: see the Companies Act 2006 s 206; and PARA 573.

7 *Young v Naval, Military and Civil Service Co-operative Society of South Africa* [1905] 1 KB 687; *Marmor Ltd v Alexander* 1908 SC 78, Ct of Sess; *Steel v Northern Co-operative Society Ltd* 1962 SLT 50. Cf the provision made for payment of reasonable expenses properly incurred in the course of such business in the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 Pt 2 (art 20) (private company limited by shares), Sch 2 Pt 2 (art 20) (private company limited by guarantee), Sch 3 Pt 2 (art 24) (public company), and in the 'legacy articles', ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, which may, in their amended form, be used by companies after the commencement of the Companies Act 2006 (see the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A art 118) (cited in PARA 596 note 10)

8 *Re Financial Corpn, Goodson's Claim* (1880) 28 WR 760. See also *Re Waterloo Life etc Assurance Co, Saunders' Case* (1864) 2 De GJ & Sm 101 (where the shares were held as qualification shares); and PARA 343.

9 *Cree v Somervail* (1879) 4 App Cas 648, HL.

10 *Gray's Case* (1876) 1 ChD 664. As to the meaning of 'contributory' see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 703.

11 *Re Worcester Corn Exchange Co* (1853) 3 De GM & G 180; *Re German Mining Co, ex p Chippendale* (1853) 4 De GM & G 19. The ratification may be in general meeting (*Irvine v Union Bank of Australia* (1877) 2 App Cas 366, PC), without special resolution (*Grant v United Kingdom Switchback Rlys Co* (1888) 40 ChD 135, CA); or it may be inferred (*Re Magdalena Steam Navigation Co* (1860) John 690). See also PARA 1257. As to the powers of companies see PARA 125. The ratification by a company of conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company, for the purpose of relieving the

director of any liability for such conduct, is subject to statutory constraints: see the Companies Act 2006 s 239; and PARA 593.

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537. Delegation of directors' powers.

Without express authority to do so, a company's directors¹ cannot delegate their duties or powers².

However, a company's articles of association³ generally confer such authority on the directors to delegate their powers to committees or local boards⁴ or to managing directors⁵; and, where they have sufficient powers of delegation, the directors may delegate any of their powers to committees, or even to a single director⁶.

Where any specific powers are properly delegated, the directors are absolved from liability for the exercise of those powers by the delegates⁷; but whilst directors are entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated functions⁸. Powers of delegation must be used bona fide and directors cannot form a committee to deal with the affairs of the company in order to exclude one or more of their number from acting⁹.

Where powers are delegated to a committee and there is no provision for a quorum, the whole of a committee must meet and then act by a majority, and the committee has no power to add to its number or fill a vacancy¹⁰. An excessive exercise of the committee's powers may be ratified by the directors¹¹, who do not by delegation divest themselves of their powers¹², or, if need be, by the company¹³. Business informally transacted may, generally speaking, be ratified by a subsequent formal meeting¹⁴.

A private company need not have more than one director¹⁵, in which case it is proper for the whole of the directors' powers to be vested in him.

1 As to a company's directors see PARA 478 et seq.

2 *Howard's Case* (1866) 1 Ch App 561 (allotment of shares); *Southampton Dock Co v Richards* (1840) 1 Man & G 448 (making call). See also *Horn v Henry Faulder & Co* (1908) 99 LT 524 (delegation of control to departmental manager). As to the extent to which a stranger contracting with the company is protected where there is a power but it has not been properly exercised see PARAS 266-268. As to delegated power to bring proceedings in the name of the company see PARA 302.

3 As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

4 Under the Companies (Model Articles) Regulations 2008, SI 2008/3229, subject to the articles, the directors may delegate any of the powers which are conferred on them under the articles: (1) to such person or

committee; (2) by such means (including by power of attorney); (3) to such an extent; (4) in relation to such matters or territories; and (5) on such terms and conditions, as they think fit: Sch 1 art 5(1); Sch 2 art 5(1); Sch 3 art 5(1). If the directors so specify, any such delegation may authorise further delegation of the directors' powers by any person to whom they are delegated (Sch 1 art 5(2); Sch 2 art 5(2); Sch 3 art 5(2)); and the directors may revoke any delegation in whole or part, or alter its terms and conditions (Sch 1 art 5(3); Sch 2 art 5(3); Sch 3 art 5(3)). Committees to which the directors delegate any of their powers must follow procedures which are based as far as they are applicable on those provisions of the articles which govern the taking of decisions by directors: Sch 1 art 6(1); Sch 2 art 6(1); Sch 3 art 6(1). The directors may make rules of procedure for all or any committees, which prevail over rules derived from the articles if they are not consistent with them: Sch 1 art 6(2); Sch 2 art 6(2); Sch 3 art 6(2). As to provision made for decision-making by directors at meetings see PARA 527.

The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 72 provides that the directors may delegate any of their powers to any committee consisting of one or more directors; and that they may also delegate to any managing director or any director holding any other executive office such of their powers as they consider desirable to be exercised by him. Any such delegation may be made subject to any conditions the directors may impose, and either collaterally with or to the exclusion of their own powers, and may be revoked or altered: Table A art 72. Subject to any such conditions, the proceedings of a committee with two or more members must be governed by the articles regulating the proceedings of directors so far as they are capable of applying: Table A art 72. See *Mitchell & Hobbs (UK) Ltd v Mill* [1996] 2 BCLC 102 (actual delegation required if a director is to claim powers of management separate from the collective board of directors). The directors may also, by power of attorney or otherwise, appoint any person to be the agent of the company for such purposes and on such conditions as they determine, including authority for the agent to delegate all or any of his powers: Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 71. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but arts 71, 72 are applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

5 As to the appointment of managing directors see PARA 538.

6 *Re Fireproof Doors Ltd* [1916] 2 Ch 142; *Re Taurine Co* (1883) 25 ChD 118, CA; *Re Scottish Petroleum Co, MacLagan's Case* (1882) 51 LJ Ch 841; *Harris' Case* (1872) 7 Ch App 587 (committee for allotment).

7 *Weir v Bell* (1878) 3 ExD 238, CA.

8 *Re Barings plc (No 5), Secretary of State for Trade and Industry v Baker (No 5)* [1999] 1 BCLC 433 at 489 per Jonathan Parker J; approved [2000] 1 BCLC 523, CA. See *Re Westmid Packing Services Ltd, Secretary of State for Trade and Industry v Griffiths* [1998] 2 All ER 124 at 129-130, [1998] 2 BCLC 646 at 653, CA, per Lord Woolf MR; and see *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407. See also PARA 548.

9 *Kyshe v Alturas Gold Co* (1888) 4 TLR 331; *Bray v Smith* (1908) 124 LT Jo 293.

10 *Re Liverpool Household Stores Association* (1890) 59 LJ Ch 616. As to the quorum required for a meeting of directors see PARA 529.

11 *Bolton Partners v Lambert* (1889) 41 ChD 295, CA; *Re Portuguese Consolidated Copper Mines Ltd, ex p Badman, ex p Bosanquet* (1890) 45 ChD 16; *Hooper v Kerr, Stuart & Co Ltd* (1900) 83 LT 729; *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407.

12 *Huth v Clarke* (1890) 25 QBD 391.

13 See also the Companies Act 2006 s 180(4)(a) (cited in PARA 533); and PARAS 527, 543.

14 *Re Phosphate of Lime Co, Austin's Case* (1871) 24 LT 932.

15 See the Companies Act 2006 s 154(1); and PARA 483.

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538. Position of managing directors.

A managing director may be either merely a director¹ with additional functions and additional remuneration², or else he may be a person holding two distinct positions, that of a director and that of a manager³. The directors have no general right to appoint a managing director⁴, nor, it seems, to remunerate him under a power to remunerate employees⁵, nor to delegate to him powers which they themselves would not possess unless expressly given to them⁶. Where such a power of appointment is conferred upon the directors by the company's articles of association⁷, the company cannot take it away by means of an ordinary resolution⁸; but if, owing to internal dissensions, the directors cannot make the appointment, the company may do so⁹.

The appointment of a director as managing director without any specified time limit does not entitle him to hold office as managing director so long as he remains a director, nor does an article which forbids a director from voting on a contract in which he is interested prevent him from voting for his own appointment as managing director, if the appointment carries no special remuneration; but it is otherwise if it does¹⁰. The appointment will usually terminate if for any reason the managing director ceases to be a director¹¹. If, however, he ceases to be a director before the period for which he was appointed has expired as the result of the exercise of a power introduced into the articles after his appointment, he will be entitled to damages for breach of contract¹²; but he will not be so entitled if the power existed in the articles at the date of his appointment¹³.

If invalidly appointed, a director may sue for services rendered upon a quantum meruit basis¹⁴.

1 As to a company's directors see PARA 478 et seq.

2 *Re Newspaper Pty Syndicate Ltd, Hopkinson v Newspaper Pty Syndicate Ltd* [1900] 2 Ch 349 at 350 per Cozens-Hardy J. It is obviously beyond the powers of the directors to purport to appoint a non-director to this position: see *Craven-Ellis v Canons Ltd* [1936] 2 KB 403, [1936] 2 All ER 1066, CA. A managing director's duties may be strictly controlled by contract: *Harold Holdsworth & Co (Wakefield) Ltd v Caddies* [1955] 1 All ER 725, [1955] 1 WLR 352, HL.

3 *Goodwin v Brewster (Inspector of Taxes)* (1951) 32 TC 80, CA. The statement in the text was approved in *Harold Holdsworth & Co (Wakefield) Ltd v Caddies* [1955] 1 All ER 725 at 729, [1955] 1 WLR 352 at 357, HL, per Viscount Kilmuir LC. As to presuming delegation see PARA 272 et seq. As to the duty of a managing director to exploit every opening for the company's business even if it involves an alteration of the objects see *Fine Industrial Commodities Ltd v Powling* (1954) 71 RPC 253.

4 *Boschoek Pty Co Ltd v Fuke* [1906] 1 Ch 148 at 159 per Swinfen Eady J.

5 *Normandy v Ind, Coope & Co Ltd* [1908] 1 Ch 84; *Re Lee, Behrens & Co Ltd* [1932] 2 Ch 46 (as to the status of this case see PARA 261); *Kerr v Walker* 1933 SC 458, Ct of Sess. See also *Sputz v Broadway Engineering Co Ltd* (1944) 171 LT 50. However, it was stated in *Anderson v James Sutherland (Peterhead) Ltd* 1941 SC 230, Ct of Sess that the functions of a managing director and a director were not the same, and that in the former capacity he was within the category of members of the company 'employed by the company in any capacity'. As to payment by a percentage of profits see PARAS 520-521.

6 *Cartmell's Case* (1874) 9 Ch App 691. Cf *Gibson v Barton* (1875) LR 10 QB 329 at 336 per Blackburn J.

7 As to a company's articles of association generally see PARA 228 et seq.

The Companies (Model Articles) Regulations 2008, SI 2008/3229, provide that directors may undertake any services for the company that the directors decide: see Sch 1 art 19(1); Sch 2 art 19(1); Sch 3 art 23(1); and PARA 519. As to the model articles of association that have been prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq.

The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. Accordingly, the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A makes provision for directors' appointments. Subject to the provisions of the Companies Acts, the directors may appoint one or

more of their number to the office of managing director or to any other executive office of the company and may enter into an agreement or arrangement with any director for his employment by the company or for the provision by him of any services outside the scope of the ordinary duties of a director: Table A art 84. Any such appointment, agreement or arrangement may be made upon such terms as the directors determine and they may remunerate any such director for his services as they think fit; and any appointment of a director to an executive office will terminate if he ceases to be a director but without prejudice to any claim to damages for breach of the contract of service between the director and the company: Table A art 84. A managing director and a director holding any other executive office are not to be subject to retirement by rotation: Table A art 84. Cf *Read v Astoria Garage (Streatham) Ltd* [1952] Ch 637, [1952] 2 All ER 292, CA. See also *Harben v Phillips* (1883) 23 ChD 14 at 39, CA, per Cotton LJ; and cf *Bainbridge v Smith* (1889) 41 ChD 462 at 474, CA, per Cotton LJ; *Horn v Henry Faulder & Co Ltd* (1908) 99 LT 524.

The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but art 84 is applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

8 *Thomas Logan Ltd v Davis* (1911) 104 LT 914; affd (1912) 105 LT 419, CA. As to ordinary resolutions see PARA 613.

9 *Foster v Foster* [1916] 1 Ch 532.

10 See note 9. As to the appointment of directors see PARA 483 et seq. As to directors' interests in contracts generally see PARAS 558, 560 et seq.

11 *Bluett v Stutchbury's Ltd* (1908) 24 TLR 469, CA; *Re Alexander's Timber Co* (1901) 70 LJ Ch 767. See also note 7. As to the retirement and re-appointment of directors see PARA 515.

12 *Nelson v James Nelson & Sons Ltd* [1914] 2 KB 770, CA; *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701, [1940] 2 All ER 445, HL. See also note 7; and PARA 517.

13 *Read v Astoria Garage (Streatham) Ltd* [1952] Ch 637, [1952] 2 All ER 292, CA. Cf *Shindler v Northern Raincoat Co Ltd* [1960] 2 All ER 239, [1960] 1 WLR 1038, where *Read v Astoria Garage (Streatham) Ltd* was not followed because the terms of the managing director's contract were inconsistent with powers in the articles which were held to be restricted by the contract, whereas there was no such inconsistency in *Read v Astoria Garage (Streatham) Ltd*. See PARA 517.

14 *Craven-Ellis v Canons Ltd* [1936] 2 KB 403, [1936] 2 All ER 1066, CA. See also PARA 518. As to quantum meruit see **RESTITUTION** vol 40(1) (2007 Reissue) PARAS 7, 113 et seq.

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539. Directors' position as trustees of the company's property.

A company's directors¹ are trustees of the property of the company that is in their hands or under their control²; but they are not trustees for individual shareholders³ or the creditors⁴ of the company, nor are they in the same position as trustees of a will or settlement⁵. A director must account to the company for all of the company's property in his control⁶.

Unless so directed by the articles, the directors are not bound to invest the funds (such as, for example, reserve funds of the company) only in securities which a trustee may invest in, but they may purchase such securities as they consider to be most beneficial for the company⁷. They may invest in the name of a sole trustee⁸, and lend on securities of a speculative nature⁹, but they are liable in respect of an investment made contrary to a resolution of the company effectively¹⁰ directing a different investment¹¹. Except in so far as they have properly delegated the duty of investing the funds of the company, and attending to the securities in which they

are invested, directors are bound to see that the funds are in a proper state of investment¹²; and in order to ascertain the financial position of the company with a view to paying a dividend the directors should at least have before them a list of the investments¹³.

1 As to a company's directors see PARA 478 et seq.

2 *Re Forest of Dean Coal Mining Co* (1878) 10 ChD 450; *Re Lands Allotment Co* [1894] 1 Ch 616, CA; *Re Faure Electric Accumulator Co* (1888) 40 ChD 141; *Flitcroft's Case* (1882) 21 ChD 519, CA; *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co v Sharpe* [1892] 1 Ch 154, CA; *Re Oxford Benefit Building and Investment Society* (1886) 35 ChD 502 at 509 per Kay J; *Great Eastern Ry Co v Turner* (1872) 8 Ch App 149 at 152 per Lord Selborne LC; *Lindgren v L & P Estates Ltd* [1968] Ch 572, [1968] 1 All ER 917, CA (specific performance of contract ordered); *Selangor United Rubber Estates Ltd v Cradock (a bankrupt) (No 3)* [1968] 2 All ER 1073, [1968] 1 WLR 1555 (money in company's bank account); *International Sales and Agencies Ltd v Marcus* [1982] 3 All ER 551. See also *Regal (Hastings) Ltd v Gulliver* (1942) [1967] 2 AC 134n, [1942] 1 All ER 378; *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL; *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371, Can SC; *Weber Feeds Ltd v Weber* (1979) 24 OR (2d) 754, Ont CA; *Belmont Finance Corp Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, CA; *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246, [1985] 3 All ER 52, CA; *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [2002] 1 BCLC 162; *Bhullar v Bhullar* [2003] EWCA Civ 424, [2003] 2 BCLC 241. Consequently a change in the shareholders will not diminish their obligation to account: *Abbey Glen Property Corp v Stumborg* (1978) 85 DLR (3d) 35, Alta SC. As to the general fiduciary position of directors see PARA 535. As to the duties of directors to safeguard the assets of the company and for that purpose to take reasonable steps to prevent and detect fraud and other irregularities see *Re Westmid Packing Services Ltd, Secretary of State for Trade and Industry v Griffiths* [1998] 2 All ER 124, [1998] 2 BCLC 646; and *Re Barings plc, Secretary of State for Trade and Industry v Baker (No 5)* [1999] 1 BCLC 433 (affd [2000] 1 BCLC 523) (both cases cited in PARA 549).

By the Companies Act 2006 s 222(2), a director is deemed to be trustee for the company of illegal payments made to him by way of compensation etc: see PARAS 578-583. As to joint and several liability see PARA 585 et seq.

3 They may, therefore, purchase shares in the company without disclosing to the vendors advantageous prospects of the company: *Percival v Wright* [1902] 2 Ch 421 (a case now regarded as of doubtful authority). Cf *Allen v Hyatt* (1914) 30 TLR 444, PC. For an example of a director being deemed to be trustee for individual shareholders or ex-shareholders see PARA 580. See also *Peskin v Anderson* [2001] 1 BCLC 372, CA (fiduciary duties owed by directors to shareholders arise in certain circumstances only); and PARA 535. As to shareholders and membership of companies generally see PARA 321 et seq.

4 See PARA 590.

5 *Owen and Ashworth's Claim, Whitworth's Claim* [1901] 1 Ch 115, CA (where a director took a transfer of a security irregularly issued to a creditor who had no notice of the irregularity).

6 *Cramer v Bird* (1868) LR 6 Eq 143 (defunct company; surplus assets); *Re Forest of Dean Coal Mining Co* (1878) 10 ChD 450 (omission to get in a debt; not liable for non-feasance in absence of fraud or dishonesty); *Re Lands Allotment Co* [1894] 1 Ch 616 at 631, CA, per Lindley LJ; *Selangor United Rubber Estates Ltd v Cradock (a bankrupt) (No 3)* [1968] 2 All ER 1073, [1968] 1 WLR 1555 (directors accountable for money of the company); *Re Duckwari plc* [1999] Ch 253, sub nom *Re Duckwari plc (No 2)*, *Duckwari plc v Offerventure Ltd (No 2)* [1998] 2 BCLC 315, CA; *Bairstow v Queens Moat Houses plc* [2001] EWCA Civ 712, [2001] 2 BCLC 531; *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704; *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [2002] 1 BCLC 162 (obligations of a director to deal with company property as a trustee arise out of pre-existing duties as a director, not out of the circumstances in which the property was conveyed, and a claim based on the breach of such duties is proprietary in nature); *Re Loquitur Ltd, IRC v Richmond* [2003] EWHC 999 (Ch), [2003] 2 BCLC 442. As to a director's personal liability see PARA 588; and as to the liability of persons sharing in a breach of trust see PARA 587. As to relief against breach of trust or negligence see PARA 600.

7 *Burland v Earle* [1902] AC 83 at 97, PC.

8 *Burland v Earle* [1902] AC 83 at 97, PC.

9 Cf *Sheffield and South Yorkshire Permanent Building Society v Aizlewood* (1889) 44 ChD 412.

10 As to the extent to which shareholders can control directors' powers see PARA 541.

11 *Re British Guardian Life Assurance Co* (1880) 14 ChD 335.

12 *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 501, CA, per Pollock MR. A finance committee is not entitled to leave even temporary investment of the company's funds under the entire control of one member: *Re City Equitable Fire Insurance Co Ltd*.

13 *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 501, CA, per Pollock MR.

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B. THE GENERAL DUTIES

(A) ACTING WITHIN POWERS

540. Duty to act within powers.

The Companies Act 2006, in setting out general duties¹ that are owed to the company², provides that a director³ of a company must: (1) act in accordance with the company's constitution⁴; and (2) only exercise powers for the purposes for which they are conferred⁵.

Generally, a company's directors may do whatever is fairly incidental to the exercise of their powers in carrying out the objects of the company⁶.

1 In the Companies Act 2006 ss 171-177: see also PARA 544 et seq. As to the scope and nature of the directors' general duties see PARA 532; and as to the application and effect of the general duties see PARA 533. As to the relevance of case law on those common law rules and equitable principles that are now replaced by the statutory duties see PARA 532 note 7; and see PARA 541 et seq.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'director' under the Companies Acts see PARA 478.

4 Companies Act 2006 s 171(a). See also PARA 541. References in Pt 10 (ss 154-259) (see PARA 478 et seq) to a company's constitution include any resolution or other decision come to in accordance with the constitution, and any decision by the members of the company (or a class of members) that is treated by virtue of any enactment or rule of law as equivalent to a decision by the company: s 257(1). This is in addition to the matters mentioned in s 17 (general provision as to matters contained in company's constitution) (see PARA 227): s 257(2). As to the meaning of 'enactment' see PARA 17 note 2; and as to the meaning of 'member of the company' see PARA 321. As to resolutions and decisions of the company generally see PARA 629 et seq. As to classes of share, and the rights attached to classes of share generally, see PARA 1057 et seq.

5 Companies Act 2006 s 171(b). See also PARA 543.

As to the extent of a director's authority and powers etc see PARA 540 et seq. As to the liability of the company for the acts of its agents see PARA 269 et seq; and as to a director's position as a company's agent see PARA 271.

6 *Hutton v West Cork Ry Co* (1883) 23 ChD 654, CA; *Re Horsley & Weight Ltd* [1982] Ch 442 at 448, [1982] 3 All ER 1045 at 1050, CA, per Buckley LJ. However, in *Parke v Daily News Ltd* [1962] Ch 927, [1962] 2 All ER 929, it was held that directors were not entitled to treat dismissed employees generously beyond all entitlement (but see now the Companies Act 2006 s 247; and PARA 546). It is a breach of the duties owed by directors to the company (or alternatively an act which is ultra vires the company) to enter into an arrangement which sought to achieve a distribution of assets, as if on a winding up, without making proper provision for creditors: *MacPherson v European Strategic Bureau Ltd* [2000] 2 BCLC 683, CA. As to the meaning of 'ultra vires' for these purposes see PARA 259; and see PARA 542 et seq.

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541. Duty to act in accordance with constitution.

The extent of the directors' authority to act¹ is a matter for the company's constitution², but is also a matter of agency law³.

A company's articles of association⁴ usually contain provisions as to the directors' general powers and responsibilities⁵. If, as is usual, the general management of the company's affairs is entrusted to the directors by the company's articles, a numerical majority of the shareholders insufficient to alter the articles cannot, in the absence of any provision in the articles reserving appropriate power, impose its will on the directors as regards matters so entrusted to them⁶. If the articles provide that regulations may be made by extraordinary resolution, an ordinary resolution is not sufficient to make a regulation which will control the directors⁷. If no power is reserved to the company to control the directors when acting within the powers conferred on them by the articles, the articles must be altered by special resolution, if it is desired to give the company such power⁸. Where, under the articles, the business of the company is to be managed by the directors and the articles confer on them the full powers of the company subject to such regulations, not inconsistent with the articles, as may be prescribed by the company, the shareholders are not enabled by resolution passed at a general meeting, without altering the articles, to give effective directions to the directors as to how the company's affairs are to be managed, nor are they able to overrule any decision reached by the directors in the conduct of company business⁹. An agreement made by the company which is inconsistent with the powers of management of the directors under the articles, as, for example, an agreement purporting to confer authority upon the manager of a department to act without interference by the directors, is *ultra vires*¹⁰.

1 As to a company's directors see PARA 478 et seq.

2 As to the meaning of references to a company's constitution under the Companies Act 2006 see PARA 227; and see PARA 540 note 4.

3 As to the directors' position as company's agents see PARA 271. As to notice of a company's constitution being assumed see PARA 266.

4 As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

5 Under the Companies (Model Articles) Regulations 2008, SI 2008/3229, subject to the articles, the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company: Sch 1 art 3; Sch 2 art 3; Sch 3 art 3. The members or shareholders (as the case may be) may, by special resolution, direct the directors to take (or refrain from taking) specified action (Sch 1 art 4(1); Sch 2 art 4(1); Sch 3 art 4(1)); but such a special resolution does not invalidate anything which the directors have done before the passing of the resolution (Sch 1 art 4(2); Sch 2 art 4(2); Sch 3 art 4(2)). As to meetings of directors and their role in the management of a company see PARA 528 et seq; and as to the extent to which directors may delegate powers, including to committees, see PARA 537. As to presuming delegation see PARA 272 et seq. As to special resolutions see PARA 614. As to shareholders and the membership of companies generally see PARA 321 et seq.

The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides that, subject to the provisions of the Companies Acts, the memorandum and the articles, and to any directions given by special resolution, the business of the company must be managed by the directors who may exercise all the powers of the company: Table A art 70. No alteration of the memorandum or articles and no such direction will invalidate any prior act of the directors which would have been valid if that alteration had not been made or that direction had not been given: Table A art 70. The powers given by Table A art 70 may not be limited by any special power given to the directors by the articles and a meeting of directors at which a quorum is present may exercise all powers exercisable by the directors: Table A art 70. As to a company's memorandum of association (the role of which has been altered fundamentally under the Companies Act 2006) see PARA 104. As to the procedure for altering a company's constitutional documents generally see PARA 232 et seq. As to the quorum required for a meeting of directors see PARA 529. Under Table A art 70, the entire management of the company, including its financial direction, rests solely in the hands of the directors, and accordingly resolutions by the company purporting to interfere with this management are invalid: see *Scott v Scott* [1943] 1 All ER 582 (resolutions to make advance payments to shareholders pending declaration of dividends). As to resolutions of the company see PARA 629 et seq. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but art 70 is applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

6 See *Gramophone and Typewriter Ltd v Stanley* [1908] 2 KB 89 at 105-106, CA, per Buckley LJ; *Grundt v Great Boulder Pty Gold Mines Ltd* [1948] Ch 145 at 157, [1948] 1 All ER 21 at 29, CA, per Cohen LJ. As to the power of a majority to remove the directors under the Companies Act 2006 s 168 see PARA 517.

7 *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34, CA; *Thomas Logan Ltd v Davis* (1911) 104 LT 914 (affd (1912) 105 LT 419, CA). See also *Re Olderfleet Shipbuilding and Engineering Co Ltd* [1922] 1 IR 26. See note 5.

8 *Quin & Axtens Ltd v Salmon* [1909] AC 442, HL.

9 See *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 at 134, CA, per Greer LJ; *Scott v Scott* [1943] 1 All ER 582; *Breckland Group Holdings Ltd v London & Suffolk Properties Ltd* [1989] BCLC 100. See also the cases cited in notes 6-7. Cf *Marshall's Valve Gear Co Ltd v Manning, Wardle & Co Ltd* [1909] 1 Ch 267. As to resolutions and meetings of the company generally see PARA 629 et seq.

10 *Horn v Henry Faulder & Co Ltd* (1908) 99 LT 524. As to the meaning of 'ultra vires' for these purposes see PARA 259; and see PARA 542 et seq.

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542. Acts ultra vires the company; acts beyond the directors' authority.

The validity of an act done by a company¹ may not be called into question on the ground of lack of capacity by reason of anything in the company's constitution².

In favour of a person dealing with the company in good faith, the power of the directors³ to bind the company, or to authorise others to do so, is deemed to be free of any limitation under the company's constitution⁴.

These provisions largely abolish the effect of the old ultra vires doctrine on relations between a company and third parties⁵ and confer protection on such parties, unless they have acted in bad faith, in respect of acts beyond the authority of the directors⁶.

¹ As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 See the Companies Act 2006 s 39(1); and PARAS 256, 265 et seq. As to the meaning of references to a company's constitution see PARA 227.

3 As to a company's directors see PARA 478 et seq.

4 See the Companies Act 2006 s 40(1); and PARA 263. The Companies Act 2006 s 40 has effect subject to s 41 (transactions with directors or their associates) (see PARA 264) and s 42 (application to acts of a company that is a charity) (see PARA 265); see s 40(6); and PARA 263.

5 See PARA 265.

6 See PARAS 263-264.

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543. Duty to exercise company's powers for purpose conferred.

Directors in the exercise of their powers are fiduciary agents¹ for the company².

Save in relation to the special case of providing for employees on cessation or transfer of business³, directors cannot in any case lawfully use their powers except for the benefit, or intended benefit, of the company⁴. The proper approach to an exercise of the directors' powers is to start with a consideration of the power itself then for the court to examine the substantial purpose for which it was exercised and to conclude whether that exercise was proper or not⁵. Their powers of making calls and forfeiting shares and so on must not be used to favour themselves above other shareholders⁶, or to favour particular classes of shareholders⁷. It is unconstitutional for directors to enter into a management agreement which would frustrate the powers of management by directors at a time when, to the directors' knowledge, shareholders intend to appoint new directors, even though the directors so acting believe this to be in the best interests of the company⁸.

The law relating to a company's proper purposes does not require a claimant to prove that a director⁹ was dishonest, or that the director knew that he was pursuing a collateral purpose (and, in that sense, the test is an objective one)¹⁰.

When a dispute arises whether the directors of a company made a particular decision for one purpose or for another, or whether there being more than one purpose, one or another purpose was the substantial or primary purpose, the court is entitled to look at the situation objectively in order to estimate how critical or pressing or substantial an alleged requirement may have been¹¹.

Where directors exercise their powers improperly this may give rise to a claim by the company against them based on breach of duty¹². However, a bona fide breach of duty may be ratified by an ordinary resolution after full and frank disclosure by the directors to the shareholders¹³. Acting fraudulently or in the furtherance of the director's own interests nullifies his actual authority, but not his apparent authority¹⁴. Where the other party to a transaction is on notice, however, that the transaction was entered into by the directors for purposes other than the purposes of the company in breach of their fiduciary duties, he cannot rely on the ostensible authority of the directors and, on ordinary principles of agency, cannot hold the company to the transaction¹⁵.

The exercise by the directors of discretionary powers will not be interfered with unless it is proved that they have acted from some improper motive or arbitrarily and capriciously¹⁶.

1 See PARA 271.

2 The directors are trustees of the property of the company in their hands or under their control: see PARA 539.

3 See PARA 546.

4 Directors may not approve transfers in order to compromise proceedings against themselves (*Bennett's Case* (1854) 5 De GM & G 284; *Re Mitre Assurance Co*, *Eyre's Case* (1862) 31 Beav 177), nor postpone a call for that purpose, nor cancel shares to release a shareholder from liability (*Richmond's Case*, *Painter's Case* (1858) 4 K & J 305), nor arrange with an applicant that he shall pay for shares only out of his emoluments as an officer of the company (*National House Property Investment Co v Watson* 1908 SC 888, following *Pellatt's Case* (1867) 2 Ch App 527; cf *Power v Hoey* (1871) 19 WR 916); they may not issue shares for an indirect purpose, such as to create votes (*Fraser v Whalley* (1864) 2 Hem & M 10; *Punt v Symons & Co Ltd* [1903] 2 Ch 506; *Piercy v S Mills & Co* [1920] 1 Ch 77; *Hogg v Cramphorn Ltd* [1967] Ch 254, [1966] 3 All ER 420; cf *Abbotsford Hotel Co Ltd and Bell v Kingham and Mann* (1910) 102 LT 118, CA; and see *Teck Corp Ltd v Millar* (1972) 33 DLR (3d) 288, BC SC); nor may they draw bills for other purposes (*Balfour v Ernest* (1859) 5 CBNS 601); they may not summon a company meeting at such a date as to prevent shareholders voting (*Cannon v Trask* (1875) LR 20 Eq 669), or on a misleading notice (*Alexander v Simpson* (1889) 43 ChD 139, CA; *Jackson v Munster Bank* (1884) 13 LR Ir 118); nor may they prevent a properly elected director acting (*Pulbrook v Richmond Consolidated Mining Co* (1878) 9 ChD 610; *Munster v Cammell Co* (1882) 21 ChD 183; *Kyshe v Alturas Gold Co* (1888) 36 WR 496; *Harben v Phillips* (1883) 23 ChD 14, CA; *Grimwade v BPS Syndicate Ltd* (1915) 31 TLR 531).

5 *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, [1974] 1 All ER 1126, PC. See also *Extrasure Travel Insurances Ltd v Scattergood* [2002] EWHC 3093 (Ch), [2003] 1 BCLC 598; *CAS (Nominees) Ltd v Nottingham Forest FC plc* [2002] 1 BCLC 613.

6 *Alexander v Automatic Telephone Co* [1900] 2 Ch 56, CA; *Harris v North Devon Rly Co* (1855) 20 Beav 384 (forfeiture); *Bennett's Case* (1854) 5 De GM & G 284 at 297 (where shareholders surrendered shares to nominees of the company and paid a considerable sum to the company out of which a debt due to a director was liquidated); *Gilbert's Case* (1870) 5 Ch App 559 (where a call was deferred to enable a director to transfer his shares). The onus is on the party who impeaches a call to show improper motive: *Odessa Tramways Co v Mendel* (1878) 8 ChD 235, CA. As to shareholders and membership of companies generally see PARA 321 et seq.

7 *Kerry v Maori Dream Gold Mines Ltd* (1898) 14 TLR 402, CA; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, [1974] 1 All ER 1126, PC (power to issue and allot shares was improperly exercised where the sole object was to dilute the voting power of the majority shareholders so as to enable the minority shareholders to sell their shares more advantageously); *Re BSB Holdings Ltd (No 2)* [1996] 1 BCLC 155; *Mutual Life Insurance Co of New York v Rank Organisation Ltd* [1985] BCLC 11. See also PARA 544.

8 *Lee Panavision Ltd v Lee Lighting Ltd* [1992] BCLC 22, CA.

9 As to a company's directors see PARA 478 et seq.

10 *Extrasure Travel Insurances Ltd v Scattergood* [2002] EWHC 3093 (Ch) at [92], [2003] 1 BCLC 598 at [92] per Jonathan Crow.

11 *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, [1974] 1 All ER 1126, PC.

12 As to a director's duty to promote the success of a company see PARA 544 et seq; and as to remedies for breach see PARA 559 et seq. A claim for breach of duty will not lie at the suit of a creditor: *Western Finance Co Ltd v Tasker Enterprises Ltd* (1979) 106 DLR (3d) 81, Man CA.

13 *Bamford v Bamford* [1970] Ch 212, [1969] 1 All ER 969, CA (improper allotment of shares validated), applying dicta of Lord Russell of Killowen in *Regal (Hastings) Ltd v Gulliver* (1942) [1967] 2 AC 134n at 150, [1942] 1 All ER 378 at 380, HL, and of Sir Richard Baggallay in *North-West Transportation Co Ltd and Beatty v Beatty* (1887) 12 App Cas 589 at 593-594, PC, per Sir Richard Baggallay. As to *North-West Transportation Co Ltd and Beatty v Beatty* at 593-594 per Sir Richard Baggallay, describing the circumstances in which a company cannot ratify breaches of duty by its directors, see *Franbar Holdings Ltd v Patel* [2008] EWHC 1534 (Ch) at [44]-[45], [2009] 1 BCLC at [44]-[45], [2008] All ER (D) 14 (Jul) at [44]-[45] per William Trower QC; and see PARA 593. See also the Companies Act 2006 s 180; and PARA 533.

As to the knowledge required of a principal for ratification of an agent's act to be effective, and as to what constitutes ratificatory conduct, in the situation where one agent represented that another agent had authority to act on a principal's behalf, see *ING Re (UK) Ltd v R&V Versicherung AG* [2006] EWHC 1544 (Comm), [2006] 2 All ER (Comm) 870, [2007] 1 BCLC 108 (in order that a person might be heard to have ratified an act done without his authority, it was necessary that, at the time of the ratification, he should have full knowledge of all

the material circumstances in which the act was done, unless he intended to ratify the act and take the risk whatever the circumstances might have been). The ratification, for the purpose of relieving the director of any liability for his conduct, by a company of conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company, as opposed to ratification in the sense of affirming or authorising the improper act, is subject to statutory constraints: see the Companies Act 2006 s 239; and PARA 593.

14 *Hopkins v TL Dallas Group Ltd* [2004] EWHC 1379 (Ch), [2005] 1 BCLC 543. See also *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28 at [31], [2004] 1 WLR 1846 at [31], [2006] 1 BCLC 729 at [31] per Lord Scott of Foscote (apparent authority can only be relied on by someone who does not know that the agent has no actual authority, and if a person dealing with an agent knows or has reason to believe that the contract or transaction is contrary to the commercial interests of the agent's principal, it is likely to be very difficult for the person to assert with any credibility that he believed the agent did have actual authority; lack of such a belief would be fatal to a claim that the agent had apparent authority).

15 *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246 at 296, [1985] 3 All ER 52 at 86, CA, per Slade LJ. See also *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28 at [31], [2004] 1 WLR 1846 at [31], [2006] 1 BCLC 729 at [31] per Lord Scott of Foscote (cited in note 14); and *Wrexham Association Football Club Ltd v Crucialmove Ltd* [2006] EWCA Civ 237, [2008] 1 BCLC 508.

16 *Cannon v Trask* (1875) LR 20 Eq 669; *Robinson v Chartered Bank of India* (1865) LR 1 Eq 32. Even in such a case the order will not be made at the instance of some only of the members of the company: *Pergamon Press Ltd v Maxwell* [1970] 2 All ER 809, [1970] 1 WLR 1167; and see further PARA 464. In the absence of evidence to the contrary, the court will take it for granted that the directors have acted reasonably and in good faith: *Re Gresham Life Assurance Society, ex p Penney* (1872) 8 Ch App 446; *Gaiman v National Association for Mental Health* [1971] Ch 317, [1970] 2 All ER 362 (power of expulsion of members). See also *Mutual Life Insurance Co of New York v Rank Organisation Ltd* [1985] BCLC 11 (for good reasons, directors discriminated between shareholders when allotting shares to be offered for sale; since the power was exercised in good faith for the benefit of the company, and was exercised fairly as between the different shareholders, which did not require identical treatment, the exercise was valid); and see now the Companies Act 2006 s 561 et seq; and PARA 1098 et seq. As to the exercise by directors of their discretion with regard to transfers of shares see PARA 393.

The court will not be ready to grant an injunction at the suit of a minority of the directors to control the activities of the majority: *Lord Duncan Sandys v House of Fraser plc* 1985 SLT 200, Ct of Sess.

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(B) PROMOTING SUCCESS OF THE COMPANY

544. Duty to promote the success of the company.

The Companies Act 2006, in setting out general duties¹ that are owed to the company², provides that a director³ of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole⁴. In doing so, he must have regard (amongst other matters) to:

- 931 (1) the likely consequences of any decision in the long term⁵;
- 932 (2) the interests of the company's employees⁶;
- 933 (3) the need to foster the company's business relationships with suppliers, customers and others⁷;
- 934 (4) the impact of the company's operations on the community and the environment⁸;
- 935 (5) the desirability of the company maintaining a reputation for high standards of business conduct⁹; and
- 936 (6) the need to act fairly as between members of the company¹⁰.

Where the company is part of a group and has its own separate legal identity and its own separate creditors, the directors must continue to act in the interests of the company rather than the group¹¹. In the absence of evidence of actual separate consideration of the interests of the company, the proper test is whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company¹². Where a proposal affects the rights of different groups of shareholders as against each other then the directors must not only exercise their powers in good faith in the interests of the company but they must also be exercised fairly as between the different classes or groups of shareholders¹³. Accordingly, the directors' powers of making calls and forfeiting shares and so on must not be used to favour themselves above other shareholders¹⁴, or to favour particular classes of shareholders¹⁵.

Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, the statutory duty¹⁶ has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes¹⁷.

The duty so imposed¹⁸ has effect subject to any enactment¹⁹ or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company²⁰.

1 Ie in the Companies Act 2006 ss 171-177: see also PARAS 540 et seq, 547 et seq. As to the scope and nature of the directors' general duties see PARA 532; and as to the application and effect of the general duties see PARA 533. As to the relevance of case law on those common law rules and equitable principles that are now replaced by the statutory duties see PARA 532 note 7; and see PARA 540 et seq.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'director' under the Companies Acts see PARA 478.

4 Companies Act 2006 s 172(1). As to the meaning of 'member' see PARA 321.

This duty may require a director to disclose his own misconduct to his principal (or, more generally, information of relevance and concern to his principal) in order for the duty to be satisfied: *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2005] 2 BCLC 91 (director obliged to disclose secret approach to client). A director, for example, has a duty to communicate to the company information which he has acquired as director and which is relevant for the company to know and would be of interest to it: *Bhullar v Bhullar* [2003] EWCA Civ 424 at [41], [2003] 2 BCLC 241 at [41] per Jonathan Parker LJ; *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] EWHC 466 (Ch), [2003] 2 BCLC 523. As part of the duty to communicate information of interest to the company, a director may have to report any knowledge he has acquired concerning competition activity involving both himself and others, whether or not the activity in itself would constitute a breach by anyone of any relevant duty owed to the company: *British Midland Tool Ltd v Midland International Tooling Ltd* at [81]-[91]; *Crown Dilmun v Sutton* [2004] EWHC 52 (Ch) at [179]-[181], [2004] 1 BCLC 468 at [179]-[181]. Cf *Horcal Ltd v Gatland* [1984] BCLC 549, CA. There is, however, no separate and independent duty of disclosure; the single and overriding touchstone is the fundamental duty of a director to act in what he considers in good faith to be in the best interests of the company: *Shepherds Investments Ltd v Walters* [2006] EWHC 836 (Ch) at [132], [2007] 2 BCLC 202 at [132] per Etherton J. As to disclosure in the context of a director's general duty to avoid conflicts of interest see PARA 550 et seq.

Under the Companies Act 2006 s 417, save in the case of small companies, the directors' report (which forms part of the company's annual accounts and reports: see s 471(2),(3); and PARA 715) must include a business review whose purpose is to inform members of the company and help them assess how the directors have performed their duty under s 172: see PARA 819.

The duty under s 172 was previously expressed (ie prior to directors' duties being set out in the Companies Act 2006) in terms of a duty to act bona fide in what the directors considered to be the interests of the company (and not for any collateral purpose): see *Re Smith & Fawcett Ltd* [1942] Ch 304, [1942] 1 All ER 542, CA; *Runciman v Walter Runciman plc* [1992] BCLC 1084, [1993] BCC 223; *Bishopsgate Investment Management Ltd (in liquidation) v Maxwell (No 2)* [1994] 1 All ER 261, [1993] BCLC 1282, CA; *Re BSB Holdings Ltd (No 2)* [1996] 1 BCLC 155; *Popely v Planarive Ltd* [1997] 1 BCLC 8; *Knight v Frost* [1999] 1 BCLC 364; *CAS (Nominees) Ltd v Nottingham Forest FC plc* [2002] 1 BCLC 613; *Extrasure Travel Insurances Ltd v Scattergood* [2002] EWHC 3093 (Ch), [2003] 1 BCLC 598. See also *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, [1974] 1 All ER 1126, PC. The test was subjective, being directed at the director's state of mind: *Regentcrest plc v Cohen*

[2001] 2 BCLC 80 (the question is whether the director honestly believed that his act or omission was in the interests of the company).

5 Companies Act 2006 s 172(1)(a).

6 Companies Act 2006 s 172(1)(b). By virtue of s 247, the powers of the directors of a company include (if they would not otherwise do so) power to make provision for the benefit of persons employed or formerly employed by the company, or any of its subsidiaries, in connection with the cessation or the transfer to any person of the whole or part of the undertaking of the company or that subsidiary; and this power is exercisable notwithstanding the general duty imposed by s 172: see PARA 546.

7 Companies Act 2006 s 172(1)(c).

8 Companies Act 2006 s 172(1)(d).

9 Companies Act 2006 s 172(1)(e).

10 Companies Act 2006 s 172(1)(f). See also the text and notes 18-20.

11 *Re Polly Peck International plc (in administration)* [1996] 2 All ER 433 at 444, [1996] 1 BCLC 428 at 440 per Robert Walker J; *Facia Footwear Ltd (in administration) v Hinchcliffe* [1998] 1 BCLC 218; *Secretary of State for Trade and Industry v Goldberg* [2003] EWHC 2843 (Ch), [2004] 1 BCLC 597; *Re Genosysis Technology Management Ltd, Wallach v Secretary of State for Trade and Industry* [2006] EWHC 989 (Ch), [2007] 1 BCLC 208 (a case under the Company Directors Disqualification Act 1986); *Re Mea Corporation, Secretary of State for Trade and Industry v Aviss* [2007] 1 BCLC 618 (a case under the Company Directors Disqualification Act 1986).

12 *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62 at 74, [1969] 2 All ER 1185 at 1194, obiter, per Pennycuik J; *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd, Eaton Bray Ltd v Palmer* [2002] EWHC 2748 (Ch) at [73], [2003] 2 BCLC 153 at [73] per Leslie Kosmin QC; *Extrasure Travel Insurances Ltd v Scattergood* [2002] EWHC 3093 (Ch) at [138], [2003] 1 BCLC 598 at [138] per Jonathan Crow. See also *Official Receiver v Stern* [2001] EWCA Civ 1787, [2002] 1 BCLC 119.

13 *Mutual Life Insurance Co of New York v Rank Organisation Ltd* [1985] BCLC 11; *Re BSB Holdings Ltd (No 2)* [1996] 1 BCLC 155.

14 *Alexander v Automatic Telephone Co* [1900] 2 Ch 56, CA; *Harris v North Devon Rly Co* (1855) 20 Beav 384 (forfeiture); *Bennett's Case* (1854) 5 De GM & G 284 at 297 (where shareholders surrendered shares to nominees of the company and paid a considerable sum to the company out of which a debt due to a director was liquidated); *Gilbert's Case* (1870) 5 Ch App 559 (where a call was deferred to enable a director to transfer his shares). The onus is on the party who impeaches a call to show improper motive: *Odessa Tramways Co v Mendel* (1878) 8 ChD 235, CA.

In *Hunter v Senate Support Services Ltd* [2004] EWHC 1085 (Ch), [2005] 1 BCLC 175, the court held that the decision of the directors to forfeit the claimant's shares for non-payment of a call was not made in bad faith but nevertheless was flawed (because the directors had proceeded on the mistaken basis that the only course available to them was forfeiture of the shares) and that the appropriate legal consequence of a relevant failure by directors to take into account a material consideration was voidability.

15 *Kerry v Maori Dream Gold Mines Ltd* (1898) 14 TLR 402, CA; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, [1974] 1 All ER 1126, PC (power to issue and allot shares was improperly exercised where the sole object was to dilute the voting power of the majority shareholders so as to enable the minority shareholders to sell their shares more advantageously); *Re BSB Holdings Ltd (No 2)* [1996] 1 BCLC 155; *Mutual Life Insurance Co of New York v Rank Organisation Ltd* [1985] BCLC 11.

16 Ie the Companies Act 2006 s 172(1) (see the text and notes 1-10): see s 172(2).

17 Companies Act 2006 s 172(2).

18 Ie by the Companies Act 2006 s 172 (see the text and notes 1-10, 16-17): see s 172(3).

19 As to the meaning of 'enactment' see PARA 17 note 2.

20 See the Companies Act 2006 s 172(3); and PARA 545.

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545. Director's obligation to consider or act in the creditors' interests.

The duty imposed on a director¹ by the Companies Act 2006², to act in the way he considers, in good faith, would be most likely to promote the success of the company³ for the benefit of its members⁴ as a whole, has effect subject to any enactment⁵ or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company⁶. The obligation to have regard to the interests of the creditors (in addition to those of the shareholders or members⁷) applies generally when the company, whether technically insolvent or not, is in financial difficulties such that the creditors' money is at risk⁸.

A breach of this obligation may be challenged by a liquidator under the Insolvency Act 1986 as a misfeasance⁹ or as a basis for a claim for wrongful trading¹⁰.

1 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie by the Companies Act 2006 s 172 (see PARA 544): see s 172(3).

3 As to the meaning of 'company' under the Companies Acts see PARA 24.

4 As to the meaning of 'member' see PARA 321.

5 As to the meaning of 'enactment' see PARA 17 note 2.

6 Companies Act 2006 s 172(3). A director is otherwise not liable generally to creditors: see PARA 590.

7 As to shareholders and membership of companies generally see PARA 321 et seq.

8 *Re MDA Investment Management Ltd, Whalley v Doney* [2003] EWHC 2277 (Ch) at [70], [2004] 1 BCLC 217 at [70] per Park J. See also *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250, 4 BCC 30, CA (approving *Kinsela v Russell Kinsela Pty Ltd (in liquidation)* (1986) 4 NSWLR 722 at 730, NSW CA, per Street CJ). See *Facia Footwear Ltd (in administration) v Hinchcliffe* [1998] 1 BCLC 218; *Yukong Lines Ltd of Korea v Rendsburg Investments Corp of Liberia, The Rialto (No 2)* [1998] 4 All ER 82, [1998] 1 WLR 294; *Re Pantone 485 Ltd, Miller v Bain* [2002] 1 BCLC 266; *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd, Eaton Bray Ltd v Palmer* [2002] EWHC 2748 (Ch) at [74], [2003] 2 BCLC 153 at [74] per Leslie Kosmin QC. See also *Official Receiver v Stern* [2001] EWCA Civ 1787 at [31]-[32], [2002] 1 BCLC 119 at [31]-[32] per Morritt V-C. A failure to have regard to creditors' interests when obliged to do so merits disqualification: see *Re Genosysis Technology Management Ltd, Wallach v Secretary of State for Trade and Industry* [2006] EWHC 989 (Ch), [2007] 1 BCLC 208 (a case under the Company Directors Disqualification Act 1986); and *Re Mea Corporation, Secretary of State for Trade and Industry v Aviss* [2006] EWHC 1846 (Ch), [2007] 1 BCLC 618 (another case under the Company Directors Disqualification Act 1986 (s 6: see PARA 1592), where directors were found to be responsible for the failure of their companies to satisfy creditors and, in so doing, had failed to respect the fundamental principle that the director of a company owed a duty to exercise his powers in the best interests of the company).

A director to whom a debt is owing by the company is not in such a good position as an outside creditor; thus, where he is aware that the company is insolvent, he cannot by pressure obtain a valid security for his debt: *Gaslight Improvement Co v Terrell* (1870) LR 10 Eq 168. As to transactions at an undervalue and preferences in a winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 843 et seq.

9 Redress for individual creditors may lie through misfeasance proceedings by liquidators under the Insolvency Act 1986 s 212 (as to which see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688 et seq).

10 Ie, if the conditions are met, under the Insolvency Act 1986 s 214 (as to which see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 914). The wording of the Insolvency Act 1986 s 214(4) is adopted in the Companies Act 2006 s 174(2) as a gloss on the duty of a director under s 174(1) to exercise reasonable care, skill and diligence: see PARA 548.

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546. Directors' power to provide for employees on cessation or transfer of business.

The powers of the directors¹ of a company² include, if they would not otherwise do so, power to make provision for the benefit of persons employed or formerly employed by the company (or any of its subsidiaries³) in connection with the cessation or the transfer to any person of the whole or part of the undertaking⁴ of the company or that subsidiary⁵.

This power is exercisable notwithstanding the general duty imposed on a director by the Companies Act 2006⁶, to act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members⁷ as a whole⁸. In the case of a company that is a charity⁹, the power is exercisable notwithstanding any restrictions on the directors' powers (or the company's capacity) flowing from the objects of the company¹⁰.

The power may only be exercised if sanctioned by a resolution of the company¹¹, or by a resolution of the directors¹², and only if such a resolution of the directors is authorised by the company's articles of association¹³ and only if any other requirements of the company's articles as to the exercise of the power so conferred¹⁴ are complied with¹⁵.

Any payment made pursuant to this power¹⁶ must be made before the commencement of any winding up of the company¹⁷, and only out of profits of the company that are available for dividend¹⁸. A resolution of the directors that purports to exercise this power¹⁹ is not sufficient sanction for payments to or for the benefit of directors, former directors or shadow directors²⁰.

1 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 As to the meaning of 'subsidiary' see PARA 25.

4 As to the meaning of 'undertaking' see PARA 26 note 2.

5 Companies Act 2006 s 247(1). See also note 15. This provision negatives the effect of the decisions in *Hutton v West Cork Rly Co* (1883) 23 ChD 654, CA (a company carrying on business has power to expend its funds in gratuities to servants or directors, provided such grants are made for the purpose of advancing the interests of the company, and provided that the case is not one where the company has transferred its undertaking to another company and is being wound up); *Stroud v Royal Aquarium and Summer and Winter Garden Society Ltd* (1903) 89 LT 243; *Warren v Lambeth Waterworks* (1905) 21 TLR 685; *Parke v Daily News Ltd* [1962] Ch 927, [1962] 2 All ER 929.

As to the general duty of directors to have regard to the interests of the company's employees see the Companies Act 2006 s 172; and PARA 544.

6 Ie by the Companies Act 2006 s 172 (see PARA 544).

7 As to the meaning of 'member' see PARA 321.

8 Companies Act 2006 s 247(2).

9 In their application to a company that is a charity, the Companies Act 2006 Pt 10 Ch 2 (ss 170-181) (see PARA 533 et seq), which sets out the general duties of directors, has effect with modifications: see s 181(1); and PARA 533.

10 Companies Act 2006 s 247(3).

11 Companies Act 2006 s 247(4)(a). As to company resolutions generally see PARA 613 et seq.

12 Companies Act 2006 s 247(4)(b). As to directors' resolutions, and the provision made generally for the conduct of business at directors' meetings, see PARA 527.

13 Companies Act 2006 s 247(4), (5)(a). As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. See also note 15.

14 Ie by the Companies Act 2006 s 247: see s 247(6).

15 Companies Act 2006 s 247(4), (6).

Under the Companies (Model Articles) Regulations 2008, SI 2008/3229, the directors may decide to make provision for the benefit of persons employed or formerly employed by the company or any of its subsidiaries (other than a director or former director or shadow director) in connection with the cessation or transfer to any person of the whole or part of the undertaking of the company or that subsidiary: Sch 1 art 51; Sch 2 art 37; Sch 3 art 84.

16 Ie under the Companies Act 2006 s 247: see s 247(7).

17 Companies Act 2006 s 247(4), (7)(a). As to the effect of the commencement of winding up generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 489-490.

18 Companies Act 2006 s 247(4), (7)(b). As to distributions and dividends generally see PARA 1389 et seq.

19 Ie a resolution that is required by the Companies Act 2006 s 247(4) (see the text and notes 11-12): see s 247(5)(b).

20 Companies Act 2006 s 247(4), (5)(b). As to the meaning of 'shadow director' see PARA 479.

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(C) EXERCISE OF INDEPENDENT JUDGMENT

547. Duty to exercise independent judgment.

The Companies Act 2006, in setting out general duties¹ that are owed to the company², provides that a director³ of a company must exercise independent judgment⁴. This duty is not infringed by his acting either in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its directors⁵, or in a way authorised by the company's constitution⁶.

Under the common law rules and equitable principles that apply in relation to this duty, directors in the exercise of their powers are fiduciary agents⁷ for the company⁸ and they owe a duty to the company to exercise an independent judgment accordingly⁹. Directors must not fetter their powers by contracts with or promises to other persons¹⁰, but it does not follow that

directors can never make a contract by which they bind themselves to the future exercise of their powers in a particular manner¹¹.

1 lie in the Companies Act 2006 ss 171-177: see also PARA 540 et seq. As to the scope and nature of the directors' general duties see PARA 532; and as to the application and effect of the general duties see PARA 533. As to the relevance of case law on those common law rules and equitable principles that are now replaced by the statutory duties see PARA 532 note 7; and see the text and notes 7-11.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'director' under the Companies Acts see PARA 478.

4 Companies Act 2006 s 173(1). As to the delegation of directors' powers (by which the exercise of those powers may be affected by the will and judgment of others) see PARA 537.

5 Companies Act 2006 s 173(2)(a).

6 Companies Act 2006 s 173(2)(b). As to the meaning of references to a company's constitution for the purposes of Pt 10 (ss 154-259) (see PARA 478 et seq) see PARA 540 note 4. The provisions of s 173(2)(b) may have some relevance to the position of a nominee director who may find himself representing competing interests: see PARA 480; and see *Hawkes v Cuddy, Re Neath Rugby Ltd* [2009] EWCA Civ 291, [2009] All ER (D) 42 (Apr) (in which a nomination arrangement was subject to an informal agreement regarding its operation). See also the text and notes 10-11.

7 See PARA 271; and as to the position of directors generally see PARA 535.

8 The directors are trustees of the property of the company in their hands or under their control: see PARA 539.

9 See also *Fulham Football Club Ltd v Cabra Estates plc* [1994] 1 BCLC 363, CA; *Thorby v Goldberg* (1964) 112 CLR 597, Aust HC. As to the directors' responsibilities in a take-over see PARA 1501 et seq.

10 *Clark v Workman* [1920] 1 IR 107. See also *Horn v Henry Faulder & Co Ltd* (1908) 99 LT 524 (where an agreement giving a manager exclusive powers in a department contrary to an article giving the directors supreme control in the management of the company was held ultra vires the articles). See also the text and notes 5-6.

11 *Fulham Football Club Ltd v Cabra Estates plc* [1994] 1 BCLC 363 at 392, CA, per Neill LJ; *Thorby v Goldberg* (1964) 112 CLR 597, Aust HC. In so far as the cases of *Rackham v Peek Foods Ltd* (1977) [1990] BCLC 895 and *John Crowther Group plc v Carpets International plc* [1990] BCLC 460 (in neither of which was *Thorby v Goldberg* cited) can be read as laying down a general proposition that directors can never bind themselves as to the future exercise of their fiduciary powers, they would be wrong: *Fulham Football Club Ltd v Cabra Estates plc* at 393 per Neill LJ. See also the text and notes 5-6.

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(D) EXERCISE OF CARE, SKILL AND DILIGENCE

548. Duty to exercise reasonable care, skill and diligence.

The Companies Act 2006, in setting out general duties¹ that are owed to the company², provides that a director³ of a company must exercise reasonable care, skill and diligence⁴. This means the care, skill and diligence that would be exercised by a reasonably diligent person with: (1) the general knowledge, skill and experience that may reasonably be expected of a

person carrying out the functions carried out by the director in relation to the company⁵; and (2) the general knowledge, skill and experience that the director has⁶.

The wording that appears under heads (1) and (2) above is identical in its terms to the provisions of the Insolvency Act 1986 which deal with wrongful trading⁷, in relation to the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take, being those which would be known or ascertained, or reached or taken, by a reasonably diligent person⁸.

The court will assess the competence of the director in the context of and by reference to how a particular company's business is organised and the part which the director could reasonably have been expected to play, given the role in the management chain of the company which was in fact assigned to him (or which he in fact assumed) and by reference to his duties and responsibilities in that role⁹. There must be sufficient causal link between the breach of duty by the director and the loss suffered by the company¹⁰.

Facts which may show imprudence in the exercise of powers clearly conferred upon directors will not subject them to personal responsibility unless the imprudence amounts to negligence, which must be distinctly charged¹¹. If they act within their powers, they are not liable for loss to the company occasioned by mere imprudence or error of judgment¹², and, in making investments, they are only bound to act in the same manner as business persons of ordinary prudence¹³.

1. In the Companies Act 2006 ss 171-177: see also PARA 540 et seq. As to the scope and nature of the directors' general duties see PARA 532; and as to the application and effect of the general duties see PARA 533. As to the relevance of case law on those common law rules and equitable principles that are now replaced by the statutory duties see PARA 532 note 7; and see PARA 541 et seq.

2. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3. As to the meaning of 'director' under the Companies Acts see PARA 478.

4. Companies Act 2006 s 174(1).

It is, in any case, an implied term of a contract of service that a person will perform his duties with proper care and skill: see *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 572-573, [1957] 1 All ER 125 at 130, HL, per Viscount Simonds; and **EMPLOYMENT** vol 39 (2009) PARA 53. See further PARA 549. However, the provisions of the Supply of Goods and Services Act 1982 s 13 (which state that, in a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill) (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 97) do not apply to services rendered to a company by a director in his capacity as such: Supply of Services (Exclusion of Implied Terms) Order 1982, SI 1982/1771, art 2(2).

5. Companies Act 2006 s 174(2)(a).

6. Companies Act 2006 s 174(2)(b).

7. In the Insolvency Act 1986 s 214 (declaration of liability for wrongful trading) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 914).

8. See the Insolvency Act 1986 s 214(4); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 914. In proceedings under the Insolvency Act 1986 s 214, the standard has been described as an objective minimum, although one which may be raised by the particular attributes of the director in question: see *Re Brian D Pierson (Contractors) Ltd* [2001] 1 BCLC 275 (no suggestion that any higher standard than the objective minimum applied in this case).

Prior to the enactment of the Companies Act 2006 s 174, the wording of the Insolvency Act 1986 s 214(4) (see note 7) was recognised judicially as being a useful exposition of the standard of care required of a director generally under company law: see *Norman v Theodore Goddard (a firm), (Quirk, third party)* [1991] BCLC 1028; *Re D'Jan of London Ltd* [1994] 1 BCLC 561 at 563 per Hoffman LJ; *Re Landhurst Leasing plc, Secretary of State for Trade and Industry v Ball* [1999] 1 BCLC 286 at 344 per Hart J; *Cohen v Selby* [2001] 1 BCLC 176 at 183, CA, per Chadwick LJ; *Re Loquitur Ltd, IRC v Richmond* [2003] EWHC 999 (Ch) at [241], [2003] 2 BCLC 442 at [241] per Etherton J. The statutory statement contained in the Insolvency Act 1986 s 214(4) was thought to reflect

modern standards more accurately than the formulation, which had been much cited in this context, given in *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 427-430 per Romer J (a director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience). See also *Equitable Life Assurance Society v Bowley* [2003] EWHC 2263 (Comm) at [41], [2004] 1 BCLC 180 at [41].

9 *Bishopsgate Investment Management Ltd (in liquidation) v Maxwell (No 2)* [1994] 1 All ER 261 at 264, [1993] BCLC 1282 at 1285, CA, per Hoffmann LJ. It is arguable that a company may reasonably at least look to non-executive directors for independence of judgment and supervision of the executive management: see *Equitable Life Assurance Society v Bowley* [2003] EWHC 2263 (Comm) at [41], [2004] 1 BCLC 180 at [41] per Langley J. See also eg *Re Finelist Group Ltd, Secretary of State for Trade and Industry v Swan (No 2)* [2005] EWHC 603 (Ch), [2005] BCC 596, [2005] All ER (D) 102 (Apr) (manner in which very experienced, senior non-executive director dealt with serious 'whistle blowing' was wholly inappropriate, unsatisfactory and inadequate) (case decided under the Company Directors Disqualification Act 1986).

In *Bishopsgate Investment Management Ltd (in liquidation) v Maxwell (No 2)* at 264, 1285, Hoffmann LJ acknowledged that, in the older cases, the duty of a director to participate in the management of a company is stated in very undemanding terms and that the law may be evolving in response to changes in public attitudes to corporate governance, as shown by the enactment of the provisions consolidated in the Company Directors Disqualification Act 1986. The directors' duty to exercise reasonable care, skill and diligence has often been discussed in the context of proceedings under the Company Directors Disqualification Act 1986 (as to which generally see PARA 1575 et seq) and a summary of the principles that govern this particular directors' duty is incomplete without reference also to matters, for example, which have been considered when determining the unfitness of directors under that Act (see PARA 1578 et seq). Accordingly, see also *Re Polly Peck International plc (No 2)* [1994] 1 BCLC 574 at 594 per Lindsay J; *Re Barings plc, Secretary of State for Trade and Industry v Baker (No 5)* [1999] 1 BCLC 433 at 489 per Jonathan Parker J (affd [2000] 1 BCLC 523, CA); *Re Vintage Hallmark plc, Secretary of State for Trade and Industry v Grove* [2006] EWHC 2761 (Ch), [2007] 1 BCLC 788, [2006] All ER (D) 196 (Nov) (all cases decided under the Company Directors Disqualification Act 1986).

10 *Cohen v Selby* [2001] 1 BCLC 176, CA. Where the alleged breach consists of an omission, it must be proved that compliance with the duty would have prevented the loss: *Bishopsgate Investment Management Ltd (in liquidation) v Maxwell (No 2)* [1994] 1 All ER 261 at 264, [1993] BCLC 1282 at 1285, CA, per Hoffmann LJ. The duty of care must be owed in respect of the type of loss that has occurred: *Re Continental Assurance Co of London plc (No 4), Singer v Beckett* [2007] 2 BCLC 287 at 445, [2001] BPIR 733 at [405]-[407] per Park J (a case decided under the Insolvency Act 1986 s 214 (declaration of liability for wrongful trading) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 914)); and see *Lexi Holdings (in administration) v Luqman* [2009] EWCA Civ 117, [2009] All ER (D) 269 (Feb) (had the directors in question acted, losses would have been prevented; their failure to act meant that they were liable). As to a director's personal liability see PARA 588; and as to the liability of persons sharing in a breach of trust see PARA 587.

11 *Overend, Gurney & Co v Gibb and Gibb* (1872) LR 5 HL 480 at 487, 495 per Lord Hatherley LC; *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 at 435, CA, per Lindley MR; *Re National Bank of Wales Ltd* [1899] 2 Ch 629, CA; *Re Brazilian Rubber Plantations and Estates Ltd* [1911] 1 Ch 425.

12 Eg by making loans to customers or others on insufficient security (*Dovey v Cory* [1901] AC 477, HL; *Re New Mashonaland Exploration Co* [1892] 3 Ch 577; *Rainford v James Keith and Blackman Co Ltd* [1905] 2 Ch 147, CA; *Turquand v Marshall* (1869) 4 Ch App 376; *Grimwade v Mutual Society* (1884) 52 LT 409); by approving transfer of partly paid shares (*Re Faure Electric Accumulator Co* (1888) 40 ChD 141; but see *Re Hoylake Rly Co, ex p Littledale* (1874) 9 Ch App 257, where calls were due); by including bad debts as good in balance sheet (*Re Railway and General Light Improvement Co, Marzetti's Case* (1880) 42 LT 206, CA); by allowing calls to remain unpaid (*Re Liverpool Household Stores Association* (1890) 59 LJ Ch 616 at 625 per Kekewich J); or by not suing for a debt (*Re Forest of Dean Coal Mining Co* (1878) 10 ChD 450; and see *London Financial Association v Kelk* (1884) 26 ChD 107). As to improper payment of dividends see PARAS 1407, 1412.

In *Re Continental Assurance Co of London plc (No 4), Singer v Beckett* [2007] 2 BCLC 287, [2001] BPIR 733, [2001] All ER (D) 229 (Apr), a case decided under the Insolvency Act 1986 s 214 (declaration of liability for wrongful trading) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 914), liability was not established because the directors had made a genuine attempt to grapple with the company's real financial position and, after careful thought, they had decided (wrongly, as it turned out) that the company should trade on. Similarly, in *Re Uno plc and World of Leather plc, Secretary of State for Trade and Industry v Gill* [2004] EWHC 933 (Ch), [2006] BCC 725, a case decided under the Company Directors Disqualification Act 1986 (see note 9), it was held that continuing to accept customer deposits and using these to fund ongoing trading did not necessarily amount to unfitness, given that at all material times there was a reasonable prospect of avoiding insolvency thereby.

13 *Sheffield and South Yorkshire Permanent Building Society v Aizlewood* (1889) 44 ChD 412 at 454, 459 per Stirling J.

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549. Obligation to acquire knowledge and understanding and to exercise supervision.

Directors, collectively and individually, have a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors¹. Whilst directors are entitled (subject to the articles of association of the company²) to delegate particular functions to those below them in the management chain³, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated functions⁴. No rule of universal application can be formulated as to the duty to supervise, and the extent of the duty, and the question whether it has been discharged must depend on the facts of each particular case, including the director's role in the management of the company⁵.

Directors are not guilty of negligence if they fail to supervise acts of co-directors whom they have no reason to distrust⁶ or act in reliance on the officers of the company whom they are entitled to trust and whose reports and statements have misled them⁷; nor are they bound to know the contents of the company's books⁸.

A director is not liable for the misapplication of a cheque properly drawn⁹, but, before a director signs a cheque, he should satisfy himself that a resolution of the directors or of a committee of the directors has authorised the payment¹⁰. A director is not liable for omitting to claim a debt to the company, or to enforce a liability incurred before he joined the board¹¹.

1 See the following cases decided under the Company Directors Disqualification Act 1986 (see PARA 458 note 9): *Re Barings plc, Secretary of State for Trade and Industry v Baker (No 5)* [1999] 1 BCLC 433 at 489 per Jonathan Parker J (affd [2000] 1 BCLC 523 at 535-536, CA, per Morritt LJ); *Re Westmid Packing Services Ltd, Secretary of State for Trade and Industry v Griffiths* [1998] 2 All ER 124 at 130, [1998] 2 BCLC 646 at 653, CA, per Lord Woolf MR; *Re Landhurst Leasing plc, Secretary of State for Trade and Industry v Ball* [1999] 1 BCLC 286 at 346 per Hart J; *Official Receiver v Vass* [1999] BCC 516; *Re Kaytech International plc, Secretary of State for Trade and Industry v Kaczer* [1999] 2 BCLC 351 at 425, CA, per Robert Walker LJ; *Re Park House Properties Ltd* [1997] 2 BCLC 530 (company directors who were husband, wife, son and daughter all disqualified); *Re Galeforce Pleating Co Ltd* [1999] 2 BCLC 704; *Re Vintage Hallmark plc, Secretary of State for Trade and Industry v Grove* [2006] EWHC 2761 (Ch), [2007] 1 BCLC 788, [2006] All ER (D) 196 (Nov). A knowledge of the company's affairs includes an obligation on a director to be informed as to the financial affairs of the company: *Re Galeforce Pleating Co Ltd* at 716.

See also *Daniels v Anderson* (1995) 37 NSWLR 438, 16 ACSR 607, NSW CA; *Re Continental Assurance Co of London plc (No 4)*, *Singer v Beckett* [2007] 2 BCLC 287, [2001] BPIR 733.

2 As to a company's articles of association generally see PARA 228 et seq.

3 As to the delegation of directors' powers generally see PARA 537.

4 See the following cases decided under the Company Directors Disqualification Act 1986 (see PARA 458 note 9): *Re Barings plc, Secretary of State for Trade and Industry v Baker (No 5)* [1999] 1 BCLC 433 at 489 per Jonathan Parker J (affd [2000] 1 BCLC 523 at 535-536, CA, per Morritt LJ); *Re Westmid Packing Services Ltd, Secretary of State for Trade and Industry v Griffiths* [1998] 2 All ER 124 at 130, [1998] 2 BCLC 646 at 653, CA, per Lord Woolf MR (directors failed to resist colleague who dominated the company); *Re Landhurst Leasing plc, Secretary of State for Trade and Industry v Ball* [1999] 1 BCLC 286 at 346 per Hart J; *Re Stephenson Cobbold Ltd, Secretary of State for Trade and Industry v Stephenson* [2000] 2 BCLC 614 (director entitled to rely on advice of company's auditors); *Re Bradcrown Ltd, Official Receiver v Ireland* [2001] 1 BCLC 547 (director abdicated all responsibility to financial advisers); *Re Vintage Hallmark plc, Secretary of State for Trade and*

Industry v Grove [2006] EWHC 2761 (Ch), [2007] 1 BCLC 788, [2006] All ER (D) 196 (Nov). A consistent theme in the cases decided under the Company Directors Disqualification Act 1986 is that, while the court had to consider the extent of a director's responsibility, a director could not avoid his responsibility by leaving the management to another or others: *Secretary of State for Business Enterprise and Regulatory Reform v Sullman* [2008] EWHC 3179 (Ch) at [2], [2009] 1 BCLC 397 at [2]; *Secretary of State for Trade and Industry v Thornbury* [2007] EWHC 3202 (Ch), [2008] 1 BCLC 139 (it is no defence to say that the matter was left to others, unless and except to the extent that it was reasonable to do so). Accordingly, a director who has abdicated his responsibility to participate with fellow directors may be deemed to have acquiesced in misconduct (*Re AG (Manchester) Ltd (in liquidation), Official Receiver v Watson* [2008] EWHC 64 (Ch), [2008] 1 BCLC 321, [2008] All ER (D) 188 (Jan) (director who objected to malpractices was deemed nevertheless to be in dereliction of duty over her failure to resign on the matter)); and the duty to act cannot be excused by lack of curiosity or lack of action (*Lexi Holdings (in administration) v Luqman* [2009] EWCA Civ 117, [2009] 2 BCLC 1, [2009] All ER (D) 269 (Feb)).

See also *Re Continental Assurance Co of London plc (No 4), Singer v Beckett* [2007] 2 BCLC 287 at 445, [2001] BPIR 733; *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407; *Dovey v Cory* [1901] AC 477, HL. If it is pleaded that delegation was made to a person who was unsuitable to be entrusted with the powers, it must be established that the person was unsuitable and that the directors knew or ought to have known that or that they failed to consider the question at all: *Cohen v Selby* [2001] 1 BCLC 176 at 185, CA, per Chadwick LJ. The extent to which a non-executive director may reasonably rely on the executive directors and other professionals to perform their duties is one in which the law can fairly be said to be developing and is plainly 'fact sensitive': *Equitable Life Assurance Society v Bowley* [2003] EWHC 2263 (Comm) at [41], [2004] 1 BCLC 180 at [41] per Langley J.

5 *Re Barings plc, Secretary of State for Trade and Industry v Baker (No 5)* [1999] 1 BCLC 433 at 489 per Jonathan Parker J; affd [2000] 1 BCLC 523 at 535-536, CA, per Morritt LJ (case decided under the Company Directors Disqualification Act 1986 (see PARA 458 note 9)). The cogency of the evidence required also may vary according to the seriousness of the allegation: *Re Finelist Group Ltd, Secretary of State for Trade and Industry v Swan (No 2)* [2005] EWHC 603 (Ch), [2005] BCC 596, [2005] All ER (D) 102 (Apr) (case also decided under the Company Directors Disqualification Act 1986).

6 *Huckerby v Elliott* [1970] 1 All ER 189, DC (director failed to make specific inquiry whether a gaming licence had been obtained by a co-director). A director with grounds for suspecting the honesty of a fellow director will be liable if he or she fails to act on those suspicions: *Lexi Holdings (in administration) v Luqman* [2009] EWCA Civ 117, [2009] All ER (D) 269 (Feb). Older authorities must now be read in the light of the modern developments noted in PARA 458 notes 8, 9.

7 *Dovey v Cory* [1901] AC 477, HL (affg *Re National Bank of Wales Ltd* [1899] 2 Ch 629, CA); *Prefontaine v Grenier* [1907] AC 101, PC; *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407, CA; *Ammonia Soda Co v Chamberlain* [1918] 1 Ch 266, CA. As to older authorities see PARA 458 notes 8, 9.

8 *Hallmark's Case* (1878) 9 ChD 329, CA (where there was no obligation on the director to take shares, and knowledge that his name was on the share register was not imputed to him); *Re Printing Telegraph and Construction Co of the Agence Havas, ex p Cammell* [1894] 1 Ch 528 (affd [1894] 2 Ch 392, CA) (where the director retired upon being asked to apply for shares); *Dovey v Cory* [1901] AC 477 at 492, HL, per Lord Davey, following *Re Denham & Co* (1883) 25 ChD 752; *Cartmell's Case* (1874) 9 Ch App 691 (knowledge of the contents of the share register and entries in other books showing purchase of company's shares). See also *Turquand v Marshall* (1869) 4 Ch App 376; *Re British Provident Life and Fire Assurance Society, Lane's Case* (1863) 1 De GJ & Sm 504; *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407, CA. As to older authorities see PARA 458 notes 8, 9. See also *Re Queen's Moat Houses plc, Secretary of State for Trade and Industry v Bairstow* [2004] EWHC 1730 (Ch), [2005] 1 BCLC 136 (defendant was not under a duty to verify the execution of tasks delegated to the finance director which were properly within the expertise of an accountant and which the defendant had no reason to doubt were being properly performed) (decided under the Company Directors Disqualification Act 1986 (see PARA 458 note 9)). As to statutory liability for failing to take reasonable steps to secure that proper accounts are kept see PARA 708.

9 *Re Montrotier Asphalte Co, Perry's Case* (1876) 34 LT 716. As to older authorities see PARA 458 notes 8, 9.

10 *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 (in which is also discussed at 460 how far precautions should be taken when the resolution which is acted on is one for payment of cheques up to an aggregate amount); *Joint Stock Discount Co v Brown* (1869) LR 8 Eq 381 at 404 per Sir W M James V-C. Cf *Ramskill v Edwards* (1885) 31 ChD 100. See also *Dorchester Finance Co Ltd v Stebbing* (1977) [1989] BCLC 498 (directors negligent in signing blank cheques); *Re Finelist Group Ltd, Secretary of State for Trade and Industry v Swan (No 2)* [2005] EWHC 603 (Ch), [2005] BCC 596, [2005] All ER (D) 102 (Apr) (size of cheques should have put directors on inquiry). As to older authorities see PARA 458 notes 8, 9. As to the extent to which directors may delegate powers, including to committees, see PARA 537.

11 *Re Forest of Dean Coal Mining Co* (1878) 10 ChD 450. As to older authorities see PARA 458 notes 8, 9.

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(E) DUTY AS TO CONFLICTS OF INTEREST

550. Duty to avoid conflicts of interest.

The Companies Act 2006, in setting out general duties¹ that are owed to the company², provides that a director³ of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company⁴. This duty applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity)⁵. However, the duty is not infringed if the matter is authorised by the directors⁶, or by the shareholders⁷, or by the articles⁸.

The test is whether reasonable persons looking at the facts would think there was a real possibility of conflict⁹.

A director must account to the company for any unauthorised profits made by him when in a position of conflict¹⁰. This rule is absolute and independent of any question of fraud or absence of good faith¹¹, and it matters not that the company itself could not have made the profits (or the quantum of profits) which the director made¹². If, however, the company renounces its interest in a particular venture, with full knowledge of the circumstances, which is then taken up by the director, he will no longer be liable to account¹³. Equally, a company with full knowledge of the circumstances of a director's interest in a proposed transaction with the company may approve or acquiesce in his profiting¹⁴.

If directors use their position as directors to obtain for themselves the property of the company, as, for example, by means of securing a beneficial contract, they cannot by using their voting power as shareholders in general meeting prevent the company from claiming the benefit of it¹⁵. A director continues to be subject to the duty to avoid conflicts of interest, as regards the exploitation of any property, even when he ceases to be a director¹⁶, especially if he resigns with a view to taking advantage of current business opportunities available to the company¹⁷.

The statutory duty to avoid conflicts of interest¹⁸ does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company¹⁹; and the duty is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest²⁰, or if the matter has been authorised by the directors²¹.

Directors who make what they believe to be a beneficial contract for the company are not chargeable with breach of trust merely because in promoting the interests of the company they were promoting their own interests by enabling themselves to sell their shares at a profit²².

1 In the Companies Act 2006 ss 171-177; see also PARA 540 et seq. As to the scope and nature of the directors' general duties see PARA 532; and as to the application and effect of the general duties see PARA 533. As to the relevance of case law on those common law rules and equitable principles that are now replaced by the statutory duties see PARA 532 note 7.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'director' under the Companies Acts see PARA 478.

4 Companies Act 2006 s 175(1). Any reference in s 175 to a conflict of interest includes a conflict of interest and duty and a conflict of duties: s 175(7). See the text and notes 10-17. The duty to avoid conflicts has an obvious bearing on interests in proposed or existing transactions or agreements involving the company and special provision is made in relation to those: see the text and notes 18-19; and PARA 555 et seq.

At common law, the general rule is that no fiduciary is allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect: *Aberdeen Rly Co v Blaikie Bros* (1854) 1 Macq 461 at 471 per Lord Cranworth LC (rule described as 'of universal application'); *Bray v Ford* [1896] AC 44 at 51, HL, per Lord Herschell (rule described as 'inflexible'); *Bhullar v Bhullar* [2003] EWCA Civ 424, [2003] 2 BCLC 241. As to the general fiduciary position of directors see PARA 532 et seq.

Directors cannot in the absence of express contract be restrained from acting as directors of a competing company: *London and Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd* [1891] WN 165, approved in *Bell v Lever Bros Ltd* [1932] AC 161 at 195, HL, per Lord Blanesburgh. However, the principle established in *London and Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd* may be restricted to its very individual facts and (accordingly) limited in its application: see *In Plus Group Ltd v Pyke* [2002] EWCA Civ 370 at [84], [2002] 2 BCLC 201 at [84] per Sedley LJ; *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] EWHC 466 (Ch) at [82], [2003] 2 BCLC 523 at [82] per Hart J; *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200 at [70], [2007] 2 BCLC 239 at [70] per Rix LJ. See also PARA 532. See *In Plus Group Ltd v Pyke* (where a director had been effectively excluded from the first company, it was not a breach of fiduciary duty for him to work for a competing company where, when entering into business with this company, he had not made use of the first company's property or of confidential information which had come to him as director of that company).

5 Companies Act 2006 s 175(2). See the text and notes 10-17. As to a director's position at common law as trustee of the company's property see PARA 539.

6 See PARA 551.

7 See the Companies Act 2006 s 180(4)(a); and PARA 533. But see also the text and note 15. As to shareholders and membership of companies generally see PARA 321 et seq.

8 It is only to the extent permitted by the Companies Act 2006 s 180(4)(a) (see PARA 533), which must be read in conjunction with s 232(4) (providing that nothing in s 232 prevents a company's articles from making such provision as has previously been lawful for dealing with conflicts of interest) (see PARA 594). As to a company's articles of association generally see PARA 228 et seq.

The model articles of association that have been prescribed for the purposes of the Companies Act 2006 (ie the Companies (Model Articles) Regulations 2008, SI 2008/3229) (as to which see PARA 228 et seq) do not make any provision explicitly in relation to a director's interests but they do make provision (as do the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A arts 85-86 otherwise) for conflicts that may arise from any interests a director may have in an actual or proposed transaction or arrangement with the company: see PARA 555. See also PARA 558 note 4.

The Companies (Tables A to F) Regulations 1985, SI 1985/805, which constitute model articles that were prescribed for the purposes of the Companies Act 1985, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. Accordingly, the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides that, subject to the provisions of the Companies Act 2006, and provided that he has disclosed to the directors the nature and extent of any material interest of his, a director notwithstanding his office: (1) may be a director or other officer of, or employed by, or otherwise interested in, any body corporate promoted by the company or in which the company is otherwise interested; and (2) is not, by reason of his office, accountable to the company for any benefit which he derives from any such office or employment or from any interest in any such body corporate: see Table A art 85. For these purposes, an interest of which a director has no knowledge and of which it is unreasonable to expect him to have knowledge is not treated as an interest of his: see Table A art 86. Special provision is made by Table A arts 85-86 also in relation to interests in proposed or existing transactions or agreements involving the company: see PARA 555. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but arts 85-86 are applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

9 *Boardman v Phipps* [1967] 2 AC 46 at 124, [1966] 3 All ER 721 at 756, HL, per Lord Upjohn; *Bhullar v Bhullar* [2003] EWCA Civ 424, [2003] 2 BCLC 241. See also *Aberdeen Rly Co v Blaikie Bros* (1854) 1 Macq 461.

Where two directors became involved personally in a company transaction which was in danger of collapsing, but changed its terms so that the company did not receive a proper reward for brokering the substitute deal,

the directors were in breach of the 'no conflicts' rule; and the subsequent redress they made to a third director for the wrong suffered did not retrospectively affect that breach: *O'Donnell v Shanahan* [2009] EWCA Civ 751, (2009) Times, 21 August, [2009] All ER (D) 253 (Jul) (revsg [2008] EWHC 1973 (Ch), sub nom *Re Allied Business and Financial Consultants Ltd* [2009] 1 BCLC 328).

10 *Bhullar v Bhullar* [2003] EWCA Civ 424, [2003] 2 BCLC 241; *Re Quarter Master UK Ltd, Quarter Master UK v Pyke* [2004] EWHC 1815 (Ch) at [54], [2005] 1 BCLC 245 at [54] per Paul Morgan QC. See also *Parker v McKenna* (1874) 10 Ch App 96 (where directors had to account for profits made in dealings with new capital); *Regal (Hastings) Ltd v Gulliver* (1942) [1967] 2 AC 134n, [1942] 1 All ER 378; *Cockburn v Newbridge Sanitary Steam Laundry Co Ltd and Llewellyn* [1915] 1 IR 237, CA. The 'no profits' rule applies to a person who has agreed to become a director (*Henderson v Huntington Copper and Sulphur Co* (1878) 5 R 1, HL; *Albion Steel and Wire Co v Martin* (1875) 1 ChD 580), and to persons entering into contracts on behalf of an intended company (*Phosphate Sewage Co v Hartmont* (1877) 5 ChD 394, CA), as well as to a de facto director. If necessary, the court will lift the corporate veil where a company is used by a director to receive, in breach of his fiduciary duty, profits or corporate property for which he is accountable: *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734; *Trustor AB v Smallbone (No 2)* [2001] 3 All ER 987, [2001] 1 WLR 1177 (relevant person had to have control of the company for the corporate veil to be pierced). As to de facto directors, and the duties which they owe, see PARA 478 note 8. See further *Re Imperial Land Co of Marseilles, ex p Larking* (1877) 4 ChD 566, CA (where the directors were not allowed to make a profit out of a fraudulent transaction); and PARA 554. See also the cases cited in note 11; and *Chan v Zacharia* (1984) 154 CLR 178 (cited with approval in *Don King Productions Inc v Warren* [2000] Ch 291 at 340-341, [1999] 2 All ER 218 at 238-239, CA, per Morritt LJ) regarding the interplay between the 'no-profit' rule and the 'no-conflict' rule (see PARA 550 et seq), although it is clear from the Companies Act 2006 s 175(1) (see the text and notes 1-4) that the overriding rule is the 'no-conflict' rule.

The liability to account under the 'no profits' rule is not to be qualified by reference to whether the impugned transaction was (in the case of an alleged breach by a director) within or without the scope of the company's business: *O'Donnell v Shanahan* [2009] EWCA Civ 751, (2009) Times, 21 August, [2009] All ER (D) 253 (Jul). Accordingly, *Aas v Benham* [1891] 2 Ch 244, CA (see also **PARTNERSHIP** vol 79 (2008) PARA 107) is of no relevance in considering the extent and application of the 'no profit' and 'no conflict' rules so far as they apply to fiduciaries such as trustees and directors: *O'Donnell v Shanahan* at [61]-[69] per Rimer LJ. As to the duty to account in relation to partnerships see **PARTNERSHIP** vol 79 (2008) PARA 107.

As to the related question of whether an equitable allowance might be made in respect of services rendered by a director in earning any profits which are at issue see *Phipps v Boardman* [1964] 2 All ER 187 at 208, [1964] 1 WLR 993 at 1018 per Wilberforce J (affd sub nom *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL) (allowance made to trustee for work performed for benefit of trust, even though outside terms of trust deed); *Guinness plc v Saunders* [1990] 2 AC 663 at 701, [1990] 1 All ER 652 at 667, HL, per Lord Goff of Chieveley; and *Crown Dilmun v Sutton* at [211]-[213] (where dishonesty is found, that will militate against making any allowances but it should not be excluded as a possibility). In *Re Quarter Master UK Ltd, Quarter Master UK v Pyke* [2004] EWHC 1815 (Ch), [2005] 1 BCLC 245, no allowance was made, applying the approach of *Guinness plc v Saunders* at 701, 667, per Lord Goff of Chieveley, that the exercise of the jurisdiction is restricted to those cases where it cannot have the effect of encouraging trustees (or directors) in any way to put themselves in a position where their interests conflict with their duties as trustees (or directors). As to quantum meruit see **RESTITUTION** vol 40(1) (2007 Reissue) PARAS 7, 113 et seq.

A director cannot avoid accountability for secret profits by the simple expedient of resigning: *News International plc v Clinger* [1998] All ER (D) 592. See also the Companies Act 2006 s 170(2) (a person who ceases to be a director continues to be subject to the duty in s 175); and PARA 533.

11 *Regal (Hastings) Ltd v Gulliver* (1942) [1967] 2 AC 134n, [1942] 1 All ER 378. See *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL; *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162, [1972] 1 WLR 443 (where there was an element of bad faith). See also *Parker v McKenna* (1874) 10 Ch App 96; *Island Export Finance Ltd v Umunna* [1986] BCLC 460; *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734; *Bhullar v Bhullar* [2003] EWCA Civ 424, [2003] 2 BCLC 241; *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048, [2004] 1 BCLC 131; *Crown Dilmun v Sutton* [2004] EWHC 52 (Ch), [2004] 1 BCLC 468; *Murad v Al-Saraj* [2005] EWCA Civ 959, [2005] 32 LS Gaz R 31, [2005] All ER (D) 503 (Jul).

12 *Regal (Hastings) Ltd v Gulliver* (1942) [1967] 2 AC 134n, [1942] 1 All ER 378; *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162, [1972] 1 WLR 443; *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 (a director's strict liability to account could not be answered by a claim that the company could not or would not have taken up the business opportunity or that the profit accrued because of the use of his own skill or property); *Bhullar v Bhullar* [2003] EWCA Civ 424, [2003] 2 BCLC 241; *Crown Dilmun v Sutton* [2004] EWHC 52 (Ch), [2004] 1 BCLC 468; *Re Quarter Master UK Ltd, Quarter Master UK v Pyke* [2004] EWHC 1815 (Ch), [2005] 1 BCLC 245; *Murad v Al-Saraj* [2005] EWCA Civ 959, [2005] 32 LS Gaz R 31, [2005] All ER (D) 503 (Jul) (the purpose of the rule is to act as a deterrent to discourage fiduciaries from placing themselves in a conflict of interest, or exploiting profit opportunities, and to encourage adherence to the no-profit rule).

13 See *Queensland Mines Ltd v Hudson* (1978) 52 ALJR 399, PC; *Furs Ltd v Tomkies* (1936) 54 CLR 583. However, the wrongdoer is not absolved by establishing that, in the absence of his wrongdoing, he could have

secured the consent of the person, to whom the fiduciary duty was owed, to allow him to retain any profit: *Murad v Al-Saraj* [2005] EWCA Civ 959, [2005] 32 LS Gaz R 31, [2005] All ER (D) 503 (Jul) (person owed fiduciary duties to two others in relation to a joint venture, and made a secret profit which he concealed by fraudulent misrepresentation to those other parties; first party held accountable for full amount of secret profit because what would have happened if the truth had been told was irrelevant).

14 *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048 at [65], [2004] 1 BCLC 131 at [65] per Mummery LJ; *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 at 741 per Rimer J; *Crown Dilmun v Sutton* [2004] EWHC 52 (Ch) at [179], [2004] 1 BCLC 468 at [179] per Peter Smith J. See also *Parker v McKenna* (1874) 10 Ch App 96 at 124 per James LJ. In *O'Donnell v Shanahan* [2009] EWCA Civ 751, (2009) Times, 21 August, [2009] All ER (D) 253 (Jul), two directors obtained information while acting as directors in the course of setting up a property transaction for the company, but they made use of that information in order to take up the opportunity for their own benefit once the original transaction fell through; it was held that, as they did not offer the renewed opportunity to the company, but took it up personally, they engaged in a transaction that rendered them liable to account under the 'no profit' rule.

Requirements for disclosure are not confined to the nature of the director's interest: they extend to disclosure of its extent, including the source and scale of the profit made from his position, so as to ensure that the shareholders are 'fully informed of the real state of things': *Gwembe Valley Development Co Ltd v Koshy (No 3)* at [65] per Mummery LJ, citing *Gray v New Augarita Porcupine Mines Ltd* [1952] 3 DLR 1 at 14, PC.

15 *Cook v Deeks* [1916] 1 AC 554, PC; *Burland v Earle* [1902] AC 83, PC; cf *EBM Co Ltd v Dominion Bank* [1937] 3 All ER 555, PC (transaction unenforceable where the company purported to apply its property for the benefit of certain directors). As to the ratification by a company of conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company, and as to the statutory limitation on such ratification that applies, see the Companies Act 2006 s 239; and PARA 593.

16 See the Companies Act 2006 s 170(2); and PARA 533. This provides that a person who ceases to be a director continues to be subject to the duty in s 175(2) (see the text and note 5), ie the 'no conflict' rule in s 175(1) (see the text and notes 1-4) falls away, but the 'no profit' duty in s 175(2) continues to apply to the extent dictated by s 170(2): see *Ultraframe (UK) Ltd v Fielding, Northstar Systems Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1309]-[1310], [2005] All ER (D) 397 (Jul) at [1309]-[1310] per Lewison J; and *Wilkinson v West Coast Capital* [2005] EWHC 3009 (Ch) at [251], [2005] All ER (D) 346 (Dec) at [251] per Warren J.

17 *Island Export Finance Ltd v Umunna* [1986] BCLC 460; *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704. The underlying basis of liability of a director who resigns and then exploits a maturing business opportunity of his former company is that the opportunity is to be treated as if it were property of the company in relation to which the director had fiduciary duties; and by seeking to exploit the opportunity after resignation he is appropriating for himself that property and he becomes constructive trustee of the fruits of his abuse of the company's property, which he has acquired in circumstances where he knowingly had a conflict of interest: *CMS Dolphin Ltd v Simonet*. See also *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162, [1972] 1 WLR 443; *Shepherds Investments Ltd v Walters* [2006] EWHC 836 (Ch), [2007] 2 BCLC 202; and *Kingsley IT Consulting v McIntosh* [2006] EWHC 1288 (Ch), [2006] BCC 875.

Prior to resigning, a director must take care not to place himself in a position of conflict; however, the precise point at which preparations for the establishment of a competing business by a director become unlawful will turn on the actual facts of any particular case; the touchstone for what, on the one hand, is permissible, and what, on the other hand, is impermissible unless consent is obtained from the company or employer after full disclosure, is what, in the case of a director, will be in breach of the fiduciary duties: see *Shepherds Investments Ltd v Walters* at [108] per Etherton J; and see *Simtel Communications Ltd v Rebek* [2006] EWHC 572 (QB), [2006] 2 BCLC 571. As to the fiduciary's duty to disclose his own misconduct to his principal see PARA 544.

18 See the Companies Act 2006 s 175(1); and the text and notes 1-4.

19 Companies Act 2006 s 175(3). For the purposes of Pt 10 (ss 154-259) (see PARA 478 et seq) it is immaterial whether the law that (apart from the Companies Act 2006) governs an arrangement or transaction is the law of the United Kingdom, or a part of it, or not: s 259. As to the meaning of 'United Kingdom' see PARA 1 note 5. As to the other provisions that govern interests in proposed or existing transactions or agreements involving the company see note 4.

In relation to companies which are charities, it is provided, instead of the wording given in s 175(3), that the duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company if or to the extent that the company's articles allow that duty to be so disapplied, which they may do only in relation to descriptions of transaction or arrangement specified in the company's articles: see s 175(3) (substituted by s 181(2)(a)). See PARA 533. As to the meaning of references to a company's 'articles' see PARA 228 note 2.

20 Companies Act 2006 s 175(4)(a). See also the cases cited in note 8.

21 Companies Act 2006 s 175(4)(b). As to the authorisation that is so required see PARA 551.

22 *Hirsche v Sims* [1894] AC 654 at 660, PC. The court has power to sanction a sale by a trustee in bankruptcy to a company of which he and the committee of inspection are to be directors: see *Re Spink, ex p Slater* (1913) 108 LT 572; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 459.

UPDATE

550 Duty to avoid conflicts of interest

NOTES 4, 17--See *Berryland Books Ltd v BK Books Ltd* [2009] EWHC 1877 (Ch), [2009] 2 BCLC 709.

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551. Authorisation by directors regarding potential conflicts.

The statutory duty to avoid conflicts of interest¹ is not infringed if the matter has been authorised by the directors². Such authorisation may be given by the directors³: (1) where the company is a private company⁴, and nothing in the company's constitution invalidates such authorisation, by the matter being proposed to and authorised by the directors⁵; or (2) where the company is a public company⁶, and its constitution includes provision⁷ enabling the directors to authorise the matter, by the matter being proposed to and authorised by them in accordance with the constitution⁸. However, the authorisation is effective only if: (a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director⁹; and (b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted¹⁰.

In a case where the provisions which require conflicts of interest to be avoided¹¹ are complied with by directors' authorisation¹², the transaction or arrangement is not liable to be set aside by virtue of any common law rule or equitable principle requiring the consent or approval of the members of the company¹³. This is without prejudice to any enactment¹⁴, or provision of the company's constitution, requiring such consent or approval¹⁵.

1 See the Companies Act 2006 s 175; and PARA 550. As to the scope and nature of the directors' general duties see PARA 532; and as to the application and effect of the general duties see PARA 533. As to the relevance of case law on those common law rules and equitable principles that are now replaced by the statutory duties see PARA 532 note 7.

2 See the Companies Act 2006 s 175(4)(b); and PARA 550. As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

3 In relation to companies which are charities, heads (1) and (2) in the text do not apply and it is provided instead that authorisation may be given by the directors where the company's constitution includes provision enabling them to authorise the matter, by the matter being proposed to and authorised by them in accordance with the constitution: see the Companies Act 2006 s 175(5) (substituted by s 181(2)(b)). See PARA 533. As to the meaning of references to a company's constitution for the purposes of Pt 10 (ss 154-259) (see PARA 478 et seq) see PARA 540 note 4. As to the meaning of 'company' under the Companies Acts see PARA 24.

4 As to the meaning of 'private company' see PARA 102.

5 Companies Act 2006 s 175(5)(a). As to provision made for decision-making by directors at meetings see PARA 527. A private company incorporated under the Companies Act 1985 must pass an ordinary resolution permitting authorisation by the directors, and this resolution must be forwarded to the registrar: see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, art 9, Sch 4 para 47.

6 As to the meaning of 'public company' see PARA 102.

7 The model articles of association do not make any such provision: see PARA 228 et seq.

8 Companies Act 2006 s 175(5)(b).

9 Companies Act 2006 s 175(6)(a).

10 Companies Act 2006 s 175(6)(b).

11 Ie the Companies Act 2006 s 175 (see also PARA 550): see s 180(1).

12 Ie in accordance with the Companies Act 2006 s 175(5), (6) (see the text and notes 1-10).

13 Companies Act 2006 s 180(1). As to the meaning of 'member' see PARA 321.

14 As to the meaning of 'enactment' see PARA 17 note 2.

15 Companies Act 2006 s 180(1).

Where the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) (transactions with directors requiring approval of members) (see PARA 561 et seq) applies, and approval is given under Pt 10 Ch 4, or where the matter is one as to which it is provided that approval is not needed, it is not necessary also to comply with s 175: see s 180(2); and PARA 562.

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552. Authorisation of conflicts by the articles.

The general duties that are specified by the Companies Act 2006¹ as being owed by a director² of a company³ to the company are not infringed, where the company's articles contain provisions for dealing with conflicts of interest⁴, by anything done (or omitted) by the directors, or any of them, in accordance with those provisions⁵.

In a case where the provisions requiring conflicts of interest to be avoided⁶ are complied with by directors' authorisation⁷, the transaction or arrangement is not liable to be set aside by virtue of any common law rule or equitable principle requiring the consent or approval of the members of the company⁸. This is without prejudice to any enactment⁹, or provision of the company's constitution, requiring such consent or approval¹⁰.

1 Ie in the Companies Act 2006 ss 171-177: see also PARA 540 et seq. As to the scope and nature of the directors' general duties see PARA 532.

2 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'company' under the Companies Acts see PARA 24.

4 As to the general duty to avoid conflicts of interest see PARA 550 et seq.

5 See the Companies Act 2006 s 180(4)(b); and PARA 533. This provision should be read in conjunction with s 232(4) (which provides that nothing in s 232 prevents a company's articles from making such provision as has previously been lawful for dealing with conflicts of interest) (see PARA 594).

6 In the Companies Act 2006 s 175 (see also PARA 550): see s 180(1); and PARA 551.

7 In accordance with the Companies Act 2006 s 175(5), (6) (see PARA 551).

8 See the Companies Act 2006 s 180(1); and PARA 551. As to the meaning of 'member' see PARA 321.

9 As to the meaning of 'enactment' see PARA 17 note 2.

10 See the Companies Act 2006 s 180(1); and PARA 551. As to the meaning of references to a company's constitution for the purposes of Pt 10 (ss 154-259) (see PARA 478 et seq) see PARA 540 note 4.

Where the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) (transactions with directors requiring approval of members) (see PARA 561 et seq) applies, and approval is given under Pt 10 Ch 4, or where the matter is one as to which it is provided that approval is not needed, it is not necessary also to comply with s 175: see s 180(2); and PARA 562.

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(F) BENEFITS FROM THIRD PARTIES

553. Duty not to accept benefits from third parties.

The Companies Act 2006, in setting out general duties¹ that are owed to the company², provides that a director³ of a company must not accept a benefit from a third party⁴ conferred by reason of either his being a director⁵, or his doing (or not doing) anything as director⁶.

This duty is not infringed if the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest⁷; and the general duties that are so specified by the Companies Act 2006 as being owed by a director to the company:

937 (1) have effect subject to any rule of law enabling the company to give authority, specifically or generally, for anything to be done (or omitted) by the directors, or any of them, that would otherwise be a breach of duty⁸; and

938 (2) where the company's articles contain provisions for dealing with conflicts of interest, are not infringed by anything done (or omitted) by the directors, or any of them, in accordance with those provisions⁹.

1 In the Companies Act 2006 ss 171-177: see also PARAS 540 et seq. As to the scope and nature of the directors' general duties see PARA 532; and as to the application and effect of the general duties see PARA 533. As to the relevance of case law on those common law rules and equitable principles that are now replaced by the statutory duties see PARA 532 note 7.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'director' under the Companies Acts see PARA 478.

4 For these purposes, a 'third party' means a person other than the company, an associated body corporate or a person acting on behalf of the company or an associated body corporate: Companies Act 2006 s 176(2). For the purposes of Pt 10 (ss 154-259) (see PARA 478 et seq), bodies corporate are 'associated' if one is a subsidiary of the other or both are subsidiaries of the same body corporate: s 256(a). As to the meaning of

'body corporate' for the purposes of the Companies Acts see PARA 1 note 5; and as to the meaning of 'subsidiary' see PARA 25.

As to bribes see PARA 554.

5 Companies Act 2006 s 176(1)(a).

6 Companies Act 2006 s 176(1)(b). Benefits received by a director from a person by whom his services (as a director or otherwise) are provided to the company are not regarded as conferred by a third party: s 176(3).

7 Companies Act 2006 s 176(4). Any reference in s 176 to a conflict of interest includes a conflict of interest and duty and a conflict of duties: s 176(5). As to the general duty to avoid conflicts of interest see PARA 550; and see especially the cases cited in PARA 550 note 9.

Where the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) (transactions with directors requiring approval of members) (see PARA 561 et seq) applies, and approval is given under Pt 10 Ch 4, or where the matter is one as to which it is provided that approval is not needed, it is not necessary also to comply with s 176: see s 180(2); and PARA 562.

8 See the Companies Act 2006 s 180(4)(a); and PARA 533. Head (1) in the text still would not, however, sanction receipt of a benefit amounting to a bribe (as to which see PARA 554).

9 See the Companies Act 2006 s 180(4)(b); and PARA 533. The provisions referred to in head (2) in the text may, of course, provide legitimately for directors' benefits. Head (2) in the text should be read in conjunction with s 232(4) (which provides that nothing in s 232 prevents a company's articles from making such provision as has previously been lawful for dealing with conflicts of interest) (see PARA 594).

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554. Bribes.

Whenever a company director¹ becomes entitled to a sum of money² by way of a bribe from a vendor to the company, the company may recover, from the person giving the bribe, a sum equal to the amount of the bribe, on the basis that the person who gave it, the vendor, received from the company more than he was entitled to, measured by the amount of the bribe, the excess being money received by the vendor to the company's use³. If property representing the bribe increases in value or if a cash bribe is invested advantageously, the false fiduciary is accountable not only for the original amount or value of the bribe but also for the increased value of the property representing the bribe⁴. The fact that the director has agreed subsequently with the person giving the bribe to accept a smaller sum in prompt settlement and that this has been recovered from the director in full satisfaction of all claims against him is no defence to the person giving the bribe in a claim by the company for the balance⁵. The company may also recover against the person who gives the bribe damages for any loss sustained through entering a disadvantageous contract⁶, or it may rescind the contract⁷. A contract may be enforced by the company against the director if he has contracted as principal, deducting the amount of any secret profit which might accrue to him⁸.

1 As to a company's directors see PARA 478 et seq.

2 As to an offer of employment alleged to be in the nature of a bribe, but which did not lead to any conflict of interest, see *Amalgamated Industrials Ltd v Johnson & Firth Brown Ltd* (1981) Times, 15 April.

3 *Grant v Gold Exploration and Development Syndicate* [1900] 1 QB 233 at 249, CA, per Collins LJ. The principle that a person in a fiduciary position must not make secret profits is not based on actual fraud, but on motives of public policy: see *Bray v Ford* [1896] AC 44 at 51, HL, per Lord Herschell; *Harrington v Victoria Graving Dock Co* (1878) 3 QBD 549 (where it was held that, although the person to whom the bribe is payable

has not in fact been perverted, he cannot recover the bribe in a claim). Cf *Kregor v Hollins* (1913) 109 LT 225, CA. As to bribery of agents generally see **AGENCY** vol 1 (2008) PARA 91 et seq.

4 *A-G for Hong Kong v Reid* [1994] 1 AC 324 at 331, [1994] 1 All ER 1 at 5, PC. The decision in *Lister & Co v Stubbs* (1890) 45 ChD 1, CA, to the effect that a director who had betrayed the trust placed in him and received a bribe was liable as a debtor only and the company could not follow the profit or bribe as trust property, was doubted in *A-G for Hong Kong v Reid* at 336 and 9. The relevant merits and application of *Lister & Co v Stubbs* and *A-G for Hong Kong v Reid* have been discussed in *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch) at [75]-[86], [2005] Ch 119 at [75]-[86], [2005] 4 All ER 73 at [75]-[86] per Lawrence Collins J. The judge indicated that, if the case were not distinguishable from *Lister & Co v Stubbs*, he would have applied *A-G for Hong Kong v Reid*; and that there are powerful policy reasons for ensuring that a fiduciary does not retain gains acquired in violation of fiduciary duty, regardless of whether the fiduciary is insolvent. This point is resolved by the Companies Act 2006 s 176 (duty not to accept benefits from third parties) (see PARA 553), which, together with s 178(2) (the duties, with the exception of the duty to exercise reasonable care, skill and diligence, are enforceable in the same way as any other fiduciary duty owed to a company by its directors) (see PARA 559), means that benefits accepted in breach of that duty (and, a fortiori, bribes) are held on trust for the company. As to the joint and several nature of the liability where more than one director is concerned see PARA 586.

5 See note 4.

6 *Salford Corp'n v Lever* [1891] 1 QB 168, CA. See also *Grant v Gold Exploration and Development Syndicate* [1900] 1 QB 233 at 244, CA, per Smith LJ.

7 *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha and Telegraph Works Co* (1875) 10 Ch App 515.

8 *Whaley Bridge Calico Printing Co v Green* (1879) 5 QBD 109.

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(G) DUTY TO DECLARE INTEREST IN PROPOSED TRANSACTIONS ETC

555. Duty to declare interest in proposed transaction or arrangement with the company.

The Companies Act 2006, in setting out general duties¹ that are owed to the company², provides that if a director³ of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors⁴.

The declaration may (but need not) be made either at a meeting of the directors⁵, or by notice to the directors⁶. If such a declaration of interest⁷ proves to be (or becomes) inaccurate or incomplete, a further declaration must be made⁸. Any declaration so required⁹ must be made before the company enters into the transaction or arrangement¹⁰.

This restriction¹¹ does not require a declaration of an interest of which the director is not aware or where the director is not aware of the transaction or arrangement in question¹²; and a director need not declare an interest: (1) if it cannot reasonably be regarded as likely to give rise to a conflict of interest¹³; (2) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware)¹⁴; or (3) if, or to the extent that, it concerns terms of his service contract¹⁵ that have been or are to be considered either by a meeting of the directors¹⁶, or by a committee of the directors appointed for the purpose under the company's constitution¹⁷.

In a case where the provisions as the need to declare any interest in a proposed transaction or arrangement¹⁸ are complied with, the transaction or arrangement is not liable to be set aside by virtue of any common law rule or equitable principle requiring the consent or approval of the members of the company¹⁹. This is without prejudice to any enactment²⁰, or provision of the company's constitution, requiring such consent or approval²¹.

The strict common law doctrine against self-dealing by directors was commonly relaxed by means of a provision in the company's articles of association to this effect²². Accordingly, if a proposed decision of the directors is concerned with an actual or proposed transaction or arrangement with the company in which a director is interested, that director is not to be counted as participating in the decision-making process for quorum or voting purposes²³.

1 le in the Companies Act 2006 ss 171-177: see also PARA 540 et seq. As to the scope and nature of the directors' general duties see PARA 532; and as to the application and effect of the general duties see PARA 533. As to the relevance of case law on those common law rules and equitable principles that are now replaced by the statutory duties see PARA 532 note 7; and see PARA 556 et seq.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'director' under the Companies Acts see PARA 478.

4 Companies Act 2006 s 177(1). As to the requirement to declare an interest in an existing transaction or arrangement that has been entered into by the company see Pt 10 Ch 3 (ss 182-187); and PARAS 555, 560. As to the general duty to avoid conflicts of interest see PARA 550. In *Newgate Stud Co v Penfold* [2004] EWHC 2993 (Ch), [2008] 1 BCLC 46, where a director bought a horse from his company via public auction, it was held that the self-dealing rule does and should apply to purchases at public auction because the inherent conflict in the fiduciary's position remains and there are many ways in which both the seller's agent and a bidder can influence the outcome of an auction both before the sale and during the bidding.

5 Companies Act 2006 s 177(2)(a). As to meetings of directors generally see PARA 528 et seq.

6 Companies Act 2006 s 177(2)(b). The text refers to notice that may be given to the directors in accordance with either s 184 or s 185: see s 177(2)(b). As to the application of Pt 10 Ch 3 (ss 182-187) to shadow directors see PARA 560.

Under the provisions of s 184, which apply to a declaration of interest made by notice in writing (s 184(1)), the director must send the notice to the other directors (s 184(2)). The notice may be sent in hard copy form (or, if the recipient has agreed to receive it in electronic form, in an agreed electronic form) (s 184(3)); and may be sent by hand or by post (or, if the recipient has agreed to receive it by electronic means, by agreed electronic means) (s 184(4)). Where a director declares an interest by notice in writing in accordance with s 184, the making of the declaration is deemed to form part of the proceedings at the next meeting of the directors after the notice is given (s 184(5)(a)); and the provisions of s 248 (minutes of meetings of directors) (see PARA 530) apply as if the declaration had been made at that meeting (s 184(5)(b)). As to directors' communications see PARA 528 note 3. As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form (or by electronic means) see PARA 679. As to the construction of references to service by post see **STATUTES** vol 44(1) (Reissue) PARA 1388.

General notice in accordance with s 185 is a sufficient declaration of interest in relation to the matters to which it relates: s 185(1). General notice is notice given to the directors of a company to the effect that the director: (1) has an interest (as member, officer, employee or otherwise) in a specified body corporate or firm and is to be regarded as interested in any transaction or arrangement that may, after the date of the notice, be made with that body corporate or firm (s 185(2)(a)); or (2) is connected with a specified person (other than a body corporate or firm) and is to be regarded as interested in any transaction or arrangement that may, after the date of the notice, be made with that person (s 185(2)(b)). The notice must state the nature and extent of the director's interest in the body corporate or firm or, as the case may be, the nature of his connection with the person: s 185(3). General notice is not effective, however, unless it is given at a meeting of the directors (s 185(4)(a)), or the director takes reasonable steps to secure that it is brought up and read at the next meeting of the directors after it is given (s 185(4)(b)). As to the meaning of 'member' see PARA 321. As to the meaning of 'officer' generally see PARA 607. As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5. As to the meaning of 'firm' see PARA 112 note 14. As to the meaning of references to a director being 'connected' with a person see PARA 481.

See also the text and notes 22-23.

7 le under the Companies Act 2006 s 177: see s 177(3).

8 Companies Act 2006 s 177(3).

9 le required by the Companies Act 2006 s 177: see s 177(4).

10 Companies Act 2006 s 177(4).

11 le contained in the provisions of the Companies Act 2006 s 177: see s 177(5).

12 Companies Act 2006 s 177(5). For this purpose, a director is treated as being aware of matters of which he ought reasonably to be aware: s 177(5).

13 Companies Act 2006 s 177(6)(a).

14 Companies Act 2006 s 177(6)(b).

15 As to the meaning of a director's 'service contract', in relation to a company, for the purposes of the Companies Act 2006 Pt 10 (ss 154-259) (see PARA 478 et seq) see PARA 525 note 4.

16 Companies Act 2006 s 177(6)(c)(i).

17 Companies Act 2006 s 177(6)(c)(ii). As to the meaning of references to a company's constitution for the purposes of Pt 10 see PARA 540 note 4. As to the extent to which directors may delegate powers, including to committees, see PARA 537.

18 le the Companies Act 2006 s 177 (see the text and notes 1-17): see s 180(1).

19 Companies Act 2006 s 180(1). See also *Aberdeen Rly Co v Blaikie Bros* (1854) 1 Macq 461.

20 As to the meaning of 'enactment' see PARA 17 note 2.

21 Companies Act 2006 s 180(1).

22 As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

23 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 14(1); Sch 2 art 14(1); Sch 3 art 16(1). However, when the company by ordinary resolution disapplies the provision of the articles which would otherwise prevent a director from being counted as participating in the decision-making process, or when the director's interest cannot reasonably be regarded as likely to give rise to a conflict of interest, or when the director's conflict of interest arises from a permitted cause, a director who is interested in an actual or proposed transaction or arrangement with the company is to be counted as participating in the decision-making process for quorum and voting purposes: Sch 1 art 14(2), (3); Sch 2 art 14(2), (3); Sch 3 art 16(2), (3). For these purposes, the following are permitted causes: (1) a guarantee given, or to be given, by or to a director in respect of an obligation incurred by or on behalf of the company or any of its subsidiaries; (2) subscription, or an agreement to subscribe, for shares or other securities of the company or any of its subsidiaries, or to underwrite, sub-underwrite, or guarantee subscription for any such shares or securities; and (3) arrangements pursuant to which benefits are made available to employees and directors or former employees and directors of the company or any of its subsidiaries which do not provide special benefits for directors or former directors: Sch 1 art 14(4); Sch 2 art 14(4); Sch 3 art 16(4). References to proposed decisions and decision-making processes include any directors' meeting or part of a directors' meeting: see Sch 1 art 14(5); Sch 2 art 14(5); Sch 3 art 16(1), (2). If a question arises at a meeting of directors or of a committee of directors as to the right of a director to participate in the meeting (or part of the meeting) for voting or quorum purposes, the question may, before the conclusion of the meeting, be referred to the chairman whose ruling in relation to any director other than the chairman is to be final and conclusive: Sch 1 art 14(6); Sch 2 art 14(6); Sch 3 art 16(5). However, if any question as to the right to participate in the meeting (or part of the meeting) should arise in respect of the chairman, the question is to be decided by a decision of the directors at that meeting, for which purpose the chairman is not to be counted as participating in the meeting (or that part of the meeting) for voting or quorum purposes: Sch 1 art 14(7); Sch 2 art 14(7); Sch 3 art 16(6). As to the meaning of 'ordinary resolution' see PARA

613. As to chairing a directors' meeting see PARA 528; and as to the quorum required for such a meeting see PARA 529.

The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides that, save as otherwise provided by the articles, a director must not vote at a meeting of directors or of a committee of directors on any resolution concerning a matter in which he has, directly or indirectly, an interest or duty which is material and which conflicts or may conflict with the interests of the company unless his interest or duty arises only because the case falls within one or more of the following cases: (a) the resolution relates to the giving to him of a guarantee, security, or indemnity in respect of money lent to, or an obligation incurred by him for the benefit of, the company or any of its subsidiaries; (b) the resolution relates to the giving to a third party of a guarantee, security, or indemnity in respect of an obligation of the company or any of its subsidiaries for which the director has assumed responsibility in whole or part and whether alone or jointly with others under a guarantee or indemnity or by the giving of security; (c) his interest arises by virtue of his subscribing or agreeing to subscribe for any shares, debentures, or other securities of the company or any of its subsidiaries, or by virtue of his being, or intending to become, a participant in the underwriting or sub-underwriting of an offer of any such shares, debentures, or other securities by the company or any of its subsidiaries for subscription, purchase or exchange; (d) the resolution relates in any way to a retirement benefits scheme which has been approved, or is conditional upon approval, by the Commissioners for Revenue and Customs for taxation purposes: see Table A art 94. For these purposes, an interest of a person who is, for any purpose of the Companies Act 2006 (excluding any statutory modification thereof not in force when this article becomes binding on the company), connected with a director must be treated as an interest of the director and, in relation to an alternate director, an interest of his appointor must be treated as an interest of the alternate director without prejudice to any interest which the alternate director has otherwise: see Table A art 94. A director is not to be counted in the quorum present at a meeting in relation to a resolution on which he is not entitled to vote: Table A art 95. As to alternate directors see PARA 489. As to the extent to which directors may delegate powers, including to committees, see PARA 537. As to the Commissioners for Revenue and Customs see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARAS 900-933. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A further provides that, subject to the provisions of the Companies Act 2006, and provided that he has disclosed to the directors the nature and extent of any material interest of his, a director notwithstanding his office: (i) may be a party to, or otherwise interested in, any transaction or arrangement with the company or in which the company is otherwise interested; (ii) may be a party to any transaction or arrangement with (or otherwise interested in) any body corporate promoted by the company or in which the company is otherwise interested; and (iii) is not, by reason of his office, accountable to the company for any benefit which he derives from any such transaction or arrangement or from any interest in any such body corporate and no such transaction or arrangement is liable to be avoided on the ground of any such interest or benefit: see Table A art 85. As to the avoidance of contracts see PARA 560 et seq. For these purposes: (A) a general notice given to the directors that a director is to be regarded as having an interest of the nature and extent specified in the notice in any transaction or arrangement in which a specified person or class of persons is interested is deemed to be a disclosure that the director has an interest in any such transaction of the nature and extent so specified; and (B) an interest of which a director has no knowledge and of which it is unreasonable to expect him to have knowledge is not treated as an interest of his: see Table A art 86. Table A arts 85-86 also make provision in relation to the avoidance of more general conflicts of interest which may arise from the position a director (or other officer) may hold within a company: see PARA 550. See also PARA 558 note 4. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but arts 85-86, 94-95 are applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital). However, Table C modifies Table A art 94 to the extent that the words 'shares, debentures, or other securities' (see head (c) above) are omitted: see Table C art 10. As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

As to the director's duty to declare any other interests see note 4.

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556. Failure to make the required declaration of interest.

In the event of a failure on the part of a director to comply with the duty to declare his interest in a contract between a company and a director¹ or his firm², or a company in which he is interested as a director or shareholder even though only a trustee of the shares³, the director is liable to account for any profit made by him⁴. Further, the contract is voidable at the instance of the company⁵. If the statutory provisions⁶ are not complied with, the contract, being voidable and not void⁷, may be affirmed by the company when in possession of full information⁸.

If the duty to make a declaration is not complied with and the company objects, it is immaterial that the terms are advantageous to it⁹, or that as between the interested director and his co-directors the whole matter was above board¹⁰.

Such a contract will not be specifically enforced¹¹, and the director cannot retain the profits¹². This rule does not apply to contracts made before the company was formed with persons whose business is acquired by the company on formation¹³, but it may apply to situations where a director causes his company to enter into a transaction with a close relation, or a spouse or other partner, on the ground that the potential for abuse existed in any case where an element of common financial interest could be discerned¹⁴.

Although a director may be precluded by the articles from voting as a director in respect of his contract with the company¹⁵, he may vote as a shareholder at a general meeting¹⁶, but only to affirm the transaction, not to ratify his own breach of duty¹⁷.

1 As to a company's directors see PARA 478 et seq.

2 *Flanagan v Great Western Rly Co* (1868) LR 7 Eq 116. The restriction applies to all contracts in which a director is interested and which are made in the execution of the company's business, such as the appointment of a managing director at a salary (*Foster v Foster* [1916] 1 Ch 532); the allotment of debentures (*Cox v Dublin City Distillery (No 2)* [1915] 1 IR 345, CA; *Re North Eastern Insurance Co* [1919] 1 Ch 198); the issue of debentures as security for an overdraft guaranteed by the directors (*Victors Ltd v Lingard* [1927] 1 Ch 323); the allotment of shares (*Quinn v Robb* (1916) 141 LT Jo 6; *Neal v Quinn* [1916] WN 223). It also applies to a contract entered into with a business of which the director is a mortgagee in possession: *Star Steam Laundry Co v Dukas* (1913) 108 LT 367. See also *Holden v Southwark Corp'n* [1921] 1 Ch 550; *Lapish v Braithwaite* [1926] AC 275, HL. The bankers of the company may still be its directors (*Sheffield, Ashton-under-Lyne and Manchester Rly Co v Woodcock* (1841) 7 M & W 574); and a director may lend money to his company at a profit (*Bluck v Mallaloe* (1859) 27 Beav 398; *Re Cardiff Preserved Coal and Coke Co Ltd, Hill's Case* (1862) 32 LJ Ch 154), if it is without an unusual profit, such as a bonus.

3 *Transvaal Lands Co v New Belgium (Transvaal) Land and Development Co* [1914] 2 Ch 488, CA (rescission ordered after completion; the other company had notice of the irregularity; rescission possible). Cf *Regal (Hastings) Ltd v Gulliver* (1942) [1967] 2 AC 134n at 152n, [1942] 1 All ER 378 at 390-391, HL, per Lord Russell of Killowen. As to shareholders and membership of companies generally see PARA 321 et seq.

4 *Aberdeen Rly Co v Blaikie Bros* (1854) 2 Eq Rep 1281, HL; *Costa Rica Rly Co Ltd v Forwood* [1900] 1 Ch 756 (affd [1901] 1 Ch 746, CA); *Albion Steel and Wire Co v Martin* (1875) 1 ChD 580; *Redekop v Robco Construction Ltd* (1978) 89 DLR (3d) 507, BC SC. Cf *Re Republic of Bolivia Exploration Syndicate Ltd* [1914] 1 Ch 139. See generally *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 at 571, [1967] 2 All ER 14 at 28 per Roskill J (affd [1968] 1 QB 573, [1967] 3 All ER 98, CA). As to the fiduciary position of the director generally see PARA 535.

5 *Aberdeen Rly Co v Blaikie Bros* (1854) 2 Eq Rep 1281, HL; *Ernest v Nicholls* (1857) 6 HL Cas 401; *Ridley v Plymouth Grinding and Baking Co* (1848) 2 Exch 711; *Albion Steel and Wire Co v Martin* (1875) 1 ChD 580. A contract is made with a director if made with a person who is elected an honorary director until completion and an ordinary director afterwards: *Steers v South Essex Gas-Light and Coke Co* (1860) 9 CBNS 180. When the articles provide that the interest of a director must be disclosed in the minutes, the contract is invalid unless the entry is made within a reasonable time: *Toms v Cinema Trust Co Ltd* [1915] WN 29; and see *Re British America Corp'n* (1903) 19 TLR 662; *Exploring Land and Minerals Co Ltd v Kolckmann* (1905) 94 LT 234, CA.

6 As to the statutory duty of a director to disclose his interest see PARA 555.

7 *Aberdeen Rly Co v Blaikie Bros* (1854) 2 Eq Rep 1281, HL; *Movitex Ltd v Bulfield* [1988] BCLC 104.

8 *North-West Transportation Co Ltd and Beatty v Beatty* (1887) 12 App Cas 589, PC; *Grant v United Kingdom Switchback Rlys Co* (1888) 40 ChD 135, CA; *Murray's Executors' Case* (1854) 5 De GM & G 746. See also *Cook v Deeks* [1916] 1 AC 554, PC; *Jacobus Marler Estates Ltd v Jacobus Marler* (1913) 85 LJPC 167n. As to affirmation

see *Re Marini Ltd* [2003] EWHC 334 (Ch), [2004] BCC 172; and *Ultraframe (UK) Ltd v Fielding, Northstar Systems Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1441], [1449], [2005] All ER (D) 397 (Jul) at [1441], [1449].

9 *Aberdeen Rly Co v Blaikie Bros* (1854) 2 Eq Rep 1281, HL.

10 *Albion Steel and Wire Co v Martin* (1875) 1 ChD 580. Cf *Bray v Ford* [1896] AC 44, HL.

11 *Flanagan v Great Western Rly Co* (1868) LR 7 Eq 116; *Imperial Mercantile Credit Association (Liquidators) v Coleman* (1873) LR 6 HL 189.

12 See the text and note 4.

13 See the text and note 4.

14 See *Newgate Stud Co v Penfold* [2004] EWHC 2993 (Ch), [2008] 1 BCLC 46.

15 See eg PARA 555 note 23.

16 *North-West Transportation Co Ltd and Beatty v Beatty* (1887) 12 App Cas 589, PC. See also the cases cited in PARA 653.

17 See the Companies Act 2006 s 239(4); and PARA 593.

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557. Effect of failure to disclose on sales to the company.

In order that the director¹ may retain a profit which he has made on a contract with the company, it is not enough that he should reveal to the shareholders the existence of his interest without specifying exactly what it is². No ratification may take place in the absence of full disclosure³; but if full disclosure is contained in the notice convening the meeting, the company may by ordinary resolution confirm the contract⁴. It is unnecessary to hold a meeting if all the shareholders acquiesce⁵.

Formerly, where a director sold property to his company, without disclosing his interest, the company might, on discovery, either rescind the sale, if that was still practicable, or affirm the sale and sue for damages⁶, in which case it had to prove a breach of duty by the director amounting to negligence or misfeasance and resulting in pecuniary loss to the company⁷. Now, non-compliance with the duty to declare an interest⁸ is a head of duty which requires the director to account for any profit regardless of rescission by the company⁹.

If the director, while employed as a director to purchase property, buys on his own account and sells to the company without disclosure, he must account for the profit made by him¹⁰.

1 As to a company's directors see PARA 478 et seq.

2 *Gwembe Valley Development Co Ltd (in receivership) v Koshy (No 3)* [2003] EWCA Civ 1048, [2004] 1 BCLC 131.

3 *Imperial Mercantile Credit Association (Liquidators) v Coleman* (1873) LR 6 HL 189 (where the articles required the director to vacate his seat if he did not 'declare his interest' in any contract) (cited also in PARA 558). See also *Dunne v English* (1874) LR 18 Eq 524. The issue of disclosure is very closely related to conflicts of interest and, more generally, to the fiduciary position of directors: see PARA 555.

4 See *Kaye v Croydon Tramways Co* [1898] 1 Ch 358, CA; *Bamford v Bamford* [1970] Ch 212, [1969] 1 All ER 969, CA. See also the Companies Act 2006 s 180(4)(a); and PARA 533. As to resolutions and meetings of the company generally see PARA 629 et seq.

5 *Parker & Cooper Ltd v Reading* [1926] Ch 975.

6 *Benson v Heathorn* (1842) 1 Y & C Ch Cas 326; *Jacobus Marler Estates Ltd v Marler* (1913) 85 LJPC 167n. See also *Re Cape Breton Co* (1885) 29 ChD 795, CA (affd on other grounds sub nom *Cavendish Bentinck v Fenn* (1887) 12 App Cas 652, HL); *Ladywell Mining Co v Brookes* (1887) 35 ChD 400, CA; *Re VGM Holdings Ltd* [1942] Ch 235, [1942] 1 All ER 224, CA.

7 *Cavendish Bentinck v Fenn* (1887) 12 App Cas 652 at 662, HL, per Lord Herschell.

8 le as required by the Companies Act 2006 s 177 (see PARA 555).

9 This follows from the fiduciary duty imposed by the Companies Act 2006 s 177 (see PARA 555) (see s 178(2); and PARA 559), as liability to account on a head of fiduciary duty is not dependent on the company rescinding the transaction: see s 195(3) (cited in PARA 566), s 213(3) (cited in PARA 576).

10 *Cavendish Bentinck v Fenn* (1887) 12 App Cas 652, HL.

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558. Provision in articles for vacation of position where director interested in contract.

If a company's articles of association¹ provide for a director² being disqualified by being in any way interested in a bargain or contract with the company, his office is vacated by his being a shareholder³ in another company with which the contract is made⁴.

If the articles provide for the vacation of his seat if he enters into a contract with the company without declaring his interest, it is not sufficient for him to intimate that he has an interest without declaring its specific nature⁵.

1 As to a company's articles of association generally see PARA 228 et seq.

2 As to a company's directors see PARA 478 et seq.

3 As to shareholders and membership of companies generally see PARA 321 et seq.

4 *Todd v Robinson* (1884) 14 QBD 739, CA. The Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A arts 85, 86, 94, 95 assume full disclosure of the director's interest in accordance with the Companies Act 2006 and, with some exceptions, forbid him to vote and to be counted in the quorum in respect of such a contract, but provide no further sanction: see PARAS 550, 555. As to the quorum in company directors' meetings see PARA 529.

5 *Imperial Mercantile Credit Association (Liquidators) v Coleman* (1873) LR 6 HL 189. Cf *Turnbull v West Riding Athletic Club Leeds Ltd* (1894) 70 LT 92. As to whether, in the absence of contractual restraints or the disclosure of confidential information, the court will restrain a director of one company from joining the board of another competing company see PARA 550.

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COMPANIES ACTS/(13) DIRECTORS/(v) General Duties of Directors/C. CIVIL CONSEQUENCES OF BREACH OF DUTIES/559. Civil consequences of breach of general duties.

C. CIVIL CONSEQUENCES OF BREACH OF DUTIES

559. Civil consequences of breach of general duties.

The consequences of breach (or threatened breach) of the general duties that are specified in the Companies Act 2006¹ as being owed to the company² by a director³ are the same as would apply if the corresponding common law rule or equitable principle applied⁴.

Those duties⁵ (with the exception of the duty to exercise reasonable care, skill and diligence⁶) are, accordingly, enforceable in the same way as any other fiduciary duty owed to a company by its directors⁷.

1 The specified in the Companies Act 2006 ss 171-177: see PARA 540 et seq. As to the scope and nature of the directors' general duties see PARA 532; and as to the application and effect of the general duties see PARA 533. As to the relevance of case law on those common law rules and equitable principles that are now replaced by the statutory duties see PARA 532 note 7; and see PARA 585 et seq.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'director' under the Companies Acts see PARA 478.

4 Companies Act 2006 s 178(1). As to a director's liability at common law generally see PARA 585 et seq.

5 The duties in the Companies Act 2006 ss 171-177: see PARA 540 et seq.

6 The exception for the Companies Act 2006 s 174 (as to which see PARA 548): see s 178(2).

7 Companies Act 2006 s 178(2).

When considering the application of the Limitation Act 1980 to claims against fiduciaries, a six-year limitation period would apply under one or other provision of the Limitation Act 1980, applied directly or by analogy, unless it was specifically excluded by the Act or established case law; personal claims against fiduciaries would normally be subject to limits by analogy with claims in tort or contract: *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048, [2004] 1 BCLC 131. Claims for breach of fiduciary duty by directors would normally be covered by the Limitation Act 1980 s 21 (time limit for actions in respect of trust property) (see **LIMITATION PERIODS** vol 68 (2008) PARA 1140 et seq) and the six-year time limit under the Limitation Act 1980 s 21(3) would apply, directly or by analogy, unless excluded by s 21(1)(a) or (b): *Gwembe Valley Development Co Ltd v Koshy (No 3)*. If a claim is a claim for, or is treated for limitation purposes as analogous to a claim for, 'fraud or fraudulent breach of trust' within the Limitation Act 1980 s 21(1)(a), no limitation period applies: see *Gwembe Valley Development Co Ltd v Koshy (No 3)* (director's liability to account for secret profits made by him arose not out of simple non-disclosure but from a deliberate and dishonest concealment of his profits; in such circumstances, the claim was held to be a claim for fraudulent breach of trust and was not statute-barred). Likewise, where the claim against a director is a claim, or is treated for limitation purposes as analogous to a claim, 'to recover trust property or the proceeds of trust property . . . in the possession of the trustee' within the Limitation Act 1980 s 21(1)(b), no limitation period applies: see *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [2002] 1 BCLC 162 (where a director purchased company property in breach of his duties to the company, his obligations to deal with the property as a trustee arose out of his pre-existing duties as a director and not out of the circumstances in which the property was conveyed to him). See also *Statek Corp v Alford* [2008] EWHC 32 (Ch), (2008) Times, 12 February, [2008] All ER (D) 52 (Jan) (defendant had been a de facto director of the claimant company and, therefore, a trustee or fiduciary of its assets; the Limitation Act 1980 s 21(1) applied to the breach of fiduciary duty occasioned by his dishonest rendering of assistance to carry out the transactions complained of). As to the liability of directors generally see PARA 585 et seq. As to de facto directors, and the duties which they owe, see PARA 478 note 8.

For a case where equitable compensation was being claimed on behalf of a company and a defence of laches was raised see *Re Palmier plc (in liquidation), Sandhu v Sidhu* [2009] EWHC 983 (Ch), [2009] All ER (D) 93 (May).

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(vi) Duty to Declare Interest in Existing Transaction or Arrangement

560. Directors' duty to declare interest in existing transaction or arrangement.

Where a director¹ of a company² is in any way, whether directly or indirectly, interested in a transaction or arrangement that has been entered into by the company³, he must declare the nature and extent of the interest to the other directors⁴.

The declaration must be made: (1) at a meeting of the directors⁵; or (2) by notice in writing⁶; or (3) by general notice⁷.

If such a declaration of interest⁸ proves to be (or becomes) inaccurate or incomplete, a further declaration must be made⁹. Any declaration so required¹⁰ must be made as soon as is reasonably practicable¹¹.

This restriction¹² does not require a declaration of an interest of which the director is not aware or where the director is not aware of the transaction or arrangement in question¹³; and a director need not declare an interest: (a) if it cannot reasonably be regarded as likely to give rise to a conflict of interest¹⁴; (b) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware)¹⁵; or (c) if, or to the extent that, it concerns terms of his service contract¹⁶ that have been or are to be considered either by a meeting of the directors¹⁷, or by a committee of the directors appointed for the purpose under the company's constitution¹⁸.

A director who fails to comply with these requirements¹⁹ commits an offence²⁰; and a person guilty of such an offence is liable (on conviction on indictment) to a fine or (on summary conviction) to a fine not exceeding the statutory maximum²¹. However, failure to comply with the statute does not give a separate right of action to the company for damages against a director as such liability must depend upon a breach of the director's fiduciary obligations²².

The provisions which relate to a director's duty to declare any interest in an existing transaction or arrangement²³ apply to a shadow director²⁴ as they apply to a director²⁵, except that a shadow director must declare his interest, not at a meeting of the directors²⁶, but only by general notice, which is not effective when given by a shadow director for these purposes unless it is given by notice in writing sent to the other directors²⁷ and, where a general notice is treated as sufficient declaration²⁸, the requirement for the notice to be given at a meeting of the directors, or for the director to take reasonable steps to secure that it is brought up and read at the next meeting of the directors after it is given²⁹, does not apply³⁰.

1 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 A realistic appraisal is required of the nature of the interest to see whether it is real and substantial or merely theoretical and insubstantial: *Re Dominion International Group plc (No 2)* [1996] 1 BCLC 572 (the Companies Act 2006 s 182 is not an appropriate place for the drawing of technical distinctions between vested and contingent interests and mere hopes or expectations) (decided under the Companies Act 1985 s 317).

4 Companies Act 2006 s 182(1). For the purposes of Pt 10 (ss 154-259) (see PARA 478 et seq) it is immaterial whether the law that (apart from the Companies Act 2006) governs an arrangement or transaction is the law of the United Kingdom, or a part of it, or not: s 259. As to the meaning of 'United Kingdom' see PARA 1 note 5. The Companies Act 2006 s 182 does not apply if or to the extent that the interest has been declared under s 177

(duty to declare interest in proposed transaction or arrangement) (see PARA 555): see s 182(1). As to the general duty to avoid conflicts of interest see PARA 550. As to the register of directors' interests that must be disclosed in relation to shares etc see PARA 452 et seq.

The requirement is for the director to declare the nature and extent of the interest to the other directors in accordance with s 182 (see the text and notes 5-18): see s 182(1). Informal disclosure made piecemeal, or proof of the knowledge of individual board members, does not comply with the formal requirements of disclosure to the board, which would involve an opportunity for consideration of the matter by the board as a body: *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048 at [59], [2004] 1 BCLC 131 at [59] per Mummery LJ. See also *Guinness plc v Saunders* [1988] 2 All ER 940 at 944-945, [1988] 1 WLR 863 at 868-869, CA, per Fox LJ (on appeal but not affected on this point [1990] 2 AC 663, [1990] 1 All ER 652, HL); *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald* [1996] Ch 274 at 282-284, [1995] 3 All ER 811 at 817-819 per Lightman J; *Re MDA Investment Management Ltd, Whalley v Doney* [2003] EWHC 2277 (Ch), [2004] 1 BCLC 217. Cf *Lee Panavision Ltd v Lee Lighting Ltd* [1992] BCLC 22, CA (where the court hesitated to find that the failure formally to declare at a board meeting an interest common to all members and ex hypothesi already known to all of the members of the board, was a breach of the Companies Act 1985 s 317 (see now the Companies Act 2006 s 182)); and see the Companies Act 2006 s 177(6)(b) (a director need not declare an interest if, or to the extent that, the other directors are already aware of it); and PARA 555. See also *Runciman v Walter Runciman plc* [1992] BCLC 1084 at 1093; *MacPherson v European Strategic Bureau Ltd* [1999] 2 BCLC 203 at 219 per Ferris J (revsd but not on this point [2000] 2 BCLC 683, CA); *Re Marini Ltd* [2003] EWHC 334 (Ch) at [59]-[64], [2004] BCC 172 at [59]-[64] per Judge Richard Seymour QC.

Prior to statutory provision being made, it was held that a company might by apt words in its articles waive its right to full disclosure: *Imperial Mercantile Credit Association v Coleman* (1871) 6 Ch App 558 (revsd without affecting this point (1873) LR 6 HL 189); *Costa Rica Rly Co Ltd v Forwood* [1901] 1 Ch 746 at 760, CA, per Vaughan Williams LJ. It would appear that the Companies Act 2006 s 182 prevents a company from so waiving its right to disclosure as to sanction a contravention of that right.

Where a declaration of interest under s 182 is required of a sole director of a company that is required to have more than one director, the declaration must be recorded in writing, the making of the declaration is deemed to form part of the proceedings at the next meeting of the directors after the notice is given, and the provisions of s 248 (minutes of meetings of directors) (see PARA 530) apply as if the declaration had been made at that meeting: s 186(1). However, nothing in s 186 affects the operation of s 231 (terms of contract with sole member who is also a director must be set out in writing or recorded in minutes) (see PARA 584): s 186(2). As to a case which predated this statutory provision see *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald* (sole director cannot evade compliance with s 182 but the required meeting may be held by the director alone or with another).

5 Companies Act 2006 s 182(2)(a).

6 Companies Act 2006 s 182(2)(b). Head (2) in the text refers to notice in writing made in accordance with s 184: see s 182(2)(b). Under the provisions of s 184, which apply to a declaration of interest made by notice in writing (s 184(1)), the director must send the notice to the other directors (s 184(2)). The notice may be sent in hard copy form (or, if the recipient has agreed to receive it in electronic form, in an agreed electronic form) (s 184(3)); and may be sent by hand or by post (or, if the recipient has agreed to receive it by electronic means, by agreed electronic means) (s 184(4)). Where a director declares an interest by notice in writing in accordance with s 184, the making of the declaration is deemed to form part of the proceedings at the next meeting of the directors after the notice is given (s 184(5)(a)); and the provisions of s 248 (minutes of meetings of directors) (see PARA 530) apply as if the declaration had been made at that meeting (s 184(5)(b)). As to directors' communications see PARA 528 note 3. As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form (or by electronic means) see PARA 679. As to the construction of references to service by post see **STATUTES** vol 44(1) (Reissue) PARA 1388.

7 Companies Act 2006 s 182(2)(c). Head (3) in the text refers to general notice made in accordance with s 185: see s 182(2)(c). General notice in accordance with s 185 is a sufficient declaration of interest in relation to the matters to which it relates: s 185(1). General notice is notice given to the directors of a company to the effect that the director: (1) has an interest (as member, officer, employee or otherwise) in a specified body corporate or firm and is to be regarded as interested in any transaction or arrangement that may, after the date of the notice, be made with that body corporate or firm (s 185(2)(a)); or (2) is connected with a specified person (other than a body corporate or firm) and is to be regarded as interested in any transaction or arrangement that may, after the date of the notice, be made with that person (s 185(2)(b)). The notice must state the nature and extent of the director's interest in the body corporate or firm or, as the case may be, the nature of his connection with the person: s 185(3). General notice is not effective, however, unless it is given at a meeting of the directors (s 185(4)(a)), or the director takes reasonable steps to secure that it is brought up and read at the next meeting of the directors after it is given (s 185(4)(b)). Cf the text and notes 23-30. As to the meaning of 'member' see PARA 321. As to the meaning of 'officer' generally see PARA 607. As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5. As to the meaning of 'firm' see PARA 112 note 14. As to the meaning of references to a director being 'connected' with a person see PARA 481.

- 8 le made under the Companies Act 2006 s 182: see s 182(3).
- 9 Companies Act 2006 s 182(3).
- 10 le required by the Companies Act 2006 s 182: see s 182(4).
- 11 Companies Act 2006 s 182(4). Failure to comply with this requirement does not affect the underlying duty to make the declaration: s 182(4).
- 12 le the restriction contained in the provisions of the Companies Act 2006 s 182: see s 182(5).
- 13 Companies Act 2006 s 182(5). For this purpose, a director is treated as being aware of matters of which he ought reasonably to be aware: s 182(5).
- 14 Companies Act 2006 s 182(6)(a).
- 15 Companies Act 2006 s 182(6)(b).
- 16 As to the meaning of a director's 'service contract', in relation to a company, for the purposes of the Companies Act 2006 Pt 10 (see PARA 478 et seq) see PARA 525 note 4.
- 17 Companies Act 2006 s 182(6)(c)(i).
- 18 Companies Act 2006 s 182(6)(c)(ii). As to the meaning of references to a company's constitution for the purposes of Pt 10 (see PARA 478 et seq) see PARA 540 note 4. As to the extent to which directors may delegate powers, including to committees, see PARA 537.
- 19 le with the requirements of the Companies Act 2006 s 182: see s 183(1).
- 20 Companies Act 2006 s 183(1). As to the possible vacation of position where a director is interested in a contract see PARA 558. As to the effect of a failure to disclose on sales to the company see PARA 557.
- 21 Companies Act 2006 s 183(2). As to the meaning of 'statutory maximum' see PARA 1622 note 6.
- 22 *Coleman Taymar Ltd v Oakes* [2001] 2 BCLC 749. See also PARA 557. As to the general fiduciary position of directors see PARA 547.
- 23 le the Companies Act 2006 Pt 10 Ch 3 (ss 182-187): see s 187(1).
- 24 As to the meaning of 'shadow director' see PARA 479.
- 25 Companies Act 2006 s 187(1).
- 26 le because the Companies Act 2006 s 182(2)(a) (see the head (1) in the text) does not apply: s 187(2).
- 27 le general notice by a shadow director is not effective unless given by notice in writing in accordance with the Companies Act 2006 s 184 (see note 6): s 187(4).
- 28 le in the Companies Act 2006 s 185 (see note 7): see s 187(3).
- 29 le the provision made in the Companies Act 2006 s 185(4) (see note 7): see s 187(3).
- 30 Companies Act 2006 s 187(3).

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(vii) Transactions with Directors Requiring Approval of Members

A. IN GENERAL

561. In general.

The Companies Act 2006 specifies¹ that certain transactions involving the directors of a company² (namely, directors' long-term service contracts³, substantial property transactions⁴, loan and similar financial transactions⁵, and payments for loss of office⁶) require approval by resolution of the members, either by means of a resolution taken at a meeting of the company or, in the case of a private company, by means of a written resolution⁷. Shareholder approval is not required, however, in respect of these transactions where the company is not a UK-registered company⁸ or where the company is a wholly-owned subsidiary of another body corporate⁹.

Approval may be required under more than one provision¹⁰. Where this is so, the requirements of each applicable provision must be met¹¹, although this does not require a separate resolution for the purposes of each provision¹².

1 In the Companies Act 2006 Pt 10 Ch 4 (ss 188-226): see also PARA 563 et seq.

2 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of 'company' under the Companies Acts see PARA 24. As to the meaning of the 'Companies Acts' see PARA 16. For the purposes of the Companies Act 2006 Pt 10 (ss 154-259) (see PARA 478 et seq), it is immaterial whether the law that (apart from the Companies Act 2006) governs an arrangement or transaction is the law of the United Kingdom, or a part of it, or not: s 259. As to the meaning of 'United Kingdom' see PARA 1 note 5.

3 See the Companies Act 2006 ss 188, 189; and PARA 563. For the purposes of ss 188, 189, a shadow director is treated as a director: s 223(1)(a). See also note 6. As to the meaning of 'shadow director' see PARA 479. As to directors' service contracts generally see PARA 524 et seq.

4 See the Companies Act 2006 ss 190-196; and PARA 564 et seq. For the purposes of ss 190-196, a shadow director is treated as a director: s 223(1)(b). See also note 6.

5 See the Companies Act 2006 ss 197-214; and PARA 568 et seq. For the purposes of ss 197-214, a shadow director is treated as a director: s 223(1)(c). See also note 6.

6 See the Companies Act 2006 ss 215-222; and PARA 578 et seq. For the purposes of ss 215-222, a shadow director is treated as a director: s 223(1)(d). Any reference in ss 188-222 to loss of office as a director does not apply in relation to loss of a person's status as a shadow director: s 223(2).

7 As to the meaning of 'written resolution' see PARA 623. Where approval is required by way of a written resolution, a memorandum setting out particulars of the proposed arrangement must be circulated to the members eligible to vote on the resolution at or before the time at which the proposed resolution is sent to the members: see eg the Companies Act 2006 s 188(5) (cited in PARA 563), s 197(3) (cited in PARA 568), s 198(4) (cited in PARA 569), s 200(4) (cited in PARA 570), s 203(3) (cited in PARA 572), s 217(3) (cited in PARA 579), s 218(3) (cited in PARA 580), s 219(3) (cited in PARA 581). Where approval under Pt 10 Ch 4 (see also PARA 563 et seq) is sought by written resolution, and a memorandum is required under Pt 10 Ch 4 to be sent or submitted to every eligible member before the resolution is passed, any accidental failure to send or submit the memorandum to one or more members must be disregarded for the purpose of determining whether the requirement has been met: s 224(1). This has effect subject to any provision of the company's articles: s 224(2). As to the meaning of references to a company's 'articles' under the Companies Act 2006 see PARA 228 note 2. As to membership of companies generally see PARA 321 et seq. As to approval given by resolutions in meetings of the company generally see PARA 629 et seq. As to eligible members in relation to a resolution proposed as a written resolution of a private company see PARA 623. The ability to approve these transactions by ordinary resolution is restricted for charitable companies, which additionally require the prior written approval of the Charity Commissioners: see s 226, which amends the Charities Act 1993 in relation to the consent required for certain acts; and **CHARITIES** vol 8 (2010) PARA 239.

8 As to the meaning of 'UK-registered company' see PARA 24.

9 See eg the Companies Act 2006 s 188(6) (cited in PARA 563), s 190(4) (cited in PARA 565), s 197(5) (cited in PARA 568), s 200(6) (cited in PARA 570), s 201(6) (cited in PARA 571), s 217(4) (cited in PARA 579), s 218(4) (cited in PARA 580), s 219(6) (cited in PARA 581). As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5. As to the meanings of 'subsidiary' and 'wholly-owned subsidiary' see PARA 25.

10 Companies Act 2006 s 225(1). The text refers to more than one provision of Pt 10 Ch 4 (see also PARA 563 et seq): see s 225(1).

11 Companies Act 2006 s 225(2).

12 Companies Act 2006 s 225(3).

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562. Interaction with directors' general duties.

The application of the general duties to which the directors of a company¹ are subject² is not affected by the fact that the case also falls within the provisions which govern transactions requiring the approval of members³, except that where those provisions⁴ apply⁵, and: (1) approval is duly given⁶; or (2) the matter is one as to which it is provided that approval is not needed⁷, it is not necessary also to comply with the duty to avoid conflicts of interest⁸ or the duty not to accept benefits from third parties⁹.

Compliance with the general duties does not remove the need for approval under any of the provisions¹⁰ which apply to transactions requiring the approval of members¹¹.

1 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of 'company' under the Companies Acts see PARA 24. As to the meaning of the 'Companies Acts' see PARA 16.

2 Ie the duties specified in the Companies Act 2006 ss 171-177: see PARA 540 et seq. As to the scope and nature of the directors' general duties see PARA 532; and as to the application and effect of the general duties see PARA 533.

3 Ie within the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) (see PARAS 561, 563 et seq): see s 180(2). As to the meaning of 'member' see PARA 321.

4 Ie the Companies Act 2006 Pt 10 Ch 4 (see PARAS 561, 563 et seq): see s 180(2).

5 Companies Act 2006 s 180(2).

6 Companies Act 2006 s 180(2)(a). Head (1) in the text refers to approval given under Pt 10 Ch 4 (see PARAS 561, 563 et seq): see s 180(2)(a).

7 Companies Act 2006 s 180(2)(b). Head (2) in the text disapplies certain duties under Pt 10 Ch 4 (see PARAS 561, 563 et seq) in relation to cases excepted from the requirement to obtain approval by members under Pt 10 Ch 4 but it applies to charitable companies only if or to the extent that the company's articles allow those duties to be so disapplied, which they may do only in relation to descriptions of transaction or arrangement specified in the company's articles: s 181(3). See PARA 533. As to the meaning of references to a company's 'articles' under the Companies Act 2006 see PARA 228 note 2.

8 Ie the duty in the Companies Act 2006 s 175 (see PARA 550): see s 180(2).

9 Companies Act 2006 s 180(2). The text refers to the duty in s 176 (see PARA 553): see s 180(2).

10 Ie in the Companies Act 2006 Pt 10 Ch 4 (see PARAS 561, 563 et seq): see s 180(3).

11 Companies Act 2006 s 180(3).

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Members/B. SERVICE CONTRACTS/563. Requirement of members' approval for directors' long-term service contracts.

B. SERVICE CONTRACTS

563. Requirement of members' approval for directors' long-term service contracts.

In relation to any provision under which the guaranteed term of a director's employment¹ with the company of which he is a director, or (where he is the director of a holding company²) within the group consisting of that company and its subsidiaries³, is, or may be, longer than two years⁴, the company may not agree to such provision unless it has been approved⁵:

- 939 (1) by resolution⁶ of the members of the company⁷; and
- 940 (2) in the case of a director of a holding company, by resolution of the members of that company⁸.

If, more than six months before the end of the guaranteed term of a director's employment, the company enters into a further service contract (otherwise than in pursuance of a right conferred, by or under the original contract, on the other party to it), this restriction⁹ applies as if there were added to the guaranteed term of the new contract the unexpired period of the guaranteed term of the original contract¹⁰.

A resolution approving provision to which this restriction¹¹ applies must not be passed unless a memorandum setting out the proposed contract incorporating the provision is made available to members¹²:

- 941 (a) in the case of a written resolution¹³, by being sent or submitted to every eligible member¹⁴ at or before the time at which the proposed resolution is sent or submitted to him¹⁵;
- 942 (b) in the case of a resolution at a meeting, by being made available for inspection by members of the company both: (i) at the company's registered office¹⁶ for not less than 15 days ending with the date of the meeting¹⁷; and (ii) at the meeting itself¹⁸.

However, no such approval is required¹⁹ on the part of the members of a body corporate²⁰ that either is not a UK-registered company²¹, or is a wholly-owned subsidiary²² of another body corporate²³.

If a company agrees to provision in contravention of this restriction²⁴, the provision is void, to the extent of the contravention²⁵, and the contract is deemed to contain a term entitling the company to terminate it at any time by the giving of reasonable notice²⁶.

1 The guaranteed term of a director's employment is: (1) the period (if any) during which the director's employment: (a) is to continue, or may be continued otherwise than at the instance of the company (whether under the original agreement or under a new agreement entered into in pursuance of it) (Companies Act 2006 s 188(3)(a)(i)); and (b) cannot be terminated by the company by notice, or can be so terminated only in specified circumstances (s 188(3)(a)(ii)); or (2) in the case of employment terminable by the company by notice, the period of notice required to be given (s 188(3)(b)), or (in the case of employment having both a period within head (1) above and a period within head (2) above) the aggregate of those periods (s 188(3)). For these purposes, 'employment' means any employment under a director's service contract: s 188(7). As to the meaning of a director's 'service contract', in relation to a company, for the purposes of Pt 10 (ss 154-259) see PARA 525 note 4. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of 'director' under the Companies Acts see PARA 478. As to the meaning of the 'Companies Acts' see PARA 16.

As to the general application of the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) see PARA 561; and as to how those provisions interact with the directors' general duties see PARA 562.

- 2 As to the meaning of 'holding company' see PARA 25.
- 3 As to the meaning of 'subsidiary' see PARA 25.
- 4 Companies Act 2006 s 188(1).
- 5 Companies Act 2006 s 188(2). In accordance with the principle set out in *Re Duomatic Ltd* [1969] 2 Ch 365, [1969] 1 All ER 161 (see PARA 666), the procedural steps set out in the Companies Act 2006 s 188 can be bypassed by the unanimous informal consent of the shareholders: *Wright v Atlas Wright (Europe) Ltd* [1999] 2 BCLC 301, CA.
- 6 As to resolutions and meetings of members see PARA 629 et seq. As to voting at meetings see PARA 653 et seq.
- 7 Companies Act 2006 s 188(2)(a). As to the meaning of 'member of a company' see PARA 321.
- 8 Companies Act 2006 s 188(2)(b).
- 9 Ie the Companies Act 2006 s 188: see s 188(4).
- 10 Companies Act 2006 s 188(4).
- 11 Ie the Companies Act 2006 s 188: see s 188(5).
- 12 Companies Act 2006 s 188(5).
- 13 As to the meaning of 'written resolution' see PARA 623.
- 14 As to eligible members in relation to a resolution proposed as a written resolution of a private company see PARA 623. As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.
- 15 Companies Act 2006 s 188(5)(a). Where approval under Pt 10 Ch 4 is sought by written resolution, and a memorandum is required under Pt 10 Ch 4 to be sent or submitted to every eligible member before the resolution is passed, provision is made for accidental failure to send or submit the memorandum to one or more members: see s 224; and PARA 561 note 7.
- 16 As to the company's registered office see PARA 129.
- 17 Companies Act 2006 s 188(5)(b)(i). See note 14.
- 18 Companies Act 2006 s 188(5)(b)(ii). See note 14.
- 19 Ie under the Companies Act 2006 s 188: see s 188(6).
- 20 As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5.
- 21 Companies Act 2006 s 188(6)(a). As to the meaning of 'UK-registered company' see PARA 24.
- 22 As to the meaning of 'wholly-owned subsidiary' see PARA 25.
- 23 Companies Act 2006 s 188(6)(b).
- 24 Ie in contravention of the Companies Act 2006 s 188: see s 189.
- 25 Companies Act 2006 s 189(a).
- 26 Companies Act 2006 s 189(b).

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C. SUBSTANTIAL PROPERTY TRANSACTIONS

564. Requirement of members' approval for substantial property transactions.

A company¹ may not enter into an arrangement under which²:

- 943 (1) a director³ of the company or of its holding company⁴ (or a person connected with such a director⁵) acquires or is to acquire from the company (whether directly or indirectly) a substantial non-cash asset⁶; or
- 944 (2) the company acquires or is to acquire a substantial non-cash asset (whether directly or indirectly) from such a director or a person so connected⁷,

unless the arrangement has been approved by a resolution⁸ of the members of the company or is conditional on such approval being obtained⁹. If the director or connected person is a director of the company's holding company or a person connected with such a director, the arrangement must also have been approved by a resolution of the members of the holding company or be conditional on such approval being obtained¹⁰.

However, a company is not subject to any liability by reason of a failure to obtain any approval so required¹¹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 190(1).

As to the general application of the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) see PARA 561; and as to how those provisions interact with the directors' general duties see PARA 562.

3 As to the meaning of 'director' under the Companies Acts see PARA 478. As to an application of the Companies Act 2006 s 190 to a shadow director (for the purposes of ss 190-196, a shadow director is treated as a director: see s 223(1)(b); and PARA 561) see *Ultraframe (UK) Ltd v Fielding; Northstar Systems Ltd v Fielding* [2005] EWHC 1638 (Ch), [2005] All ER (D) 397 (Jul). As to the meaning of 'shadow director' under the Companies Acts see PARA 479.

4 As to the meaning of 'holding company' see PARA 25.

5 As to the meaning of references to a person being 'connected' with a director see PARA 481. As to the validity generally of transactions involving a director or a person connected with a director see PARA 264.

6 Companies Act 2006 s 190(1)(a). In the Companies Acts, 'non-cash asset' means any property or interest in property, other than cash; and, for this purpose, 'cash' includes foreign currency: s 1163(1). A reference to the transfer or acquisition of a non-cash asset includes the creation or extinction of an estate or interest in, or a right over, any property, and the discharge of a liability of any person, other than a liability for a liquidated sum: s 1163(2). An exclusive licence of design rights is a non-cash asset for this purpose as the ability of the licensee to exercise rights which would otherwise be exercisable by the design right owner is a right over property: *Ultraframe (UK) Ltd v Fielding; Northstar Systems Ltd v Fielding* [2005] EWHC 1638 (Ch), [2005] All ER (D) 397 (Jul).

The meaning of a 'substantial non-cash asset' for the purposes of the Companies Act 2006 s 190 is given in s 191: see ss 190(1), 191(1). Accordingly, an asset is a 'substantial' asset in relation to a company if its value exceeds 10% of the company's asset value and is more than £5,000, or if its value exceeds £100,000: s 191(2). For this purpose, a company's 'asset value' at any time is either the value of the company's net assets determined by reference to its most recent statutory accounts or (if no statutory accounts have been prepared) the amount of the company's called-up share capital: s 191(3). A company's 'statutory accounts' means its annual accounts prepared in accordance with Pt 15 (ss 380-474) (see PARA 693 et seq), and its 'most recent' statutory accounts means those in relation to which the time for sending them out to members (see s 424; and PARA 851) is most recent: s 191(4). Whether an asset is a substantial asset is to be determined as at the time the arrangement is entered into: s 191(5). For the purposes of s 190, an arrangement involving more than one non-cash asset, or an arrangement that is one of a series involving non-cash assets, must be treated as if they involved a non-cash asset of a value equal to the aggregate value of all the non-cash assets involved in the

arrangement or, as the case may be, the series: s 190(5). As to the meanings of 'share' and 'share capital' see PARA 1042; and as to the meaning of 'called-up share capital' see PARA 1048. As to the meaning of 'member' see PARA 321. The onus is on the person alleging a contravention of this provision to prove that the value of the non-cash asset exceeds the requisite value: *Niltan Carson Ltd (joint receivers and managers) v Hawthorne* [1988] BCLC 298. As to the criteria that ought to be applied when calculating the value of a non-cash asset see *Micro Leisure Ltd v County Properties and Developments Ltd (No 2)* 1999 SLT 1428 (value must be determined in the context of the particular transaction).

The Secretary of State may by order substitute for any sum of money specified in the Companies Act 2006 Pt 10 (ss 154-259) a larger sum specified in the order: s 258(1). An order does not have effect in relation to anything done or not done before it comes into force; and, accordingly, proceedings in respect of any liability incurred before that time may be continued or instituted as if the order had not been made: s 258(3). An order under s 258 is subject to negative resolution procedure (ie the statutory instrument containing the order is subject to annulment in pursuance of a resolution of either House of Parliament): ss 258(2), 1289. As to the Secretary of State see PARA 6. As to the making of orders under the Companies Act 2006 generally see ss 1288-1292. At the date at which this volume states the law, no such order has been made in exercise of the power conferred by s 258.

7 Companies Act 2006 s 190(1)(b).

8 As to resolutions and meetings of members see PARA 629 et seq. As to voting at meetings see PARA 653 et seq.

9 Companies Act 2006 s 190(1). This requirement does not apply to a transaction so far as it relates to anything to which a director of a company is entitled under his service contract, or to payment for loss of office as defined in s 215 (payments requiring members' approval) (see PARA 578): s 190(6). As to the meaning of a director's 'service contract', in relation to a company, for the purposes of Pt 10 (ss 154-259) see PARA 525 note 4. As to other exceptions to this requirement see PARA 565; as to liabilities arising from any contravention of this requirement see PARA 566; and as to the effect of subsequent affirmation see PARA 567.

It is appropriate to construe the statutory provisions purposively to protect shareholders: *Micro Leisure Ltd v County Properties and Developments Ltd* 1999 SLT 1307, Ct of Sess. See also *British Racing Drivers' Club Ltd v Hextall Erskine & Co (a firm)* [1996] 3 All ER 667, [1997] 1 BCLC 182 (purpose of shareholders approval is to allow members to check on potential abuse of position by directors and to ensure an objective approach). Where a meeting was attended by all those entitled to attend a general meeting and a decision was made, it could not be said that there was breach of the statutory provisions simply because the minutes of the meeting categorised it as a board meeting instead of a general meeting: *Re Conegrade Ltd* [2002] EWHC 2411 (Ch), [2003] BPIR 358, [2002] All ER (D) 19 (Nov). In accordance with the principle set out in *Re Duomatic Ltd* [1969] 2 Ch 365, [1969] 1 All ER 161 (see PARA 666), the procedural steps set out in the Companies Act 2006 s 190 can be bypassed by the unanimous informal consent of the shareholders: *NBH Ltd v Hoare* [2006] EWHC 73 (Ch), [2006] 2 BCLC 649 (decided under the Companies Act 1985 s 320(1)).

10 Companies Act 2006 s 190(2). See also *British Racing Drivers' Club Ltd v Hextall Erskine & Co (a firm)* [1996] 3 All ER 667, [1997] 1 BCLC 182.

11 Companies Act 2006 s 190(3). The text refers to approval required by s 190: see s 190(3).

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565. Exceptions to requirement for approval of substantial property transactions.

Approval is not required¹ for substantial property transactions involving a director² of the company³ or of its holding company⁴ (or a person connected with such a director⁵) in the following cases:

- 945 (1) on the part of the members of a body corporate⁶ that either is not a UK-registered company⁷, or is a wholly-owned subsidiary⁸ of another body corporate⁹;

- 946 (2) for a transaction between a company and a person in his character as a member of that company¹⁰, or for a transaction between a holding company and its wholly-owned subsidiary¹¹, or between two wholly-owned subsidiaries of the same holding company¹²;
- 947 (3) on the part of the members of a company that is being wound up (unless the winding up is a members' voluntary winding up)¹³, or that is in administration¹⁴, or for an arrangement entered into by such a company¹⁵.
- 948 (4) for a transaction on a recognised investment exchange¹⁶ effected by a director (or a person connected with him) through the agency of a person who in relation to the transaction acts as an independent broker¹⁷.

1 le under the Companies Act 2006 s 190: see PARA 564. As to liabilities arising from any contravention of s 190 see PARA 566; and as to the effect of subsequent affirmation see PARA 567.

As to the general application of the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) see PARA 561; and as to how those provisions interact with the directors' general duties see PARA 562.

2 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'company' under the Companies Acts see PARA 24.

4 As to the meaning of 'holding company' see PARA 25.

5 As to the meaning of references to a person being 'connected' with a director see PARA 481. As to the validity generally of transactions involving a director or a person connected with a director see PARA 264.

6 As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5.

7 Companies Act 2006 s 190(4)(a). As to the meaning of 'UK-registered company' see PARA 24.

8 As to the meaning of 'wholly-owned subsidiary' see PARA 25.

9 Companies Act 2006 s 190(4)(b).

10 Companies Act 2006 s 192(a). As to the meaning of 'member of a company' see PARA 321. When discussing this provision at the Bill stage, Lord Sainsbury of Turville stated: it is intended to cover transactions such as the payment of the dividend in specie as well as the distribution of assets to a member of a company during the winding-up of the company and in satisfaction of his rights qua member in the liquidation. Likewise a duly sanctioned return of capital in the form of non-cash assets would fall within this exception. It is also intended to put beyond doubt that the issue of shares or other rights to a member does not require approval under the rules for substantial property transactions: 678 HL Official Report (5th series), 9 Feb 2006, GC col 347.

11 Companies Act 2006 s 192(b)(i).

12 Companies Act 2006 s 192(b)(ii).

13 Companies Act 2006 s 193(1)(a), (2)(a). As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq. As to members' voluntary winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 reissue) PARA 939 et seq.

14 Companies Act 2006 s 193(1)(b), (2)(a). For these purposes, a company is 'in administration' while the appointment of an administrator of the company has effect: see the Insolvency Act 1986 s 8, Sch B1 para 1(2) (a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 214 (definition applied by the Companies Act 2006 s 193(1)(b)). Prior to the enactment of the Companies Act 2006, the exemption to which head (3) in the text relates was available only to a liquidator and not to an administrator or receiver: see eg *Demite Ltd v Protec Health Ltd* [1998] BCC 638.

15 Companies Act 2006 s 193(2)(b).

16 For these purposes, 'recognised investment exchange' has the same meaning as in the Financial Services and Markets Act 2000 Pt XVIII (ss 285-313) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 684 et seq): Companies Act 2006 s 194(2)(b).

17 Companies Act 2006 s 194(1). For these purposes, 'independent broker' means a person who, independently of the director or any person connected with him, selects the person with whom the transaction is to be effected: s 194(2)(a).

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566. Civil consequences of contravening restrictions on substantial property transactions.

Where a company¹ enters into an arrangement in contravention of the statutory provisions² which require approval for substantial property transactions involving a director³ of the company or of its holding company⁴ (or a person connected with such a director)⁵, that arrangement, and any transaction entered into in pursuance of the arrangement, whether by the company or any other person, is voidable at the instance of the company⁶, unless:

- 949 (1) restitution of any money or other asset that was the subject matter of the arrangement or transaction is no longer possible⁷; or
- 950 (2) the company has been indemnified⁸ by any other person for the loss or damage suffered by it⁹; or
- 951 (3) rights acquired in good faith, for value and without actual notice of the contravention by any person who is not a party to the arrangement or transaction would be affected by its avoidance¹⁰.

Whether or not the arrangement or any such transaction has been avoided, each of the following persons¹¹, namely: (a) any director of the company or of its holding company with whom the company entered into the arrangement in contravention of the statutory provisions¹²; (b) any person with whom the company entered into the arrangement in like contravention¹³ who is connected with a director of the company or of its holding company¹⁴; (c) the director of the company or of its holding company with whom any such person is connected¹⁵; and (d) any other director of the company who authorised the arrangement or any transaction entered into in pursuance of such an arrangement¹⁶, is liable¹⁷ to account to the company for any gain that he has made directly or indirectly by the arrangement or transaction¹⁸ and (jointly and severally with any other person so liable¹⁹) to indemnify the company for any loss or damage resulting from the arrangement or transaction²⁰. However, in the case of an arrangement entered into by a company in contravention of the statutory provisions²¹ with a person connected with a director of the company or of its holding company, that director is not liable by virtue of head (c) above if he shows that he took all reasonable steps to secure the company's compliance²². Furthermore, in any case, a person so connected is not liable by virtue of head (b) above²³, and a director is not liable by virtue of head (d) above²⁴, if he shows that, at the time the arrangement was entered into, he did not know the relevant circumstances constituting the contravention²⁵.

Nothing in the provisions governing civil liability²⁶ is to be read as excluding the operation of any other enactment²⁷ or rule of law by virtue of which the arrangement or transaction may be called in question or any liability to the company may arise²⁸.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 le in contravention of the Companies Act 2006 s 190 (see PARA 564): see s 195(1).

As to the general application of the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) see PARA 561; and as to how those provisions interact with the directors' general duties see PARA 562.

3 As to the meaning of 'director' under the Companies Acts see PARA 478.

4 As to the meaning of 'holding company' see PARA 25.

5 Companies Act 2006 s 195(1). As to the meaning of references to a person being 'connected' with a director see PARA 481. As to the validity generally of transactions involving a director or a person connected with a director see PARA 264.

6 Companies Act 2006 s 195(2). As to the effect of subsequent affirmation see PARA 567.

7 Companies Act 2006 s 195(2)(a).

8 le in pursuance of the Companies Act 2006 s 195: see s 195(2)(b).

9 Companies Act 2006 s 195(2)(b).

10 Companies Act 2006 s 195(2)(c).

11 Companies Act 2006 s 195(3). The provisions of s 195(3), (4) are subject to the provisions of s 195(6), (7) (see the text and notes 21-25): s 195(5).

12 Companies Act 2006 s 195(4)(a). The text refers to contravention of s 190 (see PARA 564): see s 195(4)(a). See note 11.

13 le in contravention of the Companies Act 2006 s 190 (see PARA 564): see s 195(4)(b).

14 Companies Act 2006 s 195(4)(b). See note 11.

15 Companies Act 2006 s 195(4)(c). See note 11.

16 Companies Act 2006 s 195(4)(d). See note 11.

17 Companies Act 2006 s 195(3). See note 11. See *Lexi Holdings (in administration) v Luqman* [2008] EWHC 1639 (Ch) at [176]-[178], [2008] 2 BCLC 725 at [176]-[178] (revsd on other grounds [2009] EWCA Civ 117, [2009] 2 BCLC 1); *Neville v Krikorian* [2006] EWCA Civ 943, [2007] 1 BCLC 1.

18 Companies Act 2006 s 195(3)(a). See note 11. It is for the person liable to account to provide information so that his gain might be assessed: *Micro Leisure Ltd v County Properties and Developments Ltd* 1999 SLT 1307, Ct of Sess. Where a director or person connected with him has sold assets to a company at an overvalue and no loss was made by the company on a resale of those assets, it does not follow that the director is liable to account to the company for the extra profit the company might have made when it sold the assets on, since although the court would take account of movements of value after the purchase if the asset fell in value, if the company did not make a loss after the purchase, any change in the value of the asset in the period when it was owned by the vendor before the sale to the company is irrelevant: *NBH Ltd v Hoare* [2006] EWHC 73 (Ch), [2006] 2 BCLC 649, applying *Re Duckwari plc* [1999] Ch 253 at 260-261, sub nom *Re Duckwari plc (No 2)*, *Duckwari plc v Offerventure Ltd (No 2)* [1998] 2 BCLC 315 at 320, CA, per Nourse LJ (cited also in note 20).

19 le liable under the Companies Act 2006 s 195: see s 195(3)(b).

20 Companies Act 2006 s 195(3)(b). See note 11. The liability to indemnify the company is intended to place the company in a position equivalent to that in which it would have been had rescission been ordered: *Re Duckwari plc* [1999] Ch 253, sub nom *Re Duckwari plc (No 2)*, *Duckwari plc v Offerventure Ltd (No 2)* [1998] 2 BCLC 315, CA (the loss suffered by the company which had acquired a non-cash asset from a person connected with one of its directors was the difference between the value of the property at acquisition and realisation). This liability reflects the general liability of trustees to make good any misapplication of trust moneys: *Re Duckwari plc* at 262-265 and 321-322, 324 per Nourse LJ. The extent of relief is limited to the loss or damage resulting from the acquisition of property and does not extend to the borrowing costs incurred in the acquisition: *Re Duckwari plc (No 2)* [1999] Ch 268, sub nom *Re Duckwari plc (No 3)*, *Duckwari plc v Offerventure Ltd (No 3)* [1999] 1 BCLC 168, CA. See also note 18.

21 le in contravention of the Companies Act 2006 s 190 (see PARA 564): see s 195(6).

22 Companies Act 2006 s 195(6). The text refers to compliance with s 190 (see PARA 564): see s 195(6). See note 11.

- 23 Companies Act 2006 s 195(7)(a). See note 11.
- 24 Companies Act 2006 s 195(7)(b). See note 11.
- 25 Companies Act 2006 s 195(7). See note 11.
- 26 Ie nothing in the Companies Act 2006 s 195: see s 195(8).
- 27 As to the meaning of 'enactment' see PARA 17 note 2.
- 28 Companies Act 2006 s 195(8).

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567. Effect of transaction or arrangement being subsequently affirmed.

Where a transaction or arrangement is entered into by a company¹ in contravention of the statutory provisions² which require approval for substantial property transactions involving a director³ of the company or of its holding company⁴ (or a person connected with such a director)⁵, but where, within a reasonable period, it is affirmed⁶:

- 952 (1) in a case where approval was required by way of a resolution of the members of the company⁷ or where the arrangement was conditional on such approval being obtained⁸, by resolution of the members of the company⁹; and
- 953 (2) in a case where the director or connected person is a director of the company's holding company or a person connected with such a director, and the arrangement must also have been approved by a resolution of the members of the holding company or be conditional on such approval being obtained¹⁰, by resolution of the members of the holding company¹¹,

the transaction or arrangement may no longer be avoided¹².

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie in contravention of the Companies Act 2006 s 190 (see PARA 564); see s 196.

As to the general application of the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) see PARA 561; and as to how those provisions interact with the directors' general duties see PARA 562.

3 As to the meaning of 'director' under the Companies Acts see PARA 478.

4 As to the meaning of 'holding company' see PARA 25.

5 As to the meaning of references to a person being 'connected' with a director see PARA 481. As to the validity generally of transactions involving a director or a person connected with a director see PARA 264.

6 Companies Act 2006 s 196.

7 As to the meaning of 'member of the company' see PARA 321. As to resolutions and meetings of members see PARA 629 et seq. As to voting at meetings see PARA 653 et seq.

8 Ie in the case of a contravention of the Companies Act 2006 s 190(1) (see PARA 564); see s 196(a).

9 Companies Act 2006 s 196(a).

10 ie in the case of a contravention of the Companies Act 2006 s 190(2) (see PARA 564): see s 196(b).

11 Companies Act 2006 s 196(b).

12 Companies Act 2006 s 196. The text refers to avoidance of the transaction or arrangement under s 195 (see PARA 566): see s 196.

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D. LOANS, QUASI-LOANS AND CREDIT TRANSACTIONS

(A) REQUIREMENT OF MEMBERS' APPROVAL

568. Requirement of members' approval for loans and guarantees etc to directors.

A company¹ may not either make a loan to a director² of the company or of its holding company³, or give a guarantee or provide security in connection with a loan made by any person to such a director⁴, unless the transaction has been approved by a resolution of the members of the company⁵. If the director is a director of the company's holding company, the transaction must also have been approved by a resolution of the members of the holding company⁶.

A resolution approving such a transaction⁷ must not be passed unless a memorandum setting out the matters mentioned in heads (i) to (iii) below is made available to members⁸:

- 954 (1) in the case of a written resolution⁹, by being sent or submitted to every eligible member¹⁰ at or before the time at which the proposed resolution is sent or submitted to him¹¹; or
- 955 (2) in the case of a resolution at a meeting, by being made available for inspection by members of the company both: (a) at the company's registered office¹² for not less than 15 days ending with the date of the meeting¹³; and (b) at the meeting itself¹⁴.

The matters to be disclosed for these purposes are: (i) the nature of the transaction¹⁵; (ii) the amount of the loan and the purpose for which it is required¹⁶; and (iii) the extent of the company's liability under any transaction connected with the loan¹⁷.

However, no such approval is required¹⁸ on the part of the members of a body corporate¹⁹ that either is not a UK-registered company²⁰, or is a wholly-owned subsidiary²¹ of another body corporate²².

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'director' under the Companies Acts see PARA 478. A transaction which is described as a loan to a director may in fact be a misappropriation of the company's assets: *Bracken Partners Ltd v Gutteridge* [2003] EWHC 1064 (Ch) at [33]-[35], [2003] 2 BCLC 84 at [33]-[35] per Peter Leaver QC; affd on different grounds [2003] EWCA Civ 1875, [2004] 1 BCLC 377. Equally, 'advance dividends' paid to directors of a

company prior to its liquidation may be regarded as loans in breach of the statutory provisions and not remuneration or a dividend properly paid: see *First Global Media Group Ltd v Larkin* [2003] EWCA Civ 1765, [2003] All ER (D) 293 (Nov). However, where a director has done work for or rendered services to the company and has received consideration from it in respect of that work or services, the sums may not be repayable to the company as loans: *Currencies Direct Ltd v Ellis* [2002] EWCA Civ 779, [2002] 2 BCLC 482. As to the approval required for quasi-loans and credit transactions etc see PARA 569 et seq.

3 Companies Act 2006 s 197(1)(a). As to the meaning of 'holding company' see PARA 25.

As to the general application of the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) see PARA 561; and as to how those provisions interact with the directors' general duties see PARA 562.

4 Companies Act 2006 s 197(1)(b).

5 Companies Act 2006 s 197(1). As to the meaning of 'member of the company' see PARA 321. As to resolutions and meetings of members see PARA 629 et seq. As to voting at meetings see PARA 653 et seq.

As to the need for approval of loans to persons connected with a director see PARA 570; and as to the need for approval of related arrangements see PARA 572. As to general exceptions to the requirement for approval under s 197 see PARA 573 et seq; as to liabilities arising from any contravention of this requirement see PARA 576; and as to the effect of subsequent affirmation see PARA 577.

6 Companies Act 2006 s 197(2).

7 Is a transaction to which the Companies Act 2006 s 197 applies: see s 197(3).

8 Companies Act 2006 s 197(3).

9 As to the meaning of 'written resolution' see PARA 623.

10 As to eligible members in relation to a resolution proposed as a written resolution of a private company see PARA 623. As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

11 Companies Act 2006 s 197(3)(a). Where approval under Pt 10 Ch 4 is sought by written resolution, and a memorandum is required under Pt 10 Ch 4 to be sent or submitted to every eligible member before the resolution is passed, provision is made for accidental failure to send or submit the memorandum to one or more members: see s 224; and PARA 561 note 7.

12 As to the company's registered office see PARA 129.

13 Companies Act 2006 s 197(3)(b)(i). See note 11.

14 Companies Act 2006 s 197(3)(b)(ii). See note 11.

15 Companies Act 2006 s 197(4)(a).

16 Companies Act 2006 s 197(4)(b). For the purposes of s 197, the value of a transaction or arrangement is determined as follows, and the value of any other relevant transaction or arrangement is taken to be the value so determined reduced by any amount by which the liabilities of the person for whom the transaction or arrangement was made have been reduced: s 211(1). The value of a loan is the amount of its principal (s 211(2)); and the value of a guarantee or security is the amount guaranteed or secured (s 211(5)). If the value of a transaction or arrangement is not capable of being expressed as a specific sum of money, whether because the amount of any liability arising under the transaction or arrangement is unascertainable, or for any other reason (s 211(7)(a)), and whether or not any liability under the transaction or arrangement has been reduced (s 211(7)(b)), its value is deemed to exceed £50,000 (s 211(7)). For these purposes, the person for whom a transaction or arrangement is entered into is, in the case of a loan, the person to whom it is made (s 212(a)); and, in the case of a guarantee or security, the person for whom the transaction is made in connection with which the guarantee or security is entered into (s 212(c)). As to the Secretary of State's power by order to substitute for any sum of money specified in the Companies Act 2006 Pt 10 (ss 154-259) (see PARA 478 et seq) a larger sum specified in the order see PARA 564 note 6.

17 Companies Act 2006 s 197(4)(c).

18 Is under the Companies Act 2006 s 197: see s 197(5).

19 As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5.

20 Companies Act 2006 s 197(5)(a). As to the meaning of 'UK-registered company' see PARA 24.

21 As to the meaning of 'wholly-owned subsidiary' see PARA 25.

22 Companies Act 2006 s 197(5)(b).

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569. Requirement of members' approval for quasi-loans to directors.

A company¹, which is either a public company² or a company associated with a public company³, may not either make a quasi-loan to a director⁴ of the company or of its holding company⁵, or give a guarantee or provide security in connection with a quasi-loan made by any person to such a director⁶, unless the transaction has been approved by a resolution of the members of the company⁷. If the director is a director of the company's holding company, the transaction must also have been approved by a resolution of the members of the holding company⁸.

A resolution approving such a transaction⁹ must not be passed unless a memorandum setting out the matters mentioned in heads (i) to (iii) below is made available to members¹⁰:

- 956 (1) in the case of a written resolution¹¹, by being sent or submitted to every eligible member¹² at or before the time at which the proposed resolution is sent or submitted to him¹³; or
- 957 (2) in the case of a resolution at a meeting, by being made available for inspection by members of the company both: (a) at the company's registered office¹⁴ for not less than 15 days ending with the date of the meeting¹⁵; and (b) at the meeting itself¹⁶.

The matters to be disclosed for these purposes are: (i) the nature of the transaction¹⁷; (ii) the amount of the quasi-loan and the purpose for which it is required¹⁸; and (iii) the extent of the company's liability under any transaction connected with the quasi-loan¹⁹.

However, no such approval is required²⁰ on the part of the members of a body corporate that either is not a UK-registered company²¹, or is a wholly-owned subsidiary²² of another body corporate²³.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'public company' see PARA 102.

3 See the Companies Act 2006 s 198(1). For the purposes of Pt 10 (ss 154-259) (see PARA 478 et seq), companies are 'associated' if one is a subsidiary of the other or both are subsidiaries of the same body corporate: s 256(b). As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5; and as to the meaning of 'subsidiary' see PARA 25.

As to the general application of the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) see PARA 561; and as to how those provisions interact with the directors' general duties see PARA 562.

4 As to the meaning of 'director' under the Companies Acts see PARA 478. A 'quasi-loan' is a transaction under which one party (the 'creditor') agrees to pay, or pays otherwise than in pursuance of an agreement, a sum for another (the 'borrower') or agrees to reimburse, or reimburses otherwise than in pursuance of an

agreement, expenditure incurred by another party for another (the 'borrower') on terms that the borrower (or a person on his behalf) will reimburse the creditor, or in circumstances giving rise to a liability on the borrower to reimburse the creditor: Companies Act 2006 s 199(1). Any reference to the 'person to whom a quasi-loan is made' is a reference to the borrower: s 199(2). The 'liabilities of the borrower under a quasi-loan' include the liabilities of any person who has agreed to reimburse the creditor on behalf of the borrower: s 199(3).

5 Companies Act 2006 s 198(2)(a). As to the meaning of 'holding company' see PARA 25.

6 Companies Act 2006 s 198(2)(b).

7 Companies Act 2006 s 198(2). As to the meaning of 'member of the company' see PARA 321. As to resolutions and meetings of members see PARA 629 et seq. As to voting at meetings see PARA 653 et seq.

As to the need for approval of quasi-loans to persons connected with a director see PARA 570; and as to the need for approval of related arrangements see PARA 572. As to general exceptions to the requirement for approval under s 198 see PARA 573 et seq; as to liabilities arising from any contravention of this requirement see PARA 576; and as to the effect of subsequent affirmation see PARA 577.

8 Companies Act 2006 s 198(3).

9 Is a transaction to which the Companies Act 2006 s 198 applies: see s 198(4).

10 Companies Act 2006 s 198(4).

11 As to the meaning of 'written resolution' see PARA 623.

12 As to eligible members in relation to a resolution proposed as a written resolution of a private company see PARA 623. As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

13 Companies Act 2006 s 198(4)(a). Where approval under Pt 10 Ch 4 is sought by written resolution, and a memorandum is required under Pt 10 Ch 4 to be sent or submitted to every eligible member before the resolution is passed, provision is made for accidental failure to send or submit the memorandum to one or more members: see s 224; and PARA 561 note 7.

14 As to the company's registered office see PARA 129.

15 Companies Act 2006 s 198(4)(b)(i). See note 13.

16 Companies Act 2006 s 198(4)(b)(ii). See note 13.

17 Companies Act 2006 s 198(5)(a).

18 Companies Act 2006 s 198(5)(b). For the purposes of ss 198, 199, the value of a transaction or arrangement is determined as follows, and the value of any other relevant transaction or arrangement is taken to be the value so determined reduced by any amount by which the liabilities of the person for whom the transaction or arrangement was made have been reduced: s 211(1). The value of a quasi-loan is the amount, or maximum amount, that the person to whom the quasi-loan is made is liable to reimburse the creditor (s 211(3)); and the value of a guarantee or security is the amount guaranteed or secured (s 211(5)). If the value of a transaction or arrangement is not capable of being expressed as a specific sum of money, whether because the amount of any liability arising under the transaction or arrangement is unascertainable, or for any other reason (s 211(7)(a)), and whether or not any liability under the transaction or arrangement has been reduced (s 211(7)(b)), its value is deemed to exceed £50,000 (s 211(7)). For these purposes, the person for whom a transaction or arrangement is entered into is, in the case of a quasi-loan, the person to whom it is made (s 212(a)); and, in the case of a guarantee or security, the person for whom the transaction is made in connection with which the guarantee or security is entered into (s 212(c)). As to the Secretary of State's power by order to substitute for any sum of money specified in the Companies Act 2006 Pt 10 (ss 154-259) (see PARA 478 et seq) a larger sum specified in the order see PARA 564 note 6.

19 Companies Act 2006 s 198(5)(c).

20 Is under the Companies Act 2006 s 198: see s 198(6).

21 Companies Act 2006 s 198(6)(a). As to the meaning of 'UK-registered company' see PARA 24.

22 As to the meaning of 'wholly-owned subsidiary' see PARA 25.

23 Companies Act 2006 s 198(6)(b).

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570. Requirement of members' approval for loans and quasi-loans to persons connected with director.

A company¹, which is either a public company² or a company associated with a public company³, may not either make a loan or quasi-loan⁴ to a person connected with a director⁵ of the company or of its holding company⁶, or give a guarantee or provide security in connection with a loan or quasi-loan made by any person to a person connected with such a director⁷, unless the transaction has been approved by a resolution of the members of the company⁸. If the connected person is a person connected with a director of the company's holding company, the transaction must also have been approved by a resolution of the members of the holding company⁹.

A resolution approving such a transaction¹⁰ must not be passed unless a memorandum setting out the matters mentioned in heads (i) to (iii) below is made available to members¹¹:

- 958 (1) in the case of a written resolution¹², by being sent or submitted to every eligible member¹³ at or before the time at which the proposed resolution is sent or submitted to him¹⁴; or
- 959 (2) in the case of a resolution at a meeting, by being made available for inspection by members of the company both: (a) at the company's registered office¹⁵ for not less than 15 days ending with the date of the meeting¹⁶; and (b) at the meeting itself¹⁷.

The matters to be disclosed for these purposes are: (i) the nature of the transaction¹⁸; (ii) the amount of the loan or quasi-loan and the purpose for which it is required¹⁹; and (iii) the extent of the company's liability under any transaction connected with the loan or quasi-loan²⁰.

However, no such approval is required²¹ on the part of the members of a body corporate²² that either is not a UK-registered company²³, or is a wholly-owned subsidiary²⁴ of another body corporate²⁵.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'public company' see PARA 102.

3 See the Companies Act 2006 s 200(1). As to the meaning of companies which are 'associated' for the purposes of Pt 10 (ss 154-259) (see PARA 478 et seq) see PARA 569 note 3.

As to the general application of the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) see PARA 561; and as to how those provisions interact with the directors' general duties see PARA 562.

4 As to the meaning of 'quasi-loan' for these purposes see PARA 569 note 4.

5 As to the meaning of the 'person to whom a quasi-loan is made' see PARA 569 note 4. As to the meaning of references to a person being 'connected' with a director see PARA 481. As to the meaning of 'director' under the Companies Acts see PARA 478. As to the validity generally of transactions involving a director or a person connected with a director see PARA 264.

- 6 Companies Act 2006 s 200(2)(a). As to the meaning of 'holding company' see PARA 25.
- 7 Companies Act 2006 s 200(2)(b).
- 8 Companies Act 2006 s 200(2). As to the meaning of 'member of the company' see PARA 321. As to resolutions and meetings of members see PARA 629 et seq. As to voting at meetings see PARA 653 et seq.
As to the need for approval of related arrangements see PARA 572. As to general exceptions to the requirement for approval under s 200 see PARA 573 et seq; as to liabilities arising from any contravention of this requirement see PARA 576; and as to the effect of subsequent affirmation see PARA 577.
- 9 Companies Act 2006 s 200(3).
- 10 Is a transaction to which the Companies Act 2006 s 200 applies: see s 200(4).
- 11 Companies Act 2006 s 200(4).
- 12 As to the meaning of 'written resolution' see PARA 623.
- 13 As to eligible members in relation to a resolution proposed as a written resolution of a private company see PARA 623. As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.
- 14 Companies Act 2006 s 200(4)(a). Where approval under Pt 10 Ch 4 is sought by written resolution, and a memorandum is required under Pt 10 Ch 4 to be sent or submitted to every eligible member before the resolution is passed, provision is made for accidental failure to send or submit the memorandum to one or more members: see s 224; and PARA 561 note 7.
- 15 As to the company's registered office see PARA 129.
- 16 Companies Act 2006 s 200(4)(b)(i). See note 13.
- 17 Companies Act 2006 s 200(4)(b)(ii). See note 13.
- 18 Companies Act 2006 s 200(5)(a).
- 19 Companies Act 2006 s 200(5)(b). As to determining the value of such a transaction or arrangement, and the person for whom such a transaction or arrangement is entered into, in the case of loans, see PARA 568 note 16; and, the case of quasi-loans, see PARA 569 note 18.
- 20 Companies Act 2006 s 200(5)(c). As to the meaning of the 'liabilities of the borrower under a quasi-loan' see PARA 569 note 4.
- 21 Is under the Companies Act 2006 s 200: see s 200(6).
- 22 As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5.
- 23 Companies Act 2006 s 200(6)(a). As to the meaning of 'UK-registered company' see PARA 24.
- 24 As to the meaning of 'wholly-owned subsidiary' see PARA 25.
- 25 Companies Act 2006 s 200(6)(b).

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571. Requirement of members' approval for credit transactions.

A company¹, which is either a public company² or a company associated with a public company³, may not either enter into a credit transaction as creditor for the benefit of a director⁴

of the company or of its holding company⁵ (or a person connected with such a director)⁶, or give a guarantee or provide security in connection with a credit transaction entered into by any person for the benefit of such a director (or a person connected with such a director)⁷, unless the transaction (that is, the credit transaction, the giving of the guarantee or the provision of security, as the case may be) has been approved by a resolution of the members of the company⁸. If the director (or connected person) is a director of the company's holding company (or a person connected with such a director), the transaction must also have been approved by a resolution of the members of the holding company⁹.

A resolution approving such a transaction¹⁰ must not be passed unless a memorandum setting out the matters mentioned in heads (i) to (iii) below is made available to members¹¹:

- 960 (1) in the case of a written resolution¹², by being sent or submitted to every eligible member¹³ at or before the time at which the proposed resolution is sent or submitted to him¹⁴; or
- 961 (2) in the case of a resolution at a meeting, by being made available for inspection by members of the company both: (a) at the company's registered office¹⁵ for not less than 15 days ending with the date of the meeting¹⁶; and (b) at the meeting itself¹⁷.

The matters to be disclosed for these purposes are: (i) the nature of the transaction¹⁸; (ii) the value of the credit transaction and the purpose for which the land, goods or services sold or otherwise disposed of, leased, hired or supplied under the credit transaction are required¹⁹; and (iii) the extent of the company's liability under any transaction connected with the credit transaction²⁰.

However, no such approval is required²¹ on the part of the members of a body corporate²² that either is not a UK-registered company²³, or is a wholly-owned subsidiary²⁴ of another body corporate²⁵.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'public company' see PARA 102.

3 See the Companies Act 2006 s 201(1). As to the meaning of companies which are 'associated' for the purposes of Pt 10 (ss 154-259) (see PARA 478 et seq) see PARA 569 note 3.

As to the general application of the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) see PARA 561; and as to how those provisions interact with the directors' general duties see PARA 562.

4 As to the meaning of 'director' under the Companies Acts see PARA 478. For these purposes, a 'credit transaction' is a transaction under which one party (the 'creditor') supplies any goods or sells any land under a hire-purchase agreement or a conditional sale agreement, leases or hires any land or goods in return for periodical payments, or otherwise disposes of land or supplies goods or services on the understanding that payment (whether in a lump sum or instalments or by way of periodical payments or otherwise) is to be deferred: Companies Act 2006 s 202(1). Any reference to the 'person for whose benefit a credit transaction is entered into' is to the person to whom goods, land or services are supplied, sold, leased, hired or otherwise disposed of under the transaction: s 202(2). For these purposes, 'conditional sale agreement' has the same meaning as in the Consumer Credit Act 1974 (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 93); and 'services' means anything other than goods or land: Companies Act 2006 s 202(3). In the Companies Acts, 'hire-purchase agreement' has the same meaning as in the Consumer Credit Act 1974 (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 95); Companies Act 2006 s 1173(1).

5 As to the meaning of 'holding company' see PARA 25.

6 Companies Act 2006 s 201(2)(a). As to the meaning of references to a person being 'connected' with a director see PARA 481. As to the validity generally of transactions involving a director or a person connected with a director see PARA 264.

7 Companies Act 2006 s 201(2)(b).

8 Companies Act 2006 s 201(2). As to the meaning of 'member of the company' see PARA 321. As to resolutions and meetings of members see PARA 629 et seq. As to voting at meetings see PARA 653 et seq.

As to the need for approval of related arrangements see PARA 572. As to general exceptions to the requirement for approval under s 201 see PARA 573 et seq; as to liabilities arising from any contravention of this requirement see PARA 576; and as to the effect of subsequent affirmation see PARA 577.

9 Companies Act 2006 s 201(3).

10 Is a transaction to which the Companies Act 2006 s 201 applies: see s 201(4).

11 Companies Act 2006 s 201(4).

12 As to the meaning of 'written resolution' see PARA 623.

13 As to eligible members in relation to a resolution proposed as a written resolution of a private company see PARA 623. As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

14 Companies Act 2006 s 201(4)(a). Where approval under Pt 10 Ch 4 is sought by written resolution, and a memorandum is required under Pt 10 Ch 4 to be sent or submitted to every eligible member before the resolution is passed, provision is made for accidental failure to send or submit the memorandum to one or more members: see s 224; and PARA 561 note 7.

15 As to the company's registered office see PARA 129.

16 Companies Act 2006 s 201(4)(b)(i). See note 14.

17 Companies Act 2006 s 201(4)(b)(ii). See note 14.

18 Companies Act 2006 s 201(5)(a).

19 Companies Act 2006 s 201(5)(b). For the purposes of ss 201, 202, the value of a transaction or arrangement is determined as follows, and the value of any other relevant transaction or arrangement is taken to be the value so determined reduced by any amount by which the liabilities of the person for whom the transaction or arrangement was made have been reduced: s 211(1). The value of a credit transaction is the price that it is reasonable to expect could be obtained for the goods, services or land to which the transaction relates if they had been supplied (at the time the transaction is entered into) in the ordinary course of business and on the same terms (apart from price) as they have been supplied, or are to be supplied, under the transaction in question (s 211(4)); and the value of a guarantee or security is the amount guaranteed or secured (s 211(5)). If the value of a transaction or arrangement is not capable of being expressed as a specific sum of money, whether because the amount of any liability arising under the transaction or arrangement is unascertainable, or for any other reason (s 211(7)(a)), and whether or not any liability under the transaction or arrangement has been reduced (s 211(7)(b)), its value is deemed to exceed £50,000 (s 211(7)). For these purposes, the person for whom a transaction or arrangement is entered into is, in the case of a credit transaction, the person to whom goods, land or services are supplied, sold, hired, leased or otherwise disposed of under the transaction (s 212(b)); and, in the case of a guarantee or security, the person for whom the transaction is made in connection with which the guarantee or security is entered into (s 212(c)). As to the Secretary of State's power by order to substitute for any sum of money specified in the Companies Act 2006 Pt 10 (ss 154-259) (see PARA 478 et seq) a larger sum specified in the order see PARA 564 note 6.

20 Companies Act 2006 s 201(5)(c).

21 Is under the Companies Act 2006 s 201: see s 201(6).

22 As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5.

23 Companies Act 2006 s 201(6)(a). As to the meaning of 'UK-registered company' see PARA 24.

24 As to the meaning of 'wholly-owned subsidiary' see PARA 25.

25 Companies Act 2006 s 201(6)(b).

COMPANIES ACTS/(13) DIRECTORS/(vii) Transactions with Directors Requiring Approval of Members/D. LOANS, QUASI-LOANS AND CREDIT TRANSACTIONS/(A) Requirement of Members' Approval/572. Requirement of members' approval for related arrangements.

572. Requirement of members' approval for related arrangements.

A company¹ may not either take part in an arrangement under which another person enters into a transaction that, if it had been entered into by the company, would have required approval² by members of the company³, and that person, in pursuance of the arrangement, obtains a benefit from the company or a body corporate⁴ associated with it⁵, or arrange for the assignment to it, or assumption by it, of any rights, obligations or liabilities under a transaction that, if it had been entered into by the company, would have required such approval⁶, unless the arrangement in question has been approved by a resolution of the members of the company⁷. If the director (or connected person) for whom the transaction is entered into is a director of the company's holding company (or a person connected with such a director), the arrangement must also have been approved by a resolution of the members of the holding company⁸.

A resolution approving such an arrangement⁹ must not be passed unless a memorandum setting out the matters mentioned in heads (i) to (iii) below is made available to members¹⁰:

- 962 (1) in the case of a written resolution¹¹, by being sent or submitted to every eligible member¹² at or before the time at which the proposed resolution is sent or submitted to him¹³; or
- 963 (2) in the case of a resolution at a meeting, by being made available for inspection by members of the company both: (a) at the company's registered office¹⁴ for not less than 15 days ending with the date of the meeting¹⁵; and (b) at the meeting itself¹⁶.

The matters to be disclosed for these purposes are: (i) the matters that would have to be disclosed if the company were seeking approval of the transaction to which the arrangement relates¹⁷; (ii) the nature of the arrangement¹⁸; and (iii) the extent of the company's liability under the arrangement or any transaction connected with it¹⁹.

However, no such approval is required²⁰ on the part of the members of a body corporate that either is not a UK-registered company²¹, or is a wholly-owned subsidiary²² of another body corporate²³.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 I.e., in the case of loans made to a director of the company or of its holding company, or a guarantee given or security provided in connection with a loan made by any person to such a director, under the Companies Act 2006 s 197 (see PARA 568), in the case of quasi-loans made to a director of the company or of its holding company, or a guarantee given or security provided in connection with a quasi-loan made by any person to such a director, under s 198 (see PARA 569), in the case of loans or quasi-loans made to a person connected with a director of the company or of its holding company, or a guarantee given or security provided in connection with a loan or quasi-loan made by any person to a person connected with such a director, under s 200 (see PARA 570), or in the case of credit transactions entered into by a company as creditor for the benefit of a director of the company or of its holding company (or a person connected with such a director) or a guarantee given or security provided in connection with a credit transaction entered into by any person for the benefit of such a director (or a person connected with such a director), under s 201 (see PARA 571): see s 203(1)(a)(i). In determining for the purposes of s 203 whether a transaction is one that would have required approval under s 197, 198, 200 or 201 if it had been entered into by the company, the transaction is to be treated as having been entered into on the date of the arrangement: s 203(6). As to the meaning of 'director' under the Companies Acts see PARA 478; as to the meaning of 'credit transaction' for these purposes see PARA 571 note 4; as to the meaning of 'holding company' see PARA 25; and as to the meaning of 'quasi-loan' for these purposes see PARA 569 note 4. As to the meaning of references to a person being 'connected' with a director see PARA

481. As to the validity generally of transactions involving a director or a person connected with a director see PARA 264.

As to the general application of the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) see PARA 561; and as to how those provisions interact with the directors' general duties see PARA 562.

3 Companies Act 2006 s 203(1)(a)(i). As to the meaning of 'member of the company' see PARA 321. As to resolutions and meetings of members see PARA 629 et seq. As to voting at meetings see PARA 653 et seq.

As to liabilities arising from any contravention of this requirement see PARA 576; and as to the effect of subsequent affirmation see PARA 577.

4 As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5.

5 Companies Act 2006 s 203(1)(a)(ii). As to the meaning of companies which are 'associated' for the purposes of Pt 10 (ss 154-259) (see PARA 478 et seq) see PARA 569 note 3; and as to the meaning of bodies corporate which are 'associated' for the purposes of Pt 10 see PARA 553 note 4.

6 Companies Act 2006 s 203(1)(b).

7 Companies Act 2006 s 203(1).

8 Companies Act 2006 s 203(2).

9 Ie an arrangement to which the Companies Act 2006 s 203 applies: see s 203(3).

10 Companies Act 2006 s 203(3).

11 As to the meaning of 'written resolution' see PARA 623.

12 As to eligible members in relation to a resolution proposed as a written resolution of a private company see PARA 623. As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

13 Companies Act 2006 s 203(3)(a). Where approval under Pt 10 Ch 4 is sought by written resolution, and a memorandum is required under Pt 10 Ch 4 to be sent or submitted to every eligible member before the resolution is passed, provision is made for accidental failure to send or submit the memorandum to one or more members: see s 224; and PARA 561 note 7.

14 As to the company's registered office see PARA 129.

15 Companies Act 2006 s 203(3)(b)(i). See note 13.

16 Companies Act 2006 s 203(3)(b)(ii). See note 13.

17 Companies Act 2006 s 203(4)(a). The value of an arrangement to which s 203 applies is the value of the transaction to which the arrangement relates (s 211(6)); and the person for whom a transaction or arrangement is entered into is, in the case of an arrangement within s 203, the person for whom the transaction is made to which the arrangement relates (s 212(d)). See also note 2.

18 Companies Act 2006 s 203(4)(b).

19 Companies Act 2006 s 203(4)(c).

20 Ie under the Companies Act 2006 s 203: see s 203(5).

21 Companies Act 2006 s 203(5)(a). As to the meaning of 'UK-registered company' see PARA 24.

22 As to the meaning of 'wholly-owned subsidiary' see PARA 25.

23 Companies Act 2006 s 203(5)(b).

Members/D. LOANS, QUASI-LOANS AND CREDIT TRANSACTIONS/(B) General Exceptions/573.
Exceptions to requirement for approval of loans, quasi-loans and credit transactions.

(B) GENERAL EXCEPTIONS

573. Exceptions to requirement for approval of loans, quasi-loans and credit transactions.

Approval is not required in relation to loans, quasi-loans and credit transactions¹ for anything done by a company²:

- 964 (1) to provide a director of the company or of its holding company (or a person connected with any such director) with funds to meet expenditure incurred or to be incurred by him³ for the purposes of the company⁴, or for the purpose of enabling him properly to perform his duties as an officer of the company⁵, or to enable any such person to avoid incurring such expenditure⁶;
- 965 (2) to provide a director of the company or of its holding company with funds to meet expenditure incurred or to be incurred by him⁷ in defending any criminal or civil proceedings in connection with any alleged negligence, default, breach of duty or breach of trust by him in relation to the company or an associated company⁸, or in connection with a specified application for relief⁹, or to enable any such director to avoid incurring such expenditure¹⁰, if it is done on the following terms¹¹: (a) that the loan is to be repaid, or (as the case may be) any liability of the company incurred under any transaction connected with the thing done is to be discharged¹², in the event of the director being convicted in the proceedings¹³, in the event of judgment being given against him in the proceedings¹⁴, or in the event of the court refusing to grant him relief on the application¹⁵; and (b) that it is to be so repaid or discharged not later than the date when the conviction becomes final¹⁶, the date when the judgment becomes final¹⁷, or the date when the refusal of relief becomes final¹⁸;
- 966 (3) to provide a director of the company or of its holding company with funds to meet expenditure incurred or to be incurred by him in defending himself either in an investigation by a regulatory authority¹⁹, or against action proposed to be taken by a regulatory authority²⁰, in connection with any alleged negligence, default, breach of duty or breach of trust by him in relation to the company or an associated company²¹; or to enable any such director to avoid incurring such expenditure²².

1 I.e., in the case of loans made to a director of the company or of its holding company, or a guarantee given or security provided in connection with a loan made by any person to such a director, under the Companies Act 2006 s 197 (see PARA 568), in the case of quasi-loans made to a director of the company or of its holding company, or a guarantee given or security provided in connection with a quasi-loan made by any person to such a director, under s 198 (see PARA 569), in the case of loans or quasi-loans made to a person connected with a director of the company or of its holding company, or a guarantee given or security provided in connection with a loan or quasi-loan made by any person to a person connected with such a director, under s 200 (see PARA 570), or in the case of credit transactions entered into by a company as creditor for the benefit of a director of the company or of its holding company (or a person connected with such a director) or a guarantee given or security provided in connection with a credit transaction entered into by any person for the benefit of such a director (or a person connected with such a director), under s 201 (see PARA 571): see ss 204(1), 205(1), 206(1). As to the meaning of 'company' under the Companies Acts see PARA 24; as to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'credit transaction' for these purposes see PARA 571 note 4; as to the meaning of 'holding company' see PARA 25; and as to the meaning of 'quasi-loan' for these purposes see PARA 569 note 4. As to the meaning of references to a person being 'connected' with a director see PARA 481. As to the validity generally of transactions involving a director or a person connected with a director see PARA 264.

As to the general application of the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) see PARA 561; and as to how those provisions interact with the directors' general duties see PARA 562.

2 As to exceptions to the requirement for approval that apply to loans and quasi-loans but not to credit transactions see PARA 574; and as to exceptions to the requirement for approval that apply to credit transactions but not to loans and quasi-loans see PARA 575.

3 Companies Act 2006 s 204(1)(a). The provisions of s 204 do not authorise a company to enter into a transaction if the aggregate of the value of the transaction in question, and the value of any other relevant transactions or arrangements, exceeds £50,000: s 204(2). As to the Secretary of State's power by order to substitute for any sum of money specified in Pt 10 (ss 154-259) (see PARA 478 et seq) a larger sum specified in the order see PARA 564 note 6. The provisions of s 210 have effect for determining what are 'other relevant transactions or arrangements' for the purposes of any exception to s 197 (see PARA 568), s 198 (see PARA 569), s 200 (see PARA 570) or s 201 (see PARA 571); and, for these purposes, the 'relevant exception' means the exception for the purposes of which that falls to be determined: s 210(1). Accordingly, other relevant transactions or arrangements are those previously entered into, or entered into at the same time as the transaction or arrangement in question in relation to which the following conditions are met (s 210(2)):

- 189 (1) where the transaction or arrangement in question is entered into either for a director of the company entering into it, or for a person connected with such a director, the conditions are that the transaction or arrangement was (or is) entered into for that director, or a person connected with him, by virtue of the relevant exception by that company or by any of its subsidiaries (s 210(3));
- 190 (2) where the transaction or arrangement in question is entered into either for a director of the holding company of the company entering into it, or for a person connected with such a director, the conditions are that the transaction or arrangement was (or is) entered into for that director, or a person connected with him, by virtue of the relevant exception by the holding company or by any of its subsidiaries (s 210(4)).

A transaction or arrangement entered into by a company that, at the time it was entered into, either was a subsidiary of the company entering into the transaction or arrangement in question, or was a subsidiary of that company's holding company, is not a relevant transaction or arrangement if, at the time the question arises whether the transaction or arrangement in question falls within a relevant exception, it is no longer such a subsidiary: s 210(5). As to the meaning of 'subsidiary' see PARA 25. As to determining the value of transactions and other relevant transactions or arrangements generally, and as to determining the person for whom a transaction or arrangement is entered into, see PARAS 568 note 16, 569 note 18, 571 note 19.

4 Companies Act 2006 s 204(1)(a)(i). See note 3.

5 Companies Act 2006 s 204(1)(a)(ii). As to the meaning of 'officer' see PARA 607. See note 3.

6 Companies Act 2006 s 204(1)(b). See note 3.

7 Companies Act 2006 s 205(1)(a).

8 Companies Act 2006 s 205(1)(a)(i). As to the meaning of companies which are 'associated' for the purposes of Pt 10 (ss 154-259) (see PARA 478 et seq) see PARA 569 note 3. The Companies Act 2006 contains for the first time a statutory statement of directors' duties: see Pt 10 Ch 2 (ss 170-181); and PARA 532 et seq. As to directors' fiduciary duties owed to the company see PARA 544 et seq.

9 Companies Act 2006 s 205(1)(a)(ii). The reference in s 205(1)(a)(ii) to an application for relief is to an application for relief under s 661(3) or s 661(4) (power of court to grant relief in case of acquisition of shares by innocent nominee) (see PARA 1199), or under s 1157 (general power of court to grant relief in case of honest and reasonable conduct) (see PARA 600): s 205(5).

10 Companies Act 2006 s 205(1)(b).

11 Companies Act 2006 s 205(1).

12 Companies Act 2006 s 205(2)(a).

13 Companies Act 2006 s 205(2)(a)(i).

14 Companies Act 2006 s 205(2)(a)(ii).

15 Companies Act 2006 s 205(2)(a)(iii).

16 Companies Act 2006 s 205(2)(b)(i). For this purpose, a conviction, judgment or refusal of relief becomes final (if not appealed against) at the end of the period for bringing an appeal or (if appealed against) when the appeal (or any further appeal) is disposed of (s 205(3)); and an appeal is disposed of if it is determined and the period for bringing any further appeal has ended, or if it is abandoned or otherwise ceases to have effect (s 205(4)).

17 Companies Act 2006 s 205(2)(b)(ii). See note 16.

18 Companies Act 2006 s 205(2)(b)(iii). See note 16.

19 Companies Act 2006 s 206(a)(i).

20 Companies Act 2006 s 206(a)(ii).

21 Companies Act 2006 s 206(a).

22 Companies Act 2006 s 206(b). Note that the terms set out in relation to head (2) in the text (see head (2) (a) and head (2)(b) in the text) have not been applied for the purposes of head (3) in the text.

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574. Exceptions to requirement for approval applicable to loans and quasi-loans but not credit transactions.

Approval is not required under the provisions which govern the making of loans or quasi-loans¹:

- 967 (1) for a company to make a loan or quasi-loan, or to give a guarantee or provide security in connection with a loan or quasi-loan, if the aggregate of the value of the transaction², and the value of any other relevant transactions or arrangements³, does not exceed £10,000⁴;
- 968 (2) for the making of a loan or quasi-loan to an associated body corporate⁵, or for the giving of a guarantee or provision of security in connection with a loan or quasi-loan made to an associated body corporate⁶;
- 969 (3) for the making of a loan or quasi-loan, or the giving of a guarantee or provision of security in connection with a loan or quasi-loan, by a money-lending company⁷ if: (a) the transaction (that is, the loan, quasi-loan, guarantee or security) is entered into by the company in the ordinary course of the company's business⁸; and (b) the value of the transaction is not greater, and its terms are not more favourable, than it is reasonable to expect the company would have offered to a person of the same financial standing but unconnected with the company⁹.

1 le, in the case of loans made to a director of the company or of its holding company, or a guarantee given or security provided in connection with a loan made by any person to such a director, under the Companies Act 2006 s 197 (see PARA 568), in the case of quasi-loans made to a director of the company or of its holding company, or a guarantee given or security provided in connection with a quasi-loan made by any person to such a director, under s 198 (see PARA 569) or, in the case of loans or quasi-loans made to a person connected with a director of the company or of its holding company, or a guarantee given or security provided in connection with a loan or quasi-loan made by any person to a person connected with such a director, under s 200 (see PARA 570): see ss 207(1), 208(1), 209(1). As to the meaning of 'company' under the Companies Acts see PARA 24; as to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'holding company' see PARA 25; and as to the meaning of 'quasi-loan' for these purposes see PARA 569 note 4. As to the meaning of references to a person being

'connected' with a director see PARA 481. As to the validity generally of transactions involving a director or a person connected with a director see PARA 264. As to exceptions to the requirement for approval that apply to loans and quasi-loans and to credit transactions alike see PARA 573; and as to exceptions to the requirement for approval that apply to credit transactions but not to loans and quasi-loans see PARA 575. As to the meaning of 'credit transaction' for these purposes see PARA 571 note 4.

As to the general application of the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) see PARA 561; and as to how those provisions interact with the directors' general duties see PARA 562.

2 Companies Act 2006 s 207(1)(a).

3 Companies Act 2006 s 207(1)(b). The provisions of s 210 have effect for determining what are 'other relevant transactions or arrangements' for the purposes of any exception to s 197 (see PARA 568), s 198 (see PARA 569) or s 200 (see PARA 570): see PARA 573 note 3. As to determining the value of transactions and other relevant transactions or arrangements generally, and as to determining the person for whom a transaction or arrangement is entered into, see PARAS 568 note 16, 569 note 18, 571 note 19.

4 Companies Act 2006 s 207(1). As to the Secretary of State's power by order to substitute for any sum of money specified in Pt 10 (ss 154-259) (see PARA 478 et seq) a larger sum specified in the order see PARA 564 note 6.

5 Companies Act 2006 s 208(1)(a). As to the meaning of bodies corporate which are 'associated' for the purposes of Pt 10 (ss 154-259) (see PARA 478 et seq) see PARA 553 note 4.

6 Companies Act 2006 s 208(1)(b).

7 Companies Act 2006 s 209(1). For these purposes, a 'money-lending company' means a company whose ordinary business includes the making of loans or quasi-loans, or the giving of guarantees or provision of security in connection with loans or quasi-loans: s 209(2).

8 Companies Act 2006 s 209(1)(a).

9 Companies Act 2006 s 209(1)(b). The condition specified in head (3)(b) in the text does not of itself prevent a company from making a home loan either to a director of the company (or of its holding company), or to an employee of the company, if loans of that description are ordinarily made by the company to its employees and the terms of the loan in question are no more favourable than those on which such loans are ordinarily made: s 209(3). For this purpose, a 'home loan' means a loan: (1) for the purpose of facilitating the purchase, for use as the only or main residence of the person to whom the loan is made, of the whole or part of any dwelling-house together with any land to be occupied and enjoyed with it (s 209(4)(a)); (2) for the purpose of improving a dwelling-house or part of a dwelling-house so used or any land occupied and enjoyed with it (s 209(4)(b)); or (3) in substitution for any loan made by any person and falling within head (1) or head (2) above (s 209(4)(c)).

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575. Exceptions to requirement for approval applicable to credit transactions but not to loans and quasi-loans.

Approval is not required¹ for a company² to enter into a credit transaction³, or to give a guarantee or provide security in connection with a credit transaction, if:

- 970 (1) the aggregate of the value of the transaction (that is, of the credit transaction, guarantee or security)⁴, and the value of any other relevant transactions or arrangements⁵, does not exceed £15,000⁶;
- 971 (2) the transaction is entered into by the company in the ordinary course of the company's business⁷, and the value of the transaction is not greater, and the terms

on which it is entered into are not more favourable, than it is reasonable to expect the company would have offered to, or in respect of, a person of the same financial standing but unconnected with the company⁸.

Nor is such approval required⁹: (a) to enter into a credit transaction as creditor for the benefit of an associated body corporate¹⁰; or (b) to give a guarantee or provide security in connection with a credit transaction entered into by any person for the benefit of an associated body corporate¹¹.

1 le under the Companies Act 2006 s 201 (see PARA 571): see s 207(2), (3).

As to the general application of the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) see PARA 561; and as to how those provisions interact with the directors' general duties see PARA 562.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'credit transaction' for these purposes see PARA 571 note 4.

4 Companies Act 2006 s 207(2)(a).

5 Companies Act 2006 s 207(2)(b). The provisions of s 210 have effect for determining what are 'other relevant transactions or arrangements' for the purposes of any exception to s 201 (see PARA 571): see PARA 573 note 3. As to determining the value of transactions and other relevant transactions or arrangements generally, and as to determining the person for whom a transaction or arrangement is entered into, see PARAS 568 note 16, 569 note 18, 571 note 19.

6 Companies Act 2006 s 207(2). As to the Secretary of State's power by order to substitute for any sum of money specified in Pt 10 (ss 154-259) (see PARA 478 et seq) a larger sum specified in the order see PARA 564 note 6.

7 Companies Act 2006 s 207(3)(a).

8 Companies Act 2006 s 207(3)(b).

9 le under the Companies Act 2006 s 201 (see PARA 571): see s 208(2).

10 Companies Act 2006 s 208(2)(a). As to the meaning of bodies corporate which are 'associated' for the purposes of Pt 10 see PARA 553 note 4.

11 Companies Act 2006 s 208(2)(b).

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(C) CONTRAVENTION OF REQUIREMENTS

576. Civil consequences for breach of prohibition on loans etc to directors.

Where a company¹ enters into a transaction or arrangement in contravention of the statutory provisions which require approval² for loans, quasi-loans, credit transactions and related arrangements³, the transaction or arrangement is voidable at the instance of the company⁴, unless:

- 972 (1) restitution of any money or other asset that was the subject matter of the transaction or arrangement is no longer possible⁵; or
- 973 (2) the company has been indemnified for any loss or damage resulting from the transaction or arrangement⁶; or
- 974 (3) rights acquired in good faith, for value and without actual notice of the contravention by any person who is not a party to the transaction or arrangement would be affected by its avoidance⁷.

Whether or not the transaction or arrangement has been avoided, each of the following persons⁸, namely: (a) any director of the company or of its holding company with whom the company entered into the transaction or arrangement in contravention of the statutory provisions⁹; (b) any person with whom the company entered into the transaction or arrangement in like contravention¹⁰ who is connected with a director of the company or of its holding company¹¹; (c) the director of the company or of its holding company with whom any such person is connected¹²; and (d) any other director of the company who authorised the transaction or arrangement¹³, is liable¹⁴ to account to the company for any gain that he has made directly or indirectly by the transaction or arrangement¹⁵, and (jointly and severally with any other person so liable¹⁶) to indemnify the company for any loss or damage resulting from the transaction or arrangement¹⁷. However, in the case of a transaction or arrangement entered into by a company in contravention of the statutory provisions¹⁸ governing credit transactions, certain loans and quasi-loans and related arrangements, and made with a person connected with a director of the company or of its holding company, that director is not liable by virtue of head (c) above if he shows that he took all reasonable steps to secure the company's compliance¹⁹. Furthermore, in any case, a person so connected is not liable by virtue of head (b) above²⁰, and a director is not liable by virtue of head (d) above²¹, if he shows that, at the time the arrangement was entered into, he did not know the relevant circumstances constituting the contravention²².

Nothing in the provisions governing civil liability²³ is to be read as excluding the operation of any other enactment²⁴ or rule of law by virtue of which the transaction or arrangement may be called in question or any liability to the company may arise²⁵.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 I.e., in the case of loans made to a director of the company or of its holding company, or a guarantee given or security provided in connection with a loan made by any person to such a director, under the Companies Act 2006 s 197 (see PARA 568), in the case of quasi-loans made to a director of the company or of its holding company, or a guarantee given or security provided in connection with a quasi-loan made by any person to such a director, under s 198 (see PARA 569), in the case of loans or quasi-loans made to a person connected with a director of the company or of its holding company, or a guarantee given or security provided in connection with a loan or quasi-loan made by any person to a person connected with such a director, under s 200 (see PARA 570), in the case of credit transactions entered into by a company as creditor for the benefit of a director of the company or of its holding company (or a person connected with such a director) or a guarantee given or security provided in connection with a credit transaction entered into by any person for the benefit of such a director (or a person connected with such a director), under s 201 (see PARA 571) or, in the case of an arrangement under which another person enters into a transaction that, if it had been entered into by the company, would have required approval under s 197, s 198, s 200 or s 201, and that person, in pursuance of the arrangement, obtains a benefit from the company or a body corporate associated with it, or where a company arranges for the assignment to it, or assumption by it, of any rights, obligations or liabilities under a transaction that, if it had been entered into by the company, would have required such approval, under s 203 (see PARA 572): see s 213(1). As to the meaning of 'director' under the Companies Acts see PARA 478. As to the meaning of 'credit transaction' for these purposes see PARA 571 note 4; as to the meaning of 'holding company' see PARA 25; and as to the meaning of 'quasi-loan' for these purposes see PARA 569 note 4. As to the meaning of references to a person being 'connected' with a director see PARA 481. As to the validity generally of transactions involving a director or a person connected with a director see PARA 264.

As to the general application of the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) see PARA 561; and as to how those provisions interact with the directors' general duties see PARA 562.

3 See the Companies Act 2006 s 213(1).

4 Companies Act 2006 s 213(2). Monies paid under the transaction or arrangement in question are recoverable by the company in this way irrespective of the terms on which the transaction or arrangement was made: *Tait Consibee (Oxford) Ltd v Tait* [1997] 2 BCLC 349, CA; *Currencies Direct Ltd v Ellis* [2002] 1 BCLC 193 (affd on different grounds [2002] EWCA Civ 779, [2002] 2 BCLC 482). However, a company may seek to recover without recourse to the statutory provision: *Currencies Direct Ltd v Ellis*. As to the effect of subsequent affirmation see PARA 567.

Because a voidable loan stands until avoided, the statutory provision for avoidance is inimical to the concept of a constructive trusteeship or any form of tracing claim, at least in the absence of special circumstances: *Re Ciro Citterio Menswear plc (in administration)*, *Ciro Citterio Menswear plc v Thakrar* [2002] EWHC 293 (Ch), [2002] 2 All ER 717, [2002] 1 WLR 2217 (distinguished in *Baker v Potter* [2004] EWHC 1422 (Ch) at [109], [2004] All ER (D) 174 (Jun) at [109]). Cf *Re Duckwari plc* [1999] Ch 253, sub nom *Re Duckwari plc (No 2)*, *Duckwari plc v Offerventure Ltd (No 2)* [1998] 2 BCLC 315, CA (cited in PARA 566); and see *Re Lands Allotment Co* [1894] 1 Ch 616 at 631, CA, per Lindley LJ. Set-off under the Insolvency Rules 1986, SI 1986/1925, r 4.90 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 793) could not be invoked by a director whose liability to the company arose out of an unlawful loan: *Re a Company (No 1641 of 2003)* [2003] EWHC 2652 (Ch), [2004] 1 BCLC 210.

5 Companies Act 2006 s 213(2)(a).

6 Companies Act 2006 s 213(2)(b).

7 Companies Act 2006 s 213(2)(c).

8 Companies Act 2006 s 213(3). The provisions of s 213(3), (4) are subject to the provisions of s 213(6), (7) (see the text and notes 18-22): s 213(5).

9 Companies Act 2006 s 213(4)(a). The text refers to contravention of the Companies Act 2006 s 197 (see PARA 568), s 198 (see PARA 569), s 201 (see PARA 571) or s 203 (see PARA 572): see s 213(4)(a). See note 8.

10 Ie in contravention of any of the Companies Act 2006 s 197 (see PARA 568), s 198 (see PARA 569), s 201 (see PARA 571) or s 203 (see PARA 572): see s 213(4)(b).

11 Companies Act 2006 s 213(4)(b). See note 8.

12 Companies Act 2006 s 213(4)(c). See note 8.

13 Companies Act 2006 s 213(4)(d). See note 8.

14 See the Companies Act 2006 s 213(3). See note 8. A director who knowingly allowed a practice to continue under which lending by the company to his co-director was treated as acceptable had authorised the individual payments which were made in accordance with that practice notwithstanding that he did not have actual knowledge of each individual payment at the time that it was made: *Neville v Krikorian* [2006] EWCA Civ 943, [2007] 1 BCLC 1. See also *Queensway Systems Ltd (in liq) v Walker* [2006] EWHC 2496 (Ch), [2007] 2 BCLC 577 (directors who took funds from their company in the form of interest-free loans and, at the end of each financial year, declared dividends which were then used to extinguish their liability to the company were jointly and severally liable for the repayment of the outstanding loans when they were unable to establish that a dividend had been properly declared).

15 Companies Act 2006 s 213(3)(a). See note 8.

16 Ie liable under the Companies Act 2006 s 213: see s 213(3)(b).

17 Companies Act 2006 s 213(3)(b). See note 8.

18 Ie in contravention of the Companies Act 2006 s 200 (see PARA 570), s 201 (see PARA 571) or s 203 (see PARA 572): see s 213(6).

19 Companies Act 2006 s 213(6). The text refers to securing compliance with s 200 (see PARA 570), s 201 (see PARA 571) or s 203 (see PARA 572), as the case may be: see s 213(6). See note 8.

20 Companies Act 2006 s 213(7)(a). See note 8.

21 Companies Act 2006 s 213(7)(b). See note 8.

22 Companies Act 2006 s 213(7). See note 8.

23 le nothing in the Companies Act 2006 s 213: see s 213(8).

24 As to the meaning of 'enactment' see PARA 17 note 2.

25 Companies Act 2006 s 213(8). See also *Baker v Potter* [2004] EWHC 1422 (Ch), [2004] All ER (D) 174 (Jun); *Queensway Systems Ltd (in liq) v Walker* [2006] EWHC 2496 (Ch), [2007] 2 BCLC 577.

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577. Effect of transaction or arrangement being subsequently affirmed.

Where a transaction or arrangement is entered into by a company¹ in contravention of the statutory provisions which require approval² for loans, quasi-loans, credit transactions and related arrangements, but where, within a reasonable period, it is affirmed³:

- 975 (1) in the case of a contravention of the requirement for a resolution of the members of the company⁴, by a resolution of the members of the company⁵; and
 976 (2) in the case of a contravention of the requirement for a resolution of the members of the company's holding company, by a resolution of the members of the holding company⁶,

the transaction or arrangement may no longer be avoided⁷.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie, in the case of loans made to a director of the company or of its holding company, or a guarantee given or security provided in connection with a loan made by any person to such a director, under the Companies Act 2006 s 197 (see PARA 568), in the case of quasi-loans made to a director of the company or of its holding company, or a guarantee given or security provided in connection with a quasi-loan made by any person to such a director, under s 198 (see PARA 569), in the case of loans or quasi-loans made to a person connected with a director of the company or of its holding company, or a guarantee given or security provided in connection with a loan or quasi-loan made by any person to a person connected with such a director, under s 200 (see PARA 570), in the case of credit transactions entered into by a company as creditor for the benefit of a director of the company or of its holding company (or a person connected with such a director) or a guarantee given or security provided in connection with a credit transaction entered into by any person for the benefit of such a director (or a person connected with such a director), under s 201 (see PARA 571) or, in the case of an arrangement under which another person enters into a transaction that, if it had been entered into by the company, would have required approval under s 197, s 198, s 200 or s 201, and that person, in pursuance of the arrangement, obtains a benefit from the company or a body corporate associated with it, or where a company arranges for the assignment to it, or assumption by it, of any rights, obligations or liabilities under a transaction that, if it had been entered into by the company, would have required such approval, under s 203 (see PARA 572): see s 214. As to the meaning of 'director' under the Companies Acts see PARA 478. As to the meaning of 'credit transaction' for these purposes see PARA 571 note 4; as to the meaning of 'holding company' see PARA 25; and as to the meaning of 'quasi-loan' for these purposes see PARA 569 note 4. As to the meaning of references to a person being 'connected' with a director see PARA 481. As to the validity generally of transactions involving a director or a person connected with a director see PARA 264.

As to the general application of the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) see PARA 561; and as to how those provisions interact with the directors' general duties see PARA 562.

3 Companies Act 2006 s 214.

4 As to the meaning of 'member of the company' see PARA 321. As to resolutions and meetings of members see PARA 629 et seq. As to voting at meetings see PARA 653 et seq.

5 Companies Act 2006 s 214(a).

6 Companies Act 2006 s 214(b).

7 Companies Act 2006 s 214. The text refers to avoidance of the transaction or arrangement under s 213 (see PARA 576): see s 214.

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E. PAYMENT FOR LOSS OF OFFICE

578. Definition of 'payment for loss of office'.

For the purposes of the provisions which govern transactions with directors¹ requiring the approval of members², 'payment for loss of office' means a payment made to a director or past director of a company³:

- 977 (1) by way of compensation⁴ for loss of office as director of the company⁵;
- 978 (2) by way of compensation for loss, while director of the company or in connection with his ceasing to be a director of it, of⁶: (a) any other office or employment in connection with the management of the affairs of the company⁷; or (b) any office (as director or otherwise) or employment in connection with the management of the affairs of any subsidiary undertaking⁸ of the company⁹;
- 979 (3) as consideration for or in connection with his retirement from his office as director of the company¹⁰; or
- 980 (4) as consideration for or in connection with his retirement, while director of the company or in connection with his ceasing to be a director of it, from¹¹: (a) any other office or employment in connection with the management of the affairs of the company¹²; or (b) any office (as director or otherwise) or employment in connection with the management of the affairs of any subsidiary undertaking of the company¹³.

For the purposes of the provisions which govern payments for loss of office requiring members' approval¹⁴, payment to a person connected with a director¹⁵, or payment to any person at the direction of, or for the benefit of, a director or a person connected with him¹⁶, is treated as payment to the director¹⁷.

1 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie in the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) (see PARA 561 et seq): see s 215(1). As to the meaning of 'member of the company' see PARA 321.

As to the general application of the Companies Act 2006 Pt 10 Ch 4 see PARA 561; and as to how those provisions interact with the directors' general duties see PARA 562.

3 Companies Act 2006 s 215(1). As to the meaning of 'company' under the Companies Acts see PARA 24.

The information required to be provided by s 412 (information about directors' emoluments and other benefits) may include payments for loss of office: see PARA 767. The requirements imposed by s 190 (substantial property transactions) do not apply to a transaction so far as it relates to payment for loss of office as defined in s 215: see s 190(6); and PARA 564.

4 The references to compensation and consideration include benefits otherwise than in cash and references in the Companies Act 2006 Pt 10 Ch 4 (see PARA 561 et seq) to payment have a corresponding meaning: s 215(2). As to the meaning of 'cash' see PARA 564 note 6. See also *Mercer v Heart of Midlothian plc* 2001 SLT 945, Ct of Sess (where it was not proved that the claimant's enjoyment of benefits had been of any cost to the defendant).

5 Companies Act 2006 s 215(1)(a). As to the retirement or removal of directors see PARA 515 et seq.

6 Companies Act 2006 s 215(1)(b).

7 Companies Act 2006 s 215(1)(b)(i). This provision closes the loophole discussed in *Taupo Totara Timber Co Ltd v Rowe* [1978] AC 537 at 545-546, [1977] 3 All ER 123 at 127-128, PC (sum contractually payable on retirement in connection, not simply with the office of director, but also with some employment held by director).

8 As to the meaning of 'subsidiary undertaking' see PARA 26.

9 Companies Act 2006 s 215(1)(b)(ii).

10 Companies Act 2006 s 215(1)(c).

11 Companies Act 2006 s 215(1)(d).

12 Companies Act 2006 s 215(1)(d)(i).

13 Companies Act 2006 s 215(1)(d)(ii).

14 I.e the Companies Act 2006 ss 217-221 (see PARA 579 et seq): see s 215(3). References in ss 217-221 to payment by a person include payment by another person at the direction of, or on behalf of, the person referred to: s 215(4).

15 Companies Act 2006 s 215(3)(a). As to the meaning of references to a person being 'connected' with a director see PARA 481. As to the validity generally of transactions involving a director or a person connected with a director see PARA 264.

16 Companies Act 2006 s 215(3)(b).

17 Companies Act 2006 s 215(3).

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579. Requirement of members' approval for payment by company for loss of office.

A company¹ may not make a payment for loss of office² to a director³ of the company unless the payment has been approved by a resolution of the members of the company⁴; and a company may not make such a payment to a director of its holding company⁵ unless the payment has been approved by a resolution of the members of each of those companies⁶.

A resolution approving such a payment⁷ must not be passed unless a memorandum setting out particulars of the proposed payment (including its amount) is made available to the members of the company whose approval is sought⁸:

981 (1) in the case of a written resolution⁹, by being sent or submitted to every eligible member¹⁰ at or before the time at which the proposed resolution is sent or submitted to him¹¹; or

982 (2) in the case of a resolution at a meeting, by being made available for inspection by members of the company both: (a) at the company's registered office¹² for not less than 15 days ending with the date of the meeting¹³; and (b) at the meeting itself¹⁴.

If the proposal is not so approved, the directors responsible for authorising the payment are guilty of misfeasance¹⁵.

However, no such approval is required¹⁶ on the part of the members of a body corporate¹⁷ that either is not a UK-registered company¹⁸, or is a wholly-owned subsidiary¹⁹ of another body corporate²⁰.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'payment for loss of office' see PARA 578.

3 As to the meaning of 'director' under the Companies Acts see PARA 478.

4 Companies Act 2006 s 217(1). As to the meaning of 'member of the company' see PARA 321. As to resolutions and meetings of members see PARA 629 et seq. As to voting at meetings see PARA 653 et seq.

As to exceptions to the requirement to obtain members' approval for payments to a director for loss of office see PARA 582; and as to civil consequences that may arise from any contravention of the requirement see PARA 583. As to the general application of the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) see PARA 561; and as to how those provisions interact with the directors' general duties see PARA 562.

5 As to the meaning of 'holding company' see PARA 25.

6 Companies Act 2006 s 217(2).

7 I.e. a payment to which the Companies Act 2006 s 217 applies: see s 217(3).

8 Companies Act 2006 s 217(3).

9 As to the meaning of 'written resolution' see PARA 623.

10 As to eligible members in relation to a resolution proposed as a written resolution of a private company see PARA 623. As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

11 Companies Act 2006 s 217(3)(a). Where approval under Pt 10 Ch 4 is sought by written resolution, and a memorandum is required under Pt 10 Ch 4 to be sent or submitted to every eligible member before the resolution is passed, provision is made for accidental failure to send or submit the memorandum to one or more members: see s 224; and PARA 561 note 7.

12 As to the company's registered office see PARA 129.

13 Companies Act 2006 s 217(3)(b)(i). See note 11.

14 Companies Act 2006 s 217(3)(b)(ii). See note 11.

15 *Re Duomatic Ltd* [1969] 2 Ch 365, [1969] 1 All ER 161. As to the power of the court to grant relief from liability in certain cases see PARA 600.

16 I.e. under the Companies Act 2006 s 217: see s 217(4).

17 As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5.

18 Companies Act 2006 s 217(4)(a). As to the meaning of 'UK-registered company' see PARA 24.

19 As to the meaning of 'wholly-owned subsidiary' see PARA 25.

20 Companies Act 2006 s 217(4)(b).

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580. Requirement of members' approval for payment for loss of office on a transfer of undertaking or property.

No payment for loss of office¹ may be made by any person to a director² of a company³ in connection with the transfer of the whole or any part of the undertaking⁴ or property of the company unless the payment has been approved by a resolution of the members of the company⁵; and no such payment may be made by any person to a director of a company in connection with the transfer of the whole or any part of the undertaking or property of a subsidiary⁶ of the company unless the payment has been approved by a resolution of the members of each of the companies⁷.

Where in connection with any such transfer⁸:

- 983 (1) a director of the company either is to cease to hold office⁹, or is to cease to be the holder of any other office or employment in connection with the management of the affairs of the company¹⁰, or any office (as director or otherwise) or employment in connection with the management of the affairs of any subsidiary undertaking of the company¹¹; and
- 984 (2) the price to be paid to the director for any shares¹² in the company held by him is in excess of the price which could at the time have been obtained by other holders of like shares¹³, or if any valuable consideration is given to the director by a person other than the company¹⁴,

the excess or, as the case may be, the money value of the consideration is taken¹⁵ to have been a payment for loss of office¹⁶.

A resolution approving any payment for loss of office on a transfer of undertaking¹⁷ must not be passed unless a memorandum setting out particulars of the proposed payment (including its amount) is made available to the members of the company whose approval is sought¹⁸:

- 985 (a) in the case of a written resolution¹⁹, by being sent or submitted to every eligible member²⁰ at or before the time at which the proposed resolution is sent or submitted to him²¹; or
- 986 (b) in the case of a resolution at a meeting, by being made available for inspection by members of the company both: (i) at the company's registered office²² for not less than 15 days ending with the date of the meeting²³; and (ii) at the meeting itself²⁴.

However, no such approval is required²⁵ on the part of the members of a body corporate²⁶ that either is not a UK-registered company²⁷, or is a wholly-owned subsidiary²⁸ of another body corporate²⁹.

1 As to the meaning of 'payment for loss of office' see PARA 578.

2 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

- 3 As to the meaning of 'company' under the Companies Acts see PARA 24.
- 4 As to the meaning of 'undertaking' in the Companies Acts see PARA 26 note 2.
- 5 Companies Act 2006 s 218(1). As to the meaning of 'member of the company' see PARA 321. As to resolutions and meetings of members see PARA 629 et seq. As to voting at meetings see PARA 653 et seq. A payment made in pursuance of an arrangement entered into as part of the agreement for the transfer in question (or within one year before or two years after that agreement) and to which the company whose undertaking or property is transferred (or any person to whom the transfer is made) is privy, is presumed, except in so far as the contrary is shown, to be a payment to which s 218 applies: s 218(5).
As to exceptions to the requirement to obtain members' approval for payments to a director for loss of office see PARA 582; and as to civil consequences that may arise from any contravention of the requirement see PARA 583. As to the general application of the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) see PARA 561; and as to how those provisions interact with the directors' general duties see PARA 562.
- 6 As to the meaning of 'subsidiary' see PARA 25.
- 7 Companies Act 2006 s 218(2). See note 5.
- 8 Ie as is mentioned in the Companies Act 2006 s 218: see s 216(1), (2).
- 9 Companies Act 2006 s 216(1)(a).
- 10 Companies Act 2006 s 216(1)(b)(i).
- 11 Companies Act 2006 s 216(1)(b)(ii). As to the meaning of 'subsidiary undertaking' see PARA 26.
- 12 As to the meaning of 'share' see PARA 1042.
- 13 Companies Act 2006 s 216(2)(a).
- 14 Companies Act 2006 s 216(2)(b).
- 15 Ie for the purposes of the Companies Act 2006 s 218: see s 216(2).
- 16 Companies Act 2006 s 216(2).
- 17 Ie a payment to which the Companies Act 2006 s 218 applies: see s 218(3).
- 18 Companies Act 2006 s 218(3).
- 19 As to the meaning of 'written resolution' see PARA 623.
- 20 As to eligible members in relation to a resolution proposed as a written resolution of a private company see PARA 623. As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.
- 21 Companies Act 2006 s 218(3)(a). Where approval under Pt 10 Ch 4 is sought by written resolution, and a memorandum is required under Pt 10 Ch 4 to be sent or submitted to every eligible member before the resolution is passed, provision is made for accidental failure to send or submit the memorandum to one or more members: see s 224; and PARA 561 note 7.
- 22 As to the company's registered office see PARA 129.
- 23 Companies Act 2006 s 218(3)(b)(i). See note 21.
- 24 Companies Act 2006 s 218(3)(b)(ii). See note 21.
- 25 Ie under the Companies Act 2006 s 218: see s 218(4).
- 26 As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5.
- 27 Companies Act 2006 s 218(4)(a). As to the meaning of 'UK-registered company' see PARA 24.
- 28 As to the meaning of 'wholly-owned subsidiary' see PARA 25.
- 29 Companies Act 2006 s 218(4)(b).

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581. Requirement of shareholders' approval for payment for loss of office in connection with share transfer.

No payment for loss of office¹ may be made by any person to a director² of a company³ in connection with a transfer of shares⁴ in the company, or in a subsidiary⁵ of the company, resulting from a takeover bid⁶ unless the payment has been approved by a resolution of the relevant shareholders⁷.

Where in connection with any such transfer⁸:

- 987 (1) a director of the company either is to cease to hold office⁹, or is to cease to be the holder of any other office or employment in connection with the management of the affairs of the company¹⁰, or any office (as director or otherwise) or employment in connection with the management of the affairs of any subsidiary undertaking of the company¹¹; and
- 988 (2) the price to be paid to the director for any shares in the company held by him is in excess of the price which could at the time have been obtained by other holders of like shares¹², or if any valuable consideration is given to the director by a person other than the company¹³,

the excess or, as the case may be, the money value of the consideration is taken¹⁴ to have been a payment for loss of office¹⁵.

A resolution approving a payment for loss of office in connection with a transfer of shares¹⁶ must not be passed unless a memorandum setting out particulars of the proposed payment (including its amount) is made available to the members of the company whose approval is sought¹⁷:

- 989 (a) in the case of a written resolution¹⁸, by being sent or submitted to every eligible member¹⁹ at or before the time at which the proposed resolution is sent or submitted to him²⁰; or
- 990 (b) in the case of a resolution at a meeting, by being made available for inspection by members of the company both: (i) at the company's registered office²¹ for not less than 15 days ending with the date of the meeting²²; and (ii) at the meeting itself²³.

Neither the person making the offer, nor any associate of his²⁴, is entitled to vote on the resolution²⁵. However, where the resolution is proposed as a written resolution, they are entitled (if they would otherwise be so entitled) to be sent a copy of it²⁶, and at any meeting to consider the resolution they are entitled (if they would otherwise be so entitled) to be given notice of the meeting, to attend and speak and if present (in person or by proxy) to count towards the quorum²⁷.

If at a meeting to consider the resolution a quorum is not present, and after the meeting has been adjourned to a later date a quorum is again not present, the payment is²⁸ deemed to have been approved²⁹.

No approval is required³⁰ on the part of shareholders in a body corporate³¹ that either is not a UK-registered company³², or is a wholly-owned subsidiary³³ of another body corporate³⁴.

1 As to the meaning of 'payment for loss of office' see PARA 578.

2 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'company' under the Companies Acts see PARA 24.

4 As to the meaning of 'share' see PARA 1042.

5 As to the meaning of 'subsidiary' see PARA 25.

6 As to takeover offers generally see PARA 1480 et seq.

7 Companies Act 2006 s 219(1). For these purposes, the relevant shareholders are the holders of the shares to which the bid relates and any holders of shares of the same class as any of those shares: s 219(2). As to the meaning of 'class of shares' see PARA 1057. As to shareholders and the membership of companies generally see PARA 321 et seq. As to resolutions and meetings of members see PARA 629 et seq; and as to voting at meetings see PARA 653 et seq. A payment made in pursuance of an arrangement entered into as part of the agreement for the transfer in question (or within one year before or two years after that agreement) and to which the company whose shares are the subject of the bid (or any person to whom the transfer is made) is privy, is presumed, except in so far as the contrary is shown, to be a payment to which s 219 applies: s 219(7).

As to exceptions to the requirement to obtain members' approval for payments to a director for loss of office see PARA 582; and as to civil consequences that may arise from any contravention of the requirement see PARA 583. As to the general application of the Companies Act 2006 Pt 10 Ch 4 (ss 188-226) see PARA 561; and as to how those provisions interact with the directors' general duties see PARA 562.

8 Ie as is mentioned in the Companies Act 2006 s 219: see s 216(1), (2).

9 Companies Act 2006 s 216(1)(a).

10 Companies Act 2006 s 216(1)(b)(i).

11 Companies Act 2006 s 216(1)(b)(ii). As to the meaning of 'subsidiary undertaking' see PARA 26.

12 Companies Act 2006 s 216(2)(a).

13 Companies Act 2006 s 216(2)(b).

14 Ie for the purposes of the Companies Act 2006 s 219: see s 216(2).

15 Companies Act 2006 s 216(2).

16 Ie a payment to which the Companies Act 2006 s 219 applies: see s 219(3).

17 Companies Act 2006 s 219(3).

18 As to the meaning of 'written resolution' see PARA 623.

19 As to eligible members in relation to a resolution proposed as a written resolution of a private company see PARA 623. As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

20 Companies Act 2006 s 219(3)(a). Where approval under Pt 10 Ch 4 is sought by written resolution, and a memorandum is required under Pt 10 Ch 4 to be sent or submitted to every eligible member before the resolution is passed, provision is made for accidental failure to send or submit the memorandum to one or more members: see s 224; and PARA 561 note 7.

21 As to the company's registered office see PARA 129.

22 Companies Act 2006 s 219(3)(b)(i). See note 20.

23 Companies Act 2006 s 219(3)(b)(ii). See note 20.

- 24 le as defined in the Companies Act 2006 s 988 (see PARA 1512): see s 219(4).
- 25 Companies Act 2006 s 219(4).
- 26 Companies Act 2006 s 219(4)(a).
- 27 Companies Act 2006 s 219(4)(b).
- 28 le for the purposes of the Companies Act 2006 s 219: see s 219(5).
- 29 Companies Act 2006 s 219(5).
- 30 le under the Companies Act 2006 s 219: see s 219(6).
- 31 As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5.
- 32 Companies Act 2006 s 219(6)(a). As to the meaning of 'UK-registered company' see PARA 24.
- 33 As to the meaning of 'wholly-owned subsidiary' see PARA 25.
- 34 Companies Act 2006 s 219(6)(b).

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582. Exceptions to requirement for approval for payment for loss of office.

Approval is not required under the provisions¹ that govern payments made to the director² of a company for loss of office for a payment made in good faith³:

- 991 (1) in discharge of an existing legal obligation⁴;
- 992 (2) by way of damages for breach of such an obligation⁵;
- 993 (3) by way of settlement or compromise of any claim arising in connection with the termination of a person's office or employment⁶; or
- 994 (4) by way of pension in respect of past services⁷.

A payment part of which falls within one or more of these categories⁸ and part of which does not is treated as if the parts were separate payments⁹.

Nor is such approval required¹⁰ if: (a) the payment in question is made by the company or any of its subsidiaries¹¹; and (b) the amount or value of the payment, together with the amount or value of any other relevant payments¹², does not exceed £200¹³.

1 le, in relation to the requirement of members' approval for payment for loss of office made by the company, under the Companies Act 2006 s 217 (see PARA 579) and, in relation to such payments on a transfer of undertaking or property, under s 218 (see PARA 580) and, in relation to the requirement of shareholders' approval for such payments in connection with a share transfer, under s 219 (see PARA 581): see s 220(1). As to the meaning of 'payment for loss of office' see PARA 578. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'director' under the Companies Acts see PARA 478.

3 Companies Act 2006 s 220(1).

4 Companies Act 2006 s 220(1)(a). Head (1) in the text may apply, for example, to contractual payments due under service agreements between the company and its managing director: see *Taupo Totara Timber Co Ltd v Rowe* [1978] AC 537, [1977] 3 All ER 123, PC (sum contractually payable on retirement).

In relation to a payment within s 217 (payment by company) (see PARA 579), an existing legal obligation means an obligation of the company, or any body corporate associated with it, that was not entered into in connection with, or in consequence of, the event giving rise to the payment for loss of office: s 220(2). As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5; and as to the meaning of bodies corporate which are 'associated' for the purposes of the Companies Act 2006 Pt 10 (ss 154-259) (see PARA 478 et seq) see PARA 553 note 4.

In relation to a payment within s 218 (payment in connection with transfer of undertaking or property) (see PARA 580) or s 219 (payment in connection with transfer of shares) (see PARA 581) an existing legal obligation means an obligation of the person making the payment that was not entered into for the purposes of, in connection with or in consequence of, the transfer in question: s 220(3).

In the case of a payment within both s 217 and s 218, or within both s 217 and s 219, s 220(2) applies and not s 220(3): s 220(4).

5 Companies Act 2006 s 220(1)(b). See note 4. If the director's service agreement contains inflation-proofing of his salary, this may be taken into account in arriving at any damages: *Re Crowther & Nicholson Ltd* (1981) 125 Sol Jo 529. As to directors' service contracts under the Companies Act 2006 see PARA 524 et seq.

6 Companies Act 2006 s 220(1)(c). Where the sum paid as compensation is payable under the terms of the service agreement upon the company electing to terminate it in accordance with its terms, the sum is a profit from the employment and taxable as such: *Dale v De Soissons* [1950] 2 All ER 460, CA.

7 Companies Act 2006 s 220(1)(d). This does not cover a lump sum payment made by directors who have no other power to pay pensions on the eve of liquidation: *Gibson's Executor v Gibson* 1980 SLT 2, Ct of Sess. Cf provision that may be made in a company's articles of association for special remuneration and expenses and pensions (cited in PARA 522).

8 le part of which falls within the Companies Act 2006 s 220(1): see s 220(5).

9 Companies Act 2006 s 220(5).

10 le, in relation to the requirement of members' approval for payment for loss of office made by the company, under the Companies Act 2006 s 217 (see PARA 579) and, in relation to such payments on a transfer of undertaking or property, under s 218 (see PARA 580) and, in relation to the requirement of shareholders' approval for such payments in connection with a share transfer, under s 219 (see PARA 581): see s 221(1).

11 Companies Act 2006 s 221(1)(a). As to the meaning of 'subsidiary' see PARA 25.

12 For this purpose, 'other relevant payments' are payments for loss of office in relation to which the following conditions are met (s 221(2)):

191 (1) where the payment in question is one to which s 217 (payment by company) (see PARA 579) applies, the conditions are that the other payment was or is paid: (a) by the company making the payment in question or any of its subsidiaries (s 221(3)(a)); (b) to the director to whom that payment is made (s 221(3)(b)); and (c) in connection with the same event (s 221(3)(c));

192 (2) where the payment in question is one to which s 218 (payment in connection with transfer of undertaking or property) (see PARA 580) or s 219 (payment in connection with transfer of shares) (see PARA 581) applies, the conditions are that the other payment was (or is) paid in connection with the same transfer: (a) to the director to whom the payment in question was made (s 221(4)(a)); and (b) by the company making the payment or any of its subsidiaries (s 221(4)(b)).

13 Companies Act 2006 s 221(1)(b). As to the Secretary of State's power by order to substitute for any sum of money specified in Pt 10 (see PARA 478 et seq) a larger sum specified in the order see PARA 564 note 6.

Members/E. PAYMENT FOR LOSS OF OFFICE/583. Civil consequences of payments for loss of office made without required approval.

583. Civil consequences of payments for loss of office made without required approval.

If a payment for loss of office¹ is made in contravention of the restriction imposed on such payments being made by a company² without members' approval³, it is held by the recipient on trust for the company making the payment⁴, and any director⁵ who authorised the payment is jointly and severally liable to indemnify the company that made the payment for any loss resulting from it⁶.

If a payment is made in contravention of the restriction imposed on such payments being made on a transfer of undertaking or property without members' approval⁷, it is held by the recipient on trust for the company whose undertaking or property is or is proposed to be transferred⁸.

If a payment is made in contravention of the restriction imposed on such payments being made in connection with a share⁹ transfer without shareholders' approval¹⁰, it is held by the recipient on trust for persons who have sold their shares as a result of the offer made¹¹, and the expenses incurred by the recipient in distributing that sum amongst those persons must be borne by him and not retained out of that sum¹².

1 As to the meaning of 'payment for loss of office' see PARA 578.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 I.e. in contravention of the Companies Act 2006 s 217 (see PARA 579): see s 222(1). If a payment is in contravention of both s 217 and s 218 (see PARA 580), s 222(2) (see the text and notes 7-8) applies rather than s 222(1): s 222(4). If a payment is in contravention of s 217 and s 219 (see PARA 581), s 222(3) (see the text and notes 9-12) applies rather than s 222(1), unless the court directs otherwise: s 222(5). As to the meaning of 'court' see PARA 212 note 1.

4 Companies Act 2006 s 222(1)(a). These statutory provisions give effect to and somewhat expand a principle of law already well recognised: see *Southall v British Mutual Life Assurance Society* (1871) 6 Ch App 614; *Gaskell v Chambers* (1858) 28 LJ Ch 385; *Kaye v Croydon Tramways Co* [1898] 1 Ch 358, CA; *Tiessen v Henderson* [1899] 1 Ch 861. As to the company's power to sell property see PARAS 320, 1440. See further *Clarkson v Davies* [1923] AC 100, PC. As to the fiduciary position of directors in respect of company property under their control see PARAS 539, 547.

5 As to the meaning of 'director' under the Companies Acts see PARA 478.

6 Companies Act 2006 s 222(1)(b).

7 I.e. in contravention of the Companies Act 2006 s 218 (see PARA 580): see s 222(2). See note 3.

8 Companies Act 2006 s 222(2). See further *Clarkson v Davies* [1923] AC 100, PC (in a claim to recover sums improperly paid to a director by way of compensation on the transfer of a business from one company to another, the transferor company is a necessary party). See also notes 3, 4.

9 As to the meaning of 'share' see PARA 1042.

10 I.e. in contravention of the Companies Act 2006 s 219 (see PARA 581): see s 222(3).

11 Companies Act 2006 s 222(3)(a). See also notes 3, 4.

12 Companies Act 2006 s 222(3)(b). See also notes 3, 4.

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(viii) Contracts involving Limited Company with Sole Member

584. Contracts with a sole member who is also a director.

Where a limited company¹ having only one member² enters into a contract with the sole member of the company³, and the sole member is also a director of the company⁴, and where the contract is not entered into in the ordinary course of the company's business⁵, the company must, unless the contract is in writing, ensure that the terms of the contract are either: (1) set out in a written memorandum⁶; or (2) recorded in the minutes of the first meeting of the directors of the company⁷ following the making of the contract⁸.

If a company fails to comply with this restriction⁹, an offence is committed by every officer of the company who is in default¹⁰, and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale¹¹.

Nothing in the provisions which set out this restriction¹² is to be read as excluding the operation of any other enactment¹³ or rule of law applying to contracts between a company and a director of that company¹⁴. Failure to comply with the restriction¹⁵ in relation to a contract does not, however, affect the validity of that contract¹⁶.

1 As to the meaning of 'limited company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'member' see PARA 321.

3 Companies Act 2006 s 231(1)(a).

4 Companies Act 2006 s 231(1)(b). As to the meaning of 'director' under the Companies Acts see PARA 478. For these purposes, a shadow director is treated as a director: s 231(5). As to the meaning of 'shadow director' see PARA 479.

5 Companies Act 2006 s 231(1)(c). As to the meaning of 'business' generally see PARA 1 note 1.

6 Companies Act 2006 s 231(2)(a).

7 As to meetings of directors generally see PARA 528 et seq.

8 Companies Act 2006 s 231(2)(b).

9 If it fails to comply with the Companies Act 2006 s 231: see s 231(3).

10 Companies Act 2006 s 231(3). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

11 Companies Act 2006 s 231(4). As to the meaning of 'standard scale' see PARA 1622 note 5.

12 If nothing in the Companies Act 2006 s 231: see s 231(7).

13 As to the meaning of 'enactment' see PARA 17 note 2.

14 Companies Act 2006 s 231(7).

15 If failure to comply with the Companies Act 2006 s 231: see s 231(6).

16 Companies Act 2006 s 231(6).

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(ix) Directors' Liabilities for Breach of Duty

A. LIABILITIES OF DIRECTORS

585. Directors' liability to company.

A company's directors¹, acting as such within their powers² and within the powers of the company³ and without fraud, negligence or breach of fiduciary duty, incur no personal liability⁴. Where, however, they expend the property of the company in a manner which is ultra vires the company, as, for example, in paying a dividend out of capital⁵, or returning capital without legal reduction of capital⁶, or making unauthorised investments⁷, there is a liability on them to recoup any loss, and, if they occasion damage to the company by negligence, they may be liable to the extent of the damage caused⁸. If they dispose of the company's assets in breach of their fiduciary duties they may be treated as having committed a breach of trust and a director who is himself the recipient of assets holds them upon a trust for the company⁹.

A director who signed various stock transfers whereby shares held by the company as trustee for a number of pension funds were transferred to another company of which he was also a director, without the authority of the board of directors, and as a result of the transfer the company suffered loss, was in breach of duty and liable to the company for the loss as he was exercising his powers for an improper purpose¹⁰. If a company is the victim of a conspiracy by its directors who force it to do something illegal, it is not to be regarded as a party thereto by reason of the directors' knowledge, but may sue them in conspiracy for any loss it suffers¹¹. The claim may be brought by the company, but, where the cause of action arises from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company, any member of the company may take action, with the permission of the court¹². It may be possible for the company to ratify conduct by a director amounting to a breach of duty, in which case no liability arises¹³.

Proceedings may be taken in the winding up of a company against the directors for negligence, default, breach of duty, and breach of trust¹⁴.

A claim may be made by the company or on behalf of the company (for example, by a liquidator) but, if the company has been dissolved, the liability of the directors is extinguished by that dissolution, unless the dissolution is set aside by the court¹⁵.

1 As to a company's directors see PARA 478 et seq.

2 As to the powers of directors see PARA 544 et seq.

3 As to the powers of companies see PARA 252 et seq. As to acts which are ultra vires the company or beyond the board of directors' authority see PARA 542.

4 As to the general duties of directors see PARA 532 et seq.

5 *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co v Sharpe* [1892] 1 Ch 154 at 165-166, CA, per Lindley LJ. See also *Flitcroft's Case* (1882) 21 ChD 519 at 535-536, CA, per Cotton LJ; *Bairstow v Queens Moat Houses plc* [2001] EWCA Civ 712, [2001] 2 BCLC 531; *Re Loquitur Ltd, IRC v Richmond* [2003] EWHC 999 (Ch) at [135]-[137], [2003] 2 BCLC 442 at [135]-[137] per Etherton J. See also PARA 1390.

Directors who took funds from their company in the form of interest-free loans and, at the end of each financial year, declared dividends which were then used to extinguish their liability to the company were jointly and severally liable for the repayment of the outstanding loans when they were unable to establish that a dividend had been properly declared: *Queensway Systems Ltd (in liquidation) v Walker* [2006] EWHC 2496 (Ch), [2007] 2 BCLC 577.

6 See *Moxham v Grant* [1900] 1 QB 88, CA (claim for repayment enforceable against directors or shareholders; directors entitled to indemnity); *Holmes v Newcastle-upon-Tyne Freehold Abattoir Co* (1875) 1 ChD 682 (all shareholders and persons who took part in the transaction being before the court, repayment ordered). The doing of ultra vires acts may also be restrained: *Smith v Duke of Manchester* (1883) 24 ChD 611. See also PARA 542.

7 *Re Lands Allotment Co* [1894] 1 Ch 616, CA.

8 As to a director's duty to exercise reasonable care, skill and diligence see PARA 548 et seq.

9 As to a director's liability for breach of trust see PARA 586.

10 *Bishopsgate Investment Management Ltd (in liquidation) v Maxwell (No 2)* [1994] 1 All ER 261 at 265, CA, per Hoffmann LJ. As to the common law principles which govern the exercise of a company's powers for an improper purpose see PARA 543.

11 *Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] Ch 250, [1979] 1 All ER 118, CA (financial aid by company for purchase of its own shares).

12 See the Companies Act 2006 Pt 11 Ch 1 (ss 260-264) (derivative claims in England and Wales or Northern Ireland); and PARA 455 et seq.

13 See PARA 593.

14 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688 et seq.

15 *Coxon v Gorst* [1891] 2 Ch 73. As to the power of the court to declare a dissolution void see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 937.

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586. Breach of trust by directors.

Although the directors of a company¹ are not properly speaking trustees, they have always been considered and treated as trustees of company money or property which comes into their hands or which is under their control². A director who has misapplied or retained or become liable or accountable for any money or property of the company is treated as having committed a breach of trust and must make good the money or property so misapplied and account for any gains made by him³.

Where the loss arises from the unauthorised application of the company's property, the measure of compensation is the value of the company's property which has been misapplied and the director may be held liable even though he has not himself received any of the misapplied property⁴. If improper dividends are paid (on the basis that either statute or common law has been breached), the entire amount is recoverable from the directors⁵. If, on the other hand, a dividend could lawfully be declared, and the directors declare an excessive dividend, the directors are liable only for the excess, being the unlawful part⁶. If a director is the recipient of company assets obtained in breach of his fiduciary duties, he holds those assets on trust for the company as a result of his pre-existing trustee-like responsibilities to the company⁷. In this way, the underlying basis of the liability of a director who exploits, after his resignation, a maturing business opportunity of the company is that the opportunity is to be

treated as if it were the property of the company in relation to which the director had fiduciary duties; by seeking to exploit the opportunity after resignation, he is appropriating to himself that property, and he is just as accountable as a trustee who retires without properly accounting for trust property⁸.

Where the director's breach of fiduciary duty does not involve any use of the company's assets or property, so that the question is not one of a specific fund or asset being returned to the company, his liability is a personal liability in equity to account to the company for unauthorised profits made by him which are treated as taken for and on behalf of the company⁹.

A director may also be liable to pay equitable compensation to a company where, as a result of a breach of fiduciary duty on his part, the company has suffered loss¹⁰.

Where the money of the company has been applied for purposes which the company cannot sanction, the directors must replace it, however honestly they may have acted¹¹.

A director is liable for the acts of his co-directors, if, knowing that they intend to commit a breach of trust, he does not, by applying for an injunction or otherwise¹², take steps to prevent it. A managing director is equally responsible although required 'to act under the orders and directions of the board'¹³. However, a director is not so liable where he does not know of the breach of trust before or at its occurrence, for example, by his absence from a board meeting, and does not expressly or tacitly concur in its continuance¹⁴. If he is in fact acting on the instructions of a third party, he will be fixed with that person's knowledge of the transaction¹⁵. Merely attending a director's meeting which confirms the illegal acts of a past meeting is not necessarily sufficient to fix responsibility¹⁶. The liability of directors participating in breaches of trust and in respect of secret profits is joint and several¹⁷.

The estate of a deceased director has always been liable for his breaches of trust¹⁸; and, since 25 July 1934¹⁹, all causes of action subsisting against a deceased person at his death generally survive against his estate²⁰.

1 As to a company's directors see PARA 478 et seq.

2 *Re Lands Allotment Co* [1894] 1 Ch 616, CA; *Re Forest of Dean Coal Mining Co* (1878) 10 ChD 450 at 453 per Jessel MR; *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co v Sharpe* [1892] 1 Ch 154 at 165, CA, per Lindley LJ; *Belmont Finance Corp Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 404, CA, per Buckley LJ; *Re Duckwari plc* [1999] Ch 253, sub nom *Re Duckwari plc (No 2)*, *Duckwari plc v Offerventure Ltd (No 2)* [1998] 2 BCLC 315, CA; *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [2002] 1 BCLC 162; *Re Loquitur Ltd, IRC v Richmond* [2003] EWHC 999 (Ch) at [135], [2003] 2 BCLC 442 at [135] per Etherton J; *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048, [2004] 1 BCLC 131. As to the directors' position at common law as trustees of the company's property see PARA 539 et seq.

3 *Flitcroft's Case* (1882) 21 ChD 519 at 535-536, CA, per Cotton LJ; *Bairstow v Queens Moat Houses plc* [2001] EWCA Civ 712, [2001] 2 BCLC 531; *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [2002] 1 BCLC 162; *Re Duckwari plc* [1999] Ch 253, sub nom *Re Duckwari plc (No 2)*, *Duckwari plc v Offerventure Ltd (No 2)* [1998] 2 BCLC 315, CA; *Re Loquitur Ltd, IRC v Richmond* [2003] EWHC 999 (Ch) at [135]-[137], [2003] 2 BCLC 442 at [135]-[137] per Etherton J; *Re MDA Investment Management Ltd, Whalley v Doney* [2004] EWHC 42 (Ch), [2004] All ER (D) 165 (Jan). See also the cases cited in note 2; and *Land Credit Co of Ireland v Lord Fermoy* (1870) 5 Ch App 763 (company's money used for purchasing its shares); *Joint Stock Discount Co v Brown* (1869) LR 8 Eq 381 (buying shares in another company); *Imperial Mercantile Credit Association v Chapman* (1871) 19 WR 379 (loans to brokers for losses incurred in 'bulling' the market); *Selangor United Rubber Estates Ltd v Cradock (a bankrupt) (No 3)* [1968] 2 All ER 1073, [1968] 1 WLR 1555 (company's money utilised for acquisition of its own shares).

As to the duty to account see further *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 (profits from subsequent contracts); *Re Quarter Master UK Ltd, Quarter Master UK v Pyke* [2004] EWHC 1815 (Ch), [2005] 1 BCLC 245 (liability of director and company through which his profits are channelled); *Murad v Al-Saraj* [2005] EWCA Civ 959 at [56], [77], [108], [2005] All ER (D) 503 (Jul) at [56], [77], [108] (purpose of accounting and burden of proof); *Kingsley IT Consulting Ltd v McIntosh* [2006] EWHC 1288 (Ch), [2006] All ER (D) 237 (Feb) (profits from subsequent contracts); *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200 at [88], [101], [2007] 2 BCLC 239 at [88], [101] (purpose of accounting).

Proceedings for misfeasance are generally taken in the winding up of the company: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688.

4 *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048 at [142], [2004] 1 BCLC 131 at [142] per Mummery LJ.

5 *Re Lands Allotment Co* [1894] 1 Ch 616, CA; *Bairstow v Queens Moat Houses plc* [2001] EWCA Civ 712, [2001] 2 BCLC 531, distinguishing *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421, [1995] 3 All ER 785, HL. See also *Inn Spirit Ltd v Burns* [2002] EWHC 1731 (Ch), [2002] 2 BCLC 780; *Allied Carpets Group plc v Nethercott* [2001] BCC 81. Quaere whether directors might be excused under the Companies Act 2006 s 1157 (see PARA 600) from repaying more than is necessary to enable creditors to be paid in full: *Inn Spirit Ltd v Burns* at [30] per Rimer J.

6 See *Re Marini Ltd* [2003] EWHC 334 (Ch), [2004] BCC 172.

7 *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [2002] 1 BCLC 162. See also *Allied Carpets Group plc v Nethercott* [2001] BCC 81; *Clark v Cutland* [2003] EWCA Civ 810, [2003] 4 All ER 733, [2004] 1 WLR 783 (company entitled to proprietary remedy where unauthorised payments to pension fund trustees were received by them as innocent volunteers); *Bracken Partners Ltd v Gutteridge* [2003] EWCA Civ 1875, [2004] 1 BCLC 377; *Primlake Ltd v Matthew Associates* [2006] EWHC 1227 (Ch), [2007] 1 BCLC 666; and the cases cited in notes 5,6.

8 See *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704; approved in *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200 at [8]-[10], [2007] 2 BCLC 239 at [8]-[10] per Rix LJ.

9 *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048 at [118], [2004] 1 BCLC 131 at [118] per Mummery LJ; and see also this case at first instance, sub nom *DEG-Deutsche Investitions und Entwicklungsgesellschaft mbH v Koshy (No 2)*, *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2002] 1 BCLC 478 at 561 per Rimer J. The court will impose a constructive trust on such profits for the company's benefit, such trust being a class 2 trust within the classification given in *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 at 408-409, CA, per Millett LJ, ie a trust obligation arising directly out of an unlawful transaction which gave rise to the profits and which is impeached by the claimant: *Gwembe Valley Development Co Ltd v Koshy (No 3)* at [119] per Mummery LJ.

10 *Swindle v Harrison* [1997] 4 All ER 705, CA; *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421, [1995] 3 All ER 785, HL. Quaere whether the remedy of equitable compensation is available, as distinct from the remedies of rescission and account of profits, where there is a mere failure by a director to disclose his interest in a transaction with a company: *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048 at [143], [2004] 1 BCLC 131 at [143] per Mummery LJ. See also *Extrasure Travel Insurances Ltd v Scattergood* [2002] EWHC 3093 (Ch), [2003] 1 BCLC 598; and *Shepherds Investments Ltd v Walters* [2006] EWHC 836 (Ch), [2007] 2 BCLC 202.

11 *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co v Sharpe* [1892] 1 Ch 154 at 165-166, CA, per Lindley LJ; *Cullerne v London and Suburban General Permanent Building Society* (1890) 25 QBD 485 at 490, CA, per Lindley LJ, overruling *Pickering v Stephenson* (1872) LR 14 Eq 322. See also *Peel v London and North Western Ry Co* [1907] 1 Ch 5 at 20, CA, per Buckley LJ; *London Trust Co Ltd v Mackenzie* (1893) 62 LJ Ch 870; contra *Re Kingston Cotton Mill Co (No 2)* [1896] 1 Ch 331 at 346 per Vaughan Williams J (revsd on one point [1896] 2 Ch 279, CA). Where money paid to a company for a particular purpose has been misapplied by the sole shareholders and directors, they may be personally liable to account for the company's breach of trust to the persons paying the money: *Brenes & Co v Downie* 1914 SC 97, Ct of Sess.

12 *Re Lands Allotment Co* [1894] 1 Ch 616, CA; *Neville v Krikorian* [2006] EWCA Civ 943, [2007] 1 BCLC 1. Cf *J & P Coats Ltd v Crossland* (1904) 20 TLR 800; *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] EWHC 466 (Ch), [2003] 2 BCLC 523. A protest is not sufficient (*Jackson v Munster Bank* (1885) 15 LR Ir 356; *Joint Stock Discount Co v Brown* (1869) LR 8 Eq 381). See also *Ramskill v Edwards* (1885) 31 ChD 100 at 111 per Pearson J; *Land Credit Co of Ireland v Lord Fermoy* (1870) 5 Ch App 763; *London Trust Co Ltd v Mackenzie* (1893) 62 LJ Ch 870. Acquiescence is not to be too readily inferred: *Ashhurst v Mason* (1875) LR 20 Eq 225. As to ratification by acquiescence see **AGENCY** vol 1 (2008) PARA 68.

13 *Ramskill v Edwards* (1885) 31 ChD 100.

14 *Cargill v Bower* (1878) 10 ChD 502; *Caledonian Heritable Security Co (liquidator) v Currors Trustee* (1882) 9 R 1115 (loan without security); *Re Denham & Co* (1883) 25 ChD 752 (dividends paid out of capital); *Marquis of Bute's Case* [1892] 2 Ch 100.

15 *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073, [1968] 1 WLR 1555. See also PARA 587.

16 *Re Montrotier Asphalte Co, Perry's Case* (1876) 34 LT 716; *Ashhurst v Mason* (1875) LR 20 Eq 225.

17 *Re Carriage Co-operative Supply Association* (1884) 27 ChD 322; *Re Englefield Colliery Co* (1878) 8 ChD 388, CA; *Re Oxford Benefit Building and Investment Society* (1886) 35 ChD 502; *Leeds Estate Building and Investment Co v Shepherd* (1887) 36 ChD 787; *Re Faure Electric Accumulator Co* (1888) 40 ChD 141 at 158 per Kay J. Cf *General Exchange Bank v Horner* (1870) LR 9 Eq 480; *Gluckstein v Barnes* [1900] AC 240 at 255, HL, per Lord Macnaghten; *Re Duckwari plc* [1999] Ch 253 at 262, sub nom *Re Duckwari plc (No 2)*, *Duckwari plc v Offerventure Ltd (No 2)* [1998] 2 BCLC 315 at 322, CA, per Nourse LJ. See also *Benson v Heathorn* (1842) 1 Y & C Ch Cas 326.

18 *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co v Sharpe* [1892] 1 Ch 154, CA; *Joint Stock Discount Co v Brown* (1869) LR 8 Eq 381; *Ramskill v Edwards* (1885) 31 ChD 100. Cf *Shepherd v Bray* [1906] 2 Ch 235 (revsd by consent, and doubted [1907] 2 Ch 571, CA).

19 Ie the date on which the Law Reform (Miscellaneous Provisions) Act 1934 came into force.

20 See the Law Reform (Miscellaneous Provisions) Act 1934 s 1; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 814. There are certain immaterial exceptions: see s 1(1); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 814.

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587. Liability of persons sharing in breach of trust by directors.

All persons dealing with a director¹, knowing that he is committing a breach of trust in the transaction, must repay the loss to the company with interest².

In a claim based on knowing receipt of trust funds, the test for knowledge in such a claim is simply whether the defendant's knowledge makes it unconscionable for him to retain the benefit of the receipt³. A third party who dishonestly procures or assists the directors in a breach of their fiduciary duties is liable; and for the most part dishonesty is to be equated with conscious impropriety⁴. A fraudulent breach of trust is established in such cases where a person is proved to have acted in a way that was contrary to normally acceptable standards of honest conduct, and was conscious of (or deliberately turned a blind eye to) those elements of the transaction in question that made his participation fall below those standards; but it is not necessary to establish that the person in question knew or gave any thought to what amounted to normally acceptable standards of conduct⁵.

A director who is in partnership is liable as regards his separate estate for the property of a company which has come into the hands of his firm and which is misappropriated by his firm with his concurrence⁶.

1 As to a company's directors see PARA 478 et seq.

2 *Gray v Lewis* (1869) LR 8 Eq 526 at 544 per Sir R Malins V-C (revsd on the facts (1873) 8 Ch App 1035). Cf *Lund v Blanshard* (1844) 4 Hare 9; *Bryson v Warwick and Birmingham Canal Co* (1853) 4 De GM & G 711. As to the rate of interest see **TRUSTS** vol 48 (2007 Reissue) PARA 1108.

3 *Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Akindele* [2001] Ch 437, [2000] 4 All ER 221, CA. See also *Crown Dilmun v Sutton* [2004] EWHC 52 (Ch) at [200], [2004] 1 BCLC 468 at [200] per Peter Smith J; and **TRUSTS** vol 48 (2007 Reissue) PARA 704.

4 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, [1995] 3 All ER 97, PC. See also *Twinsectra Ltd v Yardley* [2002] UKHL 12 at [36], [2002] 2 AC 164, [2002] 2 All ER 377 at [36] per Lord Hutton (dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he sets his own standards of honesty and does

not regard as dishonest what he knows would offend the normally accepted standards of honest conduct). See also *Crown Dilmun v Sutton* [2004] EWHC 52 (Ch) at [204], [2004] 1 BCLC 468 at [204] per Peter Smith J; *Bracken Partners Ltd v Gutteridge* [2003] EWCA Civ 1875, [2004] 1 BCLC 377; *Barlow Clowes International Ltd (in Liquidation) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 All ER 333, [2006] 1 WLR 1476; *Abou-Ramah v Abacha* [2006] EWCA Civ 1492, [2007] 1 All ER (Comm) 827; *Mullarkey v Broad* [2007] EWHC 3400 (Ch), [2008] 1 BCLC 638; *Statek Corp v Alford* [2008] EWHC 32 (Ch), (2008) Times, 12 February, [2008] All ER (D) 52 (Jan). Accessory liability for dishonest assistance in a breach of trust is discussed fully in **TRUSTS** vol 48 (2007 Reissue) PARA 704; but see also the text and note 5.

As to the duties of directors to safeguard the assets of the company, and for that purpose to take reasonable steps to prevent and detect fraud and other irregularities, see eg *Re Barings (No 5)* [1999] 1 BCLC 433; *Westmid Packing Services Ltd* [1988] 2 BCLC 646, CA; *Lexi Holdings (in administration) v Luqman* [2009] EWCA Civ 117, [2009] 2 BCLC 1, [2009] All ER (D) 269 (Feb); and see PARA 549.

5 See *Mullarkey v Broad* [2007] EWHC 3400 (Ch) at [36]-[38], [2008] 1 BCLC 638 at [36]-[38] per Lewison J, following *Abou-Ramah v Abacha* [2006] EWCA Civ 1492 at [69], [2007] 1 All ER (Comm) 827 at [69] per Arden LJ, in stating that the meaning of dishonesty in this respect is as laid down in *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164, [2002] 2 All ER 377, as interpreted in *Barlow Clowes International Ltd (in Liquidation) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 All ER 333.

6 *Re Macfadyen, ex p Vizianagaram Mining Co Ltd* [1908] 2 KB 817, CA. The proof is for a debt and not for damages: *Re Macfadyen, ex p Vizianagaram Mining Co Ltd*; *Re Collie, ex p Adamson* (1878) 8 ChD 807 at 819, CA, per James LJ and Baggallay LJ.

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588. Directors' liability for breach of duty in tort.

A company's directors¹ are not liable for the company's torts unless they themselves committed or authorised², directed or procured the commission of the tortious act³; the mere fact that its directors are the sole directors and shareholders will not automatically render them liable for torts committed by the company⁴. Nor is a governing or managing director automatically so liable⁵. Such liability is not automatic; if the tort involved required some particular state of mind or knowledge on the part of the tortfeasor, the director could not be made liable without proof that he himself had that state of mind or knowledge⁶. However, the suggestion that he must, to be liable, in every case act deliberately or recklessly is not justified⁷.

A director is not liable as joint tortfeasor with the company, on the basis that he authorised, directed or procured the wrongful act, if he does no more than carry out his constitutional role in the governance of the company⁸.

A director cannot escape liability for deceit on the ground that his act was committed on behalf of the company⁹; but he will not be liable for negligent misstatement where the claimant cannot establish any assumption of responsibility on the part of the director on which the claimant could reasonably rely¹⁰.

Where the director is liable personally for the commission of a tort, his liability depends upon the usual principles and does not derive from his status as director, regardless of the fact that others (such as a company) may be liable also for the same tort, depending on the circumstances¹¹.

1 As to a company's directors see PARA 478 et seq.

2 See note 11.

3 *Rainham Chemical Works v Belvedere Fish Guano Co* [1921] 2 AC 465 at 475-476, HL, per Lord Buckmaster; *Performing Right Society Ltd v Caryl Theatrical Syndicate Ltd* [1924] 1 KB 1 at 14-15, CA, per Atkin LJ; *British Thomson-Houston Co Ltd v Sterling Accessories Ltd* [1924] 2 Ch 33; *Mancetter Developments Ltd v Garmanson Ltd* [1986] QB 1212, [1986] 1 All ER 449, CA. See also *Wah Tat Bank Ltd v Chan Cheng Kum* [1975] AC 507, [1975] 2 All ER 257, PC; *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 2 All ER 415, [1985] 1 WLR 317, CA; *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517, NZCA; *MCA Records Inc v Charly Records Ltd* [2001] EWCA Civ 1441, [2002] FSR 401, [2003] 1 BCLC 93.

4 *British Thomson-Houston Co Ltd v Sterling Accessories Ltd* [1924] 2 Ch 33. See also *Societa Esplosivi Industriali SpA v Ordnance Technologies Ltd* [2007] EWHC 2875 (Ch), [2008] 2 All ER 622, [2008] 2 BCLC 428 (defendant, as the only director and shareholder in the defendant company, had personal liability for breaching, or allowing the breach of, the claimant's design right).

5 *Performing Right Society Ltd v Caryl Theatrical Syndicate Ltd* [1924] 1 KB 1 at 14-15, CA, per Atkin LJ.

6 *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 2 All ER 415 at 424, [1985] 1 WLR 317 at 329, CA, per Slade LJ.

7 *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 2 All ER 415, [1985] 1 WLR 317, CA (disapproving *White Horse Distillers Ltd v Gregson Associates Ltd* [1984] RPC 61 and dictum of Whitford J in *Hoover plc v George Hulme (Stockport) Ltd* [1982] FSR 565 at 595-597; and doubting *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195).

8 *MCA Records Inc v Charly Records Ltd* [2001] EWCA Civ 1441, [2002] FSR 401, [2003] 1 BCLC 93 (intellectual property infringement); *Koninklijke Philips Electronics NV v Prico Digital Disc GmbH* [2003] EWHC 2588 (Ch), [2004] 2 BCLC 50 (patent infringement).

9 *Standard Chartered Bank v Pakistan National Shipping Corpn (No 2)* [2002] UKHL 43, [2003] 1 AC 959, [2003] 1 BCLC 244 (director liable not because he was a director but because he had committed a fraud); and see *GE Commercial Finance Ltd v Gee* [2005] EWHC 2056 (QB), [2006] 1 Lloyd's Rep 337 (intent to enter into conspiracy in order to benefit the group and to injure the claimant not shared by all directors).

10 *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 BCLC 689, HL. See also *Partco Group Ltd v Wragg* [2002] EWCA Civ 594, [2002] 2 Lloyd's Rep 343, [2002] 2 BCLC 323. See also the Companies Act 2006 s 463 (liability for false or misleading statements in reports); and PARA 868.

11 *Standard Chartered Bank v Pakistan National Shipping Corpn (No 2)* [2003] 1 AC 959, [2003] 1 BCLC 244, HL (fraudulent misrepresentation). See also *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 BCLC 689, HL (negligent misstatement); *Noel v Poland* [2001] 2 BCLC 645 (fraudulent misrepresentation). See also *Contex Drouzhba Ltd v Wiseman* [2007] EWCA Civ 1201, [2008] 1 BCLC 631; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 804.

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589. Directors' liability for false statements etc in offer documents etc.

Directors¹ may incur liability to persons who subscribe for shares or debentures of the company in reliance on offer documents which contain material misrepresentations of fact².

They may also incur liability by reason of false reports made by them to the company with the intention of attracting investors, and acted on by a subsequent investor to his damage³.

A director is not liable for untrue representations made to the shareholders in the balance sheets of the company if he honestly believed the representations to be true, and acted without negligence⁴. Where a company is formed to take over an existing business which turns out to be ruinous, the directors will not be responsible for making the purchase unless the ruinous nature of the business must have been obvious to any person acting with an ordinary degree of prudence, on the same principle that protects an agent purchasing by authority of

his principal⁵. Shareholders will be liable in damages to persons to whom they have sold their shares on the faith of fraudulent statements made on their behalf by a director authorised to negotiate on their behalf ⁶.

A director who has in fact retired is not liable for subsequent statements or acts, although he may know that his name is appearing on a report which is impugned⁷.

1 As to a company's directors see PARA 478 et seq.

2 As to statutory liability for misstatements see PARA 1070 et seq. As to claims in deceit see PARA 1081 et seq.

3 *Scott v Dixon* (1859) 29 LJ Ex 62n. See further PARA 1087.

4 *Dovey v Cory* [1901] AC 477, HL.

5 *Overend, Gurney & Co v Gibb and Gibb* (1872) LR 5 HL 480 at 487, 495 per Lord Hatherley LC. See **AGENCY** vol 1 (2008) PARA 74 et seq.

6 *Briess v Woolley* [1954] AC 333, [1954] 1 All ER 909, HL.

7 *Re National Bank of Wales Ltd* [1899] 2 Ch 629, CA; affd on other grounds sub nom *Dovey v Cory* [1901] AC 477, HL.

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590. Directors' liability to creditors.

A company's directors¹ are not trustees for the creditors, present² or future³, of the company, even as regards one to whom the company stands in a fiduciary relationship⁴. The creditors, therefore, except as holders of security on any property of the company, and for the purpose of realising their security, have no right of interference with the company or its affairs, and have no remedy against a director for negligence in the conduct of its business⁵ or for breach of contract by the company⁶. A creditor cannot obtain an injunction against either the company or its directors in respect of ultra vires acts⁷. However, the rule making the directors liable for acts ultra vires the company operates to preserve the capital of the company and make it available for payment of creditors⁸.

Directors may, however, be liable to third persons for breach of warranty of authority to act on behalf of the company⁹; and they are also jointly and severally liable, if a public company of which they are directors enters into transactions before the company has been issued by the registrar with a certificate that it may do business and exercise borrowing powers¹⁰ and then fails to comply with its obligations in that connection within 21 days from being called upon to do so, to indemnify the other party to the transaction in respect of any loss or damage suffered by him by reason of such failure by the company¹¹.

Directors are not liable in negligence to the company's creditors unless particular circumstances exist, for example, by way of agreement or a contractual guarantee¹².

1 As to a company's directors see PARA 478 et seq.

2 *Poole, Jackson and Whyte's Case* (1878) 9 ChD 322, CA (where directors paid up their shares in full, whereby a creditor was preferred in obtaining payment and they themselves were relieved from liability as

guarantors); *Re AM Wood's Ships' Woodite Protection Co Ltd* (1890) 62 LT 760 (where directors, in good faith, paid themselves remuneration in advance which they applied in payment of amounts unpaid on their shares).

3 *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258 at 288, [1983] 2 All ER 563 at 585, CA, per Dillon LJ. See also *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187, [1990] 3 All ER 404, PC (in circumstances where a bank held a beneficial interest in a company and appointed two directors of that company as its nominees, it was decided that a shareholder or other person who has powers to appoint a director, without fraud or bad faith, owes no duty to creditors of the company to make sure that any director so appointed discharges his duties appropriately); *Yukong Lines Ltd of Korea v Rendsburg Investments Corp of Liberia, The Rialto (No 2)* [1998] 4 All ER 82, [1998] 1 WLR 294 (the director of an insolvent company did not owe a direct fiduciary duty towards an individual creditor nor was an individual creditor entitled to sue for breach of the fiduciary duty owed by the director to the company). See PARA 545.

4 *Bath v Standard Land Co Ltd* [1911] 1 Ch 618, CA. A director does, however, have a duty in some circumstances to consider or act in the interests of creditors: see PARA 545.

5 *Wilson v Lord Bury* (1880) 5 QBD 518, CA.

6 *Ferguson v Wilson* (1866) 2 Ch App 77 (where an action was founded on a resolution of the board to allot shares to the plaintiff).

7 *Mills v Northern Rly of Buenos Ayres Co* (1870) 5 Ch App 621; and see *Lawrence v West Somerset Mineral Rly Co* [1918] 2 Ch 250 at 256-257 per Eve J.

8 As to acts which are ultra vires the company or beyond the board of directors' authority see PARA 542. Redress for individual creditors may lie through misfeasance proceedings by liquidators under the Insolvency Act 1986 s 212 (as to which see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688 et seq) or, if the conditions are met, through liability for fraudulent or wrongful trading under the Insolvency Act 1986 ss 213, 214 (as to which see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 914) or, if conditions are met, from the adjustment of prior transactions under s 238 (as to which see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 843 et seq), or arising from breach by a director of the company name requirements under s 216 (see s 217; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 916 et seq) or as a result of acting while disqualified (see the Company Directors Disqualification Act 1986 s 15(1)(a); and PARA 1616).

9 *Firbank's Executors v Humphreys* (1886) 18 QBD 54, CA; *Elkington & Co v Hurter* [1892] 2 Ch 452; *West London Commercial Bank v Kitson* (1884) 13 QBD 360, CA (acceptance of bills). See also PARA 451. If the misrepresentation is as to law, they will not be liable: *Rashdall v Ford* (1866) LR 2 Eq 750; *Beattie v Lord Ebury* (1874) LR 7 HL 102. See **AGENCY** vol 1 (2008) PARA 160.

10 See the Companies Act 2006 s 761(1); and PARA 74.

11 See the Companies Act 2006 s 767(3); and PARA 76.

12 See *Nordic Oil Services Ltd v Berman* 1993 SLT 1164, Ct of Sess.

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591. Termination of directors' liability.

A director who is charged with breach of trust may plead the Limitation Act 1980 except where the claim is founded upon any fraud or fraudulent breach of trust to which he was a party or privy¹, or is to recover trust property or the proceeds thereof² still, at the time of the action brought³, retained by him or previously received by him and converted to his use⁴.

If money wrongfully paid has been replaced before litigation either specifically or by contra accounts, the directors cannot be made liable in misfeasance proceedings⁵.

An order of discharge in bankruptcy releases a director from any liability for a breach of trust, unless it is a fraudulent breach of trust⁶.

1 *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048, [2004] 1 BCLC 131. See also *Mullarkey v Broad* [2007] EWHC 3400 (Ch), [2008] 1 BCLC 638; and PARA 587.

2 *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [2002] 1 BCLC 162.

3 *Thorne v Heard and Marsh* [1894] 1 Ch 599, CA.

4 See the Limitation Act 1980 s 21; *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048, [2004] 1 BCLC 131; *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [2002] 1 BCLC 162; *Eurocruit Europe Ltd (in liq), Goldfarb v Poppleton* [2007] EWHC 1433 (Ch), [2007] 2 BCLC 598 (claim under the Insolvency Act 1986 s 212 (as to which see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688 et seq) did not have a limitation period distinct from the limitation period applicable to the underlying claim); *Statek Corp v Alford* [2008] EWHC 32 (Ch), (2008) Times, 12 February, [2008] All ER (D) 52 (Jan); and see *Re Lands Allotment Co* [1894] 1 Ch 616, CA; *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co v Sharpe* [1892] 1 Ch 154, CA. See further PARA 539; and **LIMITATION PERIODS** vol 68 (2008) PARA 1140 et seq. As to claims in respect of the statutory liability with regard to offer documents see PARA 1070.

5 *Re David Ireland & Co* [1905] 1 IR 133, CA.

6 See generally **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 642 et seq. As to a company's directors see PARA 478 et seq.

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592. Directors' right to contribution.

A director¹ is entitled to contribution from such of his co-directors as have concurred in a transaction ultra vires the company in respect of which money has been recovered from him². This is an equitable right quite apart from contract³, and is available against the estate of a deceased director who was liable to contribute⁴.

Shareholders who receive illegal payments knowingly, being constructive trustees for the company, must indemnify directors who are called upon to repay, or must themselves repay, if sued directly⁵. A director who has had the sole benefit of the breach of trust may not claim contribution against his co-directors⁶.

In a claim for contribution the defendant is not estopped from disputing the validity of the judgment in the claim against the claimant⁷.

Directors who have concurred in the cancellation of the shares of a co-director in pursuance of an agreement ultra vires the company, although they may be liable to the company, are not liable to their co-director for contribution towards his liability for costs⁸.

1 As to a company's directors see PARA 478 et seq.

2 *Ashhurst v Mason* (1875) LR 20 Eq 225 (where he was transferee of unpaid shares to relieve an ex-director); *Ramskill v Edwards* (1885) 31 ChD 100 (where he had afterwards concurred in an unauthorised loan); and see *Queensway Systems Ltd (in liq) v Walker* [2006] EWHC 2496 (Ch) at [75], [2007] 2 BCLC 577 at [75] per Paul Giamberini QC (causative responsibility is only one, albeit important, factor in determining what contribution it is just and equitable to order). As to acts which are ultra vires the company or beyond the board of directors' authority see PARA 542.

3 *Jackson v Dickinson* [1903] 1 Ch 947; *Ramskill v Edwards* (1885) 31 ChD 100 (where the defendant died after the action was brought); *Shepherd v Bray* [1906] 2 Ch 235 (compromised on appeal [1907] 2 Ch 571, CA); *Wolmershausen v Gullick* [1893] 2 Ch 514. As to contribution in respect of statutory liability with regard to offer documents see PARA 1070.

4 See note 3.

5 *Moxham v Grant* [1900] 1 QB 88, CA; *Re National Funds Assurance Co* (1878) 10 ChD 118 at 129 per Jessel MR (cases of dividends paid out of capital).

6 *Walsh v Bardsley* (1931) 47 TLR 564.

7 See *Parker v Lewis* (1873) 8 Ch App 1056; *Shepherd v Bray* [1906] 2 Ch 235 (compromised on appeal [1907] 2 Ch 571, CA). Cf *Printing, Telegraph and Construction Co of the Agence Havas v Drucker* [1894] 2 QB 801, CA; *Furness, Withy & Co Ltd v Pickering* [1908] 2 Ch 224; *Wye Valley Rly Co v Hawes* (1880) 16 ChD 489, CA.

8 *Walkers' Case* (1856) 8 De GM & G 607.

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593. Ratification of acts giving rise to liability.

Under the Companies Act 2006¹, a company² may ratify conduct³ by a director⁴ amounting to negligence, default, breach of duty or breach of trust⁵ in relation to the company⁶. However, any conduct so authorised must be bona fide and honest and not likely to jeopardise the company's solvency or cause loss to its creditors⁷.

The decision of the company to ratify such conduct must be made by resolution of the members of the company⁸. Where the resolution is proposed as a written resolution⁹ neither the director (if a member of the company) nor any member connected with him¹⁰ is an eligible member¹¹. Where the resolution is proposed at a meeting, it is passed only if the necessary majority is obtained disregarding votes in favour of the resolution by the director (if a member of the company) and any member connected with him¹².

Nothing in these provisions¹³ affects the validity of a decision taken by unanimous consent of the members of the company¹⁴, or any power of the directors to agree not to sue, or to settle or release a claim made by them on behalf of the company¹⁵.

Nor do these provisions¹⁶ affect any other enactment¹⁷ or rule of law imposing additional requirements for valid ratification or any rule of law as to acts that are incapable of being ratified by the company¹⁸.

1 Ie by means of the Companies Act 2006 s 239, which applies: see s 239(1).

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 For these purposes, 'conduct' includes acts and omissions: Companies Act 2006 s 239(5).

4 For these purposes, 'director' includes a former director; and a shadow director is treated as a director: Companies Act 2006 s 239(5). As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of 'shadow director' see PARA 479.

5 The Companies Act 2006 contains for the first time a statutory statement of directors' duties: see Pt 10 Ch 2 (ss 170-181); and PARA 532 et seq. As to directors' fiduciary duties owed to the company see PARA 544 et seq.

6 Companies Act 2006 s 239(1).

7 *Bowthorpe Holdings Ltd v Hills* [2002] EWHC 2331 (Ch) at [51], [2003] 1 BCLC 226 at [51] per Morritt V-C, citing *Re Horsley & Weight Ltd* [1982] Ch 442 at 455, [1982] 3 All ER 1045 at 1055, CA, per Cumming-Bruce LJ, and at 456 and 1056 per Templeman LJ. See also *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246 at 296, [1985] 3 All ER 52 at 86-87, CA, per Slade LJ; *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250 at 252, CA, per Dillon LJ; *Official Receiver v Stern* [2001] EWCA Civ 1787 at [31]-[33], [2002] 1 BCLC 119 at [31]-[33] per Morritt V-C. As to ratification in the context of an application to continue a claim under the derivative action provisions see PARA 463 et seq. See also PARA 278.

8 Companies Act 2006 s 239(2). As to the meaning of 'member of the company' see PARA 321. As to resolutions and meetings of members see PARA 629 et seq. As to voting at meetings see PARA 653 et seq.

9 As to the meaning of 'written resolution' see PARA 623.

10 As to the meaning of references to a director being 'connected' with a person see PARA 481. For these purposes, in the Companies Act 2006 s 252 (meaning of 'connected person') (see PARA 481), s 252(3) does not apply (exclusion of person who is himself a director): s 239(5). The 'connected person' provisions in s 239(3), (4) impose additional requirements for effective ratification.

11 Companies Act 2006 s 239(3). As to eligible members in relation to a resolution proposed as a written resolution of a private company see PARA 623. See also note 10.

12 Companies Act 2006 s 239(4). This provision does not prevent the director or any such member from attending, being counted towards the quorum and taking part in the proceedings at any meeting at which the decision is considered: s 239(4). See note 10. As to the quorum at company meetings see PARA 646.

13 Ie nothing in the Companies Act 2006 s 239: see s 239(6).

14 Companies Act 2006 s 239(6)(a). See PARA 666.

15 Companies Act 2006 s 239(6)(b).

16 Ie the Companies Act 2006 s 239: see s 239(7).

17 As to the meaning of 'enactment' see PARA 17 note 2.

18 Companies Act 2006 s 239(7).

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B. STATUTORY PROTECTION FROM CERTAIN LIABILITIES

594. Avoidance of exemptions from directors' liability.

Any provision¹ that purports to exempt a director² of a company (to any extent) from any liability that would otherwise attach to him in connection with any negligence, default³, breach of duty or breach of trust⁴ in relation to the company is void⁵.

Any provision by which a company, directly or indirectly, provides an indemnity (to any extent) for a director of the company, or of an associated company⁶, against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company of which he is a director, is also void⁷, except as permitted by the provisions which allow a company to provide insurance against any such liability⁸, or to provide qualifying third party indemnity⁹, or to provide qualifying pension scheme indemnity¹⁰.

1 The Companies Act 2006 s 232 applies to any provision, whether contained in a company's articles or in any contract with the company or otherwise: s 232(3). The words 'or otherwise' must be construed *eiusdem generis* with the preceding words, the genus being any arrangement between the company and its officers: *Burgoine v Waltham Forest London Borough Council* [1997] 2 BCLC 612 (decided under the Companies Act 1985 s 310: see now the Companies Act 2006 ss 232, 532, 533; and see also PARAS 951-952). Nothing in the Companies Act 2006 s 232 prevents a company's articles from making such provision as has previously been lawful for dealing with conflicts of interest: s 232(4). As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. As to conflicts of interest see PARA 550 et seq.

2 As to the meaning of 'director' under the Companies Acts see PARA 478.

3 *Customs and Excise Comrs v Hedon Alpha Ltd* [1981] QB 818, [1981] 2 All ER 697, CA. (the word 'default' signified misconduct by an officer or auditor of the company in that capacity). See also *Re Duckwari plc* [1999] Ch 253 at 265-266, sub nom *Re Duckwari plc (No 2)*, *Duckwari plc v Offerventure Ltd (No 2)* [1998] 2 BCLC 315 at 325, CA; and *Queensway Systems Ltd (in liq) v Walker* [2006] EWHC 2496 (Ch) at [66]-[68], [2007] 2 BCLC 577 at [66]-[68].

4 The Companies Act 2006 contains for the first time a statutory statement of directors' duties (see Pt 10 Ch 2 (ss 170-181); and PARA 532 et seq); and the extent to which these general duties may be modified is limited to modifications permitted by the relevant duty (see eg s 173(2)(b) (conduct authorised by the company's constitution); and PARA 547) and by s 180 (which provides that, where the need to avoid conflicts of interest is complied with by directors' authorisation, the transaction or arrangement is not liable to be set aside by virtue of any common law rule or equitable principle requiring the consent or approval of the members of the company, subject to any enactment, or provision of the company's constitution, requiring such consent or approval: see PARA 551). *Movitex Ltd v Bulfield* [1988] BCLC 104 (which considered the scope available under the then-existing statutory provisions to modify directors' obligations) needs to be considered now in the light of the statutory framework provided by the Companies Act 2006. As to directors' fiduciary duties owed to the company generally see PARA 544 et seq.

5 Companies Act 2006 s 232(1). See note 1. As to provision made for the ratification of acts giving rise to liability see PARA 593. As to the statutory provisions that are intended to protect auditors from liability see ss 532, 533; and PARAS 951-952. See also *Mutual Reinsurance Co Ltd v Peat Marwick Mitchell & Co* [1997] 1 Lloyd's Rep 253, [1997] 1 BCLC 1, CA (auditors).

The repeal of the Companies Act 1985 ss 306, 307 and of the Insolvency Act 1986 s 75 (provisions relating to unlimited liability of directors and others) does not affect the operation of those provisions in relation to liabilities arising before 1 October 2009 or in connection with the holding of an office to which a person was appointed before that date on the understanding that their liability would be unlimited: see the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, art 9.

6 As to the meaning of companies which are 'associated' for the purposes of the Companies Act 2006 Pt 10 (ss 154-259) (see PARA 478 et seq) see PARA 569 note 3.

7 Companies Act 2006 s 232(2). See note 1. Under the Companies Act 1985 s 310 (see now the Companies Act 2006 s 232; and see also PARAS 951-952), the prohibition was held to apply only to indemnities given by the company concerned and not to indemnities given by third parties (see *Burgoine v Waltham Forest London Borough Council* [1997] 2 BCLC 612); but that loophole has now been closed by the Companies Act 2006 s 232(2). See also note 6.

The Companies (Model Articles) Regulations 2008, SI 2008/3229, provide that a relevant director of the company or an associated company may be indemnified out of the company's assets against:

193 (1) any liability incurred by that director in connection with any negligence, default, breach of duty or breach of trust in relation to the company or an associated company (Sch 1 art 52(1)(a); Sch 2 art 38(1)(a); Sch 3 art 85(1)(a));

194 (2) any liability incurred by that director in connection with the activities of the company or an associated company in its capacity as a trustee of an occupational pension scheme as defined in

the Companies Act 2006 s 235(6) (see PARA 596) (Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 52(1)(b); Sch 2 art 38(1)(b); Sch 3 art 85(1)(b));

- 195 (3) any other liability incurred by that director as an officer of the company or an associated company (Sch 1 art 52(1)(c); Sch 2 art 38(1)(c); Sch 3 art 85(1)(c)).

However, these provisions do not authorise any indemnity which would be prohibited or rendered void by any provision of the Companies Acts or by any other provision of law: Sch 1 art 52(2); Sch 2 art 38(2); Sch 3 art 85(2). For these purposes, companies are 'associated' if one is a subsidiary of the other or both are subsidiaries of the same body corporate; and a 'relevant director' means any director or former director of the company or an associated company: Sch 1 art 52(3); Sch 2 art 38(3); Sch 3 art 85(3). There is no equivalent provision made in the Companies (Tables A to F) Regulations 1985, SI 1985/805, but Schedule, Table A art 118 provides for every director or other officer or auditor of the company to be indemnified against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application in which relief is granted to him by the court from liability for negligence, default, breach of duty or breach of trust in relation to the affairs of the company: see PARA 596.

8 Companies Act 2006 s 232(2)(a). The text refers to the provision which is allowed by s 233 (see PARA 595): see s 232(2)(a). See note 1.

9 Companies Act 2006 s 232(2)(b). The text refers to the provision which is allowed by s 234 (see PARA 596): see s 232(2)(b). See note 1.

10 Companies Act 2006 s 232(2)(c). The text refers to the provision which is allowed by s 235 (see PARA 596): see s 232(2)(c). See note 1.

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595. Exception for provision of insurance against directors' liability.

The statutory prohibition¹ on a company², either directly or indirectly, providing an indemnity (to any extent) for a director³ of the company, or of an associated company⁴, against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company of which he is a director, is subject to the proviso that this provision⁵ does not prevent a company from purchasing and maintaining for a director of the company, or of an associated company, insurance against any such liability⁶.

1 Ie the prohibition contained in the Companies Act 2006 s 232(2) (see PARA 594): see s 233.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'director' under the Companies Acts see PARA 478.

4 As to the meaning of companies which are 'associated' for the purposes of the Companies Act 2006 Pt 10 (ss 154-259) (see PARA 478 et seq) see PARA 569 note 3.

5 Ie the Companies Act 2006 s 232(2) (see PARA 594): see s 233.

6 Companies Act 2006 s 233. The text refers to any such liability as is mentioned in s 232(2) (see PARA 594): see s 233.

The model articles of association that have been prescribed for the purposes of the Companies Act 2006 (ie the Companies (Model Articles) Regulations 2008, SI 2008/3229: see PARA 228 et seq) provide that directors may decide to purchase and maintain insurance, at the expense of the company, for the benefit of any relevant director in respect of any relevant loss: reg 2, Sch 1 art 53(1); reg 3, Sch 2 art 39(1); reg 4, Sch 3 art 86(1). For these purposes, a 'relevant director' means any director or former director of the company or an associated

company; a 'relevant loss' means any loss or liability which has been or may be incurred by a relevant director in connection with that director's duties or powers in relation to the company, any associated company or any pension fund or employees' share scheme of the company or associated company, and companies are 'associated' if one is a subsidiary of the other or both are subsidiaries of the same body corporate: Sch 1 art 53(2); Sch 2 art 39(2); Sch 3 art 86(2). Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. No provision is made therein which is equivalent exactly to that made in the Companies (Model Articles) Regulations 2008, SI 2008/3229, but see PARA 596 note 10.

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596. Exception for provision of qualifying indemnities.

The statutory prohibition¹ on a company², either directly or indirectly, providing an indemnity (to any extent) for a director³ of the company, or of an associated company⁴, against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company of which he is a director, is subject to the proviso that this provision⁵ does not apply to:

- 995 (1) qualifying third party indemnity provision⁶; or
- 996 (2) qualifying pension scheme indemnity provision⁷.

For the purposes of head (1) above, 'third party indemnity provision' means provision for indemnity against liability incurred by the director to a person other than the company or an associated company⁸; and such provision is 'qualifying third party indemnity provision' if the following requirements are met⁹, namely that the provision must not provide any indemnity against¹⁰: (a) any liability of the director to pay a fine imposed in criminal proceedings¹¹, or a sum payable to a regulatory authority by way of a penalty in respect of non-compliance with any requirement of a regulatory nature (however arising)¹²; or (b) any liability incurred by the director in defending criminal proceedings in which he is convicted¹³, or in defending civil proceedings brought by the company, or an associated company, in which judgment is given against him¹⁴, or in connection with an application for relief¹⁵ in which the court refuses to grant him relief¹⁶.

For the purposes of head (2) above, 'pension scheme indemnity provision' means a provision indemnifying a director of a company that is a trustee of an occupational pension scheme¹⁷ against liability incurred in connection with the company's activities as trustee of the scheme¹⁸; and such provision is a 'qualifying pension scheme indemnity provision' if the following requirements are met¹⁹, namely that the provision must not provide any indemnity against²⁰: (i) any liability of the director to pay a fine imposed in criminal proceedings²¹, or a sum payable to a regulatory authority by way of a penalty in respect of non-compliance with any requirement of a regulatory nature (however arising)²²; or (ii) any liability incurred by the director in defending criminal proceedings in which he is convicted²³.

A qualifying indemnity provision²⁴ must be disclosed in the directors' report²⁵.

1 Ie the prohibition contained in the Companies Act 2006 s 232(2) (see PARA 594): see ss 234(1), 235(1).

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'director' under the Companies Acts see PARA 478.

4 As to the meaning of companies which are 'associated' for the purposes of the Companies Act 2006 Pt 10 (ss 154-259) (see PARA 478 et seq) see PARA 569 note 3.

5 In the Companies Act 2006 s 232(2) (see PARA 594): see ss 234(1), 235(1).

6 Companies Act 2006 s 234(1).

7 Companies Act 2006 s 235(1).

8 Companies Act 2006 s 234(2).

9 Companies Act 2006 s 234(2).

10 Companies Act 2006 s 234(3).

Cf the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A art 118, which provides that, subject to the provisions of the Companies Acts, but without prejudice to any indemnity to which a director may otherwise be entitled, every director or other officer or auditor of the company must be indemnified out of the assets of the company against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application in which relief is granted to him by the court from liability for negligence, default, breach of duty or breach of trust in relation to the affairs of the company. This article may be so framed as to cover proceedings for liability for ultra vires acts: *Viscount of the Royal Court of Jersey v Shelton* [1986] 1 WLR 985, PC (disapproving dictum of Lindley LJ in *Cullerne v London and Suburban General Permanent Building Society* (1890) 25 QBD 485 at 488, CA, and applying *Re Claridge's Patent Asphalte Co Ltd* [1921] 1 Ch 543). A director's expenses of defending himself against an allegation that he did something which he did not in fact do and which it was not his duty to do are not incurred by him as such and are therefore not recoverable under an indemnity covering 'any act done by him as director', or under the general law: *Tomlinson v Scottish Amalgamated Silks Ltd (liquidators)* 1935 SC (HL) 1. As to the statutory provisions that are intended to protect auditors from liability see PARAS 951-952. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but Table A art 118 is applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'public company' and 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. As to the general provision that is made in similar vein by the Companies (Model Articles) Regulations 2008, SI 2008/3229, see PARA 594 note 7.

11 Companies Act 2006 s 234(3)(a)(i).

12 Companies Act 2006 s 234(3)(a)(ii).

13 Companies Act 2006 s 234(3)(b)(i). The references in s 234(3)(b) to a conviction, judgment or refusal of relief are to the final decision in the proceedings: s 234(4). For this purpose, a conviction, judgment or refusal of relief becomes final (if not appealed against) at the end of the period for bringing an appeal or (if appealed against) when the appeal (or any further appeal) is disposed of (s 234(5)(a)); and an appeal is disposed of if it is determined and the period for bringing any further appeal has ended, or if it is abandoned or otherwise ceases to have effect (s 234(5)(b)). See also note 10.

14 Companies Act 2006 s 234(3)(b)(ii). See note 13.

15 The reference in the Companies Act 2006 s 234(3)(b)(iii) to an application for relief is to an application for relief under s 661(3) or s 661(4) (power of court to grant relief in case of acquisition of shares by innocent nominee) (see PARA 1199), or under s 1157 (general power of court to grant relief in case of honest and reasonable conduct) (see PARA 600): s 234(6).

16 Companies Act 2006 s 234(3)(b)(iii). See note 13.

17 For this purpose, 'occupational pension scheme' means a pension scheme established by an employer or employers and having (or capable of having) effect so as to provide benefits to or in respect of any or all of the employees of that employer or those employers, or any other employer (whether or not it also has or is capable of having effect so as to provide benefits to or in respect of other persons) that is established under a trust: Finance Act 2004 s 150(5); Companies Act 2006 s 235(6).

18 Companies Act 2006 s 235(2).

19 Companies Act 2006 s 235(2).

20 Companies Act 2006 s 235(3).

21 Companies Act 2006 s 235(3)(a)(i).

22 Companies Act 2006 s 235(3)(a)(ii).

23 Companies Act 2006 s 235(3)(b). The reference in s 235(3)(b) to a conviction is to the final decision in the proceedings: s 235(4). For this purpose, a conviction becomes final (if not appealed against) at the end of the period for bringing an appeal or (if appealed against) when the appeal (or any further appeal) is disposed of (s 235(5)(a)); and an appeal is disposed of if it is determined and the period for bringing any further appeal has ended, or if it is abandoned or otherwise ceases to have effect (s 235(5)(b)).

24 Is a qualifying third party indemnity provision or a qualifying pension scheme indemnity provision: see the Companies Act 2006 s 236(1); and PARA 597.

25 See the Companies Act 2006 s 236(1); and PARA 597.

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597. Required disclosure of qualifying indemnity provision.

The Companies Act 2006¹ requires disclosure in the directors' report² of any qualifying third party indemnity provision³, and any qualifying pension scheme indemnity provision⁴. Such provision is referred for these purposes as 'qualifying indemnity provision'⁵.

If, when a directors' report is approved⁶, any qualifying indemnity provision (whether made by the company or otherwise) is in force for the benefit of one or more directors of the company, the report must state that such provision is in force⁷; and if at any time during the financial year to which a directors' report relates any such provision was in force for the benefit of one or more persons who were then directors of the company, the report must state that such provision was in force⁸.

If when a directors' report is approved qualifying indemnity provision made by the company is in force for the benefit of one or more directors of an associated company⁹, the report must state that such provision is in force¹⁰; and if at any time during the financial year to which a directors' report relates any such provision was in force for the benefit of one or more persons who were then directors of an associated company, the report must state that such provision was in force¹¹.

1 Is the Companies Act 2006 s 236: see s 236(1).

2 As to the duty imposed on the directors of a company to prepare a directors' report for each financial year of the company see PARA 816 et seq. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of 'director' under the Companies Acts see PARA 478. As to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'financial year' see PARA 711.

- 3 As to qualifying third party indemnity provision see the Companies Act 2006 s 234; and PARA 596.
- 4 Companies Act 2006 s 236(1). As to qualifying pension scheme indemnity provision see s 235; and PARA 596.
- 5 Companies Act 2006 s 236(1).
- 6 As to the approval of directors' reports see PARA 831 et seq.
- 7 Companies Act 2006 s 236(2).
- 8 Companies Act 2006 s 236(3).
- 9 As to the meaning of companies which are 'associated' for the purposes of the Companies Act 2006 Pt 10 (ss 154-259) (see PARA 478 et seq) see PARA 569 note 3.
- 10 Companies Act 2006 s 236(4).
- 11 Companies Act 2006 s 236(5).

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598. Copy of qualifying indemnity provision must be available for inspection.

A company¹ must keep available for inspection²: (1) a copy of the qualifying indemnity provision³; or (2) if the provision is not in writing, a written memorandum setting out its terms⁴. The copy and memorandum must be kept available for inspection either at the company's registered office⁵, or at a place specified in regulations⁶.

The copy or memorandum must be retained by the company for at least one year from the date of termination or expiry of the provision and must be kept available for inspection during that time⁷.

The company must give notice to the registrar of companies⁸: (a) of the place at which the copy or memorandum is kept available for inspection⁹; and (b) of any change in that place¹⁰, unless it has at all times been kept at the company's registered office¹¹.

If default is made in complying with any of the requirements so to keep any qualifying indemnity provision available for inspection¹², or to keep it available in the proper place¹³, or to retain it for the proper length of time¹⁴, or if default is made for 14 days in complying with the requirement to give notice to the registrar of companies¹⁵, an offence is committed by every officer of the company who is in default¹⁶. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹⁷ and (for continued contravention) a daily default fine¹⁸ not exceeding one-tenth of level 3 on the standard scale¹⁹.

1 le a company to which the Companies Act 2006 s 237 applies or, as the case may be, each of them: see s 237(2). The provisions of the Companies Act 2006 s 237 have effect where qualifying indemnity provision is made for a director of a company (s 237(1)), and they apply: (1) to the company of which he is a director (whether the provision is made by that company or an associated company) (s 237(1)(a)); and (2) where the provision is made by an associated company, to that company (s 237(1)(b)). For these purposes, 'qualifying indemnity provision' means qualifying third party indemnity provision, and qualifying pension scheme indemnity provision: s 237(9). As to qualifying third party indemnity provision and qualifying pension scheme indemnity provision see PARA 596. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of 'director' under the Companies Acts see PARA 478. As to the meaning of the 'Companies

Acts' see PARA 16. As to the meaning of companies which are 'associated' for the purposes of the Companies Act 2006 Pt 10 (ss 154-259) (see PARA 478 et seq) see PARA 569 note 3.

2 Companies Act 2006 s 237(2). See notes 1, 3. The provisions of s 1138 (duty to take precautions against falsification) do not apply to the documents required to be kept under s 237: see PARA 675. As to a members' right to inspect and request a copy of any qualifying indemnity provision see PARA 599.

3 Companies Act 2006 s 237(2)(a). See notes 1, 2. The provisions of s 237 apply to a variation of a qualifying indemnity provision as they apply to the original provision: s 237(8).

4 Companies Act 2006 s 237(2)(b). See notes 1-3.

5 Companies Act 2006 s 237(3)(a). See notes 1-3. As to a company's registered office see PARA 129.

6 Companies Act 2006 s 237(3)(b). The text refers to a place specified in regulations made under s 1136 (see PARA 676): see s 237(3)(b). See notes 1-3.

7 Companies Act 2006 s 237(4). See notes 1-3.

8 Companies Act 2006 s 237(5). See notes 1-3. As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements for the proper delivery of documents to the registrar see PARA 142.

9 Companies Act 2006 s 237(5)(a). See notes 1-3.

10 Companies Act 2006 s 237(5)(b). See notes 1-3.

11 Companies Act 2006 s 237(5). See notes 1-3.

12 Ie in complying with the Companies Act 2006 s 237(2) (see the text and notes 1-4): see s 237(6).

13 Ie in complying with the Companies Act 2006 s 237(3) (see the text and notes 5-6): see s 237(6).

14 Ie in complying with the Companies Act 2006 s 237(4) (see the text and note 7): see s 237(6).

15 Ie in complying with the Companies Act 2006 s 237(5) (see the text and notes 8-11): see s 237(6).

16 Companies Act 2006 s 237(6). See notes 1-3. As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

17 As to the meaning of 'standard scale' see PARA 1622 note 5.

18 As to the meaning of 'daily default fine' see PARA 1622.

19 Companies Act 2006 s 237(7). See notes 1-3.

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599. Members' right to inspect and request copy of qualifying indemnity provision.

Every copy or memorandum that is required to be kept pursuant to the duty of a company¹ to keep any qualifying indemnity provision² available for inspection³ must be open to inspection by any member of the company⁴ without charge⁵.

Any member of the company is entitled also, on request and on payment of such fee as may be prescribed⁶, to be provided with a copy of any such copy or memorandum⁷. The copy must be provided within seven days after the request is received by the company⁸.

If an inspection so required by a member of a company⁹ is refused, or if default is made in so providing a member with a copy or memorandum¹⁰, an offence is committed by every officer of the company who is in default¹¹. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹² and (for continued contravention) a daily default fine¹³ not exceeding one-tenth of level 3 on the standard scale¹⁴.

In the case of any such refusal or default, the court¹⁵ may by order compel an immediate inspection or, as the case may be, direct that the copy required be sent to the person requiring it¹⁶.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie any qualifying third party indemnity provision or qualifying pension scheme indemnity provision: see PARA 596.

3 Ie under the Companies Act 2006 s 237 (see PARA 598): see s 238(1).

4 As to the meaning of 'member of the company' see PARA 321.

5 Companies Act 2006 s 238(1).

6 In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6. In exercise of the powers conferred by s 238(2), the Secretary of State has made the Companies (Fees for Inspection and Copying of Company Records) Regulations 2007, SI 2007/2612. See further note 7.

7 Companies Act 2006 s 238(2). For the purposes of s 238(2), the fee prescribed is 10 pence per 500 words or part thereof copied and the reasonable costs incurred by the company in delivering the copy of the company record to the person entitled to be provided with that copy: Companies (Fees for Inspection and Copying of Company Records) Regulations 2007, SI 2007/2612, reg 4. As to the provision made for the sending of documents or information from a company (the 'company communications provisions') see PARA 678 et seq.

8 Companies Act 2006 s 238(2).

9 Ie under the Companies Act 2006 s 238(1) (see the text and notes 1-5): see s 238(3).

10 Ie in complying with the Companies Act 2006 s 238(2) (see the text and notes 6-8): see s 238(3).

11 Companies Act 2006 s 238(3). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

12 As to the meaning of 'standard scale' see PARA 1622 note 5.

13 As to the meaning of 'daily default fine' see PARA 1622.

14 Companies Act 2006 s 238(4).

15 As to the meaning of 'court' see PARA 212 note 1.

16 Companies Act 2006 s 238(5). As to the procedure for making claims and applications to the court under companies legislation see PARA 305. See also PARA 499 note 47.

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600. Power of court to give relief against liability.

If, in proceedings for negligence, default, breach of duty or breach of trust¹ against: (1) an officer of a company²; or (2) a person employed by a company as auditor³ (whether or not he is an officer of the company)⁴, it appears to the court⁵ hearing the case that the officer or person is or may be liable, but that he acted honestly and reasonably⁶ and that, having regard to all the circumstances of the case⁷, including those connected with his appointment, he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as the court thinks fit⁸. The power to grant relief does not extend to relief against claims by third parties⁹, being limited to proceedings the essential nature of which is to enforce (at the suit of, or on behalf of, the company) the duties that a director owes to the company¹⁰.

Where such a case is being tried by a judge with a jury, the judge may, after hearing the evidence and if he is satisfied that the defendant ought¹¹ to be relieved either in whole or in part from the liability sought to be enforced against him, withdraw the case from the jury and forthwith direct judgment to be entered for the defendant on such terms as to costs or otherwise as the judge may think proper¹².

If any such officer or person as is mentioned in head (1) or head (2) above has reason to apprehend that a claim will or might be made against him in respect of negligence, default, breach of duty or breach of trust¹³, then he may apply to the court for relief¹⁴; and the court on any such application has the same power to relieve him as it would have had if it had been a court before which proceedings against him for negligence, default, breach of duty or breach of trust had been brought¹⁵.

Under the provisions described above, a director may be relieved against liability in respect of a transaction that is wholly ultra vires the company¹⁶ or where he has acted without obtaining¹⁷ or after ceasing to hold¹⁸ his qualification shares¹⁹.

1 The Companies Act 2006 contains for the first time a statutory statement of directors' duties: see Pt 10 Ch 2 (ss 170-181); and PARA 532 et seq. As to directors' fiduciary duties owed to the company see PARA 544 et seq.

2 Companies Act 2006 s 1157(1)(a). As to the meaning of 'officer' see PARA 607. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As an officer of the company, an administrator could be protected under the Companies Act 2006 s 1157: *Re Home Treat Ltd* [1991] BCLC 705 (court protected the administrators by an order relieving them of any future claim against them) (case decided under the Companies Act 1985 s 727). As to administrators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 158 et seq. However, given that the statutory definition of 'shadow director', which is specified for the purposes of the Companies Act, is not incorporated by reference into the definition of 'officer' for those same purposes, it must follow that a shadow director cannot be relieved from liability under the statutory provisions: see *Ultraframe (UK) Ltd v Fielding, Northstar Systems Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1452], [2005] All ER (D) 397 (Jul) at [1452] per Lewison J.

3 As to the persons qualified to act as auditors see PARA 958 et seq.

4 Companies Act 2006 s 1157(1)(b).

5 As to the meaning of 'court' see PARA 212 note 1.

6 Failure to seek legal advice was held to be acting unreasonably in *Re Duomatic Ltd* [1969] 2 Ch 365, [1969] 1 All ER 161; as was the making of a payment which the directors had no power to make in *Gibson's Executor v Gibson* 1980 SLT 2, Ct of Sess. Questions of reasonableness may depend to some extent on past practice of the company: *Re Duomatic Ltd* at 375 and 170 per Buckley J.

The test of reasonableness is not subjective and it is questionable whether the test is subjective as regards honesty: *Bairstow v Queens Moat Houses plc* [2001] EWCA Civ 712 at [58], [2001] 2 BCLC 531 at [58] per Robert Walker LJ; cf *Coleman Taymar Ltd v Oakes* [2001] 2 BCLC 749 at 770 per Reid J; *Re Produce Marketing Consortium Ltd* [1989] 3 All ER 1 at 5-6, [1989] 1 WLR 745 at 749-751 per Knox J. See also *Re D'Jan of London Ltd* [1994] 1 BCLC 561 at 564 per Hoffman LJ (conduct may be reasonable for this purpose despite falling short of the standard of reasonable care at common law); *Queensway Systems Ltd (in liq) v Walker* [2006] EWHC 2496 (Ch), [2007] 2 BCLC 577. It is not reasonable to improperly transfer company funds without regard to the interests of the company (*Extrasure Travel Insurances Ltd v Scattergood* [2002] EWHC 3093 (Ch), [2003] 1 BCLC 598; *Re In a Flap Envelope Co Ltd, Willmott v Jenkin* [2003] EWHC 3047 (Ch) at [63], [2004] 1 BCLC 64 at [63] per Jonathan Crow); or to have the company enter into a one-sided agreement (*Re Duckwari plc* [1999] Ch 253, sub nom *Re Duckwari plc (No 2)*, *Duckwari plc v Offerventure Ltd (No 2)* [1998] 2 BCLC 315, CA); or to

make dividend payments without making provision for a possible tax liability (*Re Loquitur Ltd, IRC v Richmond* [2003] EWHC 999 (Ch) at [141], [2003] 2 BCLC 442 at [141] per Etherton J).

The burden of proving honesty and reasonableness is on those seeking relief: *Bairstow v Queens Moat Houses plc* at [58] per Robert Walker LJ; *Re Loquitur Ltd, IRC v Richmond* at [228] per Etherton J; *Re In a Flap Envelope Co Ltd, Willmott v Jenkin* at [59] per Jonathan Crow. The requirements of honesty and reasonableness are not alternatives: *PNC Telecom plc v Thomas (No 2)* [2007] EWHC 2157 (Ch), [2008] 2 BCLC 95.

7 The test is whether the director had acted with the reasonable care and circumspection which could reasonably be expected of him in the circumstances: *PNC Telecom plc v Thomas (No 2)* [2007] EWHC 2157 (Ch), [2008] 2 BCLC 95. See also *Re J Franklin & Son Ltd* [1937] 4 All ER 43 (relief refused); *Selangor United Rubber Estates Ltd v Cradock (a bankrupt) (No 3)* [1968] 2 All ER 1073, [1968] 1 WLR 1555 (relief refused where directors acted blindly at the behest of a third party). In general, the wishes of the members (or, if the company is insolvent, its creditors) must be taken into account: *Re Barry and Staines Linoleum Ltd* [1934] Ch 227.

8 Companies Act 2006 s 1157(1). For these purposes, 'liability' includes liability to account for profits: *Coleman Taymar Ltd v Oakes* [2001] 2 BCLC 749; and see *First Global Media Group Ltd v Larkin* [2003] EWCA Civ 1765, [2003] All ER (D) 293 (Nov); *Queensway Systems Ltd (in liq) v Walker* [2006] EWHC 2496 (Ch), [2007] 2 BCLC 577 (director authorised arrangements or transactions such that she was liable even for those sums paid to or for the benefit of others rather than herself). Relief may be so granted only by the court in which the pending proceedings are taken (*Re Gilt Edge Safety Glass Ltd* [1940] Ch 495, [1940] 2 All ER 237); and it would require an exceptional case for a court to conclude on an interim application that it was appropriate to grant relief (*Equitable Life Assurance Society v Bowley* [2003] EWHC 2263 (Comm), [2004] 1 BCLC 180). The court is reluctant to exercise its discretion at the expense of the company's creditors: *Re Marini Ltd* [2003] EWHC 334 (Ch), [2004] BCC 172; *Inn Spirit Ltd v Burns* [2002] EWHC 1731 (Ch) at [30], [2002] 2 BCLC 780 at [30] per Rimer J; and see *Re Simmon Box (Diamonds) Ltd* [2000] BCC 275 at 288 (revsd on other grounds *Cohen v Selby* [2001] 1 BCLC 176, sub nom *Re Simmon Box (Diamonds) Ltd* [2002] BCC 82, CA). There can be no question of relief where a director holds company funds as a constructive trustee (*Guinness plc v Saunders* [1990] 2 AC 663, [1990] 1 All ER 652, HL); or where he has been found guilty of dishonestly preparing false accounts (*Bairstow v Queens Moat Houses plc* [2001] EWCA Civ 712 at [63], [2001] 2 BCLC 531 at [63] per Robert Walker LJ); and it would require an extremely powerful case to persuade the court to exercise its discretion to relieve a director from liability if he has obtained a material personal benefit through a breach of duty (see *Re In a Flap Envelope Co Ltd, Willmott v Jenkin* [2003] EWHC 3047 (Ch) at [64], [2004] 1 BCLC 64 at [64] per Jonathan Crow). Relief is not available to a director against whom a liquidator has sought a contribution in the insolvent liquidation of the company under the Insolvency Act 1986 s 214 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 914): *Re Produce Marketing Consortium Ltd* [1989] 3 All ER 1, [1989] 1 WLR 745; *Re Brian D Pierson (Contractors) Ltd* [2001] 1 BCLC 275 at 308-309 per Hazel Williamson QC. Where, as is usually the case, a director is paid for his services, the court is less disposed to give him relief than it would be to give it to a person acting gratuitously: *National Trustees Co of Australasia v General Finance Co of Australasia* [1905] AC 373 at 381, PC. See also *Re Welfab Engineers Ltd* [1990] BCLC 833 (directors who were alleged to have breached their duty by selling company's assets at an undervalue were held not to have acted in breach of that duty and, even if they had, it was a case where, having acted honestly and reasonably, they ought to be excused under the Companies Act 2006 s 1157) (case decided under the Companies Act 1985 s 727).

9 *Customs and Excise Comrs v Hedon Alpha Ltd* [1981] QB 818, [1981] 2 All ER 697, CA. See also *First Independent Factors & Finance v Mountford* [2008] EWHC 835 (Ch), [2008] 2 BCLC 297 (director, who was held personally liable for debts of phoenix company, could not seek relief under the Companies Act 2006 s 1157 as that provision does not apply to claims against directors brought by strangers - in this case, creditors) (case decided under the Companies Act 1985 s 727). See also *IRC v McEntaggart* [2004] EWHC 3431 (Ch), [2006] 1 BCLC 476 (provisions for relief inapplicable to proceedings under the Company Directors Disqualification Act 1986 s 15 (see PARA 1616)).

10 See *IRC v McEntaggart* [2004] EWHC 3431 (Ch), [2006] 1 BCLC 476 (cited in note 9).

11 In pursuance of the Companies Act 2006 s 1157(1) (see the text and notes 1-8): see s 1157(3).

12 Companies Act 2006 s 1157(3). The statutory provision need not be pleaded: see *Singlehurst v Tapscott Steamship Co Ltd* [1899] WN 133, CA; *Re Kirbys Coaches Ltd* [1991] BCLC 414. If, however, they are pleaded, no particulars of the plea can be ordered, since the plea could, with leave, be deleted and such leave would, on a proper exercise of discretion, be given; but the right to claim relief would continue, even if the plea were deleted: *Re Kirbys Coaches Ltd*.

13 Companies Act 2006 s 1157(2). This provision is directed only to future proceedings and does not apply to proceedings which have been commenced and are pending before another court: *Re Gilt Edge Safety Glass Ltd* [1940] Ch 495, [1940] 2 All ER 237.

14 Companies Act 2006 s 1157(2)(a). As to applications made to the court under the Companies Act 2006 see generally PARA 305.

Approval is not required under s 197 (see PARA 568), s 198 (see PARA 569), s 200 (see PARA 570), or s 201 (see PARA 571) for anything done by a company to provide a director of the company or of its holding company with funds to meet expenditure incurred or to be incurred by him in connection with an application for relief under s 1157: see s 205; and PARA 573.

The statutory prohibition on a company, either directly or indirectly, providing third party indemnity (to any extent) for a director of the company, or of an associated company, against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company of which he is a director applies to an application for relief under s 1157 in which the court refuses to grant him relief: see s 234; and PARA 596. Similarly, s 532 (voidness of provisions protecting auditors from liability) (see PARA 951) does not prevent a company from indemnifying an auditor against any liability incurred by him in connection with an application under s 1157 in which relief is granted to him by the court: see s 533; and PARA 952.

- 15 Companies Act 2006 s 1157(2)(b).
- 16 *Re Claridge's Patent Asphalte Co Ltd* [1921] 1 Ch 543.
- 17 *Re Barry and Staines Linoleum Ltd* [1934] Ch 227.
- 18 *Re Gilt Edge Safety Glass Ltd* [1940] Ch 495, [1940] 2 All ER 237.
- 19 As to qualification shares see PARA 495 et seq.

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(14) COMPANY SECRETARY AND OTHER OFFICERS

601. Requirement for company to have secretary.

A private company¹ is not required to have a secretary². In the case of a private company without a secretary³: (1) anything authorised or required to be given or sent to, or served on, the company⁴ by being sent to its secretary, may be given or sent to, or served on, the company itself⁵ and, if addressed to the secretary, must be treated as addressed to the company⁶; and (2) anything else required or authorised to be done by or to the secretary of the company may be done by or to a director⁷, or to a person authorised generally or specifically in that behalf by the directors⁸.

A public company⁹ must have a secretary¹⁰.

Where, in the case of any company, the office of secretary is vacant, or there is for any other reason no secretary capable of acting, anything required or authorised to be done by or to the secretary may be done either by or to an assistant or deputy secretary (if any)¹¹ or, if there is no assistant or deputy secretary or none capable of acting, by or to any person authorised generally or specifically in that behalf by the directors¹².

The secretary should always be appointed by the company under a written agreement specifying the general conditions of service, including the term of office and the period of notice for its termination¹³. Apart from any written agreement, he holds his office on such conditions of service as may be implied from the articles of association or the practice of the company¹⁴ or of other like companies and subject to reasonable notice on either side¹⁵.

A provision requiring or authorising a thing to be done by or to a director and the secretary of a company is not satisfied by its being done by or to the same person acting both as director and as, or in place of, the secretary¹⁶.

1 As to the meaning of 'private company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 270(1).

3 Companies Act 2006 s 270(3). References in the Companies Acts to a private company 'without a secretary' are to a private company that for the time being is taking advantage of the exemption in s 270(1) (see the text and notes 1-2); and references to a private company 'with a secretary' must be construed accordingly: s 270(2).

4 As to the service of documents on a company generally see PARA 671 et seq; and as to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

5 Companies Act 2006 s 270(3)(a)(i).

6 Companies Act 2006 s 270(3)(a)(ii).

7 Companies Act 2006 s 270(3)(b)(i). As to the meaning of 'director' under the Companies Acts see PARA 478.

8 Companies Act 2006 s 270(3)(b)(ii).

9 As to the meaning of 'public company' see PARA 102.

10 Companies Act 2006 s 271. As to secretaries of public companies see further PARA 601 et seq.

11 Companies Act 2006 s 274(a).

12 Companies Act 2006 s 274(b).

13 The person or persons named as secretary or joint secretary of the company in the statement of proposed officers (ie that is required to be delivered in accordance with the Companies Act 2006 s 9(1), (4) to the registrar of companies: see PARA 111) is, or are, as from the date of the company's incorporation, deemed to have been appointed to that office: see s 16(1), (6); and PARA 120. As to the date of incorporation see PARA 119 note 7; and as to incorporation by registration under the Companies Act 2006 see PARA 111 et seq.

The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. The Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A art 99 provides that, subject to the provisions of the Companies Acts, the secretary must be appointed by the directors for such term, at such remuneration and upon such conditions as they may think fit; and any secretary so appointed may be removed by them. However, the model articles of association prescribed for the purposes of the Companies Act 2006 (see PARA 228 et seq) do not make equivalent provision.

14 *Burland v Earle* [1902] AC 83 at 101, PC. If the terms of a written agreement are clear, the articles cannot vary or modify the agreed conditions of service: *Re Alexander's Timber Co* (1901) 70 LJ Ch 767 at 769 per Wright J.

15 *Green v Wright* (1876) 1 CPD 591; *James v Thomas H Kent & Co Ltd* [1951] 1 KB 551, [1950] 2 All ER 1099, CA.

16 Companies Act 2006 s 280.

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602. Direction requiring public company to appoint secretary.

If it appears to the Secretary of State¹ that a public company² is in breach of the requirement to have a secretary³, the Secretary of State may give the company a direction⁴, which must state that the company appears to be in breach of that requirement⁵, and must specify⁶:

- 997 (1) what the company must do in order to comply with the direction⁷; and
- 998 (2) the period within which it must do so⁸.

The direction must also inform the company of the consequences of failing to comply⁹.

Where the company is in breach of the requirement to have a secretary¹⁰, it must comply with the direction by making the necessary appointment¹¹, and by giving notice of it¹², before the end of the period specified in the direction¹³. If the company has already made the necessary appointment, it must comply with the direction by giving notice of it¹⁴ before the end of the period specified in the direction¹⁵.

If a company fails to comply with a direction so given¹⁶, an offence is committed by the company, and by every officer of the company who is in default¹⁷. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 5 on the standard scale¹⁸ and (for continued contravention) a daily default fine¹⁹ not exceeding one-tenth of level 5 on the standard scale²⁰.

1 As to the Secretary of State see PARA 6.

2 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 It is in breach of the Companies Act 2006 s 271 (see PARA 601): see s 272(1).

4 Companies Act 2006 s 272(1). The direction referred to in the text is a direction under s 272: see s 272(1).

5 It appears to be in breach of the Companies Act 2006 s 271 (see PARA 601): see s 272(2).

6 Companies Act 2006 s 272(2).

7 Companies Act 2006 s 272(2)(a).

8 Companies Act 2006 s 272(2)(b). The period mentioned in the text must be not less than one month or more than three months after the date on which the direction is given: see s 272(2).

9 Companies Act 2006 s 272(3).

10 It is in breach of the Companies Act 2006 s 271 (see PARA 601): see s 272(4).

11 Companies Act 2006 s 272(4)(a). As to the qualifications required of secretaries of public companies see PARA 603.

12 Companies Act 2006 s 272(4)(b). The text refers to the giving of notice under s 276 (duty to notify registrar of changes) (see PARA 606): see s 272(4)(b).

13 Companies Act 2006 s 272(4).

14 It is under the Companies Act 2006 s 276 (duty to notify registrar of changes) (see PARA 606): see s 272(5).

15 Companies Act 2006 s 272(5).

16 It is a direction under the Companies Act 2006 s 272: see s 272(6).

17 Companies Act 2006 s 272(6). For these purposes, a shadow director is treated as an officer of the company: s 272(6). As to the meaning of 'shadow director' see PARA 479. As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

18 As to the meaning of 'standard scale' see PARA 1622 note 5.

19 As to the meaning of 'daily default fine' see PARA 1622.

20 Companies Act 2006 s 272(7).

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603. Qualifications required of secretaries of public companies.

A company's articles of association¹ may make provision for the secretary² and other officers of the company³ to be appointed by the directors⁴.

It is the duty of the directors of a public company⁵ to take all reasonable steps to secure that the secretary (or each joint secretary) of the company is a person who appears to them to have the requisite knowledge and experience to discharge the functions of secretary of the company⁶, and has one or more of the following qualifications⁷, namely:

- 999 (1) that he has held the office of secretary of a public company for at least three of the five years immediately preceding his appointment as secretary⁸; or
- 1000 (2) that he is a member of a specified body⁹; or
- 1001 (3) that he is a barrister, advocate or solicitor called or admitted in any part of the United Kingdom¹⁰; or
- 1002 (4) that he is a person who, by virtue of his holding or having held any other position or his being a member of any other body, appears to the directors to be capable of discharging the functions of secretary of the company¹¹.

1 As to a company's articles of association generally see PARA 228 et seq.

2 As to the company secretary see PARA 601.

3 As to the meaning of 'officer' generally see PARA 607.

4 See eg the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 99 (cited in PARA 601). The model articles of association prescribed for the purposes of the Companies Act 2006 (see PARA 228 et seq) make no equivalent provision. As to contracts being provisional in the case of certain companies until they are entitled to commence business see PARA 281.

5 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

6 Companies Act 2006 s 273(1)(a).

7 Companies Act 2006 s 273(1)(b).

8 Companies Act 2006 s 273(2)(a).

9 Companies Act 2006 s 273(2)(b). The bodies specified for these purposes are: (1) the Institute of Chartered Accountants in England and Wales (s 273(3)(a)); (2) the Institute of Chartered Accountants of Scotland (s 273(3)(b)); (3) the Association of Chartered Certified Accountants (s 273(3)(c)); (4) the Institute of Chartered Accountants in Ireland (s 273(3)(d)); (5) the Institute of Chartered Secretaries and Administrators (s 273(3)(e)); (6) the Chartered Institute of Management Accountants (s 273(3)(f)); (7) the Chartered Institute of Public Finance and Accountancy (s 273(3)(g)).

10 Companies Act 2006 s 273(2)(c). As to the meaning of 'United Kingdom' see PARA 1 note 5.

11 Companies Act 2006 s 273(2)(d).

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604. Nature of employment of secretary.

The secretary, being an agent only¹, is in the same position as any other agent of a company². If his dealings are such that his company is not bound by them, he may himself be liable, either as principal or on the ground of breach of warranty of authority³. Whereas it has formerly been held that he had no authority by virtue of his position to make representations to induce persons to contract with the company, his functions being ministerial only⁴, his status has now greatly increased⁵. The secretary regularly makes representations on behalf of the company and enters into contracts on its behalf which come within the day-to-day running of the company's business; he signs contracts connected with the administrative side of a company's affairs; and all these matters are now within his ostensible authority⁶. However, he is not, whilst merely performing the duties appropriate to his office, a party to the carrying on of the business of the company, so as to make him responsible without more for fraudulent trading⁷.

He has no power, without the resolution of the directors, to call a meeting of the company⁸ or to commence proceedings on behalf of the company⁹; nor may he alter the register of members¹⁰; but any such act may be ratified by the directors¹¹.

A secretary may not make a secret profit in connection with the affairs of the company¹².

A secretary is normally an employee so as to be entitled to preferential payment in a winding up¹³.

1 As to the appointment of a secretary see PARA 601.

2 See PARA 269 et seq. A secretary is liable to the company for the acts of a sub-agent employed by him and not by the company: *Re Mutual Aid Permanent Benefit Building Society, ex p James* (1883) 49 LT 530.

3 See PARA 273; and **AGENCY** vol 1 (2008) PARA 156 et seq.

4 *Barnett v South London Tramways Co* (1887) 18 QBD 815 at 817, CA, per Lord Esher MR; *Chapleo v Brunswick Permanent Benefit Building Society* (1881) 6 QBD 696, CA; *Williams v Chester and Holyhead Rly Co* (1851) 15 Jur 828; *Newlands v National Employers' Accident Association Ltd* (1885) 54 LJQB 428, CA.

5 Before the Companies Act 1948 (see s 177(1) (repealed)), it was not obligatory for a company to have a secretary at all. The Combined Code on Corporate Governance (June 2008) (published by the Financial Reporting Council) provides that, under the direction of the chairman, the company secretary's responsibilities include ensuring good information flows within the board and its committees and between senior management and non-executive directors, as well as facilitating induction and assisting with professional development as required. The company secretary should be responsible for advising the board through the chairman on all governance matters: Supporting Principles to Main Principle A.5 (Information and professional development). All directors should have access to the advice and services of the company secretary, who is responsible to the board for ensuring that board procedures are complied with. Both the appointment and removal of the company secretary should be a matter for the board as a whole: Code Provision A.5.3. While it is expected that companies will comply wholly or substantially with its provisions, it is recognised that non-compliance may be justified in particular circumstances if good governance can be achieved by other means. A condition of non-compliance is that the reasons for it should be explained to shareholders, who may wish to discuss the position with the company and whose voting intentions may be influenced as a result. This 'comply or explain' approach has been in operation since the Code's beginnings in 1992: see Preamble para 2.

6 *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711, [1971] 3 All ER 16, CA.

- 7 *Re Maidstone Building Provisions Ltd* [1971] 3 All ER 363, [1971] 1 WLR 1085. As to fraudulent trading see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 911.
- 8 *Re Haycraft Gold Reduction and Mining Co* [1900] 2 Ch 230; *Re State of Wyoming Syndicate* [1901] 2 Ch 431. As to meetings of the company see PARA 629 et seq. A directors' meeting may be called by authorising the company secretary (if any) to give notice or, in the case of a public company, by a director requesting the company secretary to do so, and thereby obliging the secretary to call such a meeting: see PARA 528 note 3.
- 9 *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307, HL. As to proceedings involving the company see PARA 301 et seq.
- 10 *Chida Mines v Anderson* (1905) 22 TLR 27; *Re Matlock Old Bath Hydropathic Co, Wheatcroft's Case* (1873) 42 LJ Ch 853 at 857 per Bacon V-C. As to the register of members see PARA 335 et seq.
- 11 *Molineaux v London, Birmingham and Manchester Insurance Co Ltd* [1902] 2 KB 589 at 596, CA.
- 12 *Re Morvah Consols Tin Mining Co, McKay's Case* (1875) 2 ChD 1. A secretary who before the formation of a company aids the promoter in forming the company (and so is himself a promoter), and is paid by him for his services, does not receive this money to the use of the company or as trustee: *Re Sale Hotel and Botanical Gardens, ex p Hesketh* (1898) 78 LT 368, CA. Cf **AGENCY** vol 1 (2008) PARA 89.
- 13 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 763 et seq.

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605. Register of secretaries.

A company¹ must keep a register of its secretaries².

The register must contain the required particulars³ of the person who is, or persons who are, the secretary or joint secretaries of the company⁴. Accordingly, a company's register of secretaries must contain the following particulars in the case of an individual⁵: (1) name⁶ and any former name⁷; (2) address⁸. In the case of a body corporate⁹, or a firm¹⁰ that is a legal person under the law by which it is governed, a company's register of secretaries must contain the following particulars¹¹:

- 1003 (a) corporate or firm name¹²;
- 1004 (b) registered or principal office¹³;
- 1005 (c) in the case of an EEA company¹⁴ to which the First Company Law Directive¹⁵ applies, particulars of¹⁶: (i) the register in which the company file¹⁷ is kept (including details of the relevant state)¹⁸; and (ii) the registration number in that register¹⁹;
- 1006 (d) in any other case, particulars of²⁰: (i) the legal form of the company or firm and the law by which it is governed²¹; and (ii) if applicable, the register in which it is entered (including details of the state) and its registration number in that register²².

However, if all the partners in a firm are joint secretaries, it is sufficient to state the particulars that would be required if the firm were a legal person and the firm had been appointed secretary²³.

The register must be kept available for inspection either at the company's registered office²⁴, or at a place specified in regulations²⁵. The company must give notice to the registrar of companies²⁶ of the place at which the register is kept available for inspection²⁷, and of any change in that place²⁸, unless it has at all times been kept at the company's registered office²⁹.

The register must be open to the inspection of any member of the company³⁰ without charge³¹, and to the inspection of any other person on payment of such fee as may be prescribed³².

If default is made in complying with the requirements to keep a register³³, or to maintain the required particulars to be contained therein³⁴, or to keep the register available for inspection³⁵, or if default is made for 14 days in complying with the giving of notice to the registrar of the place where inspection may be made³⁶, or if an inspection³⁷ is refused, an offence is committed by the company, and by every officer of the company who is in default³⁸. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 5 on the standard scale³⁹ and (for continued contravention) a daily default fine⁴⁰ not exceeding one-tenth of level 5 on the standard scale⁴¹. In the case of a refusal of inspection of the register, the court⁴² may by order compel an immediate inspection of it⁴³.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 275(1). As to whether a company is required to have a secretary see PARA 601. On and after 1 October 2009, the register of directors and secretaries kept by a company under the Companies Act 1985 s 288(1) (repealed) was to be treated as two separate registers, namely a register of directors kept under and for the purposes of the Companies Act 2006 s 162 (see PARA 499), and a register of secretaries kept under and for the purposes of s 275: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 25. As to the meaning of 'director' under the Companies Acts see PARA 478.

The provisions of the Companies Act 2006 ss 275, 277-279 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 8, but with the Companies Act 2006 s 275 as modified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Ie as specified in the Companies Act 2006 s 277 (particulars of secretaries to be registered: individuals) (see the text and notes 5-8), s 278 (particulars of secretaries to be registered: corporate secretaries and firms) (see the text and notes 9-23) and s 279 (particulars of secretaries to be registered: power to make regulations): see s 275(2). The Secretary of State may make provision by regulations amending s 277 or s 278, so as to add to or remove items from the particulars required to be contained in a company's register of secretaries: s 279(1). As to the Secretary of State see PARA 6. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 279 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 279(2), 1290. At the date at which this volume states the law, no such regulations had been made under s 279. As to a company's duty to notify the registrar of changes in particulars contained in the register see PARA 606.

The statement of proposed officers that is required to be delivered in accordance with s 9(1), (4) (see PARA 111) to the registrar of companies must contain the required particulars (ie those same particulars that are required to be stated in the company's register of secretaries) of (in the case of a company that is to be a private company) any person who is (or any persons who are) to be the first secretary (or joint secretaries) of the company and (in the case of a company that is to be a public company) the person who is (or the persons who are) to be the first secretary (or joint secretaries) of the company: see s 12; and PARA 112.

4 Companies Act 2006 s 275(2).

5 Companies Act 2006 s 277(1). See note 3.

6 For these purposes, 'name' means a person's Christian name (or other forename) and surname, except that in the case of a peer, or an individual usually known by a title, the title may be stated instead of his Christian name (or other forename) and surname or in addition to either or both of them: Companies Act 2006 s 277(2). See note 3.

7 Companies Act 2006 s 277(1)(a). For these purposes, a 'former name' means a name by which the individual was formerly known for business purposes; and, where a person is or was formerly known by more than one such name, each of them must be stated: s 277(3). However, it is not necessary for the register to contain particulars of a former name in the following cases: (1) in the case of a peer or an individual normally known by a British title, where the name is one by which the person was known previous to the adoption of or succession to the title (s 277(4)(a)); (2) in the case of any person, where the former name either was changed or disused before the person attained the age of 16 years, or has been changed or disused for 20 years or more (s 277(4)(b)). See note 3.

8 Companies Act 2006 s 277(1)(b). The address required to be stated in the register is a service address, which may be stated to be 'The company's registered office': s 277(5). See note 3. As to a company's registered office see PARA 129. As to requirements relating to service addresses generally see PARA 673.

In the case of an existing company, the relevant existing address of a secretary is deemed, on and after 1 October 2009, to be a service address, and any entry in the company's register of secretaries stating that address is treated, on and after that date, as complying with the obligation in the Companies Act 2006 s 277(1)(b) to state a service address: Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 27(1). The relevant existing address is the address that immediately before 1 October 2009 appeared in the company's register of directors and secretaries as having been notified to the company under the Companies Act 1985 s 290(1A) (repealed) (service address notified by individual applying for confidentiality order in respect of usual residential address) or, if no such address appeared, the address that immediately before that date appeared in the company's register of directors and secretaries as the secretary's usual residential address: Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 27(2). Any notification of a change of a relevant existing address occurring before 1 October 2009 that is received by the company on or after that date is treated as being or, as the case may be, including notification of a change of service address: Sch 2 para 27(3). However, the operation of Sch 2 para 27 does not give rise to any duty to notify the registrar under the Companies Act 2006 s 167 (duty to notify registrar of changes in particulars contained in register) (see PARA 514): Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 27(4). As to the meaning of 'existing company' for these purposes see PARA 18 note 2. As to the company's register of directors and secretaries see note 3.

The registrar of companies may make such entries in the register of companies as appear to be appropriate having regard to Sch 2 para 27 and the information appearing on the register immediately before 1 October 2009 or notified to the registrar in accordance with Sch 2 para 31(2) (effect of repealed provisions): Sch 2 para 32(1). In particular, the registrar may record as a service address a relevant existing address (within the meaning of Sch 2 para 27) or, in the case of a company formed and registered on an application to which Sch 2 para 2(3) applies (see PARA 24 note 4), an address notified to the registrar in connection with that application as a secretary's usual residential address: Sch 2 para 32(2). Any notification of a change of a relevant existing address occurring before 1 October 2009 that is received by the registrar on or after that date is treated as being or, as the case may be, including notification of a change of service address: Sch 2 para 32(4). As to the registrar of companies see PARA 131 et seq. As to the register of companies see PARA 146 et seq.

9 As to the meaning of 'body corporate' see PARA 1 note 5.

10 As to the meaning of 'firm' see PARA 112 note 14.

11 Companies Act 2006 s 278(1). See note 3.

12 Companies Act 2006 s 278(1)(a). See note 3.

13 Companies Act 2006 s 278(1)(b). See note 3.

14 As to the meaning of 'EEA company' see PARA 29.

15 Ie EC Council Directive 68/151 (OJ L65, 14.3.68, p 8) on co-ordination of safeguards which, for the protection of the interests of members and others, are required by member states of companies, with a view to making such safeguards equivalent throughout the Community (see PARA 23): see the Companies Act 2006 s 278(1)(c). See note 3.

16 Companies Act 2006 s 278(1)(c). See note 3.

17 Ie the company file mentioned in EC Council Directive 68/151 (OJ L65, 14.3.68, p 8) art 3 (which provides that, in each member state, a file must be opened in a central register, commercial register or companies register, for each of the companies registered therein: see art 3(1); and see PARA 141 note 16): see the Companies Act 2006 s 278(1)(c)(i). See note 3.

18 Companies Act 2006 s 278(1)(c)(i). See note 3.

19 Companies Act 2006 s 278(1)(c)(ii). See note 3.

20 Companies Act 2006 s 278(1)(d). See note 3.

21 Companies Act 2006 s 278(1)(d)(i). See note 3.

22 Companies Act 2006 s 278(1)(d)(ii). See note 3. As to a company's registered number see ss 1066, 1067; and PARAS 139, 140.

23 Companies Act 2006 s 278(2). See note 3.

24 Companies Act 2006 s 275(3)(a).

25 Companies Act 2006 s 275(3)(b). The text refers to a place specified in regulations made under s 1136 (see PARA 676): see s 275(3)(b).

26 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements for the proper delivery of documents to the registrar see PARA 142. As to a company's general duty to notify the registrar of changes relating to secretaries or their particulars see PARA 514.

27 Companies Act 2006 s 275(4)(a).

28 Companies Act 2006 s 275(4)(b).

29 Companies Act 2006 s 275(4).

30 As to the meaning of 'member of the company' see PARA 321.

31 Companies Act 2006 s 275(5)(a).

32 Companies Act 2006 s 275(5)(b). In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: s 1167. In exercise of the powers conferred by s 275(5)(b), the Secretary of State has made the Companies (Fees for Inspection of Company Records) Regulations 2008, SI 2008/3007. Accordingly, for the purpose of the Companies Act 2006 s 275(5)(b), the fee prescribed is £3.50 for each hour or part thereof during which the right of inspection is exercised: Companies (Fees for Inspection of Company Records) Regulations 2008, SI 2008/3007, reg 2.

33 Ie in complying with the Companies Act 2006 s 275(1) (see the text and notes 1-2): see s 275(6).

34 Ie in complying with the Companies Act 2006 s 275(2) (see the text and notes 3-4): see s 275(6).

35 Ie in complying with the Companies Act 2006 s 275(3) (see the text and notes 24-25): see s 275(6).

36 Ie in complying with the Companies Act 2006 s 275(4) (see the text and notes 26-29): see s 275(6).

37 Ie an inspection required under the Companies Act 2006 s 275(5) (see the text and notes 30-32): see s 275(6).

38 Companies Act 2006 s 275(6). For these purposes, a shadow director is treated as an officer of the company: s 275(6). As to the meaning of 'shadow director' see PARA 479. As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

39 As to the meaning of 'standard scale' see PARA 1622 note 5.

40 As to the meaning of 'daily default fine' see PARA 1622.

41 Companies Act 2006 s 275(7).

42 As to the meaning of 'court' see PARA 212 note 1.

43 Companies Act 2006 s 275(8). As to the procedure for making claims and applications to the court under companies legislation see PARA 305. See also PARA 499 note 47.

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606. Duty to notify registrar of changes.

A company¹ must, within the period of 14 days from²: (1) a person becoming or ceasing to be its secretary or one of its joint secretaries³; or (2) the occurrence of any change in the particulars contained in its register of secretaries⁴, give notice to the registrar of companies⁵ of the change and of the date on which it occurred⁶.

Notice of a person having become secretary, or one of joint secretaries, of the company must be accompanied by a consent by that person to act in the relevant capacity⁷.

If default is made in complying with these requirements⁸, an offence is committed by every officer of the company who is in default⁹. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 5 on the standard scale¹⁰ and (for continued contravention) a daily default fine¹¹ not exceeding one-tenth of level 5 on the standard scale¹².

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 276(1).

The provisions of the Companies Act 2006 s 276 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 8: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Companies Act 2006 s 276(1)(a). As to whether a company is required to have a secretary see PARA 601.

4 Companies Act 2006 s 276(1)(b). As to the requirement for a company to keep a register of secretaries see PARA 605.

5 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements for the proper delivery of documents to the registrar see PARA 142.

6 Companies Act 2006 s 276(1).

7 Companies Act 2006 s 276(2). The Secretary of State may make provision by regulations requiring a statement or notice sent to the registrar of companies under s 276 (notice of a person having become secretary or one of joint secretaries) that relates (wholly or partly) to a person disqualified under Pt 40 (ss 1182-1191) (see PARA 1617 et seq) or a person who is subject to a disqualification order or disqualification undertaking under the Company Directors Disqualification Act 1986 (see PARA 1578 et seq) to be accompanied by an additional statement stating that the person has obtained permission from a court to act in the capacity in question: see the Companies Act 2006 s 1189; and PARA 1621.

8 In complying with the Companies Act 2006 s 276: see s 276(3).

9 Companies Act 2006 s 276(3). For these purposes, a shadow director is treated as an officer of the company: s 276(3). As to the meaning of 'shadow director' see PARA 479. As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.

10 As to the meaning of 'standard scale' see PARA 1622 note 5.

11 As to the meaning of 'daily default fine' see PARA 1622.

12 Companies Act 2006 s 276(4).

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607. Officers of the company.

Prior to the Companies Act 1948¹, there was no statutory definition of 'officer', but the following were held to be officers of a company: its secretary²; its auditors when appointed as such³, but not a person casually employed by the directors to prepare a balance sheet⁴; a solicitor when remunerated by fixed salary, but not when employed in the ordinary way⁵; persons whose duty it is to invest the company's money and hold the investments⁶; a liquidator⁷; and an administrator appointed under the Insolvency Act 1986⁸. The following have been held not to be officers: trustees of the company⁹; trustees of a debenture trust deed¹⁰; bankers¹¹; experts employed to investigate and report on the management of the company¹²; and the editor or chief reporter of a newspaper¹³.

In the Companies Acts¹⁴, 'officer', in relation to a body corporate¹⁵, includes a director¹⁶, manager or secretary¹⁷. 'Manager' means, in everyday language, a person who has the management of the whole affairs of the company¹⁸. It connotes a person holding, whether de jure or de facto, a position in or with the company of a nature charging him with the duty of managing the affairs of the company for the company's benefit¹⁹. It does not include a local manager²⁰.

1 As to the Companies Act 1948 see PARA 12.

2 *McKay's Case* (1875) 2 ChD 1, CA; *Re Stapleford Colliery Co, Barrow's Case (No 2)* (1880) 42 LT 12; *Re Mutual Aid Permanent Benefit Building Society, ex p James* (1883) 49 LT 530. See also note 17; and PARA 601 et seq.

3 *Re London and General Bank* [1895] 2 Ch 166, CA; *Leeds Estate Building and Investment Co v Shepherd* (1887) 36 ChD 787; *Re Kingston Cotton Mill Co* [1896] 1 Ch 6 at 14 per Vaughan Williams J; *Re Republic of Bolivia Exploration Syndicate Ltd* [1914] 1 Ch 139; *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407, CA; *R v Shacter* [1960] 2 QB 252, [1960] 1 All ER 61, CCA. See also *Mutual Reinsurance Co Ltd v Peat Marwick Mitchell & Co* [1997] 1 Lloyd's Rep 253, [1997] 1 BCLC 1, CA (equivalent provisions of the Bermudan Companies Act 1981).

4 *Re Western Counties Steam Bakeries and Milling Co* [1897] 1 Ch 617, CA.

5 See PARA 611.

6 *Re British Guardian Life Assurance Co* as reported in [1880] WN 63.

7 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 967. See also PARA 609 note 1.

8 *Re Home Treat Ltd* [1991] BCLC 705, [1991] BCC 165. As to the appointment of administrators under the Insolvency Act 1986 see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1201.

9 *Cornell v Hay* (1873) LR 8 CP 328.

10 *Astley v New Tivoli Ltd* [1899] 1 Ch 151 at 154 per North J. As to the liability of such trustees under the Companies Act 2006 s 750 see PARA 1311.

11 *Re Imperial Land Co of Marseilles, Re National Bank* (1870) LR 10 Eq 298; *Re General Provident Assurance Co, ex p National Bank* (1872) LR 14 Eq 507; *Re Kingston Cotton Mill Co* [1896] 1 Ch 6 at 14, CA, per Vaughan Williams J.

12 *Openshaw v Fletcher* (1916) 32 TLR 372, CA.

13 *Murray v 'The Northern Whig' Ltd* (1911) 46 ILT 77.

14 As to the meaning of the 'Companies Acts' see PARA 16.

15 As to the meaning of 'body corporate' see PARA 1 note 5.

16 As to the meaning of 'director' see PARA 478.

17 See the Companies Act 2006 s 1173(1). As to whether a company is required to have a secretary see PARA 601.

18 *Gibson v Barton* (1875) LR 10 QB 329 at 336 per Blackburn J.

19 *Re B Johnson & Co (Builders) Ltd* [1955] Ch 634 at 661, [1955] 2 All ER 775 at 790 per Jenkins LJ. See also *Oak Investment Partners XII v Boughtwood* [2009] EWHC 176 (Ch), [2009] All ER (D) 67 (Feb) (exertion of managerial powers by a shareholder or director who acts in breach of his fiduciary duty in the carrying out of the company's affairs (but not through use of any company organ) would be capable in principle of attracting relief under the Companies Act 2006 s 994 (see PARA 466 et seq)); and *Morris v Bank of India* [2005] EWCA Civ 693, [2005] 2 BCLC 328 (it would in practice defeat the effectiveness of the Insolvency Act 1986 s 213 (as to which see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 911) if liability were limited to those cases in which the board of directors was actually a direct privy to the fraud of the company with whom the transactions were entered into; the scheme of delegation of authority might provide only an incomplete picture of what was done and might not be sufficient for the purposes of determining whether the company itself should be treated as possessing the requisite knowledge).

20 *Registrar of Restrictive Trading Agreements v WH Smith & Son Ltd* [1969] 3 All ER 1065 at 1069, CA, per Lord Denning MR.

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608. Remuneration and lien.

A provision that the remuneration of an officer¹ (other than a director²) is to be determined only in general meeting³ does not prevent him from bringing a claim for a quantum meruit⁴. He has no lien on the books or any other property of the company for money due to him⁵.

1 As to the meaning of 'officer' see PARA 607.

2 See PARA 518 et seq. As to the meaning of 'director' see PARA 478.

3 As to meetings of the company see PARA 629 et seq.

4 *Bill v Darenth Valley Rly Co* (1856) 1 H & N 305 (secretary). Cf *Craven-Ellis v Canons Ltd* [1936] 2 KB 403, [1936] 2 All ER 1066 (remuneration to director for services as estate agent), explained in *Re Richmond Gate Property Co Ltd* [1964] 3 All ER 936, [1965] 1 WLR 335. See also PARA 518; and **EMPLOYMENT** vol 39 (2009) PARA 22. As to quantum meruit see **RESTITUTION** vol 40(1) (2007 Reissue) PARAS 7, 113 et seq.

5 *Barnton Hotel Co Ltd v Cook* (1899) 1 F 1190.

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609. Misfeasance proceedings and relief.

Managers and other officers¹ are in the same position as directors² as regards liability to misfeasance proceedings³ in a winding up, and as regards the power of the court⁴ to grant them relief where proceedings are taken against them, or where they apprehend that any claim will or may be made against them, in respect of any negligence, default, breach of duty or breach of trust⁵.

- 1 As to the meanings of 'manager' and 'officer' see PARA 607. It was not argued in *Re Windsor Steam Coal Co (1901) Ltd* [1929] 1 Ch 151, CA, that a liquidator was not an officer within this provision.
- 2 As to the meaning of 'director' see PARA 478.
- 3 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688 et seq.
- 4 As to the meaning of 'court' see PARA 212 note 1.
- 5 See the Companies Act 2006 s 1157; and PARA 600.

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610. Manager.

If a manager¹ commits such a breach of his duty as to cause a loss to the company, he is liable in damages²; and a de facto manager is also liable to penalties wherever the 'manager' is made liable by the Companies Acts³. A manager who takes a secret commission may be dismissed⁴. A secretary⁵ who has in fact acted as manager is liable for negligence in preparing balance sheets and accounts whereby he has caused dividends to be paid out of capital⁶.

- 1 As to the meaning of 'manager' see PARA 607.
- 2 *Leeds Estate Building and Investment Co v Shepherd* (1887) 36 ChD 787 (where owing to the manager's fraudulent accounts the directors paid a dividend).
- 3 See *Gibson v Barton* (1875) LR 10 QB 329; *Coventry and Dixon's Case* (1880) 14 ChD 660, CA; *Re Western Counties Steam Bakeries and Milling Co* [1897] 1 Ch 617, CA; *R v Lawson* [1905] 1 KB 541. The authority of a manager to 'take entire charge of the interest of a company' in South America does not extend to an unusual transaction, such as a promise to pay a guarantor of the company whose fund has been forfeited: *Re Cunningham & Co Ltd, Simpson's Claim* (1887) 36 ChD 532. Cf *Cartmell's Case* (1874) 9 Ch App 691.
- 4 *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339, CA (where the manager was dismissed on other grounds which could not be substantiated, and the taking of a commission was not discovered until a later date). See also **EMPLOYMENT** vol 40 (2009) PARA 701.
- 5 As to the company secretary see PARA 601 et seq.
- 6 *Municipal Freehold Land Co Ltd v Pollington* (1890) 59 LJ Ch 734.

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611. Solicitor.

A solicitor is not ordinarily an officer of a company¹; but, if he is paid by way of salary and has certain duties to perform, he may be an officer². It is not within the province of the company's solicitor to make any representations to possible investors as to the financial state of the company³.

In the case of the formation of a particular company, a solicitor is not the company's agent, but the agent of the promoter, to whom he must look for payment⁴. The company cannot become

liable to the solicitor by ratifying his acts, as it cannot ratify acts done before it was incorporated⁵; but it may become liable if the contract is novated⁶. If a solicitor charges the company for his professional services in the formation of the company, he cannot also charge the vendors on the sale of the business to the company⁷. An agreement made before the company is formed does not give him any right to employment⁸. The appointment of a solicitor is sometimes provided for in the company's articles⁹, but the articles themselves do not constitute a contract with him¹⁰.

A company's solicitor cannot set off an unliquidated claim for his costs against calls made in respect of shares held by him in the company¹¹.

He has no lien on the registers or books of the company, which must be kept at the company's office or otherwise under the control of the company¹², but he may have a lien on documents which the company does not need for the conduct of its business. A winding up will not displace this lien¹³. He cannot, however, assert such a lien as would prejudice the conduct of the winding up¹⁴; nor has he a lien for costs incurred in business that he knows to be ultra vires¹⁵; nor may he assert a lien against a third party¹⁶.

1 *Re Great Wheal Polgooth Co Ltd* (1883) 53 LJ Ch 42; *Re Great Western Forest of Dean Coal Consumers' Co Ltd, Carter's Case* (1886) 31 ChD 496; *Re Kingston Cotton Mill Co* [1896] 1 Ch 6 at 14 per Vaughan Williams J; *Re Harper's Ticket Issuing and Recording Machine Ltd* (1912) 29 TLR 63. As to the meaning of 'officer' see PARA 607.

2 *Re Liberator Permanent Benefit Building Society* (1894) 71 LT 406, DC.

3 *Burnes v Pennell* (1849) 2 HL Cas 497.

4 *Re Rotherham Alum and Chemical Co* (1883) 25 ChD 103, CA; *Re English and Colonial Produce Co Ltd* [1906] 2 Ch 435, CA; *Re National Motor Mail-Coach Co Ltd, Clinton's Claim* [1908] 2 Ch 515 at 521 per Swinfen Eady J. Hence he is not a promoter: *Re Great Wheal Polgooth Co Ltd* (1883) 32 WR 107.

5 See PARA 280.

6 *Re Hereford and South Wales Waggon and Engineering Co* (1876) 2 ChD 621, CA; *Nichols v Regent's Canal Co* (1894) 63 LJQB 641 (revsd on other grounds sub nom *Nichols v North Metropolitan Railway and Canal Co* (1894) 71 LT 836, CA; decision of Court of Appeal affd (1896) 74 LT 744, HL). See also *Re Patent Ivory Manufacturing Co, Howard v Patent Ivory Manufacturing Co* (1888) 38 ChD 156; and PARA 280.

7 *Welsh v Forbes* (1906) 8 F 453.

8 Cf *Re Dale and Plant Ltd* (1889) 61 LT 206.

9 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

10 *Eley v Positive Government Security Life Assurance Co* (1876) 1 ExD 88, CA.

11 *Johnson v Lyttle's Iron Agency* (1877) 5 ChD 687, CA.

12 *Re Anglo-Maltese Hydraulic Dock Co Ltd* (1885) 54 LJ Ch 730. See also *DTC (CNC) Ltd v Gary Sargeant & Co (a firm)* [1996] 2 All ER 369, [1996] 1 WLR 797 (an accountant may not exercise a lien for unpaid fees over books and documents etc of a client company, which were accounting records required by statute to be kept at a particular place or to be available for a particular purpose, such as inspection).

13 *Re Rapid Road Transit Co* [1909] 1 Ch 96; *Re Ardtully Copper Mines Ltd* (1915) 50 ILT 95. See also **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 808.

14 *Re Capital Fire Insurance Association* (1883) 24 ChD 408, CA; *Re Anglo-Maltese Hydraulic Dock Co* (1885) 54 LJ Ch 730; *Graham (Liquidator of Donaldson & Co) v White and Park* 1908 SC 309; *Re Hawkes* [1898] 2 Ch 1, CA; *Rorie v Stevenson* 1908 SC 559, Ct of Sess; *Re South Essex Estuary and Reclamation Co, ex p Paine and Layton* (1869) 4 Ch App 215; *Re Union Cement and Brick Co, ex p Pulbrook* (1869) 4 Ch App 627. As to the priority of the lien of a solicitor over a floating charge see PARA 1272.

15 *Re Phoenix Life Assurance Co, Howard and Dollman's Case* (1863) 1 Hem & M 433. As to the meaning of 'ultra vires' see PARA 259.

16 See *Re Aveling Barford Ltd* [1988] 3 All ER 1019, [1989] 1 WLR 360, following *Re South Essex Estuary and Reclamation Co, ex p Paine and Layton* (1869) 4 Ch App 215.

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(15) RESOLUTIONS AND MEETINGS OF THE COMPANY

(i) Resolutions

A. IN GENERAL

612. General requirements of the Companies Act 2006.

Part 13 of the Companies Act 2006¹ governs resolutions and meetings of a company². Amongst other things, these provisions implement the European Parliament and EC Council Directive³ which governs the exercise of certain shareholder rights attached to voting shares in relation to general meetings of companies incorporated in a member state and admitted to trading on a regulated market in a member state⁴.

The provisions of Part 13 are mandatory except where it is stated that the matter is subject to contrary provision in a company's articles⁵. In particular, a resolution of the members⁶ (or of a class of members⁷) must be passed in accordance with the procedure that is laid down in the Companies Act 2006⁸.

The rights conferred by Part 13 may be exercised⁹ by beneficial owners and nominees¹⁰.

1 *Ie the Companies Act 2006 Pt 13 (ss 281-361) (see PARA 617 et seq).*

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to resolutions see PARA 613 et seq. As to meetings see PARA 629 et seq.

3 *Ie European Parliament and EC Council Directive 2007/36 (OJ L184, 14.07.2007, p 17) on the exercise of certain rights of shareholders in listed companies.*

4 For the purposes of implementing the Directive, the Companies (Shareholders' Rights) Regulations 2009, SI 2009/1632, have been made, amending the Companies Act 2006 Pt 13 (see PARA 617 et seq).

5 See the Companies Act 2006 s 287; and PARA 617 note 10. As to the meaning of references to a company's 'articles' see PARA 228 note 2.

6 As to the meaning of 'member' see PARA 321.

7 As to classes of shares and of rights attached to shares see PARA 1057 et seq.

8 See the Companies Act 2006 s 281; and PARA 617. A resolution of the members (or of a class of members) of a private company must be passed either as a written resolution in accordance with Pt 13 Ch 2 (ss 288-300) (see PARA 623 et seq), or at a meeting of the members to which the provisions of Pt 13 Ch 3 (ss 301-335) (see PARA 632 et seq) apply: see s 281(1); and PARA 617. A resolution of the members (or of a class of members) of a public company must be passed at a meeting of the members to which the provisions of Pt 13 Ch 3 and, where relevant, Pt 13 Ch 4 (ss 336-340) (see PARAS 630, 643-644) apply: see s 281(2); and PARA 617. As to the meanings of 'private company' and 'public company' see PARA 102.

9 le under the Companies Act 2006 Pt 9 (ss 145-153) (see PARA 374 et seq).

10 See PARA 374 et seq.

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B. TYPES OF RESOLUTION

613. Ordinary resolutions.

An 'ordinary resolution'¹ of the members² (or of a class of members³) of a company⁴ means a resolution that is passed by a simple majority⁵.

A written resolution is passed by a simple majority if it is passed by members representing a simple majority of the total voting rights of eligible members⁶.

A resolution passed at a meeting on a show of hands is passed by a simple majority if it is passed by a simple majority of the votes cast by those entitled to vote⁷.

A resolution passed on a poll taken at a meeting⁸ is passed by a simple majority if it is passed by members representing a simple majority of the total voting rights of members who (being entitled to do so) vote in person, by proxy or in advance⁹ on the resolution¹⁰.

Anything that may be done by ordinary resolution may also be done by special resolution¹¹.

1 As to the manner of passing resolutions see PARA 617.

2 As to the meaning of 'member' see PARA 321.

3 As to classes of shares and of rights attached to shares see PARA 1057 et seq.

4 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

5 Companies Act 2006 s 282(1). As to the procedure at meetings of a company see PARA 642 et seq. As to voting on a resolution see PARA 653. As to savings regarding provisions of a company's articles that relate to a person's entitlement to vote on a resolution see s 287; and PARA 617 note 10. As to the application of s 282 where, immediately before 1 October 2007, the articles of a company provided for the chairman of a meeting to have a casting vote in the event of equality of votes on an ordinary resolution see PARA 649.

6 Companies Act 2006 s 282(2). A written resolution must be passed in accordance with Pt 13 Ch 2 (ss 288-300) (PARA 623 et seq): see s 282(2). As to eligible members in relation to a resolution proposed as a written resolution of a private company see PARA 623.

7 Companies Act 2006 s 282(3) (amended by SI 2009/1632). As to voting on a show of hands see PARA 654.

8 As to the right to demand a poll, and as to voting on a poll, see PARA 655 et seq.

9 As to which see the Companies Act 2006 s 322A (see PARA 656): see s 282(4) (amended by SI 2009/1632).

10 Companies Act 2006 s 282(4) (as amended: see note 9).

11 Companies Act 2006 s 282(5). As to special resolutions see s 283; and PARA 614.

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614. Special resolutions.

A 'special resolution'¹ of the members² (or of a class of members³) of a company⁴ means a resolution passed by a majority of not less than 75 per cent⁵.

A written resolution is passed by a majority of not less than 75 per cent if it is passed by members representing not less than 75 per cent of the total voting rights of eligible members⁶.

Where a resolution of a private company⁷ is passed as a written resolution, the resolution is not a special resolution unless it stated that it was proposed as a special resolution⁸, and, if the resolution so stated, it may only be passed as a special resolution⁹.

A resolution passed at a meeting on a show of hands is passed by a majority of not less than 75 per cent if it is passed by not less than 75 per cent of the votes cast by those entitled to vote¹⁰.

A resolution passed on a poll taken at a meeting¹¹ is passed by a majority of not less than 75 per cent if it is passed by members representing not less than 75 per cent of the total voting rights of the members who (being entitled to do so) vote in person, by proxy or in advance¹² on the resolution¹³.

Where a resolution is passed at a meeting, the resolution is not a special resolution unless the notice of the meeting included the text of the resolution and specified the intention to propose the resolution as a special resolution¹⁴ and, if the notice of the meeting so specified, the resolution may only be passed as a special resolution¹⁵.

1 As to the manner of passing resolutions see PARA 617.

2 As to the meaning of 'member' see PARA 321.

3 As to classes of shares and of rights attached to shares see PARA 1057 et seq.

4 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

5 Companies Act 2006 s 283(1). As to the procedure at meetings of a company see PARA 642 et seq. As to voting on a resolution see PARA 653. As to savings regarding provisions of a company's articles that relate to a person's entitlement to vote on a resolution see s 287; and PARA 617 note 10. See also *Ayre v Skelsey's Adamant Cement Co Ltd* (1904) 20 TLR 587.

6 Companies Act 2006 s 283(2). A written resolution must be passed in accordance with Pt 13 Ch 2 (ss 288-300) (PARA 623 et seq): see s 283(2). As to eligible members in relation to a resolution proposed as a written resolution of a private company see PARA 623.

7 As to the meaning of 'private company' see PARA 102.

8 Companies Act 2006 s 283(3)(a).

9 Companies Act 2006 s 283(3)(b).

10 Companies Act 2006 s 283(4) (amended by SI 2009/1632). As to voting on a show of hands see PARA 654.

11 As to the right to demand a poll, and as to voting on a poll, see PARA 655 et seq. A resolution passed in accordance with the requirements of the statute is effective, notwithstanding that it may be a breach of the articles: *Etheridge v Central Uruguay Northern Extension Rly Co* [1913] 1 Ch 425.

12 As to which see the Companies Act 2006 s 322A (see PARA 656): see s 283(5) (amended by SI 2009/1632).

13 Companies Act 2006 s 283(5) (as amended: see note 12).

14 Companies Act 2006 s 283(6)(a). As to meetings convened by notice see PARA 632. To be valid, a resolution passed at the meeting must be the same as that specified in the notice convening it, both in form and in substance: *Re Moorgate Mercantile Holdings Ltd* [1980] 1 All ER 40, [1980] 1 WLR 227. As to amendments to special resolutions see PARA 622.

15 Companies Act 2006 s 283(6)(b).

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615. Extraordinary resolutions.

Extraordinary resolutions are no longer provided for under the Companies Act 2006¹ but any reference to an extraordinary resolution in a provision of a company's memorandum² or articles³, or in a provision of a contract, continues to have effect⁴.

1 As they were under the Companies Act 1985 s 378 (repealed). See also *Ayre v Skelsey's Adamant Cement Co Ltd* (1904) 20 TLR 587 (affd (1905) 21 TLR 464, CA); *Re Oxted Motor Co Ltd* [1921] 3 KB 32; and *McConnell v E Prill & Co Ltd* [1916] 2 Ch 57.

2 As to the memorandum see PARA 104.

3 As to a company's articles of association see PARA 228 et seq.

4 See the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, art 9, Sch 3 para 23(1) (renumbered by SI 2007/3495). Any such reference as is mentioned in the text must continue to be construed in accordance with the Companies Act 1985 s 378 (repealed) (see note 1) as if that section had not been repealed: see the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, Sch 3 para 23(1) (as so renumbered). The provisions of the Companies Act 2006 Pt 3 Ch 3 (ss 29-30) (resolutions and agreements affecting a company's constitution) (see PARA 231) apply to any such resolution: see the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, Sch 3 para 23(2) (added by SI 2007/3495).

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616. Registration of copies of certain resolutions and agreements.

A copy of every resolution¹ or agreement that falls under any of heads (1) to (5) below², namely:

1007 (1) any special resolution³;

1008 (2) any resolution or agreement agreed to by all the members of a company⁴ that, if not so agreed to, would not have been effective for its purpose unless passed as a special resolution⁵;

1009 (3) any resolution or agreement agreed to by all the members of a class of shareholders⁶ that, if not so agreed to, would not have been effective for its

- purpose unless passed by some particular majority or otherwise in some particular manner⁷;
- 1010 (4) any resolution or agreement that effectively binds all members of a class of shareholders though not agreed to by all those members⁸;
- 1011 (5) any other resolution or agreement which affects a company's constitution⁹ by virtue of any enactment¹⁰,

or (in the case of a resolution or agreement that is not in writing) a written memorandum setting out its terms, must be forwarded to the registrar of companies¹¹ within 15 days after it is passed or made¹².

If a company fails to comply with this requirement¹³, an offence is committed by the company, and by every officer of the company who is in default¹⁴.

1 As to the manner of passing resolutions see PARA 617.

2 Heads (1) to (5) in the text specify the resolutions and agreements to which the Companies Act 2006 Pt 3 Ch 3 (ss 29-30) (resolutions and agreements affecting a company's constitution) applies: see s 29(1); and PARA 231.

3 See the Companies Act 2006 s 29(1)(a); and PARA 231. As to special resolutions see PARA 614.

4 As to the meaning of references in the Companies Act 2006 s 29(1) to a member of a company see s 29(2); and PARA 231.

5 See the Companies Act 2006 s 29(1)(b); and PARA 231.

6 As to the meaning of references in the Companies Act 2006 s 29(1) to a class of members of a company see s 29(2); and PARA 231.

7 See the Companies Act 2006 s 29(1)(c); and PARA 231.

8 See the Companies Act 2006 s 29(1)(d); and PARA 231.

9 Ie any other resolution or agreement to which the Companies Act 2006 Pt 3 Ch 3 applies (see note 2): see s 29(1)(e); and PARA 231. As to the meaning of references in the Companies Acts to a company's constitution see PARA 227.

10 See the Companies Act 2006 s 29(1)(e); and PARA 231. As to the meaning of 'enactment' see PARA 17 note 2.

11 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. Any amendment of the company's articles (including every resolution or agreement required to be embodied in or annexed to copies of the company's articles issued by the company, and any resolution under the Companies Act 2006 ss 570, 571 (disapplication of pre-emption rights: sale of treasury shares) (see PARA 1101)) is subject to the disclosure requirements in s 1078: see PARA 144.

12 See the Companies Act 2006 s 30(1); and PARA 231. A company must, on request by any member, send to him a copy of any resolution or agreement to which Pt 3 Ch 3 applies: see s 32(1)(b); and PARA 242.

13 Ie fails to comply with the Companies Act 2006 s 30 (see PARA 231): see s 30(2); and PARA 231.

14 See the Companies Act 2006 s 30(2); and PARA 231. As to the meaning of 'officer' generally see PARA 607; and as to the meaning of 'officer in default' see PARA 315.

C. PASSING RESOLUTIONS

617. Manner of passing resolutions.

The Companies Act 2006 provides for two types of resolution: the ordinary resolution¹; and the special resolution². Extraordinary resolutions are no longer provided for under the Companies Act 2006³ but any reference to an extraordinary resolution in a provision of a company's memorandum⁴ or articles⁵, or in a provision of a contract, continues to have effect⁶.

A resolution of the members⁷ (or of a class of members⁸) of a private company⁹ must be passed either as a written resolution¹⁰, or at a meeting of the members¹¹.

A resolution of the members (or of a class of members) of a public company¹² must be passed at a meeting of the members¹³.

Where a provision of the Companies Acts requires a resolution of a company, or of the members (or a class of members) of a company¹⁴, and does not specify what kind of resolution is required¹⁵, what is required is an ordinary resolution unless the company's articles require a higher majority (or unanimity)¹⁶.

1 See the Companies Act 2006 s 282; and PARA 613.

2 See the Companies Act 2006 s 283; and PARA 614.

3 As they were under the Companies Act 1985 s 378 (repealed): see PARA 615.

4 As to the memorandum see PARA 104.

5 As to a company's articles of association see PARA 228 et seq.

6 See the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, art 9, Sch 3 para 23; and PARA 615. Under the Companies Act 1985 s 379A (repealed), private companies also were allowed the choice of varying or dispensing with certain requirements relating to shares and governance by resolution ('elective resolution').

7 As to the meaning of 'member' see PARA 321.

8 As to classes of shares and of rights attached to shares see PARA 1057 et seq.

9 As to the meaning of 'private company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

10 Companies Act 2006 s 281(1)(a). The text refers to a written resolution passed in accordance with Pt 13 Ch 2 (ss 288-300) (see PARA 623 et seq): see s 281(1)(a). As to voting on a resolution see PARA 653. A provision of the articles of a private company is void in so far as it would have the effect that a resolution that is required by or otherwise provided for in an enactment could not be proposed and passed as a written resolution: see s 300; and PARA 623 note 4. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to the meaning of 'enactment' see PARA 17 note 2.

Nothing in Pt 13 Ch 1 (ss 281-287) affects: (1) any provision of a company's articles requiring an objection to a person's entitlement to vote on a resolution to be made in accordance with the articles, and for the determination of any such objection to be final and conclusive (s 287(a)); or (2) the grounds on which such a determination may be questioned in legal proceedings (s 287(b)).

Nothing in Pt 13 (ss 281-361) affects any enactment or rule of law as to things done otherwise than by passing a resolution, as to circumstances in which a resolution is or is not treated as having been passed, or as to cases in which a person is precluded from alleging that a resolution has not been duly passed: s 281(4).

11 Companies Act 2006 s 281(1)(b). The text refers to a resolution passed at a meeting of the members to which the provisions of Pt 13 Ch 3 (ss 301-335) (see PARA 632 et seq) apply: see s 281(1)(b). See note 10.

12 As to the meaning of 'public company' see PARA 102.

13 Companies Act 2006 s 281(2). The text refers to a resolution passed at a meeting of the members to which the provisions of Pt 13 Ch 3 (see PARA 632 et seq) and, where relevant, Pt 13 Ch 4 (ss 336-340) (see PARAS 630, 643-644) apply: see s 281(2). See note 10.

14 Companies Act 2006 s 281(3)(a). See note 10.

15 Companies Act 2006 s 281(3)(b). See note 10.

16 Companies Act 2006 s 281(3). See note 10. As to the application of s 281(3) where, immediately before 1 October 2007, the articles of a company provided for the chairman of a meeting to have a casting vote in the event of equality of votes on an ordinary resolution see PARA 649.

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618. Criteria for resolutions validly passed at general meetings.

A resolution¹ of the members of a company² is validly passed at a general meeting³ if notice of the meeting and of the resolution is duly⁴ given, and if the meeting is duly⁵ held and conducted⁶.

1 As to the manner of passing resolutions see PARA 617.

2 As to the meaning of 'member of a company' see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to meetings of the company see PARA 629 et seq.

4 In accordance with the provisions of the Companies Act 2006 Pt 13 Ch 3 (ss 301-335) (see PARA 632 et seq) and, where relevant, Pt 13 Ch 4 (ss 336-340) (see PARAS 630, 643-644), and the company's articles: see s 301; and PARA 653. As to the meaning of references to a company's 'articles' see PARA 228 note 2.

5 See note 4.

6 See the Companies Act 2006 s 301; and PARA 653.

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619. Chairman's declaration that resolution is carried on a show of hands.

On a vote on a resolution¹ at a meeting² on a show of hands³, a declaration by the chairman⁴ that the resolution either has or has not been passed⁵, or passed with a particular majority⁶, is conclusive evidence of that fact without proof of the number or proportion of the votes recorded in favour of or against the resolution⁷. However, any formalities, such as the showing of hands⁸, must be complied with, even on an unopposed motion⁹.

An entry in respect of such a declaration in minutes of the meeting¹⁰ is also conclusive evidence of that fact without such proof¹¹.

However, these provisions do not have effect if a poll is demanded¹² in respect of the resolution (and the demand is not subsequently withdrawn)¹³.

1 As to the manner of passing resolutions see PARA 617.

2 As to meetings of the company see PARA 629 et seq. As to the application of the provisions of the Companies Act 2006 Pt 13 Ch 3 (ss 301-335) (see PARA 632 et seq) to class meetings see PARA 631.

3 As to voting on a show of hands see PARA 654.

4 As to the chairman see PARA 648.

5 Companies Act 2006 s 320(1)(a).

6 Companies Act 2006 s 320(1)(b). See note 2. As to the majority required for an ordinary resolution see PARA 613; and as to the majority required for special resolutions see PARA 614.

7 Companies Act 2006 s 320(1). See note 2. See the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A art 47 (from which the Companies Act 2006 s 320 is derived); and PARA 653.

8 See PARAS 653- 654.

9 *Re Citizens' Theatre* 1946 SC 14.

10 It is recorded in accordance with the Companies Act 2006 s 355 (see PARA 668); see s 320(2).

11 Companies Act 2006 s 320(2). See note 2. See the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 47 (from which the Companies Act 2006 s 320 is derived); and PARA 653.

12 As to the right to demand a poll, and as to voting on a poll, see PARA 655 et seq.

13 Companies Act 2006 s 320(3). See note 2. See the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A arts 46-49 (from which the Companies Act 2006 s 320 is derived); and PARA 653.

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620. Special notice of certain resolutions.

Where, by any provision of the Companies Acts¹, special notice is required of a resolution², the resolution is not effective unless notice of the intention to move it has been given to the company³ at least 28 days before the meeting at which it is moved⁴. The company must, where practicable, give its members⁵ notice of any such resolution in the same manner and at the same time as it gives notice of the meeting⁶; or, where that is not practicable, the company must give its members notice at least 14 days before the meeting⁷, either by advertisement in a newspaper having an appropriate circulation⁸ or in any other manner allowed by the company's articles⁹. This provision does not confer upon an individual member the right to compel inclusion of an item in the agenda; it merely deals with the question of notice to the members¹⁰. If, after notice of the intention to move such a resolution has been given to the company, a meeting is called for a date 28 days or less after the notice has been given, the notice is deemed to have been properly given, though not given within the time required¹¹.

1 As to the meaning of the 'Companies Acts' see PARA 16.

2 See eg the Companies Act 2006 s 168(2) (removal of directors) (see PARA 517) and s 511 (removal of auditor from office) (see PARA 939). In the case of a private company special notice will be required if no period for appointing auditors has ended since the outgoing auditor ceased to hold office or such a period has ended and an auditor or auditors should have been appointed but were not; and in the case of a public company special notice will be required if there has been no accounts meeting of the company since the outgoing auditor ceased to hold office or there has been an accounts meeting at which an auditor or auditors should have been appointed but were not: see s 515(2); and PARA 939.

3 As to the meaning of 'company' under the Companies Acts see PARA 24.

4 Companies Act 2006 s 312(1). Any reference in s 312(1) to a period of notice is to a period of the specified length excluding the day of the meeting, and excluding the day on which the notice is given: s 360(1), (2). See PARA 617 note 11. As to the application of the provisions of Pt 13 Ch 3 (see PARA 632 et seq) to class meetings see PARA 631. As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

5 As to the meaning of 'member of a company' see PARA 321.

6 Companies Act 2006 s 312(2). See PARA 617 note 11.

7 Companies Act 2006 s 312(3). Any reference in s 312(3) to a period of notice is to a period of the specified length excluding the day of the meeting, and the day on which the notice is given: s 360(1), (2). See PARA 617 note 11.

8 Companies Act 2006 s 312(3)(a). See PARA 617 note 11.

9 Companies Act 2006 s 312(3)(b). See PARA 617 note 11.

10 *Pedley v Inland Waterways Association Ltd* [1977] 1 All ER 209. As to the power of members of a traded company to include additional business in the AGM see PARA 644.

11 Companies Act 2006 s 312(4). See PARA 617 note 11. See *Fenning v Fenning Environmental Products Ltd* [1982] LS Gaz R 803.

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621. Valid and invalid resolutions passed together.

If an ultra vires or invalid resolution is combined, as part of the same transaction, with a resolution otherwise valid¹, the whole transaction is void²; but, where the two resolutions are separate and distinct, the invalidity of one will not affect the validity of the other³.

1 As to resolutions generally see PARA 617 et seq.

2 *Re Imperial Bank of China, India and Japan* (1866) 1 Ch App 339 at 347 per Turner LJ.

3 Ie as in *Thomson v Henderson's Transvaal Estates Ltd* [1908] 1 Ch 765, CA (where a special reconstruction scheme was bad, but the resolution to wind up was good), following *Cleve v Financial Corp'n* (1873) LR 16 Eq 363 at 378 per Bacon V-C, and *Re Irrigation Co of France, ex p Fox* (1871) 6 Ch App 176.

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622. Amendments to resolutions.

Any amendment fairly arising on a resolution¹ which is specified in the notice of meeting and within the scope of the notice may be proposed and passed at the meeting, and a chairman has no right to refuse to put such an amendment². However, in the case of a special resolution³ (and, by analogy, of an extraordinary resolution⁴, if it applies) an amendment can be put to and voted on at a meeting properly only if the amendment involves no departure from the substance of the resolution as notified to the shareholders; and in deciding whether there is complete identity between the substance of the resolution as passed and the substance of the intended resolution as notified there is no room for the application of the *de minimis* principle⁵.

Provision for the procedure that applies where an amendment to a resolution is proposed may be made in a company's articles of association⁶.

It is usual for a resolution or an amended resolution to be moved by one voter and seconded by another; but, if the chairman chooses, he may put it to the vote without these formalities⁷.

1 As to resolutions generally see PARA 617 et seq.

2 *Re Horbury Bridge Coal, Iron and Waggon Co* (1879) 11 ChD 109 at 117, CA, per Bramwell LJ.

3 As to special resolutions see PARA 614.

4 As to extraordinary resolutions see PARA 615.

5 *Re Moorgate Mercantile Holdings Ltd* [1980] 1 All ER 40 at 54, [1980] 1 WLR 227 at 242 per Slade J.

6 As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102.

Accordingly, an ordinary resolution to be proposed at a general meeting may be amended by ordinary resolution if notice of the proposed amendment is given to the company (or, in the case of a public company, to the company secretary) in writing by a person entitled to vote at the general meeting at which it is to be proposed not less than 48 hours before the meeting is to take place (or such later time as the chairman of the meeting may determine), and if the proposed amendment does not, in the reasonable opinion of the chairman of the meeting, materially alter the scope of the resolution: Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 47(1); Sch 2 art 33(1); Sch 3 art 40(1). As to ordinary resolutions see PARA 613. As to meetings of the company generally see PARA 629 et seq. As to notice see PARA 632 et seq. As to the chairman see PARA 648. As to the company secretary see PARA 601 et seq.

A special resolution to be proposed at a general meeting may be amended by ordinary resolution, if the chairman of the meeting proposes the amendment at the general meeting at which the resolution is to be proposed, and if the amendment does not go beyond what is necessary to correct a grammatical or other non-substantive error in the resolution: Sch 1 art 47(2); Sch 2 art 33(2); Sch 3 art 40(2).

If the chairman of the meeting, acting in good faith, wrongly decides that an amendment to a resolution is out of order, the chairman's error does not invalidate the vote on that resolution: Sch 1 art 47(3); Sch 2 art 33(3); Sch 3 art 40(3).

7 *Torbock v Lord Westbury* [1902] 2 Ch 871; *Betts & Co Ltd v Macnaghten* [1910] 1 Ch 430; *Henderson v Bank of Australasia* (1890) 45 ChD 330, CA (where the chairman refused to put the amendment and the resolution was set aside).

D. WRITTEN RESOLUTIONS

623. Meaning of 'written resolution' and general provisions.

In the Companies Acts¹, a 'written resolution' means a resolution² of a private company³ proposed and passed in accordance with the statutory provisions⁴. However, neither a resolution⁵ removing a director⁶ before the expiration of his period of office⁷, nor a resolution⁸ removing an auditor⁹ before the expiration of his term of office¹⁰, may be passed as a written resolution¹¹.

A resolution may be proposed as a written resolution either by the directors of a private company¹², or by the members¹³ of a private company¹⁴.

A written resolution of a private company has effect as if passed (as the case may be) either by the company in general meeting¹⁵, or by a meeting of a class of members of the company¹⁶.

In relation to a resolution proposed as a written resolution of a private company, the eligible members¹⁷ are the members who would have been entitled to vote on the resolution on the circulation date of the resolution¹⁸. If the persons entitled to vote on a written resolution change during the course of the day that is the circulation date of the resolution, the eligible members are the persons entitled to vote on the resolution at the time that the first copy of the resolution is sent or submitted to a member for his agreement¹⁹.

1 As to the meaning of the 'Companies Acts' see PARA 16.

2 As to the manner of passing resolutions see PARA 617.

3 As to the meaning of 'private company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24.

4 Companies Act 2006 s 288(1). The text refers to a resolution proposed and passed in accordance with Pt 13 Ch 2 (ss 288-300): see s 288(1). A provision of the articles of a private company is void in so far as it would have the effect that a resolution that is required by or otherwise provided for in an enactment could not be proposed and passed as a written resolution: s 300. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to the meaning of 'enactment' see PARA 17 note 2.

Where a company has given an electronic address in any document containing or accompanying a proposed written resolution, it is deemed to have agreed that any document or information relating to that resolution may be sent by electronic means to that address (subject to any conditions or limitations specified in the document): s 298(1). For this purpose, 'electronic address' means any address or number used for the purposes of sending or receiving documents or information by electronic means: s 298(2). As to documents or information sent or supplied by electronic means see PARA 679 note 3.

Where a company sends either a written resolution, or a statement relating to a written resolution, to a person by means of a website, the resolution or statement is not validly sent for the purposes of Pt 13 Ch 2 unless the resolution is available on the website throughout the period beginning with the circulation date and ending on the date on which the resolution lapses under s 297 (see PARA 627): see s 299(1), (2). References in Pt 13 (ss 281-361) to the circulation date of a written resolution are to the date on which copies of it are sent or submitted to members in accordance with Pt 13 Ch 2 (or if copies are sent or submitted to members on different days, to the first of those days): s 290.

5 Ie a resolution under the Companies Act 2006 s 168 (see PARA 517): see s 288(2)(a).

6 As to the meaning of 'director' under the Companies Acts see PARA 478.

7 Companies Act 2006 s 288(2)(a).

8 Ie a resolution under the Companies Act 2006 s 510 (see PARA 938): see s 288(2)(b).

9 As to company auditors see PARA 905 et seq.

10 Companies Act 2006 s 288(2)(b).

11 Companies Act 2006 s 288(2).

12 Companies Act 2006 s 288(3)(a). As to the circulation of written resolutions proposed by the directors of a private company see further s 291 (see PARA 624): see s 288(3)(a).

13 As to the meaning of 'member' see PARA 321.

14 Companies Act 2006 s 288(3)(b). As to the circulation of written resolutions proposed by the members of a private company see further ss 292-295 (see PARAS 625-626): see s 288(3)(b).

15 As to meetings of the company see PARA 629 et seq.

16 Companies Act 2006 s 288(5). As to classes of shares and of rights attached to shares see PARA 1057 et seq.

References in enactments passed or made before 1 October 2007 (ie before s 288 came into force: see the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, art 2(1)(f)) to a meeting at which a resolution is passed or to members voting in favour of a resolution must be construed accordingly: see the Companies Act 2006 s 288(5). References in enactments passed or made before 1 October 2007 (ie before Pt 13 Ch 2 came into force: see the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, art 2(1)(f)) either to a resolution of a company in general meeting, or to a resolution of a meeting of a class of members of the company, have effect as if they included references to a written resolution of the members, or of a class of members, of a private company (as appropriate): Companies Act 2006 s 288(4).

17 Is eligible for the purposes of the Companies Act 2006 s 282(2) (see PARA 613).

18 Companies Act 2006 s 289(1).

19 Companies Act 2006 s 289(2).

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624. Circulation of written resolutions proposed by directors.

Where a resolution¹ is proposed as a written resolution² by the directors³ of the company⁴, the company must send or submit a copy of the resolution to every eligible member⁵. The company must do so:

- 1012 (1) by sending copies at the same time (so far as reasonably practicable) to all eligible members in hard copy form, in electronic form or by means of a website⁶;
or
- 1013 (2) if it is possible to do so without undue delay, by submitting the same copy to each eligible member in turn (or different copies to each of a number of eligible members in turn)⁷,

or by sending copies to some members in accordance with head (1) above and submitting a copy or copies to other members in accordance with head (2) above⁸. The copy of the resolution must be accompanied by a statement informing the member: (a) how to signify agreement to the resolution⁹; and (b) as to the date by which the resolution must be passed if it is not to lapse¹⁰.

In the event of default in complying with these requirements¹¹, an offence is committed by every officer of the company who is in default¹²; and a person guilty of such an offence is liable

(on conviction on indictment) to a fine and (on summary conviction) to a fine not exceeding the statutory maximum¹³.

The validity of the resolution, if passed, is not affected by any such failure to comply¹⁴.

1 As to the manner of passing resolutions see PARA 617.

2 As to the meaning of 'written resolution' see PARA 623.

3 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

4 Companies Act 2006 s 291(1). The provisions of s 291 apply to a resolution proposed as a written resolution by the directors of the company: see s 291(1). The company must be a private company: see s 288; and PARA 623. As to the meaning of 'private company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24.

5 Companies Act 2006 s 291(2). As to eligible members in relation to a resolution proposed as a written resolution of a private company see PARA 623. As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq. As to the enjoyment and exercise by a nominated person of members' rights conferred under s 291 see s 145; and PARA 374.

Where a resolution is proposed as a written resolution of a private company whose effect would be to appoint a person as auditor in place of a person (the 'outgoing auditor') whose term of office has expired, or is to expire, at the end of the period for appointing auditors, the company must, if certain conditions are met, send a copy of the proposed resolution to the person proposed to be appointed and to the outgoing auditor, and the outgoing auditor may, within 14 days after receiving the notice, make with respect to the proposed resolution representations to the company and request their circulation to members of the company: see s 514(4); and PARA 939. The company must circulate the representations together with the copy or copies of the resolution circulated in accordance with s 291: see s 514(5); and PARA 939.

6 Companies Act 2006 s 291(3)(a). As to sending any document or information relating to a resolution by electronic means see s 298; and PARA 623 note 4. As to a company sending a written resolution, or a statement relating to a written resolution, to a person by means of a website see s 299; and PARA 623 note 4. As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form (or by electronic means) see PARA 679.

7 Companies Act 2006 s 291(3)(b).

8 Companies Act 2006 s 291(3).

9 Companies Act 2006 s 291(4)(a). As to the procedure for signifying agreement to the resolution see s 296 (see PARA 627): see s 291(4)(a).

10 Companies Act 2006 s 291(4)(b). As to the lapsing of a resolution see s 297 (see PARA 627): see s 291(4)(b).

11 In complying with the Companies Act 2006 s 291: see s 291(5).

12 Companies Act 2006 s 291(5). As to the meaning of 'officer' see PARA 607; and as to the meaning of 'officer in default' see PARA 315.

13 Companies Act 2006 s 291(6). As to the meaning of the 'statutory maximum' see PARA 1622.

14 Companies Act 2006 s 291(7). The text refers to a failure to comply with s 291: see s 291(7).

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625. Members' power to require circulation of written resolution and accompanying statement.

The members¹ of a private company² may require the company to circulate a resolution³ that may properly be moved and is proposed to be moved as a written resolution⁴.

Any resolution may properly be moved as a written resolution unless: (1) it would, if passed, be ineffective (whether by reason of inconsistency with any enactment⁵ or the company's constitution⁶ or otherwise)⁷; (2) it is defamatory of any person⁸; or (3) it is frivolous or vexatious⁹.

Where the members require a company to circulate a resolution, they may require the company to circulate with it a statement of not more than 1,000 words on the subject matter of the resolution¹⁰.

A company is required to circulate the resolution and any accompanying statement once it has received requests that it do so from members representing not less than the requisite percentage of the total voting rights of all members entitled to vote on the resolution¹¹. A request may be in hard copy form or in electronic form¹², must identify the resolution and any accompanying statement¹³, and must be authenticated by the person or persons making it¹⁴.

A company that is so required¹⁵ to circulate a resolution must send or submit to every eligible member¹⁶ a copy of the resolution¹⁷, and a copy of any accompanying statement¹⁸. The company must do so: (a) by sending copies at the same time (so far as reasonably practicable) to all eligible members in hard copy form, in electronic form or by means of a website¹⁹; or (b) if it is possible to do so without undue delay, by submitting the same copy to each eligible member in turn (or different copies to each of a number of eligible members in turn)²⁰, or by sending copies to some members in accordance with head (a) above and submitting a copy or copies to other members in accordance with head (b) above²¹. The company must send or submit the copies (or, if copies are sent or submitted to members on different days, the first of those copies) not more than 21 days after it becomes subject to the requirement²² to circulate the resolution²³. The copy of the resolution must be accompanied by guidance as to how to signify agreement to the resolution²⁴, and the date by which the resolution must be passed if it is not to lapse²⁵.

In the event of default in complying with these requirements²⁶, an offence is committed by every officer of the company who is in default²⁷; and a person guilty of such an offence is liable (on conviction on indictment) to a fine and (on summary conviction) to a fine not exceeding the statutory maximum²⁸.

The validity of the resolution, if passed, is not affected by any such failure to comply²⁹.

The expenses of the company in complying with the requirement to circulate such a resolution³⁰ must be paid by the members who requested the circulation of the resolution unless the company resolves otherwise³¹. Unless the company has previously so resolved, it is not bound so to comply³² unless there is deposited with or tendered to it a sum reasonably sufficient to meet its expenses in doing so³³.

1 As to the meaning of 'member' see PARA 321.

2 As to the meaning of 'private company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the manner of passing resolutions see PARA 617.

4 Companies Act 2006 s 292(1). Neither a resolution under s 168 (see PARA 517) removing a director before the expiration of his period of office, nor a resolution under s 510 (see PARA 938) removing an auditor before the expiration of his term of office, may be passed as a written resolution: see s 288; and PARA 623. As to the meaning of 'written resolution' see PARA 623. As to the provision made for the sending or supplying of

documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq. As to the enjoyment and exercise by a nominated person of members' rights conferred under s 292 see s 145; and PARA 374.

5 As to the meaning of 'enactment' see PARA 17 note 2.

6 As to the meaning of references to a company's constitution see PARA 227.

7 Companies Act 2006 s 292(2)(a). See *Isle of Wight Rly Co v Tahourdin* (1883) 25 Ch D 320, CA; *Rose v McGivern* [1998] 2 BCLC 593.

8 Companies Act 2006 s 292(2)(b).

9 Companies Act 2006 s 292(2)(c).

10 Companies Act 2006 s 292(3).

11 Companies Act 2006 s 292(4). The 'requisite percentage' is 5% or such lower percentage as is specified for this purpose in the company's articles: s 292(5). As to the meaning of references to a company's 'articles' under the Companies Act 2006 see PARA 228 note 2.

12 Companies Act 2006 s 292(6)(a). As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form see PARA 679.

13 Companies Act 2006 s 292(6)(b).

14 Companies Act 2006 s 292(6)(c). In relation to the authentication of a document under the Companies Act 2006 see s 1146; and PARA 678 et seq.

15 Ie under the Companies Act 2006 s 292 (see the text and notes 1-14): s 293(1).

16 Companies Act 2006 s 293(1). This is subject to s 294(2) (deposit or tender of sum in respect of expenses of circulation) (see the text and notes 32-33) and s 295 (application not to circulate members' statement) (see PARA 626): see s 293(1). As to eligible members in relation to a resolution proposed as a written resolution of a private company see PARA 623.

Where a resolution is proposed as a written resolution of a private company whose effect would be to appoint a person as auditor in place of a person (the 'outgoing auditor') whose term of office has expired, or is to expire, at the end of the period for appointing auditors, the company must, if certain conditions are met, send a copy of the proposed resolution to the person proposed to be appointed and to the outgoing auditor, and the outgoing auditor may, within 14 days after receiving the notice, make with respect to the proposed resolution representations to the company and request their circulation to members of the company: see s 514(4); and PARA 939. The company must circulate the representations together with the copy or copies of the resolution circulated in accordance with s 293 (see s 514(5); and PARA 939); and, in such circumstances, the period allowed under s 293(3) (see the text and notes 22-23) for service of copies of the proposed resolution is 28 days instead of 21 days, and the provisions of s 293(5), (6) (offences) (see the text and notes 26-28) apply in relation to a failure to comply with s 514(5) as in relation to a default in complying with s 293 (see s 514(6); and PARA 939).

17 Companies Act 2006 s 293(1)(a).

18 Companies Act 2006 s 293(1)(b). The text refers to the accompanying statement made under s 292(3) (see the text and note 10).

19 Companies Act 2006 s 293(2)(a). As to a company sending a written resolution, or a statement relating to a written resolution, to a person by means of a website see s 299; and PARA 623 note 4.

20 Companies Act 2006 s 293(2)(b).

21 Companies Act 2006 s 293(2).

22 Ie the requirement under the Companies Act 2006 s 292 (see the text and notes 1-14): s 293(3).

23 Companies Act 2006 s 293(3). See note 16.

24 Companies Act 2006 s 293(4)(a). As to the procedure for signifying agreement to the resolution see s 296 (see PARA 627): see s 293(4)(a).

- 25 Companies Act 2006 s 293(4)(b). As to the lapsing of a resolution see s 297 (see PARA 627); see s 293(4) (b).
- 26 Ie in complying with the Companies Act 2006 s 293: see s 293(5).
- 27 Companies Act 2006 s 293(5). See note 16. As to the meaning of 'officer' see PARA 607; and as to the meaning of 'officer in default' see PARA 315.
- 28 Companies Act 2006 s 293(6). See note 16. As to the meaning of the 'statutory maximum' see PARA 1622.
- 29 Companies Act 2006 s 293(7). The text refers to a failure to comply with s 293: see s 293(7).
- 30 Ie in complying with the Companies Act 2006 s 293: see s 294(1).
- 31 Companies Act 2006 s 294(1). A decision of the company may be a decision of the members or of the directors: see s 288(3); and PARA 623.
- 32 Ie to comply with the Companies Act 2006 s 293: see s 294(2).
- 33 Companies Act 2006 s 294(2).

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626. Application by company or aggrieved person not to circulate members' statement.

A company¹ is not required to circulate a members' statement² on the subject matter of a resolution³ if, on an application by the company or another person who claims to be aggrieved, the court⁴ is satisfied that the rights so conferred⁵ are being abused⁶.

The court may order the members who requested the circulation of the statement to pay the whole or part of the company's costs on such an application, even if they are not parties to the application⁷.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie under the Companies Act 2006 s 293 (see PARA 625); see s 295(1). As to the meaning of 'member' see PARA 321.

3 Ie of a resolution proposed by the members: see the Companies Act 2006 s 292; and PARA 625. As to the manner of passing resolutions see PARA 617.

4 As to the meaning of 'court' see PARA 212 note 1.

5 Ie the rights conferred by the Companies Act 2006 ss 292, 293 (see PARA 625); see s 295(1).

6 Companies Act 2006 s 295(1). As to the procedure for making applications to the court under companies legislation see PARA 305. In an application for an order under s 295, the claimant must notify each member who requested the circulation of the relevant statement of the application: *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 10.

7 Companies Act 2006 s 295(2).

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627. Procedure for signifying agreement to written resolution; period before lapse.

A member¹ signifies his agreement to a proposed written resolution² when the company³ receives from him (or from someone acting on his behalf) an authenticated document⁴: (1) identifying the resolution to which it relates⁵; and (2) indicating his agreement to the resolution⁶. The document must be sent to the company in hard copy form or in electronic form⁷.

A member's agreement to a written resolution, once signified, may not be revoked⁸.

A written resolution is passed when the required majority of eligible members⁹ have signified their agreement to it¹⁰.

A proposed written resolution lapses if it is not passed before the end of the period specified for this purpose in the company's articles¹¹ or (if none is specified) the period of 28 days beginning with the circulation date¹². The agreement of a member to a written resolution is ineffective if signified after the expiry of that period¹³.

1 As to the meaning of 'member' see PARA 321.

2 As to the power to propose a written resolution see the Companies Act 2006 s 288(3); and PARA 623. As to the meaning of 'written resolution' see PARA 623. As to the manner of passing resolutions see PARA 617.

3 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 Companies Act 2006 s 296(1). In relation to the authentication of a document under the Companies Act 2006 see s 1146; and PARA 678 et seq.

5 Companies Act 2006 s 296(1)(a).

6 Companies Act 2006 s 296(1)(b).

7 Companies Act 2006 s 296(2). As to sending any document or information relating to a resolution by electronic means see s 298; and PARA 623 note 4. As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form (or by electronic means) see PARA 679.

8 Companies Act 2006 s 296(3).

9 As to eligible members in relation to a resolution proposed as a written resolution of a private company see PARA 623. As to the majority required for an ordinary resolution see PARA 613; and as to the majority required for special resolutions see PARA 614.

10 Companies Act 2006 s 296(4).

11 Companies Act 2006 s 297(1)(a). As to the meaning of references to a company's 'articles' under the Companies Act 2006 see PARA 228 note 2.

12 Companies Act 2006 s 297(1)(b). As to the circulation date for these purposes see PARA 623 note 4.

13 Companies Act 2006 s 297(2).

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628. Written resolutions: auditor's entitlement to receive communications etc.

In relation to a written resolution¹ proposed to be agreed to by a private company², the company's auditor is entitled to receive all such communications relating to the resolution as are required to be supplied³ to a member⁴ of the company⁵.

1 As to the meaning of 'written resolution' see PARA 623. As to the manner of passing resolutions see PARA 617.

2 As to the power to propose a written resolution see the Companies Act 2006 s 288(3); and PARA 623. As to the meaning of 'private company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 Ie by virtue of any provision of the Companies Act 2006 Pt 13 Ch 2 (ss 288-300) (see PARA 623 et seq).

4 See especially the Companies Act 2006 s 291 (cited in PARA 624), s 293 (cited in PARA 625). As to the meaning of 'member' see PARA 321.

5 See the Companies Act 2006 s 502(1); and PARA 934. As to an auditor's entitlement to receive communications etc relating to general meetings see s 502(2); and PARA 637.

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(ii) Meetings of the Company

A. IN GENERAL

629. General meetings and annual general meetings.

General meetings of the members of a company¹ may be convened at any time². Where a public company³ is required (either by statute or by the company's constitution⁴) to hold such a meeting periodically, the term 'annual general meeting (AGM)' is often used⁵.

A company's articles of association⁶ usually contain provisions as to the meetings of the company⁷.

1 As to who qualifies as a member of a company see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 For example, where the net assets of a public company are half or less of its called up share capital, the directors must, not later than 28 days from the earliest day on which that fact is known to a director of the company, call a general meeting of the company for a date not later than 56 days from that day to consider whether any, and if so what, steps should be taken to deal with the situation: see the Companies Act 2006 s 656(1)-(3); and PARA 1054. As to the meaning of 'called up share capital' see PARA 1045. A company's meetings are governed generally by Pt 13 (ss 281-361) (see PARA 617 et seq). Apart from any special provision, directors cannot postpone an ordinary meeting: *Smith v Paringa Mines Ltd* [1906] 2 Ch 193.

- 3 As to the meaning of 'public company' see PARA 102.
- 4 As to the meaning of references to a company's constitution see PARA 227.
- 5 See the Companies Act 2006 s 336; and PARA 630.
- 6 As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.
- 7 In the model articles, particular provision is made in relation to:
 - 196 (1) attendance and speaking at general meetings (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 arts 37, 40; Sch 2 arts 23, 26; Sch 3 arts 29, 32; the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A art 44; and PARA 645);
 - 197 (2) the quorum required for a general meeting (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 38; Sch 2 art 24; Sch 3 art 30; the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 40; and PARA 646);
 - 198 (3) the chairing of a general meeting (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 39; Sch 2 art 25; Sch 3 art 31; the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A arts 42, 43; and PARA 648);
 - 199 (4) the adjournment of a general meeting (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 41; Sch 2 art 27; Sch 3 art 33; the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 41; and PARA 650);
 - 200 (5) voting at a general meeting (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 arts 42-47; Sch 2 arts 28-33; Sch 3 arts 34-42; the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A arts 46-63; and PARA 653 et seq).

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630. Requirement to hold annual general meeting.

Every public company¹ must hold a general meeting² as its annual general meeting in each period of six months beginning with the day following its accounting reference date³ (in addition to any other meetings held during that period)⁴.

Every private company⁵ that is a traded company⁶ must hold a general meeting as its annual general meeting in each period of nine months beginning with the day following its accounting reference date (in addition to any other meetings held during that period)⁷.

If such a private or public company fails to comply with this requirement⁸, an offence is committed by every officer of the company who is in default⁹; and a person guilty of such an offence is liable (on conviction on indictment) to a fine and (on summary conviction) to a fine not exceeding the statutory maximum¹⁰.

However, if a company fails so to comply¹¹ as a result of giving notice¹² of an alteration of its accounting reference date¹³, specifying a new accounting reference date¹⁴, and stating that the current accounting reference period¹⁵ or the previous accounting reference period is to be shortened¹⁶, that company is to be treated as if it had complied with the requirement to hold an annual general meeting¹⁷ if it holds a general meeting as its annual general meeting within three months of giving that notice¹⁸.

1 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to meetings of the company generally see PARA 629 et seq.

3 As to the accounting reference date see PARA 712.

4 Companies Act 2006 s 336(1). As to the formalities required of a notice calling an annual general meeting of a public company see s 337(1), (3); and PARA 636. As to calling an annual general meeting by shorter notice than that required by s 307(2) (see PARA 632) or by the company's articles (as the case may be), if all the members entitled to attend and vote at the meeting agree to the shorter notice, see s 337(2); and PARA 632. As to the meaning of references to a company's 'articles' see PARA 228 note 2.

5 As to the meaning of 'private company' see PARA 102.

6 In the Companies Act 2006 Pt 13 (ss 281-361), 'traded company' means a company any shares of which carry rights to vote at general meetings, and are admitted to trading on a regulated market in an EEA State by or with the consent of the company: s 360C (added by SI 2009/1632). As to the meaning of 'share' see PARA 1042. As to the meaning of 'regulated market' see PARA 334 note 11. As to the meaning of 'EEA State' see PARA 29 note 5. As to rights attached to classes of shares generally see PARA 1057 et seq.

7 Companies Act 2006 s 336(1A) (added by SI 2009/1632). The need for private companies generally to have annual general meetings (AGMs) otherwise is optional: see the Companies Act 2006 s 288; and PARA 623.

The repeal of the Companies Act 1985 s 366 (duty to hold annual general meeting) does not affect any provision of a private company's memorandum or articles that expressly requires the company to hold an annual general meeting; and any such provision continues to have such effect as it had immediately before 1 October 2007: see the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, art 9, Sch 3 para 32(1), (2). Provision specifying that one or more directors are to retire at an annual general meeting of the company is not provision expressly requiring the company to hold an annual general meeting (see Sch 3 para 32(3)); and a company is not to be treated as one whose articles expressly require it to hold an annual general meeting if immediately before 1 October 2007 there was in force in relation to the company a resolution under the Companies Act 1985 s 366A (repealed) (election to dispense with annual general meetings) (see the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, Sch 3 para 32(4) (added by SI 2007/3495)).

8 Ie if a company fails to comply with the Companies Act 2006 s 336(1) (see the text and notes 1-4) or s 336(1A) (see the text and notes 5-7): see s 336(3) (amended by SI 2009/1632).

9 Companies Act 2006 s 336(3) (as amended: see note 8). As to the meaning of 'officer' see PARA 607; and as to the meaning of 'officer in default' see PARA 315.

10 Companies Act 2006 s 336(4). As to the meaning of the 'statutory maximum' see PARA 1622.

11 Ie if a company fails to comply with the Companies Act 2006 s 336(1) (see the text and notes 1-4) or s 336(1A) (see the text and notes 5-7): see s 336(2) (amended by SI 2009/1632).

12 Ie under the Companies Act 2006 s 392 (alteration of accounting reference date) (see PARA 713): see s 336(2) (as amended: see note 11).

13 Companies Act 2006 s 336(2) (as amended: see note 11).

14 Companies Act 2006 s 336(2)(a).

15 As to the accounting reference period see PARA 712.

16 Companies Act 2006 s 336(2)(b).

17 le as if it had complied with the Companies Act 2006 s 336(1) (see the text and notes 1-4) or s 336(1A) (see the text and notes 5-7): see s 336(2) (as amended: see note 11).

18 Companies Act 2006 s 336(2) (as amended: see note 11).

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631. Application of general provisions to class meetings.

The statutory provisions that govern resolutions at a company's general meeting¹ apply (with necessary modifications) in relation to a meeting of holders of a class of shares² as they apply in relation to a general meeting³. However, certain of those provisions⁴ do not apply in relation to a meeting of holders of a class of shares⁵ and certain other provisions⁶ (in addition to those mentioned in relation to a meeting of holders of a class of shares)⁷ do not apply in relation to a meeting in connection with the variation of rights attached to a class of shares (a 'variation of class rights meeting')⁸.

The quorum for a variation of class rights meeting is⁹:

- 1014 (1) for a meeting other than an adjourned meeting¹⁰, two persons present¹¹ holding at least one-third in nominal value of the issued shares¹² of the class in question (excluding any shares of that class held as treasury shares)¹³;
- 1015 (2) for an adjourned meeting, one person present¹⁴ holding shares of the class in question¹⁵.

At a variation of class rights meeting, any holder of shares of the class in question present may demand a poll¹⁶.

The statutory provisions that govern resolutions at a company's general meeting¹⁷ also apply (with necessary modifications) in relation to a meeting of a class of members of a company¹⁸ without a share capital¹⁹ as they apply in relation to a general meeting²⁰. However, certain of those provisions²¹ do not apply in relation to a meeting of a class of members²² and certain other provisions²³ (in addition to those mentioned in relation to a meeting of a class of members)²⁴ do not apply in relation to a meeting in connection with the variation of rights attached to a class of members (a 'variation of class rights meeting')²⁵. For these purposes, the quorum for a variation of class rights meeting is²⁶:

- 1016 (a) for a meeting other than an adjourned meeting, two members of the class present (in person or by proxy) who together represent at least one-third of the voting rights of the class²⁷;
- 1017 (b) for an adjourned meeting, one member of the class present (in person or by proxy)²⁸.

At a variation of class rights meeting, any member present (in person or by proxy) may demand a poll²⁹.

The provisions that require the results of a poll taken at a meeting³⁰ to be made available on a website³¹, apply (with any necessary modifications) in relation to a meeting of holders of a class of shares of a quoted company³² or traded company in connection with the variation of the rights attached to such shares³³ as they apply in relation to a general meeting of the company³⁴;

and the provisions that govern the procedure when an independent report on such a poll is required³⁵ apply (with any necessary modifications) in relation to a meeting of holders of a class of shares of a quoted company in connection with the variation of the rights attached to such shares as they apply in relation to a general meeting of the company³⁶.

The provisions of the model articles of association that relate to the general meetings of a public company³⁷ apply, with any necessary modifications, to meetings of the holders of any class of shares³⁸.

1 le the provisions of the Companies Act 2006 Pt 13 Ch 3 (ss 301-335) (see PARA 617 et seq): see s 334(1). As to company resolutions and the general requirements that apply to them see PARA 617 et seq; and as to meetings of the company generally see PARA 629 et seq. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'share' in the Companies Acts see PARA 1042; and as to the meaning of 'class of share' see PARA 1057.

3 Companies Act 2006 s 334(1). This is subject to s 334(2)-(3) (see the text and notes 4-8): see s 334(1) (amended by SI 2009/1632).

4 le the Companies Act 2006 ss 303-305 (members' power to require directors to call general meeting) (see PARA 641), s 306 (power of court to order meeting) (see PARA 639) and s 311(3) (see PARA 636), s 311A (see PARA 636), s 319A (see PARA 651), s 327(A1) (see PARA 664), s 330(A1) (see PARA 665) and s 333A (see PARA 664) (additional requirements for traded companies): see s 334(2) (amended by SI 2009/1632).

5 Companies Act 2006 s 334(2) (as amended: see note 4). The provisions of s 307(1)-(6) (see PARA 632) apply in relation to a meeting of holders of a class of shares in a traded company as they apply in relation to a meeting of holders of a class of shares in a company other than a traded company (and, accordingly, s 307A (notice required of general meeting: certain meetings of traded company) (see PARA 632) does not apply in relation to such a meeting): s 334(2A) (added by SI 2009/1632). As to the meaning of 'traded company' for these purposes see PARA 630 note 6.

6 le the Companies Act 2006 s 318 (quorum) (see PARA 646), and s 321 (right to demand a poll) (see PARA 655): see s 334(3).

7 le in addition to those provisions mentioned in the Companies Act 2006 s 334(2) (see the text and notes 4-5): see s 334(3).

8 Companies Act 2006 s 334(3). For these purposes, any amendment of a provision contained in a company's articles for the variation of the rights attached to a class of shares, or the insertion of any such provision into the articles, is itself to be treated as a variation of those rights (s 334(7)(a)); and references to the variation of rights attached to a class of shares include references to their abrogation (s 334(7)(b)). As to the meaning of references to a company's 'articles' see PARA 228 note 2.

9 Companies Act 2006 s 334(4). This provision is mandatory and not subject to any contrary provision in the articles of association. As to the provisions which govern any variation of class rights see PARA 1060 et seq.

10 As to the adjournment of general meetings of the company see PARA 650.

11 For these purposes, where a person is present by proxy or proxies, he is treated as holding only the shares in respect of which those proxies are authorised to exercise voting rights: Companies Act 2006 s 334(5). As to the appointment of a proxy to exercise a member's rights at a meeting see PARA 662.

12 As to the meaning of 'issued shares' see PARA 1045. As to the nominal value of shares see PARA 1044.

13 Companies Act 2006 s 334(4)(a). As to the meaning of 'treasury share' see PARA 1251.

14 See note 11.

15 Companies Act 2006 s 334(4)(b).

16 Companies Act 2006 s 334(6). As to the right to demand a poll at a meeting see PARA 655.

17 le the provisions of the Companies Act 2006 Pt 13 Ch 3 (see PARA 617 et seq): see s 335(1).

18 As to the meaning of 'member of the company' see PARA 321.

- 19 As to the meaning of 'company having a share capital' (and, by implication, one without) see PARA 1042.
- 20 Companies Act 2006 s 335(1). This is subject to s 335(2), (3) (see the text and notes 21-25): see s 335(1).
- 21 In the Companies Act 2006 ss 303-305 (members' power to require directors to call general meeting) (see PARA 641) and s 306 (power of court to order meeting) (see PARA 639): see s 335(2).
- 22 Companies Act 2006 s 335(2).
- 23 In the Companies Act 2006 s 318 (quorum) (see PARA 646), and s 321 (right to demand a poll) (see PARA 655): see s 335(3).
- 24 In addition to those provisions mentioned in the Companies Act 2006 s 335(2) (see the text and notes 21-22): see s 335(3).
- 25 Companies Act 2006 s 335(3). For these purposes, any amendment of a provision contained in a company's articles for the variation of the rights of a class of members, or the insertion of any such provision into the articles, is itself to be treated as a variation of those rights (s 335(6)(a)); and references to the variation of rights attached to a class of members include references to their abrogation (s 335(6)(b)).
- 26 Companies Act 2006 s 335(4).
- 27 Companies Act 2006 s 335(4)(a).
- 28 Companies Act 2006 s 335(4)(b).
- 29 Companies Act 2006 s 335(5).
- 30 As to voting on such a poll see PARA 656.
- 31 In the provisions of the Companies Act 2006 s 341 (see PARA 656): see s 352(1) (substituted by SI 2009/1632).
- 32 As to the meaning of 'quoted company' in the Companies Act 2006 see PARA 77.
- 33 For these purposes, any amendment of a provision contained in a company's articles for the variation of the rights attached to a class of shares, or the insertion of any such provision into the articles, is itself to be treated as a variation of those rights (Companies Act 2006 s 352(2)(a)); and references to the variation of rights attached to a class of shares include references to their abrogation (s 352(2)(b)).
- 34 Companies Act 2006 s 352(1) (as substituted: see note 31).
- The Secretary of State may by regulations limit the types of company to which some or all of the provisions of the Companies Act 2006 Pt 13 Ch 5 (ss 341-354) apply, or extend some or all of the provisions of Pt 13 Ch 5 to additional types of company: see s 354; and PARA 656 note 18.
- 35 In the provisions of the Companies Act 2006 ss 342-351 (see also PARAS 657-659): s 352(1A) (added by SI 2009/1632).
- 36 Companies Act 2006 s 352(1A) (as added: see note 35). See note 33.
- 37 In the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 arts 28-41 (see PARAS 622, 641 et seq): see Sch 3 art 42. As to the meaning of 'public company' see PARA 102.
- 38 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 42.

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B. NOTICE OF GENERAL MEETINGS

632. Meetings convened by notice.

A meeting is convened by notice to the members¹; and this notice must comply with the requirements of the Companies Acts².

A general meeting³ of a private company⁴ that is not a traded company⁵ (other than an adjourned meeting⁶) must be called by notice of at least 14 days⁷. A general meeting of a public company⁸ that is not a traded company⁹ (other than an adjourned meeting) must be called by notice of¹⁰:

- 1018 (1) in the case of an annual general meeting, at least 21 days¹¹; and
- 1019 (2) in any other case, at least 14 days¹².

However, the company's articles may require a longer period of notice than that so specified in relation to either a private or a public company¹³; and a general meeting may be called by shorter notice than that otherwise required if shorter notice is agreed by the members¹⁴.

1 As to who qualifies as a member of a company see PARA 321. As to the service of notice on members of a company generally see PARA 324.

2 A company's meetings are governed generally by the Companies Act 2006 Pt 13 (ss 281-361) (see PARA 617 et seq). As to the manner in which notice may be given see PARA 634; as to the persons entitled to notice see PARA 635; and as to the contents of such notice see PARA 636.

3 As to the requirement to hold general meetings of the company see PARA 629.

4 As to the meaning of 'private company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

5 The Companies Act 2006 s 307 applies to: (1) a general meeting of a company that is not a traded company (s 307(A1)(a) (s 307(A1), (A2) added by SI 2009/1632)); and (2) a general meeting of a traded company that is an opted-in company (as defined by the Companies Act 2006 s 971(1): see PARA 1509 note 2), where the meeting is held to decide whether to take any action that might result in the frustration of a takeover bid for the company, or where the meeting is held by virtue of s 969 (power of offeror to require general meeting to be held: see PARA 1509) (s 307(A1)(b) (as so added)). For corresponding provision in relation to general meetings of traded companies (other than meetings within s 307(A1)(b) (see head (2) above)), see s 307A (see PARA 633): s 307(A2) (as so added). As to the meaning of 'traded company' for these purposes see PARA 630 note 6. As to the application of the provisions of the Companies Act 2006 Pt 13 Ch 3 (ss 301-335) (see PARA 633 et seq) to class meetings see PARA 631.

6 As to the adjournment of general meetings of the company see PARA 650.

7 Companies Act 2006 s 307(1). Any reference in s 307(1) to a period of notice is to a period of the specified length excluding the day of the meeting, and excluding the day on which the notice is given: s 360(1), (2). As to the period of notice required for general meetings of a traded company see PARA 633.

Although the model articles of association that have been prescribed for the purposes of the Companies Act 2006 (see PARA 228 et seq) do not make explicit provision for the calling of meetings by notice, the default articles prescribed for the purposes of the Companies Act 1985 (ie the Companies (Tables A to F) Regulations 1985, SI 1985/805), which have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006 (see PARA 230), make provision in reg 2, Schedule, Table A art 38. Accordingly, general meetings must be called by at least 14 clear days' notice but a general meeting may be called by shorter notice if is so agreed by a majority in number of the members having a right to attend and vote being a majority together holding not less than 90% in nominal value of the shares giving that right: Table A art 38 (amended in relation to private companies limited by shares by SI 2007/2541). In relation to companies which are not private companies limited by shares, an annual general meeting must be called by at least 21 clear days' notice (other meetings requiring only the 14 days' notice); and an annual general meeting may be called by shorter notice if is so agreed by all the members entitled to attend and vote thereat; for other meetings, a majority in number of the members having a right to attend and vote is required, being a majority together holding not less than 95% (cf note 14) in nominal value of the shares giving that right: see the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 38 (as so amended). As to accidental failures to give notice of a general meeting etc see PARA 638. As to the giving of notice generally see PARA 324 et seq.

The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but art 38 is applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital) and Table E (regulations for the management of an unlimited company having a share capital). However, Table C applies Table A art 38 with the modifications that the words 'of the total voting rights at the meeting of all the members' are substituted for 'in nominal value of the shares giving that right' (see Table C art 5); and Table E applies Table A art 38 with the modification that general meetings must be called by at least seven clear days' notice (rather than by at least 14 clear days' notice) (see Table E art 2). As to the meanings of 'company limited by guarantee', 'company limited by shares' and 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

8 As to the meaning of 'public company' see PARA 102.

9 See note 5.

10 Companies Act 2006 s 307(2). Any reference in s 307(2) to a period of notice is to a period of the specified length excluding the day of the meeting, and excluding the day on which the notice is given: s 360(1), (2). The Companies Act 2006 does not define specifically when notice is given; but as to the deemed delivery of documents and information see s 1147; and PARA 687.

11 Companies Act 2006 s 307(2)(a). This means 21 clear days between the day on which the member would receive the notice in the ordinary course of post in England and the day of the meeting: *Re Railway Sleepers Supply Co* (1885) 29 ChD 204. Cf *Papillon v Brunton* (1860) 29 LJ Ex 265; *Gresham House Estate Co v Rossa Grande Gold Mining Co* [1870] WN 119. See also *Re Hector Whaling Ltd* [1936] Ch 208; *Re Pavilion, Newcastle-upon-Tyne Ltd and Reduced* [1911] WN 235 (where there was an inconsistency in the articles as to notice). As to the position in Scotland see *Neil McLeod & Sons Ltd, Petitioners* 1967 SLT 46, Ct of Sess. This is a matter which concerns the company and shareholders only: *Re Miller's Dale and Ashwood Dale Lime Co* (1885) 31 ChD 211. Where notice is to be by advertisement in a newspaper, the clear days count from the day after the issue of the newspaper: *Sneath v Valley Gold Ltd* [1893] 1 Ch 477, CA.

12 Companies Act 2006 s 307(2)(b).

13 Companies Act 2006 s 307(3). The text refers to a period of notice that may be specified that is longer than that specified in either s 307(1) (see the text and notes 4-7) or s 307(2): see s 307(3). An annual general meeting of a public company that is not a traded company may be called by shorter notice than that required by s 307(2) or by the company's articles (as the case may be), if all the members entitled to attend and vote at the meeting agree to the shorter notice: s 337(2) (amended by SI 2009/1632). As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to the meaning of 'member' see PARA 321.

14 Companies Act 2006 s 307(4). The shorter notice must be agreed to by a majority in number of the members having a right to attend and vote at the meeting, being a majority who: (1) together hold not less than the requisite percentage in nominal value of the shares giving a right to attend and vote at the meeting (excluding any shares in the company held as treasury shares) (s 307(5)(a)); or (2) in the case of a company not having a share capital, together represent not less than the requisite percentage of the total voting rights at that meeting of all the members (s 307(5)(b)). The requisite percentage is (in the case of a private company) 90% or such higher percentage (not exceeding 95%) as may be specified in the company's articles or (in the case of a public company) 95% (cf note 7): s 307(6). However, neither s 307(5) nor s 307(6) applies to an annual general meeting of a public company (see instead s 337(2); and note 10): s 307(7). As to the meaning of 'treasury share' see PARA 1251. As to the nominal value of shares see PARA 1042.

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633. Period of notice required for general meeting of traded company.

A general meeting of a traded company¹ must be called by notice of²:

- 1020 (1) at least 14 days, in a case where the following conditions are met³: (a) that the general meeting is not an annual general meeting ('Condition A')⁴; (b) that the company offers the facility for members to vote by electronic means⁵ accessible to all members who hold shares that carry rights to vote at general meetings ('Condition B')⁶; (c) that a special resolution reducing the period of notice to not less than 14 days has been passed ('Condition C')⁷;
- 1021 (2) in any other case, at least 21 days⁸.

The company's articles may require a longer period of notice than that specified in heads (1) and (2) above⁹. Where a general meeting is adjourned, the adjourned meeting may be called by shorter notice than required by heads (1) and (2) above¹⁰; but, in the case of an adjournment for lack of a quorum, this provision applies only if no business is to be dealt with at the adjourned meeting the general nature of which was not stated in the notice of the original meeting¹¹; and only if the adjourned meeting is to be held at least ten days after the original meeting¹².

1 As to the meaning of 'traded company' for these purposes see PARA 630 note 6. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the requirement to hold general meetings of the company see PARA 629. Nothing in the Companies Act 2006 s 307A applies in relation to a general meeting of a kind mentioned in s 307(A1)(b) (certain meetings regarding takeover of opted-in company) (see PARA 632 note 5): s 307A(8) (s 307A added by SI 2009/1632).

2 Companies Act 2006 s 307A(1) (as added: see note 1). Any reference in s 307A(1) to a period of notice is to a period of the specified length excluding the day of the meeting, and excluding the day on which the notice is given: s 360(1), (2) (s 360(1) amended by SI 2009/1632). The Companies Act 2006 does not define specifically when notice is given; but as to the deemed delivery of documents and information see s 1147; and PARA 687. As to the manner in which notice may be given see PARA 634; as to the persons entitled to notice see PARA 635; and as to the contents of such notice see PARA 636. As to the service of notice on members of a company generally see PARA 324.

3 Companies Act 2006 s 307A(1)(a) (as added: see note 1).

4 Companies Act 2006 s 307A(1)(a), (2) (as added: see note 1). As to annual general meetings of the company see PARA 629.

5 Nothing in the Companies Act 2006 Pt 13 is to be taken to preclude the holding and conducting of a meeting in such a way that persons who are not present together at the same place may by electronic means attend and speak and vote at it: s 360A(1) (s 360A added by SI 2009/1632). In the case of a traded company, the use of electronic means for the purpose of enabling members to participate in a general meeting may be made subject only to such requirements and restrictions as are both necessary to ensure the identification of those taking part and the security of the electronic communication, and proportionate to the achievement of those objectives: Companies Act 2006 s 360A(2) (as so added). Nothing in s 360A(2) affects any power of a company to require reasonable evidence of the entitlement of any person who is not a member to participate in the meeting: s 360A(3) (as so added).

6 Companies Act 2006 s 307A(1)(a), (3) (as added: see note 1). Condition B is met if there is a facility, offered by the company and accessible to all such members, to appoint a proxy by means of a website: see s 307A(1)(a), (3) (as so added).

Any provision of a traded company's articles is void in so far as it would have the effect of:

- 201 (1) imposing a restriction on a right of a member to participate in and vote at a general meeting of the company unless the member's shares have (after having been acquired by the member and before the meeting) been deposited with, or transferred to, or registered in the name of another person (s 360B(1)(a) (s 360B added by SI 2009/1632)); or
- 202 (2) imposing a restriction on the right of a member to transfer shares in the company during the period of 48 hours before the time for the holding of a general meeting of the company if that right would not otherwise be subject to that restriction (Companies Act 2006 s 360B(1)(b) (as so added)).

A traded company must determine the right to vote at a general meeting of the company by reference to the register of members as at a time (determined by the company) that is not more than 48 hours before the time

for the holding of the meeting: s 360B(2) (as so added). In calculating the period mentioned in s 360B(1)(b), (2), no account is to be taken of any part of a day that is not a working day: s 360B(3) (as so added). As to the meaning of 'working day' see PARA 145 note 16. Nothing in s 360B affects: (a) the operation of Pt 22 (ss 791-828) (information about interests in a company's shares) (see PARA 436 et seq), the Companies Act 1985 Pt XV (ss 454-457) (see PARAS 1548-1550) (orders imposing restrictions on shares), or any provision in a company's articles relating to the application of any provision of either of those Parts (Companies Act 2006 s 360B(4)(a) (as so added)); or (b) the validity of articles prescribed, or to the same effect as articles prescribed, under s 19 (power of Secretary of State to prescribe model articles) (see PARA 228 et seq) (s 360B(4)(b) (as so added)). The Companies Act 1985 ss 454-457, which apply for the purposes of the Companies Act 2006 Pt 22, are restated in ss 797-802: see PARA 446 et seq.

7 Companies Act 2006 s 307A(1)(a), (4) (as added: see note 1). Condition C requires that a special resolution reducing the period of notice to not less than 14 days has been passed either at the immediately preceding annual general meeting, or at a general meeting held since that annual general meeting: see s 307A(1)(a), (4) (as so added). In the case of a company which has not yet held an annual general meeting, condition C is that a special resolution reducing the period of notice to not less than 14 days has been passed at a general meeting: s 307A(1)(a), (5) (as so added). Any references in s 307A(4), (5) to: (1) a period of notice is to a period of the specified length excluding the day of the meeting, and excluding the day on which the notice is given (s 360(1), (2) (s 360(1) amended by SI 2009/1632)); and (2) to annual general meetings and general meetings include ones held before 3 August 2009 (reg 23).

8 Companies Act 2006 s 307A(1)(b) (as added: see note 1).

9 Companies Act 2006 s 307A(6) (as added: see note 1).

10 Companies Act 2006 s 307A(7) (as added: see note 1).

11 Companies Act 2006 s 307A(7)(a) (as added: see note 1).

12 Companies Act 2006 s 307A(7)(b) (as added: see note 1). Any reference in s 307A(7)(b) to a period of notice is to a period of the specified length excluding the day of the meeting, and excluding the day on which the notice is given: s 360(1), (2) (s 360(1) amended by SI 2009/1632).

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634. Manner in which notice may be given.

Notice of a general meeting of a company¹ must be given in hard copy form², in electronic form³, or by means of a website⁴, or partly by one such means and partly by another⁵. Where a company has given an electronic address⁶ in a notice calling a meeting, it is deemed to have agreed that any document or information relating to proceedings at the meeting may be sent by electronic means to that address (subject to any conditions or limitations specified in the notice)⁷.

For the purpose of calling a meeting of the holders of bearer debentures⁸, in the absence of special provision, notice by advertisement is sufficient⁹. Such a notice will be deemed to have been given on the date of the publication of the advertisement¹⁰.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the requirement to hold general meetings of the company see PARA 629. As to meetings convened by notice see PARA 632 et seq; as to the persons entitled to notice see PARA 635; and as to the contents of such notice see PARA 636. As to the service of notice on members of a company generally see PARA 324.

2 Companies Act 2006 s 308(a). As to documents or information sent or supplied in hard copy form see PARA 678.

3 Companies Act 2006 s 308(b). As to documents or information sent or supplied in electronic form (or by electronic means) see PARA 679.

4 Companies Act 2006 s 308(c). Notice of a meeting is not validly given by a company by means of a website unless (s 309(1)): (1) when the company notifies a member of the presence of the notice on the website the notification states that it concerns a notice of a company meeting, specifies the place, date and time of the meeting and (in the case of a public company) states whether the meeting will be an annual general meeting (s 309(2)); and (2) the notice is available on the website throughout the period beginning with the date of that notification and ending with the conclusion of the meeting (s 309(3)). As to documents or information sent or supplied by a company on a website see PARA 683.

5 Companies Act 2006 s 308.

6 For these purposes, 'electronic address' means any address or number used for the purposes of sending or receiving documents or information by electronic means: Companies Act 2006 s 333(4).

7 Companies Act 2006 s 333(1).

8 As to the meaning of 'debenture' see PARA 1299.

9 *Mercantile Investment and General Trust Co v International Co of Mexico* [1893] 1 Ch 484n at 488n, CA, per Lindley LJ.

10 *Mercantile Investment and General Trust Co v International Co of Mexico* [1893] 1 Ch 484n at 489n, CA, per Lindley LJ.

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635. Persons entitled to notice.

Subject to any enactment¹, and to any provision of the articles², notice of a general meeting of a company³ must be sent to every member of the company⁴, and to every director⁵.

1 As to the meaning of 'enactment' see PARA 17 note 2.

2 Companies Act 2006 s 310(4). As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to the application of the provisions of Pt 13 Ch 3 (ss 301-335) (see PARA 632 et seq) to class meetings see PARA 631. As to the enjoyment and exercise by nominated persons of members' rights conferred by the Companies Act 2006 s 310 see s 145(3)(d); and PARA 374.

Model articles have been made for the purposes of the Companies Act 2006 and intended for adoption by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1; and PARA 228 et seq) and by public companies (see reg 4, Sch 3; and PARA 228 et seq). As to the meanings of 'company limited by shares', 'private company' and 'public company' see PARA 102. Accordingly, where those articles are adopted, it is provided that transmitters do not have the right to attend or vote at a general meeting (or, in the case of a private company, agree to a proposed written resolution) in respect of shares to which they are entitled, by reason of the holder's death or bankruptcy or otherwise, unless they become the holders of those shares: Sch 1 art 27(3); Sch 3 art 66(2).

The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. Accordingly, subject to the provisions of the articles and to any restrictions imposed on any shares, notice of a meeting must be given to all the members, to all persons entitled to a share in consequence of the death or bankruptcy of a member and to the directors and auditors: Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule Table A art 38. Table A provides regulations for the management of a company limited by shares but art 38 is applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital) and Table E (regulations for the management of an unlimited

company having a share capital). However, Table C applies Table A art 38 with the modification that the notice must be given simply to all the members and to the directors and auditors (see Table C art 5). As to the meanings of 'company limited by guarantee' and 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

3 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the requirement to hold general meetings of the company see PARA 629. As to meetings convened by notice see PARAS 632 et seq; as to the manner in which notice may be given see PARA 634; and as to the contents of such notice see PARA 636. As to the service of notice on members of a company generally see PARA 324. As to accidental failures to give notice of a general meeting etc see PARA 638. As to the giving of notice generally see PARA 324.

4 Companies Act 2006 s 310(1)(a). As to the meaning of 'member of a company' see PARA 321. For these purposes, the reference to members includes any person who is entitled to a share in consequence of the death or bankruptcy of a member, if the company has been notified of their entitlement (s 310(2)); and this reference to the bankruptcy of a member includes the sequestration of the estate of a member (s 310(3)). For the purpose of serving notices of meetings, whether under the Companies Act 2006 s 310(1), any other enactment, a provision in the articles of association or any other instrument, a participating issuer may determine that persons entitled to receive such notices are those persons entered on the relevant register of securities at the close of business on a day determined by him: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 41(3) (amended by SI 2009/1889). The day so determined by a participating issuer may not be more than 21 days before the day that the notices of the meeting are sent: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 41(4). These provisions are without prejudice to the protection afforded by Sch 4 para 5(3) (see PARA 340) to a participating issuer which is a company and by Sch 4 paras 13(4), 15(3) (see PARA 425) to a participating issuer: reg 41(5). As to the meaning of 'participating issuer' see PARA 421 text and note 9. As to the meaning of 'register of securities' see PARA 421 note 3. As to the meaning of 'company' for these purposes see PARA 340 note 1. As to the Uncertificated Securities Regulations 2001, SI 2001/3755, generally see PARA 420.

5 Companies Act 2006 s 310(1)(b). As to the meaning of 'director' under the Companies Acts see PARA 478.

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636. Contents of notice.

Notice of a general meeting of a company¹ must state the time and date of the meeting², and the place of the meeting³, and must⁴ state the general nature of the business to be dealt with at the meeting⁵. A notice calling an annual general meeting of a public company or a private company that is a traded company⁶ must state that the meeting is an annual general meeting⁷. Notice of a general meeting of a traded company must also include:

- 1022 (1) a statement giving the address of the website on which the information required of traded companies⁸ in advance of a general meeting is published⁹;
- 1023 (2) a statement that the right to vote at the meeting is determined by reference to the register of members, and a statement of the time when that right¹⁰ will be determined¹¹;
- 1024 (3) a statement of the procedures with which members must comply in order to be able to attend and vote at the meeting (including the date by which they must comply)¹²;
- 1025 (4) a statement giving details of any forms to be used for the appointment of a proxy¹³;
- 1026 (5) where the company offers the facility for members to vote in advance¹⁴ or by electronic means¹⁵, a statement of the procedure for doing so (including the date by which it must be done, and details of any forms to be used)¹⁶; and
- 1027 (6) a statement of the right of members to ask questions¹⁷ at meetings¹⁸.

Provisions in the articles requiring special business to be specially notified¹⁹ and any other directions in the articles as to content must be followed²⁰.

If the notice is misleading, the court will restrain the holding of the meeting²¹, or restrain the directors from acting on resolutions passed on insufficient notice, until confirmed by the company at a meeting properly notified²². The transaction of business which has not been sufficiently notified or which is substantially different from that notified is invalid²³, but want of notice of some of the business does not invalidate such business as has been properly notified²⁴. Amendments fairly arising on a proposed resolution may be passed²⁵; thus a meeting summoned to pass a special resolution to wind up may appoint a different liquidator from the one named in the notice convening the meeting²⁶; but, in the case of a special resolution, an amendment can properly be put to and voted on at a meeting only if the amendment involves no departure whatever from the substance of the resolution as notified to the shareholders²⁷.

A notice of a meeting to pass a resolution 'with such amendments and alterations as shall be determined at the meeting' enables substantial alteration to be made, although the business is special business, the general nature of which is required by the articles to be notified²⁸; but, in the case of a notice of intention to propose a special resolution, nothing is achieved by the addition of such words²⁹.

Unequivocal notice must be given of a resolution involving the pecuniary advantage of a director³⁰. A notice not stating the particulars of the advantage is insufficient and the consequent resolutions are void³¹. A notice stating that the meeting will be asked to ratify an act of the directors, which (while beyond the powers of the directors) is intra vires the company³², is sufficient³³, although it does not say why such ratification is required³⁴.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the requirement to hold general meetings of the company see PARA 629. As to meetings convened by notice see PARAS 632 et seq; as to the manner in which notice may be given see PARA 634; and as to the persons entitled to notice see PARA 635. As to the service of notice on members of a company generally see PARA 324. As to accidental failures to give notice of a general meeting etc see PARA 638. As to the giving of notice generally see PARA 324.

2 Companies Act 2006 s 311(1)(a).

3 Companies Act 2006 s 311(1)(b). In the absence of fraud, the place of meeting is entirely at the discretion of the directors: *Martin v Walker* (1918) 145 LT Jo 377.

4 In relation to a company other than a traded company, the Companies Act 2006 s 311(2) has effect subject to any provision of the company's articles: s 311(2) (amended by SI 2009/1632). As to the meaning of 'traded company' for these purposes see PARA 630 note 6.

5 Companies Act 2006 s 311(2) (as amended: see note 4).

Although the model articles of association that have been prescribed for the purposes of the Companies Act 2006 (see PARA 228 et seq) do not make explicit provision for the giving of notice of meetings, the default articles prescribed for the purposes of the Companies Act 1985 (ie the Companies (Tables A to F) Regulations 1985, SI 1985/805), which have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006 (see PARA 230), do make provision in reg 2, Schedule, Table A art 38. Accordingly, such notice must specify the time and place of the meeting and the general nature of the business to be transacted: Table A art 38 (amended in relation to private companies limited by shares by SI 2007/2541). See also the text and notes 30-34. In the case of an annual general meeting held otherwise than in relation to a private company limited by shares, the notice must specify the meeting as such: see the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 38 (as so amended). The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but art 38 is applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital) and Table E (regulations for the management of an unlimited company having a share capital). However, Table C applies Table A art 38 with the modification that the notice must be given simply to all the members and to the directors and auditors (see Table C art 5). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'private company' and 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

6 As to the meaning of 'traded company' for these purposes see PARA 630 note 6.

7 Companies Act 2006 s 337(1) (amended by SI 2009/1632). Where a notice calling an annual general meeting of a traded company is given more than six weeks before the meeting, the notice must include (if the company is a public company) a statement of the right under the Companies Act 2006 s 338 (see PARA 643) to require the company to give notice of a resolution to be moved at the meeting and (whether or not the company is a public company) a statement of the right under s 338A (see PARA 644) to require the company to include a matter in the business to be dealt with at the meeting: s 337(3) (added by SI 2009/1632). Any reference in the Companies Act 2006 s 337(3) to a period of notice is to a period of the specified length excluding the day of the meeting, and excluding the day on which the notice is given: s 360(1), (2) (s 360(1) amended by SI 2009/1632).

8 The information required by the Companies Act 2006 s 311A: see s 311(3)(a) (s 311(3) added by SI 2009/1632). Accordingly, a traded company must ensure that the following information relating to a general meeting of the company is made available on a website (Companies Act 2006 s 311A(1) (s 311A added by SI 2009/1632)):

- 203 (1) the matters set out in the notice of the meeting (Companies Act 2006 s 311A(1)(a) (as so added));
- 204 (2) the total numbers of shares in the company, and shares of each class, in respect of which members are entitled to exercise voting rights at the meeting (s 311A(1)(b) (as so added));
- 205 (3) the totals of the voting rights that members are entitled to exercise at the meeting in respect of the shares of each class (s 311A(1)(c) (as so added));
- 206 (4) members' statements, members' resolutions and members' matters of business received by the company after the first date on which notice of the meeting is given (s 311A(1)(d) (as so added)).

The amounts mentioned in head (2) and head (3) above must be ascertained at the latest practicable time before the first date on which notice of the meeting is given: s 311A(6) (as so added). As to the meaning of 'share' see PARA 1042. As to rights attached to classes of shares generally see PARA 1057 et seq.

The information must be made available on a website that is maintained by or on behalf of the company, and which identifies the company: s 311A(2) (as so added). Access to the information on the website, and the ability to obtain a hard copy of the information from the website, must not be conditional on payment of a fee or otherwise restricted (s 311A(3) (as so added)); and the information: (a) must be made available (in the case of information required by heads (1) to (3) above) on or before the first date on which notice of the meeting is given and (in the case of information required by head (4) above), as soon as reasonably practicable (s 311A(4) (a) (as so added)); and (b) must be kept available throughout the period of two years beginning with the date on which it is first made available on a website in accordance with s 311A (s 311A(4)(b) (as so added)). However, a failure to make information available throughout the period specified in head (b) above is disregarded if the information is made available on the website for part of that period, and if the failure is wholly attributable to circumstances that it would not be reasonable to have expected the company to prevent or avoid: s 311A(5) (as so added). If the requirements of s 311A are not complied with as respects any meeting, an offence is committed by every officer of the company who is in default (s 311A(8) (as so added)); and a person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale (s 311A(9) (as so added)). Failure to comply with s 311A does not affect the validity of the meeting or of anything done at the meeting: s 311A(7) (as so added). As to the meaning of 'officer' see PARA 607; and as to the meaning of 'officer in default' see PARA 315. As to the meaning of the 'standard scale' see PARA 1622 note 5.

9 Companies Act 2006 s 311(3)(a) (as added: see note 8).

10 In accordance with the Companies Act 2006 s 360B(2) (see PARA 633 note 6): see s 311(3)(b) (as added: see note 8).

11 Companies Act 2006 s 311(3)(b) (as added: see note 8).

12 Companies Act 2006 s 311(3)(c) (as added: see note 8).

13 Companies Act 2006 s 311(3)(d) (as added: see note 8). As to the appointment of a proxy to exercise rights at a meeting see PARA 662.

14 In accordance with the Companies Act 2006 s 322A (see PARA 656): see s 311(3)(e) (as added: see note 8).

- 15 le in accordance with the Companies Act 2006 s 360A (see PARA 632 note 5): see s 311(3)(e) (as added: see note 8).
- 16 Companies Act 2006 s 311(3)(e) (as added: see note 8).
- 17 le in accordance with the Companies Act 2006 s 319A (see PARA 651): see s 311(3)(f) (as added: see note 8).
- 18 Companies Act 2006 s 311(3)(f) (as added: see note 8).
- 19 Eg under the Companies Act 1948 Sch 1, Table A art 52: see PARA 655 note 3.
- 20 See the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 38 (cited in note 5) and the Companies Act 2006 s 311(2) (cited in the text and notes 4-5). See also *Graham v Van Diemen's Land Co* (1856) 1 H & N 541, Ex Ch; *Kaye v Croydon Tramways Co* [1898] 1 Ch 358, CA; *Tiessen v Henderson* [1899] 1 Ch 861; *Normandy v Ind, Coope & Co Ltd* [1908] 1 Ch 84. A notice specifying the business as 'to elect directors' was held to have sufficiently specified the general nature of the business to elect directors up to the number permitted by the articles in *Choppington Collieries Ltd v Johnson* [1944] 1 All ER 762, CA. In *Robert Batcheller & Sons Ltd v Batcheller* [1945] Ch 169, [1945] 1 All ER 522 (overruled on another point by *Grundt v Great Boulder Pty Gold Mines Ltd* [1948] Ch 145, [1948] 1 All ER 21, CA), a reminder of a poll was held insufficient notice of a meeting. Where notice of a meeting is accompanied by a circular, the notice includes the circular: *Tiessen v Henderson* at 866-867 per Kekewich J; *Re Moorgate Mercantile Holdings Ltd* [1980] 1 All ER 40 at 54, [1980] 1 WLR 227 at 242 per Slade J (notices and circulars can and should be treated ordinarily as one document); *Re RAC Motoring Services Ltd, Royal Automobile Club Ltd* [2000] 1 BCLC 307 at 327 per Neuberger J. A circular to shareholders must give a fair, candid and reasonably full explanation of the purpose for which the meeting is called: *Kaye v Croydon Tramways Co* at 369-370, CA, per Lindley MR; *Tiessen v Henderson* at 866-867 per Kekewich J; *Re Imperial Chemical Industries Ltd* [1936] Ch 587 at 618, CA, per Clauson J (affd sub nom *Carruth v Imperial Chemical Industries Ltd* [1937] AC 707, [1937] 2 All ER 422, HL); *Re RAC Motoring Services Ltd, Royal Automobile Club Ltd* at 327-328 per Neuberger J; *CAS (Nominees) Ltd v Nottingham Forest FC plc* [2002] 1 BCLC 613 at 639 per Hart J. As to specifying the intention to pass a resolution as a special resolution see PARA 614. Whether it is necessary that the notice of a resolution to substitute new articles for the present articles should be accompanied by a circular explaining the alterations (or, alternatively, a copy of the proposed new articles) depends on the circumstances of the case and the particular nature of the alterations: see *Young v South African and Australian Exploration and Development Syndicate* [1896] 2 Ch 268; *Normandy v Ind, Coope & Co Ltd* at 97 per Kekewich J; *Re North of Scotland and Orkney and Shetland Steam Navigation Co Ltd* 1920 SC 94, Ct of Sess. A director's report accompanying a notice may supplement it: *Boschoek Pty Co Ltd v Fuke* [1906] 1 Ch 148. The notice may be looked at to see if the proceedings are regular: *Betts & Co Ltd v Macnaghten* [1910] 1 Ch 430.
- 21 *Jackson v Munster Bank* (1884) 13 LR 118.
- 22 *Kaye v Croydon Tramways Co* [1898] 1 Ch 358, CA; *Baillie v Oriental Telephone and Electric Co Ltd* [1915] 1 Ch 503, CA; *Pacific Coast Coal Mines Ltd v Arbuthnot* [1917] AC 607, PC. Cf *Bentley-Stevens v Jones* [1974] 2 All ER 653, [1974] 1 WLR 638 (injunction refused as no doubt about ultimate result and any invalidity was curable).
- 23 *Re Bridport Old Brewery Co* (1867) 2 Ch App 191; *Imperial Bank of China, India and Japan v Bank of Hindustan, China and Japan* (1868) LR 6 Eq 91; *Re Teede and Bishop Ltd* (1901) 70 LJ Ch 409. Cf *Henderson v Bank of Australasia* (1890) 45 ChD 330, CA.
- 24 *Re British Sugar Refining Co* (1857) 3 K & J 408; *Re London and Mediterranean Bank Ltd, Wright's Case* (1871) 7 Ch App 55. Cf *Cleve v Financial Corp'n* (1873) LR 16 Eq 363.
- 25 See PARA 622.
- 26 *Re Trench Tubeless Tyre Co, Bethell v Trench Tubeless Tyre Co* [1900] 1 Ch 408, CA. This case was decided under the law existing before the Companies Act 1929, which required a special resolution to be passed and confirmed at separate meetings, but the principles laid down in that case would appear to apply equally where there is only one meeting. It was further decided under the old law requiring two meetings that the resolution at the first meeting need not follow the exact terms of the notice: *Torbock v Lord Westbury* [1902] 2 Ch 871.
- 27 *Re Moorgate Mercantile Holdings Ltd* [1980] 1 All ER 40 at 54, [1980] 1 WLR 227 at 242 per Slade J. See also PARA 622. As to shareholders see PARA 321 et seq.
- 28 *Betts & Co Ltd v Macnaghten* [1910] 1 Ch 430 (where the notice proposed that three directors only should be re-elected, but other directors, not previously named, were at the meeting proposed and elected). Cf *Choppington Collieries Ltd v Johnson* [1944] 1 All ER 762, CA (cited in note 20).

29 *Re Moorgate Mercantile Holdings Ltd* [1980] 1 All ER 40 at 54, [1980] 1 WLR 227 at 242 per Slade J. See also PARA 622.

30 *Hutton v West Cork Rly Co* (1883) 23 ChD 654, CA. See also PARA 560 et seq. As to a company's directors see PARA 478 et seq.

31 *Normandy v Ind, Coope & Co Ltd* [1908] 1 Ch 84 (resolution replaced articles with articles conferring greater remuneration, pension and other benefits on directors); *Tiessen v Henderson* [1899] 1 Ch 861 (resolution giving an option on shares to a director). See also *Kaye v Croydon Tramways Co* [1898] 1 Ch 358, CA; *Baillie v Oriental Telephone and Electric Co Ltd* [1915] 1 Ch 503, CA; and distinguish *Young v South African and Australian Exploration and Development Syndicate* [1896] 2 Ch 268 at 276 per Kekewich J. As to when a claim will lie in favour of an individual shareholder see PARA 465.

32 As to the ratification by a company of conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company, see the Companies Act 2006 s 239; and PARA 593.

33 *Boschoek Pty Co Ltd v Fuke* [1906] 1 Ch 148 at 164 per Swinfen Eady J, applying *Irvine v Union Bank of Australia* (1877) 2 App Cas 366 at 375, PC. See also *Hogg v Cramphorn Ltd* [1967] Ch 254, [1966] 3 All ER 420.

34 *Grant v United Kingdom Switchback Rlys Co* (1888) 40 ChD 135, CA.

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637. General meetings: auditor's entitlement to receive communications etc.

A company's auditor¹ is entitled²:

- 1028 (1) to receive all notices of, and other communications relating to, any general meeting which a member of the company³ is entitled to receive⁴;
- 1029 (2) to attend any general meeting of the company⁵; and
- 1030 (3) to be heard at any general meeting which he attends on any part of the business of the meeting and which concerns him as auditor⁶.

1 As to company auditors see PARA 905 et seq. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 See the Companies Act 2006 s 502(2); and PARA 934.

3 As to the meaning of 'member of the company' see PARA 321.

4 See the Companies Act 2006 s 502(2)(a); and PARA 934.

5 See the Companies Act 2006 s 502(2)(b); and PARA 934. Where the auditor is a firm, the right to attend or be heard at a meeting is exercisable by an individual authorised by the firm in writing to act as its representative at the meeting: see s 502(3); and PARA 934. As to the meaning of 'firm' see PARA 112 note 14.

6 See the Companies Act 2006 s 502(2)(c); and PARA 934.

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638. Accidental failure to give notice of meeting.

Where a company¹ gives notice of a general meeting², any accidental failure to give notice to one or more persons is to be disregarded for the purpose of determining whether notice of the meeting is duly given³.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to meetings convened by notice see PARA 632 et seq.

3 Companies Act 2006 s 313(1). Except in relation to notice given under s 304 (notice of meetings required by members) (see PARA 641) or s 305 (notice of meetings called by members) (see PARA 641), s 313(1) has effect subject to any provision of the company's articles: s 313(2). See also s 339 (public companies' duty to circulate members' resolutions for AGMs); and PARA 642. As to the application of the provisions of Pt 13 Ch 3 (ss 301-335) (see PARA 632 et seq) to class meetings see PARA 631. As to the meaning of references to a company's 'articles' see PARA 228 note 2.

The Companies Act 2006 s 313 is derived from the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A art 39, which provides that the accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by, any person entitled to receive notice does not invalidate the proceedings at that meeting: see Table A art 39. See also *Re West Canadian Collieries Ltd* [1962] Ch 370, [1962] 1 All ER 26. As to the giving of notice to members generally see PARA 324. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but art 39 is applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital) and Table E (regulations for the management of an unlimited company having a share capital). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'private company' and 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

The Companies (Tables A to F) Regulations 1985, SI 1985/805, which were default articles prescribed for the purposes of the Companies Act 1985, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. The model articles of association that have been prescribed for the purposes of the Companies Act 2006 (see PARA 228 et seq) do not make equivalent provision; s 313 is sufficient for the purpose.

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C. PERSONS ENTITLED TO CALL MEETINGS

639. Power of court to order meeting.

If for any reason it is impracticable to call a meeting of a company¹ in any manner in which meetings of that company may be called², or to conduct the meeting in the manner prescribed by the articles³ or by the Companies Act 2006⁴, the court⁵ may, either of its own motion or on the application of any director of the company⁶, or on the application of a member of the company⁷ who would be entitled to vote at the meeting⁸, order a meeting of the company to be called, held and conducted in any manner the court thinks fit⁹.

Where such an order is made, the court may give such ancillary or consequential directions as it thinks expedient¹⁰; and such directions may include a direction that one member of the company present at the meeting be deemed to constitute a quorum¹¹. A meeting called, held

and conducted in accordance with such an order¹² is deemed for all purposes to be a meeting of the company duly called, held and conducted¹³.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to meetings of the company see PARA 629 et seq.

2 Companies Act 2006 s 306(1)(a). As to the application of the provisions of Pt 13 Ch 3 (ss 301-335) (see PARA 632 et seq) to class meetings see PARA 631. As to meetings convened by notice see PARA 632 et seq.

3 As to the meaning of references to a company's 'articles' see PARA 228 note 2.

4 Companies Act 2006 s 306(1)(b). See PARA 646 et seq. See eg *Re British Union for the Abolition of Vivisection* [1995] 2 BCLC 1 (impracticable to call a meeting when previous meeting had degenerated into disorderly tumult due to disgraceful conduct of a minority).

5 As to the meaning of 'court' see PARA 212 note 1.

6 Companies Act 2006 s 306(2)(a). As to the meaning of 'director' under the Companies Acts see PARA 478.

7 As to the meaning of 'member of the company' see PARA 321.

8 Companies Act 2006 s 306(2)(b). As to voting at meetings see PARA 653 et seq.

9 Companies Act 2006 s 306(2). As to the procedure for making applications to the court under companies legislation see PARA 305. As to the exercise of the court's discretion under s 306 see *Re El Sombrero Ltd* [1958] Ch 900, [1958] 3 All ER 1; *Re Opera Photographic Ltd* [1989] 1 WLR 634; *Re Sticky Fingers Restaurant Ltd* [1992] BCLC 84; *Re Whitchurch Insurance Consultants Ltd* [1993] BCLC 1359; *Re Woven Rugs Ltd* [2002] 1 BCLC 324; *Union Music Ltd v Watson* [2003] EWCA Civ 180, [2003] 1 BCLC 453 (meeting ordered as the court, in exercising its discretion, will take into account the ordinary right of a majority shareholder to remove or appoint a director). See also *Might SA v Redbus Interhouse plc* [2003] EWHC 3514 (Ch), [2004] 2 BCLC 449, [2003] All ER (D) 167 (Jul) (despite a disagreement over the choice of chairman, the proper conduct of the meeting in the manner provided for by the articles was not impracticable and the court had no jurisdiction to make an order); and *Monnington v Easier plc* [2005] EWHC 2578 (Ch), [2006] 2 BCLC 283. While the Companies Act 2006 s 306 is a procedural section, the court will not allow the procedure to be used to override class rights or substantive rights conferred on a shareholder: see *Harman v BML Group Ltd* [1994] 1 WLR 893, [1994] 2 BCLC 674, CA (distinguishing *Re El Sombrero Ltd*) (order refused where effect of order would be to override quorum requirement of shareholders' agreement which was a class right designed to protect a particular shareholder); *Ross v Telford* [1998] 1 BCLC 82, CA (order refused as the procedural provision was not an appropriate vehicle for resolving deadlock between two equal shareholders and is not designed to affect substantive voting rights or to shift the balance of power between shareholders); *Vectone Entertainment Holding Ltd v South Entertainment Ltd* [2004] EWHC 744 (Ch), [2004] 2 BCLC 224; *Alvona Developments Ltd v Manhattan Loft Corporation (AC) Ltd* [2005] EWHC 1567 (Ch), [2005] All ER (D) 252 (Jul), [2006] BCC 119.

10 Companies Act 2006 s 306(3).

11 Companies Act 2006 s 306(4). As to the quorum required for a general meeting of the company see PARA 646. See further *Re Edinburgh Workmen's Houses Improvement Co* 1935 SC 56, Ct of Sess; *Re El Sombrero Ltd* [1958] Ch 900, [1958] 3 All ER 1; *Re HR Paul & Son Ltd* (1973) 118 Sol Jo 166.

12 Ie an order under the Companies Act 2006 s 306: see s 306(5).

13 Companies Act 2006 s 306(5).

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640. Directors' power to call general meetings.

The Companies Act 2006 provides that the directors of a company¹ may call a general meeting of the company²; and the company's articles of association³ may make further provision⁴.

A meeting of the company called by a secretary⁵ without a resolution duly passed at a directors' meeting⁶ cannot pass effectual resolutions⁷; but the directors may, before the meeting, ratify the secretary's act⁸. A meeting of the company called by a de facto director⁹ and adopted by the other directors¹⁰, or one called by an acting quorum¹¹, may be good under the articles¹². Directors may by valid resolutions ratify any irregularity in the convening of a meeting committed by a de facto director¹³.

An administrator¹⁴ has power to call a meeting of members or creditors of the company¹⁵.

1 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of 'company' under the Companies Acts see PARA 24. As to the meaning of the 'Companies Acts' see PARA 16.

2 See the Companies Act 2006 s 302. As to the application of the provisions of Pt 13 Ch 3 (ss 301-335) (see PARA 632 et seq) to class meetings see PARA 631. As to meetings of the company see PARA 629 et seq.

3 As to a company's articles of association generally see PARA 228 et seq.

4 The Companies Act 2006 s 302 is derived from the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A art 37, which provides that the directors may call general meetings and, on the requisition of members pursuant to the provisions of the Companies Acts (see PARA 641), must forthwith proceed to convene a general meeting in accordance with those provisions; if there are not within the United Kingdom sufficient directors to call a general meeting, any director or any member of the company may call a general meeting: see Table A art 37 (amended by SI 2007/2541). As to the meaning of 'United Kingdom' see PARA 1 note 5. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but art 37 is applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital) and Table E (regulations for the management of an unlimited company having a share capital). As to the meanings of 'company limited by guarantee', 'company limited by shares' and 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

The Companies (Tables A to F) Regulations 1985, SI 1985/805, which were default articles prescribed for the purposes of the Companies Act 1985, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. The model articles of association that have been prescribed for the purposes of the Companies Act 2006 (see PARA 228 et seq) do not make equivalent provision; s 302 is sufficient for the purpose.

5 As to the company secretary see PARA 601 et seq.

6 As to provision made for the conduct of business at directors' meetings see PARA 527.

7 *Re Haycraft Gold Reduction and Mining Co* [1900] 2 Ch 230; *Re State of Wyoming Syndicate* [1901] 2 Ch 431 (where a resolution to wind up was passed).

8 *Hooper v Kerr Stuart & Co Ltd* (1900) 83 LT 729 (a meeting summoned by a notice issued without authority of the directors after receipt of a requisition is validly summoned on ratification of notice by directors).

9 As to de facto directors, and the duties which they owe, see PARA 478 note 8.

10 *Transport Ltd v Schonberg* (1905) 21 TLR 305 (following *British Asbestos Co Ltd v Boyd* [1903] 2 Ch 439); *Southern Counties Deposit Bank Ltd v Rider and Kirkwood* (1895) 73 LT 374, CA.

11 *Re Peruvian Rlys Co, ex p International Contract Co* (1868) 19 LT 803; on appeal (1869) 4 Ch App 322.

12 See PARA 486.

13 *Boschoek Pty Co Ltd v Fuke* [1906] 1 Ch 148 (the matter being one of internal arrangement, with which the court would not interfere). See also *Browne v La Trinidad* (1887) 37 ChD 1, CA; *Southern Counties Deposit Bank Ltd v Rider and Kirkwood* (1895) 73 LT 374, CA; *British Asbestos Co Ltd v Boyd* [1903] 2 Ch 439; *Grant v United Kingdom Switchback Rlys Co* (1888) 40 ChD 135, CA; *Bentley-Stevens v Jones* [1974] 2 All ER 653, [1974] 1 WLR 638. Directors may ratify a notice given without authority: *Hooper v Kerr Stuart & Co Ltd* (1900) 83 LT 729.

14 As to administrators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 158 et seq.

15 See the Insolvency Act 1986 s 8, Sch B1 para 62; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 312.

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641. Members' power to require directors to call general meeting.

The members of a company¹ may require the directors² to call a general meeting of the company³; and the directors are required to call a general meeting once the company has received requests to do so from⁴: (1) members representing at least 5 per cent of such of the paid-up capital⁵ of the company as carries the right of voting at general meetings of the company⁶ (excluding any paid-up capital held as treasury shares)⁷; or (2) in the case of a company not having a share capital⁸, members who represent at least 5 per cent of the total voting rights of all the members having a right to vote at general meetings⁹.

A request must state the general nature of the business to be dealt with at the meeting¹⁰, and may include the text of a resolution¹¹ that may properly be moved and is intended to be moved at the meeting¹². A resolution may properly be moved at a meeting unless: (a) it would, if passed, be ineffective (whether by reason of inconsistency with any enactment¹³ or the company's constitution¹⁴ or otherwise)¹⁵; (b) it is defamatory of any person¹⁶; or (c) it is frivolous or vexatious¹⁷. A request may be in hard copy form or in electronic form¹⁸, and must be authenticated by the person or persons making it¹⁹.

Directors who are required in this way²⁰ to call a general meeting of the company must call a meeting²¹: (i) within 21 days from the date on which they become subject to the requirement²²; and (ii) to be held on a date not more than 28 days after the date of the notice convening the meeting²³. If the requests received by the company identify a resolution intended to be moved at the meeting, the notice of the meeting must include notice of the resolution²⁴; and the business that may be dealt with at the meeting includes a resolution of which notice is so given²⁵.

If the directors are required²⁶ to call a meeting²⁷, and if they do not do so in accordance with the statutory provisions²⁸, the members who requested the meeting, or any of them representing more than one half of the total voting rights of all of them, may themselves call a general meeting²⁹. The notice convening the meeting need not state the statutory authority under which it is convened, nor is it necessary for the notice to be signed by all those requesting it provided that documents accompanying the notice clearly indicate that the meeting is in fact being called by all of them³⁰; but any meeting must be called for a date not more than three months after the date on which the directors become subject to the requirement to call a meeting³¹; and the meeting must be called in the same manner, as nearly as possible, as that in which meetings are required to be called by directors of the company³². Where the requests received by the company included the text of a resolution intended to be moved at the meeting, the notice of the meeting must include notice of the resolution³³; and the business which may be dealt with at the meeting includes a resolution of which notice is so given³⁴. Any reasonable expenses incurred by the members requesting the meeting by reason of the failure of the directors duly to call a meeting must be reimbursed by the company³⁵; and any sum so reimbursed must be retained by the company out of any sums due or to become due from the

company by way of fees or other remuneration in respect of the services of such of the directors as were in default³⁶.

The model articles of association of a public company³⁷ provide that if the company has fewer than two directors, and the director (if any) is unable or unwilling to appoint sufficient directors to make up a quorum or to call a general meeting to do so, then two or more members may call a general meeting (or instruct the company secretary³⁸ to do so) for the purpose of appointing one or more directors³⁹.

A meeting convened by request cannot transact any business other than that covered by the terms of the requisition⁴⁰, except where the directors have put forward resolutions with due notice given⁴¹.

1 As to the meaning of 'member of the company' see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'director' under the Companies Acts see PARA 478.

3 Companies Act 2006 s 303(1). As to meetings of the company see PARA 629 et seq; as to the notice required of general meetings see PARA 632; and as to the power of the court to call such a meeting see PARA 639. As to the enjoyment and exercise by a nominated person of members' rights conferred under s 303 see s 145; and PARA 374; and as to the application of the provisions of Pt 13 Ch 3 (ss 301-335) (see PARA 632 et seq) to class meetings see PARA 631.

4 Companies Act 2006 s 303(2). This provision applies (inter alia) where there are regulations, but no board of directors to carry them out: *Re Brick and Stone Co* [1878] WN 140. As to the sending or supplying of documents or information to or from a company see PARA 678 et seq.

5 As to the meaning of 'paid up capital' see PARA 1048.

6 As to voting at meetings see PARA 653 et seq.

7 Companies Act 2006 s 303(2)(a) (amended by SI 2009/1632). As to treasury shares see PARA 1251.

8 As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

9 Companies Act 2006 s 303(2)(b) (amended by SI 2009/1632).

10 Companies Act 2006 s 303(4)(a).

11 As to the manner of passing resolutions see PARA 617.

12 Companies Act 2006 s 303(4)(b).

13 As to the meaning of 'enactment' see PARA 17 note 2.

14 As to the meaning of references to a company's constitution see PARA 227.

15 Companies Act 2006 s 303(5)(a). Directors would be justified in refusing to act upon a requisition to call a meeting whose object could not be legally carried into effect: *Isle of Wight Rly Co v Tahourdin* (1883) 25 Ch D 320, CA. See also *Rose v McGivern* [1998] 2 BCLC 593; and *PNC Telecom plc v Thomas* [2002] EWHC 2848 (Ch) at [26], [2004] 1 BCLC 88 at [26] per Morritt V-C.

16 Companies Act 2006 s 303(5)(b).

17 Companies Act 2006 s 303(5)(c).

18 Companies Act 2006 s 303(6)(a). As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form see PARA 679. See *PNC Telecom plc v Thomas* [2002] EWHC 2848 (Ch), [2004] 1 BCLC 88 (service by fax of a notice of an extraordinary general meeting on a members' requisition is a valid service).

19 Companies Act 2006 s 303(6)(b). In relation to the authentication of a document under the Companies Act 2006 see s 1146; and PARA 678 et seq. See also *Fruit and Vegetable Growers' Association Ltd v Kekewich* [1912] 2 Ch 52.

- 20 le under the Companies Act 2006 s 303 (see the text and notes 1-19): see s 304(1).
- 21 Companies Act 2006 s 304(1).
- 22 Companies Act 2006 s 304(1)(a).
- 23 Companies Act 2006 s 304(1)(b).
- 24 Companies Act 2006 s 304(2). If the resolution is to be proposed as a special resolution, the directors are treated as not having duly called the meeting if they do not give the required notice of the resolution in accordance with s 283 (see PARA 614): s 303(4). As to special resolutions generally see PARA 614.
- 25 Companies Act 2006 s 304(3).
- 26 le under the Companies Act 2006 s 303 (see the text and notes 1-19): see s 305(1)(a).
- 27 Companies Act 2006 s 305(1)(a).
- 28 Companies Act 2006 s 305(1)(b). The text refers to a meeting called by the directors otherwise than in accordance with s 304 (see the text and notes 20-25): see s 305(1)(b). The meeting must be duly convened but not necessarily held within the 21-day period: *Re Windward Islands (Enterprises) UK Ltd* [1983] BCLC 293. However, in any case, the meeting must be held within the time frame dictated by the Companies Act 2006 s 304(1): see the text and notes 20-23. See also *Hooper v Kerr Stuart & Co Ltd* (1900) 83 LT 729 (a meeting summoned by a notice issued without authority of the directors after receipt of a requisition is validly summoned on ratification of notice by directors).
- 29 Companies Act 2006 s 305(1). Directors, upon being properly requested, should include in the notice convening the meeting all the matters which those requesting the meeting require to be dealt with, so far as they can lawfully be dealt with at the meeting and, if they do not, those requesting may themselves convene a meeting: *Isle of Wight Rly Co v Tahourdin* (1883) 25 ChD 320, CA. If the shareholders can do so, an order will not be made to compel the directors to summon a meeting: *MacDougall v Gardiner* (1875) 10 Ch App 606. If those requesting the meeting are joint holders of shares, it is necessary that each joint holder should sign the requisition: *Patent Wood Keg Syndicate Ltd v Pearce* [1906] WN 164. A meeting cannot be validly convened within the 21 days by the secretary acting without the authority of the board: *Re State of Wyoming Syndicate* [1901] 2 Ch 431.
- 30 *Dalex Mines Ltd (NPL) v Schmidt* (1974) 38 DLR (3d) 17, BC SC.
- 31 Companies Act 2006 s 305(3).
- 32 Companies Act 2006 s 305(4). This provision was first introduced by the Companies Act 1929 (repealed) and differs considerably from the former law.
- 33 Companies Act 2006 s 305(2).
- 34 Companies Act 2006 s 305(5). The text refers to a resolution of which notice is given in accordance with s 305 (see the text and note 33): see s 305(5).
- 35 Companies Act 2006 s 305(6).
- 36 Companies Act 2006 s 305(7).
- 37 As to the meaning of 'public company' see PARA 102. As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company' and 'private company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.
- 38 As to the company secretary see PARA 601 et seq.
- 39 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 28.

40 *Patent Wood Keg Syndicate Ltd v Pearse* [1906] WN 164; *Ball v Metal Industries Ltd* 1957 SC 315. As to the terms of the business which may be dealt with at the meeting see the text and notes 33-34.

41 *Rose v McGivern* [1998] 2 BCLC 593.

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D. PROCEDURE AT GENERAL MEETINGS

642. Power of company members to require circulation of statement before meeting.

The members of a company¹ may require the company to circulate, to members of the company entitled to receive notice of a general meeting², a statement of not more than 1,000 words with respect to a matter referred to in a proposed resolution to be dealt with at that meeting³, or with respect to other business to be dealt with at that meeting⁴.

A company is required to circulate a statement once it has received requests to do so from: (1) members representing at least 5 per cent of the total voting rights of all the members who have a relevant right to vote⁵ (excluding any voting rights attached to any shares in the company held as treasury shares)⁶; or (2) at least 100 members who have a relevant right to vote and hold shares in the company on which there has been paid up an average sum, per member, of at least £100⁷. A request may be in hard copy form or in electronic form⁸, must identify the statement to be circulated⁹, must be authenticated by the person or persons making it¹⁰, and must be received by the company at least one week before the meeting to which it relates¹¹.

A company that is required in this way¹² to circulate a statement must send a copy of it to each member of the company entitled to receive notice of the meeting¹³ in the same manner as the notice of the meeting¹⁴, and at the same time as, or as soon as reasonably practicable after, it gives notice of the meeting¹⁵. In the event of default in complying with these requirements¹⁶, an offence is committed by every officer of the company who is in default¹⁷; and a person guilty of such an offence is liable (on conviction on indictment) to a fine and (on summary conviction) to a fine not exceeding the statutory maximum¹⁸.

The expenses of the company in complying with a request to circulate a members' statement¹⁹ need not be paid by the members who requested the circulation if the meeting to which the requests relate is an annual general meeting of a public company²⁰, and if requests sufficient to require the company to circulate the statement are received before the end of the financial year preceding the meeting²¹. Otherwise the expenses of the company in so complying²² must be paid by the members who requested the circulation of the statement unless the company resolves otherwise²³ and (unless the company has previously so resolved) it is not bound so to comply²⁴ unless there is deposited with or tendered to it, not later than one week before the meeting, a sum reasonably sufficient to meet its expenses in doing so²⁵.

A company is not required to circulate a members' statement in this way²⁶ if, on an application by the company or another person who claims to be aggrieved, the court²⁷ is satisfied that the rights so conferred²⁸ are being abused²⁹. The court may order the members who requested the circulation of the statement to pay the whole or part of the company's costs on such an application, even if they are not parties to the application³⁰.

- 1 As to the meaning of 'member of the company' see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.
- 2 As to meetings of the company see PARA 630; as to the notice required of general meetings see PARA 632; and as to the power of the court to call such a meeting see PARA 639. As to additional requirements imposed on public companies in respect of annual general meetings see PARA 643. As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.
- 3 Companies Act 2006 s 314(1)(a). As to the types of resolution that may be dealt with at meetings and the general requirements that apply to them see PARA 617. As to the enjoyment and exercise by a nominated person of members' rights conferred under s 314 see s 145; and PARA 374; and as to the exercise of members' rights under s 314 where the shares are held on behalf of others see s 153; and PARA 377. As to the application of the provisions of Pt 13 Ch 3 (ss 301-335) (see PARA 632 et seq) to class meetings see PARA 631.
- 4 Companies Act 2006 s 314(1)(b).
- 5 For these purposes, a 'relevant right to vote' means (in relation to a statement with respect to a matter referred to in a proposed resolution) a right to vote on that resolution at the meeting to which the requests relate and (in relation to any other statement) a right to vote at the meeting to which the requests relate: Companies Act 2006 s 314(3). See also s 153 (exercise of rights where shares held on behalf of others) (see PARA 377): see s 314(2)(a). As to voting at meetings see PARA 653 et seq.
- 6 Companies Act 2006 s 314(2)(a). As to the meaning of 'share' see PARA 1042. As to treasury shares see PARA 1251.
- 7 Companies Act 2006 s 314(2)(b). As to the meaning of 'paid up', in relation to shares, see PARA 1091. In the case of shares denominated in a currency other than pounds sterling, the court must find the appropriate date on which to effect the necessary conversion into pounds sterling: *Re Scandinavian Bank Group plc* [1988] Ch 87 at 102-104, [1987] 2 All ER 70 at 76-77 per Harman J. In the case of joint shareholders, all must sign the request: *Patent Wood Keg Syndicate Ltd v Pearse* [1906] WN 164.
- 8 Companies Act 2006 s 314(4)(a). As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form see PARA 679.
- 9 Companies Act 2006 s 314(4)(b).
- 10 Companies Act 2006 s 314(4)(c). In relation to the authentication of a document under the Companies Act 2006 see s 1146; and PARA 678 et seq.
- 11 Companies Act 2006 s 314(4)(d). Any reference in s 314(4)(d) to a period before a meeting by which a request must be received is to a period of the specified length excluding the day of the meeting, and the day on which the request is received: s 360(1), (2).
- 12 Ie required under the Companies Act 2006 s 314 (see the text and notes 1-11): see s 315(1).
- 13 Companies Act 2006 s 315(1). The provisions of s 315(1) have effect subject to s 316(2) (deposit or tender of sum in respect of expenses of circulation) (see the text and notes 22-25) and s 317 (application not to circulate members' statement) (see the text and notes 26-30): s 315(2).
- 14 Companies Act 2006 s 315(1)(a).
- 15 Companies Act 2006 s 315(1)(b).
- 16 Ie in complying with the Companies Act 2006 s 315 (see the text and notes 12-15): see s 315(3).
- 17 Companies Act 2006 s 315(3). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.
- 18 Companies Act 2006 s 315(4). As to the meaning of 'statutory maximum' see PARA 1622.
- 19 Ie in complying with the Companies Act 2006 s 315 (see the text and notes 12-18): see s 316(1).
- 20 Companies Act 2006 s 316(1)(a). As to the meaning of 'public company' see PARA 102. As to annual general meetings of a public company see PARA 629 et seq.
- 21 Companies Act 2006 s 316(1)(b). As to the meaning of 'financial year' see PARA 711.

- 22 le in complying with the Companies Act 2006 s 315 (see the text and notes 12-18): see s 316(2)(a).
- 23 Companies Act 2006 s 316(2)(a).
- 24 le to comply with the Companies Act 2006 s 315 (see the text and notes 12-18): see s 316(2)(b).
- 25 Companies Act 2006 s 316(2)(b). Any reference in s 316(2)(b) to a period before a meeting by which a sum must be deposited or tendered is to a period of the specified length excluding the day of the meeting, and the day on which the sum is deposited or tendered: s 360(1), (2).
- 26 le under the Companies Act 2006 s 315 (see the text and notes 12-18): see s 317(1).
- 27 As to the meaning of 'court' see PARA 212 note 1.
- 28 le the rights conferred by the Companies Act 2006 ss 314, 315 (see the text and notes 1-18): see s 317(1).
- 29 Companies Act 2006 s 317(1). As to the procedure for making applications to the court under companies legislation see PARA 305. In an application for an order under s 317, the claimant must notify each member who requested the circulation of the relevant statement of the application: *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 10.
- 30 Companies Act 2006 s 317(2).

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643. Power of public company members to require circulation of resolution before AGM.

The members of a public company¹ may require the company to give, to members of the company entitled to receive notice of the next annual general meeting², notice of a resolution³ which may properly be moved and is intended to be moved at the meeting⁴. A resolution may properly be moved at a meeting unless: (1) it would, if passed, be ineffective (whether by reason of inconsistency with any enactment⁵ or the company's constitution⁶ or otherwise)⁷; (2) it is defamatory of any person⁸; or (3) it is frivolous or vexatious⁹.

A company is required to give notice of a resolution once it has received requests that it do so from: (a) members representing at least 5 per cent of the total voting rights of all the members who have a right to vote on the resolution at the annual general meeting to which the requests relate¹⁰ (excluding any voting rights attached to any shares in the company held as treasury shares)¹¹; or (b) at least 100 members who have a right to vote on the resolution at the annual general meeting to which the requests relate and hold shares in the company on which there has been paid up an average sum, per member, of at least £100¹². A request may be in hard copy form or in electronic form¹³, must identify the resolution of which notice is to be given¹⁴, must be authenticated by the person or persons making it¹⁵, and must be received by the company not later than six weeks before the annual general meeting to which the requests relate¹⁶ or (if later) the time at which notice is given of that meeting¹⁷.

A company that is required in this way¹⁸ to give notice of a resolution must send a copy of it to each member of the company entitled to receive notice of the annual general meeting¹⁹ in the same manner as the notice of the meeting²⁰, and at the same time as, or as soon as reasonably practicable after, it gives notice of the meeting²¹. The business which may be dealt with at an annual general meeting includes a resolution of which notice is so given²². In the event of

default in complying with these requirements²³, an offence is committed by every officer of the company who is in default²⁴; and a person guilty of such an offence is liable (on conviction on indictment) to a fine and (on summary conviction) to a fine not exceeding the statutory maximum²⁵.

The expenses of the company in complying with a request to circulate a members' resolution²⁶ need not be paid by the members who requested the circulation if requests sufficient to require the company to circulate it are received before the end of the financial year preceding the meeting²⁷. Otherwise, the expenses of the company in complying²⁸ must be paid by the members who requested the circulation of the resolution unless the company resolves otherwise²⁹, and (unless the company has previously so resolved) it is not bound to comply³⁰ unless there is deposited with or tendered to it, not later than six weeks before the annual general meeting to which the requests relate³¹, or (if later) the time at which notice is given of that meeting³², a sum reasonably sufficient to meet its expenses in doing so³³.

1 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'member of the company' see PARA 321.

2 As to annual general meetings of a public company see PARA 630. As to meetings of the company generally see PARA 629 et seq; as to the notice required of general meetings see PARA 632; and as to the power of the court to call such a meeting see PARA 639.

3 As to the manner of passing resolutions see PARA 617.

4 Companies Act 2006 s 338(1). As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq. As to the enjoyment and exercise by a nominated person of members' rights conferred under s 338 see s 145; and PARA 374; and as to the exercise of members' rights under s 338 where the shares are held on behalf of others see s 153; and PARA 377.

5 As to the meaning of 'enactment' see PARA 17 note 2.

6 As to the meaning of references to a company's constitution see PARA 227.

7 Companies Act 2006 s 338(2)(a). See *Isle of Wight Rly Co v Tahourdin* (1883) 25 Ch D 320, CA; and *Rose v McGivern* [1998] 2 BCLC 593.

8 Companies Act 2006 s 338(2)(b).

9 Companies Act 2006 s 338(2)(c).

10 As to voting at meetings see PARA 653 et seq.

11 Companies Act 2006 s 338(3)(a). See note 4. As to the meaning of 'share' see PARA 1042. As to treasury shares see PARA 1251.

12 Companies Act 2006 s 338(3)(b). See note 4. As to the meaning of 'paid up', in relation to shares, see PARA 1091. See *Re Scandinavian Bank Group plc* [1988] Ch 87 at 102-104, [1987] 2 All ER 70 at 76-77 per Harman J.

13 Companies Act 2006 s 338(4)(a). As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form see PARA 679.

14 Companies Act 2006 s 338(4)(b).

15 Companies Act 2006 s 338(4)(c). In relation to the authentication of a document under the Companies Act 2006 see s 1146; and PARA 678 et seq.

16 Companies Act 2006 s 338(4)(d)(i). Any reference in s 338(4)(d)(i) to a period before a meeting by which a request must be received is to a period of the specified length excluding the day of the meeting, and the day on which the request is received: s 360(1), (2).

17 Companies Act 2006 s 338(4)(d)(ii).

- 18 le required under the Companies Act 2006 s 338 (see the text and notes 1-17): see s 339(1).
- 19 Companies Act 2006 s 339(1). The provisions of s 339(1) have effect subject to s 340(2) (deposit or tender of sum in respect of expenses of circulation) (see the text and notes 28-33): s 339(2).
- 20 Companies Act 2006 s 339(1)(a).
- 21 Companies Act 2006 s 339(1)(b).
- 22 Companies Act 2006 s 339(3). The text refers to a resolution of which notice is given in accordance with s 339 (see the text and notes 18-21): see s 339(3).
- 23 le in complying with the Companies Act 2006 s 339 (see the text and notes 18-22): see s 339(4).
- 24 Companies Act 2006 s 339(4). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.
- 25 Companies Act 2006 s 339(5). As to the meaning of 'statutory maximum' see PARA 1622.
- 26 le in complying with the Companies Act 2006 s 339 (see the text and notes 18-22): see s 340(1).
- 27 Companies Act 2006 s 340(1). As to the meaning of 'financial year' see PARA 711.
- 28 le in complying with the Companies Act 2006 s 339 (see the text and notes 18-22): see s 340(2)(a).
- 29 Companies Act 2006 s 340(2)(a).
- 30 le to comply with the Companies Act 2006 s 339 (see the text and notes 18-22): see s 340(2)(b).
- 31 Companies Act 2006 s 340(2)(b)(i). Any reference in s 340(2)(b)(i) to a period before a meeting by which a sum must be deposited or tendered is to a period of the specified length excluding the day of the meeting, and the day on which the sum is deposited or tendered: s 360(1), (2).
- 32 Companies Act 2006 s 340(2)(b)(ii).
- 33 Companies Act 2006 s 340(2)(b).

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644. Power of traded company members to include additional business in AGM.

The members of a traded company¹ may request the company to include in the business to be dealt with at an annual general meeting² any matter (other than a proposed resolution³) which may properly be included in the business⁴. A matter may properly be included in the business at an annual general meeting unless it is defamatory of any person⁵, or it is frivolous or vexatious⁶. A company is required to include such a matter once it has received requests that it do so from: (1) members representing at least 5 per cent of the total voting rights of all the members who have a right to vote at the meeting⁷; or (2) at least 100 members who have a right to vote at the meeting and hold shares⁸ in the company on which there has been paid up an average sum, per member, of at least £100⁹.

A request may be in hard copy form or in electronic form¹⁰, must identify the matter to be included in the business¹¹, must be accompanied by a statement setting out the grounds for the request¹², and must be authenticated by the person or persons making it¹³. A request must be

received by the company not later than six weeks before the meeting¹⁴ or (if later) the time at which notice is given of the meeting¹⁵.

A company that is required in this way¹⁶ to include any matter in the business to be dealt with at an annual general meeting must¹⁷: (a) give notice of it to each member of the company entitled to receive notice of the annual general meeting in the same manner as notice of the meeting¹⁸; and (b) publish it on the same website as that on which the company published the information required¹⁹ of a traded company in advance of a general meeting²⁰. In the event of default in complying with these requirements²¹, an offence is committed by every officer of the company who is in default²²; and a person guilty of such an offence is liable (on conviction on indictment) to a fine and (on summary conviction) to a fine not exceeding the statutory maximum²³.

The expenses of the company, in complying with a request to include a matter in the business to be dealt with at an annual general meeting²⁴, need not be paid by the members who requested the inclusion if requests sufficient to require the company to include the matter are received before the end of the financial year preceding the meeting²⁵. Otherwise, the expenses of the company in complying²⁶ must be paid by the members who requested the inclusion of the matter unless the company resolves otherwise²⁷ and (unless the company has previously so resolved) it is not bound to comply²⁸ unless there is deposited with or tendered to it, not later than six weeks before the annual general meeting to which the requests relate or (if later) the time at which notice is given of that meeting, a sum reasonably sufficient to meet its expenses in doing so²⁹.

1 As to the meaning of 'traded company' for these purposes see PARA 630 note 6. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'member of the company' see PARA 321.

2 As to annual general meetings of a public company see PARA 630. As to meetings of the company see PARA 629 et seq; as to the notice required of general meetings see PARA 632; and as to the power of the court to call such a meeting see PARA 639.

3 As to the manner of passing resolutions see PARA 617.

4 Companies Act 2006 s 338A(1) (s 338A added by SI 2009/1632). As to the enjoyment and exercise by a nominated person of members' rights conferred under the Companies Act 2006 s 338A see s 145(3)(ga); and PARA 374; and as to the exercise of members' rights under s 338A where the shares are held on behalf of others see s 153(1)(ba); and PARA 377.

5 Companies Act 2006 s 338A(2)(a) (as added: see note 4).

6 Companies Act 2006 s 338A(2)(b) (as added: see note 4).

7 Companies Act 2006 s 338A(3)(a) (as added: see note 4). See note 4. As to voting at meetings see PARA 653 et seq.

8 As to the meaning of 'share' see PARA 1042.

9 Companies Act 2006 s 338A(3)(b) (as added: see note 4). See note 4. As to the meaning of 'paid up', in relation to shares, see PARA 1091.

10 Companies Act 2006 s 338A(4)(a) (as added: see note 4). As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form see PARA 679.

11 Companies Act 2006 s 338A(4)(b) (as added: see note 4).

12 Companies Act 2006 s 338A(4)(c) (as added: see note 4).

13 Companies Act 2006 s 338A(4)(d) (as added: see note 4). In relation to the authentication of a document under the Companies Act 2006 see s 1146; and PARA 678 et seq.

- 14 Companies Act 2006 s 338A(5)(a) (as added: see note 4). Any reference in s 338A(5) to a period before a meeting by which a request must be received is to a period of the specified length excluding the day of the meeting, and the day on which the request is received: s 360(1), (2) (s 360(1) amended by SI 2009/1632).
- 15 Companies Act 2006 s 338A(5)(b) (as added: see note 4).
- 16 *le* required under the Companies Act 2006 s 338A (see the text and notes 1-15): see s 340A(1) (s 340A added by SI 2009/1632).
- 17 Companies Act 2006 s 340A(1) (as added: see note 16). The provisions of s 340A(1) have effect subject to s 340B(2) (deposit or tender of sum in respect of expenses of circulation) (see the text and notes 26-29): s 340A(2) (as so added).
- 18 Companies Act 2006 s 340A(1)(a) (as added: see note 16). See note 17.
- 19 *le* required by the Companies Act 2006 s 311A (see PARA 636 note 11): see s 340A(1)(b) (as added: see note 16). See note 17.
- 20 Companies Act 2006 s 340A(1)(b) (as added: see note 16). See note 17.
- 21 *le* in complying with the Companies Act 2006 s 340A (see the text and notes 16-20): see s 340A(3) (as added: see note 16).
- 22 Companies Act 2006 s 340A(3) (as added: see note 16). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.
- 23 Companies Act 2006 s 340A(4) (as added: see note 16). As to the meaning of 'statutory maximum' see PARA 1622.
- 24 *le* in complying with the Companies Act 2006 s 340A (see the text and notes 16-23): see s 340B(1) (s 340B added by SI 2009/1632).
- 25 Companies Act 2006 s 340B(1) (as added: see note 24). As to the meaning of 'financial year' see PARA 711.
- 26 *le* in complying with the Companies Act 2006 s 340A (see the text and notes 16-23): see s 340B(2)(a) (as added: see note 24).
- 27 Companies Act 2006 s 340B(2)(a) (as added: see note 24).
- 28 *le* to comply with the Companies Act 2006 s 340A (see the text and notes 16-23): see s 340B(2)(b) (as added: see note 24).
- 29 Companies Act 2006 s 340B(2)(b) (as added: see note 24). Any reference in s 340B(2)(b) to a period before a meeting by which a sum must be deposited or tendered is to a period of the specified length excluding the day of the meeting, and the day on which the sum is deposited or tendered: s 360(1), (2) (s 360(1) amended by SI 2009/1632).

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645. Provision in articles for attendance and speaking at general meeting.

The model articles of association¹ make provision in relation to attendance and speaking at a general meeting as follows².

Directors³ may attend and speak at general meetings, whether or not they are members (or shareholders, as the case may be)⁴. The chairman of the meeting⁵ may permit other persons

who are not members of a private company limited by guarantee to attend and speak at a general meeting⁶; and, in other cases, the chairman may permit other persons who are not members or shareholders of the company, or who are not otherwise entitled to exercise the rights of members or shareholders in relation to general meetings, to attend and speak at such a meeting⁷.

A person is able to exercise the right to speak at a general meeting when that person is in a position to communicate to all those attending the meeting, during the meeting, any information or opinions which that person has on the business of the meeting⁸.

A person is able to exercise the right to vote at a general meeting when that person is able to vote, during the meeting, on resolutions put to the vote at the meeting⁹, and when that person's vote can be taken into account in determining whether or not such resolutions are passed at the same time as the votes of all the other persons attending the meeting¹⁰.

The directors may make whatever arrangements they consider appropriate to enable those attending a general meeting to exercise their rights to speak or vote at it¹¹.

In determining attendance at a general meeting, it is immaterial whether any two or more members attending it are in the same place as each other¹²; and two or more persons who are not in the same place as each other attend a general meeting if their circumstances are such that if they have (or were to have) rights to speak and vote at that meeting, they are (or would be) able to exercise them¹³.

1 As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

2 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 arts 37, 40; Sch 2 arts 23, 26; Sch 3 arts 29, 32; the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A art 44; and the text and notes 3-13. Table A provides regulations for the management of a company limited by shares but art 44 is applied by Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital), and is applied and modified by Table C art 6 (regulations for the management of a company limited by guarantee and not having a share capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. As to meetings of the company see PARA 629 et seq; as to the notice required of general meetings see PARA 632; and as to the power of the court to call such a meeting see PARA 639.

3 As to directors of a company see PARA 478 et seq.

4 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 40(1); Sch 2 art 26(1); Sch 3 art 32(1); and the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 44. As to shareholders and membership of companies generally see PARA 321 et seq.

Except in relation to companies limited by guarantee and not having a share capital, Table A art 44 further provides that a director's entitlement to attend and speak extends to any separate meeting of the holders of any class of shares in the company: see art 44 (as modified: see note 2). As to classes of shares generally see PARA 1057 et seq.

5 As to the chairing of a general meeting see PARA 648.

6 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 2 art 26(2).

7 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 40(2); Sch 3 art 32(2).

8 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 37(1); Sch 2 art 23(1); Sch 3 art 29(1).

9 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 37(2)(a); Sch 2 art 23(2)(a); Sch 3 art 29(2)(a). As to voting on a resolution at meetings see PARA 653 et seq. As to resolutions and the general requirements that apply to them see PARA 617.

10 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 37(2)(b); Sch 2 art 23(2)(b); Sch 3 art 29(2)(b).

11 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 37(3); Sch 2 art 23(3); Sch 3 art 29(3).

12 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 37(4); Sch 2 art 23(4); Sch 3 art 29(4).

13 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 37(5); Sch 2 art 23(5); Sch 3 art 29(5). See *Byng v London Life Association Ltd* [1990] Ch 170, [1989] 1 All ER 560, CA.

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646. Quorum at meeting.

In the case of a company¹ limited either by shares² or by guarantee³ and having only one member⁴, one qualifying person⁵ present at a meeting⁶ is a quorum⁷. In any other case, subject to the provisions of the company's articles⁸, two qualifying persons⁹ present at a meeting are a quorum¹⁰, unless:

- 1031 (1) each is a qualifying person only because he is duly authorised¹¹ to act as the representative of a corporation¹² in relation to the meeting, and they are representatives of the same corporation¹³; or
- 1032 (2) each is a qualifying person only because he is appointed as proxy¹⁴ of a member in relation to the meeting, and they are proxies of the same member¹⁵.

For these purposes, a 'qualifying person' means: (a) an individual who is a member of the company¹⁶; (b) a person duly authorised¹⁷ to act as the representative of a corporation in relation to the meeting¹⁸; or (c) a person appointed as proxy of a member in relation to the meeting¹⁹.

If the quorum is not present within the prescribed time after the time appointed for the meeting, no business may be transacted, except as provided by the articles of the company²⁰. Where the number of shareholders is less than the requisite quorum, or where there is only one member of the class, the consent of all the members or the only member must be obtained²¹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meanings of 'limited company' and 'company limited by shares' see PARA 102. As to the meaning of 'share' see PARA 1042.

3 As to the meaning of 'company limited by guarantee' see PARA 102.

4 As to the meaning of 'member of the company' see PARA 321.

5 As to the meaning of 'qualifying person' for these purposes see the text and notes 16-19.

6 As to meetings of the company see PARA 629 et seq.

7 Companies Act 2006 s 318(1). As to the application of the provisions of Pt 13 Ch 3 (ss 301-335) (see PARA 631 et seq) to class meetings see PARA 631.

8 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

Accordingly, under the model articles, no business other than the appointment of the chairman of the meeting is to be transacted at a general meeting if the persons attending it do not constitute a quorum: Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 38; Sch 2 art 24; Sch 3 art 30. As to the notice required of general meetings see PARA 632; and as to the power of the court to call such a meeting see PARA 639. The Companies (Tables A to F) Regulations 1985, SI 1985/805, provides that no business can be transacted at any meeting unless a quorum is present; and, except in the case of company with a single member, a quorum is specified for these purposes as being two persons entitled to vote upon the business to be transacted, each being a member or a proxy for a member or a duly authorised representative of a corporation: reg 2, Schedule, Table A art 40 (amended by SI 2007/2541). See further the text and notes 20-21; and as to adjournment of a meeting for want of a quorum see PARA 650. Table A provides regulations for the management of a company limited by shares but art 40 is applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital) and Table E (an unlimited company having a share capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

9 See note 5.

10 Companies Act 2006 s 318(2).

11 Ie under the Companies Act 2006 s 323 (representation of corporations at meetings) (see PARA 661): see s 318(2)(a).

12 As to the meaning of 'corporation' under the Companies Acts see PARA 1 note 5.

13 Companies Act 2006 s 318(2)(a).

14 As to voting by proxy see PARA 662 et seq. The termination of the authority of a person to act as proxy does not affect whether he counts in deciding whether there is a quorum at a meeting, unless the company receives notice of the termination before the commencement of the meeting: see the Companies Act 2006 s 330(2)(a); and PARA 665.

15 Companies Act 2006 s 318(2)(b).

16 Companies Act 2006 s 318(3)(a).

17 Ie under the Companies Act 2006 s 323 (representation of corporations at meetings) (see PARA 661): see s 318(3)(b).

18 Companies Act 2006 s 318(3)(b). See *M Harris Ltd, Petitioners* 1956 SC 207 (predating the statutory provision).

19 Companies Act 2006 s 318(3)(c).

20 See note 8. A resolution passed at a meeting at which there is no quorum is void: *Re Cambrian Peat, Fuel and Charcoal Co Ltd, De la Mott's Case and Turner's Case* (1875) 31 LT 773; *Re Romford Canal Co, Pocock's Claim, Trickett's Claim, Carew's Claim* (1883) 24 ChD 85. The question whether a member present only by proxy may be counted in a quorum was, as a matter of construction of the relevant articles, treated as doubtful in *Re Cambrian Peat, Fuel and Charcoal Co Ltd*, as was the question whether members not entitled to vote may be entitled to form a quorum in *Young v South African and Australian Exploration and Development Syndicate* [1896] 2 Ch 268 at 277 per Kekewich J; but see now the text and notes 16-19. In *Re MJ Shanley Contracting (in voluntary liquidation)* (1979) 124 Sol Jo 239 it was held (distinguishing *Neil McLeod & Sons Ltd, Petitioners* 1967

SLT 46) that one shareholder could not constitute a meeting. In the latter case (doubted by Oliver J in the former) there were two persons actually present, one of whom also held a proxy; it was held that the necessary quorum of three was present.

21 See PARA 666. See also PARA 647.

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647. Whether one person can constitute a meeting.

Strictly speaking, one shareholder cannot form a meeting¹; the ordinary meaning of the word 'meeting', denoting a coming together of two or more persons, is well established in the context of companies². However, in circumstances where there is only one member of a class, the word 'meeting' could include the case of a single shareholder³; and the court, in exercising its power to convene a meeting of the company⁴, may convene a meeting to be attended by only one shareholder⁵.

1 *Sharp v Dawes* (1876) 2 QBD 26, CA (followed in *Re Prain & Sons Ltd* 1947 SC 325, Ct of Sess; *Re London Flats Ltd* [1969] 2 All ER 744, [1969] 1 WLR 711); *Re Sanitary Carbon Co* [1877] WN 223. However, see *East v Bennett Bros Ltd* [1911] 1 Ch 163 (where there was only one preference shareholder, and it was held that a provision in the constitution requiring the sanction of a meeting of the holders of preference shares should not be construed strictly, and written consent was enough); and, in *Re MJ Shanley Contracting (in voluntary liquidation)* (1979) 124 Sol Jo 239, it was held (distinguishing *Neil McLeod & Sons Ltd, Petitioners* 1967 SLT 46, Ct of Sess) that one shareholder could not constitute a meeting. In the latter case (doubted by Oliver J in the former) there were two persons actually present, one of whom also held a proxy; it was held that the necessary quorum of three was present.

2 *Re Altitude Scaffolding Ltd, Re T&N Ltd* [2006] EWHC 1401 (Ch), [2007] 1 BCLC 199 (company proposed to enter into a scheme with creditors, but at creditors' meetings of the company only one creditor attended each meeting).

3 See *East v Bennett Brothers Ltd* [1911] 1 Ch 163 (cited in note 1), followed in *Re RMCA Reinsurance Ltd* [1994] BCC 378 (where a class comprised only one creditor, a meeting attended by the creditor would satisfy the statutory requirements for a meeting).

4 See PARA 639.

5 See eg *Union Music Ltd v Watson* [2003] EWCA Civ 180, [2003] 1 BCLC 453.

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648. Chairman of meeting.

The Companies Act 2006 provides that either a member of the company¹ or a proxy² may be elected to be the chairman of a general meeting³ by a resolution of the company⁴ passed at the meeting⁵. However, it would be exceptional for a member or a proxy to be so elected, and the

position of chairman is normally dictated by the company's articles⁶, the statutory provision being subject to any provision of the articles that states who may or may not be chairman⁷.

1 As to the meaning of 'member of the company' see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to voting by proxy see PARA 662 et seq.

3 As to meetings of the company see PARA 629 et seq; as to the notice required of general meetings see PARA 632; and as to the power of the court to call such a meeting see PARA 639.

4 As to company resolutions and the general requirements that apply to them see PARA 617.

5 Companies Act 2006 ss 319(1), 328(1). As to the application of the provisions of Pt 13 Ch 3 (ss 301-335) (see PARA 632 et seq) to class meetings see PARA 631. The termination of the authority of a person to act as proxy does not affect the validity of anything he does as chairman of a meeting, unless the company receives notice of the termination before the commencement of the meeting: see s 330(2)(b); and PARA 665.

6 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'private company' and 'public company' see PARA 102. As to the meaning of 'share' see PARA 1042. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

Under the model articles prescribed for use under the Companies Act 2006, if the directors have appointed a chairman, the chairman must chair general meetings if present and willing to do so: Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 39(1); Sch 2 art 25(1); Sch 3 art 31(1). If the directors have not appointed a chairman (or if the chairman is unwilling to chair the meeting, or if he is not present within ten minutes of the time at which a meeting was due to start), the directors present or (if no directors are present) the meeting, must appoint a director or member (or shareholder, as the case may be) to chair the meeting, and the appointment of the chairman of the meeting must be the first business of the meeting: Sch 1 art 39(2); Sch 2 art 25(2); Sch 3 art 31(2). The person chairing a meeting in accordance with these provisions is referred to as the 'chairman of the meeting': Sch 1 art 39(3); Sch 2 art 25(3); Sch 3 art 31(3). As to directors of a company see PARA 478 et seq. As to shareholders of the company see PARA 321 et seq.

The provision made under the legacy articles differs slightly as the chairman, if any, of the board of directors (or in his absence some other director nominated by the directors) must preside as chairman of the meeting, but if neither the chairman nor such other director (if any) is present within 15 minutes after the time appointed for holding the meeting and willing to act, the directors present must elect one of their number to be chairman and, if there is only one director present and willing to act, he is to be chairman: see the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A art 42. If no director is willing to act as chairman (or if no director is present within 15 minutes after the time appointed for holding the meeting) the members present and entitled to vote must choose one of their number to be chairman: Table A art 43. Table A provides regulations for the management of a company limited by shares but arts 42, 43 are applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital) and Table E (an unlimited company having a share capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

7 Companies Act 2006 ss 319(2), 328(2). Nothing in s 328 prevents a company's articles from conferring more extensive rights on members or proxies than are conferred by that section: s 331. As to a chairman's declaration that a resolution is carried on a show of hands see PARA 619; as to the chairman's powers regarding who may speak at a meeting see PARA 645; and as to the chairman's power to adjourn see PARA 650.

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649. Casting vote of chairman at general meeting.

Where, immediately before 1 October 2007¹, the articles of a company² provided that, in the event of equality of votes on an ordinary resolution³, whether on a show of hands or on a poll, the chairman⁴ should have a casting vote in addition to any other vote that the chairman might have, then if that provision has not been removed by a subsequent alteration of the articles⁵, it continues to have effect⁶. If that provision has been removed by a subsequent alteration of the articles, the company may at any time restore that provision⁷.

1 The date when the relevant provisions of the Companies Act 2006 Pt 13 (ss 281-361) (see PARA 617 et seq) came into force: see the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, art 2(1)(f).

2 As to a company's articles of association see PARA 228 et seq.

3 As to ordinary resolutions see PARA 613. As to meetings of the company generally see PARA 629 et seq.

4 As to the chairman of a meeting see PARA 648.

5 As to the alteration of articles generally see PARA 232 et seq.

6 See the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, art 9, Sch 3 para 23A(1), (2) (Sch 3 para 23A added by SI 2007/3495). The provision referred to in the text continues to have effect notwithstanding the Companies Act 2006 s 281(3) (where a provision of the Companies Acts requires a resolution of a company but does not specify what kind of resolution is required) (see PARA 617) and s 282 (ordinary resolutions) (see PARA 613): see the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, Sch 3 para 23A(2) (as so added).

Nothing in Sch 3 para 23A applies in relation to a traded company as defined by the Companies Act 2006 s 360C (see PARA 630 note 6): see the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, Sch 3 para 23A(4) (Sch 3 para 23A as so added; Sch 3 para 23A(4) added by SI 2009/1632).

7 See the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, Sch 3 para 23A(3) (as added: see note 6). The provision so restored has effect notwithstanding the Companies Act 2006 s 281(3) (see PARA 617) and s 282 (see PARA 613): see the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, Sch 3 para 23A(3) (as so added). See note 6.

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650. Adjournment of meeting.

Except where empowered by the constitution of the company¹, a chairman² cannot adjourn a meeting of the company³, nor dissolve it, while any of the business for which it was called remains untransacted⁴; and, if he refuses to act, the meeting may elect another chairman. If he has the right, with the meeting's consent, to adjourn it, the majority of the members present at the meeting cannot compel him to do so, subject to any provision of the articles⁵. He cannot, however, adjourn or dissolve the meeting against the wish of the majority⁶, but he has prima facie authority to decide all incidental questions which arise and necessarily require decision at the time⁷. Where, however, there is a meeting at which the views of the majority cannot be validly ascertained, the chairman has a residual common law power to adjourn the meeting

without its consent in order to give all persons entitled a reasonable opportunity of voting and speaking at the meeting⁸.

Where the business of a meeting has been completed with the exception of the taking of a poll⁹, the subsequent taking of the poll is part of the same meeting for the purposes of determining the validity of proxies¹⁰. Similarly, if a meeting is reconstituted subsequent to the taking of a poll on a motion for adjournment which is lost, the reconstituted meeting is the same meeting¹¹.

For the purposes of considering what business may be transacted at an adjourned meeting, the adjourned meeting must be considered as the original meeting¹²; but, where a resolution¹³ is passed at an adjourned meeting of a company¹⁴, the resolution is for all purposes treated as having been passed on the date on which it was in fact passed, and is not to be deemed passed on any earlier date¹⁵. A meeting of shareholders¹⁶ cannot by a majority refuse to hear the views of the minority, but, after a reasonable opportunity has been afforded for the expression of their views, it is competent for the chairman, with the meeting's consent, to declare the discussion closed and put the motion to the vote¹⁷.

1 As to the company's powers under its constitution see PARA 256 et seq; and see note 4.

2 As to the chairman of a meeting see PARA 648.

3 As to meetings of the company see PARA 629 et seq; and as to the power of the court to call such a meeting see PARA 639.

4 *National Dwellings Society v Sykes* [1894] 3 Ch 159. In the absence of special powers, the directors cannot postpone a meeting properly convened: *Smith v Paranga Mines Ltd* [1906] 2 Ch 193. Cf *John v Rees* [1970] Ch 345 at 381-382, [1969] 2 All ER 274 at 292 (where Megarry J suggested that a chairman has an inherent power to adjourn for serious disorder; such provision is now made in the Companies (Model Articles) Regulations 2008, SI 2008/3229); *Byng v London Life Association Ltd* [1990] Ch 170 at 186, [1989] 1 All ER 560 at 567, CA, per Browne-Wilkinson V-C. As to directors of a company see PARA 478 et seq.

Provision as to the adjournment of meetings is usually made under the company's articles of association. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'private company' and 'public company' see PARA 102. As to the meaning of 'share' see PARA 1042. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

Accordingly, if the persons attending a general meeting within half an hour of the time at which the meeting was due to start do not constitute a quorum, or if during a meeting a quorum ceases to be present, the chairman of the meeting must adjourn it: Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 41(1); Sch 2 art 27(1); Sch 3 art 33(1). The chairman of the meeting may adjourn a general meeting at which a quorum is present if the meeting consents to an adjournment, or if it appears to the chairman of the meeting that an adjournment is necessary to protect the safety of any person attending the meeting or ensure that the business of the meeting is conducted in an orderly manner: Sch 1 art 41(2); Sch 2 art 27(2); Sch 3 art 33(2). The chairman of the meeting must adjourn a general meeting if directed to do so by the meeting: Sch 1 art 41(3); Sch 2 art 27(3); Sch 3 art 33(3). When adjourning a general meeting, the chairman of the meeting must either specify the time and place to which it is adjourned or state that it is to continue at a time and place to be fixed by the directors, and have regard to any directions as to the time and place of any adjournment which have been given by the meeting: Sch 1 art 41(4); Sch 2 art 27(4); Sch 3 art 33(4). If the continuation of an adjourned meeting is to take place more than 14 days after it was adjourned, the company must give at least seven clear days' notice of it (that is, excluding the day of the adjourned meeting and the day on which the notice is given) to the same persons to whom notice of the company's general meetings is required to be given, and containing the same information which such notice is required to contain: Sch 1 art 41(5); Sch 2 art 27(5); Sch 3 art 33(5). No business may be transacted at an adjourned general meeting which could not properly have been transacted at the meeting if the adjournment had not taken place: Sch 1 art 41(6); Sch 2 art 27(6); Sch 3 art 33(6). As to the quorum at a meeting see PARA 646.

Under the Companies (Tables A to F) Regulations 1985, SI 1985/805, if a quorum is not present within half an hour from the time appointed for the meeting, or if during a meeting such a quorum ceases to be present, the

meeting must stand adjourned to the same day in the next week at the same time and place or to such time and place as the directors may determine: reg 2, Schedule, Table A art 41 (amended by SI 1985/1052). Cf *Re Hartley Baird Ltd* [1955] Ch 143, [1954] 3 All ER 695 (in default of such a provision, a quorum must be present when a meeting proceeds to business but not necessarily when a vote is taken). The chairman may, with the consent of a meeting at which a quorum is present (and must if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business is to be transacted at an adjourned meeting other than business which might properly have been transacted at the meeting had the adjournment not taken place: Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 45. When a meeting is adjourned for 14 days or more, at least seven clear days' notice must be given specifying the time and place of the adjourned meeting and the general nature of the business to be transacted; otherwise it is not necessary to give any such notice: Table A art 45. Table A provides regulations for the management of a company limited by shares but arts 41, 45 are applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital) and Table E (an unlimited company having a share capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

5 *Salisbury Gold Mining Co v Hathorn* [1897] AC 268, PC. But see the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 41(3), Sch 2 art 27(3), Sch 3 art 33(3) (cited in note 4).

6 *National Dwellings Society v Sykes* [1894] 3 Ch 159. Cf *Henderson v Bank of Australasia* (1890) 45 ChD 330, CA. See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 41(2), Sch 2 art 27(2), Sch 3 art 33(2) (cited in note 4).

7 *Re Indian Zoedone Co* (1884) 26 ChD 70, CA.

8 *Byng v London Life Association Ltd* [1990] Ch 170, [1989] 1 All ER 560, CA. The chairman's decision, in the exercise of his residual power to adjourn, can be impugned not only where it is taken in bad faith but also if he fails to take into account relevant factors or takes into account irrelevant factors or reaches a conclusion that no reasonable chairman could have reached having regard to his power to adjourn: *Byng v London Life Association Ltd*. But see now the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 41(2), Sch 2 art 27(2), Sch 3 art 33(2) (cited in note 4).

9 As to taking a poll see PARA 655 et seq.

10 *Shaw v Tati Concessions Ltd* [1913] 1 Ch 292; *Spiller v Mayo (Rhodesia) Development Co (1908) Ltd* [1926] WN 78. As to proxies see PARA 662 et seq.

11 *Jackson v Hamlyn* [1953] Ch 577, [1953] 1 All ER 887.

12 *Scadding v Lorant* (1851) 3 HL Cas 418; *McLaren v Thomson* [1917] 2 Ch 261 at 264, CA. It is sometimes provided that the members present at the adjourned meeting shall form a quorum but such a provision does not apply to a meeting of a special class of shareholders: *Hemans v Hotchkiss Ordnance Co* [1899] 1 Ch 115, CA.

13 As to company resolutions and the general requirements that apply to them see PARA 617.

14 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

15 Companies Act 2006 s 332. This provision removed some of the difficulties caused by the decision in *Neuschild v British Equatorial Oil Co* [1925] 1 Ch 346. As to the application of the provisions of the Companies Act 2006 Pt 13 Ch 3 (ss 301-335) (see PARA 632 et seq) to class meetings see PARA 631.

16 As to shareholders and membership of companies generally see PARA 321 et seq.

17 *Wall v London and Northern Assets Corpn* [1898] 2 Ch 469, CA.

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651. Questions at meetings of traded company.

At a general meeting¹ of a traded company², the company must cause to be answered any question relating to the business being dealt with at the meeting put by a member³ attending the meeting⁴. However, no such answer need be given: (1) if to do so would interfere unduly with the preparation for the meeting⁵, or involve the disclosure of confidential information⁶; (2) if the answer has already been given on a website in the form of an answer to a question⁷; or (3) if it is undesirable in the interests of the company or the good order of the meeting that the question be answered⁸.

1 As to meetings of the company see PARA 629 et seq; as to the notice required of general meetings see PARA 632; and as to the power of the court to call such a meeting see PARA 639.

2 As to the meaning of 'traded company' for these purposes see PARA 630 note 6. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'member of the company' see PARA 321.

4 Companies Act 2006 s 319A(1) (s 319A added by SI 2009/1632). As to the provision that may be made in a company's articles of association for attendance at a general meeting see PARA 645. As to the enjoyment and exercise by nominated persons of members' rights conferred by the Companies Act 2006 s 319A see s 145(3) (ea); and PARA 374. As to the application of the provisions of Pt 13 Ch 3 (ss 301-335) (see PARA 632 et seq) to class meetings see PARA 631.

5 Companies Act 2006 s 319A(2)(a)(i) (as added: see note 4).

6 Companies Act 2006 s 319A(2)(a)(ii) (as added: see note 4).

7 Companies Act 2006 s 319A(2)(b) (as added: see note 4).

8 Companies Act 2006 s 319A(2)(c) (as added: see note 4).

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E. EXERCISE OF VOTING RIGHTS

652. Exercise of voting rights generally.

Unless otherwise provided by a company's articles of association¹, a shareholder, even if a director, is not debarred from using his voting power to carry a resolution by reason of his having a particular interest in the subject matter of the vote²; but, if members holding a majority of the voting power use their votes for a corrupt purpose, such as obtaining an unfair advantage for themselves or another company in which they are shareholders, the resolutions will be set aside³. An agreement by a shareholder, although in a representative capacity, with the purchaser or the mortgagee of some of his shares that he will vote as the purchaser directs is good and will be enforced by a mandatory injunction⁴. Directors may legitimately use their influence with the shareholders as to the way in which they should vote⁵.

It is usual to provide in the articles of association that every member present in person has one vote on a show of hands and on a poll one vote for each share of which he is the holder⁶. If there is no such provision contained in the articles, the statutory rule relating to votes on a written resolution or on a resolution taken on a poll at the meeting prevails, being, in the case

of a company having a share capital, that every member has one vote in respect of each share or each £10 of stock held by him, and that in any other case every member has one vote⁷.

It is sometimes provided that a person entitled by transmission may vote in respect of the shares to which he is so entitled, although not registered, if he satisfies the directors that he is so entitled⁸. It is doubtful whether, in the absence of any provision specifically giving the right to vote, a person entitled by transmission and not registered as a member is entitled to vote⁹.

Subject to any provision in the articles, a bankrupt is entitled to vote so long as the shares remain registered in his name, but he must exercise his votes in accordance with the directions of the persons beneficially entitled to his shares¹⁰.

During a state of war, the right of an alien enemy to vote is suspended and cannot be exercised by him¹¹.

Every registered holder is entitled to vote subject to any provision in the articles¹², as where the member must have been registered for a fixed term before voting¹³, or where a member is only allowed to vote in respect of preference shares held by him in certain cases¹⁴. Where under the articles there is no right to vote while any sum is due in respect of the shares¹⁵, a purchaser of a forfeited share cannot vote while calls, for which the former holder alone is liable, are unpaid¹⁶.

Where a company gave an undertaking to the court which involved the company in general meeting passing a resolution for the issue and allotment of shares, it was held that a shareholder voting against that resolution would not be in contempt of court¹⁷.

It is not unusual in private companies for the shareholders to enter into an agreement outside the articles relating to voting their shares¹⁸.

1 As to a company's articles of association and their application generally see PARA 228 et seq.

2 *North-West Transportation Co Ltd and Beatty v Beatty* (1887) 12 App Cas 589, PC; *Ving v Robertson and Woodcock Ltd* (1912) 56 Sol Jo 412; *Burland v Earle* [1902] AC 83 at 94, PC; *Pender v Lushington* (1877) 6 ChD 70; *East Pant Du United Lead Mining Co Ltd v Merryweather* (1864) 2 Hem & M 254; *Baird v J Baird & Co (Falkirk) Ltd* 1949 SLT 368, Ct of Sess. Cf *Mason v Harris* (1879) 11 ChD 97, CA. See also *Citco Banking NV v Pusser's Ltd* [2007] UKPC 13, [2007] 2 BCLC 483, [2007] 4 LRC 626 (shareholder not banned from voting on amendment to the articles simply because the alteration was beneficial to him personally). As to a director using his vote to appropriate the company's property see, however, *Cook v Deeks* [1916] 1 AC 554, PC.

The statement in the text is subject also to the Companies Act 2006 s 239 (see PARA 593), which provides that, where a resolution is proposed as a written resolution neither the director (if a member of the company) nor any member connected with him is an eligible member (see s 239(3); and PARA 593); and that, where the resolution is proposed at a meeting, it is passed only if the necessary majority is obtained disregarding votes in favour of the resolution by the director (if a member of the company) and any member connected with him (see s 239(3); and PARA 593).

3 *Menier v Hooper's Telegraph Works* (1874) 9 Ch App 350; *Re Consolidated South Rand Mines Deep Ltd* [1909] 1 Ch 491; *Brown v British Abrasive Wheel Co* [1919] 1 Ch 290; *Clemens v Clemens Bros Ltd* [1976] 2 All ER 268. See also PARA 463 et seq.

4 *Greenwell v Porter* [1902] 1 Ch 530; *Puddephatt v Leith* [1916] 1 Ch 200. See, however, *Greenhalgh v Mallard* [1943] 2 All ER 234, CA (where it was held that such restrictions would not be binding upon third parties into whose hands the shares might come). An unpaid vendor of shares who remains the registered holder of them after the contract for sale retains vis-à-vis the purchaser the prima facie right to vote in respect of those shares (*Musselwhite v CH Musselwhite & Son Ltd* [1962] Ch 964, [1962] 1 All ER 201; *JRRT (Investments) Ltd v Haycraft, Haycraft v JRRT (Investments) Ltd* [1993] BCLC 401); but that prima facie right is inhibited by the fiduciary obligation of the unpaid vendor in this position (*Michaels v Harley House (Marylebone) Ltd* [2000] Ch 104, [1999] 1 All ER 356, CA).

5 *Campbell v Australian Mutual Provident Society* (1908) 77 LJPC 117.

6 See PARA 653 note 15.

7 See the Companies Act 2006 s 284(1), (3); and PARA 653. Since the articles form a contract between the company and its members, there is no reason why the articles should not provide for different voting rights for

different categories or classes of shares; private companies often have different classes of shares which either have different voting rights or rights which differ according to the resolution proposed. See further *Holt v Holt* [1990] 1 WLR 1250, PC ('A' shares carried 10,000 votes and 'B' shares one vote each); *Bushell v Faith* [1970] AC 1099, [1970] 1 All ER 53, CA (articles provided that, in the event of a resolution being proposed at any general meeting of the company for the removal from office of any director, any shares held by that director should on a poll in respect of the resolution carry the right to three votes per share).

8 *Marks v Financial News Ltd* (1919) 35 TLR 681.

9 See PARAS 396, 434. It is not clear how such a person could have an effective vote because, until he is registered, he is not a member. See also *Llewellyn v Kasintoe Rubber Estates Ltd* [1914] 2 Ch 670, CA; contra *Collins v Donald* (1895) 3 SLT 57. As to the continuance of the rights of a deceased member in his personal representative see *James v Buena Ventura Nitrate Grounds Syndicate Ltd* [1896] 1 Ch 456, CA; *New Zealand Gold Extraction Co (Newbury-Vautin Process) v Peacock* [1894] 1 QB 622, CA; *Howling's Trustees v Smith* (1905) 7 F 390; *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656. As to the provision made in respect of the transmission of shares in the model articles see the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 Pt 3 arts 27-29 (private company); Sch 3 Pt 4 arts 65-68 (public company); and the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A arts 29-31 (cited in PARA 434 note 3).

10 *Wise v Lansdell* [1921] 1 Ch 420; *Morgan v Gray* [1953] Ch 83, [1953] 1 All ER 213.

11 *Robson v Premier Oil and Pipe Line Co Ltd* [1915] 2 Ch 124, CA. In most cases his right to receive notices of meetings will also be suspended, as all communications are normally prohibited: see *Re Anglo-International Bank Ltd* [1943] Ch 233, [1943] 2 All ER 88, CA. See further *Re Pharaon et Fils* [1916] 1 Ch 1, CA; and **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 573 et seq. As to the Secretary of State's power by order to vest any securities, or to vest the right to transfer them, in a custodian see the Trading with the Enemy Act 1939 s 7(1)(b), (c); and **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 585.

12 See *Pender v Lushington* (1877) 6 ChD 70 at 80 per Jessel MR (where shares had been transferred to increase voting power).

13 *Pender v Lushington* (1877) 6 ChD 70.

14 *Coulson v Austin Motor Co Ltd* (1927) 43 TLR 493.

15 See eg the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 art 41; and PARA 653.

16 *Randt Gold Mining Co Ltd v Wainwright* [1901] 1 Ch 184.

17 *Northern Counties Securities Ltd v Jackson & Steeple Ltd* [1974] 2 All ER 625, [1976] 1 WLR 1133.

18 As to such agreements see PARA 251.

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653. Voting on a resolution.

The Companies Act 2006 sets out general rules¹ for when members of a company² vote on a resolution³, as follows:

- 1033 (1) on a vote on a written resolution⁴ (in the case of a company having a share capital⁵) every member has one vote in respect of each share⁶ or each £10 of stock⁷ held by him⁸ and (in any other case) every member has one vote⁹;
- 1034 (2) on a vote on a resolution on a show of hands at a meeting¹⁰, each member present in person has one vote¹¹;
- 1035 (3) on a vote on a resolution on a poll taken at a meeting¹² (in the case of a company having a share capital) every member has one vote in respect of each

share or each £10 of stock held by him¹³ and (in any other case) every member has one vote¹⁴.

These rules have effect subject to any provision of the company's articles¹⁵.

On a vote on a resolution on a show of hands at a meeting, every proxy present who has been duly appointed by one or more members entitled to vote on the resolution has one vote¹⁶. But this is subject to the provision¹⁷ that, on a vote on a resolution on a show of hands at a meeting, a proxy has one vote for and one vote against the resolution if¹⁸: (a) the proxy has been duly appointed by more than one member entitled to vote on the resolution¹⁹; and (b) the proxy has been instructed by one or more of those members to vote for the resolution and by one or more other of those members to vote against it²⁰. These provisions²¹ also have effect subject to any provision of the company's articles²². On a poll taken at a meeting of a company all or any of the voting rights of a member may be exercised by one or more duly appointed proxies²³.

In relation to a resolution required or authorised by an enactment²⁴, if a private company's articles provide that a member has a different number of votes in relation to a resolution when it is passed as a written resolution and when it is passed on a poll taken at a meeting²⁵, then: (i) the provision about how many votes a member has in relation to the resolution passed on a poll is void²⁶; and (ii) a member has the same number of votes in relation to the resolution when it is passed on a poll as the member has when it is passed as a written resolution²⁷.

In the case of joint holders of shares of a company, only the vote of the senior holder who votes (and any proxies duly authorised by him) may be counted by the company²⁸.

For the purposes of determining the entitlement of persons who are holding uncertificated securities to attend or vote at a meeting, and how many votes such persons may cast, the participating issuer may specify in the notice of the meeting a time, not more than 48 hours before the time fixed for the meeting, by which a person must be entered on the relevant register of securities in order to have the right to attend or vote at the meeting²⁹.

A resolution of the members of a company is validly passed at a general meeting if notice of the meeting and of the resolution is duly³⁰ given, and if the meeting is duly³¹ held and conducted³².

1 le in the Companies Act 2006 s 284: see the text and notes 1-15. Nothing in s 284 is to be read as restricting the effect of s 152 (exercise of rights by nominees) (see PARA 377), s 285 (voting by proxy) (see the text and notes 16-23), s 322 (exercise of voting rights on poll) (see PARA 656), s 322A (voting on a poll: votes cast in advance) (see PARA 656), or s 323 (representation of corporations at meetings) (see PARA 661): s 284(5) (added by SI 2009/1632).

2 As to the meaning of 'member of the company' see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to company resolutions and the general requirements that apply to them see PARA 617.

4 As to the meaning of 'written resolution' see PARA 623.

5 As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

6 As to the meaning of 'share' see PARA 1042. As to orders imposing restrictions on the voting rights in respect of any shares see PARA 1548.

7 As to the meaning of 'stock' see PARA 1163.

8 Companies Act 2006 s 284(1)(a).

9 Companies Act 2006 s 284(1)(b).

10 As to voting on a show of hands see PARA 654. As to meetings of the company see PARA 629 et seq.

11 Companies Act 2006 s 284(2) (substituted by SI 2009/1632).

12 As to polls taken at a meeting see PARA 655 et seq.

13 Companies Act 2006 s 284(3)(a).

14 Companies Act 2006 s 284(3)(b). See note 1.

15 Companies Act 2006 s 284(4). See note 1. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to savings regarding provisions of a company's articles that relate to a person's entitlement to vote on a resolution see s 287; and PARA 617 note 10.

The default articles prescribed for the purposes of the Companies Act 1985 (ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, which have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230) provide that a resolution put to the vote of a meeting is to be decided on a show of hands unless before, or on the declaration of the result of, the show of hands a poll is duly demanded by the persons specified in the articles for that purpose; a demand by a person as proxy for a member is the same as a demand by a member: see reg 2, Schedule, Table A art 46. Unless a poll is duly demanded, a declaration by the chairman that a resolution has been carried or carried unanimously, or by a particular majority, or lost, or not carried by a particular majority and an entry to that effect in the minutes of the meeting is conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution: see Table A art 47. As to the right to make a demand for, and vote on, a poll see further PARA 655. As to voting by proxy see PARA 662 et seq.

Subject to any rights or restrictions attached to any shares, on a show of hands every member who (being an individual) is present in person or by proxy or (being a corporation) is present by a duly authorised representative or by proxy, unless the proxy (in either case) or the representative is himself a member entitled to vote, must have one vote and on a poll every member must have one vote for every share of which he is the holder: Table A art 54 (amended by SI 2007/2826). In the case of joint holders the vote of the senior who tenders a vote, whether in person or by proxy, must be accepted to the exclusion of the votes of the other joint holders; and seniority must be determined by the order in which the names of the holders stand in the register of members: Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 55. A member in respect of whom an order has been made by any court having jurisdiction (whether in the United Kingdom or elsewhere) in matters concerning mental disorder may vote, whether on a show of hands or on a poll, by his receiver, curator bonis or other person authorised in that behalf appointed by that court, and any such receiver, curator bonis or other person may, on a poll, vote by proxy; however, evidence to the satisfaction of the directors of the authority of the person claiming to exercise the right to vote must be deposited at the office, or at such other place as is specified in accordance with the articles for the deposit of instruments of proxy, not less than 48 hours before the time appointed for holding the meeting or adjourned meeting at which the right to vote is to be exercised and in default the right to vote is not to be exercisable: Table A art 56. No member may vote at any general meeting or at any separate meeting of the holders of any class of shares in the company, either in person or by proxy, in respect of any share held by him unless all moneys presently payable by him in respect of that share have been paid: Table A art 57. No objection may be raised to the qualification of any voter except at the meeting or adjourned meeting at which the vote objected to is tendered, and every vote not disallowed at the meeting must be valid; any objection made in due time must be referred to the chairman whose decision is final and conclusive: Table A art 58. On a poll, votes may be given either personally or by proxy; a member may appoint more than one proxy to attend on the same occasion: Table A art 59. As to the meaning of 'United Kingdom' see PARA 1 note 5.

The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but arts 46-47, 54-59 are applied by Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital) and Table E (an unlimited company having a share capital). Table A arts 46-47, 56 only are applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), although Table A art 46 is amended in respect of who may duly demand a poll (see Table C art 7) and it is provided that, on a show of hands, every member present in person or by proxy has one vote and that, on a poll, every member present in person or by proxy has one vote (see Table C art 8 (amended by SI 2008/739)). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company' and 'unlimited company' see PARA 102.

The provision made in the model articles of association that have been prescribed for the purposes of the Companies Act 2006 (see PARA 228 et seq) is less detailed (but specific provision for the declaration of a result is made in s 320 which is derived in part from the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A arts 46, 47). Different versions of model articles are prescribed for the purposes of the Companies Act 2006 for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'private company' and 'public company' see PARA 102. As to the meaning of 'share' see PARA 1042. Accordingly, under these model articles, a resolution put to the vote of a general meeting must be decided on a show of hands unless a poll is duly demanded in accordance with the articles: Sch 1 art 42; Sch 2 art 28; Sch 3 art 34. No voting rights attached to a share may be exercised at any general meeting of a public company, at any adjournment of it, or on any poll called at or in relation to it,

unless all amounts payable to the company in respect of that share have been paid: Sch 3 art 41. No objection may be raised to the qualification of any person voting at a general meeting except at the meeting or adjourned meeting at which the vote objected to is tendered, and every vote not disallowed at the meeting is valid (Sch 1 art 43(1); Sch 2 art 29(1); Sch 3 art 35(1)); and any such objection must be referred to the chairman of the meeting, whose decision is final (Sch 1 art 43(2); Sch 2 art 29(2); Sch 3 art 35(2)). A poll on a resolution may be demanded either in advance of the general meeting where it is to be put to the vote, or at a general meeting, either before a show of hands on that resolution or immediately after the result of a show of hands on that resolution is declared: Sch 1 art 44(1); Sch 2 art 30(1); Sch 3 art 36(1). A poll may be demanded by the chairman of the meeting, the directors, two or more persons having the right to vote on the resolution, or a person or persons representing not less than one tenth of the total voting rights of all the members (or shareholders, as the case may be) having the right to vote on the resolution: Sch 1 art 44(2); Sch 2 art 30(2); Sch 3 art 36(2). See further PARA 655.

16 Companies Act 2006 s 285(1) (s 285 substituted by SI 2009/1632).

17 Ie the Companies Act 2006 s 285(1) is subject to s 285(2) (see the text and notes 18-20): see s 285(1) (as substituted: see note 16).

18 Companies Act 2006 s 285(2) (as substituted: see note 16).

19 Companies Act 2006 s 285(2)(a) (as substituted: see note 16).

20 Companies Act 2006 s 285(2)(b) (as substituted: see note 16).

21 Ie the Companies Act 2006 s 285(1), (2) (see the text and notes 16-20): see s 285(5) (as substituted: see note 16).

22 Companies Act 2006 s 285(5) (as substituted: see note 16). See also note 15.

23 Companies Act 2006 s 285(3) (as substituted: see note 16). Where a member appoints more than one proxy, s 285(3) does not authorise the exercise by the proxies taken together of more extensive voting rights on a poll than could be exercised by the member in person: s 285(4) (as so substituted).

24 As to the meaning of 'enactment' see PARA 17 note 2.

25 Companies Act 2006 s 285A (s 285A added by SI 2009/1632). See also note 15.

26 Companies Act 2006 s 285A(a) (as added: see note 25).

27 Companies Act 2006 s 285A(b) (as added: see note 25).

28 Companies Act 2006 s 286(1). For these purposes, the senior holder of a share is determined by the order in which the names of the joint holders appear in the register of members: s 286(2). As to the register of members see PARA 146. The provisions of s 286(1), (2) have effect subject to any provision of the company's articles: s 286(3). See also note 15.

29 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 41(1). In calculating the period mentioned in reg 41(1), no account may be taken of any part of a day that is not a working day: reg 41(6) (added by SI 2009/1889). Changes to entries on the relevant register of securities after the time so specified must be disregarded in determining the rights of any person to attend or vote at the meeting, notwithstanding any provisions in any enactment, articles of association or other instrument to the contrary: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 41(2). As to the meaning of 'participating issuer' see PARA 421. As to the meaning of 'register of securities' for these purposes see PARA 421 note 3. As to the Uncertificated Securities Regulations 2001, SI 2001/3755, generally see PARA 420 et seq.

30 Ie in accordance with the provisions of the Companies Act 2006 Pt 13 Ch 3 (ss 301-335) (see PARA 632 et seq) and, where relevant, Pt 13 Ch 4 (ss 336-340) (see PARAS 630, 636, 643-644), and the company's articles: see s 301. See also note 15.

31 See note 30.

32 Companies Act 2006 s 301. As to the application of the provisions of Pt 13 Ch 3 (see PARA 632 et seq) to class meetings see PARA 631.

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654. Voting on a show of hands.

Under the model articles of association¹, a resolution put to the vote of a general meeting² must be decided on a show of hands unless a poll is demanded in accordance with the articles³. An entry in respect of a chairman's declaration that a resolution is carried on a show of hands in the minutes of the meeting is conclusive evidence of that fact⁴. Even when it is to be conclusive, it may be disputed where it is inaccurate on the face of it⁵, or where fraud is shown⁶; otherwise it cannot be disputed⁷. The chairman's ruling that a resolution has been passed by show of hands cannot be challenged if not challenged at the time⁸. If his decision is challenged, it is his duty to take steps to ascertain the true numbers⁹. If there is only a mistake and no fraud, the proper course is to call another meeting¹⁰. If votes are improperly excluded, the court will intervene on proper evidence¹¹.

Where there are two resolutions before a meeting of shareholders, the chairman may, it seems¹², put the resolutions to the meeting en bloc if no shareholder requires them to be put separately and there is a right to a poll¹³; but at a general meeting of a public company a motion for the appointment of two or more persons as directors is not, in general, to be made¹⁴.

1 As to the model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'private company' and 'public company' see PARA 102. As to the meaning of 'share' see PARA 1042. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, be used by companies for the purposes of the Companies Act 2006: see PARA 230.

2 As to company resolutions and the general requirements that apply to them see PARA 617.

3 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 art 42, reg 3, Sch 2 art 28, reg 4, Sch 3 art 34, and the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A art 46 (cited in PARA 653 note 15).

4 See the Companies Act 2006 s 320 (which is derived in part from the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A arts 46, 47); and PARA 619.

5 *Re Caratal (New) Mines Ltd* [1902] 2 Ch 498 (where the declaration showed that the requisite majority had not been obtained); *Re Clark & Co Ltd* 1911 SC 243, Ct of Sess.

6 *Wall v London and Northern Assets Corpn* [1899] 1 Ch 550 (approved in *Wall v Exchange Investment Corpn* [1926] Ch 143, CA); *Arnot v United African Lands Ltd* [1901] 1 Ch 518, CA; *Allison v Johnson* (1902) 46 Sol Jo 686.

7 *Arnot v United African Lands Ltd* [1901] 1 Ch 518, CA; *Colonial Gold Reef Ltd v Free State Rand Ltd* [1914] 1 Ch 382; *Oppert v Brownhill Great Southern Ltd* (1898) 14 TLR 249, CA; *Re Hadleigh Castle Gold Mines Ltd* [1900] 2 Ch 419, distinguishing *Young v South African and Australian Exploration and Development Syndicate* [1896] 2 Ch 268. See also *Wandsworth and Putney Gas Light and Coke Co v Wright* (1870) 22 LT 404; *Re Graham's Morocco Co* 1932 SC 269, Ct of Sess.

8 *Arnot v United African Lands Ltd* [1901] 1 Ch 518, CA.

9 *R v St Pancras (Vestrymen)* (1839) 11 Ad & El 15.

10 See note 9.

11 *Pender v Lushington* (1877) 6 ChD 70; *Young v South African and Australian Exploration and Development Syndicate* [1896] 2 Ch 268; *Re Indian Zoedone Co* (1884) 26 ChD 70, CA.

12 Cf PARA 655.

13 See *Re RE Jones Ltd* (1933) 50 TLR 31 (reduction of capital and conversion of preference into ordinary shares; show of hands, and poll).

14 See the Companies Act 2006 s 160; and PARA 485.

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655. Right to demand a poll.

At common law, a person entitled to vote at a meeting¹ has a right to demand a poll².

A provision of a company's articles³ is void in so far as it would have the effect of either⁴:

1036 (1) excluding the right to demand a poll at a general meeting on any question other than the election of the chairman of the meeting⁵ or the adjournment of the meeting⁶; or

1037 (2) making ineffective a demand for a poll on any such question which is made⁷:

39

68. (a) by not less than five members⁸ having the right to vote on the resolution⁹; or

69. (b) by a member or members representing not less than 10 per cent of the total voting rights of all the members having the right to vote on the resolution (excluding any voting rights attached to any shares¹⁰ in the company held as treasury shares)¹¹; or

70. (c) by a member or members holding shares¹² in the company conferring a right to vote on the resolution, being shares on which an aggregate sum has been paid up equal to not less than 10 per cent of the total sum paid up¹³ on all the shares conferring that right (excluding any shares in the company conferring a right to vote on the resolution which are held as treasury shares)¹⁴.

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The appointment of a proxy to vote¹⁵ on a matter at a meeting of a company authorises the proxy to demand, or join in demanding, a poll on that matter¹⁶.

The right may be exercised at different times depending on the articles¹⁷; where the articles provide that a resolution is to be decided on a show of hands unless a poll is demanded 'before or on the declaration' of the result of the show of hands¹⁸, a poll may be validly demanded without going through the formality of a show of hands¹⁹. The demand may be made privately to the chairman and by him communicated to the meeting²⁰. If the chairman refuses a poll on a motion for adjournment which he has declared carried, the court will not interfere²¹. Unless the articles state the place and time for taking the poll²², the chairman may direct the manner of taking it²³; but, where a poll is required to be taken 'immediately at the meeting'²⁴, the poll must be taken as soon as practicable in all the circumstances²⁵.

1 As to general meetings of the company see PARA 629 et seq; and as to voting at such meetings generally see PARA 653 et seq.

2 *R v Wimbledon Local Board* (1882) 8 QBD 459, CA; *Campbell v Maund* (1836) 5 Ad & El 865. As to the demand for a poll in the case of extraordinary or special resolutions see PARA 655. As to the adjournment of a meeting for the taking of a poll see PARA 650.

3 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to savings regarding provisions of a company's articles that relate to a person's entitlement to vote on a resolution see the Companies Act 2006 s 287; and PARA 617 note 10.

The default articles prescribed for the purposes of the Companies Act 1985 (ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, which have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230) provide that the demand for a poll may, before the poll is taken, be withdrawn but only with the consent of the chairman and a demand so withdrawn must not be taken to have invalidated the result of a show of hands declared before the demand was made: Table A art 48. A poll must be taken as the chairman directs and he may appoint scrutineers (who need not be members) and fix a time and place for declaring the result of the poll; the result of the poll is deemed to be the resolution of the meeting at which the poll was demanded: Table A art 49. A poll demanded on the election of a chairman or on a question of adjournment must be taken forthwith; and a poll demanded on any other question must be taken either forthwith or at such time and place as the chairman directs not being more than 30 days after the poll is demanded: Table A art 51. The demand for a poll does not prevent the continuance of a meeting for the transaction of any business other than the question on which the poll was demanded; if a poll is demanded before the declaration of the result of a show of hands and the demand is duly withdrawn, the meeting must continue as if the demand had not been made: Table A art 51. No notice need be given of a poll not taken forthwith if the time and place at which it is to be taken are announced at the meeting at which it is demanded; in any other case at least seven clear days' notice must be given specifying the time and place at which the poll is to be taken: Table A art 52.

The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but arts 48-49, 51, 52 are applied by Table C (regulations for the management of a company limited by guarantee and not having a share capital), Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital) and Table E (an unlimited company having a share capital). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company' and 'unlimited company' see PARA 102.

Similar provision is made in the model articles of association that have been prescribed for the purposes of the Companies Act 2006 (see PARA 228 et seq). Different versions of model articles are prescribed for the purposes of the Companies Act 2006 for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'private company' and 'public company' see PARA 102. As to the meaning of 'share' see PARA 1042. Accordingly, under these model articles, a demand for a poll may be withdrawn if the poll has not yet been taken, and if the chairman of the meeting consents to the withdrawal: Sch 1 art 44(3); Sch 2 art 30(3); Sch 3 art 36(3). Polls must be taken immediately and in such manner as the chairman of the meeting directs (Sch 1 art 44(4); Sch 2 art 30(4)), except that, in relation to public companies only, it is specified that polls at general meetings must be taken when, where and in such manner as the chairman of the meeting directs, and that this is subject to the articles (Sch 3 art 37(1)). In the latter case only, the chairman of the meeting may appoint scrutineers (who need not be members) and decide how and when the result of the poll is to be declared (Sch 3 art 37(2)); and the result of a poll must be the decision of the meeting in respect of the resolution on which the poll was demanded (Sch 3 art 37(3)). A poll on the election of the chairman of the meeting, or on a question of adjournment, must be taken immediately (Sch 3 art 37(4)); other polls must be taken within 30 days of their being demanded (Sch 3 art 37(5)). A demand for a poll does not prevent a general meeting from continuing, except as regards the question on which the poll was demanded: Sch 3 art 37(6). No notice need be given of a poll not taken immediately if the time and place at which it is to be taken are announced at the meeting at which it is demanded (Sch 3 art 37(7)); in any other case, at least seven days' notice must be given specifying the time and place at which the poll is to be taken (Sch 3 art 37(8)).

4 See the Companies Act 2006 s 321(1), (2).

5 As to the election etc of a chairman see PARA 648.

6 Companies Act 2006 s 321(1). As to the application of the provisions of Pt 13 Ch 3 (ss 301-335) (see PARA 632 et seq) to class meetings see PARA 631. As to adjournment see PARA 650.

7 Companies Act 2006 s 321(2).

8 As to the meaning of 'member of the company' see PARA 321.

- 9 Companies Act 2006 s 321(2)(a). As to company resolutions and the general requirements that apply to them see PARA 617; and as to the right to vote on a resolution see PARA 653.
- 10 As to the meaning of 'share' see PARA 1042. As to rights attached to classes of shares generally see PARA 1057 et seq.
- 11 Companies Act 2006 s 321(2)(b). As to treasury shares see PARA 1251.
- 12 This will include joint holders of the specified number: *Siemens Bros & Co Ltd v Burns* [1918] 2 Ch 324, CA.
- 13 As to paid up and unpaid shares see PARA 1042 et seq.
- 14 Companies Act 2006 s 321(2)(c). The articles may extend the right to demand a poll (see PARA 653 note 15); and, where such a power is given to the chairman of the meeting, it is not a personal right to be exercised according to his wishes, but one to be exercised so as to ascertain the real sense of the meeting (*Second Consolidated Trust Ltd v Ceylon Amalgamated Tea and Rubber Estates Ltd* [1943] 2 All ER 567).
- 15 As to voting by proxy see PARA 662 et seq.
- 16 Companies Act 2006 s 329(1). In applying the provisions of s 321(2) (requirements for effective demand) (see heads (2)(a), (2)(b) and (2)(c) in the text), a demand by a proxy counts: (1) for the purposes of head (2)(a), as a demand by the member (s 329(2)(a)); (2) for the purposes of head (2)(b), as a demand by a member representing the voting rights that the proxy is authorised to exercise (s 329(2)(b)); and (3) for the purposes of head (2)(c), as a demand by a member holding the shares to which those rights are attached (s 329(2)(c)). Nothing in s 329 prevents a company's articles from conferring more extensive rights on members or proxies than are conferred by that section: s 331. The termination of the authority of a person to act as proxy does not affect the validity of a poll demanded by him at a meeting, unless the company receives notice of the termination before the commencement of the meeting: see s 330(2)(c); and PARA 665. As to the rights of corporate representatives at a meeting see PARA 661.
- 17 See eg the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 art 36(1) (cited in PARA 653 note 15). See also *Campbell v Maund* (1836) 5 Ad & El 865 at 881, Exch (any such right should be exercised immediately after the declaration of the chairman on the result of the show of hands).
- 18 See eg the model articles cited in PARA 653 note 15.
- 19 *Holmes v Lord Keyes* [1959] Ch 199, [1958] 2 All ER 129, CA.
- 20 *Re Phoenix Electric Light and Power Co* (1883) 31 WR 398.
- 21 *MacDougall v Gardiner* (1875) 1 ChD 13, CA; *Foss v Harbottle* (1843) 2 Hare 461.
- 22 *Re British Flax Producers' Co Ltd* (1889) 60 LT 215. As to the notice of a poll required by the articles see note 3.
- 23 *Re Chillington Iron Co* (1885) 29 ChD 159. See also note 3.
- 24 See eg the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 art 37(4) (cited in note 3).
- 25 *Jackson v Hamlyn* [1953] Ch 577, [1953] 1 All ER 887.

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656. Voting on poll.

On a poll¹ taken at a general meeting of a company², a member³ entitled to more than one vote need not, if he votes, use all his votes or cast all the votes he uses in the same way⁴.

A company's articles⁵ may contain provision to the effect that on a vote on a resolution⁶ on a poll taken at a meeting, the votes may include votes cast in advance⁷. In the case of a traded company⁸, any such provision in relation to voting at a general meeting may be made subject only to such requirements and restrictions as are both necessary to ensure the identification of the person voting, and proportionate to the achievement of that objective⁹. Any provision of a company's articles is void in so far as it would have the effect of requiring any document casting a vote in advance to be received by the company or another person earlier than the following time¹⁰: (1) in the case of a poll taken more than 48 hours after it was demanded, 24 hours before the time appointed for the taking of the poll¹¹; (2) in the case of any other poll, 48 hours before the time for holding the meeting or adjourned meeting¹².

Where two resolutions before a meeting have been separately voted upon and a poll has been demanded, each must be put to the poll separately¹³; but resolutions may be put en bloc if there is a right to demand a poll and no member objects¹⁴. If, after a rightful demand for a poll, the poll is not taken, the resolution is void¹⁵. A poll is part of the meeting, and, for the purpose of taking it, the meeting continues until the poll is closed¹⁶. In a poll of members of a company present at a meeting there is no confidentiality which prevents the company from knowing how votes are cast¹⁷.

Where a poll is taken at a general meeting of a quoted company¹⁸ that is not a traded company, the company must ensure that the following information is made available on a website¹⁹:

- 1038 (a) the date of the meeting²⁰;
- 1039 (b) the text of the resolution or, as the case may be, a description of the subject matter of the poll²¹;
- 1040 (c) the number of votes cast in favour²²; and
- 1041 (d) the number of votes cast against²³.

Where a poll is taken at a general meeting of a traded company, the company must ensure that the following information is made available on a website²⁴:

- 1042 (i) the date of the meeting²⁵;
- 1043 (ii) the text of the resolution or, as the case may be, a description of the subject matter of the poll²⁶;
- 1044 (iii) the number of votes validly cast²⁷;
- 1045 (iv) the proportion of the company's issued share capital²⁸ represented by those votes²⁹;
- 1046 (v) the number of votes cast in favour³⁰;
- 1047 (vi) the number of votes cast against³¹; and
- 1048 (vii) the number of abstentions (if counted)³².

In the event of default in complying with the requirements regarding making such information available³³, an offence is committed by every officer of the company who is in default³⁴; and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale³⁵. Failure to comply with these requirements³⁶ does not affect the validity of either the poll, or the resolution or other business (if passed or agreed to) to which the poll relates³⁷.

Where a poll is held, the date of the resolution is that on which the result of the poll is announced³⁸.

1 As to the right to demand a poll see PARA 655.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to general meetings of the company see PARA 629 et seq.

3 As to the meaning of 'member of the company' see PARA 321.

4 Companies Act 2006 s 322. As to voting rights on a resolution see PARA 653. This is an important right for shareholders who may, as trustees or otherwise as representatives, hold shares for different persons, some of whom may wish their shares to be voted one way and some another way (or not at all). As to shareholders generally see PARA 321 et seq. As to the application of the provisions of Pt 13 Ch 3 (ss 301-335) (see PARA 632 et seq) to class meetings see PARA 631.

5 As to the meaning of references to a company's 'articles' see PARA 228 note 2. See further PARA 655 note 3.

6 As to company resolutions and the general requirements that apply to them see PARA 617.

7 Companies Act 2006 s 322A(1) (s 322A added by SI 2009/1632).

8 As to the meaning of 'traded company' for these purposes see PARA 630 note 6.

9 Companies Act 2006 s 322A(2) (as added: see note 7). Nothing in s 322A(2) affects any power of a company to require reasonable evidence of the entitlement of any person who is not a member to vote: see s 322A(2) (as so added).

10 Companies Act 2006 s 322A(3) (as added: see note 7). In calculating the periods mentioned in s 322A(3), no account is to be taken of any part of a day that is not a working day: s 322A(4) (as so added). As to the meaning of 'working day' see PARA 145 note 16.

11 Companies Act 2006 s 322A(3)(a) (as added: see note 7). See note 10.

12 Companies Act 2006 s 322A(3)(b) (as added: see note 7). See note 10. As to the adjournment of general meetings of the company see PARA 650.

13 *Blair Open Hearth Furnace Co Ltd v Reigart* (1913) 29 TLR 449. Cf *Patent Wood Keg Syndicate Ltd v Pearse* [1906] WN 164.

14 *Re RE Jones Ltd* (1933) 50 TLR 31. This is subject to the qualification mentioned in the Companies Act 2006 s 160 (see PARA 485).

15 *R v Cooper* (1870) LR 5 QB 457.

16 *Shaw v Tati Concessions Ltd* [1913] 1 Ch 292; *Spiller v Mayo (Rhodesia) Development Co (1908) Ltd* [1926] WN 78; *Jackson v Hamlyn* [1953] Ch 577, [1953] 1 All ER 887; *Holmes v Lord Keyes* [1959] Ch 199, [1958] 2 All ER 129, CA.

17 *Haarhaus & Co GmbH v Law Debenture Trust Corpn plc* [1988] BCLC 640.

18 As to the meaning of 'quoted company' in the Companies Act 2006 see PARA 77.

The Secretary of State may by regulations limit the types of company to which some or all of the provisions of Pt 13 Ch 5 (ss 341-354) apply, or extend some or all of the provisions of Pt 13 Ch 5 to additional types of company: s 354(1). Regulations under s 354 extending the application of any provision of Pt 13 Ch 5 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 354(2), 1290. Any other regulations under s 354 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 354(3), 1289. Regulations under s 354 may amend the provisions of Pt 13 Ch 5 (apart from s 354), repeal and re-enact provisions of Pt 13 Ch 5 with modifications of form or arrangement, whether or not they are modified in substance, and contain such consequential, incidental and supplementary provisions (including provisions amending, repealing or revoking enactments) as the Secretary of State thinks fit: s 354(4). As to the Secretary of State see PARA 6 et seq. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. At the date at which this volume states the law, no such regulations have been made in exercise of the power conferred by s 354.

19 Companies Act 2006 s 341(1) (amended by SI 2009/1632). The provisions of the Companies Act 2006 s 353 (requirements as to website availability) (see PARAS 656, 658) apply: s 341(2). Accordingly, for the purposes of s 341, the information must be made available on a website that is maintained by or on behalf of the company, and identifies the company in question: s 353(1), (2). Access to the information on the website, and the ability to obtain a hard copy of the information from the website, must not be conditional on the payment of a fee or otherwise restricted (s 353(3)); and the information: (1) must be made available as soon as reasonably practicable (s 353(4)(a)); and (2) must be kept available throughout the period of two years beginning with the date on which it is first made available on a website in accordance with s 353 (s 353(4)(b)). A failure to make

information available on a website throughout the period specified in s 353(4)(b) is disregarded if the information is made available on the website for part of that period, and if the failure is wholly attributable to circumstances that it would not be reasonable to have expected the company to prevent or avoid: s 353(5).

As to the application of s 341 in relation to a meeting of holders of a class of shares of a quoted company see s 352; and PARA 631.

20 Companies Act 2006 s 341(1)(a).

21 Companies Act 2006 s 341(1)(b).

22 Companies Act 2006 s 341(1)(c).

23 Companies Act 2006 s 341(1)(d).

24 Companies Act 2006 s 341(1A) (s 341(1A), (1B) added by SI 2009/1632). The provisions of the Companies Act 2006 s 353 (requirements as to website availability) (see PARA 658) apply: s 341(2). A traded company must comply with s 341(1A) by the end of 16 days beginning with the day of the meeting or (if later) the end of the first working day after the day on which the result of the poll is declared: s 341(1B) (as so added).

25 Companies Act 2006 s 341(1A)(a) (as added: see note 24).

26 Companies Act 2006 s 341(1A)(b) (as added: see note 24).

27 Companies Act 2006 s 341(1A)(c) (as added: see note 24).

28 Is determined at the time at which the right to vote is determined under the Companies Act 2006 s 360B(2) (see PARA 633 note 6): see s 341(1A)(d) (as added: see note 24). As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. As to the meaning of 'issued share capital' see PARA 1045.

29 Companies Act 2006 s 341(1A)(d) (as added: see note 24).

30 Companies Act 2006 s 341(1A)(e) (as added: see note 24).

31 Companies Act 2006 s 341(1A)(f) (as added: see note 24).

32 Companies Act 2006 s 341(1A)(g) (as added: see note 24).

33 Is in complying with the Companies Act 2006 s 341 (or with the requirements of s 353 (requirements as to website availability) (see PARA 658) as it applies for the purposes of s 341 (see notes 24, 28)): see s 341(3).

34 Companies Act 2006 s 341(3). As to the meaning of 'officer' see PARA 607; and as to the meaning of 'officer in default' see PARA 315.

35 Companies Act 2006 s 341(4). As to the meaning of the 'standard scale' see PARA 1622 note 5.

36 Is a failure to comply with the Companies Act 2006 s 341 (results of poll to be made available on website), or with the requirements of s 353 (requirements as to website availability) (see PARA 658) as it applies for the purposes of s 341 (see notes 24, 28): see s 341(5).

37 Companies Act 2006 s 341(5).

38 *Holmes v Keyes* [1959] Ch 199, [1958] 2 All ER 129, CA.

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657. Members' power to demand independent report on poll.

The members of a quoted company¹ may require the directors² to obtain an independent report on any poll taken, or to be taken, at a general meeting of the company³.

The directors are required to obtain an independent report if they receive requests to do so from⁴: (1) members representing at least 5 per cent of the total voting rights of all the members who have a right to vote on the matter to which the poll relates⁵ (excluding any voting rights attached to any shares⁶ in the company held as treasury shares)⁷; or (2) not less than 100 members who have a right to vote on the matter to which the poll relates and hold shares in the company on which there has been paid up an average sum, per member, of not less than £100⁸.

A request may be in hard copy form or in electronic form⁹, must identify the poll or polls to which it relates¹⁰, must be authenticated by the person or persons making it¹¹, and must be received by the company not later than one week after the date on which the poll is taken¹².

1 As to the meaning of 'member of the company' see PARA 321. As to the meaning of 'quoted company' in the Companies Act 2006 see PARA 77. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

The Secretary of State may by regulations limit the types of company to which some or all of the provisions of the Companies Act 2006 Pt 13 Ch 5 (ss 341-354) apply, or extend some or all of the provisions of Pt 13 Ch 5 to additional types of company: see s 354; and PARA 656 note 18.

2 As to the meaning of 'director' under the Companies Acts see PARA 478.

3 Companies Act 2006 s 342(1). As to the appointment of an independent assessor to make such a report, and as to the making of such a report, see PARA 658 et seq. As to the exercise of members' rights under s 342 where the shares are held on behalf of others see s 153; and PARA 377. As to the right to demand a poll, and as to voting on such a poll, see PARAS 655-656. As to meetings of the company see PARA 629 et seq.

As to the application of ss 342-351 in relation to a meeting of holders of a class of shares of a quoted company see s 352; and PARA 631.

4 Companies Act 2006 s 342(2). Where the requests relate to more than one poll, s 342(2) must be satisfied in relation to each of them: s 342(3).

5 As to voting at meetings see PARA 653 et seq.

6 As to the meaning of 'share' see PARA 1042.

7 Companies Act 2006 s 342(2)(a). As to treasury shares see PARA 1251.

8 Companies Act 2006 s 342(2)(b). As to the meaning of 'paid up', in relation to shares, see PARA 1091.

9 Companies Act 2006 s 342(4)(a). As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form see PARA 679.

10 Companies Act 2006 s 342(4)(b).

11 Companies Act 2006 s 342(4)(c). In relation to the authentication of a document under the Companies Act 2006 see s 1146; and PARA 678 et seq.

12 Companies Act 2006 s 342(4)(d).

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658. Appointment of independent assessor to make report on poll.

Directors¹ who are required² to obtain an independent report on a poll or polls³ must appoint a person they consider to be appropriate (an 'independent assessor') to prepare a report for the company⁴ on it or them⁵. The appointment must be made within one week after the company being required to obtain the report⁶. The directors must not appoint a person who does not meet the independence requirement⁷ or who has another role in relation to any poll on which he is to report (including, in particular, a role in connection with collecting or counting votes or with the appointment of proxies)⁸. In the event of default in complying with these requirements⁹, an offence is committed by every officer of the company who is in default¹⁰; and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale¹¹. If, at the meeting, no poll on which a report is required is taken¹², then the directors are not required to obtain a report from the independent assessor¹³, and his appointment ceases (but without prejudice to any right to be paid for work done before the appointment ceased)¹⁴.

Where an independent assessor has been appointed to report on a poll, the company must ensure that the following information is made available on a website¹⁵: (1) the fact of his appointment¹⁶; (2) his identity¹⁷; (3) the text of the resolution¹⁸ or, as the case may be, a description of the subject matter of the poll to which his appointment relates¹⁹; and (4) a copy of a report by him which complies with the statutory requirements²⁰. In the event of default in complying with these requirements²¹, an offence is committed by every officer of the company who is in default²²; and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale²³. Failure to comply with these requirements²⁴ does not affect the validity of either the poll, or the resolution or other business (if passed or agreed to) to which the poll relates²⁵.

Where a partnership that is not a legal person under the law by which it is governed²⁶ is appointed as an independent assessor²⁷ then, unless a contrary intention appears, the appointment is an appointment of the partnership as such and not of the partners²⁸. Where the partnership ceases, the appointment is to be treated as extending to any partnership that succeeds to the practice of that partnership²⁹, or any other person who succeeds to that practice having previously carried it on in partnership³⁰.

1 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie under the Companies Act 2006 s 342 (see PARA 657); see s 343(1). As to the application of the provisions of ss 342-351 in relation to a meeting of holders of a class of shares of a quoted company see s 352; and PARA 631.

3 As to the right to demand a poll, and as to voting on such a poll, see PARAS 655-656.

4 As to the meaning of 'company' under the Companies Acts see PARA 24.

The Secretary of State may by regulations limit the types of company to which some or all of the provisions of the Companies Act 2006 Pt 13 Ch 5 (ss 341-354) apply, or extend some or all of the provisions of Pt 13 Ch 5 to additional types of company: see s 354; and PARA 656 note 18.

5 Companies Act 2006 s 343(1).

6 Companies Act 2006 s 343(2).

7 Companies Act 2006 s 343(3)(a). The text refers to the independence requirement in s 344: s 343(3)(a). Accordingly, a person may not be appointed as an independent assessor:

207 (1) if he is an officer or employee of the company, or if he is a partner or employee of such a person, or a partnership of which such a person is a partner (s 344(1)(a));

- 208 (2) if he is an officer or employee of an associated undertaking of the company, or if he is a partner or employee of such a person, or a partnership of which such a person is a partner (s 344(1)(b)); and
- 209 (3) if there exists between the person or an associate of his, and the company or an associated undertaking of the company, a connection of any such description as may be specified by regulations made by the Secretary of State (s 344(1)(c)).

An auditor of the company is not regarded as an officer or employee of the company for this purpose: s 344(2). Regulations under s 344 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 344(4), 1289. As to the Secretary of State see PARA 6. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. At the date at which this volume states the law, no such regulations had been made under s 344. For these purposes, 'associated undertaking' means a parent undertaking or subsidiary undertaking of the company, or a subsidiary undertaking of a parent undertaking of the company; and 'associate' has the meaning given by s 345: see ss 344(3), 345(1). Accordingly, in relation to an individual, 'associate' means that individual's spouse or civil partner or minor child or step-child, any body corporate of which that individual is a director, and any employee or partner of that individual: s 345(2). In relation to a body corporate, 'associate' means any body corporate of which that body is a director, any body corporate in the same group as that body, and any employee or partner of that body or of any body corporate in the same group: s 345(3). In relation to a partnership that is a legal person under the law by which it is governed, 'associate' means any body corporate of which that partnership is a director, any employee or partner in that partnership, and any person who is an associate of a partner in that partnership: s 345(4). In relation to a partnership that is not a legal person under the law by which it is governed, 'associate' means any person who is an associate of any of the partners: s 345(5). For the purposes of s 345, in relation to a limited liability partnership, for 'director' read 'member': s 345(6). As to the effect of appointing a partnership as assessor see the text and notes 26-30. As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5. As to the meaning of 'officer' generally see PARA 607. As to the meanings of 'parent undertaking', 'subsidiary' and 'subsidiary undertaking' in the Companies Acts see PARA 26. As to company auditors see PARA 905 et seq. As to the meaning of 'partnership' generally see **PARTNERSHIP** vol 79 (2008) PARA 1; and as to the legal personality of a partnership or firm generally see **PARTNERSHIP** vol 79 (2008) PARA 2. As to limited liability partnerships incorporated in the United Kingdom see **PARTNERSHIP** vol 79 (2008) PARA 234 et seq.

8 Companies Act 2006 s 343(3)(b). As to the procedure that applies to voting on poll see PARA 656. As to voting by proxy see PARA 662 et seq.

9 In complying with the Companies Act 2006 s 343: see s 343(4).

10 Companies Act 2006 s 343(4). As to the meaning of 'officer' see PARA 607; and as to the meaning of 'officer in default' see PARA 315.

11 Companies Act 2006 s 343(5). As to the meaning of the 'standard scale' see PARA 1622 note 5.

12 Companies Act 2006 s 343(6).

13 Companies Act 2006 s 343(6)(a).

14 Companies Act 2006 s 343(6)(b).

15 Companies Act 2006 s 351(1). The provisions of s 353 (requirements as to website availability) (see PARA 656) apply: s 351(2). Accordingly, for the purposes of s 351, the information must be made available on a website that is maintained by or on behalf of the company, and identifies the company in question: s 353(1), (2). Access to the information on the website, and the ability to obtain a hard copy of the information from the website, must not be conditional on the payment of a fee or otherwise restricted (s 353(3)); and the information: (1) must be made available as soon as reasonably practicable (s 353(4)(a)); and (2) must be kept available throughout the period of two years beginning with the date on which it is first made available on a website in accordance with s 353 (s 353(4)(b)). A failure to make information available on a website throughout the period specified in s 353(4)(b) is disregarded if the information is made available on the website for part of that period, and if the failure is wholly attributable to circumstances that it would not be reasonable to have expected the company to prevent or avoid: s 353(5).

16 Companies Act 2006 s 351(1)(a).

17 Companies Act 2006 s 351(1)(b).

18 As to company resolutions and the general requirements that apply to them see PARA 617.

19 Companies Act 2006 s 351(1)(c).

20 Companies Act 2006 s 351(1)(d). The text refers to a report that complies with s 347 (see PARA 660): see s 351(1)(d).

21 Ie in complying with the Companies Act 2006 s 351 (or with the requirements of s 353 (see note 15) as it applies for the purposes of s 351): see s 351(3).

22 Companies Act 2006 s 351(3).

23 Companies Act 2006 s 351(4).

24 Ie a failure to comply with the Companies Act 2006 s 351 (or with the requirements of s 353 (see note 15) as it applies for the purposes of s 351): see s 351(5).

25 Companies Act 2006 s 351(5).

26 Under English law, a partnership (or firm) is not a 'person' or legal entity: *Sadler v Whiteman* [1910] 1 KB 868 at 889, CA, per Farwell J. As to partnership generally see PARA 4; and **PARTNERSHIP**.

27 See the Companies Act 2006 s 346(1). As to the application of the provisions of the Companies Act 2006 ss 342-351 (with any necessary modifications) in relation to a meeting of holders of a class of shares of a quoted company see s 352; and PARA 631.

28 Companies Act 2006 s 346(2).

29 Companies Act 2006 s 346(3)(a). For these purposes a partnership is to be regarded as 'succeeding' to the practice of another partnership only if the members of the successor partnership are substantially the same as those of the former partnership; and a partnership or other person is to be regarded as succeeding to the practice of a partnership only if it or he succeeds to the whole or substantially the whole of the business of the former partnership: s 346(4).

30 Companies Act 2006 s 346(3)(b). Where the partnership ceases and the appointment is not treated under s 346(3) as extending to any partnership or other person, the appointment may with the consent of the company be treated as extending to a partnership, or other person, who succeeds to the business of the former partnership or such part of it as is agreed by the company is to be treated as comprising the appointment: s 346(5). As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. The Secretary of State may by regulations limit the types of company to which some or all of the provisions of Pt 13 Ch 5 (ss 341-354) apply, or extend some or all of the provisions of Pt 13 Ch 5 to additional types of company: see s 354; and PARA 656 note 18.

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659. Rights of independent assessor.

Where an independent assessor has been appointed to report on a poll¹, he is entitled to attend both the meeting at which the poll may be taken², and any subsequent proceedings in connection with the poll³. He is also entitled to be provided by the company with a copy of the notice of the meeting⁴, and any other communication provided by the company in connection with the meeting to persons who have a right to vote on the matter to which the poll relates⁵. The rights so conferred⁶ are only to be exercised to the extent that the independent assessor considers necessary for the preparation of his report⁷.

The independent assessor is entitled to access to the company's records⁸ relating to any poll on which he is to report⁹, and relating to the meeting at which the poll or polls may be, or were, taken¹⁰.

The independent assessor may require anyone who at any material time was: (1) a director or secretary of the company¹¹; (2) an employee of the company¹²; (3) a person holding or accountable for any of the company's records¹³; (4) a member of the company¹⁴; or (5) an agent

of the company¹⁵, to provide him with information or explanations for the purpose of preparing his report¹⁶. A statement made by a person in response to such a requirement¹⁷ may not be used in evidence against him in criminal proceedings except proceedings for an offence¹⁸ relating to the provision of such information¹⁹; and a person is not so required²⁰ to disclose information in respect of which a claim to legal professional privilege²¹ could be maintained in legal proceedings²². However, a person who fails to comply with such a requirement to disclose information²³ without delay commits an offence unless it was not reasonably practicable for him to provide the required information or explanation²⁴; and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale²⁵. A person who knowingly or recklessly makes to an independent assessor a statement (oral or written) that both conveys (or purports to convey) any information or explanations which the independent assessor either requires²⁶ or is entitled so to require²⁷, and is misleading, false or deceptive in a material particular²⁸, commits an offence²⁹; and a person who is guilty of such an offence is liable (on conviction on indictment) to imprisonment for a term not exceeding two years or a fine (or both)³⁰ and (on summary conviction) to imprisonment for a term not exceeding 12 months³¹ or to a fine not exceeding the statutory maximum³² (or both)³³.

1 As to the appointment of an independent assessor to make a report on a poll see PARA 658.

2 Companies Act 2006 s 348(1)(a). If the independent assessor is a firm, the right under s 348(1) to attend the meeting and any subsequent proceedings in connection with the poll (see the text and note 3) is exercisable by an individual authorised by the firm in writing to act as its representative for that purpose: s 348(4). As to the meaning of 'firm' see PARA 112 note 14.

3 Companies Act 2006 s 348(1)(b). See note 2.

4 Companies Act 2006 s 348(2)(a).

5 Companies Act 2006 s 348(2)(b).

6 It is conferred by the Companies Act 2006 s 348: see s 348(3).

7 Companies Act 2006 s 348(3).

8 As to a company's records of meetings and resolutions see PARA 668.

9 Companies Act 2006 s 349(1)(a).

10 Companies Act 2006 s 349(1)(b).

11 Companies Act 2006 s 349(2)(a). As to the company secretary see PARA 601 et seq.

12 Companies Act 2006 s 349(2)(b).

13 Companies Act 2006 s 349(2)(c).

14 Companies Act 2006 s 349(2)(d). As to the meaning of 'member of the company' see PARA 321.

15 Companies Act 2006 s 349(2)(e). For this purpose, 'agent' includes the company's bankers, solicitors and auditor: s 349(3).

16 Companies Act 2006 s 349(2).

17 It is a requirement under the Companies Act 2006 s 349: see s 349(4).

18 It is an offence under the Companies Act 2006 s 350 (see the text and notes 23-33): see s 349(4).

19 Companies Act 2006 s 349(4).

20 It is a person who is not required by the Companies Act 2006 s 349: see s 349(5).

21 As to legal professional privilege see **CIVIL PROCEDURE** vol 11 (2009) PARA 558 et seq; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1479.

- 22 Companies Act 2006 s 349(5).
- 23 Is a requirement under the Companies Act 2006 s 349: see s 350(1).
- 24 Companies Act 2006 s 350(1).
- 25 Companies Act 2006 s 350(2).
- 26 Is requires under the Companies Act 2006 s 349: see s 350(3)(a).
- 27 Companies Act 2006 s 350(3)(a).
- 28 Companies Act 2006 s 350(3)(b).
- 29 Companies Act 2006 s 350(3).
- 30 Companies Act 2006 s 350(4)(a).
- 31 In relation to an offence committed after the commencement of the Companies Act 2006 s 1131 (summary proceedings) (see PARA 1625), but before a day is appointed in relation to the commencement of the Criminal Justice Act 2003 s 154(1) (general limit on magistrates' courts' power to impose imprisonment), the reference in the Companies Act 2006 s 350(4)(b) to '12 months' must be read as a reference to 'six months': see ss 350(4)(b), 1131, 1133; and see PARA 1625.
- 32 As to the meaning of 'statutory maximum' see PARA 1622.
- 33 Companies Act 2006 s 350(4)(b).

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660. Content and publication of independent report on poll.

The report of the independent assessor¹ on a poll taken, or to be taken, at a general meeting of a quoted company² must state his opinion whether³:

- 1049 (1) the procedures adopted in connection with the poll or polls were adequate⁴;
- 1050 (2) the votes cast⁵ (including proxy votes⁶) were fairly and accurately recorded and counted⁷;
- 1051 (3) the validity of members' appointments of proxies was fairly assessed⁸;
- 1052 (4) the notice of the meeting complied with the statutory requirements⁹ relating to the right to appoint a proxy¹⁰;
- 1053 (5) the statutory requirements¹¹ relating to company-sponsored invitations to appoint a proxy were complied with in relation to the meeting¹².

The report must give his reasons for the opinions stated¹³; and, if he is unable to form an opinion on any of those matters, the report must record that fact and state the reasons for it¹⁴. The report also must state the name of the independent assessor¹⁵.

1 As to the appointment of an independent assessor referred to in the text see PARAS 658.

2. As required by the Companies Act 2006 s 342(1) (see PARA 657). As to the meaning of 'quoted company' in the Companies Act 2006 see PARA 77. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the right to demand a poll, and as to voting on such a poll, see PARAS 655-656. As to meetings of the company generally see PARA 629 et seq.

The Secretary of State may by regulations limit the types of company to which some or all of the provisions of the Companies Act 2006 Pt 13 Ch 5 (ss 341-354) apply, or extend some or all of the provisions of Pt 13 Ch 5 to additional types of company: see s 354; and PARA 656 note 18.

3. Companies Act 2006 s 347(1). As to the application of the provisions of ss 342-351 (with any necessary modifications) in relation to a meeting of holders of a class of shares of a quoted company see s 352; and PARA 631.

4. Companies Act 2006 s 347(1)(a). As to the procedure that applies to voting on poll see PARA 656.

5. As to voting on poll see PARA 656 et seq.

6. As to voting by proxy see PARA 662 et seq.

7. Companies Act 2006 s 347(1)(b).

8. Companies Act 2006 s 347(1)(c).

9. As complied with the Companies Act 2006 s 325 (notice of meeting to contain statement of rights to appoint proxy) (see PARA 662): see s 347(1)(d).

10. Companies Act 2006 s 347(1)(d).

11. As the Companies Act 2006 s 326 (company-sponsored invitations to appoint proxies) (see PARA 663): see s 347(1)(e).

12. Companies Act 2006 s 347(1)(e).

13. Companies Act 2006 s 347(2).

14. Companies Act 2006 s 347(3).

15. Companies Act 2006 s 347(4).

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F. CORPORATE REPRESENTATION AT MEETINGS

661. Representation of corporations at meetings.

If a corporation¹, whether or not a company within the meaning of the Companies Act 2006², is a member of a company³, it may by resolution of its directors⁴ or other governing body⁵, authorise a person or persons to act as its representative or representatives at any meeting of the company⁶.

A person authorised by a corporation is entitled to exercise (on behalf of the corporation) the same powers as the corporation could exercise if it were an individual member of the company⁷; but, where a corporation authorises more than one person, this is subject to the following provisos⁸:

- 1054 (1) on a vote on a resolution on a show of hands at a meeting of the company⁹, each authorised person has the same voting rights as the corporation would be entitled to¹⁰;
- 1055 (2) where head (1) above does not apply¹¹, and more than one authorised person purport to exercise a power¹² in respect of the same shares¹³: (a) if they purport to exercise the power in the same way as each other, the power is treated as exercised in that way¹⁴; (b) if they do not purport to exercise the power in the same way as each other, the power is treated as not exercised¹⁵.

1 As to the meaning of 'corporation' under the Companies Acts see PARA 1 note 5; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 As to the meaning of 'member of the company' see PARA 321.

4 As to a company's directors see PARA 478 et seq; and as to directors' resolutions see PARA 528 et seq.

5 A liquidator may be the 'governing body' of a company at the appropriate time: see *Hillman v Crystal Bowl Amusements Ltd* [1973] 1 All ER 379, [1973] 1 WLR 162, CA.

6 Companies Act 2006 s 323(1). As to meetings of the company see PARA 629 et seq. The effect of this provision negates the effect of the decision in *Blair Open Hearth Furnace Co Ltd v Reigart* (1913) 108 LT 665.

As to the application of the provisions of the Companies Act 2006 Pt 13 Ch 3 (ss 301-335) (see PARA 632 et seq) to class meetings see PARA 631.

7 Companies Act 2006 s 323(2) (s 323(2)-(4) substituted by SI 2009/1632).

8 Ie subject to the Companies Act 2006 s 323(3), (4) (see heads (1) and (2) in the text): see s 323(2) (as substituted: see note 7).

9 As to voting on a resolution see PARA 653; and as to voting at a meeting on a show of hands see PARA 654.

10 Companies Act 2006 s 323(3) (as substituted: see note 7).

11 Ie because it is not a vote taken on a show of hands at a meeting.

12 Ie a power under the Companies Act 2006 s 323(2) (see the text and note 7): see s 323(4) (as substituted: see note 13).

13 Companies Act 2006 s 323(4) (as substituted: see note 7). As to the meaning of 'share' see PARA 1042.

14 Companies Act 2006 s 323(4)(a) (as substituted: see note 7).

15 Companies Act 2006 s 323(4)(b) (as substituted: see note 7).

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G. PROXIES

662. Appointment of proxy to exercise rights at a meeting.

There is no common law right on the part of a member of a company to vote by proxy¹.

However, statute provides that a member of a company² is entitled to appoint another person as his proxy to exercise all or any of his rights to attend and to speak and vote at a meeting of the company³. In the case of a company having a share capital⁴, a member may appoint more than one proxy in relation to a meeting, provided that each proxy is appointed to exercise the rights attached to a different share⁵ or shares held by him, or (as the case may be) to a different £10, or multiple of £10, of stock⁶ held by him⁷.

In every notice calling a meeting of a company⁸ there must appear, with reasonable prominence, a statement informing the member of his rights⁹ to appoint proxies¹⁰, and any more extensive rights conferred by the company's articles¹¹ to appoint more than one proxy¹². Failure to comply with this requirement as to notice¹³ does not affect the validity of the meeting or of anything done at the meeting¹⁴; but if this provision¹⁵ is not complied with as respects any meeting, an offence is committed by every officer of the company who is in default¹⁶; and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale¹⁷.

A proxy must vote in accordance with any instructions given by the member by whom the proxy is appointed¹⁸. A vote by a proxy holder 'for self and proxies' is good for all the votes he represents¹⁹. The appointment of a proxy to vote on a matter at a meeting of a company authorises the proxy to demand, or join in demanding, a poll on that matter²⁰; and a proxy may be elected to be the chairman of a general meeting by a resolution of the company passed at the meeting²¹.

The form of proxy is generally given in the articles of association²². When attestation is required, a proxy holder cannot be the attesting witness to his own proxy form²³. Where the article setting out the form of proxy is merely directory, the fact that the form refers to a particular meeting does not prevent the execution of a general form of proxy²⁴. The proxy form, when signed by the member, may have blanks for the date of execution and the day of the meeting provided that some person duly authorised by him fills in the blanks²⁵.

Where the articles require that the instrument of proxy of a corporation must be under its common seal, this requirement only applies to such corporations as have a common seal²⁶.

In cases where the articles may and do provide that a proxy must be a member, it is no objection to a proxy duly lodged that an unqualified person is named, provided that the qualification exists when the proxy is lodged and continues when it is used; and that the proxy cannot be objected to if he is sufficiently described for all business purposes, as for instance a member for the time being of a specified firm²⁷.

1 *Harben v Phillips* (1883) 23 ChD 14 at 35, CA, per Bowen LJ. As to who qualifies as a member of a company see PARA 321.

2 As to the meaning of 'member of the company' see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 Companies Act 2006 s 324(1). This right is to be notified in the notice convening the meeting; see PARA 634. Nothing in s 324 prevents a company's articles from conferring more extensive rights on members or proxies than are conferred by that section: s 331. As to the enjoyment and exercise by a nominated person of members' rights conferred under s 324 see s 145; and PARA 374. As to company-sponsored invitations to appoint proxies see PARA 663. As to the notice that is required of the termination of a proxy's authority see PARA 665. As to the application of the provisions of Pt 13 Ch 3 (ss 301-335) (see PARA 632 et seq) to class meetings see PARA 631. As to provision made in the articles for attendance and speaking at meetings see PARA 645. As to voting at meetings see PARA 653 et seq.

4 As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

5 As to the meaning of 'share' see PARA 1042. As to class rights associated with certain shares see PARA 1057. As to orders imposing restrictions on the voting rights in respect of any shares see PARA 1548.

6 As to the meaning of 'stock' see PARA 1163.

7 Companies Act 2006 s 324(2).

8 As to meetings of the company convened by notice see PARA 632 et seq.

9 Ie under the Companies Act 2006 s 324 (see the text and notes 2-7): see s 325(1)(a).

10 Companies Act 2006 s 325(1)(a).

11 Nothing in the Companies Act 2006 s 325 prevents a company's articles from conferring more extensive rights on members or proxies than are conferred by that section: s 331. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. The model articles do not confer more extensive rights than the statute. See further note 22.

12 Companies Act 2006 s 325(1)(b).

13 Ie failure to comply with the Companies Act 2006 s 325 (see the text and notes 8-12): see s 325(2).

14 Companies Act 2006 s 325(2).

15 Ie the Companies Act 2006 s 325 (see the text and notes 8-12): see s 325(3).

16 Companies Act 2006 s 325(3). As to the meaning of 'officer' see PARA 607; and as to the meaning of 'officer in default' see PARA 315.

17 Companies Act 2006 s 325(4). As to the meaning of the 'standard scale' see PARA 1622 note 5.

18 Companies Act 2006 s 324A (added by SI 2009/1632). Nothing in the Companies Act 2006 s 324A prevents a company's articles from conferring more extensive rights on members or proxies than are conferred by that section: s 331.

19 *Foerster v Newlands (West Griqualand) Diamond Mines Ltd* (1902) 18 TLR 497.

20 See the Companies Act 2006 s 329; and PARA 655. The termination of the authority of a person to act as proxy does not affect the validity of a poll demanded by him at a meeting, unless the company receives notice of the termination before the commencement of the meeting: see s 330(2)(c); and PARA 665.

21 See the Companies Act 2006 s 328; and PARA 648. As to company resolutions and the general requirements that apply to them see PARA 617.

22 Under the model articles of association that have been prescribed for the purposes of the Companies Act 2006, proxies may only validly be appointed by a notice in writing (a 'proxy notice') which:

210 (1) states the name and address of the member (or shareholder, as the case may be) appointing the proxy (Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 45(1)(a); Sch 2 art 31(1)(a); Sch 3 art 38(1)(a));

211 (2) identifies the person appointed to be that member's (or shareholder's) proxy and the general meeting in relation to which that person is appointed (Sch 1 art 45(1)(b); Sch 2 art 31(1)(b); Sch 3 art 38(1)(b));

212 (3) is signed by or on behalf of the member (or shareholder) appointing the proxy, or is authenticated in such manner as the directors may determine (Sch 1 art 45(1)(c); Sch 2 art 31(1)(c); Sch 3 art 38(1)(c)); and

213 (4) is delivered to the company in accordance with the articles and any instructions contained in the notice of the general meeting to which they relate (Sch 1 art 45(1)(d); Sch 2 art 31(1)(d); Sch 3 art 38(1)(d)).

The company may require proxy notices to be delivered in a particular form, and may specify different forms for different purposes: Sch 1 art 45(2); Sch 2 art 31(2); Sch 3 art 38(2). Proxy notices may specify how the proxy appointed under them is to vote (or that the proxy is to abstain from voting) on one or more resolutions: Sch 1

art 45(3); Sch 2 art 31(3); Sch 3 art 38(3). Unless a proxy notice indicates otherwise, it must be treated as allowing the person appointed under it as a proxy discretion as to how to vote on any ancillary or procedural resolutions put to the meeting, and appointing that person as a proxy in relation to any adjournment of the general meeting to which it relates as well as the meeting itself: Sch 1 art 45(4); Sch 2 art 31(4); Sch 3 art 38(4). As to adjourned meetings of the company see PARA 650. As to the procedure that applies to voting on poll see PARA 656. As to a company's directors see PARA 478 et seq; and as to a company's shareholders see PARA 321 et seq.

Any notice of a general meeting of a public company must specify the address or addresses ('proxy notification address') at which the company or its agents will receive proxy notices relating to that meeting, or any adjournment of it, delivered in hard copy or electronic form: Sch 3 art 39(1). A proxy notice must be delivered to a proxy notification address not less than 48 hours before the general meeting or adjourned meeting to which it relates (Sch 3 art 39(3)); but (in the case of a poll taken more than 48 hours after it is demanded) the notice must be delivered to a proxy notification address not less than 24 hours before the time appointed for the taking of the poll (Sch 3 art 39(4)) and (in the case of a poll not taken during the meeting but taken not more than 48 hours after it was demanded) the proxy notice must be delivered either in accordance with Sch 3 art 39(3), or at the meeting at which the poll was demanded to the chairman, secretary or any director (Sch 3 art 39(5)). As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form see PARA 679.

A person who is entitled to attend, speak or vote (either on a show of hands or on a poll) at a general meeting remains so entitled in respect of that meeting or any adjournment of it, even though a valid proxy notice has been delivered to the company by or on behalf of that person: Sch 1 art 46(1); Sch 2 art 32(1); Sch 3 art 39(2). An appointment under a proxy notice may be revoked by delivering to the company (or, in the case of a public company, to a proxy notification address) a notice in writing given by or on behalf of the person by whom or on whose behalf the proxy notice was given: Sch 1 art 46(2); Sch 2 art 32(2); Sch 3 art 39(6). A notice revoking a proxy appointment only takes effect if it is delivered before the start of the meeting or adjourned meeting to which it relates (Sch 1 art 46(3); Sch 2 art 32(3); Sch 3 art 39(7)); or (in the case of a poll not taken on the same day as the meeting of a public company or such an adjourned meeting) before the time appointed for taking the poll to which it relates (see Sch 3 art 39(7)). If a proxy notice is not signed or executed by the person appointing the proxy, it must be accompanied by written evidence of the authority of the person who executed it to execute it on the appointor's behalf: Sch 1 art 46(4); Sch 2 art 32(4); Sch 3 art 39(8).

Where a company is still using the prescribed legacy articles of association, the form of notice that is required for the appointment of a proxy is set out in the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 60 (amended by SI 2000/3373; SI 2007/2541). Where it is desired to afford members an opportunity of instructing the proxy how he is to act, the form of notice that is required for the appointment of a proxy is set out in the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 61 (amended by SI 2000/3373; SI 2007/2541). In either case, the form may be as near thereto as circumstances allow or may be in any other form which is usual or which the directors may approve: see the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A arts 60, 61. The appointment of a proxy and any authority under which it is executed or a copy of such authority certified notarially or in some other way approved by the directors may (Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 62 (amended by SI 2000/3373)):

- 214 (a) in the case of an instrument in writing, be deposited at the office or at such other place within the United Kingdom as is specified in the notice convening the meeting or in any instrument of proxy sent out by the company in relation to the meeting not less than 48 hours before the time for holding the meeting or adjourned meeting at which the person named in the instrument proposes to vote (Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 62(a) (amended by SI 2000/3373)); or
- 215 (b) in the case of an appointment contained in an electronic communication, where an address has been specified for the purpose of receiving electronic communications, in the notice convening the meeting, or in any instrument of proxy sent out by the company in relation to the meeting, or in any invitation contained in an electronic communication to appoint a proxy issued by the company in relation to the meeting, be received at such address not less than 48 hours before the time for holding the meeting or adjourned meeting at which the person named in the appointment proposes to vote (Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 62(aa) (added by SI 2000/3373));
- 216 (c) in the case of a poll taken more than 48 hours after it is demanded, be deposited or received as aforesaid after the poll has been demanded and not less than 24 hours before the time appointed for the taking of the poll (Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 62(b) (amended by SI 2000/3373)); or
- 217 (d) where the poll is not taken forthwith but is taken not more than 48 hours after it was demanded, be delivered at the meeting at which the poll was demanded to the chairman or to

the secretary or to any director (Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 62(c));

and an appointment of proxy which is not deposited, delivered or received in a manner so permitted is invalid (Table A art 62 (as so amended)). See also *Re Waxed Papers Ltd* [1937] 2 All ER 481, CA (where the form of proxy enabled the holder to vote as and when he chose); *Oliver v Dalglish* [1963] 3 All ER 330, [1963] 1 WLR 1274 (proxy not invalidated by misprint or palpable mistake on face of instrument of proxy). A vote given or poll demanded by proxy or by the duly authorised representative of a corporation is valid notwithstanding the previous determination of the authority of the person voting or demanding a poll unless notice of the determination was received by the company at the office or at such other place at which the instrument of proxy was duly deposited (or, where the appointment of the proxy was contained in an electronic communication, at the address at which such appointment was duly received) before the commencement of the meeting or adjourned meeting at which the vote is given or the poll demanded or (in the case of a poll taken otherwise than on the same day as the meeting or adjourned meeting) the time appointed for taking the poll: Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 63 (amended by SI 2000/3373). For these purposes, 'address', in relation to electronic communications, includes any number or address used for the purposes of such communications: Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 62 (as so amended).

23 *Re Parrott, ex p Cullen* [1891] 2 QB 151.

24 *Isaacs v Chapman* (1915) 32 TLR 183.

25 *Sadgrove v Bryden* [1907] 1 Ch 318, following *Ernest v Loma Gold Mines Ltd* [1896] 2 Ch 572 (affd [1897] 1 Ch 1, CA). See also *Re Lancaster, ex p Lancaster* (1877) 5 ChD 911, CA.

26 *Colonial Gold Reef Ltd v Free State Rand Ltd* [1914] 1 Ch 382. A company may have a common seal, but need not have one: see Companies Act 2006 s 45; and PARA 283.

27 *Bombay-Burmah Trading Corp'n v Dorabji Cursetji Shroff* [1905] AC 213, PC.

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663. Company-sponsored invitations to appoint proxies.

The directors of a company¹ may pay out of the company's funds the cost of printing and stamping proxy papers² and of posting them to the members³, if, in so doing, they are acting in good faith in the interests of the company⁴. If, for the purposes of a meeting⁵, there are issued at the company's expense⁶ invitations to members⁷ to appoint as proxy a specified person or a number of specified persons, the invitations must be issued to all members entitled to vote at the meeting⁸. If this requirement⁹ is contravened as respects a meeting, an offence is committed by every officer of the company who is in default¹⁰; and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale¹¹. However, there is no such contravention¹² if there is issued to a member at his request a form of appointment naming the proxy, or a list of persons willing to act as proxy¹³, and if the form or list is available on request to all members entitled to vote at the meeting¹⁴.

1 As to a company's directors see PARA 478 et seq.

2 As to the appointment of a proxy to exercise a member's rights at a meeting see PARA 662.

3 As to who qualifies as a member of a company see PARA 321.

4 *Peel v London and North Western Ry Co* [1907] 1 Ch 5, CA (a case relating to a statutory company, where the proxies were for one particular meeting only and would not now require a stamp), overruling on this point *Studdert v Grosvenor* (1886) 33 ChD 528.

- 5 As to meetings of the company see PARA 629 et seq.
- 6 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.
- 7 As to the meaning of 'member of the company' see PARA 321.
- 8 Companies Act 2006 s 326(1). As to the entitlement to vote at a meeting see PARA 653. Nothing in s 326 prevents a company's articles from conferring more extensive rights on members or proxies than are conferred by that section: s 331. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to the application of the provisions of Pt 13 Ch 3 (ss 301-335) (see PARA 632 et seq) to class meetings see PARA 631.
- 9 Ie the Companies Act 2006 s 326(1) (see the text and notes 5-8): see s 326(3).
- 10 Companies Act 2006 s 326(3). As to the meaning of 'officer' see PARA 607; and as to the meaning of 'officer in default' see PARA 315.
- 11 Companies Act 2006 s 326(4). As to the meaning of the 'standard scale' see PARA 1622 note 5.
- 12 Ie the Companies Act 2006 s 326(1) (see the text and notes 5-8) is not contravened: see s 326(2).
- 13 Companies Act 2006 s 326(2)(a).
- 14 Companies Act 2006 s 326(2)(b).

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664. Notice required of appointment of proxy etc.

It is usual to provide in a company's articles of association¹ that a proxy² should be lodged a specified time before the meeting³ or adjourned meeting⁴ at which it is proposed to be used⁵. Any provision of a company's articles⁶ (including, for these purposes, the articles of a traded company⁷) is void in so far as it would have the effect of requiring either the appointment of a proxy⁸, or any document necessary to show the validity of (or otherwise relating to) the appointment of a proxy, to be received by the company or another person earlier than the following time⁹:

- 1056 (1) in the case of a meeting or adjourned meeting¹⁰, 48 hours before the time for holding the meeting or adjourned meeting¹¹;
- 1057 (2) in the case of a poll taken more than 48 hours after it was demanded¹², 24 hours before the time appointed for the taking of the poll¹³;
- 1058 (3) in the case of a poll taken not more than 48 hours after it was demanded, the time at which it was demanded¹⁴.

In the case of a traded company, the appointment of a person as proxy for a member must be notified to the company in writing¹⁵; and, where such an appointment is made, the company may require reasonable evidence of:

- 1059 (a) the identity of the member and of the proxy¹⁶;
- 1060 (b) the member's instructions (if any) as to how the proxy is to vote¹⁷; and
- 1061 (c) where the proxy is appointed by a person acting on behalf of the member, authority of that person to make the appointment¹⁸.

However, the company may not require to be provided with anything else relating to the appointment¹⁹.

Where a company has given an electronic address²⁰ either in an instrument of proxy sent out by the company in relation to the meeting²¹, or in an invitation to appoint a proxy issued by the company in relation to the meeting²², it is deemed to have agreed that any document or information relating to proxies²³ for that meeting may be sent by electronic means to that address (subject to any conditions or limitations specified in the notice)²⁴.

A traded company must provide an electronic address²⁵ for the receipt of any document or information relating to proxies for a general meeting²⁶; and the company must provide the address either by giving it when sending out an instrument of proxy for the purposes of the meeting or issuing an invitation to appoint a proxy for those purposes²⁷, or by ensuring that it is made available, throughout the period beginning with the first date on which notice of the meeting is given and ending with the conclusion of the meeting, on the same website on which the other information that such a company is required²⁸ to publish is made available²⁹. The company is deemed to have agreed that any document or information relating to proxies for the meeting may be sent by electronic means to the address provided (subject to any limitations specified by the company when providing the address)³⁰.

1 As to a company's articles of association see PARA 228 et seq.

2 As to voting by proxy see PARA 662.

3 As to meetings of members see PARA 629 et seq.

4 As to adjourned meetings see PARA 650.

5 As to the provision so made in the model articles of association see PARA 653.

6 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

7 As to the meaning of 'traded company' see PARA 630 note 6.

8 As to the appointment of a proxy to exercise a member's rights at a meeting see PARA 662.

9 Companies Act 2006 s 327(1), (2) (s 327(1) amended by SI 2009/1632). This provision negatives the effect of the decision in *McLaren v Thomson* [1917] 2 Ch 261, CA. See, however, *Jackson v Hamlyn* [1953] Ch 577, [1953] 1 All ER 887 (resumed meeting). In calculating the periods mentioned in heads (1) to (3) in the text, no account is to be taken of any part of a day that is not a working day: s 327(3). As to the meaning of 'working day' see PARA 145 note 16. Nothing in s 327 prevents a company's articles from conferring more extensive rights on members or proxies than are conferred by that section: s 331. As to the application of the provisions of Pt 13 Ch 3 (ss 301-335) to class meetings see PARA 631.

10 As to adjourned meetings of the company see PARA 650.

11 Companies Act 2006 s 327(2)(a).

12 As to the procedure that applies to voting on poll see PARA 656.

13 Companies Act 2006 s 327(2)(b).

14 Companies Act 2006 s 327(2)(c). Section 327(2)(c) has not been commenced and it is expected to be repealed, as from a day to be appointed, on the basis that it constitutes a drafting error. However, at the date at which this volume states the law, no such day had been appointed.

15 Companies Act 2006 s 327(A1)(a) (s 327(A1) added by SI 2009/1632).

16 Companies Act 2006 s 327(A1)(b)(i) (as added: see note 15).

17 Companies Act 2006 s 327(A1)(b)(ii) (as added: see note 15).

18 Companies Act 2006 s 327(A1)(b)(iii) (as added: see note 15).

- 19 Companies Act 2006 s 327(A1)(b) (as added: see note 15).
- 20 As to the meaning of 'electronic address' see the Companies Act 2006 s 333(4); and PARA 634 note 6.
- 21 Companies Act 2006 s 333(2)(a).
- 22 Companies Act 2006 s 333(2)(b). As to company-sponsored invitations to appoint proxies see PARA 663.
- 23 In the Companies Act 2006 s 333(2), documents relating to proxies include the appointment of a proxy in relation to a meeting, any document necessary to show the validity of, or otherwise relating to, the appointment of a proxy, and notice of the termination of the authority of a proxy: s 333(3). As to the notice that is required of the termination of a proxy's authority see PARA 665.
- 24 Companies Act 2006 s 333(2). As to the meaning of references to sending documents by electronic means see PARA 679 note 3.
- 25 For these purposes, 'electronic address' has the meaning given by the Companies Act 2006 s 333(4) (PARA 634 note 6): s 333A(4)(b) (s 333A added by SI 2009/1632).
- 26 Companies Act 2006 s 333A(1) (as added: see note 25). For these purposes, documents relating to proxies include the appointment of a proxy for a meeting, any document necessary to show the validity of, or otherwise relating to, the appointment of a proxy, and notice of the termination of the authority of a proxy: s 333A(4)(a) (as so added).
- 27 Companies Act 2006 s 333A(2)(a) (as added: see note 25).
- 28 In the website on which the information required by the Companies Act 2006 s 311A (see PARA 636 note 8): see s 333A(2)(b) (as added: see note 25).
- 29 Companies Act 2006 s 333A(2)(b) (as added: see note 25).
- 30 Companies Act 2006 s 333A(3) (as added: see note 25).

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665. Notice required of termination of proxy's authority.

The termination of the authority of a person to act as proxy¹ does not affect²:

- 1062 (1) whether he counts in deciding whether there is a quorum at a meeting³;
- 1063 (2) the validity of anything he does as chairman of a meeting⁴; or
- 1064 (3) the validity of a poll demanded by him at a meeting⁵,

unless the company receives notice of the termination before the commencement of the meeting⁶.

The termination of the authority of a person to act as proxy does not affect the validity of a vote given by that person⁷ unless the company receives notice of the termination⁸:

- 1065 (a) before the commencement of the meeting or adjourned meeting⁹ at which the vote is given¹⁰; or
- 1066 (b) in the case of a poll taken more than 48 hours after it is demanded, before the time appointed for taking the poll¹¹.

If the company's articles require or permit members to give notice of termination to a person other than the company¹², the references above to the company receiving notice have effect as if they were or (as the case may be) included a reference to that person¹³.

The provisions given in heads (1) and (2) and in heads (a) and (b) above have effect subject to any provision of the company's articles which has the effect of requiring notice of termination to be received by the company or another person at a time earlier than that so specified¹⁴; but this is subject to the proviso¹⁵ that any provision of the company's articles is void in so far as it would have the effect of requiring notice of termination to be received by the company or another person earlier than the following time¹⁶:

- 1067 (i) in the case of a meeting or adjourned meeting, 48 hours before the time for holding the meeting or adjourned meeting¹⁷;
- 1068 (ii) in the case of a poll taken more than 48 hours after it was demanded, 24 hours before the time appointed for the taking of the poll¹⁸;
- 1069 (iii) in the case of a poll taken not more than 48 hours after it was demanded, the time at which it was demanded¹⁹.

Ordinarily a proxy may be revoked at any time before it is used, and, if two are given, the later one revokes the earlier one. Under a provision of the company's articles of association that provides for notice of revocation²⁰, where the meeting is adjourned for the purpose solely of taking a poll²¹, notice of the revocation must be given before the original meeting²². A shareholder²³ by attending in person at such an adjourned meeting and voting thereat revokes a proxy given by him²⁴.

1 As to the appointment of a proxy to exercise a member's rights at a meeting see PARA 662.

2 Companies Act 2006 s 330(2). The provisions of s 330 apply in the case of traded companies and other companies as regards notice that the authority of a person to act as proxy is terminated ('notice of termination'): s 330(1) (amended by SI 2009/1632). As to the meaning of 'traded company' see PARA 630 note 6. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. Nothing in the Companies Act 2006 s 330 prevents a company's articles from conferring more extensive rights on members or proxies than are conferred by that section: s 331. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to the meaning of 'member' see PARA 321. As to the application of the provisions of Pt 13 Ch 3 (ss 301-335) to class meetings see PARA 631.

3 Companies Act 2006 s 330(2)(a). As to the quorum required for a meeting see PARA 646.

4 Companies Act 2006 s 330(2)(b). As to the chairman of a meeting see PARA 648.

5 Companies Act 2006 s 330(2)(c). As to the right to demand a poll, and as to voting on such a poll, see PARAS 655-656.

6 Companies Act 2006 s 330(2). In the case of a traded company, the termination of the authority of a person to act as proxy must be notified to the company in writing: s 330(A1) (added by SI 2009/1632).

7 As to voting at meetings see PARA 653 et seq.

8 Companies Act 2006 s 330(3).

9 As to adjourned meetings of the company see PARA 650.

10 Companies Act 2006 s 330(3)(a).

11 Companies Act 2006 s 330(3)(b). In calculating the period mentioned in s 330(3)(b), no account is to be taken of any part of a day that is not a working day: s 330(7). As to the meaning of 'working day' see PARA 145 note 16.

12 As to the provision so made in the model articles of association see PARA 653. See also the text and notes 20-24.

- 13 Companies Act 2006 s 330(4).
- 14 Companies Act 2006 s 330(5).
- 15 Ie the Companies Act 2006 s 330(5) is subject to s 330(6) (see the text and notes 16-19): see s 330(5).
- 16 Companies Act 2006 s 330(6). In calculating the period mentioned in s 330(6) no account is to be taken of any part of a day that is not a working day: s 330(7).
- 17 Companies Act 2006 s 330(6)(a). See note 16.
- 18 Companies Act 2006 s 330(6)(b). See note 16.
- 19 Companies Act 2006 s 330(6)(c). Section 330(6)(c) has not been commenced and it is expected to be repealed, as from a day to be appointed, on the basis that it constitutes a drafting error. However, at the date at which this volume states the law, no such day had been appointed.
- 20 See PARA 653.
- 21 See PARA 655.
- 22 *Spiller v Mayo (Rhodesia) Development Co (1908) Ltd* [1926] WN 78. This decision proceeded on the ground that, where there is a continuation of a meeting at a subsequent date for the purpose of taking a poll, it is all one meeting (*Cousins v International Brick Co Ltd* [1931] 2 Ch 90 at 99, CA, per Lord Hanworth MR); but it may be otherwise if the meeting is adjourned for other purposes.
- 23 As to shareholders of the company generally see PARA 321 et seq.
- 24 *Cousins v International Brick Co Ltd* [1931] 2 Ch 90, CA.

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(iii) Decisions reached without Meetings

666. Decisions reached without meetings.

The members of a company, as a body, may in general act only by means of passing resolutions¹. Where each and every shareholder assents to or sanctions an act which is intra vires the company, that will constitute an effective act by the company². It is not necessary for the members to meet together or to give their assent simultaneously³. Assent can be oral, in writing or, it seems, by conduct⁴, but actual assent must be sought⁵. Further, where it is shown that all members who have a right to attend and vote at a general meeting of the company assent to any matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be⁶. A similar position obtains in the case of resolutions by classes of members⁷. However, the principle cannot be used to override statutory provisions whose purpose extends beyond the protection of the class which has purported to waive the provision⁸.

1 See *Re George Newman & Co Ltd* [1895] 1 Ch 674, CA. As to membership of a company generally see PARA 321 et seq. As to the various types of resolution that may be passed by members see PARA 617 et seq. As to written resolutions of private companies see PARA 623. As to decisions by a sole member see PARA 667.

2 *Re Express Engineering Works Ltd* [1920] 1 Ch 466, CA (meeting styled a directors' meeting; all five shareholders present and they could have turned it into a general meeting and transacted the same business; business transacted valid); *Re Oxted Motor Co Ltd* [1921] 3 KB 32 (it was held competent for all the shareholders of the company acting together to waive the statutory formalities required as to notice of intention

to propose a resolution as an extraordinary resolution); *Wright v Atlas Wright (Europe) Ltd* [1999] 2 BCLC 301, CA (the procedural steps set out by what is now the Companies Act 2006 s 188 (directors' long-term service contracts: requirement of members' approval) (see PARA 563) can be bypassed if the shareholders consent to the term in question, and unanimous informal consent is sufficient); *Euro Brokers Holdings Ltd v Monecor (London) Ltd* [2003] EWCA Civ 105, [2003] 1 BCLC 506 (shareholders bound by their acceptance of a call for more capital made by e-mail even though the shareholders' agreement specified more formal notice). The persons assenting must be competent to effect the act to which they have assented: *Re New Cedos Engineering Co Ltd* [1994] 1 BCLC 797; *Wright v Atlas Wright (Europe) Ltd* at 314-315, CA, per Potter LJ. Quare whether, in the case of joint holders, the assent of the first-named joint holder is sufficient or whether a second joint holder might challenge such a decision.

Nothing in the Companies Act 2006 s 239 (ratification of acts of directors) affects the validity of a decision taken by unanimous consent of the members of the company: see s 239(6)(a); and PARA 593.

3 *Parker & Cooper Ltd v Reading* [1926] Ch 975 at 984 per Astbury J. See also *Salomon v A Salomon & Co Ltd* [1897] AC 22 at 57, HL, per Lord Davey; *Barthels Shewan & Co Ltd v Winnipeg Cigar Co* (1909) 10 WLR 263; *Mid-West Collieries Ltd v McEwen* [1925] SCR 326, Can SC; *Re Pearce Duff & Co Ltd* [1960] 3 All ER 222, [1960] 1 WLR 1014 (the consent of all ordinary shareholders having been obtained to a special resolution for reduction of capital being treated as valid, and the petition being prosecuted on that footing, the court ought not to hear any such shareholder to say that the resolution was invalid), doubted in *Cane v Jones* [1981] 1 All ER 533, [1980] 1 WLR 1451 (all the corporators of a company acting together can do anything which is intra vires the company); *Roman Hotels Ltd v Desrochers Hotels Ltd* (1977) 69 DLR (3d) 126, Sask CA.

4 See *Re Bailey, Hay & Co Ltd* [1971] 3 All ER 693, [1971] 1 WLR 1357 (the three corporators who did not vote in favour of the resolution allowed it to be passed with knowledge of their power to stop it and by their subsequent conduct were to be deemed to have assented to it). See also *Re Torvale Group Ltd* [1999] 2 BCLC 605 (acquiescence of shareholders with knowledge of the matter sufficient).

5 See *Re D'Jan of London Ltd* [1994] 1 BCLC 561; *EIC Services Ltd v Phipps* [2003] EWHC 1507 (Ch), [2003] 3 All ER 804, [2003] 1 WLR 2360 (revsd on other grounds: [2004] EWCA Civ 1069, [2005] 1 All ER 338, [2005] 1 WLR 1377); and *Queensway Systems Ltd (in liq) v Walker* [2006] EWHC 2496 (Ch), [2007] 2 BCLC 577.

6 *Re Duomatic Ltd* [1969] 2 Ch 365, [1969] 1 All ER 161. See also *Re MJ Shanley Contracting Ltd (in voluntary liquidation)* (1979) 124 Sol Jo 239; *Wright v Atlas Wright (Europe) Ltd* [1999] 2 BCLC 301, CA; *Re Torvale Group Ltd* [1999] 2 BCLC 605; *Deakin v Faudling, Specialist Group International Ltd v Deakin* [2001] 35 LS Gaz R 32, [2001] All ER (D) 463 (Jul); *Euro Brokers Holdings Ltd v Monecor (London) Ltd* [2003] EWCA Civ 105, [2003] 1 BCLC 506; *NBH Ltd v Hoare* [2006] EWHC 73 (Ch), [2006] 2 BCLC 649.

However, the principle in *Re Duomatic Ltd* is based on agreements made by all the registered shareholders, not beneficial owners, since companies only take notice of legal ownership as signified by the presence of shareholders on the register of members: *Domoney v Godinho* [2004] EWHC 328 (Ch), [2004] 2 BCLC 15. As to whether the principle in *Re Duomatic Ltd* is available where a group of known shareholders signed an agreement but, unbeknownst to everyone, a further party was a shareholder and did not consent, see *Peña v Dale* [2003] EWHC 1065 (Ch) at [117]-[121], [2004] 2 BCLC 508 at [117]-[121].

7 *East v Bennett Bros Ltd* [1911] 1 Ch 163 (there being nothing in the constitution of the company to prevent the whole of the original preference shares being held by one shareholder, the word 'meeting' in the memorandum and articles had to be taken to have been used not in its strict sense but as applicable to the case of a single shareholder; there had been a sufficient compliance with the requirements of the memorandum and articles and the new preference shares had been validly issued). See also *Re Torvale Group Ltd* [1999] 2 BCLC 605.

8 *Wright v Atlas Wright (Europe) Ltd* [1999] 2 BCLC 301 at 315, CA, per Potter LJ; and see *Re Oceanrose Investments Ltd* [2008] EWHC 3475 (Ch) at [24] per David Richards J (as a common law principle, the principle in *Re Duomatic Ltd* [1969] 2 Ch 365, [1969] 1 All ER 161 must give way to any statutory provision to the contrary) (considering the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974 (see PARA 1451)). See also *RW Peak (Kings Lynn) Ltd* [1998] 1 BCLC 193 (provisions governing purchase by company of own shares would have been undermined); *Kinlan v Crimmin* [2006] EWHC 779 (Ch), [2007] 2 BCLC 67; *Dashfield v Davidson* [2008] EWHC 486 (Ch), [2009] 1 BCLC 220. Cf *Re BDG Roof-Bond Ltd v Douglas* [2000] 1 BCLC 401 at 417 per Park J (provision in the Companies Acts governing purchase by company of own shares (see PARA 1237) was designed solely for the benefit of shareholders who could waive); *Bairstow v Queens Moat Houses plc* [2001] EWCA Civ 712, [2001] 2 BCLC 531 (statutory provisions governing distributions protect creditors and cannot be waived).

COMPANIES ACTS/(15) RESOLUTIONS AND MEETINGS OF THE COMPANY/(iv) Decisions by the Sole Member of Limited Company/667. Recording of decisions by the sole member.

(iv) Decisions by the Sole Member of Limited Company

667. Recording of decisions by the sole member.

Where a company¹ limited by shares² or by guarantee³ has only one member⁴, and he takes any decision that may be taken by the company in general meeting⁵, and has effect as if agreed by the company in general meeting⁶, he must, unless that decision is taken by way of a written resolution⁷, provide the company with details of that decision⁸.

If the sole member fails to comply with this requirement⁹, he commits an offence¹⁰; and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 2 on the standard scale¹¹. Failure by the sole member to comply with this requirement¹² does not affect the validity of any such decision¹³.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meanings of 'company limited by shares' and 'limited company' see PARA 102. As to the meaning of 'share' in the Companies Acts see PARA 1042.

3 As to the meaning of 'company limited by guarantee' see PARA 102.

4 Companies Act 2006 s 357(1). As to the meaning of 'member of the company' see PARA 321. As to the formation of a company under the Companies Act 2006 by only one person see s 7; and PARAS 102, 106.

The provisions of Pt 13 Ch 6 (ss 355-359) (see also PARAS 668-669) apply (with necessary modifications) in relation to resolutions and meetings of holders of a class of shares and (in the case of a company without a share capital) a class of members, as they apply in relation to resolutions of members generally and to general meetings: s 359. As to the meaning of 'company having a share capital' see PARA 1042. As to the meaning of 'class of share' see PARA 1057. As to the types of resolution that may be passed by members see PARA 617 et seq. As to general meetings of the company see PARA 629 et seq.

5 Companies Act 2006 s 357(2)(a).

6 Companies Act 2006 s 357(2)(b).

7 As to the meaning of 'written resolution' see PARA 623.

8 Companies Act 2006 s 357(2). As to the records kept of such decisions, and provision for their inspection, see PARA 668.

9 If he fails to comply with the Companies Act 2006 s 357: see s 357(3).

10 Companies Act 2006 s 357(3).

11 Companies Act 2006 s 357(4). As to the meaning of the 'standard scale' see PARA 1622 note 5.

12 If failure to comply with the Companies Act 2006 s 357: see s 357(5).

13 Companies Act 2006 s 357(5). The text refers to the validity of any decision referred to in s 357(2) (see the text and notes 5-8): see s 357(5).

Records of Resolutions and Meetings etc/668. Records of resolutions, meetings of the company etc.

(v) Company's Records of Resolutions and Meetings etc

668. Records of resolutions, meetings of the company etc.

Every company¹ must keep records comprising:

- 1070 (1) copies of all resolutions² of members³ passed otherwise than at general meetings⁴;
- 1071 (2) minutes of all proceedings of general meetings⁵; and
- 1072 (3) details provided to the company⁶ of decisions made by a sole member⁷.

The records must be kept for at least ten years from the date of the resolution, meeting or decision (as appropriate)⁸.

If a company fails to comply with this requirement⁹, an offence is committed by every officer of the company who is in default¹⁰; and a person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹¹ and (for continued contravention) a daily default fine¹² not exceeding one-tenth of level 3 on the standard scale¹³.

Where such records are retained in this way¹⁴:

- 1073 (a) the record of a resolution passed otherwise than at a general meeting, if purporting to be signed by a director¹⁵ of the company or by the company secretary¹⁶, is evidence of the passing of the resolution¹⁷;
- 1074 (b) where there is a record of a written resolution of a private company¹⁸, the requirements of the Companies Act 2006 with respect to the passing of the resolution¹⁹ are deemed to be complied with unless the contrary is proved²⁰;
- 1075 (c) the minutes of proceedings of a general meeting, if purporting to be signed by the chairman of that meeting²¹ or by the chairman of the next general meeting, are evidence²² of the proceedings at the meeting²³;
- 1076 (d) where there is a record of proceedings of a general meeting of a company, then, until the contrary is proved, the meeting is deemed duly held and convened²⁴, all proceedings at the meeting are deemed to have duly taken place²⁵, and all appointments at the meeting are deemed valid²⁶.

A listed company must notify a Regulatory Information Service (RIS)²⁷ as soon as possible after a general meeting of all resolutions passed by the company other than resolutions concerning ordinary business passed at an annual general meeting²⁸.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the types of resolution that may be passed by members see PARA 617 et seq.

3 As to the meaning of 'member of the company' see PARA 321.

4 Companies Act 2006 s 355(1)(a). As to general meetings of the company see PARA 629 et seq. As to records of meetings of directors see s 248; and PARA 530.

The provisions of Pt 13 Ch 6 (ss 355-359) (see also PARAS 667-669) apply (with necessary modifications) in relation to resolutions and meetings of holders of a class of shares and (in the case of a company without a share capital) a class of members, as they apply in relation to resolutions of members generally and to general

meetings: s 359. As to the meaning of 'company having a share capital' see PARA 1042. As to the meaning of 'class of share' see PARA 1057.

5 Companies Act 2006 s 355(1)(b).

6 le in accordance with the Companies Act 2006 s 357 (see also PARA 667): see s 355(1)(c).

7 Companies Act 2006 s 355(1)(c).

8 Companies Act 2006 s 355(2). As to the inspection of such records see PARA 669. On a vote on a resolution at a meeting on a show of hands, a declaration by the chairman that the resolution either has or has not been passed, or passed with a particular majority, is conclusive evidence of that fact without proof of the number or proportion of the votes recorded in favour of or against the resolution; and an entry in respect of such a declaration in minutes of the meeting is also conclusive evidence of that fact without such proof: see s 320; and PARA 619. See also the text and notes 14-26.

9 le fails to comply with the Companies Act 2006 s 355: see s 355(3).

10 Companies Act 2006 s 355(3). As to the meaning of 'officer' see PARA 607; and as to the meaning of 'officer in default' see PARA 315.

11 As to the meaning of the 'standard scale' see PARA 1622 note 5.

12 As to the meaning of 'daily default fine' see PARA 1622.

13 Companies Act 2006 s 355(4).

14 See the Companies Act 2006 s 356(1). The provisions of s 356 apply to the records kept in accordance with s 355 (see the text and notes 1-13): see s 356(1).

15 As to the meaning of 'director' under the Companies Acts see PARA 478.

16 As to the company secretary see PARA 601 et seq.

17 Companies Act 2006 s 356(2). As to evidence see note 22.

18 As to the meaning of 'private company' see PARA 102.

19 le the requirements of the Companies Act 2006 Pt 13 Ch 2 (ss 288-300) (see PARA 623 et seq).

20 Companies Act 2006 s 356(3).

21 As to the chairman of the meeting see PARA 648. The chairman's signature need not be written at the meeting: *Re Llanharry Hematite Iron Ore Co Ltd, Roney's Case, Stock's Case* (1864) 4 De GJ & Sm 426. The record may be transcribed or made from rough minutes taken at the time of the meeting: see *Re Jennings* (1851) 1 I Ch R 236 (on appeal without touching this point (1851) 1 I Ch R 654).

22 le prima facie evidence: see *Re Indian Zoedone Co* (1884) 26 ChD 70, CA; *Re Llanharry Hematite Iron Ore Co Ltd, Roney's Case, Stock's Case* (1864) 4 De GJ & Sm 426.

23 Companies Act 2006 s 356(4).

24 Companies Act 2006 s 356(5)(a).

25 Companies Act 2006 s 356(5)(b). Where articles provided that the minutes of any meeting, if purporting to be signed by the chairman, 'shall be conclusive evidence without any further proof of the facts therein stated', it was held that (in the absence of fraud) such evidence could not be displaced and was conclusive as between any parties bound by the minutes: see *Kerr v John Mottram Ltd* [1940] Ch 657, [1940] 2 All ER 629.

26 Companies Act 2006 s 356(5)(c).

27 As to the meaning of 'Regulatory Information Service' see PARA 483 note 7.

28 See the Listing Rules r 9.6.16. As to the Financial Services Authority's Listing Rules generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385.

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669. Inspection of records of resolutions and meetings.

The records that must be kept by a company¹, comprising:

- 1077 (1) copies of all resolutions² of members³ passed otherwise than at general meetings⁴;
- 1078 (2) minutes of all proceedings of general meetings⁵; and
- 1079 (3) details provided to the company⁶ of decisions made by a sole member⁷,

and relating to the previous ten years⁸, must be kept available for inspection either at the company's registered office⁹, or at a place specified in regulations¹⁰. The company must give notice to the registrar of companies¹¹ of the place at which the records are kept available for inspection¹², and of any change in that place¹³, unless they have at all times been kept at the company's registered office¹⁴. The records must be open to the inspection of any member of the company without charge¹⁵; and any member may require a copy of any of the records on payment of such fee as may be prescribed¹⁶.

If default is made for 14 days in complying with the giving of notice to the registrar of the place where inspection may be made¹⁷, or if an inspection¹⁸ is refused, or if a copy duly requested¹⁹ is not sent, an offence is committed by every officer of the company who is in default²⁰. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale²¹ and (for continued contravention) a daily default fine²² not exceeding one-tenth of level 3 on the standard scale²³. In the case of a required inspection²⁴ being refused, or in the case of a copy duly requested²⁵ that is not sent, the court²⁶ may by order compel an immediate inspection of the records or direct that the copies required be sent to the persons who requested them²⁷.

1 I.e. the records referred to in the Companies Act 2006 s 355 (see PARA 668): see s 358(1). As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the types of resolution that may be passed by members see PARA 617 et seq.

3 As to the meaning of 'member of the company' see PARA 321.

4 See the Companies Act 2006 s 355(1)(a); and PARA 668. As to general meetings of the company see PARA 629 et seq.

The provisions of Pt 13 Ch 6 (ss 355-359) (see also PARAS 667-669) apply (with necessary modifications) in relation to resolutions and meetings of holders of a class of shares and (in the case of a company without a share capital) a class of members, as they apply in relation to resolutions of members generally and to general meetings: s 359. As to the meaning of 'company having a share capital' see PARA 1042. As to the meaning of 'class of share' see PARA 1057.

5 See the Companies Act 2006 s 355(1)(b); and PARA 668. As to records of meetings of directors see s 248; and PARA 530.

6 I.e. in accordance with the Companies Act 2006 s 357 (see also PARA 667): see s 355(1)(c).

7 See the Companies Act 2006 s 355(1)(c); and PARA 668.

8 See the Companies Act 2006 s 355(2); and PARA 668.

- 9 Companies Act 2006 s 358(1)(a). As to a company's registered office see PARA 129.
- 10 Companies Act 2006 s 358(1)(b). The text refers to a place specified in regulations made under s 1136 (see PARA 676); see s 358(1)(b). Resolutions that fall within Pt 3 Ch 3 (ss 29-30) (resolutions and agreements affecting a company's constitution) are on the public record: see PARA 231.
- 11 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements for the proper delivery of documents to the registrar see PARA 142.
- 12 Companies Act 2006 s 358(2)(a).
- 13 Companies Act 2006 s 358(2)(b).
- 14 Companies Act 2006 s 358(2).
- 15 Companies Act 2006 s 358(3).
- 16 Companies Act 2006 s 358(4). In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: s 1167. As to the Secretary of State see PARA 6. In exercise of the powers conferred by s 358(4), the Secretary of State has made the Companies (Fees for Inspection and Copying of Company Records) Regulations 2007, SI 2007/2612. Accordingly, for the purpose of the Companies Act 2006 s 358(4), the fee prescribed is 10 pence per 500 words or part thereof copied, and the reasonable costs incurred by the company in delivering the copy of the company record to the person entitled to be provided with that copy: Companies (Fees for Inspection and Copying of Company Records) Regulations 2007, SI 2007/2612, reg 4.
- 17 Ie in complying with the Companies Act 2006 s 358(2) (see the text and notes 11-14): see s 358(5).
- 18 Ie an inspection required under the Companies Act 2006 s 358(3) (see the text and note 15): see s 358(5).
- 19 Ie a copy requested under the Companies Act 2006 s 358(4) (see the text and note 16): see s 358(5).
- 20 Companies Act 2006 s 358(5). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' generally see PARA 607.
- 21 As to the meaning of 'standard scale' see PARA 1622 note 5.
- 22 As to the meaning of 'daily default fine' see PARA 1622.
- 23 Companies Act 2006 s 358(6).
- 24 Ie an inspection required under the Companies Act 2006 s 358(3) (see the text and note 15): see s 358(7).
- 25 Ie a copy requested under the Companies Act 2006 s 358(4) (see the text and note 16): see s 358(7).
- 26 As to the meaning of 'court' see PARA 212 note 1.
- 27 Companies Act 2006 s 358(7). See also PARA 349 note 30. As to the procedure for making claims and applications to the court under companies legislation see PARA 305. The power to order inspection ceases when the company goes into liquidation; and in that case the only right of inspection which a creditor or contributory has is in conformity with an order of the winding-up court under the Insolvency Act 1986: see s 155; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 569; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1086.

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670. Privilege for published reports of meetings.

For the purposes of defamation proceedings¹, the publication² of a fair and accurate report of proceedings at a general meeting of a United Kingdom public company³ is subject to a statutory defence of qualified privilege⁴ unless the publication is shown to be made with malice⁵.

However, in defamation proceedings in respect of the publication of such a report or statement, the statutory defence of qualified privilege is not available if the claimant shows that the defendant⁶: (1) was requested by him to publish in a suitable manner⁷ a reasonable letter or statement by way of explanation or contradiction⁸; and (2) refused or neglected to do so⁹. Nor is the statutory defence available to protect the publication of matter the publication of which is prohibited by law¹⁰.

1 As to defamation proceedings generally see **LIBEL AND SLANDER**.

2 For these purposes, 'publication' and 'publish', in relation to a statement, have the meaning they have for the purposes of the law of defamation generally (see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 60 et seq); see the Defamation Act 1996 s 17(1); and PARA 299.

3 For these purposes, 'United Kingdom public company' means: (1) a public company within the meaning of the Companies Act 2006 s 4(2) (see PARA 102); or (2) a body corporate incorporated by or registered under any other statutory provision, or by royal charter, or formed in pursuance of letters patent (see PARAS 1-2); see the Defamation Act 1996 Sch 1 para 13(4); and PARA 299. As to meetings of the company generally see PARA 629 et seq.

4 It is under the Defamation Act 1996 s 15 (see **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 131-132). The protection afforded by s 15 (see **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 131-132) does not apply to the publication to the public, or a section of the public, of matter which is not of public concern and the publication of which is not for the public benefit: see s 15(3); and PARA 299. Publication of a report of charges against a company's officers is not for the public benefit: *Ponsford v Financial Times Ltd and Hart* (1900) 16 TLR 248 (although whether this authority still stands today is debatable). See further **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 294, 297. As to the defence of qualified privilege generally see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 109 et seq.

5 See the Defamation Act 1996 s 15(1), Sch 1 para 13(1); and PARA 299. As to malice sufficient to defeat a defence raised in defamation proceedings see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 149 et seq.

6 See the Defamation Act 1996 s 15(2); and PARA 299.

7 For this purpose, 'in a suitable manner' means in the same manner as the publication complained of or in a manner that is adequate and reasonable in the circumstances: see the Defamation Act 1996 s 15(2); and PARA 299. The terms of the letter or statement which the claimant requires must be sent by him to the defendant as part of the request: see *Khan v Ahmed* [1957] 2 QB 149, [1957] 2 All ER 385 (a decision on an earlier similar provision under the Defamation Act 1952).

8 See the Defamation Act 1996 s 15(2)(a); and PARA 299.

9 See the Defamation Act 1996 s 15(2)(b); and PARA 299.

10 See the Defamation Act 1996 s 15(4)(a); and PARA 299.

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(16) COMPANY COMMUNICATIONS AND RECORDS

(i) Service of Documents; Notice

671. Service of documents on a company.

A document may be served on a company registered under the Companies Act 2006¹ by leaving it at, or sending it by post² to, the company's registered office³. Further provision as to service and other matters is made in the company communications provisions⁴.

A document may be served on an overseas company⁵ whose particulars are registered under the Companies Act 2006⁶:

1080 (1) by leaving it at, or sending it by post to, the registered address⁷ of any person resident in the United Kingdom⁸ who is authorised to accept service of documents on the company's behalf⁹; or

1081 (2) if there is no such person, or if any such person refuses service or service cannot for any other reason be effected, by leaving it at or sending by post to any place of business of the company in the United Kingdom¹⁰.

Where a company registered in Scotland or Northern Ireland carries on business in England and Wales¹¹, the process of any court in England and Wales may be served on the company by leaving it at, or sending it by post to, the company's principal place of business in England and Wales, addressed to the manager or other head officer¹² in England and Wales of the company¹³. Where process is served on a company under this provision, the person issuing out the process must send a copy of it by post to the company's registered office¹⁴.

1 As to the meaning of 'company' see PARA 24. As to the companies formed and registered under the Companies Act 2006 see PARA 102 et seq.

2 Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post: see the Interpretation Act 1978 s 7; and **STATUTES** vol 44(1) (Reissue) PARA 1388. As to proof of posting and proof of delivery see **CIVIL PROCEDURE** vol 11 (2009) PARAS 945, 946. A requirement to send a document by post is not confined to sending it by the Post Office postal system: see the Postal Services Act 2000 s 127(4), Sch 8 Pt 1; and **POST OFFICE**.

3 Companies Act 2006 s 1139(1). As to the company's registered office see PARA 129. Non-compliance with the statutory provision does not, however, necessarily constitute such an irregularity in the proceedings as to render them a nullity and entitle the defendant to have them set aside: *Singh v Atombrook Ltd* [1989] 1 All ER 385, [1989] 1 WLR 810, CA (no reason why 'may' should be read as 'must'), distinguishing *Vignes v Stephen Smith & Co Ltd* (1909) 53 Sol Jo 716 (in so far as this decision was to be taken as an authority that this provision requires service only at the registered office).

In civil proceedings a company may be served by any method permitted under the CPR Pt 6, or by any of the methods of service permitted under the Companies Act 2006: see CPR 6.3.2 (Pt 6 substituted by SI 2008/2178; CPR 6.3.2 amended by SI 2009/2092). As to service of documents in civil proceedings generally see CPR Pt 6; and **CIVIL PROCEDURE** vol 11 (2009) PARA 138 et seq.

Subject to a company's articles of association, anything sent or supplied by or to the company under the articles may be sent or supplied in any way in which the Companies Act 2006 provides for documents or information which are authorised or required by any provision of that Act to be sent or supplied by or to the company: see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 5 (art 48); reg 3, Sch 2 Pt 4 (art 34); reg 4, Sch 3 Pt 5 (art 79); and PARA 528. As to a company's articles of association generally see PARA 228 et seq.

4 Companies Act 2006 s 1139(5). As to the company communications provisions see s 1143; and PARA 677.

5 As to the meaning of 'overseas company' see PARA 1824.

6 ie under the Companies Act 2006 s 1046: see PARA 1826.

7 For these purposes a person's 'registered address' means any address for the time being shown as a current address in relation to that person in the part of the register available for public inspection: Companies

Act 2006 s 1139(3). As to the meaning of 'person' see PARA 311 note 2. As to the meaning of the 'register' see PARA 146.

8 As to the meaning of 'United Kingdom' see PARA 1 note 5.

9 See the Companies Act 2006 s 1139(2)(a); and PARA 1836. See also the Overseas Companies Regulations 2009, SI 2009/1801, reg 7(1)(e) (names and service addresses of persons authorised to accept service of documents on behalf of an overseas company in respect of a UK establishment); and PARA 1826.

10 See the Companies Act 2006 s 1139(2)(b); and PARA 1836.

11 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

12 As to the meaning of 'officer' see PARA 607.

13 Companies Act 2006 s 1139(4).

14 Companies Act 2006 s 1139(4).

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672. Service of documents on directors, secretaries and others.

The following provisions apply to:

- 1082 (1) a director¹ or secretary² of a company³;
- 1083 (2) in the case of an overseas company⁴ whose particulars are registered under the Companies Act 2006⁵, a person holding any such position as may be specified⁶ for these purposes⁷;
- 1084 (3) a person appointed in relation to a company as:
 - 41 71. (a) a judicial factor (in Scotland)⁸;
 - 72. (b) an interim manager appointed⁹ under the Charities Act 1993¹⁰; or
 - 73. (c) a manager appointed¹¹ under the Companies (Audit, Investigations and Community Enterprise) Act 2004¹².
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These provisions apply whatever the purpose of the document in question¹³. They are not restricted to service for purposes arising out of or in connection with the appointment or position mentioned in heads (1) to (3) above or in connection with the company concerned¹⁴.

A document may be served on such a person as is mentioned above by leaving it at, or sending it by post¹⁵ to, the person's registered address¹⁶. If notice of a change of that address is given to the registrar¹⁷, a person may validly serve a document at the address previously registered until the end of the period of 14 days beginning with the date on which notice of the change is registered¹⁸. However, service may not be effected by virtue of these provisions at an address:

- 1085 (i) if notice has been registered of the termination of the appointment in relation to which the address was registered and the address is not a registered address of the person concerned in relation to any other appointment¹⁹;
- 1086 (ii) in the case of a person holding any such position as is mentioned in head (2) above, if the overseas company has ceased to have any connection with the United Kingdom²⁰ by virtue of which it is required²¹ to register particulars²².

Nothing in these provisions must be read as affecting any enactment²³ or rule of law under which permission is required for service out of the jurisdiction²⁴.

Further provision as to service and other matters is made in the company communications provisions²⁵.

1 As to the meaning of 'director' see PARA 478.

2 As to the company secretary see PARA 601 et seq.

3 Companies Act 2006 s 1140(2)(a). As to the meaning of 'company' see PARA 24.

4 As to the meaning of 'overseas company' see PARA 1824.

5 Ie under the Companies Act 2006 s 1046: see PARA 1826.

6 Ie by regulations under the Companies Act 2006 s 1046: see PARA 1826. As to the regulations so made see the Overseas Companies Regulations 2009, SI 2009/1801; and see note 7.

7 See the Companies Act 2006 s 1140(2)(b). The positions specified for the purposes of s 1140(2)(b) are director, secretary, and permanent representative: Overseas Companies Regulations 2009, SI 2009/1801, reg 75.

8 Companies Act 2006 s 1140(2)(c)(i).

9 Ie under the Charities Act 1993 s 18: see **CHARITIES** vol 8 (2010) PARA 561.

10 Companies Act 2006 s 1140(2)(c)(ii) (amended by SI 2009/1941).

11 Ie under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 47: see PARA 97.

12 Companies Act 2006 s 1140(2)(c)(iii).

13 Companies Act 2006 s 1140(3).

14 Companies Act 2006 s 1140(3).

15 As to service by post see PARA 671 note 2.

16 Companies Act 2006 s 1140(1). For these purposes a person's 'registered address' means any address for the time being shown as a current address in relation to that person in the part of the register available for public inspection: s 1140(4). As to the meaning of the 'register' see PARA 421.

Subject to a company's articles of association, anything sent or supplied by or to the company under the articles may be sent or supplied in any way in which the Companies Act 2006 provides for documents or information which are authorised or required by any provision of that Act to be sent or supplied by or to the company: see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 5 (art 48); reg 3, Sch 2 Pt 4 (art 34); reg 4, Sch 3 Pt 5 (art 79); and PARA 528. As to a company's articles of association generally see PARA 228 et seq.

17 As to the meaning of 'registrar' see PARA 131 note 2.

18 Companies Act 2006 s 1140(5).

19 Companies Act 2006 s 1140(6)(a).

20 As to the meaning of 'United Kingdom' see PARA 1 note 5.

21 Ie under the Companies Act 2006 s 1046: see PARA 1826.

22 Companies Act 2006 s 1140(6)(b). As to the duty to give notice of an overseas company ceasing to have registrable presence see the Overseas Companies Regulations 2009, SI 2009/1801, reg 77; and PARA 1829.

23 As to the meaning of 'enactment' see PARA 17 note 2.

24 Companies Act 2006 s 1140(8). As to service out of the jurisdiction see **CIVIL PROCEDURE** vol 11 (2009) PARA 156 et seq.

25 Companies Act 2006 s 1140(7). As to the company communications provisions see s 1143; and PARA 677.

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673. Requirements relating to service addresses.

Any obligation under the Companies Acts¹ to give a person's² address is, unless otherwise expressly provided, to give a service address for that person³. In the Companies Acts a 'service address', in relation to a person, means an address at which documents may be effectively served on that person⁴. The Secretary of State⁵ may by regulations specify conditions with which a service address must comply⁶; and the regulations so made require that the service address be a place where: (1) the service of documents can be effected by physical delivery⁷; and (2) the delivery of documents is capable of being recorded by the obtaining of an acknowledgement of delivery⁸.

1 As to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'person' see PARA 311 note 2.

3 Companies Act 2006 s 1142.

4 Companies Act 2006 s 1141(1).

5 As to the Secretary of State see PARA 6.

6 Companies Act 2006 s 1141(2). Such regulations are subject to negative resolution procedure (ie the statutory instrument containing the order is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1141(3), 1289. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. As to the regulations so made see the text and notes 7-8.

7 Companies Act 2006 (Annual Return and Service Addresses) Regulations 2008, SI 2008/3000, reg 10(a).

8 Companies Act 2006 (Annual Return and Service Addresses) Regulations 2008, SI 2008/3000, reg 10(b).

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(ii) Company Records

674. Form of company records.

'Company records' means¹:

- 1087 (1) any register, index, accounting records, agreement, memorandum, minutes or other document required by the Companies Acts² to be kept by a company³; and
- 1088 (2) any register kept by a company of its debenture holders⁴.

Company records may be kept in hard copy or electronic form⁵, and may be arranged in such manner as the directors⁶ of the company think fit⁷, provided the information in question is adequately recorded for future reference⁸. Where the records are kept in electronic form, they must be capable of being reproduced in hard copy form⁹.

If a company fails to comply with these provisions¹⁰, an offence is committed by every officer¹¹ of the company who is in default¹².

1 lie in the Companies Act 2006 Pt 37 (ss 1134-1157). The provisions of ss 1134, 1135 and s 1138 (see PARA 674-675) apply to any register, record or index required to be kept by any person in accordance with the Uncertificated Securities Regulations 2001, SI 2001/3755, as they apply to any register, record or index required by the Companies Acts to be kept by a company, and to an Operator and its officers as they apply to a company and its officers: reg 23(4), Sch 4 para 18 (amended by SI 2009/1889). As to the meaning of 'operator' see PARA 421 note 1. As to the meaning of 'officer' (in relation to an operator or a participating issuer) see PARA 421 note 4. As to the entries to be made generally in registers regarding uncertificated securities see PARA 340.

2 As to the meaning of the 'Companies Acts' see PARA 16.

3 Companies Act 2006 s 1134(a). As to the meaning of 'company' see PARA 24.

4 Companies Act 2006 s 1134(b). As to the meaning of 'debenture' see PARA 1299.

5 Companies Act 2006 s 1135(1)(a).

6 As to the meaning of 'director' see PARA 478.

7 Companies Act 2006 s 1135(1)(b).

Under the Companies Act 1985, all proceedings at meetings of a company's directors and (where applicable) managers had to be entered in books; and a collection of loose leaves fastened together between two covers but readily detachable was held not to be a 'book' for that purpose: see *Hearts of Oak Assurance Co Ltd v James Flower & Sons* [1936] Ch 76; and see now the Companies Act 2006 s 248 (cited in PARA 530), s 355 (cited in PARA 631).

8 Companies Act 2006 s 1135(1). Any provision of an instrument made by a company before 12 February 1979 that requires a register of holders of the company's debentures to be kept in hard copy form is to be read as requiring it to be kept in hard copy or electronic form: s 1135(5). As to the location of company records see PARA 676.

9 Companies Act 2006 s 1135(2).

10 lie with the Companies Act 2006 s 1135: see the text to notes 5-10.

11 As to the meaning of 'officer' see PARA 607.

12 Companies Act 2006 s 1135(3). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 1135(4). As to the standard scale and as to the meaning of 'daily default fine' see PARA 1622.

675. Duty to take precautions against falsification.

Where company records¹ are kept otherwise than in bound books, adequate precautions must be taken to guard against falsification², and to facilitate the discovery of falsification³.

If a company⁴ fails to comply with this provision, an offence is committed by every officer⁵ of the company who is in default⁶.

1 As to the meaning of 'company records' see PARA 674. The Companies Act 2006 s 1138 does not apply to the documents required to be kept under s 228 (copy of director's service contract or memorandum of its terms: see PARA 525) (s 1138(4)(a)), or s 237 (qualifying indemnity provision: see PARA 598) (s 1138(4)(b)). The provisions of s 1138 apply to any register, record or index required to be kept by any person in accordance with the Uncertificated Securities Regulations 2001, SI 2001/3755, as they apply to any register, record or index required by the Companies Acts to be kept by a company, and to an operator and its officers as they apply to a company and its officers: reg 23(4), Sch 4 para 18 (amended by SI 2009/1889). An officer of a participating issuer is in default in complying with, or in contravention of, the Companies Act 2006 s 1138, as applied by the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 18, if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: Sch 4 para 20 (amended by SI 2009/1889). An officer of an operator is in default in complying with, or in contravention of, the Companies Act 2006 s 1138, as applied by the Uncertificated Securities Regulations 2001, SI 2001/3755, Sch 4 para 18, if, and only if, he knowingly and wilfully authorised or permitted the default or contravention: Sch 4 para 21 (amended by SI 2009/1889). As to the meaning of 'operator' see PARA 421 note 1. As to the meaning of 'officer' (in relation to an operator or a participating issuer) see PARA 421 note 4. As to the entries to be made generally in registers regarding uncertificated securities see PARA 340.

2 Companies Act 2006 s 1138(1)(a). See note 1.

3 Companies Act 2006 s 1138(1)(b). See note 1.

4 As to the meaning of 'company' see PARA 24.

5 As to the meaning of 'officer' see PARA 607.

6 Companies Act 2006 s 1138(2). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 1138(3). See note 1. As to the standard scale and as to the meaning of 'daily default fine' see PARA 1622.

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676. Inspection of company records.

The Secretary of State¹ may make provision by regulations² specifying places other than a company's registered office³ at which company records⁴ required to be kept available for inspection under a relevant provision⁵ may be so kept in compliance with that provision⁶. The regulations:

1089 (1) may specify a place by reference to the company's principal place of business, the part of the United Kingdom in which the company is registered⁷, the place at which the company keeps any other records available for inspection or in any other way⁸;

1090 (2) may provide that a company does not comply with a relevant provision by keeping company records available for inspection at a place specified in the regulations unless conditions specified in the regulations are met⁹;

- 1091 (3) need not specify a place in relation to each relevant provision¹⁰;
 1092 (4) may specify more than one place in relation to a relevant provision¹¹.

A requirement under a relevant provision to keep company records available for inspection is not complied with by keeping them available for inspection at a place specified in the regulations unless all the company's records subject to the requirement are kept there¹².

The Secretary of State may also make provision by regulations¹³ as to the obligations of a company that is required by any provision of the Companies Acts to keep available for inspection any company records¹⁴, or to provide copies of any company records¹⁵. A company that fails to comply with the regulations is treated as having refused inspection or, as the case may be, having failed to provide a copy¹⁶. The regulations may;

- 1093 (a) make provision as to the time, duration and manner of inspection, including the circumstances in which and extent to which the copying of information is permitted in the course of inspection¹⁷; and
 1094 (b) define what may be required of the company as regards the nature, extent and manner of extracting or presenting any information for the purposes of inspection or the provision of copies¹⁸.
 1095 (c) where there is power to charge a fee, make provision as to the amount of the fee and the basis of its calculation¹⁹.

Nothing in any provision of the Companies Act 2006 or in the regulations is to be read as preventing a company from affording more extensive facilities than are required by the regulations²⁰, or where a fee may be charged, from charging a lesser fee than that prescribed²¹ or none at all²².

A private company²³ must make its company records available for inspection by a person on a day which has been specified by that person (the 'specified day') provided that the specified day is a working day²⁴ and that person gives the company the required notice of the specified day²⁵. A public company²⁶ must make its company records available for inspection for at least two hours between 9 am and 5 pm on each working day²⁷.

A company is not required for the purposes of inspection of a company record to present information in that record in a different order, structure or form from that set out in that record²⁸. A company must permit a person to make a copy of the whole or any part of a company record in the course of inspection at the location at which the record is made available for inspection²⁹ and any time during which the record is made available for inspection³⁰, but a company is not required to assist that person in making his copy of that record³¹. Where a company is requested to provide a copy of a company record in hard copy form³², the company must provide that copy in hard copy form³³. Where a person requests a company to provide a copy of a company record in electronic form³⁴, the company must provide that copy in such electronic form as the company decides³⁵; but where a company keeps a company record in hard copy form only, it is not required to provide a copy of that record in electronic form³⁶. A company is not required to present information in a copy of a company record that it provides in a different order, structure or form from that set out in the record³⁷.

The right of inspection ceases when the company is being wound up³⁸. The inspection may be made, under proper restrictions, by an agent of the member desiring inspection³⁹.

1 As to the Secretary of State see PARA 6.

2 Such regulations are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): Companies Act 2006 ss 1136(7), 1289. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292.

3 As to the meaning of 'company' see PARA 24. As to a company's registered office see PARA 129.

4 As to the meaning of 'company records' see PARA 674.

5 The 'relevant provisions' are: the Companies Act 2006 s 114 (register of members: see PARA 347); s 162 (register of directors: see PARA 499); s 228 (directors' service contracts: see PARA 525); s 237 (directors' indemnities: see PARA 598); s 275 (register of secretaries: see PARA 605); s 358 (records of resolutions etc: see PARA 669); s 702 (contracts relating to purchase of own shares: see PARA 1240); s 720 (documents relating to redemption or purchase of own shares out of capital by private company: see PARA 1248); s 743 (register of debenture holders: see PARA 1321); s 805 (report to members of outcome of investigation by public company into interests in its shares: see PARA 451); s 809 (register of interests in shares disclosed to public company: see PARA 453); s 877 (instruments creating charges and register of charges: England and Wales: see PARA 1297); s 892 (instruments creating charges and register of charges: Scotland): s 1136(2). The specified place in respect of the relevant provisions listed in s 1136(2) is a place that is situated in the part of the United Kingdom in which the company is registered, must be the same place for all the relevant provisions, and must have been notified to the registrar as being the company's alternative inspection location: Companies (Company Records) Regulations 2008, SI 2008/3006, reg 3. As to the meaning of 'United Kingdom' see PARA 1 note 5. As to the meaning of 'registrar' see PARA 131 note 2.

6 Companies Act 2006 s 1136(1). As to the provisions relating to the inspection of records and accounts in the model forms of articles of association see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 5 art 50 (for a private company limited by shares), reg 3, Sch 2 Pt 4 art 36 (for a private company limited by guarantee), reg 4, Sch 3 Pt 5 arts 82, 83 (for a public company; also the destruction of documents). As to the model forms of articles of association see PARA 228.

7 As to company registration see PARA 111 et seq.

8 Companies Act 2006 s 1136(3).

9 Companies Act 2006 s 1136(4).

10 Companies Act 2006 s 1136(5)(a).

11 Companies Act 2006 s 1136(5)(b).

12 Companies Act 2006 s 1136(6).

13 Such regulations are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): Companies Act 2006 ss 1137(6), 1289.

14 Companies Act 2006 s 1137(1)(a).

15 Companies Act 2006 s 1137(1)(b).

16 Companies Act 2006 s 1137(2).

17 Companies Act 2006 s 1137(3)(a).

18 Companies Act 2006 s 1137(3)(b).

19 Companies Act 2006 s 1137(4).

20 Companies Act 2006 s 1137(5)(a).

21 In the Companies Acts 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the meaning of the 'Companies Acts' see PARA 16.

22 Companies Act 2006 s 1137(5)(b).

23 As to the meaning of 'private company' see PARA 102.

24 Companies (Company Records) Regulations 2008, SI 2008/3006, reg 4(1)(a). As to the meaning of 'working day' see PARA 145 note 16.

25 Companies (Company Records) Regulations 2008, SI 2008/3006, reg 4(1)(b). The required notice is at least two working days' notice of the specified day if the notice is given (1) during the period of notice for a

general meeting or a class meeting; or (2) where the company circulates a written resolution, during the period provided for in the Companies Act 2006 s 297(1) (see PARA 627), provided that the notice given both begins and ends during the period referred to in head (1) or (2) (as the case may be): Companies (Company Records) Regulations 2008, SI 2008/3006, reg 4(2). In all other cases the required notice is at least ten working days' notice of the specified day: reg 4(3). When the person gives notice of the specified day he must also give notice of the time on that day at which he wishes to start the inspection (which must be any time between 9 am and 3 pm) and the company must make its company records available for inspection by that person for a period of at least two hours beginning with that time: reg 4(4). As to general meetings see PARA 629. As to class meetings see PARA 631.

26 As to the meaning of 'public company' see PARA 102.

27 Companies (Company Records) Regulations 2008, SI 2008/3006, reg 5.

28 Companies (Company Records) Regulations 2008, SI 2008/3006, reg 6(1).

29 Companies (Company Records) Regulations 2008, SI 2008/3006, reg 6(2)(a).

30 Companies (Company Records) Regulations 2008, SI 2008/3006, reg 6(2)(b).

31 Companies (Company Records) Regulations 2008, SI 2008/3006, reg 6(2).

32 As to documents or information sent or supplied in hard copy form see PARA 678.

33 Companies (Company Records) Regulations 2008, SI 2008/3006, reg 7. Pt 4 (regs 7-9) applies to any request made on or after 1 October 2009 to be provided with a copy of a company record: reg 1(2). The Companies (Inspection and Copying of Registers, Indices and Documents) Regulations 1991, SI 1991/1998, are revoked but continue to apply to any request made before 1 October 2009 to be provided with a copy of a company record: see the Companies (Company Records) Regulations 2008, SI 2008/3006, reg 2.

34 As to documents or information sent or supplied in electronic form see PARA 679.

35 Companies (Company Records) Regulations 2008, SI 2008/3006, reg 8(1). See also note 33. Where a company provides a copy of a company record in electronic form to a member of the company or to a holder of the company's debentures, the company is not required to provide a hard copy of that record in accordance with the Companies Act 2006 s 1145 (see PARA 681): Companies (Company Records) Regulations 2008, SI 2008/3006, reg 8(3). As to the meaning of 'member of the company' see PARA 321. As to the meaning of 'debenture' see PARA 1299.

36 Companies (Company Records) Regulations 2008, SI 2008/3006, reg 8(2). See also note 33.

37 Companies (Company Records) Regulations 2008, SI 2008/3006, reg 9. See also note 33.

38 *Re Kent Coalfields Syndicate* [1898] 1 QB 754, CA; *Re Yorkshire Fibre Co* (1870) LR 9 Eq 650.

39 *Re Joint-Stock Discount Co, Buchanan's Case* (1866) 15 LT 261; *Bevan v Webb* [1901] 2 Ch 59, CA; *Norey v Keep* [1909] 1 Ch 561.

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(iii) The Company Communications Provisions

A. INTRODUCTION

677. Application of the provisions.

The 'company communications provisions'¹ have effect for the purposes of any provision of the Companies Acts² that authorises or requires documents or information to be sent or supplied by

or to a company³. The company communications provisions have effect subject to any requirements imposed, or contrary provision made, by or under any enactment⁴. In particular, in their application in relation to documents or information to be sent or supplied to the registrar⁵, they have effect subject to the provisions of the Companies Act 2006⁶ relating to the registrar⁷.

1 In the Companies Act 2006 ss 1144-1148, Schs 4, 5: see PARAS 678-687.

2 As to the meaning of the 'Companies Acts' see PARA 16.

3 Companies Act 2006 s 1143(1). As to the meaning of 'company' see PARA 24.

Subject to a company's articles of association, anything sent or supplied by or to the company under the articles may be sent or supplied in any way in which the Companies Act 2006 provides for documents or information which are authorised or required by any provision of that Act to be sent or supplied by or to the company: see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 5 (art 48); reg 3, Sch 2 Pt 4 (art 34); reg 4, Sch 3 Pt 5 (art 79); and PARA 528. As to a company's articles of association generally see PARA 228 et seq.

4 Companies Act 2006 s 1143(2). For these purposes, provision is not to be regarded as contrary to the company communications provisions by reason only of the fact that it expressly authorises a document or information to be sent or supplied in hard copy form, in electronic form or by means of a website: s 1143(4). As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form see PARA 679. As to the meaning of 'enactment' see PARA 17 note 2.

5 As to the meaning of 'registrar' see PARA 131 note 2.

6 In the Companies Act 2006 Pt 35 (ss 1059A-1120).

7 Companies Act 2006 s 1143(3).

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B. DOCUMENTS ETC SENT TO COMPANY

678. Sending or supplying documents or information to a company in hard copy form.

Documents¹ or information (other than documents or information that are to be sent or supplied by one company² to another³) to be sent or supplied to a company in hard copy form⁴ must be sent or supplied in accordance with the following provisions⁵.

A document or information is validly sent or supplied to a company if it is sent or supplied in hard copy form in the following manner⁶. A document or information in hard copy form may be sent or supplied by hand or by post⁷:

1096 (1) to an address⁸ specified by the company for the purpose⁹;

1097 (2) to the company's registered office¹⁰;

1098 (3) to an address to which any provision of the Companies Acts authorises the document or information to be sent or supplied¹¹.

A document or information sent or supplied by a person to a company in hard copy form is sufficiently authenticated if it is signed by the person sending or supplying it¹². However, where a document or information is sent or supplied by one person on behalf of another, nothing in this provision¹³ affects any provision of the company's articles¹⁴ under which the company may require reasonable evidence of the authority of the former to act on behalf of the latter¹⁵.

1 In the company communications provisions, 'document' includes summons, notice, order or other legal process and registers: Companies Act 2006 s 1148(1). As to the meaning of the 'company communications provisions' and as to their application see PARA 677 et seq.

2 In the company communications provisions, 'company' includes any body corporate: Companies Act 2006 s 1148(1). As to the meaning of 'body corporate' see PARA 1 note 5. As to the meaning of 'company' see PARA 678 note 2.

3 See the Companies Act 2006 s 1144(3), Sch 4 para 1(2). References in the company communications provisions to documents or information being sent or supplied by or to a company include references to documents or information being sent or supplied by or to the directors of a company acting on behalf of the company: s 1148(3). As to the meaning of 'director' see PARA 478.

4 The following provisions apply for the purposes of the Companies Acts: Companies Act 2006 s 1168(1). A document or information is sent or supplied in hard copy form if it is sent or supplied in a paper copy or similar form capable of being read; and references to 'hard copy' have a corresponding meaning: s 1168(2). For the purposes of s 1168, a document or information can be read only if: (1) it can be read with the naked eye; or (2) to the extent that it consists of images (for example photographs, pictures, maps, plans or drawings), it can be seen with the naked eye: s 1168(6). These provisions apply whether the provision of the Companies Acts in question uses the words 'sent' or 'supplied' or uses other words (such as 'deliver', 'provide', 'produce' or, in the case of a notice, 'give') to refer to the sending or supplying of a document or information: Companies Act 2006 s 1168(7). As to the sending or supply of documents or information in electronic form see PARA 679. As to the sending or supply of documents or information otherwise than in hard copy form or electronic form see PARA 680.

5 See the Companies Act 2006 s 1144(1), Sch 4 para 1(1). As to provision made in the model forms of articles of association as to means of communication to be used see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 5 art 48 (for a private company limited by shares), reg 3, Sch 2 Pt 4 art 34 (for a private company limited by guarantee), and reg 4, Sch 3 Pt 5 art 79 (for a public company). As to the model forms of articles of association see PARA 228 et seq.

6 See the Companies Act 2006 Sch 4 para 2.

7 See the Companies Act 2006 Sch 4 para 3(1). For these purposes, a person sends a document or information by post if he posts a prepaid envelope containing the document or information: Sch 4 para 3(2). As to the meaning of 'person' see PARA 311 note 2. As to the service of documents by post generally see PARA 671 note 2.

8 In the company communications provisions, 'address' includes a number or address used for the purposes of sending or receiving documents or information by electronic means: Companies Act 2006 s 1148(1). As to documents or information sent or supplied by electronic means see PARA 679 note 3.

9 Companies Act 2006 Sch 4 para 4(1).

10 Companies Act 2006 Sch 4 para 4(2). As to a company's registered office see PARA 129.

11 Companies Act 2006 Sch 4 para 4(3). References in the company communications provisions to provisions of the Companies Acts authorising or requiring a document or information to be sent or supplied include all such provisions, whatever expression is used, and references to documents or information being sent or supplied must be construed accordingly: s 1148(2). As to the meaning of the 'Companies Acts' see PARA 16.

12 See the Companies Act 2006 s 1146(1), (2).

13 In the Companies Act 2006 s 1146: see the text to note 12.

14 As to the meaning of 'articles' see PARA 228 note 2.

15 Companies Act 2006 s 1146(4).

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679. Sending or supplying documents or information to a company in electronic form.

Documents¹ or information (other than documents or information that are to be sent or supplied by one company to another²) to be sent or supplied to a company in electronic form³ must be sent or supplied in accordance with the following provisions⁴.

A document or information is validly sent or supplied to a company if it is sent or supplied in electronic form as follows⁵. A document or information may only be sent or supplied to a company in electronic form if: (1) the company has agreed (generally or specifically) that the document or information may be sent or supplied in that form (and has not revoked that agreement)⁶; or (2) the company is deemed to have so agreed by a provision in the Companies Acts⁷. Where the document or information is sent or supplied by electronic means⁸, it may only be sent or supplied to an address⁹ specified for the purpose by the company (generally or specifically)¹⁰, or deemed by a provision in the Companies Acts to have been so specified¹¹. Where the document or information is sent or supplied in electronic form by hand or by post, it must be sent or supplied to an address to which it could be validly sent if it were in hard copy form¹².

Where a document or information is sent or supplied by a person¹³ to a company¹⁴ in electronic form, it is sufficiently authenticated: (a) if the identity of the sender is confirmed in a manner specified by the company¹⁵; or (b) where no such manner has been specified by the company, if the communication contains or is accompanied by a statement of the identity of the sender and the company has no reason to doubt the truth of that statement¹⁶. Where a document or information is sent or supplied by one person on behalf of another, nothing in this provision¹⁷ affects any provision of the company's articles¹⁸ under which the company may require reasonable evidence of the authority of the former to act on behalf of the latter¹⁹.

1 As to the meaning of 'document' see PARA 678 note 1.

2 See the Companies Act 2006 s 1144(3), Sch 4 para 1(2). As to the meaning of references to documents or information being sent or supplied by or to a company see PARA 678 note 4. As to the meaning of 'company' see PARA 678 note 2. The Companies Act 2006 ss 1144, 1146, Sch 4 form part of the company communications provisions; as to the meaning of the 'company communications provisions' and as to their application see PARA 677.

3 The following provisions apply for the purposes of the Companies Acts: Companies Act 2006 s 1168(1). A document or information is sent or supplied in electronic form if it is sent or supplied: (1) by electronic means (for example, by e-mail or fax); or (2) by any other means while in an electronic form (for example, sending a disk by post); and references to 'electronic copy' have a corresponding meaning: s 1168(3). A document or information is sent or supplied by electronic means if it is: (a) sent initially and received at its destination by means of electronic equipment for the processing (which expression includes digital compression) or storage of data; and (b) entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means; and references to 'electronic means' have a corresponding meaning: s 1168(4). A document or information authorised or required to be sent or supplied in electronic form must be sent or supplied in a form, and by a means, that the sender or supplier reasonably considers will enable the recipient to read it, and to retain a copy of it: s 1168(5). For the purposes of s 1168, a document or information can be read only if: (i) it can be read with the naked eye; or (ii) to the extent that it consists of images (for example photographs, pictures, maps, plans or drawings), it can be seen with the naked eye: s 1168(6). These provisions apply whether the provision of the Companies Acts in question uses the words 'sent' or 'supplied' or uses other words (such as 'deliver', 'provide', 'produce' or, in the case of a notice, 'give') to refer to the sending or supplying of a document or information: Companies Act 2006 s 1168(7). As to the sending or supply of

documents or information in hard copy form see PARA 678. As to the sending or supply of documents or information otherwise than in hard copy form or electronic form see PARA 680.

4 See the Companies Act 2006 s 1144(1), Sch 4 para 1(1). As to provision made in the model forms of articles of association as to means of communication to be used see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 5 art 48 (for a private company limited by shares), reg 3, Sch 2 Pt 4 art 34 (for a private company limited by guarantee), and reg 4, Sch 3 Pt 5 art 79 (for a public company). As to the model forms of articles of association see PARA 228 et seq.

5 See the Companies Act 2006 Sch 4 para 5.

6 Companies Act 2006 Sch 4 para 6(a).

7 Companies Act 2006 Sch 4 para 6(b). As to the meaning of the 'Companies Acts' see PARA 16.

8 As to the meaning of 'electronic means' see PARA 679 note 3.

9 As to the meaning of 'address' see PARA 678 note 8.

10 Companies Act 2006 Sch 4 para 7(1)(a).

11 Companies Act 2006 Sch 4 para 7(1)(a).

12 Companies Act 2006 Sch 4 para 7(2). As to the meaning of 'hard copy form' see PARA 678 note 4.

13 As to the meaning of 'person' see PARA 311 note 2.

14 See the Companies Act 2006 s 1146(1).

15 See the Companies Act 2006 s 1146(3)(a).

16 See the Companies Act 2006 s 1146(3)(b).

17 Ie nothing in the Companies Act 2006 s 1146: see the text to notes 13-16.

18 As to the meaning of 'articles' see PARA 228 note 2.

19 Companies Act 2006 s 1146(4).

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680. Sending or supplying documents or information to a company in agreed form.

Documents¹ or information (other than documents or information to be sent or supplied by one company to another²) to be sent or supplied to a company otherwise than in hard copy form³ or electronic form⁴ must be sent or supplied in accordance with the following provision⁵. A document or information that is sent or supplied to a company otherwise than in hard copy form or electronic form is validly sent or supplied if it is sent or supplied in a form or manner that has been agreed by the company⁶.

1 As to the meaning of 'document' see PARA 678 note 1.

2 See the Companies Act 2006 s 1144(3), Sch 4 para 1(2). As to the meaning of references to documents or information being sent or supplied by or to a company see PARA 678 note 4. As to the meaning of 'company' see PARA 678 note 2. The Companies Act 2006 s 1144, Sch 4 form part of the company communications provisions; as to the meaning of the 'company communications provisions' and as to their application see PARA 677 et seq.

3 As to the sending or supply of documents or information in hard copy form see PARA 678.

4 As to the sending or supply of documents or information in electronic form see PARA 679.

5 See the Companies Act 2006 s 1144(1), Sch 4 para 1(1). As to provision made in the model forms of articles of association as to means of communication to be used see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 5 art 48 (for a private company limited by shares), reg 3, Sch 2 Pt 4 art 34 (for a private company limited by guarantee), and reg 4, Sch 3 Pt 5 art 79 (for a public company). As to the model forms of articles of association see PARA 228 et seq.

6 Companies Act 2006 Sch 4 para 8.

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C. DOCUMENTS ETC SENT BY COMPANY

681. Documents or information sent or supplied by a company in hard copy form.

Documents¹ or information to be sent or supplied by a company² in hard copy form³ must be sent or supplied in accordance with the following provisions⁴.

A document or information is validly sent or supplied by a company if it is sent or supplied in hard copy form as follows⁵. A document or information in hard copy form must be handed to the intended recipient⁶, or sent or supplied by hand or by post⁷:

- 1099 (1) to an address specified for the purpose by the intended recipient⁸;
- 1100 (2) to a company at its registered office⁹;
- 1101 (3) to a person¹⁰ in his capacity as a member of the company¹¹ at his address as shown in the company's register of members¹²;
- 1102 (4) to a person in his capacity as a director¹³ of the company at his address as shown in the company's register of directors¹⁴;
- 1103 (5) to an address to which any provision of the Companies Acts¹⁵ authorises the document or information to be sent or supplied¹⁶.

Where the company is unable to obtain any such address, the document or information may be sent or supplied to the intended recipient's last address known to the company¹⁷.

Where a member of a company or a holder of a company's debentures¹⁸ has received a document or information from the company otherwise than in hard copy form, he is entitled to require the company to send him a version of the document or information in hard copy form¹⁹. The company must send the document or information in hard copy form within 21 days of receipt of the request from the member or debenture holder²⁰, and may not make a charge for providing the document or information in that form²¹. If a company fails to comply with this provision²², an offence is committed by the company and every officer²³ of it who is in default²⁴.

1 As to the meaning of 'document' see PARA 678 note 1.

2 The provisions referred to in the Companies Act 2006 s 1144(2) apply in relation to documents or information that are to be sent or supplied by one company to another: s 1144(3). As to the meaning of references to documents or information being sent or supplied by or to a company see PARA 678 note 4. As to

the meaning of 'company' see PARA 678 note 2. The Companies Act 2006 ss 1144, 1145, Sch 5 form part of the company communications provisions; as to the meaning of the 'company communications provisions' and as to their application see PARA 677.

3 As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form see PARA 679. As to documents or information sent or supplied by a company via website see PARA 683. As to documents or information sent or supplied by a company in other agreed form see PARA 684. As to documents or information sent or supplied by a company to joint holders of shares or debentures see PARA 685. As to documents or information sent or supplied by a company on the death or bankruptcy of holders of shares see PARA 686.

4 See the Companies Act 2006 s 1144(2), Sch 5 para 1. As to provision made in the model forms of articles of association as to means of communication to be used see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 5 art 48 (for a private company limited by shares), reg 3, Sch 2 Pt 4 art 34 (for a private company limited by guarantee), and reg 4, Sch 3 Pt 5 art 79 (for a public company). As to the model forms of articles of association see PARA 228 et seq.

5 Companies Act 2006 Sch 5 para 2. As to the deemed delivery of documents and information see PARA 687.

6 Companies Act 2006 Sch 5 para 3(1)(a).

7 See the Companies Act 2006 Sch 5 para 3(1)(b). For the purposes of Sch 5, a person sends a document or information by post if he posts a prepaid envelope containing the document or information: Sch 5 para 3(2). As to the service of documents by post generally see PARA 671 note 2.

8 See the Companies Act 2006 Sch 5 para 4(1)(a). As to the meaning of 'address' see PARA 678 note 8.

9 See the Companies Act 2006 Sch 5 para 4(1)(b). As to a company's registered office see PARA 129.

10 As to the meaning of 'person' see PARA 311 note 2.

11 As to the meaning of 'member of the company' see PARA 321.

12 See the Companies Act 2006 Sch 5 para 4(1)(c). As to the meaning of 'register of members' see PARA 335.

13 As to the meaning of 'director' see PARA 478.

14 See the Companies Act 2006 Sch 5 para 4(1)(d). As to the meaning of 'register of directors' see PARA 499.

15 As to the meaning of the 'Companies Acts' see PARA 16.

16 See the Companies Act 2006 Sch 5 para 4(1)(e). As to the meaning of references to provisions of the Companies Acts authorising or requiring a document or information to be sent or supplied see PARA 678 note 11.

17 See the Companies Act 2006 Sch 5 para 4(2).

18 As to the meaning of 'debenture' see PARA 1299.

19 Companies Act 2006 s 1145(1).

20 Companies Act 2006 s 1145(2).

21 Companies Act 2006 s 1145(3).

22 In with the Companies Act 2006 s 1145: see the text to notes 18-21.

23 As to the meaning of 'officer' see PARA 607.

24 Companies Act 2006 s 1145(4). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 1145(5). As to the standard scale and as to the meaning of 'daily default fine' see PARA 1622.

COMPANIES ACTS/(16) COMPANY COMMUNICATIONS AND RECORDS/(iii) The Company Communications Provisions/C. DOCUMENTS ETC SENT BY COMPANY/682. Documents or information sent or supplied by a company in electronic form.

682. Documents or information sent or supplied by a company in electronic form.

Documents¹ or information to be sent or supplied by a company² in electronic form³ must be sent or supplied in accordance with the following provisions⁴.

A document or information is validly sent or supplied by a company if it is sent in electronic form as follows⁵. A document or information may only be sent or supplied by a company in electronic form:

- 1104 (1) to a person⁶ who has agreed (generally or specifically) that the document or information may be sent or supplied in that form (and has not revoked that agreement)⁷; or
- 1105 (2) to a company that is deemed to have so agreed by a provision in the Companies Acts⁸.

Where the document or information is sent or supplied by electronic means, it may only be sent or supplied to an address⁹ specified for the purpose by the intended recipient (generally or specifically)¹⁰, or, where the intended recipient is a company, deemed by a provision of the Companies Acts to have been so specified¹¹. Where the document or information is sent or supplied in electronic form by hand or by post¹², it must be handed to the intended recipient¹³ or sent or supplied to an address to which it could be validly sent if it were in hard copy form¹⁴.

Where a member of a company or a holder of a company's debentures has received a document or information from the company otherwise than in hard copy form, he is entitled to require the company to send him a version of the document or information in hard copy form¹⁵.

1 As to the meaning of 'document' see PARA 678 note 1.

2 The provisions referred to in the Companies Act 2006 s 1144(2) apply in relation to documents or information that are to be sent or supplied by one company to another: s 1144(3). As to the meaning of references to documents or information being sent or supplied by or to a company see PARA 678 note 4. As to the meaning of 'company' see PARA 678 note 2. The Companies Act 2006 ss 1144, 1145, Sch 5 form part of the company communications provisions; as to the meaning of the 'company communications provisions' and as to their application see PARA 677.

3 As to documents or information sent or supplied in electronic form see PARA 679. As to documents or information sent or supplied by a company via website see PARA 683. As to documents or information sent or supplied by a company in an other agreed form see PARA 684. As to documents or information sent or supplied by a company to joint holders of shares or debentures see PARA 685. As to documents or information sent or supplied by a company on the death or bankruptcy of holders of shares see PARA 686.

4 See the Companies Act 2006 s 1144(2), Sch 5 para 1. As to provision made in the model forms of articles of association as to means of communication to be used see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 5 art 48 (for a private company limited by shares), reg 3, Sch 2 Pt 4 art 34 (for a private company limited by guarantee), and reg 4, Sch 3 Pt 5 art 79 (for a public company). As to the model forms of articles of association see PARA 228 et seq.

5 See the Companies Act 2006 Sch 5 para 5. As to the deemed delivery of documents and information see PARA 687.

6 As to the meaning of 'person' see PARA 311 note 2.

7 Companies Act 2006 Sch 5 para 6(a). Where an address has been notified by a person to a company for the purposes of the Companies Act 1985 s 238(4A) or s 239(2A) (both repealed) (sending or supply of accounts and reports by means of electronic communications), s 251(2A) (repealed) (sending of summary financial statement by means of electronic communications), or s 369(4A) or s 379A(2B) (both repealed) (notice of

meeting given by means of electronic communications), any such notification that was in force immediately before 20 January 2007 has effect on and after that date, in relation to the matters to which it relates, as an agreement under the Companies Act 2006 Sch 5 para 6(a) and as an address specified under Sch 5 para 7(1) (see the text to notes 9-11): see the Companies Act 2006 (Commencement No 1, Transitional Provisions and Savings) Order 2006, SI 2006/3428, art 8(1), Sch 5 para 4(1), (2).

- 8 Companies Act 2006 Sch 5 para 6(b). As to the meaning of the 'Companies Acts' see PARA 16.
- 9 As to the meaning of 'address' see PARA 678 note 8.
- 10 Companies Act 2006 Sch 5 para 7(1)(a). See also note 7.
- 11 Companies Act 2006 Sch 5 para 7(1)(b). See also note 7.
- 12 As to when a person sends a document or information by post see PARA 681 note 7.
- 13 Companies Act 2006 Sch 5 para 7(2)(a).
- 14 Companies Act 2006 Sch 5 para 7(2)(b). As to documents or information sent or supplied in hard copy form see PARA 678.
- 15 See the Companies Act 2006 s 1145; and PARA 681.

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683. Documents or information communicated by a company via website.

Documents¹ or information to be sent or supplied by a company² on a website³ must be sent or supplied in accordance with the following provisions⁴.

A document or information is validly sent or supplied by a company if it is made available on a website as follows⁵. A document or information may only be sent or supplied by the company to a person⁶ by being made available on a website if the person has agreed (generally or specifically) that the document or information may be sent or supplied to him in that manner⁷, or is taken⁸ to have so agreed⁹, and has not revoked that agreement¹⁰.

A document or information authorised or required to be sent or supplied by means of a website must be made available in a form, and by a means, that the company reasonably considers will enable the recipient to read it¹¹, and to retain a copy of it¹². The company must notify the intended recipient of the presence of the document or information on the website¹³, the address of the website¹⁴, the place on the website where it may be accessed¹⁵, and how to access the document or information¹⁶. The document or information is taken to be sent on the date on which such notification is sent¹⁷ or, if later, the date on which the document or information first appears on the website after that notification is sent¹⁸.

The company must make the document or information available on the website throughout the period specified by any applicable provision of the Companies Acts¹⁹ or, if no such period is specified, the period of 28 days beginning with the date on which the notification²⁰ is sent to the person in question²¹. For these purposes, a failure to make a document or information available on a website throughout this period²² must be disregarded if it is made available on the website for part of that period²³, and the failure to make it available throughout that period is wholly attributable to circumstances that it would not be reasonable to have expected the company to prevent or avoid²⁴.

Where a member of a company or a holder of a company's debentures has received a document or information from the company otherwise than in hard copy form, he is entitled to require the company to send him a version of the document or information in hard copy form²⁵.

1 As to the meaning of 'document' see PARA 678 note 1.

2 The provisions referred to in the Companies Act 2006 s 1144(2) apply in relation to documents or information that are to be sent or supplied by one company to another: s 1144(3). As to the meaning of references to documents or information being sent or supplied by or to a company see PARA 678 note 4. As to the meaning of 'company' see PARA 678 note 2. The Companies Act 2006 ss 1144, 1145, Sch 5 form part of the company communications provisions; as to the meaning of the 'company communications provisions' and as to their application see PARA 677.

3 As to documents or information sent or supplied by a company in hard copy form see PARA 681. As to documents or information sent or supplied by a company in electronic form see PARA 682. As to documents or information sent or supplied by a company in other agreed form see PARA 684. As to documents or information sent or supplied by a company to joint holders of shares or debentures see PARA 685. As to documents or information sent or supplied by a company on the death or bankruptcy of holders of shares see PARA 686.

4 See the Companies Act 2006 s 1144(2), Sch 5 para 1. As to provision made in the model forms of articles of association as to means of communication to be used see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 5 art 48 (for a private company limited by shares), reg 3, Sch 2 Pt 4 art 34 (for a private company limited by guarantee), and reg 4, Sch 3 Pt 5 art 79 (for a public company). As to the model forms of articles of association see PARA 228 et seq.

5 See the Companies Act 2006 Sch 5 para 8. As to the deemed delivery of documents and information see PARA 687.

6 As to the meaning of 'person' see PARA 311 note 2.

7 Companies Act 2006 Sch 5 para 9(a). Where an agreement between a person and a company has been entered into for the purposes of the Companies Act 1985 s 238(4B) (repealed) (sending or supply of copies of accounts and reports by means of website), s 251(2B) (repealed) (sending of summary financial statement by means of website), or s 369(4B) or s 379A(2C) (both repealed) (notice of meeting given by means of website), any such agreement that was in force immediately before 20 January 2007 has effect on and after that date, in relation to the matters to which it relates, as an agreement under the Companies Act 2006 Sch 5 para 9(a): Companies Act 2006 (Commencement No 1, Transitional Provisions and Savings) Order 2006, SI 2006/3428, art 8(1), Sch 5 para 5(1), (2).

8 Ie under the Companies Act 2006 Sch 5 para 10 (Sch 5 para 9(b)(i)) or para 11 (Sch 5 para 9(b)(ii)). In the case of a document or information to be sent or supplied to a person:

218 (1) as a member of the company (Sch 5 para 10(1)(a)); or

219 (2) as a person nominated by a member in accordance with the company's articles to enjoy or exercise all or any specified rights of the member in relation to the company (Sch 5 para 10(1)(b)); or

220 (3) as a person nominated by a member under s 146 (see PARA 375) to enjoy information rights (Sch 5 para 10(1)(c)),

to the extent that the members of the company have resolved that the company may send or supply documents or information to members by making them available on a website (Sch 5 para 10(2)(a)), or the company's articles contain provision to that effect (Sch 5 para 10(2)(b)), a person in relation to whom the following conditions are met is taken to have agreed that the company may send or supply documents or information to him in that manner (Sch 5 para 10(2)). The conditions are that: (a) the person has been asked individually by the company to agree that the company may send or supply documents or information generally, or the documents or information in question, to him by means of a website (Sch 5 para 10(3)(a)); and (b) the company has not received a response within the period of 28 days beginning with the date on which the company's request was sent (Sch 5 para 10(3)(b)). A person is not taken to have so agreed if the company's request did not state clearly what the effect of a failure to respond would be (Sch 5 para 10(4)(a)), or was sent less than 12 months after a previous request made to him for these purposes in respect of the same or a similar class of documents or information (Sch 5 para 10(4)(b)). Part 3 Ch 3 (ss 29-30) (resolutions affecting a company's constitution: see PARA 231) applies to a resolution under Sch 5 para 10: Sch 5 para 10(5). As to the meaning of 'member of the company' see PARA 321. As to the meaning of 'articles' see PARA 228 note 2. As to the meaning of 'information rights' see PARA 375 note 4. As to the meaning of 'month' see PARA 1625 note 10.

In the case of a document or information to be sent or supplied to a person as holder of a company's debentures (Sch 5 para 11(1)), to the extent that the relevant debenture holders have duly resolved that the company may send or supply documents or information to them by making them available on a website (Sch 5 para 11(2)(a)), or the instrument creating the debenture in question contains provision to that effect (Sch 5 para 11(2)(b)), a debenture holder in relation to whom the following conditions are met is taken to have agreed that the company may send or supply documents or information to him in that manner (Sch 5 para 11(2)). The conditions are that: (i) the debenture holder has been asked individually by the company to agree that the company may send or supply documents or information generally, or the documents or information in question, to him by means of a website (Sch 5 para 11(3)(a)); and (ii) the company has not received a response within the period of 28 days beginning with the date on which the company's request was sent (Sch 5 para 11(3)(b)). A person is not taken to have so agreed if the company's request did not state clearly what the effect of a failure to respond would be (Sch 5 para 11(4)(a)), or was sent less than 12 months after a previous request made to him for these purposes in respect of the same or a similar class of documents or information (Sch 5 para 11(4)(b)). For the purposes of Sch 5 para 11: (A) the relevant debenture holders are the holders of debentures of the company ranking *pari passu* for all purposes with the intended recipient (Sch 5 para 11(5)(a)); and (B) a resolution of the relevant debenture holders is duly passed if they agree in accordance with the provisions of the instruments creating the debentures (Sch 5 para 11(5)(b)). As to the meaning of 'debenture' see PARA 1299. As to debentures generally see PARA 1299.

9 Companies Act 2006 Sch 5 para 9(b).

10 Companies Act 2006 Sch 5 para 9.

11 Companies Act 2006 Sch 5 para 12(1)(a). For these purposes a document or information can be read only if (1) it can be read with the naked eye (Sch 5 para 12(2)(a)); or (2) to the extent that it consists of images (for example photographs, pictures, maps, plans or drawings), it can be seen with the naked eye (Sch 5 para 12(2)(b)).

12 Companies Act 2006 Sch 5 para 12(1)(b).

13 Companies Act 2006 Sch 5 para 13(1)(a).

14 Companies Act 2006 Sch 5 para 13(1)(b). As to the meaning of 'address' see PARA 678 note 8.

15 Companies Act 2006 Sch 5 para 13(1)(c).

16 Companies Act 2006 Sch 5 para 13(1)(d).

17 Companies Act 2006 Sch 5 para 13(2)(a).

18 Companies Act 2006 Sch 5 para 13(2)(b).

19 Companies Act 2006 Sch 5 para 14(1)(a). As to the meaning of the 'Companies Acts' see PARA 16.

20 Ie the notification required under the Companies Act 2006 Sch 5 para 13: see the text to notes 13-18.

21 Companies Act 2006 Sch 5 para 14(1)(b).

22 Ie the period mentioned in the Companies Act 2006 Sch 5 para 14(1): see the text to notes 19-21.

23 Companies Act 2006 Sch 5 para 14(2)(a).

24 Companies Act 2006 Sch 5 para 14(2)(b).

25 See the Companies Act 2006 s 1145; and PARA 681. As to the meaning of 'hard copy form' see PARA 678 note 4.

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684. Documents or information sent or supplied by a company in agreed form.

Documents¹ or information to be sent or supplied by a company² otherwise than in hard copy³ or electronic form⁴ or by means of a website⁵ must be sent or supplied in accordance with the following provisions⁶.

A document or information that is sent or supplied otherwise than in hard copy or electronic form or by means of a website is validly sent or supplied if it is sent or supplied in a form or manner that has been agreed by the intended recipient⁷. Where a member of a company or a holder of a company's debentures has received a document or information from the company otherwise than in hard copy form, he is entitled to require the company to send him a version of the document or information in hard copy form⁸.

1 As to the meaning of 'document' see PARA 678 note 1.

2 The provisions referred to in the Companies Act 2006 s 1144(2) apply in relation to documents or information that are to be sent or supplied by one company to another: s 1144(3). As to the meaning of references to documents or information being sent or supplied by or to a company see PARA 678 note 4. As to the meaning of 'company' see PARA 678 note 2. The Companies Act 2006 ss 1144, 1145, Sch 5 form part of the company communications provisions; as to the meaning of the 'company communications provisions' and as to their application see PARA 677.

3 As to documents or information sent or supplied by a company in hard copy form see PARA 681.

4 As to documents or information sent or supplied by a company in electronic form see PARA 682.

5 As to documents or information sent or supplied by a company on a website see PARA 683.

6 See the Companies Act 2006 s 1144(2), Sch 5 para 1. As to provision made in the model forms of articles of association as to means of communication to be used see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 5 art 48 (for a private company limited by shares), reg 3, Sch 2 Pt 4 art 34 (for a private company limited by guarantee), and reg 4, Sch 3 Pt 5 art 79 (for a public company). As to the model forms of articles of association see PARA 228 et seq.

7 Companies Act 2006 Sch 5 para 15. As to documents or information sent or supplied by a company to joint holders of shares or debentures see PARA 685. As to documents or information sent or supplied by a company on the death or bankruptcy of holders of shares see PARA 686. As to the deemed delivery of documents and information see PARA 687.

8 See the Companies Act 2006 s 1145; and PARA 681.

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685. Documents or information sent or supplied by a company to joint holders of shares or debentures.

Documents¹ or information to be sent or supplied by a company² to joint holders of shares³ or debentures⁴ must be sent or supplied in accordance with the following provisions⁵.

In relation to documents or information to be sent or supplied to joint holders of shares or debentures of a company⁶, subject to anything in the company's articles⁷:

- 1106 (1) anything to be agreed or specified by the holder must be agreed or specified by all the joint holders⁸;

1107 (2) anything authorised or required to be sent or supplied to the holder may be sent or supplied either (a) to each of the joint holders⁹; or (b) to the holder whose name appears first in the register of members¹⁰ or the relevant register of debenture holders¹¹.

1 As to the meaning of 'document' see PARA 678 note 1.

2 The provisions referred to in the Companies Act 2006 s 1144(2) apply in relation to documents or information that are to be sent or supplied by one company to another: s 1144(3). As to the meaning of references to documents or information being sent or supplied by or to a company see PARA 678 note 4. As to the meaning of 'company' see PARA 678 note 2. The Companies Act 2006 s 1144, Sch 5 form part of the company communications provisions; as to the meaning of the 'company communications provisions' and as to their application see PARA 677.

3 As to the meaning of 'share' see PARA 1042.

4 As to the meaning of 'debenture' see PARA 1299.

5 See the Companies Act 2006 s 1144(2), Sch 5 para 1. As to documents or information sent or supplied by a company in hard copy form see PARA 681. As to documents or information sent or supplied by a company in electronic form see PARA 682. As to documents or information sent or supplied by a company on a website see PARA 683. As to documents or information sent or supplied by a company in other agreed form see PARA 684. As to documents or information sent or supplied by a company on the death or bankruptcy of holders of shares see PARA 686. As to the deemed delivery of documents and information see PARA 687. As to provision made in the model forms of articles of association as to means of communication to be used see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 5 art 48 (for a private company limited by shares), reg 3, Sch 2 Pt 4 art 34 (for a private company limited by guarantee), and reg 4, Sch 3 Pt 5 art 79 (for a public company). As to the model forms of articles of association see PARA 228 et seq.

6 Companies Act 2006 Sch 5 para 16(1).

7 See the Companies Act 2006 Sch 5 para 16(4). As to the meaning of 'articles' see PARA 228 note 2.

8 Companies Act 2006 Sch 5 para 16(2).

9 Companies Act 2006 Sch 5 para 16(3)(a).

10 As to the meaning of 'register of members' see PARA 335.

11 Companies Act 2006 Sch 5 para 16(3)(b). As to registers of debenture holders see PARA 1321.

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686. Documents or information sent or supplied by a company on death or bankruptcy of holder of shares.

Documents¹ or information to be sent or supplied by a company² in the case of the death or bankruptcy³ of a holder of a company's shares⁴ must be sent or supplied in accordance with the following provisions⁵.

In the case of the death or bankruptcy of a holder of a company's shares⁶, subject to anything in the company's articles⁷, documents or information required or authorised to be sent or supplied to the member⁸ may be sent or supplied to the persons⁹ claiming to be entitled to the shares in consequence of the death or bankruptcy,

- 1108 (1) by name¹⁰; or
 1109 (2) by the title of representatives of the deceased, or trustee of the bankrupt,
 or by any like description¹¹,

at the address¹² in the United Kingdom¹³ supplied for the purpose by those so claiming¹⁴. Until such an address has been so supplied, a document or information may be sent or supplied in any manner in which it might have been sent or supplied if the death or bankruptcy had not occurred¹⁵.

1 As to the meaning of 'document' see PARA 678 note 1.

2 The provisions referred to in the Companies Act 2006 s 1144(2) apply in relation to documents or information that are to be sent or supplied by one company to another: s 1144(3). As to the meaning of references to documents or information being sent or supplied by or to a company see PARA 678 note 4. As to the meaning of 'company' see PARA 678 note 2. The Companies Act 2006 s 1144, Sch 5 form part of the company communications provisions; as to the meaning of the 'company communications provisions' and as to their application see PARA 677.

3 References to the bankruptcy of a person include: (1) the sequestration of the estate of a person (Companies Act 2006 Sch 5 para 17(5)(a)); (2) a person's estate being the subject of a protected trust deed (within the meaning of the Bankruptcy (Scotland) Act 1985) (Companies Act 2006 Sch 5 para 17(5)(b)). In such a case the reference in Sch 5 para (2)(b) (see the text to note 11) to the trustee of the bankrupt is to be read as the permanent or interim trustee (within the meaning of the Bankruptcy (Scotland) Act 1985) on the sequestrated estate or, as the case may be, the trustee under the protected deed: Sch 5 para 17(5).

4 As to the meaning of 'share' see PARA 1042.

5 See the Companies Act 2006 s 1144(2), Sch 5 para 1. As to the deemed delivery of documents and information see PARA 687.

6 See the Companies Act 2006 Sch 5 para 17(1).

7 See the Companies Act 2006 Sch 5 para 17(4). As to the meaning of 'articles' see PARA 228 note 2.

8 As to the meaning of 'member' see PARA 321.

9 As to the meaning of 'person' see PARA 311 note 2.

10 Companies Act 2006 Sch 5 para 17(2)(a).

11 Companies Act 2006 Sch 5 para 17(2)(b). See also note 3.

12 As to the meaning of 'address' see PARA 678 note 8.

13 As to the meaning of 'United Kingdom' see PARA 1 note 5.

14 Companies Act 2006 Sch 5 para 17(2).

15 Companies Act 2006 Sch 5 para 17(3). As to documents or information sent or supplied by a company in hard copy form see PARA 681. As to documents or information sent or supplied by a company in electronic form see PARA 682. As to documents or information sent or supplied by a company on a website see PARA 683. As to documents or information sent or supplied by a company in other agreed form see PARA 684. As to documents or information sent or supplied by a company to joint holders of shares or debentures see PARA 685. As to provision made in the model forms of articles of association as to means of communication to be used see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 5 art 48 (for a private company limited by shares), reg 3, Sch 2 Pt 4 art 34 (for a private company limited by guarantee), and reg 4, Sch 3 Pt 5 art 79 (for a public company). As to the model forms of articles of association see PARA 228 et seq.

Communications Provisions/C. DOCUMENTS ETC SENT BY COMPANY/687. Deemed delivery of documents and information.

687. Deemed delivery of documents and information.

The following provisions apply in relation to documents¹ and information sent or supplied by a company². These provisions have effect subject to:

- 1110 (1) in their application to documents or information sent or supplied by a company to its members³, any contrary provision of the company's articles⁴;
- 1111 (2) in their application to documents or information sent or supplied by a company to its debenture⁵ holders, any contrary provision in the instrument constituting the debentures⁶;
- 1112 (3) in their application to documents or information sent or supplied by a company to a person⁷ otherwise than in his capacity as a member or debenture holder, any contrary provision in an agreement between the company and that person⁸.

Where the document or information is sent by post⁹ (whether in hard copy or electronic form¹⁰) to an address¹¹ in the United Kingdom¹², and the company is able to show that it was properly addressed, prepaid and posted¹³, it is deemed to have been received by the intended recipient 48 hours after it was posted¹⁴. Where the document or information is sent or supplied by electronic means¹⁵, and the company is able to show that it was properly addressed¹⁶, it is deemed to have been received by the intended recipient 48 hours after it was sent¹⁷. Where the document or information is sent or supplied by means of a website, it is deemed to have been received by the intended recipient when the material was first made available on the website¹⁸, or, if later, when the recipient received (or is deemed to have received) notice of the fact that the material was available on the website¹⁹.

In calculating a period of hours for the purposes of these provisions, no account must be taken of any part of a day that is not a working day²⁰.

1 As to the meaning of 'document' see PARA 678 note 1.

2 Companies Act 2006 s 1147(1). As to the meaning of references to documents or information being sent or supplied by or to a company see PARA 678 note 4. As to the meaning of 'company' see PARA 678 note 2. As to documents or information sent or supplied by a company in hard copy form see PARA 681. As to documents or information sent or supplied by a company in electronic form see PARA 682. As to documents or information sent or supplied by a company on a website see PARA 683. As to documents or information sent or supplied by a company in other agreed form see PARA 684. As to documents or information sent or supplied by a company to joint holders of shares or debentures see PARA 685. As to documents or information sent or supplied by a company on the death or bankruptcy of holders of shares see PARA 686.

The Companies Act 2006 s 1147 forms part of the company communications provisions; as to the meaning of the 'company communications provisions' and as to their application see PARA 677.

3 As to the meaning of 'member of the company' see PARA 321.

4 Companies Act 2006 s 1147(6)(a). As to the meaning of 'articles' see PARA 228 note 2.

5 As to the meaning of 'debenture' see PARA 1299.

6 Companies Act 2006 s 1147(6)(b). As to debentures see PARA 1299.

7 As to the meaning of 'person' see PARA 311 note 2.

8 Companies Act 2006 s 1147(6)(c).

9 As to when a person sends a document or information by post see PARA 681 note 7.

- 10 As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form see PARA 679.
- 11 As to the meaning of 'address' see PARA 678 note 8.
- 12 Companies Act 2006 s 1147(2)(a). As to the meaning of 'United Kingdom' see PARA 1 note 5.
- 13 Companies Act 2006 s 1147(2)(b).
- 14 Companies Act 2006 s 1147(2).
- 15 Companies Act 2006 s 1147(3)(a). As to documents or information sent or supplied by electronic means see PARA 679 note 3.
- 16 Companies Act 2006 s 1147(3)(b).
- 17 Companies Act 2006 s 1147(3).
- 18 Companies Act 2006 s 1147(4)(a).
- 19 Companies Act 2006 s 1147(4)(b).
- 20 Companies Act 2006 s 1147(5). As to the meaning of 'working day' see PARA 145 note 16.

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(17) CONTROL OF POLITICAL DONATIONS AND EXPENDITURE MADE BY COMPANY

688. Donations and expenditure to which the statutory restrictions apply.

Part 14 of the Companies Act 2006¹ has effect for controlling: (1) political donations² made by companies³ to political parties, to other political organisations and to independent election candidates; and (2) political expenditure⁴ incurred by companies⁵.

Part 14 applies to a political party if: (a) it is registered under Part II of the Political Parties, Elections and Referendums Act 2000⁶; or (b) it carries on, or proposes to carry on, activities for the purposes of or in connection with the participation of the party in any election or elections to public office held in a member state other than the United Kingdom⁷.

Part 14 applies to an organisation⁸ (a 'political organisation') if it carries on, or proposes to carry on, activities that are capable of being reasonably regarded as intended: (i) to affect public support for a political party to which, or an independent election candidate to whom, Part 14 applies; or (ii) to influence voters in relation to any national or regional referendum held under the law of the United Kingdom or another member state⁹.

Part 14 applies to an independent election candidate at any election to public office held in the United Kingdom or another member state¹⁰.

Any reference in Part 14¹¹ to a political party, political organisation or independent election candidate, or to political expenditure, is to a party, organisation, independent candidate or expenditure to which Part 14 applies¹².

¹ ie the Companies Act 2006 Pt 14 (ss 362-379): see also PARAS 689-692.

The provisions of the Companies Act 2006 Pt 14 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 9: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

2 The following provisions have effect for the purposes of the Companies Act 2006 Pt 14 (ss 362-378) as regards the meaning of 'political donation': s 364(1). In relation to a political party or other political organisation (1) 'political donation' means anything that in accordance with the Political Parties, Elections and Referendums Act 2000 ss 50-52 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**) (a) constitutes a donation for the purposes of Pt IV Ch I (ss 50-53) (control of donations to registered parties) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**); or (b) would constitute such a donation reading references in those provisions to a registered party as references to any political party or other political organisation; and (2) s 53 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**) applies, in the same way, for the purpose of determining the value of a donation: Companies Act 2006 s 364(2).

In relation to an independent election candidate (i) 'political donation' means anything that, in accordance with the Political Parties, Elections and Referendums Act 2000 ss 50-52, would constitute a donation for the purposes of Pt 4 Ch 1 reading references in those sections to a registered party as references to the independent election candidate; and (ii) s 53 applies, in the same way, for the purpose of determining the value of a donation: Companies Act 2006 s 364(3).

For the purposes of the Companies Act 2006 s 364, the Political Parties, Elections and Referendums Act 2000 ss 50, 53 (definition of 'donation' and value of donations) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**) is treated as if the amendments to those provisions made by the Electoral Administration Act 2006 (which remove from the definition of 'donation' loans made otherwise than on commercial terms) had not been made: Companies Act 2006 s 364(4).

3 As to the meaning of 'company' see PARA 24.

4 In the Companies Act 2006 Pt 14 (ss 362-379) 'political expenditure', in relation to a company, means expenditure incurred by the company on (1) the preparation, publication or dissemination of advertising or other promotional or publicity material (a) of whatever nature; and (b) however published or otherwise disseminated, that, at the time of publication or dissemination, is capable of being reasonably regarded as intended to affect public support for a political party or other political organisation, or an independent election candidate; or (2) activities on the part of the company that are capable of being reasonably regarded as intended (a) to affect public support for a political party or other political organisation, or an independent election candidate; or (b) to influence voters in relation to any national or regional referendum held under the law of a member state: s 365(1). For the purposes of Pt 14 a political donation does not count as political expenditure: s 365(2).

5 Companies Act 2006 s 362. As to the disclosure of political donations and expenditure see PARA 821.

6 In the Political Parties, Elections and Referendums Act 2000 Pt II (ss 22-40): see **ELECTIONS AND REFERENDUMS** vol 15(3) (2007 Reissue) PARA 260; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

7 Companies Act 2006 s 363(1). As to the meaning of 'United Kingdom' see PARA 1 note 5.

8 'Organisation' includes any body corporate or unincorporated association and any combination of persons: Companies Act 2006 s 379(1).

9 Companies Act 2006 s 363(2).

10 Companies Act 2006 s 363(3).

11 In the Companies Act 2006 ss 364-378.

12 Companies Act 2006 s 363(4).

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689. Authorisation required for donations or expenditure.

A company¹ must not: (1) make a political donation² to a political party or other political organisation, or to an independent election candidate³; or (2) incur any political expenditure⁴, unless the donation or expenditure is authorised in accordance with the provisions below⁵, or is otherwise exempt from the requirement for authorisation⁶.

The donation or expenditure must be authorised: (a) in the case of a company that is not a subsidiary⁷ of another company, by a resolution of the members of the company; (b) in the case of a company that is a subsidiary of another company by: (i) a resolution of the members of the company; and (ii) a resolution of the members of any relevant holding company⁸. No resolution is required on the part of a company that is a wholly-owned subsidiary of a UK-registered company⁹.

The resolution or resolutions required¹⁰ must comply with the provision below on the form of the authorising resolution¹¹, and must be passed before the donation is made or the expenditure incurred¹².

A resolution conferring authorisation for the purposes of Part 14 of the Companies Act 2006¹³ may relate to the company passing the resolution, one or more subsidiaries of that company, or the company passing the resolution and one or more subsidiaries of that company¹⁴. A resolution may be expressed to relate to all companies that are subsidiaries of the company passing the resolution either at the time the resolution is passed, or at any time during the period for which the resolution has effect, without identifying them individually¹⁵.

The resolution may authorise donations or expenditure under one or more of the following heads: (A) donations to political parties or independent election candidates; (B) donations to political organisations other than political parties; (C) political expenditure¹⁶. The resolution must specify a head or heads, in the case of a resolution that is expressed to relate to all companies that are subsidiaries of the company passing the resolution, for all of the companies to which it relates taken together; and in the case of any other resolution, for each company to which it relates¹⁷. The resolution must be expressed in general terms conforming with heads (A) to (C) above and must not purport to authorise particular donations or expenditure¹⁸.

For each of the specified heads the resolution must authorise donations or, as the case may be, expenditure up to a specified amount in the period for which the resolution has effect¹⁹. The resolution must specify such amounts in the case of a resolution under heads (A) and (B) above, for all of the companies to which it relates taken together; and in the case of any other resolution, for each company to which it relates²⁰.

A resolution conferring authorisation for the purposes of Part 14 has effect for a period of four years beginning with the date on which it is passed unless the directors²¹ determine, or the articles²² require, that it is to have effect for a shorter period beginning with that date²³. The power of the directors to make such a determination²⁴ is subject to any provision of the articles that operates to prevent them from doing so²⁵.

1 As to the meaning of 'company' see PARA 24.

2 As to the meaning of 'political donation' see PARA 688 note 2.

3 As to the application of the Companies Act 2006 Pt 14 (ss 362-379) to political parties, political organisations and independent election candidates see PARA 688.

The provisions of the Companies Act 2006 Pt 14 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 9: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 As to the meaning of 'political expenditure' see PARA 688 note 4.

5 Companies Act 2006 s 366(1). The reference is to s 366(2)-(6).

Nothing in s 366 enables a company to be authorised to do anything that it could not lawfully do apart from s 366: s 366(6).

6 See PARA 692.

7 As to the meaning of 'subsidiary' see PARA 25.

8 Companies Act 2006 s 366(2). For these purposes a 'relevant holding company' means a company that, at the time the donation was made or the expenditure was incurred (1) was a holding company of the company by which the donation was made or the expenditure was incurred; (2) was a UK-registered company; and (3) was not a subsidiary of another UK-registered company: s 366(4). As to the meaning of 'holding company' see PARA 25. As to the meaning of 'UK-registered company' see PARA 24. See also s 379(2); and note 11.

9 Companies Act 2006 s 366(3).

10 Ie required by the Companies Act 2006 s 366.

11 Ie the Companies Act 2006 s 367: see the text and notes 12-19.

12 Companies Act 2006 s 366(5). Except as otherwise provided, any reference in Part 14 (ss 362-379) to the time at which a donation is made or expenditure is incurred is, in a case where the donation is made or expenditure incurred in pursuance of a contract, any earlier time at which that contract is entered into by the company: s 379(2).

13 Ie the Companies Act 2006 Pt 14 (ss 362-379): see also PARAS 688, 690-692.

14 Companies Act 2006 s 367(1). An approval resolution passed in accordance with the Companies Act 1985 s 347C before 1 October 2007 is treated as complying with the requirements of the Companies Act 2006 s 367 although it does not comply with the requirements of that provision as to the heads under which donations and expenditure are to be stated: Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, art 9, Sch 3 para 42.

15 Companies Act 2006 s 367(2). See note 13.

16 Companies Act 2006 s 367(3). See note 13.

17 Companies Act 2006 s 367(4). See note 13.

18 Companies Act 2006 s 367(5) (amended by SI 2009/1941). See note 13.

19 Companies Act 2006 s 367(6). See s 368 and notes 20-24. See note 13.

20 Companies Act 2006 s 367(7). See note 13.

21 For these purposes, 'director' includes shadow director: Companies Act 2006 s 379(1). As to the meaning of 'director' generally see PARA 478.

22 As to the meaning of 'articles' see PARA 228 note 2.

23 Companies Act 2006 s 368(1).

24 Ie a determination under the Companies Act 2006 s 368.

25 Companies Act 2006 s 368(2).

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690. Liability of directors in case of unauthorised donation or expenditure.

Where a company¹ has made a political donation² or incurred political expenditure³ without the authorisation required by Part 14 of the Companies Act 2006⁴, the directors⁵ in default are jointly and severally liable (1) to make good to the company the amount of the unauthorised

donation or expenditure, with interest⁶; and (2) to compensate the company for any loss or damage sustained by it as a result of the unauthorised donation or expenditure having been made⁷.

The directors in default are (a) those who, at the time the unauthorised donation was made or the unauthorised expenditure was incurred, were directors of the company by which the donation was made or the expenditure was incurred; and (b) where that company was a subsidiary of a relevant holding company⁸, and the directors of the relevant holding company failed to take all reasonable steps to prevent the donation being made or the expenditure being incurred, the directors of the relevant holding company⁹.

Where only part of a donation or expenditure was unauthorised, the above provision¹⁰ applies only to so much of it as was unauthorised¹¹.

1 As to the meaning of 'company' see PARA 24.

2 As to the meaning of 'political donation' see PARA 688 note 2.

3 As to the meaning of 'political expenditure' see PARA 688 note 4.

4 Companies Act 2006 s 369(1). The reference is to Pt 14 (ss 362-379): see also PARAS 688, 689, 691, 692. As to such authorisation see PARA 689.

The provisions of the Companies Act 2006 Pt 14 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 9, but with the Companies Act 2006 s 369 as modified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 As to the meaning of 'director' see PARA 478.

6 The interest referred to in head (1) in the text is interest on the amount of the unauthorised donation or expenditure, so far as not made good to the company (1) in respect of the period beginning with the date when the donation was made or the expenditure was incurred; and (2) at such rate as the Secretary of State may prescribe by regulations: Companies Act 2006 s 369(5). Section 379(2) (construction of references to date when donation made or expenditure incurred) (see PARA 689 note 12) does not apply for the purposes of s 369(5): s 369(5). As to the Secretary of State see PARA 6. As from 1 October 2007 the rate of interest for the purposes of head (2) above is 8% per annum: see the Companies (Interest Rate for Unauthorised Political Donation or Expenditure) Regulations 2007, SI 2007/2242, reg 2.

7 Companies Act 2006 s 369(2).

8 For these purposes, a 'relevant holding company' means a company that, at the time the donation was made or the expenditure was incurred (1) was a holding company of the company by which the donation was made or the expenditure was incurred; (2) was a UK-registered company; and (3) was not a subsidiary of another UK-registered company: Companies Act 2006 s 369(4). As to the meaning of 'holding company' see PARA 25. As to the meaning of 'UK-registered company' see PARA 24. As to the meaning of 'subsidiary' see PARA 25. See also s 379(2); and PARA 689 note 12.

9 Companies Act 2006 s 369(3).

10 Ie the Companies Act 2006 s 369.

11 Companies Act 2006 s 369(6).

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691. Enforcement of directors' liabilities in respect of unauthorised political donations and political expenditure by shareholder action.

Any liability¹ of a director² is enforceable (1) in the case of a liability of a director of a company³ to that company, by proceedings brought⁴ in the name of the company by an authorised group⁵ of its members; (2) in the case of a liability of a director of a holding company⁶ to a subsidiary⁷, by proceedings brought⁸ in the name of the subsidiary by an authorised group of members of the subsidiary, or an authorised group of members of the holding company⁹. This is in addition to the right of the company to which the liability is owed to bring proceedings itself to enforce the liability¹⁰.

A group of members may not bring proceedings under the above provision¹¹ in the name of a company unless (a) the group has given written notice to the company stating the cause of action and a summary of the facts on which the proceedings are to be based; the names and addresses of the members comprising the group; and the grounds on which it is alleged that those members constitute an authorised group¹²; and (b) not less than 28 days have elapsed between the date of the giving of the notice to the company and the bringing of the proceedings¹³.

Where such a notice is given to a company, any director of the company may apply to the court within the period of 28 days beginning with the date of the giving of the notice for an order directing that the proposed proceedings not be brought, on one or more of the following grounds (i) that the unauthorised amount has been made good to the company; (ii) that proceedings to enforce the liability have been brought, and are being pursued with due diligence, by the company¹⁴; (iii) that the members proposing to bring these proceedings¹⁵ do not constitute an authorised group¹⁶.

The members by whom proceedings are brought under the above provision¹⁷ owe to the company in whose name they are brought the same duties in relation to the proceedings as would be owed by the company's directors if the proceedings were being brought by the company; but proceedings to enforce any such duty may be brought by the company only with the permission of the court¹⁸. Such proceedings¹⁹ may not be discontinued or settled by the group except with the permission of the court, which may be given on such terms as the court thinks fit²⁰.

In relation to proceedings brought under the above provision²¹ in the name of a company (the 'company') by an authorised group (the 'group')²², the group may apply to the court for an order directing the company to indemnify the group in respect of costs incurred or to be incurred by the group in connection with the proceedings, and the court may make such an order on such terms as it thinks fit²³. The group is not entitled to be paid any such costs out of the assets of the company except by virtue of such an order²⁴.

If no such order has been made with respect to the proceedings, then (A) if the company is awarded costs in connection with the proceedings, or it is agreed that costs incurred by the company in connection with the proceedings should be paid by any defendant, the costs are paid to the group; and (B) if any defendant is awarded costs in connection with the proceedings, or it is agreed that any defendant should be paid costs incurred by him in connection with the proceedings, the costs are paid by the group²⁵.

Where proceedings have been brought under the above provision²⁶ in the name of a company by an authorised group, the group is entitled to require the company to provide it with all information relating to the subject matter of the proceedings that is in the company's possession or under its control or which is reasonably obtainable by it²⁷. If the company, having been required by the group to do so, refuses to provide the group with all or any of that information, the court may, on an application made by the group, make an order directing the company, and any of its officers or employees specified in the application, to provide the group with the information in question in such form and by such means as the court may direct²⁸.

1 le under the Companies Act 2006 s 369: see PARA 690.

2 As to the meaning of 'director' see PARA 478.

3 As to the meaning of 'company' see PARA 24.

4 le brought under the Companies Act 2006 s 370. The right to bring proceedings under s 370 is subject to the provisions of s 371 (see the text and notes 11-20): Companies Act 2006 s 370(4). Proceedings to enforce a director's liability under s 370 must be started by a CPR Pt 7 claim form: *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 11. As to CPR Pt 7 see **CIVIL PROCEDURE** vol 11 (2009) PARA 116 et seq.

The provisions of the Companies Act 2006 ss 370-373 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 9: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 An 'authorised group' of members of a company means (1) the holders of not less than 5% in nominal value of the company's issued share capital; (2) if the company is not limited by shares, not less than 5% of its members; or (3) not less than 50 of the company's members: Companies Act 2006 s 370(3). As to the meaning of 'member' see PARA 321. As to issued share capital see PARA 1045. As to the meaning of 'limited by shares' see PARA 78.

6 As to the meaning of 'holding company' see PARA 25.

7 As to the meaning of 'subsidiary' see PARA 25.

8 See note 4.

9 Companies Act 2006 s 370(1). Nothing in s 370 affects any right of a member of a company to bring or continue proceedings under Pt 11 (ss 260-269) (derivative claims or proceedings) (see PARA 455 et seq): s 370(5).

10 Companies Act 2006 s 370(2).

11 le under the Companies Act 2006 s 370.

12 Companies Act 2006 s 371(1)(a)(i)-(iii).

13 Companies Act 2006 s 371(1)(b).

14 Where an application is made on the ground mentioned in the Companies Act 2006 s 371(2)(b) (see head (ii) in the text), the court may as an alternative to directing that the proposed proceedings under s 370 are not to be brought, direct (1) that such proceedings may be brought on such terms and conditions as the court thinks fit; and (2) that the proceedings brought by the company be discontinued, or may be continued on such terms and conditions as the court thinks fit: s 371(3).

15 le under the Companies Act 2006 s 371.

16 Companies Act 2006 s 371(2).

17 See note 11.

18 Companies Act 2006 s 371(4).

19 See note 11.

20 Companies Act 2006 s 371(5).

21 See note 11.

22 Companies Act 2006 s 372(1).

23 Companies Act 2006 s 372(2).

24 Companies Act 2006 s 372(3).

25 Companies Act 2006 s 372(4). See note 23.

26 See note 11.

27 Companies Act 2006 s 373(1).

28 Companies Act 2006 s 373(2).

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692. Exemptions.

A donation to a trade union¹, other than a contribution to the union's political fund², is not a political donation³ for the purposes of Part 14 of the Companies Act 2006⁴. A trade union is not a political organisation⁵ for the purposes of the provision on political expenditure⁶.

A subscription⁷ paid to a trade association⁸ for membership of the association is not a political donation for the purposes of Part 14⁹.

An all-party parliamentary group¹⁰ is not a political organisation for the purposes of Part 14¹¹.

Authorisation under Part 14¹² is not needed for political expenditure that is exempt by virtue of an order¹³ of the Secretary of State¹⁴. An order may confer an exemption in relation to (1) companies¹⁵ of any description or category specified in the order; or (2) expenditure of any description or category so specified (whether framed by reference to goods, services or other matters in respect of which such expenditure is incurred or otherwise), or both¹⁶. If or to the extent that expenditure is exempt from the requirement of authorisation under Part 14 by virtue of such an order¹⁷, it is disregarded in determining what donations are authorised by any resolution of the company passed for the purposes of Part 14¹⁸.

Authorisation under Part 14 is not needed for a donation except to the extent that the total amount of (a) that donation¹⁹; and (b) other relevant donations²⁰ made in the period of 12 months ending with the date on which that donation is made, exceeds £5,000²¹. If or to the extent that a donation is exempt by virtue of this provision²² from the requirement of authorisation under Part 14, it is disregarded in determining what donations are authorised by any resolution passed for the purposes of Part 14²³.

1 'Trade union' has the meaning given by the Trade Union and Labour Relations (Consolidation) Act 1992 s 1 (see **EMPLOYMENT** vol 40 (2009) PARA 846) or the Industrial Relations (Northern Ireland) Order 1992, SI 1992/807 (NI 5), art 3: Companies Act 2006 s 374(3).

The provisions of the Companies Act 2006 ss 374-378 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 9, but with the Companies Act 2006 s 377 as modified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

2 'Political fund' means the fund from which payments by a trade union in the furtherance of political objects are required to be made by virtue of the Trade Union and Labour Relations (Consolidation) Act 1992 s 82(1)(a) (see **EMPLOYMENT** vol 40 (2009) PARA 935): Companies Act 2006 s 374(3).

3 As to the meaning of 'political donation' see PARA 688 note 2.

4 Companies Act 2006 s 374(1). The reference is to Pt 14 (ss 362-379): see also PARAS 689-691.

5 As to the meaning of 'political organisation' see PARA 688.

6 Companies Act 2006 s 374(2). The reference is to s 365 and the meaning of 'political expenditure': see PARA 688.

7 'Subscription' does not include a payment to the trade association to the extent that it is made for the purpose of financing any particular activity of the association: Companies Act 2006 s 375(2). 'Trade association' means an organisation formed for the purpose of furthering the trade interests of its members, or of persons represented by its members: s 375(2).

8 See note 7.

9 Companies Act 2006 s 375(1).

10 An 'all-party parliamentary group' means an all-party group composed of members of one or both of the Houses of Parliament (or of such members and other persons): Companies Act 2006 s 376(2).

11 Companies Act 2006 s 376(1).

12 As to such authorisation see PARA 689.

13 Ie an order under the Companies Act 2006 s 377: see s 377(1).

14 Companies Act 2006 s 377(1). As to the Secretary of State see PARA 6. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. An order under s 377 is subject to affirmative resolution procedure (ie the order must not be made unless a draft of the statutory instrument containing it has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 377(4), 1290. In exercise of the powers conferred by s 377, the Secretary of State has made the Companies (Political Expenditure Exemption) Order 2007, SI 2007/2081. Accordingly, political expenditure is exempt from the need for authorisation under the Companies Act 2006 Pt 14 if it is:

221 (1) political expenditure incurred in respect of the preparation, publication or dissemination of news material, where that material contains matter which would render that preparation, publication or dissemination on the part of the company an activity on the part of the company that is capable of being reasonably regarded as intended: (a) to affect public support for a political party or other political organisation, or an independent election candidate; or (b) to influence voters in relation to any national or regional referendum held under the law of a member State (Companies (Political Expenditure Exemption) Order 2007, SI 2007/2081, arts 2(a), 3(1));

222 (2) incurred by any company whose ordinary course of business includes, or is proposed to include, the publication or dissemination to the public, or any part of the public, of news material, or the preparation of such material for publication or dissemination to the public, or any part of the public (arts 2(b), 4(1)).

For these purposes, 'news material' means material relating to news, public and political affairs, public and political events, or views, opinion or comment on such news, affairs or events: see art 1(2). For the purposes of head (2), it is irrelevant by which means or modes the news material is to be prepared, published or disseminated, and it is irrelevant where the public, or any part of the public, to which such material is published or disseminated is located or the identity or description of the public or any part of it: art 4(2).

15 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

16 Companies Act 2006 s 377(2). See note 14.

17 Ie an order under the Companies Act 2006 s 377: see s 377(3).

18 Companies Act 2006 s 377(3). See note 14.

19 'Donation' means a donation to a political party or other political organisation or to an independent election candidate: Companies Act 2006 s 378(2). As to the application of Pt 14 (ss 362-379) to a political party or other political organisation or to an independent election candidate see PARA 688.

20 'Other relevant donations' means (1) in relation to a donation made by a company that is not a subsidiary, any other donations made by that company or by any of its subsidiaries; (2) in relation to a donation made by a company that is a subsidiary, any other donations made by that company, by any holding company of that company or by any other subsidiary of any such holding company: Companies Act 2006 s 378(2). As to the meaning of 'subsidiary' see PARA 25. As to the meaning of 'holding company' see PARA 25.

21 Companies Act 2006 s 378(1).

22 Ie the Companies Act 2006 s 378: see s 378(3).

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(18) ACCOUNTS AND REPORTS

(i) In general

A. GENERAL PROVISION MADE FOR COMPANIES AND GROUPS

693. Application of provisions regarding accounts and reports.

Accounts may be prepared under the Companies Act regime or according to international accounting standards (IAS), now known as the International Financial Reporting Standards (IFRS)¹. This title deals largely with the Companies Act regime.

The requirements of Part 15 of the Companies Act 2006² as to accounts and reports apply in relation to each financial year of a company³. In certain respects different provisions apply to different kinds of company⁴. The main distinctions for this purpose are: (1) between companies subject to the small companies regime⁵ and companies that are not subject to that regime⁶; and (2) between quoted companies and companies that are not quoted⁷. There are also distinctions between private and public companies⁸.

1 Under European Parliament and EC Council Regulation 1606/2002 (OJ L243, 11.9.2002, p 1) on the application of international accounting standards, the application of IAS to the consolidated accounts of listed companies is mandatory, and the option of applying IAS to other types of company is permitted. See further PARA 22. For the purposes of the Companies Act 2006 Pt 15 (ss 380-474), 'international accounting standards' means the international accounting standards, within the meaning of the IAS Regulation, adopted from time to time by the European Commission in accordance with that Regulation; and 'IAS Regulation' means European Parliament and EC Council Regulation 1606/2002 (OJ L243, 11.9.2002, p 1): see the Companies Act 2006 s 474(1).

2 Ie the Companies Act 2006 Pt 15: see PARA 694 et seq.

3 Companies Act 2006 s 380(1). As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq. As to a company's financial year see PARA 711.

The provisions of the Companies Act 2006 s 380 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 2006 s 380(2). In Pt 15, where provisions do not apply to all kinds of company: (1) provisions applying to companies subject to the small companies regime appear before the provisions applying to other companies; (2) provisions applying to private companies appear before the provisions applying to public companies; and (3) provisions applying to quoted companies appear after the provisions applying to other companies: s 380(4). As to private and public companies see PARA 102. As to quoted and unquoted companies see PARA 77.

5 As to the small companies regime see PARA 694.

6 Companies Act 2006 s 380(3)(a). As to companies that are not subject to the small companies regime see PARA 695.

7 Companies Act 2006 s 380(3)(b).

8 See PARA 102.

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694. Small companies and groups.

Regulations made under the Companies Act 2006 specify the form and content of the accounts and directors' report of companies subject to the small companies regime¹. The small companies regime applies to a company² for a financial year³ in relation to which the company qualifies as small and is not excluded from the regime⁴.

A company qualifies as small in relation to its first financial year if the qualifying conditions are met in that year⁵. A company qualifies as small in relation to a subsequent financial year: (1) if the qualifying conditions are met in that year and the preceding financial year; (2) if the qualifying conditions are met in that year and the company qualified as small in relation to the preceding financial year; (3) if the qualifying conditions were met in the preceding financial year and the company qualified as small in relation to that year⁶. The qualifying conditions are met by a company in a year in which it satisfies two or more of the following requirements:

- 1113 (a) the turnover is not more than £6.5 million⁷;
- 1114 (b) the balance sheet total is not more than £3.26 million⁸;
- 1115 (c) the number of employees is not more than 50⁹.

A parent company qualifies as a small company in relation to a financial year only if the group headed by it qualifies as a small group¹⁰. A group qualifies as small in relation to the parent company's first financial year if the qualifying conditions are met in that year¹¹. A group qualifies as small in relation to a subsequent financial year of the parent company: (i) if the qualifying conditions are met in that year and the preceding financial year; (ii) if the qualifying conditions are met in that year and the group qualified as small in relation to the preceding financial year; (iii) if the qualifying conditions were met in the preceding financial year and the group qualified as small in relation to that year¹². The qualifying conditions are met by a group in a year in which it satisfies two or more of the following requirements:

- 1116 (A) the aggregate turnover is not more than £6.5 million net or £7.8 million gross¹³;
- 1117 (B) the aggregate balance sheet total is not more than £3.26 million net or £3.9 million gross¹⁴;
- 1118 (C) the aggregate number of employees is not more than 50¹⁵.

The small companies regime does not apply to a company that is, or was at any time within the financial year to which the accounts relate:

- 1119 (aa) a public company¹⁶;
- 1120 (bb) a company that is an authorised insurance company¹⁷, a banking company¹⁸, an e-money issuer¹⁹, a MiFID investment firm²⁰ or a UCITS management company²¹, or a company that carries on insurance market activity²²; or
- 1121 (cc) a member of an ineligible group²³.

1 See the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409; and PARA 871 et seq. The regulations continue the implementation of EEC Council Directive 78/660 on the annual accounts of certain types of companies (the 'Fourth Directive') (OJ L222, 14.8.1978, p 1) and EEC Council Directive 83/349 on consolidated accounts (the 'Seventh Directive') (OJ L193, 18.7.1983, p 1).

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to a company's financial year see PARA 711.

4 Companies Act 2006 s 381 (amended by SI 2008/393).

The provisions of the Companies Act 2006 ss 381-384 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10, but with the modifications to the Companies Act 2006 s 383 as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 Companies Act 2006 s 382(1). Section 382 is subject to s 383 (parent companies: see the text and notes 10-15): s 382(7).

6 Companies Act 2006 s 382(2). See note 5.

7 For a period that is a company's financial year but not in fact a year the maximum figures for turnover must be proportionately adjusted: Companies Act 2006 s 382(4). For the purposes of Pt 15 (ss 380-474), 'turnover', in relation to a company, means the amounts derived from the provision of goods and services falling within the company's ordinary activities, after deduction of: (1) trade discounts; (2) value added tax; and (3) any other taxes based on the amounts so derived: s 474(1).

8 The 'balance sheet total' means the aggregate of the amounts shown as assets in the company's balance sheet: Companies Act 2006 s 382(5). As to the meaning of 'balance sheet' see PARA 715.

9 Companies Act 2006 s 382(3) (amended by SI 2008/393). See note 5. The number of employees means the average number of persons employed by the company in the year (Companies Act 2006 s 382(6)), determined as follows:

223 (1) find for each month in the financial year the number of persons employed under contracts of service by the company in that month (whether throughout the month or not) (s 382(6)(a));

224 (2) add together the monthly totals (s 382(6)(b)); and

225 (3) divide by the number of months in the financial year (s 382(6)(c)).

10 Companies Act 2006 s 383(1). As to the meaning of 'parent company' see PARA 26 note 2. For the purposes of Pt 15, 'group' means a parent undertaking and its subsidiary undertakings: s 474(1). As to the meanings of 'parent undertaking' and 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

11 Companies Act 2006 s 383(2).

12 Companies Act 2006 s 383(3).

13 The aggregate figures are ascertained by aggregating the relevant figures determined in accordance with the Companies Act 2006 s 382 (see the text and notes 5-9) for each member of the group: s 383(5). In relation to the aggregate figures for turnover and balance sheet total:

226 (1) 'net' means after any set-offs and other adjustments made to eliminate group transactions (a) in the case of Companies Act accounts, in accordance with regulations under s 404 (see PARA 784); (b) in the case of IAS accounts, in accordance with international accounting standards (s 383(6)); and

227 (2) 'gross' means without those set-offs and other adjustments (s 383(6)).

A company may satisfy any relevant requirement on the basis of either the net or the gross figure: s 383(6). As to the meanings of 'Companies Act accounts' and 'IAS accounts' see PARAS 717, 776; and as to the meaning of 'international accounting standards' see PARA 693 note 1.

The figures for each subsidiary undertaking must be those included in its individual accounts for the relevant financial year, that is: (i) if its financial year ends with that of the parent company, that financial year; and (ii) if not, its financial year ending last before the end of the financial year of the parent company: s 383(7). If those figures cannot be obtained without disproportionate expense or undue delay, the latest available figures must be taken: s 383(7). As to the meaning of 'individual accounts' see PARA 716.

14 See note 13.

15 Companies Act 2006 s 383(4) (amended by SI 2008/393). See note 13.

16 As to the meaning of 'public company' see PARA 102.

17 As to the meaning of 'authorised insurance company' see PARA 704 note 4.

18 As to the meaning of 'banking company' see PARA 701 note 1.

19 For the purposes of the Companies Act 2006 Pt 15, 'e-money issuer' means a person who has permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) to carry on the activity of issuing electronic money within the meaning of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9B (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 96, 348 et seq): Companies Act 2006 s 474(1).

20 For the purposes of the Companies Act 2006 Pt 15, 'MiFID investment firm' means an investment firm (within the meaning of EC Directive 2004/39 of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, art 4.1.1), other than: (1) a company to which that Directive does not apply by virtue of art 2; (2) a company which is an exempt investment firm within the meaning of the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2007, SI 2007/126, reg 4A(3); and (3) any other company which fulfils all the requirements set out in reg 4C(3) (see **FINANCIAL SERVICES AND INSTITUTIONS**): Companies Act 2006 s 474(1) (definition added by SI 2007/2932).

21 For the purposes of the Companies Act 2006 Pt 15, 'UCITS management company' has the meaning given by the Glossary forming part of the Handbook made by the Financial Services Authority under the Financial Services and Markets Act 2000: Companies Act 2006 s 474(1). As to the Financial Services Authority see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 4 et seq; and as to the Authority's Handbook of Rules and Guidance generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 22.

22 As to the meaning of 'insurance market activity' see PARA 701 note 4.

23 Companies Act 2006 s 384(1) (amended by SI 2007/2932). A group is ineligible if any of its members is: (1) a public company; (2) a body corporate (other than a company) whose shares are admitted to trading on a regulated market in an EEA state; (3) a person (other than a small company) who has permission under the Financial Services and Markets Act 2000 Pt IV (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 348 et seq) to carry on a regulated activity; (4) a small company that is an authorised insurance company, a banking company, an e-money issuer, a MiFID investment firm or a UCITS management company; or (5) a person who carries on insurance market activity: Companies Act 2006 s 384(2) (amended by SI 2007/2932). A company is a small company for the purposes of the Companies Act 2006 s 384(2) if it qualified as small in relation to its last financial year ending on or before the end of the financial year to which the accounts relate: s 384(3). As to the meaning of 'body corporate' see PARA 1 note 5. As to the meaning of 'share' see PARA 1042. As to the meaning of 'EEA state' see PARA 29 note 5. As to the meaning of 'regulated market' see PARA 334 note 11. For the purposes of Pt 15, 'regulated activity' has the meaning given in the Financial Services and Markets Act 2000 s 22 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 84), except that it does not include activities of the kind specified in any of the following provisions of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, namely: art 25A (arranging regulated mortgage contracts); art 25B (arranging regulated home reversion plans); art 25C (arranging regulated home purchase plans); art 39A (assisting administration and performance of a contract of insurance); art 53A (advising on regulated mortgage contracts); art 53B (advising on regulated home reversion plans); art 53C (advising on regulated home purchase plans); art 21 (dealing as agent), art 25 (arranging deals in investments) or art 53 (advising on investments) where the activity concerns relevant investments that are not contractually based investments (within the meaning of art 3); or art 64 (agreeing to carry on a regulated activity of the kind mentioned above): Companies Act 2006 s 474(1).

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695. Medium-sized companies and groups.

Regulations made under the Companies Act 2006 specify the form and content of the accounts and reports of large and medium-sized companies¹.

A company² qualifies as medium-sized in relation to its first financial year³ if the qualifying conditions are met in that year⁴. A company qualifies as medium-sized in relation to a subsequent financial year: (1) if the qualifying conditions are met in that year and the preceding financial year; (2) if the qualifying conditions are met in that year and the company qualified as medium-sized in relation to the preceding financial year; (3) if the qualifying conditions were met in the preceding financial year and the company qualified as medium-sized in relation to that year⁵. The qualifying conditions are met by a company in a year in which it satisfies two or more of the following requirements:

- 1122 (a) the turnover is not more than £25.9 million⁶;
- 1123 (b) the balance sheet total is not more than £12.9 million⁷;
- 1124 (c) the number of employees is not more than 250⁸.

A parent company qualifies as a medium-sized company in relation to a financial year only if the group headed by it qualifies as a medium-sized group⁹. A group qualifies as medium-sized in relation to the parent company's first financial year if the qualifying conditions are met in that year¹⁰. A group qualifies as medium-sized in relation to a subsequent financial year of the parent company: (i) if the qualifying conditions are met in that year and the preceding financial year; (ii) if the qualifying conditions are met in that year and the group qualified as medium-sized in relation to the preceding financial year; (iii) if the qualifying conditions were met in the preceding financial year and the group qualified as medium-sized in relation to that year¹¹. The qualifying conditions are met by a group in a year in which it satisfies two or more of the following requirements:

- 1125 (A) the aggregate turnover is not more than £25.9 million net or £31.1 million gross¹²;
- 1126 (B) the aggregate balance sheet total is not more than £12.9 million net or £15.5 million gross¹³;
- 1127 (C) the aggregate number of employees is not more than 250¹⁴.

A company is not entitled to take advantage of any of the provisions of Part 15 of the Companies Act 2006¹⁵ relating to companies qualifying as medium-sized if it was at any time within the financial year in question:

- 1128 (aa) a public company¹⁶;
- 1129 (bb) a company that has permission under Part 4 of the Financial Services and Markets Act 2000¹⁷ to carry on a regulated activity¹⁸, or that carries on insurance market activity¹⁹; or
- 1130 (cc) a member of an ineligible group²⁰.

1 See the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410; and PARA 873 et seq. These regulations apply to companies that not subject to the small companies regime, as to which see PARA 694. The regulations continue the implementation of EEC Council Directive 78/660 on the annual accounts of certain types of companies (the 'Fourth Directive') (OJ L222, 14.8.1978, p 1) and EEC Council Directive 83/349 on consolidated accounts (the 'Seventh Directive') (OJ L193, 18.7.1983, p 1). They also continue the implementation of EEC Council Directive 86/635 on the annual accounts and consolidated accounts of banks and other financial institutions (the 'Bank Accounts Directive') (OJ L372, 31.12.1986, p 1), and EEC Council Directive 91/674 on the annual accounts and consolidated accounts of insurance undertakings (the

'Insurance Accounts Directive') (OJ L374, 31.12.1991, p 7). As to banking and insurance see further the Bank Accounts Directive (Miscellaneous Banks) Regulations 2008, SI 2008/567; the Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 2008, SI 2008/565; and PARA 701 et seq. See also the Partnerships (Accounts) Regulations 2008, SI 2008/569.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to a company's financial year see PARA 711.

4 Companies Act 2006 s 465(1). Section 465 is subject to s 466 (parent companies: see the text and notes 9-14): s 465(7).

The provisions of the Companies Act 2006 ss 465-467 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 Companies Act 2006 s 465(2). See note 4.

6 For a period that is a company's financial year but not in fact a year the maximum figures for turnover must be proportionately adjusted: Companies Act 2006 s 465(4). As to the meaning of 'turnover' see PARA 694 note 7.

7 The 'balance sheet total' means the aggregate of the amounts shown as assets in the company's balance sheet: Companies Act 2006 s 465(5). As to the meaning of 'balance sheet' see PARA 715.

8 Companies Act 2006 s 465(3) (amended by SI 2008/393). See note 4. The number of employees means the average number of persons employed by the company in the year (Companies Act 2006 s 465(6)), determined as follows:

228 (1) find for each month in the financial year the number of persons employed under contracts of service by the company in that month (whether throughout the month or not) (s 465(6)(a));

229 (2) add together the monthly totals (s 465(6)(b)); and

230 (3) divide by the number of months in the financial year (s 465(6)(c)).

9 Companies Act 2006 s 466(1). As to the meaning of 'parent company' see PARA 26 note 2; and as to the meaning of 'group' see PARA 694 note 10.

10 Companies Act 2006 s 466(2).

11 Companies Act 2006 s 466(3).

12 The aggregate figures are ascertained by aggregating the relevant figures determined in accordance with the Companies Act 2006 s 465 (see the text and notes 2-8) for each member of the group: s 466(5). In relation to the aggregate figures for turnover and balance sheet total:

231 (1) 'net' means after any set-offs and other adjustments made to eliminate group transactions: (a) in the case of Companies Act accounts, in accordance with regulations under s 404 (see PARA 784); (b) in the case of IAS accounts, in accordance with international accounting standards (s 466(6)); and

232 (2) 'gross' means without those set-offs and other adjustments (s 466(6)).

A company may satisfy any relevant requirement on the basis of either the net or the gross figure: s 466(6). As to the meanings of 'Companies Act accounts' and 'IAS accounts' see PARAS 717, 776; and as to the meaning of 'international accounting standards' see PARA 693 note 1.

The figures for each subsidiary undertaking must be those included in its individual accounts for the relevant financial year, that is: (i) if its financial year ends with that of the parent company, that financial year; and (ii) if not, its financial year ending last before the end of the financial year of the parent company: s 466(7). If those figures cannot be obtained without disproportionate expense or undue delay, the latest available figures must be taken: s 466(7). As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2. As to the meaning of 'individual accounts' see PARA 716.

13 See note 12.

14 Companies Act 2006 s 466(4) (amended by SI 2008/393). See note 12.

15 Ie the Companies Act 2006 Pt 15 (ss 380-474).

16 As to the meaning of 'public company' see PARA 102.

17 Ie the Financial Services and Markets Act 2000 Pt IV (ss 40-55): see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 348 et seq.

18 As to the meaning of 'regulated activity' see PARA 694 note 23.

19 As to the meaning of 'insurance market activity' see PARA 704 note 4.

20 Companies Act 2006 s 467(1). A group is ineligible if any of its members is: (1) a public company; (2) a body corporate (other than a company) whose shares are admitted to trading on a regulated market; (3) a person (other than a small company) who has permission under the Financial Services and Markets Act 2000 Pt IV (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 348 et seq) to carry on a regulated activity; (4) a small company that is an authorised insurance company, a banking company, an e-money issuer, a MiFID investment firm or a UCITS management company; or (5) a person who carries on insurance market activity: s 467(2) (amended by SI 2007/2932). A company is a small company for the purposes of the Companies Act 2006 s 467(2) if it qualified as small in relation to its last financial year ending on or before the end of the financial year in question: s 467(3). As to the meaning of 'body corporate' see PARA 1 note 5. As to the meaning of 'share' see PARA 1042. As to the meaning of 'regulated market' see PARA 334 note 11. As to the meaning of 'authorised insurance company' see PARA 704 note 4; and as to the meaning of 'banking company' see PARA 701 note 1. As to the meaning of 'e-money issuer' see PARA 694 note 19; as to the meaning of 'MiFID investment firm' see PARA 694 note 20; and as to the meaning of 'UCITS management company' see PARA 694 note 21.

Section 467 does not prevent a company from taking advantage of s 417(7) (business review: non-financial information) (see PARA 819) by reason only of its having been a member of an ineligible group at any time within the financial year in question: s 467(4) (added by SI 2008/393).

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696. Quoted and unquoted companies.

For the purposes of Part 15 of the Companies Act 2006¹ a company² is a quoted company in relation to a financial year³ if it is a quoted company immediately before the end of the accounting reference period by reference to which that financial year was determined⁴. A 'quoted company' means a company whose equity share capital⁵: (1) has been included in the official list⁶ in accordance with the provisions of Part 6 of the Financial Services and Markets Act 2000⁷; (2) is officially listed in an EEA state⁸; or (3) is admitted to dealing on either the New York Stock Exchange or the exchange known as Nasdaq⁹.

An 'unquoted company' means a company that is not a quoted company¹⁰.

1 Ie the Companies Act 2006 Pt 15 (ss 380-474).

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to a company's financial year see PARA 711.

4 Companies Act 2006 s 385(1). As to a company's accounting reference period see PARA 712.

The Secretary of State may by regulations amend or replace the provisions of s 385(1), (2) so as to limit or extend the application of some or all of the provisions of Pt 15 that are expressed to apply to quoted companies: s 385(4). Regulations under s 385 extending the application of any such provision are subject to

affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament) (ss 385(5), 1290), but any other regulations under s 385 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament) (ss 385(6), 1289). At the date at which this volume states the law, no regulations had been made under s 385. As to the Secretary of State see PARA 6.

The provisions of the Companies Act 2006 s 385 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 As to the meaning of 'equity share capital' see PARA 1047.

6 For these purposes, 'official list' has the meaning given by the Financial Services and Markets Act 2000 s 103(1) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 387): Companies Act 2006 s 385(2).

7 Ie the Financial Services and Markets Act 2000 Pt VI (ss 72-103): see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385 et seq.

8 As to the meaning of 'EEA state' see PARA 29 note 5.

9 Companies Act 2006 s 385(2). See note 4.

10 Companies Act 2006 s 385(3).

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697. Accounting standards.

'Accounting standards' means statements of standard accounting practice issued by such body or bodies as may be prescribed by regulations¹; and references to accounting standards applicable to a company's annual accounts² are to such standards as are, in accordance with their terms, relevant to the company's circumstances and to the accounts³. The prescribed body is the Accounting Standards Board⁴.

1 Companies Act 2006 s 464(1). Such regulations may contain such transitional and other supplementary and incidental provisions as appear to the Secretary of State to be appropriate: s 464(3). As to the regulations that have been made see the Accounting Standards (Prescribed Body) Regulations 2008, SI 2008/651 (and see the text and note 4). As to the Secretary of State see PARA 6.

The provisions of the Companies Act 2006 s 464 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

2 As to the meaning of 'annual accounts' see PARA 715. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 Companies Act 2006 s 464(2).

4 See the Accounting Standards (Prescribed Body) Regulations 2008, SI 2008/651, reg 2. The Accounting Standards Board is established under the articles of association of the Financial Reporting Council Limited (see PARA 699 note 2).

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COMPANIES ACTS/(18) ACCOUNTS AND REPORTS/ (i) In general/A. GENERAL PROVISION MADE FOR COMPANIES AND GROUPS/698. Supervision of accounts and reports.

698. Supervision of accounts and reports.

The Secretary of State¹ may make an order appointing a body (the 'prescribed body') to exercise the functions of:

- 1131 (1) keeping under review periodic accounts and reports² that are produced by issuers³ of transferable securities⁴ and are required to comply with certain accounting requirements⁵; and
- 1132 (2) informing the Financial Services Authority⁶, if the prescribed body thinks fit, of any conclusions reached by it in relation to any such accounts or report⁷.

A body may be appointed if it is a body corporate or an unincorporated association which appears to the Secretary of State: (a) to have an interest in, and to have satisfactory procedures directed to, monitoring compliance by issuers of transferable securities with the accounting requirements in relation to periodic accounts and reports produced by such issuers; and (b) otherwise to be a fit and proper body to be appointed⁸. However, where the order is to contain certain requirements or provisions⁹, the Secretary of State may not appoint a body unless, in addition, it appears to him that the body would, if appointed, exercise its functions as a prescribed body in accordance with any such requirements or provisions¹⁰.

A body may be appointed either generally or in respect of any particular class or classes of issuers or any particular class or classes of periodic accounts or reports, and different bodies may be appointed in respect of different classes¹¹. Where a body is so appointed, and the Financial Services Authority requests the body to exercise its functions¹² in relation to any particular issuer of transferable securities in relation to whom those functions would not otherwise be exercisable, the body is to exercise those functions in relation to that issuer as well¹³.

If the prescribed body is an unincorporated association, any relevant proceedings¹⁴ may be brought by or against that body in the name of any body corporate whose constitution provides for the establishment of the body¹⁵.

Where an appointment is revoked, the revoking order may make such provision as the Secretary of State thinks fit with respect to pending proceedings¹⁶.

The prescribed body has power to require any document, information or explanations that it may reasonably require for the purposes of its functions¹⁷.

The prescribed body is the Financial Reporting Review Panel¹⁸.

1 As to the Secretary of State see PARA 6.

2 'Periodic' accounts and reports means accounts and reports which are required by Part 6 rules to be produced periodically: Companies (Audit Investigations and Community Enterprise) Act 2004 s 14(12) (amended by the Companies Act 2006 Sch 15 Pt 2 paras 13, 14; and by SI 2008/948). 'Part 6 rules' has the meaning given by the Financial Services and Markets Act 2000 s 103(1) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385); Companies (Audit Investigations and Community Enterprise) Act 2004 s 14(12) (amended by the Companies Act 2006 Sch 15 Pt 2 paras 13, 14; and by SI 2005/1433; SI 2008/948).

3 'Issuer' has the meaning given by the Financial Services and Markets Act 2000 s 102A(6) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385); Companies (Audit Investigations and Community Enterprise) Act 2004 s 14(12) (amended by the Companies Act 2006 Sch 15 Pt 2 paras 13, 14; and by SI 2005/1433; SI 2008/948).

4 'Transferable securities' has the meaning given by the Financial Services and Markets Act 2000 s 102A(3) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385): Companies (Audit Investigations and Community Enterprise) Act 2004 s 14(12) (amended by the Companies Act 2006 Sch 15 Pt 2 paras 13, 14; and by SI 2008/948).

5 Ie any accounting requirements imposed by Part 6 rules.

6 As to the Financial Services Authority see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 4 et seq.

7 Companies (Audit Investigations and Community Enterprise) Act 2004 s 14(1), (2) (s 14(2), (3), (7) amended by the Companies Act 2006 Sch 15 Pt 2 paras 13, 14). An order under the Companies (Audit Investigations and Community Enterprise) Act 2004 s 14 may contain such requirements or other provisions relating to the exercise of functions by the prescribed body as appear to the Secretary of State to be appropriate: s 14(8). As to the order that has been made see the Companies (Defective Accounts and Directors' Reports) (Authorised Person) and Supervision of Accounts and Reports (Prescribed Body) Order 2008, SI 2008/623.

8 Companies (Audit Investigations and Community Enterprise) Act 2004 s 14(3) (as amended: see note 7).

9 Ie any requirements or other provisions specified under the Companies (Audit Investigations and Community Enterprise) Act 2004 s 14(8) (see note 7).

10 Companies (Audit Investigations and Community Enterprise) Act 2004 s 14(4).

11 See the Companies (Audit Investigations and Community Enterprise) Act 2004 s 14(5). In relation to the appointment of a body in respect of any such class or classes, the provisions of s 14(2), (3) (see the text and notes 1-8) are to be read as referring to issuers, or (as the case may be) to periodic accounts or reports, of the class or classes concerned: s 14(6).

12 Ie under the Companies (Audit Investigations and Community Enterprise) Act 2004 s 14(2) (see the text and notes 1-7).

13 Companies (Audit Investigations and Community Enterprise) Act 2004 s 14(7) (as amended: see note 7).

14 For this purpose, 'relevant proceedings' means proceedings brought in or in connection with the exercise of any function by the body as a prescribed body: Companies (Audit Investigations and Community Enterprise) Act 2004 s 14(9).

15 Companies (Audit Investigations and Community Enterprise) Act 2004 s 14(9).

16 Companies (Audit Investigations and Community Enterprise) Act 2004 s 14(10).

17 See the Companies (Audit Investigations and Community Enterprise) Act 2004 s 15 (substituted by SI 2008/948); and the Companies (Audit Investigations and Community Enterprise) Act 2004 s 15B (s 15A-15E added by SI 2008/948). As to restrictions on the disclosure of information so obtained see the Companies (Audit Investigations and Community Enterprise) Act 2004 ss 15, 15C (s 15 as so substituted; and s 15C as so added); as to permitted disclosure of such information see ss 15, 15D (s 15 as so substituted; and s 15D as so added); and as to the power to amend the categories of permitted disclosure see ss 15, 15E (s 15 as so substituted; and s 15E as so added). As to the disclosure of information by tax authorities see ss 15, 15A (s 15 as so substituted; and s 15A as so added).

18 See the Companies (Defective Accounts and Directors' Reports) (Authorised Person) and Supervision of Accounts and Reports (Prescribed Body) Order 2008, SI 2008/623, arts 3, 4. The Financial Reporting Review Panel is established under the articles of association of the Financial Reporting Council Limited (see PARA 699 note 2).

The Companies (Audit Investigations and Community Enterprise) Act 2004 extends the supervisory system relating to the accounts of listed companies (administered by the Financial Reporting Review Panel) to a wider class of accounts and reports and to a wider class of issuers.

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699. Grants to bodies concerned with accounting standards etc.

The Secretary of State¹ may make grants to any body carrying on activities concerned with any of the following matters²:

- 1133 (1) issuing accounting standards³;
- 1134 (2) issuing standards in respect of matters to be contained in reports required to be produced by auditors or company directors⁴;
- 1135 (3) investigating departures from standards within head (1) or head (2) or from the accounting requirements of the Companies Act 2006 or any requirements of directly applicable Community legislation relating to company accounts⁵;
- 1136 (4) taking steps to secure compliance with such standards or requirements⁶;
- 1137 (5) keeping under review periodic accounts and reports that are produced by issuers of listed securities⁷ and are required to comply with any accounting requirements imposed by listing rules⁸;
- 1138 (6) establishing, maintaining or carrying out certain arrangements⁹;
- 1139 (7) exercising certain functions¹⁰ of the Secretary of State¹¹;
- 1140 (8) carrying out investigations into public interest cases¹² arising in connection with the performance of accountancy functions¹³ by members of professional accountancy bodies¹⁴;
- 1141 (9) holding disciplinary hearings relating to members of such bodies following the conclusion of such investigations¹⁵;
- 1142 (10) deciding whether (and, if so, what) disciplinary action should be taken against members of such bodies to whom such hearings related¹⁶;
- 1143 (11) supervising the exercise by such bodies of regulatory functions¹⁷ in relation to their members¹⁸;
- 1144 (12) exercising functions of the Independent Supervisor¹⁹;
- 1145 (13) establishing, maintaining or carrying out certain arrangements²⁰;
- 1146 (14) issuing standards to be applied in actuarial work²¹;
- 1147 (15) issuing standards in respect of matters to be contained in reports or other communications required to be produced or made by actuaries or in accordance with standards within head (14)²²;
- 1148 (16) investigating departures from standards within head (14) or head (15)²³;
- 1149 (17) taking steps to secure compliance with standards within head (14) or head (15)²⁴;
- 1150 (18) carrying out investigations into public interest cases arising in connection with the performance of actuarial functions by members of professional actuarial bodies²⁵;
- 1151 (19) holding disciplinary hearings relating to members of professional actuarial bodies following the conclusion of investigations within head (18)²⁶;
- 1152 (20) deciding whether (and, if so, what) disciplinary action should be taken against members of professional actuarial bodies to whom hearings within head (19) related²⁷;
- 1153 (21) supervising the exercise by professional actuarial bodies of regulatory functions²⁸ in relation to their members²⁹;
- 1154 (22) overseeing or directing any of the matters mentioned above³⁰.

A grant may be made to a body falling within these provisions in respect of any of its activities³¹.

For the purpose of meeting any part of the expenses of a grant-aided body³², the Secretary of State may by regulations provide for a levy to be payable to that body by bodies or persons which are specified, or are of a description specified, in the regulations³³.

A body to whom a grant has been paid by the Secretary of State³⁴, is not liable in damages in respect of certain acts or omissions occurring during the period of 12 months beginning with the date on which the grant was paid³⁵.

1 As to the Secretary of State see PARA 6.

2 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(1). For the purposes of s 16, a body is to be regarded as carrying on any subsidiary activities of the body; and a body's 'subsidiary activities' are activities carried on by any of its subsidiaries or by any body established under its constitution or under the constitution of such a subsidiary: s 16(4). 'Subsidiary' has the meaning given by the Companies Act 2006 s 1159 (see PARA 25): Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(5) (amended by SI 2009/1941). The functions noted in the text are carried out by the Financial Reporting Council (FRC) through its operating bodies (the Accounting Standards Board, the Auditing Practices Board, the Board for Actuarial Standards, the Professional Oversight Board, the Financial Reporting Review Panel and the Accountancy and Actuarial Discipline Board). HM Government has indicated that, as a market-led regulator, the FRC should in future be funded largely by market participants (ie not by grant as envisaged by the Companies (Audit Investigations and Community Enterprise) Act 2004): see 471 HC Official Report (6th series), 6 February 2008, written ministerial statements col 66WS.

Because the Companies (Audit Investigations and Community Enterprise) Act 2004 ss 16-18 govern the operation and funding of bodies concerned with accounting standards, rather than the conduct of companies generally, they are not regarded as 'company law' provisions under the statutory scheme mentioned in PARA 9 note 1.

3 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(a). As to accounting standards see PARA 697.

4 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(b). For these purposes, 'company' means a company as defined in the Companies Act 2006 s 1(1) (see PARA 24): Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(5) (amended by SI 2009/1941). As to reports required to be produced by auditors or company directors see PARAS 693 et seq. As to auditors see PARA 905 et seq; and as to directors see PARA 478 et seq.

5 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(c) (amended by SI 2008/948).

6 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(d).

7 'Listed securities' and 'listing rules' have the meanings given by the Financial Services and Markets Act 2000 s 103(1) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 11, 385): Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(5) (amended by SI 2005/1433). 'Issuer', in relation to listed securities, has the meaning given by the Financial Services and Markets Act 2000 s 102A(6)(b) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385): Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(5) (amended by SI 2005/1433).

8 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(e). See note 7.

9 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(f) (amended by the Companies Act 2006 Sch 14 para 1). The text refers to arrangements within the Companies Act 2006 Sch 10 para 21, 22, 23(1) or 24(1): see PARA 1026.

10 Ie under the Companies Act 2006 Pt 42 (ss 1209-1264): see PARA 957 et seq.

11 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(g) (amended by the Companies Act 2006 Sch 14 para 1).

12 'Public interest cases' means matters which raise or appear to raise important issues affecting the public interest: Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(5).

13 'Accountancy functions' means functions performed as an accountant, whether in the capacity of auditor or otherwise: Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(5).

14 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(h). 'Professional accountancy body' means:

233 (1) a supervisory body which is recognised for the purposes of the Companies Act 2006 Pt 42 (see PARA 975); or

234 (2) a qualifying body, as defined by s 1220 (see PARA 998), which enforces rules as to the performance of accountancy functions by its members,

and references to the members of professional accountancy bodies include persons who, although not members of such bodies, are subject to their rules in performing accountancy functions: Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(5) (amended by the Companies Act 2006 Sch 14 para 1).

15 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(i).

16 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(j).

17 'Regulatory functions', in relation to professional accountancy bodies, means any of the following functions: (1) investigatory or disciplinary functions exercised by such bodies in relation to the performance by their members of accountancy functions; (2) the setting by such bodies of standards in relation to the performance by their members of accountancy functions; and (3) the determining by such bodies of requirements in relation to the education and training of their members: Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(5).

18 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(k).

19 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(ka) (added by the Companies Act 2006 s 1238). The text refers to an Independent Supervisor appointed under the Companies Act 2006 Pt 42 Ch 3 (ss 1226-1238): see PARA 1016 et seq.

20 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(kb) (added by the Companies Act 2006 s 1247). The text refers to arrangements within the Companies Act 2006 Sch 12 para 1 or 2: see PARA 1026.

21 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(l) (substituted by the Companies Act 2006 s 1274).

22 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(m) (s 16(2)(m)-(t) added by the Companies Act 2006 s 1274).

23 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(n) (as added: see note 22).

24 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(o) (as added: see note 22).

25 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(p) (as added: see note 22). 'Professional actuarial body' means the Institute of Actuaries; and the 'members' of a professional actuarial body include persons who, although not members of the body, are subject to its rules in performing actuarial functions: Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(5) (amended by the Companies Act 2006 s 1274).

26 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(q) (as added: see note 22).

27 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(r) (as added: see note 22).

28 'Regulatory functions', in relation to professional actuarial bodies, means any of the following functions: (1) investigatory or disciplinary functions exercised by such bodies in relation to the performance by their members of actuarial functions; (2) the setting by such bodies of standards in relation to the performance by their members of actuarial functions; and (3) the determining by such bodies of requirements in relation to the education and training of their members: Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(5) (amended by the Companies Act 2006 s 1274).

29 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(s) (as added: see note 22).

30 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(2)(t) (as added: see note 22).

31 Companies (Audit Investigations and Community Enterprise) Act 2004 s 16(3).

32 For these purposes, 'grant-aided body' means a body to whom the Secretary of State has paid, or is proposing to pay, grant under s 16 (see the text and notes 1-31); and any expenses of any body carrying on subsidiary activities of the grant-aided body (see note 2) are to be regarded as expenses of the grant-aided body: Companies (Audit Investigations and Community Enterprise) Act 2004 s 17(2).

33 See the Companies (Audit Investigations and Community Enterprise) Act 2004 s 17 (amended by the Companies Act 2006 s 1275). At the date at which this volume states the law, no such regulations had been made.

34 See under the Companies (Audit Investigations and Community Enterprise) Act 2004 s 16 (see the text and notes 1-31).

35 See the Companies (Audit Investigations and Community Enterprise) Act 2004 s 18(1). The exemption applies to anything done, or omitted to be done, for the purposes of or in connection with the carrying on of any activities of the body concerned with any of the matters set out in s 16(2) (see heads (1)-(22) in the text), or the purported carrying on of any such activities, but it does not apply: (1) if the act or omission is shown to have been in bad faith; or (2) so as to prevent an award of damages in respect of the act or omission on the grounds that it was unlawful as a result of the Human Rights Act 1998 s 6(1) (acts of public authorities incompatible with Convention rights: see **JUDICIAL REVIEW** vol 61 (2010) PARA 650; **CONSTITUTIONAL LAW AND HUMAN RIGHTS**): see the Companies (Audit Investigations and Community Enterprise) Act 2004 s 18(2)-(4).

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700. General power to make further provision about accounts and reports.

The Secretary of State¹ may make provision by regulations about:

- 1155 (1) the accounts and reports that companies² are required to prepare;
- 1156 (2) the categories of companies required to prepare accounts and reports of any description;
- 1157 (3) the form and content of the accounts and reports that companies are required to prepare;
- 1158 (4) the obligations of companies and others as regards: (a) the approval of accounts and reports; (b) the sending of accounts and reports to members and others; (c) the laying of accounts and reports before the company in general meeting³; (d) the delivery of copies of accounts and reports to the registrar⁴; and (e) the publication of accounts and reports⁵.

The regulations may amend Part 15 of the Companies Act 2006⁶ by adding, altering or repealing provisions⁷.

The regulations may create criminal offences in cases corresponding to those in which an offence is created by an existing provision of this Part⁸. The regulations may provide for civil penalties in certain circumstances⁹.

1 As to the Secretary of State see PARA 6.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to company meetings see PARA 629 et seq.

4 As to the meaning of 'registrar' see PARA 131 note 2.

5 Companies Act 2006 s 468(1). As to the regulations that have been made under s 468 see the Companies Act 2006 (Amendment) (Accounts and Reports) Regulations 2008, SI 2008/393; and the Companies Act 2006 (Accounts, Reports and Audit) Regulations 2009, SI 2009/1581.

The provisions of the Companies Act 2006 ss 468, 473 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

6 le the Companies Act 2006 Pt 15 (ss 380-474).

7 Companies Act 2006 s 468(2). However, the regulations must not amend (other than consequentially) the provisions of s 393 (accounts to give true and fair view: see PARA 714) or the provisions of Ch 11 (ss 454-462) (revision of defective accounts and reports: see PARA 885 et seq): s 468(3).

Regulations under s 468 or under s 396 (Companies Act individual accounts: see PARA 728), s 404 (Companies Act group accounts: see PARA 784), s 409 (information about related undertakings: see PARA 755), s 412 (information about directors' benefits: see PARA 767), s 416 (contents of directors' report: see PARA 818), s 421 (contents of directors' remuneration report: see PARA 835), s 444 (filing obligations of companies subject to small companies regime: see PARA 871) or s 445 (filing obligations of medium-sized companies: see PARA 873) may make consequential amendments or repeals in other provisions of this Act, or in other enactments: s 473(1), (2). Regulations that:

235 (1) restrict the classes of company which have the benefit of any exemption, exception or special provision;

236 (2) require additional matter to be included in a document of any class; or

237 (3) otherwise render the requirements of Pt 15 more onerous,

are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): ss 473(3), 1290. Otherwise, the regulations are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 473(4), 1289.

8 Companies Act 2006 s 468(4). The maximum penalty for any such offence may not be greater than is provided in relation to an offence under the existing provision: s 468(4).

9 Companies Act 2006 s 468(5). Regulations providing for civil penalties may be made in circumstances corresponding to those within s 453(1) (civil penalty for failure to file accounts and reports: see PARA 884), and the provisions of s 453(2)-(5) apply in relation to any such penalty: s 468(5).

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B. SPECIAL PROVISION MADE FOR CERTAIN TYPES OF COMPANY AND GROUP

(A) BANKING AND INSURANCE COMPANIES AND GROUPS

701. Special provisions for banking and insurance companies.

The directors of a banking company¹ must prepare its individual accounts² in accordance with special statutory provisions³; and there are also special statutory provisions in accordance with which the directors of an insurance company⁴ must prepare its individual accounts⁵. Accounts so prepared must contain a statement that they are prepared in accordance with the special provisions relating to banking companies or to insurance companies, as the case may be⁶.

1 For the purposes of the Companies Acts, 'banking company' means a person who has permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48

(2008) PARA 348 et seq) to accept deposits, other than: (1) a person who is not a company; and (2) a person who has such permission only for the purpose of carrying on another regulated activity in accordance with permission under that Part: Companies Act 2006 s 1164(1), (2). The definition in s 1164(2) must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under s 22, and Sch 2 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 84-85): Companies Act 2006 s 1164(3). As to the meaning of 'regulated activity' see PARA 694 note 23. As to the meaning of 'Companies Acts' see PARA 16. As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'individual accounts' see PARA 716.

3 See the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 5, Sch 2. See also the Bank Accounts Directive (Miscellaneous Banks) Regulations 2008, SI 2008/567.

4 For the purposes of the Companies Acts, 'insurance company' means:

238 (1) an authorised insurance company (Companies Act 2006 s 1165(1), (3)(a)); or

239 (2) any other person (whether incorporated or not) who: (a) carries on insurance market activity; or (b) may effect or carry out contracts of insurance under which the benefits provided by that person are exclusively or primarily benefits in kind in the event of accident to or breakdown of a vehicle (s 1165(1), (3)(b)),

and 'authorised insurance company' means a person (whether incorporated or not) who has permission under the Financial Services and Markets Act 2000 Pt IV (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 348 et seq) to effect or carry out contracts of insurance (Companies Act 2006 s 1165(1), (2)). Neither expression includes a friendly society within the meaning of the Friendly Societies Act 1992 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 2082-2083): Companies Act 2006 s 1165(4).

'Insurance market activity' has the meaning given in the Financial Services and Markets Act 2000 s 316(3) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 743): Companies Act 2006 s 1165(1), (7).

References in s 1165 to contracts of insurance and to the effecting or carrying out of such contracts must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under s 22, and Sch 2 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 84-85): Companies Act 2006 s 1165(1), (8).

5 See the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 6, Sch 3. See also the Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 2008, SI 2008/565.

6 See the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, regs 5(3), 6(3).

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702. Special provisions for banking and insurance groups.

The directors¹ of the parent company² of a banking group³ preparing Companies Act group accounts must do so in accordance with special statutory provisions⁴; and there are also special statutory provisions in accordance with which the directors of the parent company of an insurance group⁵ must prepare Companies Act group accounts⁶.

Accounts so prepared must contain a statement that they are prepared in accordance with the special statutory provisions relating to banking groups or to insurance groups, as the case may be⁷.

1 As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'parent company' see PARA 26 note 2.

3 For the purposes of the Companies Acts, references to a 'banking group' are references to a group where the parent company is a banking company or where: (1) the parent company's principal subsidiary undertakings are wholly or mainly credit institutions; and (2) the parent company does not itself carry on any material business apart from the acquisition, management and disposal of interests in subsidiary undertakings; and for these purposes, 'group' means a parent undertaking and its subsidiary undertakings: Companies Act 2006 s 1164(1), (4). For the purposes of s 1164(4): (a) a parent company's principal subsidiary undertakings are the subsidiary undertakings of the company whose results or financial position would principally affect the figures shown in the group accounts; and (b) the management of interests in subsidiary undertakings includes the provision of services to such undertakings: s 1164(5). As to the meaning of 'banking company' see PARA 701 note 1. As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2. As to the meaning of 'credit institution' see PARA 146 note 22. As to group accounts see PARA 775 et seq. As to the meaning of 'Companies Acts' see PARA 16.

4 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 9(2). The special statutory provisions are the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 as modified by Sch 6 Pt 2. See also the Bank Accounts Directive (Miscellaneous Banks) Regulations 2008, SI 2008/567.

5 For the purposes of the Companies Acts, references to an 'insurance group' are references to a group where the parent company is an insurance company or where: (1) the parent company's principal subsidiary undertakings are wholly or mainly insurance companies; and (2) the parent company does not itself carry on any material business apart from the acquisition, management and disposal of interests in subsidiary undertakings; and for these purposes, 'group' means a parent undertaking and its subsidiary undertakings: Companies Act 2006 s 1165(1), (5). For the purposes of s 1165(5): (a) a parent company's principal subsidiary undertakings are the subsidiary undertakings of the company whose results or financial position would principally affect the figures shown in the group accounts; and (b) the management of interests in subsidiary undertakings includes the provision of services to such undertakings: s 1165(6). As to the meaning of 'insurance company' see PARA 701 note 4.

6 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 9(3). The special statutory provisions are the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 as modified by Sch 6 Pt 3. See also the Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 2008, SI 2008/565.

7 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 9(4).

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703. Modification of disclosure requirements in relation to banking company or group.

In relation to a banking company¹ or banking group², the statutory requirements relating to the disclosure of information in respect of related undertakings³ have effect subject to special additional provisions⁴.

1 As to the meaning of 'banking company' see PARA 701 note 1.

2 As to the meaning of 'banking group' see PARA 702 note 3.

3 I.e the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pts 1-3: see PARA 755 et seq. As to the meaning of 'undertaking' see PARA 26 note 2.

4 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 7, Sch 4 Pt 4 para 23(1). The additional provisions are those contained in Sch 4 Pt 4 para 23.

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704. Power to make provision for banking partnerships.

The Secretary of State¹ may by regulations apply to banking partnerships², subject to such exceptions, adaptations and modifications as he considers appropriate, the statutory provisions relating to accounts³ which apply to banking companies⁴.

1 As to the Secretary of State see PARA 6.

2 For these purposes, a 'banking partnership' means a partnership which has permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 348 et seq): Companies Act 2006 s 470(2). However, a partnership is not a banking partnership if it has permission to accept deposits only for the purpose of carrying on another regulated activity in accordance with that permission: s 470(2). As to the meaning of 'regulated activity' see PARA 694 note 23. Expressions used in s 470 that are also used in the provisions regulating activities under the Financial Services and Markets Act 2000 have the same meaning as they do in those provisions: Companies Act 2006 s 470(3). See the Financial Services and Markets Act 2000 s 22, orders made under that provision, and Sch 2 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 84-85); applied by the Companies Act 2006 s 470(3).

3 Ie the provisions of the Companies Act 2006 Pt 15 (ss 380-474) and of regulations made under Pt 15.

4 Companies Act 2006 s 470(1). Such regulations are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): ss 470(4), 1290. As to the meaning of 'banking company' see PARA 701 note 1. At the date at which this volume states the law, no regulations had been made under s 470.

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(B) PARTNERSHIPS

705. Preparation of accounts of qualifying partnerships.

Special provision is made in relation to qualifying partnerships¹, the effect of which is to apply the statutory provisions relating to accounts², with modifications, to such partnerships³.

1 A partnership which is formed under the law of any part of the United Kingdom is a 'qualifying partnership' if each of its members is: (1) a limited company; or (2) an unlimited company, or a Scottish partnership, each of whose members is a limited company: Partnerships (Accounts) Regulations 2008, SI 2008/569, regs 2(1), 3(1). Where the members of a qualifying partnership include:

240 (a) an unlimited company, or a Scottish partnership, each of whose members is a limited company; or

- 241 (b) a member of another partnership each of whose members is: (i) a limited company; or (ii) an unlimited company, or a Scottish partnership, each of whose members is a limited company,

any reference to the members of the qualifying partnership includes a reference to the members of that company, or other partnership: reg 3(2). Any reference in reg 3(1) or reg 3(2) to a limited company, an unlimited company, or a partnership includes a reference to any comparable undertaking incorporated in or formed under the law of any country or territory outside the United Kingdom: reg 3(4). As to the meaning of 'United Kingdom' see PARA 1 note 5. For these purposes, 'limited company' means a company limited by shares or limited by guarantee: reg 2(1). As to the meanings of 'company limited by shares' and 'company limited by guarantee' see PARA 102.

For these purposes, any reference to the members of a qualifying partnership is to be construed, in relation to a limited partnership, as a reference to its general partner or partners: reg 2(2). 'Limited partnership' means a partnership formed in accordance with the Limited Partnerships Act 1907 (see **PARTNERSHIP** vol 79 (2008) PARA 218 et seq); and 'general partner' has the same meaning as in the Limited Partnerships Act 1907 (see **PARTNERSHIP** vol 79 (2008) PARA 219); Partnerships (Accounts) Regulations 2008, SI 2008/569, reg 2(1).

The requirements of the Partnerships (Accounts) Regulations 2008, SI 2008/569, apply without regard to any change in the members of a qualifying partnership which does not result in it ceasing to be such a partnership: reg 3(3).

2 Ie the Companies Act 2006 Pt 15 (ss 380-474), the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, and the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409.

3 See the Partnerships (Accounts) Regulations 2008, SI 2008/569. See also **PARTNERSHIP** vol 79 (2008) PARAS 135, 155.

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(C) LIMITED LIABILITY PARTNERSHIPS

706. Preparation of accounts of limited liability partnerships.

Special provision is made in relation to limited liability partnerships¹, the effect of which is to apply the statutory provisions relating to accounts², with modifications, to such partnerships³.

1 As to limited liability partnerships see **PARTNERSHIP** vol 79 (2008) PARA 234 et seq.

2 Ie the Companies Act 2006 Pt 15 (ss 380-474), the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, and the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409.

3 See the Limited Liability Partnerships Act 2000 ss 15, 17; the Limited Liability Partnerships (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008, SI 2008/1911; the Small Limited Liability Partnerships (Accounts) Regulations 2008, SI 2008/1912; and the Large and Medium-sized Limited Liability Partnerships (Accounts) Regulations 2008, SI 2008/1913. See also **PARTNERSHIP** vol 79 (2008) PARA 245.

UPDATE

706 Preparation of accounts of limited liability partnerships

NOTE 3--SI 2008/1911 amended: SI 2009/1804.

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(D) INVESTMENT COMPANIES

707. Special provision where the company is an investment company.

The general provisions applicable to a revaluation reserve¹ do not apply to the amount of any profit or loss arising from a determination of the value of any investments of an investment company² on any basis applicable to investments falling to be included in either of the statutory balance sheet formats³ under the alternative accounting rules⁴.

Any provisions made⁵ in the case of an investment company in respect of the diminution in value of any fixed asset investments⁶ need not be charged to the company's profit and loss account⁷ provided they are:

- 1159 (1) charged against any reserve account to which any amount so excluded from the general provisions applicable to a revaluation reserve has been credited; or
- 1160 (2) shown as a separate item in the company's balance sheet under the sub-heading 'other reserves'⁸.

Any distribution made by an investment company which reduces the amount of its net assets⁹ to less than the aggregate of its called up share capital¹⁰ and undistributable reserves¹¹ must be disclosed in a note to the company's accounts¹².

¹ I.e. the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 35: see PARA 722.

² For these purposes, a company is to be treated as an investment company in relation to any financial year of the company if: (1) during the whole of that year it was an investment company as defined in the Companies Act 2006 s 833 (see PARA 1394); and (2) it was not at any time during that year prohibited from making a distribution by virtue of s 832 due to either or both of the conditions specified in s 832(5)(a) or (b) (see PARA 1394): Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 5 para 75(3). As to the meaning of 'company' see PARA 24. As to a company's financial year see PARA 711.

³ I.e. under item B III: see PARAS 730-731.

⁴ Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 5 para 74(1). As to the alternative accounting rules see PARA 722.

⁵ I.e. by virtue of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 19(1) or (2): see PARA 720.

⁶ For these purposes, 'fixed asset investment' means any asset falling to be included under any item shown in the company's balance sheet under the sub-division 'investments' under the general item 'fixed assets': Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 5 para 74(3). As to the meaning of 'balance sheet' see PARA 715. As to the meaning of 'fixed assets' see PARA 720 note 2.

⁷ As to the meaning of 'profit and loss account' see PARA 715.

⁸ Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 5 para 74(2).

9 For these purposes, a company's net assets are the aggregate of its assets less the aggregate of its liabilities (including any provision for liabilities within the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 9 para 2 (see PARA 1393) that is made in Companies Act accounts and any provision that is made in IAS accounts): Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 5 para 75(2). As to the meanings of 'Companies Act accounts' and 'IAS accounts' see PARAS 717, 776.

10 As to the meaning of 'called up share capital' see PARA 1048.

11 For these purposes, 'undistributable reserves' has the meaning given by the Companies Act 2006 s 831(4) (see PARA 170 note 5): Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 5 para 75(2).

12 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 5 para 75(1).

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(ii) Accounting Records

708. Duty to keep accounting records.

Every company¹ must keep adequate accounting records². 'Adequate accounting records' means records that are sufficient: (1) to show and explain the company's transactions; (2) to disclose with reasonable accuracy, at any time, the financial position of the company at that time; and (3) to enable the directors³ to ensure that any accounts required to be prepared comply with the statutory requirements⁴.

Accounting records must, in particular, contain:

- 1161 (a) entries from day to day of all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place; and
- 1162 (b) a record of the assets and liabilities of the company⁵.

If the company's business involves dealing in goods, the accounting records must contain:

- 1163 (i) statements of stock held by the company at the end of each financial year of the company⁶;
- 1164 (ii) all statements of stocktakings from which any statement of stock as is mentioned in head (i) has been or is to be prepared; and
- 1165 (iii) except in the case of goods sold by way of ordinary retail trade, statements of all goods sold and purchased, showing the goods and the buyers and sellers in sufficient detail to enable all these to be identified⁷.

A parent company⁸ that has a subsidiary undertaking⁹ in relation to which the above requirements do not apply must take reasonable steps to secure that the undertaking keeps such accounting records as to enable the directors of the parent company to ensure that any accounts required to be prepared¹⁰ comply with the statutory requirements¹¹.

If a company fails to comply with any provision relating to the duty to keep accounting records¹², an offence is committed by every officer of the company who is in default¹³. It is a defence for a person charged with such an offence to show that he acted honestly and that in the circumstances in which the company's business was carried on the default was excusable¹⁴.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 Companies Act 2006 s 386(1). An accountant may not exercise a lien for unpaid fees over the accounting records of a company which are required by statute to be kept in specific places for certain periods available for inspection: *DTC (CNC) Ltd v Gary Sargeant & Co (a firm)* [1996] 2 All ER 369, [1996] 1 WLR 797, [1996] 1 BCLC 529.

Non-compliance with this duty may form the basis for disqualification: see *Re Rocksteady Services Ltd, Secretary of State for Trade and Industry v Staton* [2001] 1 BCLC 84; *Re Galeforce Pleating Co Ltd* [1999] 2 BCLC 704; *Secretary of State for Trade and Industry v Arif* [1997] 1 BCLC 34, [1996] BCC 586; *Re Firedart Ltd, Official Receiver v Fairall* [1994] 2 BCLC 340; *Re Swift 736 Ltd, Secretary of State for Trade and Industry v Ettinger* [1993] BCLC 896, [1993] BCC 312, CA; and PARA 1595 et seq. Non-compliance with this duty may also be a factor in justifying winding up the company in the public interest: *Secretary of State for Trade and Industry v Leyton Housing Trustees Ltd* [2000] 2 BCLC 808.

The provisions of the Companies Act 2006 ss 386, 387 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 As to the meaning of 'director' see PARA 478.

4 Companies Act 2006 s 386(2). The statutory requirements referred to in the text are those of the Companies Act 2006 and regulations and orders made under it (and, where applicable, of the IAS Regulation art 4): see the Companies Act 2006 ss 386(2), 1172. As to the meaning of 'IAS Regulation' see PARA 693 note 1.

5 Companies Act 2006 s 386(3).

6 As to a company's financial year see PARA 711.

7 Companies Act 2006 s 386(4).

8 As to the meaning of 'parent company' see PARA 26 note 2.

9 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

10 Ie under the Companies Act 2006 Pt 15 (ss 380-474).

11 Companies Act 2006 s 386(5). See note 4.

12 Ie any provision of the Companies Act 2006 s 386: see the text and notes 1-11.

13 Companies Act 2006 s 387(1). As to the meaning of 'officer' see PARA 607; and as to the liability of an officer in default see PARA 315.

A person guilty of an offence under s 387 is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine (or both); and on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or both): s 387(3). As to the statutory maximum see PARA 1622.

14 Companies Act 2006 s 387(2).

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709. Where and for how long records to be kept.

A company's accounting records¹ must be kept at its registered office² or such other place as the directors³ think fit, and must at all times be open to inspection by the company's officers⁴.

If accounting records are kept at a place outside the United Kingdom⁵, accounts and returns with respect to the business dealt with in the accounting records so kept must be sent to, and kept at, a place in the United Kingdom, and must at all times be open to such inspection⁶. The accounts and returns to be sent to the United Kingdom must be such as to: (1) disclose with reasonable accuracy the financial position of the business in question at intervals of not more than six months; and (2) enable the directors to ensure that the accounts required to be prepared⁷ comply with the statutory requirements⁸.

Accounting records that a company is required⁹ to keep must be preserved by it:

- 1166 (a) in the case of a private company¹⁰, for three years from the date on which they are made;
- 1167 (b) in the case of a public company¹¹, for six years from the date on which they are made¹².

If a company fails to comply with any of the requirements as to keeping of accounting records¹³, an offence is committed by every officer of the company who is in default¹⁴. It is a defence for a person charged with such an offence to show that he acted honestly and that in the circumstances in which the company's business was carried on the default was excusable¹⁵.

An officer of a company commits an offence if he: (i) fails to take all reasonable steps for securing compliance by the company with the provision relating to the period for which records are to be preserved¹⁶; or (ii) intentionally causes any default by the company under that provision¹⁷.

1 As to the duty to keep accounting records see PARA 708. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the registered office see PARA 129.

3 As to the meaning of 'director' see PARA 478.

4 Companies Act 2006 s 388(1). As to the meaning of 'officer' see PARA 607.

See *Oxford Legal Group Ltd v Sibbasbridge Services plc* [2008] EWCA Civ 387, [2008] 2 BCLC 381, (2008) Times, 15 May (affg *Oxford Legal Group Ltd v Sibbasbridge Services plc* [2007] EWHC 2265 (Ch), [2007] All ER (D) 129 (Oct)), where it was held that there was nothing to support the view that the right to inspect under the Companies Act 1985 s 222 (see now the Companies Act 2006 s 388) could be invoked for a purpose which went beyond enabling the director to carry out his role as such, nor was there anything which supported the proposition that the circumstances in which the court would refuse to enforce the right to inspect were confined to those in which the purpose for which the director sought inspection was to injure the company; it was not open to the court to refuse its assistance in a case where it had no reason to think that the right to inspect was being used for an improper purpose, and the court had to be astute to ensure that a director's right to inspect the books and documents of the company was not rendered nugatory by delay whilst the court embarked on an examination of his motives for seeking to exercise that right.

The provisions of the Companies Act 2006 ss 388, 389 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 As to the meaning of 'United Kingdom' see PARA 1 note 5.

6 Companies Act 2006 s 388(2).

7 le under the Companies Act 2006 Pt 15 (ss 380-474).

8 Companies Act 2006 s 388(3). The statutory requirements referred to in the text are those of the Companies Act 2006 and regulations and orders made under it (and, where applicable, of the IAS Regulation art 4): see the Companies Act 2006 ss 388(3), 1172. As to the meaning of 'IAS Regulation' see PARA 693 note 1.

9 le by the Companies Act 2006 s 386: see PARA 708.

10 As to the meaning of 'private company' see PARA 102.

11 As to the meaning of 'public company' see PARA 102.

12 Companies Act 2006 s 388(4). Section 388(4) is subject to any provision contained in rules made under the Insolvency Act 1986 s 411 (company insolvency rules: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1041) or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 359: Companies Act 2006 s 388(5).

13 le any provision of the Companies Act 2006 s 388(1)-(3): see the text and notes 1-8.

14 Companies Act 2006 s 389(1). As to the liability of an officer in default see PARA 315.

A person guilty of an offence under s 389 is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine (or both); and on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or both): s 389(4). As to the statutory maximum see PARA 1622.

15 Companies Act 2006 s 389(2).

16 le the Companies Act 2006 s 388(4): see the text and notes 9-12.

17 Companies Act 2006 s 389(3). See note 14.

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710. Inspection of accounting records.

In view of the statutory duties imposed on directors in relation to accounts¹, directors have long had a common law right to inspect all the company's documents² and they have a statutory right of inspection conferred by the Companies Act 2006³.

As a rule shareholders have no right to inspect the company's books of account unless the articles so provide⁴. Beneficiaries of shares held by directors as trustees cannot require the trustee directors to disclose information obtained by them in the exercise of their powers of inspection as directors⁵.

Absent members of a company are affected by the information furnished by the directors at a general meeting and are bound by the proceedings as to matters within its competence⁶.

1 See PARAS 708-709, 711 et seq.

2 *Burn v London and South Wales Coal Co* [1890] WN 209; *Conway v Petronius Clothing Co Ltd* [1978] 1 All ER 185, [1978] 1 WLR 72 (motion for inspection adjourned pending outcome of meeting to consider director's removal from office).

3 See the Companies Act 2006 s 388(1); and PARA 709. The statutory right of inspection conferred by the Companies Act 1948 s 147(3) was repealed by the Companies Act 1976 s 42(2), Sch 3 and not replaced until the Companies Act 2006 did so. The statutory right conferred by the 1948 Act carried the right to be assisted by an accountant: *Healey v Healey Homes Ltd* [1973] IR 309. A provision of the company's articles of association,

directing directors to cause accounts to be laid before the company, prepared in accordance with the statutory provisions, does not confer on an individual shareholder the right to compel compliance with it: *Devlin v Slough Estates Ltd* [1983] BCLC 497.

4 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 Pt 5 art 50, which provides that, except as provided by law or authorised by the directors or an ordinary resolution of the company, no person is entitled to inspect any of the company's accounting or other records or documents merely by virtue of being a shareholder. As to private companies limited by guarantee see reg 3, Sch 2 Pt 4 art 36; and as to public companies see reg 4, Sch 3 Pt 5 art 83. As to articles of association see PARA 228. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq. As to the right of inspection after the commencement of a winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1086.

5 *Butt v Kelson* [1952] Ch 197, sub nom *Re Butt, Butt v Kelson* [1952] 1 All ER 167, CA; cf *Re Whichelow, Bradshaw v Orpen* [1953] 2 All ER 1558, [1954] 1 WLR 5.

6 *Re Norwich Yarn Co, ex p Bignold* (1856) 22 Beav 143 at 165; *Evans v Smallcombe* (1868) LR 3 HL 249. As to company meetings see PARA 629 et seq.

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(iii) Financial Year and Accounting Reference Periods

711. Company's financial year.

A company's 'financial year' is determined as follows¹.

Its first financial year begins with the first day of its first accounting reference period²; and ends with the last day of that period or such other date, not more than seven days before or after the end of that period, as the directors may determine³.

Subsequent financial years begin with the day immediately following the end of the company's previous financial year; and end with the last day of its next accounting reference period or such other date, not more than seven days before or after the end of that period, as the directors may determine⁴.

In relation to an undertaking⁵ that is not a company, references in the Companies Act 2006 to its financial year are to any period in respect of which a profit and loss account⁶ of the undertaking is required to be made up (by its constitution⁷ or by the law under which it is established), whether that period is a year or not⁸.

The directors of a parent company⁹ must secure that, except where in their opinion there are good reasons against it, the financial year of each of its subsidiary undertakings¹⁰ coincides with the company's own financial year¹¹.

1 Companies Act 2006 s 390(1). As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

The provisions of the Companies Act 2006 s 390 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. Where an overseas company, or a credit or financial institution to which the Companies Act 2006 s 1050 applies (see PARA 1831), is not required to prepare and disclose accounts under parent law, s 390 is applied with modifications: see the Overseas Companies Regulations 2009, SI 2009/1801, regs 37, 52; and PARA 1830 et seq. As to the meaning of 'overseas company' see PARA 1824.

- 2 As to a company's accounting reference period see PARA 712.
- 3 Companies Act 2006 s 390(2). As to the meaning of 'director' see PARA 478.
- 4 Companies Act 2006 s 390(3).
- 5 As to the meaning of 'undertaking' see PARA 26 note 2.
- 6 As to the meaning of 'profit and loss account' see PARA 715.
- 7 As to a company's constitution see PARA 227.
- 8 Companies Act 2006 s 390(4).
- 9 As to the meaning of 'parent company' see PARA 26 note 2.
- 10 As to the meaning of 'subsidiary undertaking' see PARA 26.
- 11 Companies Act 2006 s 390(5).

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712. Accounting reference periods and accounting reference date.

A company's accounting reference periods are determined according to its accounting reference date in each calendar year¹.

The accounting reference date of a company incorporated in Great Britain² before 1 April 1996 is the date specified by notice given³ within nine months of incorporation to the registrar⁴. Failing such notice, the accounting reference date of such a company is:

- 1168 (1) in the case of a company incorporated before 1 April 1990, 31 March; and
- 1169 (2) in the case of a company incorporated on or after 1 April 1990, the last day of the month in which the anniversary of its incorporation falls⁵.

The accounting reference date of a company incorporated in Great Britain on or after 1 April 1996 and before the commencement of the Companies Act 2006, or incorporated after the commencement of that Act, is the last day of the month in which the anniversary of its incorporation falls⁶.

A company's first accounting reference period is the period of more than six months, but not more than 18 months, beginning with the date of its incorporation and ending with its accounting reference date⁷. Its subsequent accounting reference periods are successive periods of 12 months beginning immediately after the end of the previous accounting reference period and ending with its accounting reference date⁸.

In certain circumstances, a company may alter its accounting reference date⁹.

1 Companies Act 2006 s 391(1). As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

The provisions of the Companies Act 2006 s 391 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of

'unregistered company' see PARA 1665. Where an overseas company, or a credit or financial institution to which the Companies Act 2006 s 1050 applies (see PARA 1831), is not required to prepare and disclose accounts under parent law, s 391 is applied with modifications: see the Overseas Companies Regulations 2009, SI 2009/1801, regs 37, 52; and PARA 1830 et seq. As to the meaning of 'overseas company' see PARA 1824.

2 As to the meaning of 'Great Britain' see PARA 1 note 5.

3 In accordance with the Companies Act 1985 s 224(2) (now repealed). As to the meaning of 'registrar' see PARA 131 note 2.

4 Companies Act 2006 s 391(2)(a).

5 Companies Act 2006 s 391(2)(b).

6 Companies Act 2006 s 391(4).

7 Companies Act 2006 s 391(5).

8 Companies Act 2006 s 391(6).

9 See the Companies Act 2006 s 391(7), which provides that s 391 is to have effect subject to the provisions of s 392 (see PARA 713).

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713. Alteration of accounting reference date.

A company¹ may by notice given to the registrar² specify a new accounting reference date³ having effect in relation to: (1) the company's current accounting reference period⁴ and subsequent periods⁵; or (2) the company's previous accounting reference period⁶ and subsequent periods⁷.

The notice must state whether the current or previous accounting reference period:

- 1170 (a) is to be shortened, so as to come to an end on the first occasion on which the new accounting reference date falls or fell after the beginning of the period; or
- 1171 (b) is to be extended, so as to come to an end on the second occasion on which that date falls or fell after the beginning of the period⁸.

A notice extending a company's current or previous accounting reference period is not effective if given less than five years after the end of an earlier accounting reference period of the company that was extended under these provisions⁹; but this does not apply: (i) to a notice given by a company that is a subsidiary undertaking¹⁰ or parent undertaking¹¹ of another EEA undertaking¹² if the new accounting reference date coincides with that of the other EEA undertaking or, where that undertaking is not a company, with the last day of its financial year¹³; or (ii) where the company is in administration¹⁴; or (iii) where the Secretary of State¹⁵ directs that it should not apply, which he may do with respect to a notice that has been given or that may be given¹⁶.

An accounting reference period may not be extended so as to exceed 18 months and a notice under these provisions is ineffective if the current or previous accounting reference period as extended in accordance with the notice would exceed that limit¹⁷.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'registrar' see PARA 131 note 2.

3 As to the accounting reference date see PARA 712.

4 As to the accounting reference period see PARA 712.

5 Companies Act 2006 s 392(1)(a).

The provisions of the Companies Act 2006 s 392 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. Where an overseas company, or a credit or financial institution to which the Companies Act 2006 s 1050 applies (see PARA 1831), is not required to prepare and disclose accounts under parent law, s 392 is applied with modifications: see the Overseas Companies Regulations 2009, SI 2009/1801, regs 37, 52; and PARA 1830 et seq. As to the meaning of 'overseas company' see PARA 1824.

6 A company's 'previous accounting reference period' means the one immediately preceding its current accounting reference period: Companies Act 2006 s 392(1).

7 Companies Act 2006 s 392(1)(b). A notice under s 392 may not be given in respect of a previous accounting reference period if the period for filing accounts and reports for the financial year determined by reference to that accounting reference period has already expired: s 392(4). As to a company's financial year see PARA 711.

8 Companies Act 2006 s 392(2).

9 Companies Act 2006 s 392(3).

10 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

11 As to the meaning of 'parent undertaking' see PARA 26.

12 For these purposes, 'EEA undertaking' means an undertaking established under the law of any part of the United Kingdom or the law of any other EEA state: Companies Act 2006 s 392(6). As to the meaning of 'undertaking' see PARA 26 note 2. As to the meaning of 'United Kingdom' see PARA 1 note 5; and as to the meaning of 'EEA state' see PARA 29 note 5.

13 Companies Act 2006 s 392(3)(a).

14 Companies Act 2006 s 392(3)(b). The text refers to administration under the Insolvency Act 1986 Pt II (s 8) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 145 et seq) or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Pt 3: see the Companies Act 2006 s 392(3)(b).

15 As to the Secretary of State see PARA 6.

16 Companies Act 2006 s 392(3)(c).

17 Companies Act 2006 s 392(5). This does not apply where the company is in administration under the Insolvency Act 1986 Pt II (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 145 et seq) or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Pt 3: Companies Act 2006 s 392(5).

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(iv) Annual Accounts

A. IN GENERAL

714. Accounts to give true and fair view.

The directors of a company¹ must not approve accounts² unless they are satisfied that they give a true and fair view³ of the assets, liabilities, financial position and profit or loss:

- 1172 (1) in the case of the company's individual accounts⁴, of the company⁵;
- 1173 (2) in the case of the company's group accounts⁶, of the undertakings included in the consolidation⁷ as a whole, so far as concerns members of the company⁸.

The auditor of a company in carrying out his functions under the Companies Act 2006⁹ in relation to the company's annual accounts¹⁰ must have regard to the directors' duty described above¹¹.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq. As to the meaning of 'director' see PARA 478.

2 See for the purposes of the Companies Act 2006 Pt 15 Ch 4 (ss 393-414).

3 As to giving a true and fair view see further the Companies Act 2006 ss 396, 404; and PARAS 728, 784. There has been no statutory definition of 'true and fair' and the most authoritative statements as to the meaning of 'true and fair' have been legal opinions, currently made available by the Financial Reporting Council on their website, which, at the date at which this volume states the law, is <http://www.frc.org.uk>. See *Macquarie Internationale Investments Ltd v Glencore UK Ltd* [2009] EWHC 2267 (Comm) at [154]-[170], [2009] All ER (D) 123 (Sep) at [164]-[170] per Andrew Smith J. As to the Financial Reporting Council see PARA 699 note 2. See also *Lloyd Cheyham & Co Ltd v Littlejohn & Co* [1987] BCLC 303 (while the Statements of Standard [Accounting] Practice are not rigid rules, they are very strong evidence of what is the proper standard to be adopted).

4 As to the meaning of 'individual accounts' see PARA 716.

5 Companies Act 2006 s 393(1)(a).

The provisions of the Companies Act 2006 s 393 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

6 As to group accounts see PARA 775 et seq.

7 As to the meaning of 'undertaking' see PARA 26 note 2; and as to the meaning of 'included in the consolidation' see PARA 775 note 12.

8 Companies Act 2006 s 393(1)(b).

9 As to auditors and audit see PARA 905 et seq.

10 As to the meaning of 'annual accounts' see PARA 715.

11 Companies Act 2006 s 393(2).

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715. Interpretation of references to 'annual accounts', 'balance sheet' and 'profit and loss account'.

For the purposes of Part 15 of the Companies Act 2006¹, 'annual accounts' of a company², in relation to a financial year³, means: (1) the company's individual accounts for that year⁴; and (2) any group accounts prepared by the company for that year⁵. This is subject to the provision that allows an option to omit the individual profit and loss account from annual accounts where information is given in group accounts⁶.

In the case of an unquoted company⁷, its 'annual accounts and reports' for a financial year are: (a) its annual accounts⁸; (b) the directors' report⁹; and (c) the auditor's report on those accounts and the directors' report (unless the company is exempt from audit)¹⁰. In the case of a quoted company¹¹, its 'annual accounts and reports' for a financial year are: (i) its annual accounts¹²; (ii) the directors' remuneration report¹³; (iii) the directors' report¹⁴; and (iv) the auditor's report on those accounts, on the auditable part of the directors' remuneration report and on the directors' report¹⁵.

References in Part 15 of the Companies Act 2006 to a company's 'annual accounts', or to a 'balance sheet' or 'profit and loss account'¹⁶, include notes to the accounts giving information which is required by any provision of the Act or international accounting standards, and required or allowed by any such provision to be given in a note to company accounts¹⁷.

1 In the Companies Act 2006 Pt 15 (ss 380-474).

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to a company's financial year see PARA 711.

4 Companies Act 2006 s 471(1)(a). As to the meaning of 'individual accounts' see PARA 716.

The provisions of the Companies Act 2006 ss 471, 472, 474 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. Where an overseas company, or a credit or financial institution to which the Companies Act 2006 s 1050 applies (see PARA 1831), is not required to prepare and disclose accounts under parent law, ss 471, 472, 474 are applied with modifications: see the Overseas Companies Regulations 2009, SI 2009/1801, regs 42, 57; and PARA 1830 et seq. As to the meaning of 'overseas company' see PARA 1824.

5 Companies Act 2006 s 471(1)(b). As to group accounts see PARA 775 et seq.

6 Companies Act 2006 s 471(1). The provision referred to in the text is s 408: see PARA 778.

7 As to unquoted companies see PARA 696.

8 Companies Act 2006 s 471(2)(a).

9 Companies Act 2006 s 471(2)(b). As to the directors' report see PARA 816 et seq. As to the meaning of 'director' see PARA 478.

10 Companies Act 2006 s 471(2)(c). As to auditors and audit see PARA 905 et seq; and as to exemption from audit see PARAS 908-911.

11 As to quoted companies see PARA 696.

12 Companies Act 2006 s 471(3)(a).

13 Companies Act 2006 s 471(3)(b). As to the directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq.

14 Companies Act 2006 s 471(3)(c).

15 Companies Act 2006 s 471(3)(d). As to the auditor's report see PARA 924 et seq.

16 For the purposes of the Companies Act 2006 Pt 15, 'profit and loss account', in relation to a company that prepares IAS accounts, includes an income statement or other equivalent financial statement required to be

prepared by international accounting standards: s 474(1). As to the meaning of 'IAS accounts' see PARAS 717, 776; and as to the meaning of 'international accounting standards' see PARA 693 note 1.

In the case of an undertaking not trading for profit, any reference in Pt 15 to a profit and loss account is to an income and expenditure account; and references to profit and loss and, in relation to group accounts, to a consolidated profit and loss account are to be construed accordingly: s 474(2). As to the meaning of 'undertaking' see PARA 26 note 2. As to group accounts see PARA 775 et seq.

17 Companies Act 2006 s 472(2). As to notes to the accounts see PARAS 738 et seq, 792 et seq.

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B. INDIVIDUAL ACCOUNTS EXCLUDING BANKING AND INSURANCE COMPANIES

(A) GENERAL REQUIREMENTS

716. Duty to prepare individual company accounts.

The directors¹ of every company² must prepare accounts for the company for each of its financial years³; and those accounts are referred to as the company's 'individual accounts'⁴.

1 As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to a company's financial year see PARA 711.

4 Companies Act 2006 s 394. As to the applicable accounting framework see PARA 717. As to the form and content of Companies Act individual accounts see PARA 728 et seq. As to group accounts see PARA 775 et seq.

The provisions of the Companies Act 2006 s 394 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. Where an overseas company, or a credit or financial institution to which the Companies Act 2006 s 1050 applies (see PARA 1831), is not required to prepare and disclose accounts under parent law, s 394 is applied with modifications: see the Overseas Companies Regulations 2009, SI 2009/1801, regs 38, 53; and PARA 1830 et seq. As to the meaning of 'overseas company' see PARA 1824.

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717. Applicable accounting framework.

A company's individual accounts¹ may be prepared in accordance with the relevant provision of the Companies Act 2006² ('Companies Act individual accounts'), or in accordance with

international accounting standards ('IAS individual accounts')³. Where the directors⁴ of a company prepare IAS individual accounts, they must state in the notes to the accounts that the accounts have been prepared in accordance with international accounting standards⁵.

After the first financial year⁶ in which the directors of a company prepare IAS individual accounts (the 'first IAS year'), all subsequent individual accounts of the company must be prepared in accordance with international accounting standards unless there is a relevant change of circumstance⁷. There is a relevant change of circumstance if, at any time during or after the first IAS year:

- 1174 (1) the company becomes a subsidiary undertaking⁸ of another undertaking that does not prepare IAS individual accounts⁹;
- 1175 (2) the company ceases to be a subsidiary undertaking¹⁰;
- 1176 (3) the company ceases to be a company with securities admitted to trading on a regulated market¹¹ in an EEA state¹²; or
- 1177 (4) a parent undertaking¹³ of the company ceases to be an undertaking with securities admitted to trading on a regulated market in an EEA state¹⁴.

If, having changed to preparing Companies Act individual accounts following a relevant change of circumstance, the directors again prepare IAS individual accounts for the company, the above provisions¹⁵ apply again as if the first financial year for which such accounts are again prepared were the first IAS year¹⁶.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq. As to the meaning of 'individual accounts' see PARA 716.

2 I.e. the Companies Act 2006 s 396: see PARA 728.

3 Companies Act 2006 s 395(1). This is subject to the provisions of s 395(2)-(5) (see the text and notes 6-16) and of s 407 (consistency of financial reporting within group: see PARA 777). As to the meaning of 'international accounting standards' see PARA 693 note 1. Note that the individual accounts of a company that is a charity must be Companies Act individual accounts: s 395(2). As to charities generally see **CHARITIES**.

The provisions of the Companies Act 2006 ss 395, 397 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. Where an overseas company, or a credit or financial institution to which the Companies Act 2006 s 1050 applies (see PARA 1831), is not required to prepare and disclose accounts under parent law, ss 395, 397 are applied with modifications: see the Overseas Companies Regulations 2009, SI 2009/1801, regs 38, 53; and PARA 1830 et seq. As to the meaning of 'overseas company' see PARA 1824.

4 As to the meaning of 'director' see PARA 478.

5 Companies Act 2006 s 397. As to notes to the accounts see PARA 738 et seq.

6 As to a company's financial year see PARA 711.

7 Companies Act 2006 s 395(3).

8 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

9 Companies Act 2006 s 395(4)(a).

10 Companies Act 2006 s 395(4)(aa) (added by SI 2008/393).

11 As to the meaning of 'regulated market' see PARA 334 note 11.

12 Companies Act 2006 s 395(4)(b). As to the meaning of 'EEA state' see PARA 29 note 5.

13 As to the meaning of 'parent undertaking' see PARA 26.

- 14 Companies Act 2006 s 395(4)(c).
 15 ie the Companies Act 2006 s 395(3), (4): see the text and notes 6-14.
 16 Companies Act 2006 s 395(5).

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(B) ACCOUNTING PRINCIPLES AND RULES

(a) General Principles

718. Accounting principles.

Companies Act individual accounts¹ must comply with the statutory provisions² as to the form and content of the balance sheet and profit and loss account³, and additional information to be provided by way of notes to the accounts⁴.

The amounts to be included in respect of all items shown in a company's accounts must be determined in accordance with the principles below⁵. If, however, it appears to the directors⁶ of a company that there are special reasons for departing from any of those principles in preparing the company's accounts in respect of any financial year⁷, they may do so, but particulars of the departure, the reasons for it and its effect must be given in a note to the accounts⁸.

The principles determining the amounts to be so included are:

- 1178 (1) the company is to be presumed to be carrying on business as a going concern⁹;
 1179 (2) accounting policies must be applied consistently within the same accounts and from one financial year to the next¹⁰;
 1180 (3) the amount of any item must be determined on a prudent basis, and in particular:
 43
 74. (a) only profits realised¹¹ at the balance sheet date¹² are to be included in the profit and loss account¹³; and
 75. (b) all liabilities which have arisen in respect of the financial year to which the accounts relate or a previous financial year are to be taken into account, including those which only became apparent between the balance sheet date and the date on which it is signed¹⁴ on behalf of the board of directors¹⁵;
 44
 1181 (4) all income and charges relating to the financial year to which the accounts relate are to be taken into account, without regard to the date of receipt or payment¹⁶;
 1182 (5) in determining the aggregate amount of any item, the amount of each individual asset or liability that falls to be taken into account must be determined separately¹⁷.

1 The Companies Act individual accounts under the Companies Act 2006 s 396: see PARA 728. As to the meaning of 'individual accounts' see PARA 716; and as to the meaning of 'Companies Act individual accounts' see PARA 717.

2 The Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1.

3 As to the meanings of 'balance sheet' and 'profit and loss account' see PARA 715.

4 See the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 3(1); and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 3(1). The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 3(1) is subject to reg 4 (see PARAS 879), and does not apply to banking companies or insurance companies: see reg 3(1). As to banking companies and insurance companies see PARA 701 et seq. As to notes to the accounts see PARA 738 et seq.

The profit and loss account of a company that falls within the Companies Act 2006 s 408 (individual profit and loss account where group accounts are prepared: see PARA 778) need not contain the information specified in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 paras 59-61 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 paras 65-69 (information supplementing the profit and loss account: see PARA 750): Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 3(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 3(2).

Accounts are treated as having complied with any provision of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 if they comply instead with the corresponding provision of the Large and Medium-Sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1: see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 3(3); and PARA 728 note 9.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section A para 10(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section A para 10(1). As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq. As to unregistered companies see PARA 1665 et seq. Amounts which, in the particular context of any provision of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1, are not material may be disregarded for the purposes of that provision: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 8 para 7; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 10.

6 As to the meaning of 'director' see PARA 478.

7 As to a company's financial year see PARA 711.

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section A para 10(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section A para 10(2). As to notes to the accounts see PARA 738 et seq.

9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section A para 11; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section A para 11.

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section A para 12; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section A para 12.

11 As to the meanings of 'realised profits' and 'realised losses' see the Companies Act 2006 s 853(4), (5); and PARA 1390 (definitions applied by the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 8 para 10; and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 13).

12 The term 'balance sheet date' is not defined for the purposes of the Companies Act 2006, or for the purposes of regulations made thereunder, but for the purposes of the Companies Act 1985 it was defined as the date as at which the balance sheet was made up: see s 262(3) (repealed), s 742(2) (repealed).

13 As to the meaning of 'profit and loss account' see PARA 715.

14 le in accordance with the Companies Act 2006 s 414: see PARA 815.

15 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section A para 13; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section A para 13.

16 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section A para 14; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section A para 14.

17 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section A para 15; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section A para 15.

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(b) Historical Cost Accounting Rules

719. Historical cost accounting rules; preliminary.

Subject to the alternative accounting rules¹ and the provisions relating to fair value accounting², the amounts to be included in respect of all items shown in a company's accounts must be determined in accordance with the historical cost accounting rules³.

1 See the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C; the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C; and PARA 722 et seq.

2 See the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D; the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D; and PARA 725 et seq.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 16; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 16. The 'historical cost accounting rules' are the rules set out in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B: see further PARAS 720-721. References to the historical cost accounting rules are to be read in accordance with the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 30 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 30 (see PARA 722): Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 8 para 4; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 6. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

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Rules/(b) Historical Cost Accounting Rules/720. Rules for determining particular fixed asset items and current assets.

720. Rules for determining particular fixed asset items and current assets.

Subject to any provision for depreciation or diminution in value made in accordance with the following provisions¹, the amount to be included in respect of any fixed asset² must be its purchase price or production cost³. In the case of any fixed asset which has a limited useful economic life, the amount of its purchase price or production cost, or, where it is estimated that any such asset will have a residual value at the end of the period of its useful economic life, its purchase price or production cost less that estimated residual value, must be reduced by provisions for depreciation calculated to write off that amount systematically over the period of the asset's useful economic life⁴.

Where certain fixed asset investments⁵ have diminished in value, provisions for diminution in value may be made in respect of them and the amount to be included in respect of them may be reduced accordingly⁶; and any such provisions which are not shown in the profit and loss account⁷ must be disclosed, either separately or in aggregate, in a note to the accounts⁸. Provisions for diminution in value must be made in respect of any fixed asset which has diminished in value if the reduction in its value is expected to be permanent, whether its useful economic life is limited or not, and the amount to be included in respect of it must be reduced accordingly⁹; and any such provisions which are not shown in the profit and loss account must be disclosed, either separately or in aggregate, in a note to the accounts¹⁰. Where the reasons for which any provision was so made¹¹ have ceased to apply to any extent, that provision must be written back to the extent that it is no longer necessary¹²; and any amounts so written back which are not shown in the profit and loss account must be disclosed, either separately or in aggregate, in a note to the accounts¹³.

Notwithstanding that an item in respect of 'development costs' is included under 'fixed assets' in the statutory balance sheet formats¹⁴, an amount may only be included in a company's balance sheet¹⁵ in respect of development costs in special circumstances¹⁶. If any amount is included in a company's balance sheet in respect of development costs, the following information must be given in a note to the accounts:

- 1183 (1) the period over which the amount of those costs originally capitalised¹⁷ is being or is to be written off; and
- 1184 (2) the reasons for capitalising the development costs in question¹⁸.

The application of the rules as to fixed assets¹⁹ in relation to goodwill, in any case where goodwill is treated as an asset, is subject to the following provisions²⁰. The amount of the consideration for any goodwill acquired by a company must be reduced by provisions for depreciation calculated to write off that amount systematically over a period chosen by the directors of the company²¹; the period chosen must not exceed the useful economic life of the goodwill in question²². In any case where any goodwill acquired by a company is shown or included as an asset in the company's balance sheet, the period chosen for writing off the consideration for that goodwill and the reasons for choosing that period must be disclosed in a note to the accounts²³.

The amount to be included in respect of any current asset must be its purchase price or production cost²⁴. If, however, the net realisable value of any current asset is lower than its purchase price or production cost, the amount to be included in respect of that asset must be the net realisable value²⁵.

1 le made in accordance with the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B paras 18-20 or the Large and Medium-sized Companies and Groups

(Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B paras 18-20: see the text and notes 4-13. As to references to provisions for depreciation or diminution in value of assets see PARA 720 note 4.

2 'Fixed assets' means assets of a company which are intended for use on a continuing basis in the company's activities; and 'current assets' means assets not intended for such use: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 8 para 3; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 4. See *Tudor Heights Ltd (in liquidation) v United Dominions Corp'n Finance* [1977] 1 NZLR 532 ('fixed assets' are those assets which are 'permanently' with the company for the purpose of carrying out its business undertakings and are not confined to those assets which are fixed by physical attachment to the premises). As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 17; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 17. 'Purchase price', in relation to an asset of a company or any raw materials or consumables used in the production of such an asset, includes any consideration, whether in cash or otherwise, given by the company in respect of that asset or in respect of those materials or consumables, as the case may be: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 8 para 9; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 12.

4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 18; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 18. In the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, references to provisions for depreciation or diminution in value of assets are references to any amount written off by way of providing for depreciation or diminution in value of assets; and any reference in the profit and loss account formats (see PARAS 734-737) to the depreciation of, or amounts written off, assets of any description is to any provision for depreciation or diminution in value of assets of that description: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 12, Sch 7 Pt 1 para 1(1), (2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 12, Sch 9 Pt 1 para 1(1), (2).

5 I.e. a fixed asset investment of a description falling to be included under item B III of either of the balance sheet formats set out in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1: see PARAS 730-731.

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 19(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 19(1).

7 As to the meaning of 'profit and loss account' see PARA 715.

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 19(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 19(3). As to notes to the accounts see PARA 738 et seq.

9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 19(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 19(2).

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 19(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 19(3).

11 I.e. in accordance with the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 19 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 19: see the text to notes 5-10.

12 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 20(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 20(1).

13 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 20(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 20(2).

14 See PARAS 730-731.

15 As to the meaning of 'balance sheet' see PARA 715.

16 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 21(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 21(1).

17 For these purposes, in relation to large and medium-sized companies, 'capitalisation', in relation to work or costs, means treating that work or those costs as a fixed asset: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 1.

18 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 21(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 21(2).

19 Ie those contained in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B paras 17-20 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B paras 17-20: see the text and notes 1-13.

20 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 22(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 22(1).

21 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 22(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 22(2).

22 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 22(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 22(3).

23 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 22(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 22(4).

24 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 23; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 23.

25 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 24(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 24(1). Where the reasons for which any provision for diminution in value was made in accordance with the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 24(1) or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 24(1) have ceased to apply to any extent, that provision must be written back to the extent that it is no longer necessary: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 24(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 24(2).

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721. Miscellaneous and supplementary provisions.

Where the amount repayable on any debt owed by a company¹ is greater than the value of the consideration received in the transaction giving rise to the debt, the amount of the difference may be treated as an asset². Where any such amount is so treated, it must be written off by reasonable amounts each year and must be completely written off before repayment of the debt; and if the current amount is not shown as a separate item in the company's balance sheet³, it must be disclosed in a note to the accounts⁴.

Assets which fall to be included amongst the fixed assets⁵ of a company under the item 'tangible assets'⁶, or amongst the current assets⁷ of a company under the item 'raw materials and consumables'⁸, may be included at a fixed quantity and value, if they are of a kind which are constantly being replaced, where their overall value is not material to assessing the company's state of affairs and their quantity, value and composition are not subject to material variation⁹.

The purchase price¹⁰ of an asset must be determined by adding to the actual price paid any expenses incidental to its acquisition¹¹. The production cost of an asset must be determined by adding to the purchase price of the raw materials and consumables used the amount of the costs incurred by the company which are directly attributable to the production of that asset¹². In addition there may be included in the production cost of an asset:

- 1185 (1) a reasonable proportion of the costs incurred by the company which are only indirectly attributable to the production of that asset, but only to the extent that they relate to the period of production; and
- 1186 (2) interest on capital borrowed to finance the production of that asset, to the extent that it accrues in respect of the period of production,

provided, however, in a case within head (2) above that the inclusion of the interest in determining the cost of that asset and the amount of the interest so included is disclosed in a note to the accounts¹³. In the case of current assets, distribution costs may not be included in production costs¹⁴.

Where there is no record of the purchase price or production cost of any asset of a company or of any price, expenses or costs relevant for determining its purchase price or production cost¹⁵, or any such record cannot be obtained without unreasonable expense or delay, its purchase price or production cost must be taken¹⁶ to be the value ascribed to it in the earliest available record of its value made on or after its acquisition or production by the company¹⁷.

The purchase price or production cost of any assets which fall to be included under any item shown in a company's balance sheet under the general item 'stocks'¹⁸, and any assets which are fungible assets¹⁹ (including investments), may be determined by the application of any of the following methods in relation to any such assets of the same class; and the method chosen must be one which appears to the directors to be appropriate in the circumstances of the company²⁰. Those methods are: (a) the method known as 'first in, first out' (FIFO); (b) the method known as 'last in, first out' (LIFO); (c) a weighted average price; and (d) any other method similar to any of those methods²¹.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 25(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 25(1).

3 As to the meaning of 'balance sheet' see PARA 715.

- 4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 25(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 25(2). As to notes to the accounts see PARA 738 et seq.
- 5 As to the meaning of 'fixed assets' see PARA 720 note 2.
- 6 Ie under item B II in the statutory balance sheet formats: see PARAS 730-731.
- 7 As to the meaning of 'current assets' see PARA 720 note 2.
- 8 Ie under item C I 1 in the statutory balance sheet formats: see PARAS 730-731.
- 9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 26; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 26.
- 10 As to the meaning of 'purchase price' see PARA 720 note 3.
- 11 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 27(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 27(1).
- 12 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 27(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 27(2).
- 13 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 27(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 27(3).
- 14 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 27(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 27(4).
- 15 Ie in accordance with the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 27 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 27: see the text and notes 10-14.
- 16 Ie for the purposes of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 17-24 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B paras 17-24: see PARA 720.
- 17 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 29; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 29.
- 18 Ie under item C I in the statutory balance sheet formats: see PARAS 730-731.
- 19 For these purposes, assets of any description are to be regarded as 'fungible' if assets of that description are substantially indistinguishable one from another: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 28(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 5.
- 20 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 28(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 28(1).

Where in the case of any large or medium-sized company:

- 242 (1) the purchase price or production cost of assets falling to be included under any item shown in the company's balance sheet has been determined by the application of any method permitted by Sch 1 Pt 2 Section B para 28; and
- 243 (2) the amount shown in respect of that item differs materially from the relevant alternative amount given below,

the amount of that difference must be disclosed in a note to the accounts: Sch 1 Pt 2 Section B para 28(3). Subject to Sch 1 Pt 2 Section B para 28(5), the relevant alternative amount, in relation to any item shown in a

company's balance sheet, is the amount which would have been shown in respect of that item if assets of any class included under that item at an amount determined by any method permitted by Sch 1 Pt 2 Section B para 28 had instead been included at their replacement cost as at the balance sheet date: Sch 1 Pt 2 Section B para 28(4). The relevant alternative amount may be determined by reference to the most recent actual purchase price or production cost before the balance sheet date of assets of any class included under the item in question instead of by reference to their replacement cost as at that date, but only if the former appears to the directors of the company to constitute the more appropriate standard of comparison in the case of assets of that class: Sch 1 Pt 2 Section B para 28(5). As to the meaning of 'balance sheet date' see PARA 718 note 12.

21 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 28(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 28(2).

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(c) Alternative Accounting Rules

722. Alternative accounting rules.

The alternative accounting rules¹ provide an alternative to the historical cost accounting rules², which (with certain omissions³) are referred to below as the 'depreciation rules'; and subsequent references to the historical cost accounting rules do not include the depreciation rules as they apply⁴ below⁵.

The alternative accounting rules provide that, subject to certain qualifications⁶, the amounts to be included in respect of assets of any description mentioned below⁷ may be determined on any basis so mentioned⁸. Intangible fixed assets⁹, other than goodwill, may be included at their current cost¹⁰. Tangible fixed assets may be included at a market value determined as at the date of their last valuation or at their current cost¹¹. Fixed asset investments of any description falling to be included under either of the statutory balance sheet formats¹² may be included either at a market value determined as at the date of their last valuation, or at a value determined on any basis which appears to the directors to be appropriate in the circumstances of the company¹³; but in the latter case particulars of the method of valuation adopted and of the reasons for adopting it must be disclosed in a note to the accounts¹⁴. Current asset¹⁵ investments of any description falling to be included under either of the statutory balance sheet formats¹⁶ may be included at their current cost¹⁷. Stocks may be included at their current cost¹⁸.

With respect to any determination of the value of an asset of a company on any basis mentioned in the alternative accounting rules¹⁹, the amount of any profit or loss arising from that determination (after allowing, where appropriate, for any provisions for depreciation or diminution in value made otherwise than by reference to the value so determined and any adjustments of any such provisions made in the light of that determination) must be credited or, as the case may be, debited to a separate reserve (the 'revaluation reserve')²⁰. The amount of the revaluation reserve must be shown in the company's balance sheet under a separate sub-heading in the position given for the item 'revaluation reserve' in the statutory balance sheet formats²¹, but need not be shown under that name²². An amount may be transferred:

- 1187 (1) from the revaluation reserve: (a) to the profit and loss account²³, if the amount was previously charged to that account or represents realised profit²⁴; or (b) on capitalisation²⁵;

1188 (2) to or from the revaluation reserve in respect of the taxation relating to any profit or loss credited or debited to the reserve,

and the revaluation reserve must be reduced to the extent that the amounts transferred to it are no longer necessary for the purposes of the valuation method used²⁶. The revaluation reserve must not otherwise²⁷ be reduced²⁸. The treatment for taxation purposes of amounts credited or debited to the revaluation reserve must be disclosed in a note to the accounts²⁹.

1 The 'alternative accounting rules' are the rules set out in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C: see the text and notes 2-29; and PARAS 723-724.

2 Ie the rules set out in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B: see PARAS 719-721.

3 Ie with the omission of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B paras 16, 22, 26-29 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B paras 16, 22, 26-29: see PARAS 719-721.

4 Ie by virtue of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 33 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 33: see PARA 723.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 30; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 30.

6 Ie subject to the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C paras 33-35 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C paras 33-35: see the text and notes 19-29; and PARAS 723-724.

7 Ie mentioned in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 32 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 32: see the text to notes 9-18.

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 31; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 31.

9 As to the meaning of 'fixed assets' see PARA 720 note 2.

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 32(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 32(1).

11 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 32(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 32(2).

12 Ie under item B III: see PARAS 730-731. As to the meaning of 'balance sheet' see PARA 715.

13 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq. As to the meaning of 'director' see PARA 478.

14 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 32(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 32(3). As to notes to the accounts see PARA 738 et seq.

15 As to the meaning of 'current assets' see PARA 720 note 2.

16 Ie under item C III: see PARAS 730-731.

17 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 32(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 32(4).

18 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 32(5); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 32(5).

19 Ie mentioned in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 32 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 32: see the text to notes 9-18.

20 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 35(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 35(1).

21 See PARAS 730-731.

22 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 35(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 35(2).

23 As to the meaning of 'profit and loss account' see PARA 715.

24 As to the meaning of 'realised profits' see the Companies Act 2006 s 853(4), (5); and PARA 1390 (definition applied by the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 8 para 10; and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 13).

25 For these purposes, 'capitalisation', in relation to an amount standing to the credit of the revaluation reserve, means applying it in wholly or partly paying up unissued shares in the company to be allotted to members of the company as fully or partly paid shares: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 35(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 35(4). As to the meaning of 'share' see PARA 1042; and as to the meaning of 'allotted' see PARA 1091. See also PARA 1420, citing the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 art 36 and reg 4, Sch 3 art 78, which provide that any undivided profits available for dividend may be capitalised and distributed among the shareholders. See also the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 105; and PARA 1420.

26 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 35(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 35(3).

27 Ie except as mentioned in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 35 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 35.

28 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 35(5); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 35(5).

29 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 35(6); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 35(6).

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723. Application of the depreciation rules.

Where the value of any asset of a company¹ is determined on any basis mentioned in the alternative accounting rules², that value must be, or (as the case may require) must be the starting point for determining, the amount to be included in respect of that asset in the company's accounts, instead of its purchase price³ or production cost or any value previously so determined for that asset; and the depreciation rules⁴ apply accordingly in relation to any such asset with the substitution for any reference to its purchase price or production cost of a reference to the value most recently determined for that asset on any basis mentioned in the alternative accounting rules⁵.

The amount of any provision for depreciation required in the case of any fixed asset⁶ by the depreciation rules as so applied⁷ is referred to below as the 'adjusted amount', and the amount of any provision which would be so required in the case of that asset according to the historical cost accounting rules⁸ is referred to as the 'historical cost amount'⁹.

In the case of any fixed asset, the amount of any provision for depreciation in respect of that asset:

- 1189 (1) included in any item shown in the profit and loss account¹⁰ in respect of amounts written off assets of the description in question; or
- 1190 (2) taken into account in stating any item so shown which is required by the notes on the statutory profit and loss account formats¹¹ to be stated after taking into account any necessary provisions for depreciation or diminution in value of assets,

may be the historical cost amount instead of the adjusted amount, provided that the amount of any difference between the two is shown separately in the profit and loss account or in a note to the accounts¹².

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 I.e. mentioned in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 32 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 32: see PARA 722.

3 As to the meaning of 'purchase price' see PARA 720 note 3.

4 As to the depreciation rules see PARA 722.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 33(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 33(1).

6 As to the meaning of 'fixed assets' see PARA 720 note 2.

7 I.e. by the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B paras 18-20, as applied by virtue of Sch 1 Pt 2 Section C para 33(1) (see the text to notes 1-5); or by the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B paras 18-20, as applied by virtue of Sch 1 Pt 2 Section C para 33(1) (see the text to notes 1-5).

8 I.e. the rules set out in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B: see PARAS 719-721.

9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 33(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 33(2).

10 As to the meaning of 'profit and loss account' see PARA 715.

11 See note (11) to the statutory profit and loss account formats; and PARAS 734-737.

12 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 33(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 33(3). As to notes to the accounts see PARA 738 et seq.

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724. Additional information to be provided in case of departure from historical cost accounting rules.

Where the amounts to be included in respect of assets covered by any items shown in a company's accounts have been determined on any basis mentioned in the alternative accounting rules¹, the items affected and the basis of valuation adopted in determining the amounts of the assets in question in the case of each such item must be disclosed in a note to the accounts². In the case of each balance sheet³ item affected (except stocks) either the comparable amounts determined according to the historical cost accounting rules⁴, or the differences between those amounts and the corresponding amounts actually shown in the balance sheet in respect of that item, must be shown separately in the balance sheet or in a note to the accounts⁵.

1 Ie mentioned in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 32 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 32: see PARA 722. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 34(1), (2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 34(1), (2). As to notes to the accounts see PARA 738 et seq.

3 As to the meaning of 'balance sheet' see PARA 715.

4 Ie the rules set out in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B: see PARAS 719-721. For these purposes, references in relation to any item to the comparable amounts determined according to the historical cost accounting rules are references to: (1) the aggregate amount which would be required to be shown in respect of that item if the amounts to be included in respect of all the assets covered by that item were determined according to the historical cost accounting rules; and (2) the aggregate amount of the cumulative provisions for depreciation or diminution in value which would be permitted or required in determining those amounts according to those rules: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 34(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 34(4).

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 34(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 34(3).

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(d) Fair Value Accounting

725. Inclusion of financial instruments at fair value.

Certain financial instruments (including derivatives)¹ may be included at fair value in a company's accounts². However, this does not apply to a financial instrument if the fair value of that financial instrument cannot be reliably determined³.

Where a financial instrument is valued in accordance with these provisions, a change in the value of the financial instrument must be included in the profit and loss account⁴.

Financial instruments that, under international accounting standards⁵, may be included in accounts at fair value, may be so included, provided that the disclosures required by such accounting standards are made⁶.

1 For these purposes, references to 'derivatives' include commodity-based contracts that give either contracting party the right to settle in cash or in some other financial instrument, except where such contracts: (1) were entered into for the purpose of, and continue to meet, the company's expected purchase, sale or usage requirements; (2) were designated for such purpose at their inception; and (3) are expected to be settled by delivery of the commodity: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 8 para 1; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 2. 'Financial instrument', 'derivative' and 'commodity-based contracts' have the same meanings as they have in EEC Council Directive 78/660 on the annual accounts of certain types of companies (the 'Fourth Directive') (OJ L222, 14.8.1978, p 1): see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 8 para 2; and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 3.

2 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 36(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 36(1). As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

The provisions of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 36(1) and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 36(1) do not apply to financial instruments that constitute liabilities unless: (1) they are held as part of a trading portfolio; (2) they are derivatives; or (3) they are financial instruments falling within the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 36(4) or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 36(4) (see below): Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 36(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 36(2). Nor do the provisions apply to the following, unless they are financial instruments falling within the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 36(4) or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 36(4) (see below): (a) financial instruments (other than derivatives) held to maturity; (b) loans and receivables originated by the company and not held for trading purposes; (c) interests in subsidiary undertakings, associated undertakings and joint ventures; (d) equity instruments issued by the company; (e) contracts for contingent consideration in a business combination; or (f) other financial instruments with such special

characteristics that the instruments, according to generally accepted accounting principles or practice, should be accounted for differently from other financial instruments: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 36(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 36(3). As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2. As to the meaning of 'associated undertaking' for these purposes see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 19; the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 19; and PARA 791 (definition applied by the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 36(6); and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 36(6)). As to the meaning of 'joint venture' for these purposes see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 18; the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 18; and PARA 790 (definition applied by the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 36(6); and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 36(6)). 'Business combination', 'equity instrument', 'held for trading purposes', 'held to maturity', 'receivables' and 'trading portfolio' have the same meanings as they have in EEC Council Directive 78/660 on the annual accounts of certain types of companies (the 'Fourth Directive') (OJ L222, 14.8.1978, p 1): see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 8 para 2; and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 3.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 36(5); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 36(5). The text refers to determination in accordance with the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 37 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 37: see PARA 726.

4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 40(1), (2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 40(1), (2). These provisions apply notwithstanding the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section A para 13 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section A para 13 (see PARA 718 head (3)): Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 40(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 40(2).

Where the financial instrument accounted for is a hedging instrument under a hedge accounting system that allows some or all of the change in value not to be shown in the profit and loss account, or the change in value relates to an exchange difference arising on a monetary item that forms part of a company's net investment in a foreign entity, the amount of the change in value must be credited to or (as the case may be) debited from a separate reserve (the 'fair value reserve'): Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 40(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 40(3). Where the instrument accounted for is an available for sale financial asset, and is not a derivative, the change in value may be credited to or (as the case may be) debited from the fair value reserve: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 40(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 40(4). The fair value reserve must be adjusted to the extent that the amounts shown in it are no longer necessary for the purposes of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 40(3), (4) or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 40(3), (4): Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 41(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 41(1). The treatment for taxation purposes of amounts credited or debited to the fair value reserve must be disclosed in a note to the accounts: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 41(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 41(2). As to notes to the accounts see PARA 738 et seq.

'Available for sale financial asset', 'exchange difference', 'foreign entity', 'hedge accounting', 'hedge accounting system', 'hedging instrument' and 'monetary item' have the same meanings as they have in EEC Council Directive 78/660 on the annual accounts of certain types of companies (the 'Fourth Directive') (OJ L222, 14.8.1978, p 1): see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 8 para 2; and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 3.

5 le adopted by the European Commission on or before 5 September 2006 in accordance with the IAS Regulation. As to the meanings of 'international accounting standards' and 'IAS Regulation' see PARA 693 note 1.

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 36(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 36(4).

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726. Determination of fair value.

The 'fair value' of a financial instrument is its value determined in accordance with the following provisions¹.

If a reliable market can readily be identified for the financial instrument, its fair value is to be determined by reference to its market value². If a reliable market cannot readily be identified for the financial instrument but can be identified for its components or for a similar instrument, its fair value is determined by reference to the market value of its components or of the similar instrument³. If neither of these provisions applies, the fair value of the financial instrument is a value resulting from generally accepted valuation models and techniques⁴, and any valuation models and techniques used for these purposes must ensure a reasonable approximation of the market value⁵.

1 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 37(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 37(1). The text refers to the provisions of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 37(2)-(5) and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 37(2)-(5): see the text and notes 2-5. As to the meaning of 'financial instrument' see PARA 725 note 1.

2 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 37(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 37(2). 'Reliable market' has the same meaning as it has in EEC Council Directive 78/660 on the annual accounts of certain types of companies (the 'Fourth Directive') (OJ L222, 14.8.1978, p 1): see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 8 para 2; and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 3.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 37(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 37(3).

4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 37(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 37(4).

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 37(5); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 37(5).

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COMPANIES ACTS/(18) ACCOUNTS AND REPORTS/(iv) Annual Accounts/B. INDIVIDUAL ACCOUNTS EXCLUDING BANKING AND INSURANCE COMPANIES/(B) Accounting Principles and Rules/(d) Fair Value Accounting/727. Hedged items, and other assets that may be included at fair value.

727. Hedged items, and other assets that may be included at fair value.

A company¹ may include any assets and liabilities, or identified portions of such assets or liabilities, that qualify as hedged items under a fair value hedge accounting system at the amount required under that system².

Investment property and also living animals and plants that, under international accounting standards³, may be included in accounts at fair value⁴ may be included at fair value, provided that all such investment property or, as the case may be, all such living animals and plants are so included where their fair value can reliably be determined⁵.

Where a financial instrument⁶ or an asset is valued in accordance with these provisions⁷, a change in the value of the financial instrument or of the investment property or living animal or plant must be included in the profit and loss account⁸.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 38; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 38. 'Hedged items' and 'fair value hedge accounting system' have the same meanings as they have in EEC Council Directive 78/660 on the annual accounts of certain types of companies ('the Fourth Directive') (OJ L222, 14.8.1978, p 1): see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 8 para 2; and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 3. As to the meanings of 'hedge accounting' and 'hedge accounting system' see PARA 725 note 4.

3 As to the meaning of 'international accounting standards' see PARA 693 note 1.

4 For these purposes, 'fair value' means fair value determined in accordance with relevant international accounting standards: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 39(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 39(3).

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 39(1), (2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 39(1), (2).

6 As to the meaning of 'financial instrument' see PARA 725 note 1.

7 I.e. where a financial instrument is valued in accordance with the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 38 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 38, or where an asset is valued in accordance with the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 39 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 39.

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 40(1), (2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 40(1), (2). See further the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D paras 40(3), (4), 41; the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D paras 40(3), (4), 41; and PARA 725 note 4.

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(C) FORM AND CONTENT OF COMPANIES ACT INDIVIDUAL ACCOUNTS

(a) In general

728. Required form and content of Companies Act individual accounts.

Companies Act individual accounts¹ must comprise:

- 1191 (1) a balance sheet² as at the last day of the financial year³; and
- 1192 (2) a profit and loss account⁴.

The accounts must, in the case of the balance sheet, give a true and fair view⁵ of the state of affairs of the company⁶ as at the end of the financial year and, in the case of the profit and loss account, give a true and fair view of the profit or loss of the company for the financial year⁷.

The accounts must comply with provision made by the Secretary of State⁸ by regulations⁹ as to:

- 1193 (a) the form and content of the balance sheet and profit and loss account¹⁰; and
- 1194 (b) additional information to be provided by way of notes to the accounts¹¹.

If compliance with the regulations, and any other provision made by or under the Companies Act 2006 as to the matters to be included in a company's individual accounts or in notes to those accounts, would not be sufficient to give a true and fair view, the necessary additional information must be given in the accounts or in a note to them¹². If in special circumstances compliance with any of those provisions is inconsistent with the requirement to give a true and fair view, the directors¹³ must depart from that provision to the extent necessary to give a true and fair view; but particulars of any such departure, the reasons for it and its effect must be given in a note to the accounts¹⁴.

¹ As to the meaning of 'individual accounts' see PARA 716; and as to the meaning of 'Companies Act individual accounts' see PARA 717.

² As to the meaning of 'balance sheet' see PARA 715.

³ Companies Act 2006 s 396(1)(a). As to a company's financial year see PARA 711.

The provisions of the Companies Act 2006 s 396 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. Where an overseas company, or a credit or financial institution to which the Companies Act 2006 s 1050 applies (see PARA 1831), is not required to prepare and disclose accounts under parent law, s 396 is also applied with modifications: see the Overseas Companies Regulations 2009, SI 2009/1801, regs 38, 53; and PARA 1830 et seq. As to the meaning of 'overseas company' see PARA 1824.

⁴ Companies Act 2006 s 396(1)(b). As to the meaning of 'profit and loss account' see PARA 715.

⁵ As to the need to give a true and fair view see also PARA 714.

6 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

7 Companies Act 2006 s 396(2).

8 As to the Secretary of State see PARA 6.

9 Companies Act 2006 s 396(3). As to the regulations that have been made see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409; and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410.

Companies Act individual accounts under the Companies Act 2006 s 396 must comply with the provisions of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 (see PARA 729 et seq) as to the form and content of the balance sheet and profit and loss account, and additional information to be provided by way of notes to the accounts: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 3(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 3(1). As to notes to the accounts see PARA 738 et seq.

Accounts are treated as having complied with any provision of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 if they comply instead with the corresponding provision of the Large and Medium-Sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 3(3).

10 Companies Act 2006 s 396(3)(a).

11 Companies Act 2006 s 396(3)(b).

12 Companies Act 2006 s 396(4).

13 As to the meaning of 'director' see PARA 478.

14 Companies Act 2006 s 396(5).

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729. General rules relating to accounts.

Subject to the detailed provisions relating to the form, content and format of company accounts¹, every balance sheet² of a company must show the items listed in either of the balance sheet formats³, and every profit and loss account⁴ of a company must show the items listed in any one of the profit and loss account formats⁵; and the items must be in the order and under the headings and sub-headings given in the format used⁶.

Where, in accordance with these provisions, a company's balance sheet or profit and loss account for any financial year⁷ has been prepared by reference to one of the formats, the directors⁸ of the company must use the same format in preparing the Companies Act individual accounts⁹ for subsequent financial years unless in their opinion there are special reasons for a change¹⁰. Particulars of any such change must be given in a note to the accounts in which the new format is first used, and the reasons for the change must be explained¹¹.

Any item required to be shown in a company's balance sheet or profit and loss account may be shown in greater detail than required by the particular format used¹². A company's balance sheet or profit and loss account may include an item representing or covering the amount of any asset or liability, income or expenditure not otherwise covered by any of the items listed in

the format used, but none of the following may be treated as assets in any balance sheet: (1) preliminary expenses; (2) expenses of, and commission on, any issue of shares or debentures; and (3) costs of research¹³.

Where the special nature of a company's business requires it, the directors of the company must adapt the arrangement, headings and sub-headings otherwise required in respect of items given an Arabic number in the balance sheet or profit and loss account format used¹⁴. Items to which Arabic numbers are given in any of the balance sheet or profit and loss account formats may be combined if:

- 1195 (a) their individual amounts are not material to assessing the state of affairs or profit or loss of the company for the financial year in question; or
- 1196 (b) the combination facilitates that assessment,

but where head (b) above applies, the individual amounts of any items which have been combined must be disclosed in a note to the accounts¹⁵.

The directors must not include a heading or sub-heading corresponding to an item in the balance sheet or profit and loss account format used if there is no amount to be shown for that item for the financial year to which the balance sheet or profit and loss account relates¹⁶.

Every profit and loss account of a company must show the amount of the company's profit or loss on ordinary activities before taxation¹⁷.

For every item shown in a company's balance sheet or profit and loss account, the corresponding amount for the immediately preceding financial year must also be shown¹⁸. Where that corresponding amount is not comparable with the amount to be shown for the item in question in respect of the financial year to which the balance sheet or profit and loss account relates, the former amount may be adjusted and particulars of the non-comparability and of any adjustment must be disclosed in a note to the accounts¹⁹.

Amounts in respect of items representing assets or income may not be set off against amounts in respect of items representing liabilities or expenditure (as the case may be), or vice versa²⁰.

The company's directors must, in determining how amounts are presented within items in the profit and loss account and balance sheet, have regard to the substance of the reported transaction or arrangement, in accordance with generally accepted accounting principles or practice²¹.

1 See PARA 730 et seq. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'balance sheet' see PARA 715.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 1(1)(a); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 1(1)(a). As to the balance sheet formats see PARAS 730-731.

References to the items listed in any of the formats are to those items read together with any of the notes following the formats which apply to those items: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 1(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 1(2).

A statement of the amount of debentures outstanding made in a balance sheet is a sufficient acknowledgment of the debt due under the debentures within the meaning of the Limitation Act 1980 s 30(2) (see **LIMITATION PERIODS** vol 68 (2008) PARA 1185): *Re Atlantic and Pacific Fibre Importing and Manufacturing Co Ltd* [1928] Ch 836; and see *Jones v Bellegrove Properties Ltd* [1949] 1 All ER 498 (affd [1949] 2 KB 700, [1949] 2 All ER 198, CA) (where parol evidence was admitted to dissect a debit entry 'sundry creditors' so as to constitute that entry a sufficient acknowledgment to a member-creditor). See also *Re Gee & Co (Woolwich) Ltd* [1975] Ch 52, [1974] 1 All ER 1149 (where the accounts were adopted at a general meeting attended by or by the representatives of

every member of the company, all the members must be taken to have agreed to the directors' written acknowledgement of the debt). No such acknowledgment is, however, made unless the debt appears in the balance sheet as a debt existing at the time it was signed: *Consolidated Agencies Ltd v Bertram Ltd* [1965] AC 470, [1964] 3 All ER 282, PC. A statement made in a balance sheet signed by the directors relating to arrears of their own remuneration is not a sufficient acknowledgment to prevent the operation of the Limitation Act 1980: *Re Coliseum (Barrow) Ltd* [1930] 2 Ch 44. Cf *John Shaw and Sons (Salford) Ltd v Shaw* [1935] 2 KB 113, CA (debt owing by directors); *Re Transplanters (Holding Co) Ltd* [1958] 2 All ER 711, [1958] 1 WLR 822; *McMenigall v Central Refrigeration Services Ltd* 1963 SLT (Notes) 8, Ct of Sess. See further **LIMITATION PERIODS** vol 68 (2008) PARA 1193. As to the meaning of 'debenture' see PARA 1299.

4 As to the meaning of 'profit and loss account' see PARA 715.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 1(1)(b); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 1(1)(b). As to the profit and loss account formats see PARAS 734-737. As to references to the items listed in any of the formats see note 3.

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 1(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 1(3). However, the notes to the formats may permit alternative positions for any particular items; and the heading or sub-heading for any item does not have to be distinguished by any letter or number assigned to that item in the format used: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 1(3)(a), (b); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 1(3)(a), (b).

7 As to a company's financial year see PARA 711.

8 As to the meaning of 'director' see PARA 478.

9 As to the meaning of 'individual accounts' see PARA 716; and as to the meaning of 'Companies Act individual accounts' see PARA 717.

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 2(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 2(1).

11 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 2(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 2(2). As to notes to the accounts see PARA 738 et seq.

12 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 3(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 3(1).

13 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 3(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 3(2). As to the meaning of 'share' see PARA 1042.

14 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 4(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 4(1).

15 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 4(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 4(2).

16 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 5(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 5(1). Where an amount can be shown for the item in question for the immediately preceding financial year that amount must be shown under the heading or sub-heading required by the format for that item: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 5(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 5(2).

17 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 6; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 6.

18 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 7(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 7(1).

19 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 7(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 7(2).

20 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 8; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 8.

21 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 9; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 9.

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(b) Formats for Balance Sheet for Small Companies

730. Balance sheet formats: Format 1.

In relation to small companies¹, the items to be listed in a balance sheet² prepared in accordance with Format 1³ are as follows⁴:

- 1197 A Called up share capital not paid⁵
- 1198 B Fixed assets⁶
- 45
- 76. I Intangible assets
- 77. 1 Goodwill⁷
- 78. 2 Other intangible assets⁸
- 79. II Tangible assets
- 80. 1 Land and buildings
- 81. 2 Plant and machinery etc
- 82. III Investments
- 83. 1 Shares⁹ in group undertakings and participating interests¹⁰
- 84. 2 Loans to group undertakings and undertakings in which the company has a participating interest
- 85. 3 Other investments other than loans
- 86. 4 Other investments¹¹
- 46
- 1199 C Current assets¹²
- 47
- 87. I Stocks
- 88. 1 Stocks
- 89. 2 Payments on account
- 90. II Debtors¹³
- 91. 1 Trade debtors

- 92. 2 Amounts owed by group undertakings and undertakings in which the company has a participating interest
- 93. 3 Other debtors¹⁴
- 94. III Investments
- 95. 1 Shares in group undertakings
- 96. 2 Other investments¹⁵
- 97. IV Cash at bank and in hand
- 48
- 1200 D Prepayments and accrued income¹⁶
- 1201 E Creditors: amounts falling due within one year
- 49
- 98. 1 Bank loans and overdrafts
- 99. 2 Trade creditors
- 100. 3 Amounts owed to group undertakings and undertakings in which the company has a participating interest
- 101. 4 Other creditors¹⁷
- 50
- 1202 F Net current assets (liabilities)¹⁸
- 1203 G Total assets less current liabilities
- 1204 H Creditors: amounts falling due after more than one year
- 51
- 102. 1 Bank loans and overdrafts
- 103. 2 Trade creditors
- 104. 3 Amounts owed to group undertakings and undertakings in which the company has a participating interest
- 105. 4 Other creditors¹⁹
- 52
- 1205 I Provisions for liabilities²⁰
- 1206 J Accruals and deferred income²¹
- 1207 K Capital and reserves
- 53
- 106. I Called up share capital²²
- 107. II Share premium account
- 108. III Revaluation reserve
- 109. IV Other reserves
- 110. V Profit and loss account
- 54

1 As to small companies and groups see PARA 694. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'balance sheet' see PARA 715.

3 As to the general rules relating to the statutory formats see PARA 729.

4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats: Format 1).

5 This item may be shown at item A or included under item C II 3: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (1). As to the meaning of 'called up share capital' see PARA 1048.

6 As to the meaning of 'fixed assets' see PARA 720 note 2.

7 Amounts representing goodwill must only be included to the extent that the goodwill was acquired for valuable consideration: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (2).

8 Amounts in respect of concessions, patents, licences, trade marks and similar rights and assets must only be included in a company's balance sheet under this item if either: (1) the assets were acquired for valuable consideration and are not required to be shown under goodwill; or (2) the assets in question were created by the company itself: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (3).

9 As to the meaning of 'share' see PARA 1042.

10 As to the meaning of 'group undertaking' see PARA 27 note 9; and as to the meaning of 'undertaking' see PARA 26 note 2.

For these purposes, 'participating interest' means an interest held by an undertaking in the shares of another undertaking which it holds on a long term basis for the purpose of securing a contribution to its activities by the exercise of control or influence arising from or related to that interest: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 8 para 8(1). The reference in Sch 8 para 8(1) to an interest in shares includes:

244 (1) an interest which is convertible into an interest in shares; and

245 (2) an option to acquire shares or any such interest,

and an interest or option falls within head (1) or head (2) notwithstanding that the shares to which it relates are, until the conversion or the exercise of the option, unissued: Sch 8 para 8(3). For these purposes, an interest held on behalf of an undertaking is to be treated as held by it: Sch 8 para 8(4).

A holding of 20% or more of the shares of the undertaking is to be presumed to be a participating interest unless the contrary is shown: Sch 8 para 8(2).

In the balance sheet and profit and loss formats set out in Sch 1 Pt 1 and Sch 4 Pt 1 (see PARA 730), 'participating interest' does not include an interest in a group undertaking: Sch 8 para 8(5). For the purposes of Sch 8 para 8 as it applies in relation to the expression 'participating interest', in those formats as they apply in relation to group accounts and in Sch 6 para 19 (group accounts: undertakings to be accounted for as associated undertakings: see PARA 791) the references in Sch 8 para 8(1)-(4) to the interest held by, and the purposes and activities of, the undertaking concerned are to be construed as references to the interest held by, and the purposes and activities of, the group (within the meaning of Sch 6 para 1: see PARA 785): Sch 8 para 8(6).

11 Where amounts in respect of own shares held are included under either of item B III 4 or item C III 2, the nominal value of such shares must be shown separately: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (4).

12 As to the meaning of 'current assets' see PARA 720 note 2.

13 The amount falling due after more than one year must be shown separately for each item included under debtors unless the aggregate amount of debtors falling due after more than one year is disclosed in the notes to the accounts: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (5). As to notes to the accounts see PARA 738 et seq.

14 See note 5. See also note 16.

15 See note 11.

16 This item may alternatively be included under item C II 3: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (6).

17 There must be shown separately:

246 (1) the amount of any convertible loans; and

247 (2) the amount for creditors in respect of taxation and social security,

and payments received on account of orders must be included in so far as they are not shown as deductions from stocks: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (7). Accruals and deferred income may be shown under item J or included under item E 4 or item H 4, or both (as the case may require): Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (7).

18 In determining the amount to be shown under this item, any prepayments and accrued income must be taken into account wherever shown: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (8).

19 See note 17.

20 References to provisions for liabilities are references to any amount retained as reasonably necessary for the purpose of providing for any liability the nature of which is clearly defined and which is either likely to be incurred, or certain to be incurred but uncertain as to amount or as to the date on which it will arise: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 12, Sch 7 Pt 1 para 2; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 12, Sch 9 Pt 1 para 2.

21 See note 17.

22 The amount of allotted share capital and the amount of called up share capital which has been paid up must be shown separately: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (9). As to the meaning of 'allotted share capital' see PARA 1091; and as to the meaning of 'called up share capital' see PARA 1048.

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731. Balance sheet formats: Format 2.

In relation to small companies¹, the items to be listed in a balance sheet² prepared in accordance with Format 2³ are as follows⁴:

Assets

- 1208 A Called up share capital not paid⁵
- 1209 B Fixed assets⁶
- 55
- 111. I Intangible assets
- 112. 1 Goodwill⁷
- 113. 2 Other intangible assets⁸
- 114. II Tangible assets
- 115. 1 Land and buildings
- 116. 2 Plant and machinery etc
- 117. III Investments
- 118. 1 Shares⁹ in group undertakings and participating interests¹⁰
- 119. 2 Loans to group undertakings and undertakings in which the company has a participating interest
- 120. 3 Other investments other than loans
- 121. 4 Other investments¹¹
- 56
- 1210 C Current assets¹²
- 57
- 122. I Stocks
- 123. 1 Stocks
- 124. 2 Payments on account
- 125. II Debtors¹³
- 126. 1 Trade debtors

- 127. 2 Amounts owed by group undertakings and undertakings in which the company has a participating interest
- 128. 3 Other debtors¹⁴
- 129. III Investments
- 130. 1 Shares in group undertakings
- 131. 2 Other investments¹⁵
- 132. IV Cash at bank and in hand
- 58
- 1211 D Prepayments and accrued income¹⁶

Liabilities

- 1212 A Capital and reserves
- 59
- 133. I Called up share capital¹⁷
- 134. II Share premium account
- 135. III Revaluation reserve
- 136. IV Other reserves
- 137. V Profit and loss account
- 60
- 1213 B Provisions for liabilities¹⁸
- 1214 C Creditors¹⁹
- 61
- 138. 1 Bank loans and overdrafts
- 139. 2 Trade creditors
- 140. 3 Amounts owed to group undertakings and undertakings in which the company has a participating interest
- 141. 4 Other creditors²⁰
- 62
- 1215 D Accruals and deferred income²¹

1 As to small companies and groups see PARA 694. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'balance sheet' see PARA 715.

3 As to the general rules relating to the statutory formats see PARA 729.

4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats: Format 2).

5 This item may be shown at item A or included under item C II 3: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (1). As to the meaning of 'called up share capital' see PARA 1048.

6 As to the meaning of 'fixed assets' see PARA 720 note 2.

7 Amounts representing goodwill must only be included to the extent that the goodwill was acquired for valuable consideration: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (2).

8 Amounts in respect of concessions, patents, licences, trade marks and similar rights and assets must only be included in a company's balance sheet under this item if either: (1) the assets were acquired for valuable consideration and are not required to be shown under goodwill; or (2) the assets in question were created by the company itself: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (3).

9 As to the meaning of 'share' see PARA 1042.

10 As to the meaning of 'group undertaking' see PARA 27; and as to the meaning of 'participating interest' see PARA 730 note 10.

11 Where amounts in respect of own shares held are included under either of item B III 4 or item C III 2, the nominal value of such shares must be shown separately: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (4).

12 As to the meaning of 'current assets' see PARA 720 note 2.

13 The amount falling due after more than one year must be shown separately for each item included under debtors unless the aggregate amount of debtors falling due after more than one year is disclosed in the notes to the accounts: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (5). As to notes to the accounts see PARA 738 et seq.

14 See note 5. See also note 16.

15 See note 11.

16 This item may alternatively be included under item C II 3: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (6).

17 The amount of allotted share capital and the amount of called up share capital which has been paid up must be shown separately: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (9). As to the meaning of 'allotted share capital' see PARA 1091; and as to the meaning of 'called up share capital' see PARA 1048.

18 As to provisions for liabilities see PARA 730 note 20.

19 Amounts falling due within one year and after one year must be shown separately for each of these items and for the aggregate of all of these items unless the aggregate amount of creditors falling due within one year and the aggregate amount of creditors falling due after more than one year is disclosed in the notes to the accounts: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (10).

20 There must be shown separately:

248 (1) the amount of any convertible loans; and

249 (2) the amount for creditors in respect of taxation and social security,

and payments received on account of orders must be included in so far as they are not shown as deductions from stocks: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (7). Accruals and deferred income may be shown under item D or within item C 4 under Liabilities: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Balance sheet formats) note (7).

21 See note 20.

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(c) Formats for Balance Sheet for Large and Medium-sized Companies

732. Balance sheet formats: Format 1.

In relation to large and medium-sized companies¹, the items to be listed in a balance sheet² prepared in accordance with Format 1³ are as follows⁴:

1216	A	Called up share capital not paid ⁵
1217	B	Fixed assets ⁶
63		
142.	I	Intangible assets
143.	1	Development costs
144.	2	Concessions, patents, licences, trade marks and similar rights and assets ⁷
145.	3	Goodwill ⁸
146.	4	Payments on account
147.	II	Tangible assets
148.	1	Land and buildings
149.	2	Plant and machinery
150.	3	Fixtures, fittings, tools and equipment
151.	4	Payments on account and assets in course of construction
152.	III	Investments
153.	1	Shares in group undertakings ⁹
154.	2	Loans to group undertakings
155.	3	Participating interests ¹⁰
156.	4	Loans to undertakings in which the company has a participating interest
157.	5	Other investments other than loans
158.	6	Other loans
159.	7	Own shares ¹¹
64		
1218	C	Current assets ¹²
65		
160.	I	Stocks
161.	1	Raw materials and consumables
162.	2	Work in progress
163.	3	Finished goods and goods for resale
164.	4	Payments on account
165.	II	Debtors ¹³
166.	1	Trade debtors
167.	2	Amounts owed by group undertakings
168.	3	Amounts owed by undertakings in which the company has a participating interest
169.	4	Other debtors
170.	5	Called up share capital not paid ¹⁴
171.	6	Prepayments and accrued income ¹⁵
172.	III	Investments
173.	1	Shares in group undertakings
174.	2	Own shares ¹⁶
175.	3	Other investments
176.	IV	Cash at bank and in hand
66		
1219	D	Prepayments and accrued income ¹⁷
1220	E	Creditors: amounts falling due within one year
67		
177.	1	Debenture loans ¹⁸
178.	2	Bank loans and overdrafts
179.	3	Payments received on account ¹⁹
180.	4	Trade creditors
181.	5	Bills of exchange payable
182.	6	Amounts owed to group undertakings
183.	7	Amounts owed to undertakings in which the company has a participating interest

184.	8	Other creditors including taxation and social security ²⁰
185.	9	Accruals and deferred income ²¹
68		
1221	F	Net current assets (liabilities) ²²
1222	G	Total assets less current liabilities
1223	H	Creditors: amounts falling due after more than one year
69		
186.	1	Debenture loans ²³
187.	2	Bank loans and overdrafts
188.	3	Payments received on account ²⁴
189.	4	Trade creditors
190.	5	Bills of exchange payable
191.	6	Amounts owed to group undertakings
192.	7	Amounts owed to undertakings in which the company has a participating interest
193.	8	Other creditors including taxation and social security ²⁵
194.	9	Accruals and deferred income ²⁶
70		
1224	I	Provisions for liabilities ²⁷
71		
195.	1	Pensions and similar obligations
196.	2	Taxation, including deferred taxation
197.	3	Other provisions
72		
1225	J	Accruals and deferred income ²⁸
1226	K	Capital and reserves
73		
198.	I	Called up share capital ²⁹
199.	II	Share premium account
200.	III	Revaluation reserve
201.	IV	Other reserves
202.	1	Capital redemption reserve
203.	2	Reserve for own shares
204.	3	Reserves provided for by the articles of association
205.	4	Other reserves
206.	V	Profit and loss account
74		

1 As to large and medium-sized companies and groups see PARA 695. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'balance sheet' see PARA 715.

3 As to the general rules relating to the statutory formats see PARA 729.

4 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats: Format 1).

5 This item may be shown at either item A or item C II 5: see the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (1). As to the meaning of 'called up share capital' see PARA 1048.

6 As to the meaning of 'fixed assets' see PARA 720 note 2.

7 Amounts in respect of assets are only to be included in a company's balance sheet under this item if either: (1) the assets were acquired for valuable consideration and are not required to be shown under goodwill; or (2) the assets in question were created by the company itself: Large and Medium-sized Companies and

Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (2).

8 Amounts representing goodwill are only to be included to the extent that the goodwill was acquired for valuable consideration: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (3).

9 As to the meaning of 'share' see PARA 1042. As to the meaning of 'group undertaking' see PARA 27; and as to the meaning of 'undertaking' see PARA 26 note 2.

10 For these purposes, 'participating interest' means an interest held by an undertaking in the shares of another undertaking which it holds on a long term basis for the purpose of securing a contribution to its activities by the exercise of control or influence arising from or related to that interest: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 11(1). The reference in Sch 10 para 11(1) to an interest in shares includes:

250 (1) an interest which is convertible into an interest in shares; and

251 (2) an option to acquire shares or any such interest,

and an interest or option falls within head (1) or head (2) notwithstanding that the shares to which it relates are, until the conversion or the exercise of the option, unissued: Sch 10 para 11(3). For these purposes, an interest held on behalf of an undertaking is to be treated as held by it: Sch 10 para 11(4).

A holding of 20% or more of the shares of the undertaking is to be presumed to be a participating interest unless the contrary is shown: Sch 10 para 11(2).

In the balance sheet and profit and loss formats set out in Sch 1, 'participating interest' does not include an interest in a group undertaking: Sch 10 para 11(5). For the purpose of Sch 10 para 11 as it applies in relation to the expression 'participating interest', in those formats as they apply in relation to group accounts and in Sch 6 para 19 (group accounts: undertakings to be accounted for as associated undertakings: see PARA 791) the references in Sch 10 para 11(1)-(4) to the interest held by, and the purposes and activities of, the undertaking concerned are to be construed as references to the interest held by, and the purposes and activities of, the group (within the meaning of Sch 6 para 1: see PARA 785): Sch 10 para 11(6).

11 The nominal value of the shares held must be shown separately: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (4).

12 As to the meaning of 'current assets' see PARA 720 note 2.

13 The amount falling due after more than one year must be shown separately for each item included under debtors: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (5).

14 See note 5.

15 This item may be shown at either item C II 6 or item D: see the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (6).

16 See note 11.

17 See note 15.

18 The amount of any convertible loans must be shown separately: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (7). As to the meaning of 'debenture' see PARA 1299.

19 Payments received on account of orders must be shown for each of items E 3 and H 8, in so far as they are not shown as deductions from stocks: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (8).

20 The amount for creditors in respect of taxation and social security must be shown separately from the amount for other creditors: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (9).

21 The two positions given for this item at item E 9 and item H 9 are an alternative to the position at item J, but if the item is not shown in a position corresponding to that at item J it may be shown in either or both of the

other two positions (as the case may require): Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (10).

22 In determining the amount to be shown for this item any amounts shown under 'prepayments and accrued income' must be taken into account wherever shown: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (11).

23 See note 18.

24 See note 19.

25 See note 20.

26 See note 21.

27 As to provisions for liabilities see PARA 730 note 20.

28 See note 21.

29 The amount of allotted share capital and the amount of called up share capital which has been paid up must be shown separately: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (12). As to the meaning of 'allotted share capital' see PARA 1091; and as to the meaning of 'called up share capital' see PARA 1048.

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733. Balance sheet formats: Format 2.

In relation to large and medium-sized companies¹, the items to be listed in a balance sheet² prepared in accordance with Format 2³ are as follows⁴:

Assets

- | | | |
|------|-----|--|
| 1227 | A | Called up share capital not paid ⁵ |
| 1228 | B | Fixed assets ⁶ |
| 75 | | |
| 207. | I | Intangible assets |
| 208. | | 1 Development costs |
| 209. | | 2 Concessions, patents, licences, trade marks and similar rights and assets ⁷ |
| 210. | | 3 Goodwill ⁸ |
| 211. | | 4 Payments on account |
| 212. | II | Tangible assets |
| 213. | | 1 Land and buildings |
| 214. | | 2 Plant and machinery |
| 215. | | 3 Fixtures, fittings, tools and equipment |
| 216. | | 4 Payments on account and assets in course of construction |
| 217. | III | Investments |
| 218. | | 1 Shares in group undertakings ⁹ |
| 219. | | 2 Loans to group undertakings |
| 220. | | 3 Participating interests ¹⁰ |
| 221. | | 4 Loans to undertakings in which the company has a participating interest |
| 222. | | 5 Other investments other than loans |

223.	6	Other loans
224.	7	Own shares ¹¹
76		
1229	C	Current assets ¹²
77		
225.	I	Stocks
226.	1	Raw materials and consumables
227.	2	Work in progress
228.	3	Finished goods and goods for resale
229.	4	Payments on account
230.	II	Debtors ¹³
231.	1	Trade debtors
232.	2	Amounts owed by group undertakings
233.	3	Amounts owed by undertakings in which the company has a participating interest
234.	4	Other debtors
235.	5	Called up share capital not paid ¹⁴
236.	6	Prepayments and accrued income ¹⁵
237.	III	Investments
238.	1	Shares in group undertakings
239.	2	Own shares ¹⁶
240.	3	Other investments
241.	IV	Cash at bank and in hand
78		
1230	D	Prepayments and accrued income ¹⁷

Liabilities

1231	A	Capital and reserves
79		
242.	I	Called up share capital ¹⁸
243.	II	Share premium account
244.	III	Revaluation reserve
245.	IV	Other reserves
246.	1	Capital redemption reserve
247.	2	Reserve for own shares
248.	3	Reserves provided for by the articles of association
249.	4	Other reserves
250.	V	Profit and loss account
80		
1232	B	Provisions for liabilities ¹⁹
81		
251.	1	Pensions and similar obligations
252.	2	Taxation, including deferred taxation
253.	3	Other provisions
82		
1233	C	Creditors ²⁰
83		
254.	1	Debenture loans ²¹
255.	2	Bank loans and overdrafts
256.	3	Payments received on account ²²
257.	4	Trade creditors
258.	5	Bills of exchange payable
259.	6	Amounts owed to group undertakings

260. 7 Amounts owed to undertakings in which the company has a participating interest
261. 8 Other creditors including taxation and social security²³
262. 9 Accruals and deferred income²⁴
- 84
- 1234 D Accruals and deferred income²⁵

1 As to large and medium-sized companies and groups see PARA 695. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'balance sheet' see PARA 715.

3 As to the general rules relating to the statutory formats see PARA 729.

4 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats: Format 2).

5 This item may be shown at either item A or item C II 5: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (1). As to the meaning of 'called up share capital' see PARA 1048.

6 As to the meaning of 'fixed assets' see PARA 720 note 2.

7 Amounts in respect of assets are only to be included in a company's balance sheet under this item if either: (1) the assets were acquired for valuable consideration and are not required to be shown under goodwill; or (2) the assets in question were created by the company itself: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (2).

8 Amounts representing goodwill are only to be included to the extent that the goodwill was acquired for valuable consideration: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (3).

9 As to the meaning of 'share' see PARA 1042. As to the meaning of 'group undertaking' see PARA 27; and as to the meaning of 'undertaking' see PARA 26 note 2.

10 As to the meaning of 'participating interest' see PARA 732 note 10.

11 The nominal value of the shares held must be shown separately: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (4).

12 As to the meaning of 'current assets' see PARA 720 note 2.

13 The amount falling due after more than one year must be shown separately for each item included under debtors: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (5).

14 See note 5.

15 This item may be shown as either item C II 6 or item D: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (6).

16 See note 11.

17 See note 15.

18 The amount of allotted share capital and the amount of called up share capital which has been paid up must be shown separately: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (12). As to the meaning of 'allotted share capital' see PARA 1091; and as to the meaning of 'called up share capital' see PARA 1048.

19 As to provisions for liabilities see PARA 730 note 20.

20 Amounts falling due within one year and after one year must be shown separately for each of these items and for the aggregate of all of these items: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (13).

21 The amount of any convertible loans must be shown separately: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (7). As to the meaning of 'debenture' see PARA 1299.

22 Payments received on account of orders must be shown for each of these items in so far as they are not shown as deductions from stocks: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (8).

23 The amount for creditors in respect of taxation and social security must be shown separately from the amount for other creditors: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (9).

24 The two positions given for this item (ie at item C 9 or item D) are alternatives: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Balance sheet formats) note (10).

25 See note 24.

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(d) Formats for Profit and Loss Account for Small, Large and Medium-sized Companies

734. Profit and loss account formats: Format 1.

The items to be included in a profit and loss account¹ prepared in accordance with Format 1² are as follows³:

1235	1	Turnover ⁴
1236	2	Cost of sales ⁵
1237	3	Gross profit or loss
1238	4	Distribution costs ⁶
1239	5	Administrative expenses ⁷
1240	6	Other operating income
1241	7	Income from shares in group undertakings ⁸
1242	8	Income from participating interests ⁹
1243	9	Income from other fixed asset investments ¹⁰
1244	10	Other interest receivable and similar income ¹¹
1245	11	Amounts written off investments
1246	12	Interest payable and similar charges ¹²
1247	13	Tax on profit or loss on ordinary activities
1248	14	Profit or loss on ordinary activities after taxation
1249	15	Extraordinary income
1250	16	Extraordinary charges
1251	17	Extraordinary profit or loss
1252	18	Tax on extraordinary profit or loss
1253	19	Other taxes not shown under the above items

1254 20 Profit or loss for the financial year¹³

- 1 As to the meaning of 'profit and loss account' see PARA 715.
- 2 As to the general rules relating to the statutory formats see PARA 729.
- 3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Profit and loss account formats: Format 1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Profit and loss account formats: Format 1).
- 4 As to the meaning of 'turnover' see PARA 694 note 7.
- 5 These items must be stated after taking into account any necessary provisions for depreciation or diminution in value of assets: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Profit and loss account formats) note (11); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Profit and loss account formats) note (14). As to such provisions see PARA 720 note 4.
The amount of any provisions for depreciation and diminution in value of tangible and intangible fixed assets falling to be shown under items 7 (a) and A 4 (a) respectively in Formats 2 and 4 (see PARAS 735, 737) must be disclosed in a note to the accounts in any case where the profit and loss account is prepared using Format 1: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Profit and loss account formats) note (14); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Profit and loss account formats) note (17). As to the meaning of 'fixed assets' see PARA 720 note 2. As to notes to the accounts see PARA 738 et seq.
- 6 See note 5.
- 7 See note 5.
- 8 As to the meaning of 'share' see PARA 1042. As to the meaning of 'group undertaking' see PARA 27; and as to the meaning of 'undertaking' see PARA 26 note 2.
- 9 As to the meaning of 'participating interest' see PARAS 730 note 10, 732 note 10.
- 10 Income and interest derived from group undertakings must be shown separately from income and interest derived from other sources: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Profit and loss account formats) note (12); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Profit and loss account formats) note (15).
- 11 See note 10.
- 12 The amount payable to group undertakings must be shown separately: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Profit and loss account formats) note (13); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Profit and loss account formats) note (16).
- 13 As to a company's financial year see PARA 711.

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735. Profit and loss account formats: Format 2.

The items to be included in a profit and loss account¹ prepared in accordance with Format 2² are as follows³:

1255	1	Turnover ⁴
1256	2	Change in stocks of finished goods and in work in progress
1257	3	Own work capitalised ⁵
1258	4	Other operating income
1259	5	(a) Raw materials and consumables
1260		(b) Other external charges
1261	6	Staff costs ⁶
1262		(a) Wages and salaries
1263		(b) Social security costs
1264		(c) Other pension costs
1265	7	(a) Depreciation and other amounts written off tangible and intangible fixed assets ⁷
1266		(b) Exceptional amounts written off current assets ⁸
1267	8	Other operating charges
1268	9	Income from shares in group undertakings ⁹
1269	10	Income from participating interests ¹⁰
1270	11	Income from other fixed asset investments ¹¹
1271	12	Other interest receivable and similar income ¹²
1272	13	Amounts written off investments
1273	14	Interest payable and similar charges ¹³
1274	15	Tax on profit or loss on ordinary activities
1275	16	Profit or loss on ordinary activities after taxation
1276	17	Extraordinary income
1277	18	Extraordinary charges
1278	19	Extraordinary profit or loss
1279	20	Tax on extraordinary profit or loss
1280	21	Other taxes not shown under the above items
1281	22	Profit or loss for the financial year

1 As to the meaning of 'profit and loss account' see PARA 715.

2 As to the general rules relating to the statutory formats see PARA 729.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Profit and loss account formats: Format 2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Profit and loss account formats: Format 2).

4 As to the meaning of 'turnover' see PARA 694 note 7.

5 As to the meaning of 'capitalisation' in relation to large and medium-sized companies see PARA 720 note 17.

6 For these purposes, 'social security costs' means any contributions by the company to any state social security or pension scheme, fund or arrangement: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 8 para 11(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 14(1). 'Pension costs' includes any costs incurred by the company in respect of any pension scheme established for the purpose of providing pensions for persons currently or formerly employed by the company, any sums set aside for the future payment of pensions directly by the company to current or former employees, and any pensions paid directly to such persons without having first been set aside: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 8 para 11(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 14(2). Any amount stated in respect of the item 'social security costs' or in respect of the item 'wages and salaries' in the company's profit and loss account is to be determined by reference to payments made or costs incurred in respect of all persons employed by the company during the financial year under contracts of service: Small Companies and Groups (Accounts and

Directors' Report) Regulations 2008, SI 2008/409, Sch 8 para 11(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 14(3). As to a company's financial year see PARA 711. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

7 See PARAS 734 note 5, 736 note 4. As to provisions for depreciation see PARA 720 note 4. As to the meaning of 'fixed assets' see PARA 720 note 2.

8 As to the meaning of 'current assets' see PARA 720 note 2.

9 As to the meaning of 'share' see PARA 1042. As to the meaning of 'group undertaking' see PARA 27; and as to the meaning of 'undertaking' see PARA 26 note 2.

10 As to the meaning of 'participating interest' see PARAS 730 note 10, 732 note 10.

11 Income and interest derived from group undertakings must be shown separately from income and interest derived from other sources: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Profit and loss account formats) note (12); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Profit and loss account formats) note (15).

12 See note 11.

13 The amount payable to group undertakings must be shown separately: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Profit and loss account formats) note (13); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Profit and loss account formats) note (16).

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736. Profit and loss account formats: Format 3.

The items to be included in a profit and loss account¹ prepared in accordance with Format 3² are as follows³:

1282	A	Charges
85		
263.	1	Cost of sales ⁴
264.	2	Distribution costs ⁵
265.	3	Administrative expenses ⁶
266.	4	Amounts written off investments
267.	5	Interest payable and similar charges ⁷
268.	6	Tax on profit or loss on ordinary activities
269.	7	Profit or loss on ordinary activities after taxation
270.	8	Extraordinary charges
271.	9	Tax on extraordinary profit or loss
272.	10	Other taxes not shown under the above items
273.	11	Profit or loss for the financial year ⁸
86		
1283	B	Income
87		
274.	1	Turnover ⁹

275.	2	Other operating income
276.	3	Income from shares in group undertakings ¹⁰
277.	4	Income from participating interests ¹¹
278.	5	Income from other fixed asset investments ¹²
279.	6	Other interest receivable and similar income ¹³
280.	7	Profit or loss on ordinary activities after taxation
281.	8	Extraordinary income
282.	9	Profit or loss for the financial year

88

1 As to the meaning of 'profit and loss account' see PARA 715.

2 As to the general rules relating to the statutory formats see PARA 729.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Profit and loss account formats: Format 3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Profit and loss account formats: Format 3).

4 These items must be stated after taking into account any necessary provisions for depreciation or diminution in value of assets: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Profit and loss account formats) note (11); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Profit and loss account formats) note (14). As to such provisions see PARA 720 note 4.

The amount of any provisions for depreciation and diminution in value of tangible and intangible fixed assets falling to be shown under items 7 (a) and A 4 (a) respectively in Formats 2 and 4 (see PARAS 735, 737) must be disclosed in a note to the accounts in any case where the profit and loss account is prepared using Format 3: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Profit and loss account formats) note (14); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Profit and loss account formats) note (17). As to the meaning of 'fixed assets' see PARA 720 note 2. As to notes to the accounts see PARA 738 et seq.

5 See note 4.

6 See note 4.

7 The amount payable to group undertakings must be shown separately: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Profit and loss account formats) note (13); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Profit and loss account formats) note (16).

8 As to a company's financial year see PARA 711.

9 As to the meaning of 'turnover' see PARA 694 note 7.

10 As to the meaning of 'share' see PARA 1042. As to the meaning of 'group undertaking' see PARA 27; and as to the meaning of 'undertaking' see PARA 26 note 2.

11 As to the meaning of 'participating interest' see PARAS 730 note 10, 732 note 10.

12 Income and interest derived from group undertakings must be shown separately from income and interest derived from other sources: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Profit and loss account formats) note (12); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Profit and loss account formats) note (15).

13 See note 12.

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737. Profit and loss account formats: Format 4.

The items to be included in a profit and loss account¹ prepared in accordance with Format 4² are as follows³:

1284	A	Charges
89		
283.	1	Reduction in stocks of finished goods and in work in progress
284.	2	(a) Raw materials and consumables
285.		(b) Other external charges
286.	3	Staff costs ⁴
287.		(a) Wages and salaries
288.		(b) Social security costs
289.		(c) Other pension costs
290.	4	(a) Depreciation and other amounts written off tangible and intangible fixed assets ⁵
291.		(b) Exceptional amounts written off current assets ⁶
292.	5	Other operating charges
293.	6	Amounts written off investments
294.	7	Interest payable and similar charges ⁷
295.	8	Tax on profit or loss on ordinary activities
296.	9	Profit or loss on ordinary activities after taxation
297.	10	Extraordinary charges
298.	11	Tax on extraordinary profit or loss
299.	12	Other taxes not shown under the above items
300.	13	Profit or loss for the financial year ⁸
90		
1285	B	Income
91		
301.	1	Turnover ⁹
302.	2	Increase in stocks of finished goods and in work in progress
303.	3	Own work capitalised ¹⁰
304.	4	Other operating income
305.	5	Income from shares in group undertakings ¹¹
306.	6	Income from participating interests ¹²
307.	7	Income from other fixed asset investments ¹³
308.	8	Other interest receivable and similar income ¹⁴
309.	9	Profit or loss on ordinary activities after taxation
310.	10	Extraordinary income
311.	11	Profit or loss for the financial year
92		

1 As to the meaning of 'profit and loss account' see PARA 715.

2 As to the general rules relating to the statutory formats see PARA 729.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Profit and loss account formats: Format 4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Profit and loss account formats: Format 4).

- 4 As to staff costs see PARA 735 note 6.
- 5 See PARAS 734 note 5, 736 note 4. As to provisions for depreciation see PARA 720 note 4. As to the meaning of 'fixed assets' see PARA 720 note 2.
- 6 As to the meaning of 'current assets' see PARA 720 note 2.
- 7 The amount payable to group undertakings must be shown separately: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Profit and loss account formats) note (13); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Profit and loss account formats) note (16).
- 8 As to a company's financial year see PARA 711.
- 9 As to the meaning of 'turnover' see PARA 694 note 7.
- 10 As to the meaning of 'capitalisation' in relation to large and medium-sized companies see PARA 720 note 17.
- 11 As to the meaning of 'share' see PARA 1042. As to the meaning of 'group undertaking' see PARA 27; and as to the meaning of 'undertaking' see PARA 26 note 2.
- 12 As to the meaning of 'participating interest' see PARAS 730 note 10, 732 note 10.
- 13 Income and interest derived from group undertakings must be shown separately from income and interest derived from other sources: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section B (Profit and loss account formats) note (12); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section B (Profit and loss account formats) note (15).
- 14 See note 13.

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(D) NOTES TO THE ACCOUNTS

(a) In general

738. Notes to the accounts.

Any information required¹ in the case of any company² must, if not given in the company's accounts, be given by way of a note to those accounts³. Information required⁴ to be given in notes to a company's annual accounts⁵ may be contained in the accounts or in a separate document annexed to the accounts⁶.

Special provisions apply where a company is a parent company or subsidiary undertaking⁷ and where a company is an investment company⁸.

¹ ie by the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3: see PARA 739 et seq.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 42; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 42. Care must be taken not to include extraneous or superfluous material in the notes to the accounts: *Re a Company (No 1389920)* [2004] EWHC 60 (Ch), [2004] 2 BCLC 434.

4 le by the Companies Act 2006 Pt 15 (ss 380-474): see PARAS 693 et seq, 739 et seq.

5 As to the meaning of 'annual accounts' see PARA 715.

6 Companies Act 2006 s 472(1).

7 See the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 4 (para 73); and PARA 792. As to the meaning of 'parent company' see PARA 26 note 2. As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

8 See the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 5; and PARA 707.

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739. Information supplementary to the accounts.

Any information required¹ in the case of any company² must be given by way of a note to the company's accounts, if it is not given in the accounts themselves³. Such information: (1) either supplements the information given with respect to any particular items shown in the balance sheet⁴, or is otherwise relevant to assessing the company's state of affairs in the light of the information so given⁵; or (2) either supplements the information given with respect to any particular items shown in the profit and loss account⁶, or otherwise provides particulars of income or expenditure of the company or of circumstances affecting the items shown in the profit and loss account⁷.

The accounting policies⁸ adopted by the company in determining the amounts to be included in respect of items shown in the balance sheet and in determining the profit or loss of the company must be stated (including such policies with respect to the depreciation and diminution in value of assets)⁹. In relation to a large company¹⁰, it must be stated whether the accounts have been prepared in accordance with applicable accounting standards¹¹ and particulars of any material departure from those standards and the reasons for it must be given¹².

There must also be stated:

1286 (a) any amount set aside or proposed to be set aside to, or withdrawn or proposed to be withdrawn from, reserves;

1287 (b) the aggregate amount of dividends paid in the financial year¹³ (other than those for which a liability existed at the immediately preceding balance sheet date¹⁴);

1288 (c) the aggregate amount of dividends that the company is liable to pay at the balance sheet date; and

1289 (d) the aggregate amount of dividends that are proposed before the date of approval of the accounts, and not otherwise disclosed under head (b) or (c)¹⁵.

1 le by the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3; see the text and notes 2-12; and PARA 741 et seq.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 See the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 42; the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 42; and PARA 738.

4 As to the meaning of 'balance sheet' see PARA 715.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 45; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 46. As to information supplementing the balance sheet see PARA 741 et seq.

6 As to the meaning of 'profit and loss account' see PARA 715.

7 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 59; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 65. See, however, the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 3(2); the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 3(2); and PARA 718 note 4. As to information supplementing the profit and loss account see PARA 750 et seq; and see also PARA 740.

8 As to possible accounting policies see the general principles, the historical cost accounting rules and the alternative accounting rules set out in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Sections A, B and C and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Sections A, B and C; and see PARA 718 et seq.

9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 44; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 44.

10 As to large companies and groups see PARA 695.

11 As to the meaning of 'accounting standards' see PARA 697.

12 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 45. As to the exemption for medium-sized companies see reg 4(2); and PARA 879.

13 As to a company's financial year see PARA 711.

14 As to the meaning of 'balance sheet date' see PARA 718 note 12.

15 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 43; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 43.

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740. Sums denominated in foreign currencies.

Where sums originally denominated in foreign currencies have been brought into account under any items shown in the balance sheet¹ or profit and loss account², the basis on which those sums have been translated into sterling (or the currency in which the accounts are drawn up) must be stated³.

1 As to the meaning of 'balance sheet' see PARA 715.

2 As to the meaning of 'profit and loss account' see PARA 715.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 62; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 70.

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(b) Information supplementing the Balance Sheet

741. Share capital and debentures.

The following information must be given with respect to a company's share capital¹:

1290 (1) where shares of more than one class have been allotted, the number and aggregate nominal value of shares of each class allotted²; and

1291 (2) in relation to a large or medium-sized company³: (a) where shares are held as treasury shares, the number and aggregate nominal value of the treasury shares; and (b) where shares of more than one class have been allotted, the number and aggregate nominal value of the shares of each class held as treasury shares⁴.

In the case of any part of the allotted share capital that consists of redeemable shares, the following information must be given: (i) the earliest and latest dates on which the company has power to redeem those shares; (ii) whether those shares must be redeemed in any event or are liable to be redeemed at the option of the company or of the shareholder; and (iii) whether any (and, if so, what) premium is payable on redemption⁵.

If the company has allotted any shares during the financial year⁶, information must be given as to the classes of shares allotted and, as respects each class of shares, the number allotted, their aggregate nominal value, and the consideration received by the company for the allotment⁷.

In relation to a large or medium-sized company, the following particulars must be given with respect to any contingent right to the allotment of shares⁸ in the company: (A) the number, description and amount of the shares in relation to which the right is exercisable; (B) the period during which it is exercisable; and (c) the price to be paid for the shares allotted⁹. If the company has issued any debentures during the financial year to which the accounts relate, information must be given as to the classes of debentures issued and, as respects each class of debentures, the amount issued and the consideration received by the company for the issue¹⁰; and, where any of the company's debentures are held by a nominee of or trustee for the

company, the nominal amount of the debentures and the amount at which they are stated in the accounting records kept by the company¹¹ must be stated¹².

1 As to the meaning of 'share' see PARA 1042; and as to a company's share capital see PARA 1042. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 46(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 47(1)(a). As to the meaning of 'allotment' and related expressions under the Companies Acts see PARA 1091; and as to the meaning of 'share' see PARA 1042.

3 As to large and medium-sized companies and groups see PARA 695.

4 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 47(1)(b). As to treasury shares see PARA 1251.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 46(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 47(2). As to redeemable shares see PARAS 1052, 1229 et seq.

6 As to a company's financial year see PARA 711.

7 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 47; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 48.

8 For these purposes, 'contingent right to the allotment of shares' means any option to subscribe for shares and any other right to require the allotment of shares to any person whether arising on the conversion into shares of securities of any other description or otherwise: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 49(2).

9 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 49(1).

10 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 50(1). As to the meaning of 'debenture' see PARA 1299.

11 In accordance with the Companies Act 2006 s 386 (duty to keep accounting records): see PARA 708.

12 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 50(2).

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742. Fixed assets.

In respect of each item which is or would, but for its inclusion combined with other items¹, be shown under the general item 'fixed assets'² in the company's balance sheet³, the following information must be given:

1292 (1) the appropriate amounts⁴ in respect of that item as at the date of the beginning of the financial year⁵ and as at the balance sheet date⁶ respectively;

- 1293 (2) the effect on any amount shown in the balance sheet in respect of that item of: (a) any revision of the amount in respect of any assets included under that item made during that year on any basis mentioned in the alternative accounting rules⁷; (b) acquisitions during that year of any assets; (c) disposals during that year of any assets; and (d) any transfers of assets of the company to and from that item during that year⁸.

In respect of each such item there must also be stated: (a) the cumulative amount of provisions for depreciation or diminution⁹ in value of assets included under that item as at the date of the beginning of the financial year and as at the balance sheet date; (b) the amount of any such provisions made in respect of the financial year; (c) the amount of any adjustments made in respect of any such provisions during that year in consequence of the disposal of any assets; and (d) the amount of any other adjustments made in respect of any such provisions during that year¹⁰.

Where any fixed assets of the company, other than listed investments¹¹, are included under any item shown in the company's balance sheet at an amount determined on any basis mentioned in the alternative accounting rules, the following information must be given:

- 1294 (a) the years, so far as they are known to the directors, in which the assets were severally valued and the several values; and
 1295 (b) in the case of assets that have been valued during the financial year, the names of the persons who valued them or particulars of their qualifications for doing so and, whichever is stated, the bases of valuation used by them¹².

In relation to a large or medium-sized company¹³, there must be stated how much of any amount which is or would, but for its inclusion combined with other items, be shown in respect of the item 'land and buildings' in the company's balance sheet, is ascribable to land of freehold tenure and how much to land of leasehold tenure, and how much of the amount ascribable to land of leasehold tenure is ascribable to land held on long lease and how much to land held on short lease¹⁴.

1 As to the possibility of such combination see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 para 4(2)(b); the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 para 4(2)(b); and PARA 729 head (b).

2 As to the meaning of 'fixed assets' see PARA 720 note 2.

3 As to the meaning of 'balance sheet' see PARA 715. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

4 For these purposes, the reference to the appropriate amounts in respect of any item as at any date is a reference to amounts representing the aggregate amounts determined, as at that date, in respect of assets falling to be included under that item on either of the following bases, that is to say:

- 252 (1) on the basis of purchase price or production cost, determined in accordance with the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B paras 27, 28 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B paras 27, 28 (see PARA 721); or
 253 (2) on any basis mentioned in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 32 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 32 (see PARA 722),

leaving out of account in either case any provisions for depreciation or diminution in value: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 48(2); Large and

Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 51(2). As to the meaning of 'purchase price' see PARA 720 note 3.

5 As to a company's financial year see PARA 711.

6 As to the meaning of 'balance sheet date' see PARA 718 note 12.

7 I.e. the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section C para 32 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section C para 32: see PARA 722.

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 48(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 51(1).

9 As to references to provisions for depreciation or diminution in value of assets see PARA 720 note 4.

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 48(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 51(3).

11 For these purposes, 'listed investment' means an investment as respects which there has been granted a listing on a recognised investment exchange other than an overseas investment exchange, or on a stock exchange of repute outside the United Kingdom: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 8 para 5(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 8(1). 'Recognised investment exchange' and 'overseas investment exchange' have the meanings given in the Financial Services and Markets Act 2000 Pt XVIII (ss 285-313) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 684, 709): Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 8 para 5(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 8(2). As to the meaning of 'United Kingdom' see PARA 1 note 5.

12 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 49; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 52.

13 As to large and medium-sized companies and groups see PARA 695.

14 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 53. For these purposes, 'long lease' means a lease in the case of which the portion of the term for which it was granted remaining unexpired at the end of the financial year is not less than 50 years; 'short lease' means a lease which is not a long lease; and 'lease' includes an agreement for a lease: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 7.

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743. Investments.

In respect of the amount of each item which is or would, but for its inclusion combined with other items¹, be shown in the company's balance sheet² under the general item 'investments', whether as fixed assets or as current assets³, there must be stated how much of that amount is ascribable to listed investments⁴.

Where the amount of any listed investments is so stated for any item, the following amounts must also be stated:

1296 (1) the aggregate market value of those investments where it differs from the amount so stated; and

1297 (2) both the market value and the stock exchange value of any investments of which the former value is, for the purposes of the accounts, taken as being higher than the latter⁵.

1 As to the possibility of such combination see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 para 4(2)(b); the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 para 4(2)(b); and PARA 729 head (b).

2 As to the meaning of 'balance sheet' see PARA 715. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to the meanings of 'fixed assets' and 'current assets' see PARA 720 note 2.

4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 50(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 54(1). As to the meaning of 'listed investment' see PARA 742 note 11.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 50(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 54(2).

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744. Information about fair value of assets and liabilities.

Where financial instruments¹ have been valued in accordance with the fair value provisions², there must be stated:

1298 (1) the significant assumptions underlying the valuation models and techniques used where the fair value of the instruments has been determined in accordance with generally accepted valuation models and techniques³;

1299 (2) for each category of financial instrument, the fair value of the instruments in that category and the changes in value included in the profit and loss account⁴ or credited to or (as the case may be) debited from the fair value reserve⁵ in respect of those instruments; and

1300 (3) for each class of derivatives, the extent and nature of the instruments, including significant terms and conditions that may affect the amount, timing and certainty of future cash flows⁶.

Where any amount is transferred to or from the fair value reserve during the financial year⁷, there must be stated in tabular form: (a) the amount of the reserve as at the date of the beginning of the financial year and as at the balance sheet date⁸ respectively; (b) the amount transferred to or from the reserve during that year; and (c) the source and application respectively of the amounts so transferred⁹.

If the company¹⁰ has financial fixed assets¹¹ that could be included at fair value¹², the amount at which those items are included under any item in the company's accounts is in excess of their

fair value, and the company has not made provision for diminution in value of those assets¹³, then there must be stated:

- 1301 (i) the amount at which either the individual assets or appropriate groupings of those individual assets are included in the company's accounts;
- 1302 (ii) the fair value of those assets or groupings; and
- 1303 (iii) the reasons for not making a provision for diminution in value of those assets, including the nature of the evidence that provides the basis for the belief that the amount at which they are stated in the accounts will be recovered¹⁴.

In relation to a large or medium-sized company¹⁵, where the company has derivatives¹⁶ that it has not included at fair value, there must be stated for each class of such derivatives:

- 1304 (A) the fair value of the derivatives in that class, if such a value can be determined¹⁷; and
- 1305 (B) the extent and nature of the derivatives¹⁸.

1 As to the meaning of 'financial instrument' see PARA 725 note 1.

2 I.e. the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 36 or 38 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 36 or 38: see PARAS 725, 727.

3 I.e. in accordance with the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 37(4) or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 37(4): see PARA 726.

4 As to the meaning of 'profit and loss account' see PARA 715.

5 As to the meaning of 'fair value reserve' see PARA 725 note 4.

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 51(1), (2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 55(1), (2).

7 As to a company's financial year see PARA 711.

8 As to the meaning of 'balance sheet date' see PARA 718 note 12.

9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 51(1), (3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 55(1), (3).

10 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

11 As to the meaning of 'fixed assets' see PARA 720 note 2.

12 I.e. by virtue of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 36 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 36: see PARA 725.

13 I.e. in accordance with the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 19(1) or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 19(1): see PARA 720.

14 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 52; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 57.

15 As to large and medium-sized companies and groups see PARA 695.

16 As to the meaning of 'derivatives' see PARA 725 note 1.

17 Ie in accordance with the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 37: see PARA 726.

18 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 56.

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745. Information where investment property and living animals and plants included at fair value.

Where the amounts to be included in a company's¹ accounts in respect of investment property or living animals and plants have been determined², the balance sheet³ items affected and the basis of valuation adopted in determining the amounts of the assets in question in the case of each such item must be disclosed in a note to the accounts⁴. In the case of investment property, for each balance sheet item affected there must be shown, either separately in the balance sheet or in a note to the accounts: (1) the comparable amounts determined according to the historical cost accounting rules⁵; or (2) the differences between those amounts and the corresponding amounts actually shown in the balance sheet in respect of that item⁶.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 Ie in accordance with the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section D para 39 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section D para 39: see PARA 727.

3 As to the meaning of 'balance sheet' see PARA 715.

4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 53(1), (2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 58(1), (2).

5 Ie the rules set out in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B: see PARAS 719-721.

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 53(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 58(3). For these purposes, references in relation to any item to the comparable amounts determined in accordance with the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 53(3) or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 58(3) are to: (1) the aggregate amount which would be required to be shown in respect of that item if the amounts to be included in respect of all the assets covered by that item were determined according to the historical cost accounting rules; and (2) the aggregate amount of the cumulative provisions for depreciation or diminution in value which would be permitted or required in determining those amounts according to those rules: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 53(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 58(4).

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746. Reserves and provisions.

Where any amount is transferred to or from any reserves, or to any provision for liabilities, or from any provision for liabilities otherwise than for the purpose for which the provision was established, and the reserves or provisions are or would, but for their inclusion combined with other items¹, be shown as separate items in the company's balance sheet², the following information must be given in respect of the aggregate of reserves or provisions included in the same item:

- 1306 (1) the amount of the reserves or provisions as at the date of the beginning of the financial year³ and as at the balance sheet date⁴ respectively;
- 1307 (2) any amounts transferred to or from the reserves or provisions during that year; and
- 1308 (3) the source and application respectively of any amounts so transferred⁵.

Particulars must be given of each provision included in the item 'other provisions' in the company's balance sheet in any case where the amount of that provision is material⁶.

In relation to a large or medium-sized company⁷, the amount of any provision for deferred taxation must be stated separately from the amount of any provision for other taxation⁸.

1 As to the possibility of such combination see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 para 4(2)(b); the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 para 4(2)(b); and PARA 729 head (b).

2 As to the meaning of 'balance sheet' see PARA 715. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to a company's financial year see PARA 711.

4 As to the meaning of 'balance sheet date' see PARA 718 note 12.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 54(1), (2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 59(1), (2).

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 54(1), (3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 59(1), (3).

7 As to large and medium-sized companies and groups see PARA 695.

8 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 60.

COMPANIES ACTS/(18) ACCOUNTS AND REPORTS/(iv) Annual Accounts/B. INDIVIDUAL ACCOUNTS EXCLUDING BANKING AND INSURANCE COMPANIES/(D) Notes to the Accounts/(b) Information supplementing the Balance Sheet/747. Details of indebtedness.

747. Details of indebtedness.

For the aggregate of all items shown under 'creditors'¹ in the company's balance sheet² there must be stated the aggregate of the following amounts:

- 1309 (1) the amount of any debts included under 'creditors' which are payable or repayable otherwise than by instalments and fall due for payment or repayment after the end of the period of five years beginning with the day next following the end of the financial year³; and
- 1310 (2) in the case of any debts so included which are payable or repayable by instalments, the amount of any instalments which fall due for payment after the end of that period⁴.

In relation to a large or medium-sized company⁵, the terms of payment or repayment and the rate of any interest payable on each debt falling so to be taken into account must be stated⁶; but if the number of debts is such that, in the opinion of the directors⁷, compliance with this requirement would result in a statement of excessive length, it is sufficient to give a general indication of the terms of payment or repayment and the rates of any interest payable on the debts⁸.

In respect of each item shown under 'creditors' in the company's balance sheet there must be stated the aggregate amount of any debts included under that item in respect of which any security has been given by the company⁹; and, in relation to a large or medium-sized company, an indication of the nature of the securities so given¹⁰.

If any fixed cumulative dividends on the company's shares are in arrear, there must be stated: (a) the amount of the arrears; and (b) the period for which the dividends or, if there is more than one class, each class of them are in arrear¹¹.

1 For these purposes, references to items shown under 'creditors' include references to items which would, but for their having been combined with other items, be shown under that heading: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 55(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 61(5). As to the possibility of such combination see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 para 4(2)(b); the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 para 4(2)(b); and PARA 729 head (b).

2 As to the meaning of 'balance sheet' see PARA 715. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to a company's financial year see PARA 711.

4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 55(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 61(1). A loan is treated as falling due for repayment, and an instalment of a loan is treated as falling due for payment, on the earliest date on which the lender could require repayment or (as the case may be) payment, if he exercised all options and rights available to him: see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 8 para 6; and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 10 para 9.

Where amounts falling due to creditors within one year and after more than one year are distinguished in the balance sheet, the reference in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 55(1) and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 61(1) to an item shown under 'creditors' in the

company's balance sheet includes a reference to an item shown under the latter of those categories: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 55(3) (a); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 61(5)(a).

5 As to large and medium-sized companies and groups see PARA 695.

6 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 61(2).

7 As to the meaning of 'director' see PARA 478.

8 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 61(3).

9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 55(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 61(4)(a).

Where amounts falling due to creditors within one year and after more than one year are distinguished in the balance sheet, the reference in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 55(2) and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 61(4) to an item shown under 'creditors' in the company's balance sheet includes a reference to an item shown under either of those categories: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 55(3) (b); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 61(5)(b).

10 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 61(4)(b).

11 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 56; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 62. As to the meaning of 'share' see PARA 1042.

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748. Guarantees and other financial commitments.

Particulars must be given of any charge on the assets of the company¹ to secure the liabilities of any other person, including, where practicable, the amount secured². The following information must be given with respect to any other contingent liability not provided for:

- 1311 (1) the amount or estimated amount of that liability;
- 1312 (2) its legal nature; and
- 1313 (3) whether any valuable security has been provided by the company in connection with that liability and, if so, what³.

There must be stated, where practicable, the aggregate amount or estimated amount of contracts for capital expenditure, so far as not provided for⁴.

Particulars must be given of any pension commitments included under any provision shown in the company's balance sheet⁵ and any such commitments for which no provision has been made; and, where any such commitment relates wholly or partly to pensions payable to past

directors of the company, separate particulars must be given of that commitment so far as it relates to such pensions⁶.

Particulars must also be given of any other financial commitments that have not been provided for and are relevant to assessing the company's state of affairs⁷.

In relation to a small company⁸, commitments⁹ which are undertaken on behalf of or for the benefit of:

- 1314 (a) any parent undertaking or fellow subsidiary undertaking¹⁰; or
- 1315 (b) any subsidiary undertaking of the company,

must be stated separately from other commitments¹¹; and commitments within head (a) must also be stated separately from those within head (b)¹².

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 57(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 63(1).

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 57(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 63(2).

4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 57(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 63(3).

5 As to the meaning of 'balance sheet' see PARA 715.

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 57(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 63(4). As to the meaning of 'director' see PARA 478.

7 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 57(5); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 63(5).

8 As to small companies and groups see PARA 694.

9 I.e. commitments within any of the sub-paragraphs of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 57(1)-(5): see the text and notes 1-7.

10 As to the meanings of 'parent undertaking' and 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

11 I.e. other commitments within the same sub-paragraph of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 57(1)-(5): see the text and notes 1-7.

12 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 57(6).

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749. Miscellaneous matters.

Particulars must be given of any case where the purchase price¹ or production cost of any asset is for the first time determined² in a case where the price or cost is unknown³.

In relation to a large or medium-sized company⁴, where any outstanding loans made under the authority of certain statutory provisions (authorising the giving of financial assistance by a company for the purchase of its own shares)⁵ are included under any item shown in the company's balance sheet⁶, the aggregate amount of those loans must be disclosed for each item in question⁷.

1 As to the meaning of 'purchase price' see PARA 720 note 3.

2 In the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B para 29 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B para 29: see PARA 721.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 58; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 64(1).

4 As to large and medium-sized companies and groups see PARA 695.

5 In the Companies Act 2006 s 682(2)(b), (c) or (d): see PARA 1228. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq. As to the meaning of 'share' see PARA 1042.

6 As to the meaning of 'balance sheet' see PARA 715.

7 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 64(2).

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(c) Information supplementing the Profit and Loss Account

750. Particulars of turnover.

In relation to a small company¹, if the company has supplied geographical markets outside the United Kingdom² during the financial year³ in question, there must be stated the percentage of its turnover that, in the opinion of the directors⁴, is attributable to those markets⁵.

In relation to a large or medium-sized company⁶, if in the course of the financial year the company has carried on business of two or more classes that, in the opinion of the directors, differ substantially from each other, the amount of the turnover attributable to each class must be stated and the class described⁷; and, if in the course of the financial year the company has supplied markets that, in the opinion of the directors, differ substantially from each other, the amount of the turnover attributable to each such market must also be stated⁸. For these purposes, classes of business which, in the opinion of the directors, do not differ substantially from each other must be treated as one class and markets which, in the opinion of the

directors, do not differ substantially from each other must be treated as one market; and any amounts properly attributable to one class of business or (as the case may be) to one market which are not material may be included in the amount stated in respect of another⁹. Where in the opinion of the directors the disclosure of any information required by these provisions would be seriously prejudicial to the interests of the company, that information need not be disclosed, but the fact that any such information has not been disclosed must be stated¹⁰.

1 As to small companies and groups see PARA 694. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'United Kingdom' see PARA 1 note 5.

3 As to a company's financial year see PARA 711.

4 As to the meaning of 'director' see PARA 478.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 60(1). In analysing for these purposes the source of turnover, the directors of the company must have regard to the manner in which the company's activities are organised: Sch 1 Pt 3 para 60(2).

6 As to large and medium-sized companies and groups see PARA 695.

7 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 68(1). As to the exemption for medium-sized companies in accounts delivered to registrar see reg 4(3)(b); and PARA 879.

8 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 68(2). For these purposes, 'market' means a market delimited by geographical bounds: Sch 1 Pt 3 para 68(2). In analysing for these purposes the source (in terms of business or in terms of market) of turnover, the directors of the company must have regard to the manner in which the company's activities are organised: Sch 1 Pt 3 para 68(3).

9 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 68(4).

10 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 68(5).

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751. Miscellaneous matters.

Where any amount relating to any preceding financial year¹ is included in any item in the profit and loss account², the effect must be stated³.

Particulars must be given of any extraordinary income or charges arising in the financial year⁴.

The effect must be stated of any transactions that are exceptional by virtue of size or incidence though they fall within the ordinary activities of the company⁵.

1 As to a company's financial year see PARA 711.

2 As to the meaning of 'profit and loss account' see PARA 715.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 61(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 69(1).

4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 61(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 69(2).

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 61(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 69(3). As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

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752. Dormant companies acting as agents.

Where the directors of a company¹ take advantage of the exemption from audit conferred in relation to dormant companies², and the company has during the financial year³ in question acted as an agent for any person, the fact that it has so acted must be stated⁴.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq. As to the meaning of 'director' see PARA 478.

2 See the Companies Act 2006 s 480; and PARA 910.

3 As to a company's financial year see PARA 711.

4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 3 para 63; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 71.

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753. Additional requirements for large and medium-sized companies: charges, liabilities etc.

There are some additional requirements in relation to large and medium-sized companies¹.

The amount of the interest on or any similar charges in respect of bank loans and overdrafts, and loans of any other kind made to the company, must be stated². This does not apply to interest or charges on loans to the company from group undertakings³, but, with that

exception, it applies to interest or charges on all loans, whether made on the security of debentures or not⁴.

Particulars must be given of any special circumstances which affect liability in respect of taxation of profits, income or capital gains for the financial year⁵ or liability in respect of taxation of profits, income or capital gains for succeeding financial years⁶. The following amounts must be stated:

- 1316 (1) the amount of the charge for United Kingdom corporation tax⁷;
- 1317 (2) if that amount would have been greater but for relief from double taxation, the amount which it would have been but for such relief;
- 1318 (3) the amount of the charge for United Kingdom income tax⁸; and
- 1319 (4) the amount of the charge for taxation imposed outside the United Kingdom of profits, income and (so far as charged to revenue) capital gains⁹.

These amounts must be stated separately in respect of each of the amounts which is or would, but for its inclusion combined with other items¹⁰, be shown under the items 'tax on profit or loss on ordinary activities' and 'tax on extraordinary profit or loss' in the profit and loss account¹¹.

1 See also PARA 754. As to large and medium-sized companies and groups see PARA 695. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 66(1).

3 As to the meaning of 'group undertaking' see PARA 27; and as to the meaning of 'undertaking' see PARA 26 note 2.

4 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 66(2). As to the meaning of 'debenture' see PARA 1299.

5 As to a company's financial year see PARA 711.

6 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 67(1).

7 As to the meaning of 'United Kingdom' see PARA 1 note 5. As to corporation tax see **INCOME TAXATION** vol 23(1) (Reissue) PARA 835 et seq.

8 As to income tax see **INCOME TAXATION**.

9 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 67(2).

10 As to the possibility of such combination see the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 para 4(2)(b); and PARA 729 head (b).

11 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 67(2). As to the meaning of 'profit and loss account' see PARA 715.

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754. Additional requirements for large and medium-sized companies: transactions with related parties.

There are some additional requirements in relation to large and medium-sized companies¹.

In relation to a large company, particulars may be given of transactions which the company has entered into with related parties², and must be given if such transactions are material and have not been concluded under normal market conditions³. The particulars of transactions required to be disclosed include:

- 1320 (1) the amount of such transactions;
- 1321 (2) the nature of the related party relationship; and
- 1322 (3) other information about the transactions necessary for an understanding of the financial position of the company⁴.

Information about individual transactions may be aggregated according to their nature, except where separate information is necessary for an understanding of the effects of related party transactions on the financial position of the company⁵. Particulars need not be given of transactions entered into between two or more members of a group, provided that any subsidiary undertaking⁶ which is a party to the transaction is wholly-owned by such a member⁷.

1 See also PARA 753. As to large and medium-sized companies and groups see PARA 695. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 For these purposes, 'related party' has the same meaning as in international accounting standards: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 72(5). As to the meaning of 'international accounting standards' see PARA 693 note 1.

3 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 72(1). As to the exemption for medium-sized companies see reg 4(2); and PARA 879.

4 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 72(2).

5 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 72(3).

6 As to the meaning of 'subsidiary undertaking' see PARA 26.

7 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 72(4).

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(d) Related Undertakings

755. Disclosure required in notes to accounts.

The Secretary of State¹ has power to make provision by regulations requiring information about related undertakings² to be given in notes to a company's annual accounts³. The regulations may make different provision according to whether or not the company prepares group accounts⁴; and may specify the descriptions of undertaking in relation to which they apply, and make different provision in relation to different descriptions of related undertaking⁵. Regulations have been made⁶, and Companies Act accounts and IAS accounts⁷ must comply with the relevant provisions⁸.

The required information need not be disclosed with respect to an undertaking that is established under the law of a country outside the United Kingdom⁹ or that carries on business outside the United Kingdom, if the following conditions are met¹⁰, namely that:

- 1323 (1) in the opinion of the directors¹¹ of the company the disclosure would be seriously prejudicial to the business of: (a) that undertaking; (b) the company; (c) any of the company's subsidiary undertakings¹²; or (d) any other undertaking which is included in the consolidation¹³;
- 1324 (2) the Secretary of State agrees that the information need not be disclosed¹⁴.

Where advantage is taken of any such exemption, that fact must be stated in a note to the company's annual accounts¹⁵.

Where the directors of a company are of the opinion that the number of undertakings in respect of which the company is required to disclose information under any provision of the regulations is such that compliance with that provision would result in information of excessive length being given in notes to the company's annual accounts¹⁶, the information need only be given in respect of: (i) the undertakings whose results or financial position, in the opinion of the directors, principally affected the figures shown in the company's annual accounts; and (ii) where the company prepares group accounts, undertakings excluded¹⁷ from consolidation¹⁸. If advantage is taken of this, then: (A) there must be included in the notes to the company's annual accounts a statement that the information is given only with respect to such undertakings; and (B) the full information (both that which is disclosed in the notes to the accounts and that which is not) must be annexed to the company's next annual return¹⁹. If a company fails to comply with head (B), an offence is committed by the company, and by every officer of the company who is in default²⁰.

1 As to the Secretary of State see PARA 6.

2 As to the meaning of 'undertaking' see PARA 26 note 2.

3 Companies Act 2006 s 409(1). As to the meaning of 'annual accounts' see PARA 715. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

The provisions of the Companies Act 2006 ss 409, 410 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 2006 s 409(2)(a). As to group accounts see PARA 775 et seq.

5 Companies Act 2006 s 409(2)(b).

6 As to the regulations that have been made see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 4, Sch 2; the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 7, Sch 4; and PARA 756 et seq.

7 As to the meanings of 'Companies Act accounts' and 'IAS accounts' see PARAS 717, 776.

8 See the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 4(1); and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 7(1). As to the relevant provisions see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 (which applies to Companies Act or IAS individual accounts: see reg 4(1)); the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 (which applies to Companies Act or IAS individual or group accounts: see reg 7(1), (2)); and PARA 756 et seq. As to the meaning of 'individual accounts' see PARA 716. As to the provision made in relation to group accounts see PARAS 783, 793 et seq.

9 As to the meaning of 'United Kingdom' see PARA 1 note 5.

10 Companies Act 2006 s 409(3); Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 4(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 7(3). The Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 4(2) does not apply in relation to the information required by Sch 2 paras 4, 8 (see PARAS 758, 761) (see reg 4(2)); and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 7(3) does not apply in relation to the information otherwise required by Sch 4 para 3, 7 or 21 (see PARAS 758, 761, 801) (see reg 7(3)).

11 As to the meaning of 'director' see PARA 478.

12 As to the meaning of 'subsidiary undertaking' see PARA 26.

13 Companies Act 2006 s 409(4)(a). As to the meaning of 'included in the consolidation' see PARA 775 note 12.

14 Companies Act 2006 s 409(4)(b).

15 Companies Act 2006 s 409(5).

16 Companies Act 2006 s 410(1).

17 Ie under the Companies Act 2006 s 405(3): see PARA 783.

18 Companies Act 2006 s 410(2).

19 Companies Act 2006 s 410(3). For this purpose, the 'next annual return' means that next delivered to the registrar after the accounts in question have been approved under s 414 (see PARA 815): s 410(3). As to annual returns that are required to be delivered to the registrar see PARA 1421 et seq.

20 Companies Act 2006 s 410(4). As to the meaning of 'officer' see PARA 112 note 1; and as to the liability of an officer in default see PARA 315. A person guilty of an offence under s 410(4) is liable on summary conviction to a fine not exceeding level 3 on the standard scale; and, for continued contravention, is liable to a daily default fine not exceeding one-tenth of level 3 on the standard scale: Companies Act 2006 s 410(5). As to the standard scale see PARA 1622. As to the meaning of 'daily default fine' see PARA 1622.

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756. Subsidiary undertakings.

The following information must be given where at the end of the financial year¹ the company² has subsidiary undertakings³.

The name of each subsidiary undertaking must be stated⁴; and, with respect to each subsidiary undertaking:

- 1325 (1) if it is incorporated outside the United Kingdom⁵, the country in which it is incorporated must be stated;

1326 (2) if it is unincorporated, the address of its principal place of business must be stated⁶.

In relation to a small company⁷, there must be stated in relation to shares of each class held by the company in a subsidiary undertaking the identity of the class and the proportion of the nominal value of the shares of that class represented by those shares⁸. The shares held by or on behalf of the company itself must be distinguished from those attributed to the company which are held by or on behalf of a subsidiary undertaking⁹.

1 As to a company's financial year see PARA 711.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 1(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 1(1). As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2. Schedule 4 Pt 1 applies to all companies, whether preparing individual or group accounts. As to group accounts see PARA 775 et seq; and see, in particular, PARA 793 et seq.

4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 1(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 1(2).

5 As to the meaning of 'United Kingdom' see PARA 1 note 5. As to companies incorporated outside the United Kingdom ('overseas companies') see PARA 1824 et seq.

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 1(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 1(3). The question what is a principal place of business is one of fact: see *De Beers Consolidated Mines Ltd v Howe* [1906] AC 455, HL; *Re Hilton, Gibbes v Hale-Hinton* [1909] 2 Ch 548; *Egyptian Delta Land and Investment Co Ltd v Todd* [1929] AC 1, HL.

7 As to small companies and groups see PARA 694.

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 2(1). As to the meaning of 'share' see PARA 1042. As to references to shares held by a company see PARA 764.

9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 2(2).

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757. Financial information about subsidiary undertakings.

There must be disclosed with respect to each subsidiary undertaking¹:

1327 (1) the aggregate amount of its capital and reserves as at the end of its relevant financial year²; and

1328 (2) its profit and loss for that year³.

That information need not be given:

- 1329 (a) if the company is exempt⁴ (or, in the case of a small company⁵, would be exempt if it were not subject to the small companies regime⁶) from the requirement to prepare group accounts⁷;
- 1330 (b) if the company's investment in the subsidiary undertaking is included in the company's accounts by way of the equity method of valuation⁸;
- 1331 (c) if (i) the subsidiary undertaking is not required by any provision of the Companies Act 2006 to deliver a copy of its balance sheet⁹ for its relevant financial year and does not otherwise publish that balance sheet in the United Kingdom¹⁰ or elsewhere; and (ii) the company's holding is less than 50 per cent of the nominal value of the shares in the undertaking¹¹.

Information otherwise required by these provisions need not be given if it is not material¹².

1 Ie, in the case of a large or medium-sized company, each subsidiary undertaking not included in consolidated accounts by the company: see the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 2(1). As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq. As to large and medium-sized companies and groups see PARA 695. Schedule 4 Pt 1 applies to all companies, whether preparing individual or group accounts. As to group accounts see PARA 775 et seq; and see, in particular, PARA 793 et seq.

2 For these purposes, the 'relevant financial year' of a subsidiary undertaking is: (1) if its financial year ends with that of the company, that year; and (2) if not, its financial year ending last before the end of the company's financial year: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 3(6); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 2(6). As to a company's financial year see PARA 711.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 3(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 2(1).

4 Ie by virtue of the Companies Act 2006 s 400 or s 401 (parent company included in accounts of larger group): see PARAS 781-782.

5 As to small companies and groups see PARA 694.

6 See PARA 694.

7 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 3(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 2(2).

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 3(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 2(3). The International Accounting Standards (as to which see PARA 693) provide that, under the equity method of valuation, an investment is included in the company's accounts at cost, or at a valuation relating to the investment at the date of acquisition, increased (or decreased) by the investing company's interest in the increase (or decrease) in the post-acquisition profits and reserves of the body corporate whose shares comprise the investment.

9 As to the meaning of 'balance sheet' see PARA 715.

10 As to the meaning of 'United Kingdom' see PARA 1 note 5.

11 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 3(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 2(4). As to the meaning of 'share' see PARA 1042. As to references to shares held by a company see PARA 764.

12 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 3(5); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 2(5).

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758. Shares of company held by subsidiary undertakings.

The number, description and amount of the shares in the company¹ held by or on behalf of its subsidiary undertakings² must be disclosed³; but this does not apply in relation to shares in the case of which the subsidiary undertaking is concerned as personal representative or, subject as follows, as trustee⁴. The exception for shares in relation to which the subsidiary undertaking is concerned as trustee does not apply if the company, or any of its subsidiary undertakings, is beneficially interested under the trust, otherwise than by way of security only for the purposes of a transaction entered into by it in the ordinary course of a business which includes the lending of money⁵.

1 As to the meaning of 'share' see PARA 1042; and see PARA 759 note 1. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 4(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 3(1). Schedule 4 Pt 1 applies to all companies, whether preparing individual or group accounts. As to group accounts see PARA 775 et seq; and see, in particular, PARA 793 et seq.

4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 4(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 3(2).

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 4(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 3(3). The Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 2 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 5 (see PARA 759) have effect for the interpretation of the reference to a beneficial interest under a trust: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 4(4), Pt 2 para 12(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 3(4).

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759. Meaning of 'beneficial interest'.

Where shares¹ in an undertaking² are held on trust for the purposes of a pension scheme³ or an employees' share scheme⁴, there must be disregarded any residual interest⁵ of the undertaking or any of its subsidiary undertakings⁶ that has not vested in possession⁷.

Where shares in an undertaking are held on trust, there must be disregarded:

- 1332 (1) if the trust is for the purposes of a pension scheme, any such rights as are mentioned in heads (a) and (b) below;
- 1333 (2) if the trust is for the purposes of an employees' share scheme, any such rights as are mentioned in head (a) below,

being rights of the undertaking or any of its subsidiary undertakings⁸. The rights referred to are:

- 1334 (a) any charge or lien on, or set-off against, any benefit or other right or interest under the scheme for the purpose of enabling the employer⁹ or former employer of a member of the scheme to obtain the discharge of a monetary obligation due to him from the member;
- 1335 (b) any right to receive from the trustee of the scheme, or as trustee of the scheme to retain, an amount that can be recovered or retained¹⁰ in respect of the deduction of contributions equivalent premium¹¹ from a refund of pension contributions or otherwise as reimbursement or partial reimbursement for any contributions equivalent premium paid¹² in connection with the scheme¹³.

Where an undertaking is a trustee, there must be disregarded any rights which the undertaking has in its capacity as trustee, including in particular: (i) any right to recover its expenses or to be remunerated out of the trust property; and (ii) any right to be indemnified out of that property for any liability incurred by reason of any act or omission of the undertaking in the performance of its duties as trustee¹⁴.

1 The provisions of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 2 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 apply in relation to debentures as they apply in relation to shares: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 2 para 12(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 5 para 27(1). As to the meaning of 'share' see PARA 1042; and as to the meaning of 'debenture' see PARA 1299.

2 As to the meaning of 'undertaking' see PARA 26 note 2.

3 For these purposes, 'pension scheme' means any scheme for the provision of benefits consisting of or including relevant benefits for or in respect of employees or former employees; and 'relevant benefits' means any pension, lump sum, gratuity or other like benefit given or to be given on retirement or on death or in anticipation of retirement or, in connection with past service, after retirement or death: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 2 para 16; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 5 para 27(2). For these purposes, and for the purposes of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 2 para 14(2) and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 5 para 25(2) (see the text and notes 9-13), 'employee' and 'employer' are to be read as if a director of an undertaking were employed by it: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 2 para 17; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 5 para 27(3).

4 As to the meaning of 'employees' share scheme' see PARA 169 note 20.

5 For these purposes, 'residual interest' means a right of the undertaking in question (the 'residual beneficiary') to receive any of the trust property in the event of: (1) all the liabilities arising under the scheme having been satisfied or provided for; (2) the residual beneficiary ceasing to participate in the scheme; or (3) the trust property at any time exceeding what is necessary for satisfying the liabilities arising or expected to

arise under the scheme: see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 2 para 13(2); and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 5 para 24(2). For these purposes, references to a right include a right dependent on the exercise of a discretion vested by the scheme in the trustee or any other person; and references to liabilities arising under a scheme include liabilities that have resulted or may result from the exercise of any such discretion: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 2 para 13(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 5 para 24(3).

6 As to the meaning of 'subsidiary undertaking' see PARA 26.

7 See the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 2 para 13(1); and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 5 para 24(1). For these purposes, a residual interest vests in possession: (1) in a case within the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 2 para 13(2)(a) or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 5 para 24(2)(a) (see note 5 head (1)), on the occurrence of the event there mentioned, whether or not the amount of the property receivable pursuant to the right there mentioned is then ascertained; (2) in a case within the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 2 para 13(2)(a) or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 5 para 24(2)(b) or (c) (see note 5 heads (2), (3)), when the residual beneficiary becomes entitled to require the trustee to transfer to it any of the property receivable pursuant to that right: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 2 para 13(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 5 para 24(4).

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 2 para 14(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 5 para 25(1).

9 See note 3.

10 Ie under the Pension Schemes Act 1993 s 61: see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 924.

11 As to contributions equivalent premium see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 922.

12 Ie under the Pension Schemes Act 1993 Pt III Ch III (ss 50-68): see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 918 et seq.

13 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 2 para 14(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 5 para 25(2).

14 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 2 para 15; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 5 para 26.

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760. Significant holdings in undertakings other than subsidiary undertakings.

The following information must be given where at the end of the financial year¹ the company² has a significant holding³ in an undertaking which is not a subsidiary undertaking of the company⁴ and which, in relation to a large or medium-sized company⁵, does not fall within the provisions relating to joint ventures or associated undertakings⁶.

The name of the undertaking must be stated⁷; and:

- 1336 (1) if the undertaking is incorporated outside the United Kingdom⁸, the country in which it is incorporated must be stated;
- 1337 (2) if it is unincorporated, the address of its principal place of business must be stated⁹.

There must also be stated: (a) the identity of each class of shares in the undertaking held by the company; and (b) the proportion of the nominal value of the shares of that class represented by those shares¹⁰.

The aggregate amount of the capital and reserves of the undertaking as at the end of its relevant financial year¹¹ and its profit or loss for that year must be stated¹². That information need not be given:

- 1338 (i) in relation to a small company¹³, if (A) the company would (if it were not subject to the small companies regime¹⁴) be exempt¹⁵ from the requirement to prepare group accounts; and (B) the investment of the company in all undertakings in which it has such a holding¹⁶ is shown, in aggregate, in the notes to the accounts by way of the equity method of valuation¹⁷;
- 1339 (ii) in respect of an undertaking, if (A) the undertaking is not required by any provision of the Companies Act 2006 to deliver¹⁸ a copy of its balance sheet for its relevant financial year and does not otherwise publish that balance sheet in the United Kingdom or elsewhere; and (B) the company's holding is less than 50 per cent of the nominal value of the shares in the undertaking¹⁹.

Information otherwise required by these provisions need not be given if it is not material²⁰.

1 As to a company's financial year see PARA 711.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 For these purposes, a holding is significant if: (1) it amounts to 20% or more of the nominal value of any class of shares in the undertaking; or (2) the amount of the holding, as stated or included in the company's accounts (ie, in relation to a large or medium-sized company, its individual accounts) exceeds 20% of the amount (as so stated) of the company's assets: see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 5(2); and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 4(2). As to the meaning of 'undertaking' see PARA 26 note 2. As to the meaning of 'share' see PARA 1042. As to references to shares held by a company see PARA 764. Schedule 4 Pt 1 applies to all companies, whether preparing individual or group accounts. As to group accounts see PARA 775 et seq; and see, in particular, PARA 793 et seq.

4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 5(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 4(1). As to the meaning of 'subsidiary undertaking' see PARA 26.

5 As to large and medium-sized companies and groups see PARA 695.

6 See the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 4(1). The provisions mentioned in the text are those of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 18 or 19: see PARAS 798-799.

7 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 6(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 5(1).

8 As to the meaning of 'United Kingdom' see PARA 1 note 5. As to companies incorporated outside the United Kingdom ('overseas companies') see PARA 1824 et seq.

9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 6(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 5(2).

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 6(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 5(3).

11 For these purposes, the 'relevant financial year' of an undertaking is: (1) if its financial year ends with that of the company, that year; and (2) if not, its financial year ending last before the end of the company's financial year: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 7(5); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 6(4).

12 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 7(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 6(1). In relation to large and medium-sized companies, this provision is subject to Sch 4 Pt 2 para 14: see PARA 764.

13 As to small companies and groups see PARA 694.

14 See PARA 694.

15 Ie by virtue of the Companies Act 2006 s 400 or s 401 (parent company included in accounts of larger group): see PARAS 781-782.

16 Ie such a holding as is mentioned in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 7(1): see the text to notes 11-12.

17 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 7(2). As to the equity method of valuation see PARA 757 note 8.

18 The Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 7(3) specifies delivery to the registrar. As to the meaning of 'registrar' see PARA 131 note 2.

19 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 7(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 6(2).

20 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 7(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 6(3).

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761. Membership of certain undertakings.

Where at the end of the financial year¹ the company² is a member of a qualifying undertaking³, the following information must be stated⁴:

1340 (1) the name and legal form of the undertaking; and

1341 (2) the address of the undertaking's registered office (whether in or outside the United Kingdom) or, if it does not have such an office, its head office (whether in or outside the United Kingdom)⁵.

Information otherwise required by heads (1) and (2)⁶ need not be given if it is not material⁷.

Where the undertaking is a qualifying partnership⁸, there must also be stated either:

- 1342 (a) that a copy of the latest accounts of the undertaking has been or is to be appended to the copy of the company's accounts sent to the registrar⁹; or
- 1343 (b) the name of at least one body corporate (which may be the company) in whose group accounts the undertaking has been or is to be dealt with on a consolidated basis¹⁰.

Information otherwise required by head (b)¹¹ need not be given if the notes to the company's accounts disclose that advantage has been taken of the statutory exemption¹².

1 As to a company's financial year see PARA 711.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 For these purposes, 'qualifying undertaking' means: (1) a qualifying partnership; or (2) an unlimited company each of whose members is a limited company, another unlimited company each of whose members is a limited company, or a Scottish partnership each of whose members is a limited company (and for these purposes, references to a limited company, another unlimited company or a Scottish partnership include a comparable undertaking incorporated in or formed under the law of a country or territory outside the United Kingdom): Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 8(6); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 7(6). As to the meanings of 'qualifying partnership' and 'member' see PARA 705 note 1 (definitions applied by the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 8(6); and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 7(6)). As to the meanings of 'limited company' and 'unlimited company' see PARA 102. As to the meaning of 'United Kingdom' see PARA 1 note 5. The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 applies to all companies, whether preparing individual or group accounts. As to group accounts see PARA 775 et seq; and see, in particular, PARA 793 et seq.

4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 8(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 7(1).

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 8(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 7(2).

6 I.e. the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 8(2) or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 7(2).

7 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 8(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 7(4).

8 See note 3.

9 I.e. under the Companies Act 2006 s 444: see PARA 871. As to the meaning of 'registrar' see PARA 131 note 2.

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 8(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 7(3). For these purposes, 'dealt with on a consolidated basis' means dealt with by the method of full consolidation, the method of proportional consolidation or the equity method of accounting: see the Partnerships (Accounts) Regulations 2008, SI 2008/569, reg 2 (definition applied by the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 8(6); and the Large

and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 7(6)).

11 In the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 8(3)(b) or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 7(3)(b).

12 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 8(5) (amended by SI 2008/569); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 7(5) (amended by SI 2008/569). The statutory exemption mentioned in the text is the exemption conferred by the Partnerships (Accounts) Regulations 2008, SI 2008/569 (see reg 7; and see PARA 705).

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762. Parent undertaking drawing up accounts for larger group.

Where the company¹ is a subsidiary undertaking², the following information must be given with respect to the parent undertaking³ of the largest group of undertakings for which group accounts⁴ are drawn up and of which the company is a member and the smallest such group of undertakings⁵.

The name of the parent undertaking must be stated⁶; and:

- 1344 (1) if the undertaking is incorporated outside the United Kingdom⁷, the country in which it is incorporated must be stated;
- 1345 (2) if it is unincorporated, the address of its principal place of business must be stated⁸.

If copies of the group accounts mentioned above are available to the public, there must also be stated the addresses from which copies of the accounts can be obtained⁹.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

3 As to the meaning of 'parent undertaking' see PARA 26.

4 As to group accounts see PARA 775 et seq; and see, in particular, PARA 793 et seq.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 9(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 8(1). Schedule 4 Pt 1 applies to all companies, whether preparing individual or group accounts.

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 9(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 8(2).

7 As to the meaning of 'United Kingdom' see PARA 1 note 5. As to companies incorporated outside the United Kingdom ('overseas companies') see PARA 1824 et seq.

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 9(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 8(3).

9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 9(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 8(4).

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763. Identification of ultimate parent company.

Where the company¹ is a subsidiary undertaking², the following information must be given with respect to the company, if any, regarded by the directors³ as being the company's ultimate parent company⁴.

The name of that company must be stated⁵; and, if that company is incorporated outside the United Kingdom⁶, the country in which it is incorporated, if known to the directors, must also be stated⁷.

1 For these purposes, 'company' includes any body corporate: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 10(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 9(4). As to the meaning of 'body corporate' see PARA 1 note 5. As to the meaning of 'company' generally see PARA 24. Schedule 4 Pt 1 applies to all companies, whether preparing individual or group accounts. As to group accounts see PARA 775 et seq; and see, in particular, PARA 793 et seq. As to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

3 As to the meaning of 'director' see PARA 478.

4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 10(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 9(1). As to the meaning of 'parent company' see PARA 26 note 2.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 10(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 9(2).

6 As to the meaning of 'United Kingdom' see PARA 1 note 5. As to companies incorporated outside the United Kingdom ('overseas companies') see PARA 1824 et seq.

7 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 10(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 9(3).

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ACCOUNTS EXCLUDING BANKING AND INSURANCE COMPANIES/(D) Notes to the Accounts/(d) Related Undertakings/764. References to shares held by a company.

764. References to shares held by a company.

References to shares¹ held by a company² are to be construed as follows³.

For the purposes of the statutory provisions relating to information about subsidiary undertakings⁴:

- 1346 (1) there must be attributed to the company any shares held by a subsidiary undertaking, or by a person acting on behalf of the company or a subsidiary undertaking; but
- 1347 (2) there must be treated as not held by the company any shares held on behalf of a person other than the company or a subsidiary undertaking⁵.

For the purposes of the statutory provisions relating to information about undertakings other than subsidiary undertakings⁶:

- 1348 (a) there must be attributed to the company shares held on its behalf by any person; but
- 1349 (b) there must be treated as not held by the company shares held on behalf of a person other than the company⁷.

For the purposes of any of those provisions, shares held by way of security are to be treated as held by the person providing the security:

- 1350 (i) where apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights attached to the shares are exercisable only in accordance with that person's instructions; and
- 1351 (ii) where the shares are held in connection with the granting of loans as part of normal business activities and apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights attached to the shares are exercisable only in that person's interests⁸.

1 As to the meaning of 'share' see PARA 1042.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 11(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 2 para 14(1).

4 I.e. the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 paras 2, 3 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 2, Pt 2 paras 11, 12: see PARAS 756-757, 780. As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 11(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 2 para 14(2).

6 I.e. the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 paras 5-7 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 paras 4-6: see PARA 760.

7 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 11(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 2 para 14(3).

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 1 para 11(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 2 para 14(4).

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(e) Arrangements not reflected in the Balance Sheet

765. Information about arrangements not reflected in the balance sheet.

In the case of a company¹ that is not subject to the small companies regime², if in any financial year³:

- 1352 (1) the company is or has been party to arrangements that are not reflected in its balance sheet⁴; and
- 1353 (2) at the balance sheet date⁵ the risks or benefits arising from those arrangements are material,

the following information must be given in notes to the company's annual accounts⁶, namely:

- 1354 (a) the nature and business purpose of the arrangements; and
- 1355 (b) the financial impact of the arrangements on the company⁷.

The information need only be given to the extent necessary for enabling the financial position of the company to be assessed⁸.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the small companies regime see PARA 694.

3 As to a company's financial year see PARA 711.

4 As to the meaning of 'balance sheet' see PARA 715.

5 As to the meaning of 'balance sheet date' see PARA 718 note 12.

6 Companies Act 2006 s 410A(1) (s 410A added by SI 2008/393). As to the meaning of 'annual accounts' see PARA 715.

The provisions of the Companies Act 2006 s 410A apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

7 Companies Act 2006 s 410A(2) (as added: see note 6). If the company qualifies as medium-sized in relation to the financial year (see ss 465-467; and PARA 695) it need not comply with head (b) in the text: s 410A(4) (as so added). As to the application of these provisions in relation to group accounts see PARA 775. As to group accounts see PARA 775 et seq.

8 Companies Act 2006 s 410A(3) (as added: see note 6).

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(f) Employee Information

766. Information about employee numbers and costs.

In the case of a company¹ not subject to the small companies regime², the following information with respect to the employees of the company must be given in notes to the company's annual accounts³:

- 1356 (1) the average number of persons employed by the company in the financial year⁴; and
- 1357 (2) the average number of persons so employed within each category of persons employed by the company⁵.

The categories by reference to which the number required to be disclosed by head (2) is to be determined must be such as the directors⁶ may select having regard to the manner in which the company's activities are organised⁷.

The average number required by head (1) or head (2) is determined by dividing the relevant annual number by the number of months in the financial year⁸.

The relevant annual number is determined by ascertaining for each month in the financial year:

- 1358 (a) for the purposes of head (1), the number of persons employed under contracts of service by the company in that month (whether throughout the month or not);
- 1359 (b) for the purposes of head (2), the number of persons in the category in question of persons so employed,

and adding together all the monthly numbers⁹.

In respect of all persons employed by the company during the financial year who are taken into account in determining the relevant annual number for the purposes of head (1) there must also be stated the aggregate amounts respectively of: (i) wages and salaries paid or payable in respect of that year to those persons; (ii) social security costs¹⁰ incurred by the company on their behalf; and (iii) other pension costs¹¹ so incurred¹². This does not apply in so far as those amounts, or any of them, are stated elsewhere in the company's accounts¹³.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the small companies regime see PARA 694.

3 As to the meaning of 'annual accounts' see PARA 715.

4 As to a company's financial year see PARA 711.

5 Companies Act 2006 s 411(1). As to the application of these provisions in relation to group accounts see PARA 765. As to group accounts see PARA 775 et seq.

The provisions of the Companies Act 2006 s 411 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

6 As to the meaning of 'director' see PARA 478.

7 Companies Act 2006 s 411(2).

8 Companies Act 2006 s 411(3).

9 Companies Act 2006 s 411(4).

10 For these purposes, 'social security costs' means any contributions by the company to any state social security or pension scheme, fund or arrangement: Companies Act 2006 s 411(6).

11 For these purposes, 'pension costs' includes any costs incurred by the company in respect of: (1) any pension scheme established for the purpose of providing pensions for persons currently or formerly employed by the company; (2) any sums set aside for the future payment of pensions directly by the company to current or former employees; and (3) any pensions paid directly to such persons without having first been set aside: Companies Act 2006 s 411(6).

12 Companies Act 2006 s 411(5).

13 Companies Act 2006 s 411(5).

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(g) Information about Directors' Emoluments and Other Benefits

767. In general.

The Secretary of State¹ has power to make provision by regulations requiring information to be given in notes to a company's annual accounts² about directors' remuneration³. The matters about which information may be required include:

- 1360 (1) gains made by directors on the exercise of share options;
- 1361 (2) benefits received or receivable by directors under long term incentive schemes;
- 1362 (3) payments for loss of office⁴;
- 1363 (4) benefits receivable, and contributions for the purpose of providing benefits, in respect of past services of a person as director or in any other capacity while director;
- 1364 (5) consideration paid to or receivable by third parties for making available the services of a person as director or in any other capacity while director⁵.

Regulations have been made⁶, and Companies Act accounts and IAS accounts⁷ must comply with the relevant provisions⁸. The information is required to be given only so far as it is contained in the company's books and papers or the company has a right to obtain it from the persons concerned⁹; and any information is treated as shown if it is capable of being readily ascertained from other information which is shown¹⁰.

It is the duty of any director of a company, and any person who is or has at any time in the preceding five years been a director of the company, to give notice to the company of such matters relating to himself as may be necessary for the purposes of the regulations¹¹; and a person who makes default in complying with this duty commits an offence¹².

1 As to the Secretary of State see PARA 6.

2 As to the meaning of 'annual accounts' see PARA 715. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 Companies Act 2006 s 412(1). As to the meaning of 'director' see PARA 478. As to directors' remuneration see PARA 518 et seq; and as to directors' remuneration reports in respect of quoted companies see PARA 834 et seq. As to quoted companies see PARA 696.

For the purposes of s 412 and regulations made under it, amounts paid to or receivable by a person connected with a director, or a body corporate controlled by a director, are treated as paid to or receivable by the director; and for these purposes the expressions 'connected with' and 'controlled by' have the same meanings as in Pt 10 (ss 154-259) (see PARAS 481-482): s 412(4).

Without prejudice to the generality of s 412(1), regulations made under it may make any such provision as was made immediately before the commencement of Pt 15 (ss 380-474) by the Companies Act 1985 Sch 6 Pt 1: Companies Act 2006 s 412(3).

The provisions of the Companies Act 2006 s 412 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 As defined in the Companies Act 2006 s 215: see PARA 578.

5 Companies Act 2006 s 412(2).

6 As to the regulations that have been made see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 5, Sch 3; the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 8, Sch 5; and PARA 768 et seq.

7 As to the meanings of 'Companies Act accounts' and 'IAS accounts' see PARAS 717, 776.

8 See the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 5; and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 8. As to the relevant provisions see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 (which applies to Companies Act or IAS individual or group accounts: see regs 5, 9); the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 (which applies to Companies Act or IAS individual or group accounts: see reg 8); and PARA 768 et seq. As to the meaning of 'individual accounts' see PARA 716. As to group accounts see PARA 775 et seq; and as to the provision made in relation to group accounts see PARA 807 et seq.

9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 4(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 6(1).

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 4(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 6(2).

11 Companies Act 2006 s 412(5).

12 Companies Act 2006 s 412(6). Such a person is liable on summary conviction to a fine not exceeding level 3 on the standard scale: see s 412(6). As to the standard scale see PARA 1622.

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768. Total amount of directors' remuneration etc.

In relation to small companies¹, the overall total of the following amounts must be shown:

- 1365 (1) the amount of remuneration² paid to or receivable by directors in respect of qualifying services³;
- 1366 (2) the amount of money paid to or receivable by directors, and the net value⁴ of assets (other than money, share options or shares) received or receivable by directors, under long term incentive schemes in respect of qualifying services⁵; and
- 1367 (3) the value of any company contributions: (a) paid, or treated as paid, to a pension scheme in respect of directors' qualifying services⁶; and (b) by reference to which the rate or amount of any money purchase benefits⁷ that may become payable will be calculated⁸.

There must also be shown the number of directors (if any) to whom retirement benefits are accruing in respect of qualifying services under money purchase schemes⁹ and under defined benefit schemes¹⁰.

In relation to large and medium-sized companies¹¹, there must be shown:

- 1368 (i) the aggregate amount of remuneration¹² paid to or receivable by directors in respect of qualifying services¹³;
- 1369 (ii) the aggregate of the amount of gains made by directors on the exercise of share options¹⁴;
- 1370 (iii) the aggregate of the amount of money paid to or receivable by directors, and the net value¹⁵ of assets (other than money and share options) received or receivable by directors, under long term incentive schemes in respect of qualifying services¹⁶; and
- 1371 (iv) the aggregate value of any company contributions: (A) paid, or treated as paid, to a pension scheme in respect of directors' qualifying services¹⁷; and (B) by reference to which the rate or amount of any money purchase benefits¹⁸ that may become payable will be calculated¹⁹.

There must also be shown the number of directors (if any) to whom retirement benefits are accruing in respect of qualifying services under money purchase schemes²⁰ and under defined benefit schemes²¹.

The amount to be shown²² in each case includes all relevant sums, whether paid by or receivable from the company, any of the company's subsidiary undertakings or any other person²³. References to amounts paid to or receivable by a person include amounts paid to or receivable by a person connected with him or a body corporate controlled by him (but not so as to require an amount to be counted twice)²⁴. Except as otherwise provided, the amounts to be shown for any financial year are: (aa) the sums receivable in respect of that year (whenever paid); or (bb) in the case of sums not receivable in respect of a period, the sums paid during that year²⁵. Sums paid by way of expenses allowance that are charged to United Kingdom

income tax after the end of the relevant financial year must be shown in a note to the first accounts in which it is practicable to show them and must be distinguished from the amounts otherwise required to be shown²⁶. Where it is necessary to do so for the purpose of making any distinction required in complying with the statutory provisions, the directors may apportion payments between the matters in respect of which they have been paid or are receivable in such manner as they think appropriate²⁷.

1 As to small companies and groups see PARA 694. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to directors' remuneration generally see PARA 518 et seq. For the purposes of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3, 'remuneration' of a director includes: (1) salary, fees and bonuses, and sums paid by way of expenses allowance (so far as they are chargeable to United Kingdom income tax); and (2) the estimated money value of any other benefits received by him otherwise than in cash: Sch 3 Pt 2 para 7(1). However, the expression does not include: (a) the value of any share options granted to a director or the amount of any gains made on the exercise of any such options; (b) any company contributions paid, or treated as paid, in respect of him under any pension scheme or any benefits to which he is entitled under any such scheme; or (c) any money or other assets paid to or received or receivable by him under any long term incentive scheme: Sch 3 Pt 2 para 7(2). For the purposes of Sch 3, remuneration paid or receivable or share options granted in respect of a person's accepting office as a director are treated as emoluments paid or receivable or share options granted in respect of his services as a director: Sch 3 Pt 2 para 12(2). As to the meaning of 'director' see PARA 478. As to the meaning of 'United Kingdom' see PARA 1 note 5.

For the purposes of Sch 3, 'shares' means shares (whether allotted or not) in the company, or any undertaking which is a group undertaking in relation to the company, and includes a share warrant (as defined by the Companies Act 2006 s 779(1): see PARA 382); and 'share option' means a right to acquire shares: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 9. As to the meaning of 'group undertaking' see PARA 27; and as to the meaning of 'undertaking' see PARA 26 note 2. As to the meaning of 'allotted' see PARA 1091.

For the purposes of Sch 3, 'company contributions', in relation to a pension scheme and a director, means any payments (including insurance premiums) made, or treated as made, to the scheme in respect of the director by a person other than the director (Sch 3 Pt 2 para 10(2)); and 'pension scheme' means a retirement benefits scheme (as defined by the Income and Corporation Taxes Act 1988 s 611 (repealed with savings): see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 741) (Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 10(1)).

For the purposes of Sch 3, 'long term incentive scheme' means an agreement or arrangement under which money or other assets may become receivable by a director, and which includes one or more qualifying conditions with respect to service or performance which cannot be fulfilled within a single financial year: Sch 3 Pt 2 para 8(1). For this purpose the following must be disregarded: (i) bonuses the amount of which falls to be determined by reference to service or performance within a single financial year; (ii) compensation for loss of office, payments for breach of contract and other termination payments; and (iii) retirement benefits: Sch 3 Pt 2 para 8(2). As to a company's financial year see PARA 711.

For the purposes of Sch 3, 'retirement benefits' has the meaning given by the Income and Corporation Taxes Act 1988 s 612(1) (repealed with savings) (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 741): Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 10(1).

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 1(1)(a). For the purposes of Sch 3, 'qualifying services', in relation to any person, means his services as a director of the company, and his services while director of the company: (1) as director of any of its subsidiary undertakings; or (2) otherwise in connection with the management of the affairs of the company or any of its subsidiary undertakings: Sch 3 Pt 2 para 12.

Any reference in Sch 3 to a subsidiary undertaking of the company, in relation to a person who is or was, while a director of the company, a director also, by virtue of the company's nomination (direct or indirect), of any other undertaking, includes that undertaking, whether or not it is or was in fact a subsidiary undertaking of the company: Sch 3 Pt 2 para 11(1). For the purposes of Sch 3 Pt 1 para 1 (remuneration etc), any reference to a subsidiary undertaking of the company is a reference to an undertaking which is a subsidiary undertaking at the time the services were rendered; and for the purposes of Sch 3 Pt 1 para 2 (compensation for loss of office: see PARA 769), any reference to a subsidiary undertaking of the company is a reference to a subsidiary undertaking immediately before the loss of office as director: Sch 3 Pt 2 para 11(2). As to the meaning of 'subsidiary undertaking' generally see PARA 26.

4 For the purposes of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3, 'net value', in relation to any assets received or receivable by a director, means value after deducting any money paid or other value given by the director in respect of those assets: Sch 3 Pt 2 para 12(1).

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 1(1)(b).

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 1(1)(c)(i).

7 For the purposes of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3, 'money purchase benefits', in relation to a director, means retirement benefits payable under a pension scheme the rate or amount of which is calculated by reference to payments made, or treated as made, by the director or by any other person in respect of the director and which are not average salary benefits: Sch 3 Pt 2 para 10(3). See further note 10.

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 1(1)(c)(ii).

9 For the purposes of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3, 'money purchase scheme', in relation to a director, means a pension scheme under which all of the benefits that may become payable to or in respect of the director are money purchase benefits: Sch 3 Pt 2 para 10(3). See further note 10.

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 1(2). For the purposes of Sch 3, in relation to a director, 'defined benefit scheme' means a pension scheme that is not a money purchase scheme; and 'defined benefits' means retirement benefits payable under a pension scheme that are not money purchase benefits: Sch 3 Pt 2 para 10(3).

Where a pension scheme provides for any benefits that may become payable to or in respect of any director to be whichever are the greater of:

254 (1) money purchase benefits as determined by or under the scheme; and

255 (2) defined benefits as so determined,

the company may assume for the purposes of Sch 3 Pt 2 para 10 that those benefits will be money purchase benefits, or defined benefits, according to whichever appears more likely at the end of the financial year: Sch 3 Pt 2 para 10(4). For the purpose of determining whether a pension scheme is a money purchase or defined benefit scheme, any death in service benefits provided for by the scheme are to be disregarded: Sch 3 Pt 2 para 10(5).

11 As to large and medium-sized companies and groups see PARA 695. The provisions of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 1 apply to quoted and unquoted companies; the provisions of Sch 5 Pt 2 apply only to unquoted companies; and Sch 5 Pt 3 contains supplementary provisions: reg 8(2). As to quoted and unquoted companies see PARA 696.

In the case of a company which is not a quoted company and whose equity share capital is not listed on the market known as AIM: (1) Sch 5 Pt 1 para 1(1) has effect as if Sch 5 Pt 1 para 1(1)(b) (see head (ii) in the text) were omitted and as if, in Sch 5 Pt 1 para 1(1)(c) (see head (iii) in the text), 'assets' did not include shares; and (2) the number of each of the following (if any) must be shown, namely: (a) the directors who exercised share options; and (b) the directors in respect of whose qualifying services shares were received or receivable under long term incentive schemes: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 1 para 1(3). As to the meaning of 'equity share capital' see PARA 1047. As to the market known as AIM see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 75.

For the purposes of Sch 5, 'shares' means shares (whether allotted or not) in the company, or any undertaking which is a group undertaking in relation to the company, and includes a share warrant (as defined by the Companies Act 2006 s 779(1): see PARA 382); and 'share option' means a right to acquire shares: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 12.

For the purposes of Sch 5, 'qualifying services', in relation to any person, means his services as a director of the company, and his services while director of the company: (i) as director of any of its subsidiary undertakings; or (ii) otherwise in connection with the management of the affairs of the company or any of its subsidiary undertakings: Sch 5 Pt 3 para 15(1).

Any reference in Sch 5 to a subsidiary undertaking of the company, in relation to a person who is or was, while a director of the company, a director also, by virtue of the company's nomination (direct or indirect), of any other undertaking, includes that undertaking, whether or not it is or was in fact a subsidiary undertaking of the

company: Sch 5 Pt 3 para 14(1). For the purposes of Sch 5 Pt 3 para 1 (remuneration etc), any reference to a subsidiary undertaking of the company is a reference to an undertaking which is a subsidiary undertaking at the time the services were rendered; and for the purposes of Sch 5 Pt 3 para 4 (compensation for loss of office: see PARA 769), any reference to a subsidiary undertaking of the company is a reference to a subsidiary undertaking immediately before the loss of office as director: Sch 5 Pt 3 para 14(2).

For the purposes of Sch 5, 'long term incentive scheme' means an agreement or arrangement under which money or other assets may become receivable by a director, and which includes one or more qualifying conditions with respect to service or performance which cannot be fulfilled within a single financial year: Sch 5 Pt 3 para 11(1). For this purpose the following must be disregarded: (A) bonuses the amount of which falls to be determined by reference to service or performance within a single financial year; (B) compensation for loss of office, payments for breach of contract and other termination payments; and (C) retirement benefits: Sch 5 Pt 3 para 11(2).

For the purposes of Sch 5, 'retirement benefits' has the meaning given by the Income and Corporation Taxes Act 1988 s 612(1) (repealed with savings) (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 741): Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 13(1).

12 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5, 'remuneration' of a director includes: (1) salary, fees and bonuses, sums paid by way of expenses allowance (so far as they are chargeable to United Kingdom income tax); and (2) the estimated money value of any other benefits received by the director otherwise than in cash: Sch 5 Pt 3 para 9(1). The expression does not include: (a) the value of any share options granted to the director or the amount of any gains made on the exercise of any such options; (b) any company contributions paid, or treated as paid, under any pension scheme or any benefits to which the director is entitled under any such scheme; or (c) any money or other assets paid to or received or receivable by the director under any long term incentive scheme: Sch 5 Pt 3 para 9(2). For the purposes of Sch 5, remuneration paid or receivable or share options granted in respect of a person's accepting office as a director are treated as emoluments paid or receivable or share options granted in respect of his services as a director: Sch 5 Pt 3 para 15(3).

For the purposes of Sch 5, 'company contributions', in relation to a pension scheme and a director, means any payments (including insurance premiums) made, or treated as made, to the scheme in respect of the director by a person other than the director (Sch 5 Pt 3 para 13(3)); and 'pension scheme' means a retirement benefits scheme (as defined by the Income and Corporation Taxes Act 1988 s 611 (repealed with savings): see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 741) (Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 13(1)).

13 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 1 para 1(1)(a).

14 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 1 para 1(1)(b).

15 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5, 'net value', in relation to any assets received or receivable by a director, means value after deducting any money paid or other value given by the director in respect of those assets: Sch 5 Pt 3 para 15(1).

16 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 1 para 1(1)(c).

17 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 1 para 1(1)(d)(i).

18 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5, 'money purchase benefits', in relation to a director, means retirement benefits payable under a pension scheme the rate or amount of which is calculated by reference to payments made, or treated as made, by the director or by any other person in respect of the director and which are not average salary benefits: Sch 5 Pt 3 para 13(4).

19 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 1 para 1(1)(d)(ii).

20 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5, 'money purchase scheme', in relation to a director, means a pension scheme under which all of the benefits that may become payable to or in respect of the director are money purchase benefits: Sch 5 Pt 3 para 13(4).

21 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 1 para 1(2). For the purposes of Sch 5, in relation to a director, 'defined benefit scheme' means a pension scheme that is not a money purchase scheme; and 'defined benefits' means retirement benefits payable under a pension scheme that are not money purchase benefits: Sch 5 Pt 3 para 13(4).

Where a pension scheme provides for any benefits that may become payable to or in respect of any director to be whichever are the greater of:

256 (1) money purchase benefits as determined by or under the scheme; and

257 (2) defined benefits as so determined,

the company may assume for the purposes of Sch 5 Pt 3 para 13 that those benefits will be money purchase benefits, or defined benefits, according to whichever appears more likely at the end of the financial year: Sch 5 Pt 3 para 13(6). For the purpose of determining whether a pension scheme is a money purchase or defined benefit scheme, any death in service benefits provided for by the scheme are to be disregarded: Sch 5 Pt 3 para 13(7).

22 Ie under the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5.

23 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 5(1), (2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 7(1), (2).

The amounts to be shown under the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 do not include any sums that are to be accounted for: (1) to the company or any of its subsidiary undertakings; or (2) by virtue of the Companies Act 2006 s 219 and s 222(3) (payments in connection with share transfers: duty to account) (see PARAS 581, 583), to persons who sold their shares as a result of the offer made: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 6(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 8(1). Where any such sums are not shown in a note to the accounts for the relevant financial year on the ground that the person receiving them is liable to account for them, and the liability is afterwards wholly or partly released or is not enforced within a period of two years, then those sums, to the extent to which the liability is released or not enforced, must be shown in a note to the first accounts in which it is practicable to show them and must be distinguished from the amounts otherwise required to be shown: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 6(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 8(2).

24 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 5(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 7(3). For the purposes of Sch 5, references to a person being 'connected' with a director, and to a director 'controlling' a body corporate, are to be construed in accordance with the Companies Act 2006 ss 252-255 (see PARA 481); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 15(2).

25 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 5(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 7(4).

26 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 5(5); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 7(5).

27 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 5(6); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 7(6).

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(18) ACCOUNTS AND REPORTS/(iv) Annual Accounts/B. INDIVIDUAL ACCOUNTS EXCLUDING BANKING AND INSURANCE COMPANIES/(D) Notes to the Accounts/(g)

Information about Directors' Emoluments and Other Benefits/769. Compensation to directors for loss of office.

769. Compensation to directors for loss of office.

In relation to small companies¹, there must be shown the aggregate amount of any payments made to directors² or past directors for loss of office³.

In relation to unquoted⁴ large or medium-sized companies⁵, there must be shown the aggregate amount of any compensation to directors or past directors in respect of loss of office⁶. This includes compensation received or receivable by a director or past director:

- 1372 (1) for loss of office as director of the company; or
- 1373 (2) for loss, while director of the company or on or in connection with his ceasing to be a director of it, of: (a) any other office in connection with the management of the company's affairs; or (b) any office as director or otherwise in connection with the management of the affairs of any subsidiary undertaking of the company⁷.

1 As to small companies and groups see PARA 694. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'director' see PARA 478.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 2(1). 'Payment for loss of office' has the same meaning as in the Companies Act 2006 s 215 (see PARA 578): Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 2(2).

4 As to unquoted companies see PARA 696.

5 As to large and medium-sized companies and groups see PARA 695.

6 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 4(1).

For the purposes of Sch 5 Pt 2 para 4, references to compensation for loss of office include:

- 258 (1) compensation in consideration for, or in connection with, a person's retirement from office (Sch 5 Pt 2 para 4(3)(a)); and
- 259 (2) where such a retirement is occasioned by a breach of the person's contract with the company or with a subsidiary undertaking of the company:
 - 1. (a) payments made by way of damages for the breach (Sch 5 Pt 2 para 4(3)(b)(i)); or
 - 2. (b) payments made by way of settlement or compromise of any claim in respect of the breach (Sch 5 Pt 2 para 4(3)(b)(ii)).

References to compensation also include benefits otherwise than in cash, and in relation to such compensation references to its amount are to the estimated money value of the benefit: Sch 5 Pt 2 para 4(4). The nature of any such compensation must be disclosed: Sch 5 Pt 2 para 4(4). As to the meaning of 'subsidiary undertaking' for these purposes see PARA 768 note 11.

7 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 4(2).

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(18) ACCOUNTS AND REPORTS/(iv) Annual Accounts/B. INDIVIDUAL ACCOUNTS EXCLUDING BANKING AND INSURANCE COMPANIES/(D) Notes to the Accounts/(g) Information about Directors' Emoluments and Other Benefits/770. Sums paid to third parties in respect of directors' services.

770. Sums paid to third parties in respect of directors' services.

In relation to small companies¹ and unquoted² large or medium-sized companies³, there must be shown the aggregate amount of any consideration⁴ paid to or receivable by third parties⁵ for making available the services of any person:

- 1374 (1) as a director of the company; or
- 1375 (2) while director of the company:
- 93
- 312. (a) as director of any of its subsidiary undertakings; or
- 313. (b) otherwise in connection with the management of the affairs of the company or any of its subsidiary undertakings⁶.
- 94

1 As to small companies and groups see PARA 694. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to unquoted companies see PARA 696.

3 As to large and medium-sized companies and groups see PARA 695.

4 For the purposes of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 3(1) and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 5(1), the reference to consideration includes benefits otherwise than in cash, and in relation to such consideration the reference to its amount is to the estimated money value of the benefit: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 3(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 5(2). The nature of any such consideration must be disclosed: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 3(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 5(2).

5 For the purposes of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 3 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 5, a 'third party' means a person other than: (1) the director himself or a person connected with him or a body corporate controlled by him; or (2) the company or any of its subsidiary undertakings: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 3(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 5(3). As to the meaning of 'director' see PARA 478. As to the meaning of references in Sch 5 to a person being 'connected' with a director, and to a director 'controlling' a body corporate, see PARA 768 note 24. As to the meaning of 'subsidiary undertaking' for these purposes see PARA 768 notes 3, 11.

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 3(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 5(1).

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(18) ACCOUNTS AND REPORTS/(iv) Annual Accounts/B. INDIVIDUAL

ACCOUNTS EXCLUDING BANKING AND INSURANCE COMPANIES/(D) Notes to the Accounts/(g) Information about Directors' Emoluments and Other Benefits/771. Details of highest paid director's emoluments etc where company is unquoted.

771. Details of highest paid director's emoluments etc where company is unquoted.

In relation to unquoted¹ large or medium-sized companies², where the aggregates of payments to directors³ total £200,000 or more, there must be shown:

- 1376 (1) so much of the total of those aggregates as is attributable to the highest paid director⁴; and
- 1377 (2) so much of the aggregate mentioned in relation to company contributions⁵ as is so attributable⁶.

Where the aggregates total £200,000 or more as mentioned above⁷, and the highest paid director has performed qualifying services⁸ during the financial year⁹ by reference to which the rate or amount of any defined benefits¹⁰ that may become payable will be calculated, there must also be shown:

- 1378 (a) the amount at the end of the year of his accrued pension¹¹; and
- 1379 (b) where applicable, the amount at the end of the year of his accrued lump sum¹².

Where the aggregates total £200,000 or more as mentioned above¹³ in the case of a company which is not a listed company¹⁴, there must also be shown:

- 1380 (i) whether the highest paid director exercised any share options¹⁵; and
- 1381 (ii) whether any shares¹⁶ were received or receivable by that director in respect of qualifying services under a long term incentive scheme¹⁷.

Where the highest paid director has not been involved in any of the transactions specified in heads (i) and (ii), that fact need not be stated¹⁸.

1 As to unquoted companies see PARA 696.

2 As to large and medium-sized companies and groups see PARA 695. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 I.e. the aggregates shown under the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 1(1)(a), (b) and (c): see PARA 768 heads (i)-(iii). As to the meaning of 'director' see PARA 478.

4 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5, the 'highest paid director' means the director to whom is attributable the greatest part of the total of the aggregates shown under Sch 5 Pt 2 para 1(1)(a), (b) and (c) (see the text and note 3; and PARA 768 heads (i)-(iii)): Sch 5 Pt 3 para 10.

5 I.e. the aggregate mentioned in the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 1(1)(d): see PARA 768 head (iv).

6 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 2(1).

7 I.e. where the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 2(1) applies: see the text and notes 1-6.

8 As to the meaning of 'qualifying services' for these purposes see PARA 768 note 11.

9 As to a company's financial year see PARA 711.

10 As to the meaning of 'defined benefits' for these purposes see PARA 768 note 21.

11 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5, 'accrued pension' and 'accrued lump sum', in relation to any pension scheme and any director, mean respectively the amount of the annual pension, and the amount of the lump sum, which would be payable under the scheme on his attaining normal pension age if: (1) he had left the company's service at the end of the financial year; (2) there was no increase in the general level of prices in the United Kingdom during the period beginning with the end of that year and ending with his attaining that age; (3) no question arose of any commutation of the pension or inverse commutation of the lump sum; and (4) any amounts attributable to voluntary contributions paid by the director to the scheme, and any money purchase benefits which would be payable under the scheme, were disregarded: Sch 5 Pt 3 para 13(2). For the purposes of Sch 5, 'normal pension age', in relation to any pension scheme and any director, means the age at which the director will first become entitled to receive a full pension on retirement of an amount determined without reduction to take account of its payment before a later age (but disregarding any entitlement to pension upon retirement in the event of illness, incapacity or redundancy): Sch 5 Pt 3 para 13(5). As to the meaning of 'pension scheme' for these purposes see PARA 768 note 12; and as to the meaning of 'money purchase benefits' for these purposes see PARA 768 note 18. As to the meaning of 'United Kingdom' see PARA 1 note 5.

12 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 2(2).

13 In the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 2(1) applies: see the text and notes 1-6.

14 The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 2(3) refers to 'a company which is not a listed company', but it is submitted that it may be intended to refer to 'a company which is not a quoted company'. As to official listing see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385 et seq.

15 As to the meaning of 'share option' for these purposes see PARA 768 note 11.

16 As to the meaning of 'shares' for these purposes see PARA 768 note 11.

17 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 2(3). As to the meaning of 'long term incentive scheme' see PARA 768 note 11.

18 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 2(4).

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(18) ACCOUNTS AND REPORTS/(iv) Annual Accounts/B. INDIVIDUAL ACCOUNTS EXCLUDING BANKING AND INSURANCE COMPANIES/(D) Notes to the Accounts/(g) Information about Directors' Emoluments and Other Benefits/772. Excess retirement benefits of directors and past directors of unquoted company.

772. Excess retirement benefits of directors and past directors of unquoted company.

In relation to unquoted¹ large or medium-sized companies², there must be shown the aggregate amount of:

1382 (1) so much of retirement benefits³ paid to or receivable by directors⁴ under pension schemes⁵; and

1383 (2) so much of retirement benefits paid to or receivable by past directors under such schemes,

as (in each case) is in excess of the retirement benefits to which they were respectively entitled on the date on which the benefits first became payable or 31 March 1997, whichever is the later⁶. However, amounts paid or receivable under a pension scheme need not be included in the aggregate amount if: (a) the funding of the scheme was such that the amounts were or, as the case may be, could have been paid without recourse to additional contributions; and (b) amounts were paid to or receivable by all pensioner members⁷ of the scheme on the same basis⁸.

1 As to unquoted companies see PARA 696.

2 As to large and medium-sized companies and groups see PARA 695. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 3, references to retirement benefits include benefits otherwise than in cash; and in relation to so much of retirement benefits as consists of a benefit otherwise than in cash, references to their amount are to the estimated money value of the benefit: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 3(4). The nature of any such benefit must also be disclosed: Sch 5 Pt 2 para 3(4).

4 As to the meaning of 'director' see PARA 478.

5 As to the meaning of 'pension scheme' for these purposes see PARA 768 note 12.

6 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 3(1).

7 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 3(2), 'pensioner member', in relation to a pension scheme, means any person who is entitled to the present payment of retirement benefits under the scheme: Sch 5 Pt 2 para 3(3).

8 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 3(2).

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(h) Information about Directors' Advances, Credit and Guarantees

773. Information to be disclosed.

In the case of a company¹ that does not prepare group accounts², details of:

- 1384 (1) advances and credits granted by the company to its directors³; and
- 1385 (2) guarantees of any kind entered into by the company on behalf of its directors,

must be shown in the notes to its individual accounts⁴.

The details required of an advance or credit are: (a) its amount; (b) an indication of the interest rate; (c) its main conditions; and (d) any amounts repaid⁵. The details required of a guarantee are: (i) its main terms; (ii) the amount of the maximum liability that may be incurred by the company (or its subsidiary); and (iii) any amount paid and any liability incurred by the company (or its subsidiary) for the purpose of fulfilling the guarantee (including any loss incurred by reason of enforcement of the guarantee)⁶.

There must also be stated in the notes to the accounts the totals of amounts stated under head (a), of amounts stated under head (d), of amounts stated under head (ii) and of amounts stated under head (iii)⁷.

The above requirements apply in relation to every advance, credit or guarantee subsisting at any time in the financial year to which the accounts relate: (A) whenever it was entered into; (B) whether or not the person concerned was a director of the company in question at the time it was entered into; and (C) in the case of an advance, credit or guarantee involving a subsidiary undertaking⁸ of that company, whether or not that undertaking was such a subsidiary undertaking at the time it was entered into⁹.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to group accounts see PARA 775 et seq.

3 References in the Companies Act 2006 s 413 to the directors of a company are references to the persons who were a director at any time in the financial year to which the accounts relate: s 413(6). As to the meaning of 'director' generally see PARA 478. As to a company's financial year see PARA 711.

The provisions of the Companies Act 2006 s 413 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 2006 s 413(1). As to the meaning of 'individual accounts' see PARA 716.

5 Companies Act 2006 s 413(3).

6 Companies Act 2006 s 413(4).

7 Companies Act 2006 s 413(5).

8 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

9 Companies Act 2006 s 413(7). However, banking companies and the holding companies of credit institutions need only state the details required by s 413(3)(a) (see head (a) in the text) and s 413(4)(b) (see head (ii) in the text): s 413(8). As to the meaning of 'banking company' see PARA 701 note 1; and as to the meaning of 'credit institution' see PARA 146 note 22.

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(i) Information about Auditors' Remuneration and Liability Limitation Agreements.

UPDATE

773 Information to be disclosed

NOTE 9--Companies Act 2006 s 413(8) amended: SI 2009/3022.

774. Disclosure of remuneration to, and liability limitation agreements made with, auditors.

Companies must, by way of a note to the company's annual accounts¹, disclose fees receivable by their auditors and their auditors' associates² and also disclose liability limitation agreements that they make with their auditors³.

Small and medium-sized companies⁴ must disclose the fee paid to their auditors for the audit itself⁵. Every other company must disclose both the audit fee and all other fees receivable by the auditors for services supplied by them and their associates to the company, its subsidiaries (except where its control over a subsidiary is subject to severe long-term restrictions) and associated pension schemes⁶.

A company which has made a liability limitation agreement with its auditors must disclose its principal terms and the date of the approval resolution (or resolution waiving the need for approval in the case of a private company) passed by the company's members⁷.

1 As to a company's annual accounts see PARA 714 et seq.

2 As to persons who are to be regarded as an associate or distant associate of a company's auditor for these purposes see PARA 922. As to the persons qualified to act as auditors see PARA 958 et seq.

3 See the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489; and PARA 921 et seq. See also the text and notes 4-7.

4 As to when a company qualifies as 'small' in relation to a financial year or 'medium-sized' in relation to a financial year for these purposes see PARA 923 note 3.

5 See the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 4; and PARA 923.

6 See the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 5; and PARA 923. Auditors must supply their company's directors with the information needed to enable the company to disclose the types of services specified and the fees paid for them: see reg 7; and PARA 923.

7 See the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 8; and PARA 923. The disclosure must be in a note to the accounts for the year in question or (if the agreement was entered into too late to be included in those accounts) in a note to the next year's accounts: see reg 8; and PARA 923.

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C. GROUP ACCOUNTS

(A) GENERAL DUTY TO PREPARE ACCOUNTS

(a) Application of General Duty

775. General duty to prepare group accounts.

If at the end of a financial year¹ a company² that is not subject to the small companies regime³ is a parent company⁴ the directors⁵, as well as preparing individual accounts⁶ for the year, must prepare group accounts⁷ for the year unless the company is exempt from that requirement⁸. There are exemptions⁹ for a company included in the EEA accounts of a larger group¹⁰, a company included in the non-EEA accounts of a larger group¹¹, and a company none of whose subsidiary undertakings need be included in the consolidation¹².

A company to which these provisions apply but which is exempt from the requirement to prepare group accounts, may do so¹³.

1 As to a company's financial year see PARA 711.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to the small companies regime see PARA 694. Companies subject to the small companies regime may opt to prepare group accounts: see PARA 779.

4 As to the meaning of 'parent company' see PARA 26 note 2.

5 As to the meaning of 'director' see PARA 478.

6 As to the meaning of 'individual accounts' see PARA 716.

7 As to the applicable accounting framework see PARA 776. As to the form and content of Companies Act group accounts see PARA 784 et seq.

8 Companies Act 2006 s 399(1), (2).

The provisions of the Companies Act 2006 s 399 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. Where an overseas company, or a credit or financial institution to which the Companies Act 2006 s 1050 applies (see PARA 1831), is not required to prepare and disclose accounts under parent law, s 399 is applied with modifications: see the Overseas Companies Regulations 2009, SI 2009/1801, regs 38, 53; and PARA 1830 et seq. As to the meaning of 'overseas company' see PARA 1824.

9 Companies Act 2006 s 399(3).

10 See the Companies Act 2006 s 400; and PARA 781.

11 See the Companies Act 2006 s 401; and PARA 782.

12 See the Companies Act 2006 s 402; and PARA 783. For the purposes of Pt 15 (ss 380-474), 'included in the consolidation', in relation to group accounts, or 'included in consolidated group accounts', means that the undertaking is included in the accounts by the method of full (and not proportional) consolidation, and references to an undertaking 'excluded from consolidation' are to be construed accordingly: s 474(1).

13 Companies Act 2006 s 399(4).

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776. Applicable accounting framework.

The group accounts¹ of certain parent companies² are required³ to be prepared in accordance with international accounting standards⁴ ('IAS group accounts')⁵.

The group accounts of other companies may be prepared in accordance with the relevant provision of the Companies Act 2006⁶ ('Companies Act group accounts'), or in accordance with international accounting standards ('IAS group accounts')⁷. Where the directors⁸ of a company prepare IAS group accounts, they must state in the notes to those accounts that the accounts have been prepared in accordance with international accounting standards⁹.

After the first financial year¹⁰ in which the directors of a parent company prepare IAS group accounts (the 'first IAS year'), all subsequent group accounts of the company must be prepared in accordance with international accounting standards unless there is a relevant change of circumstance¹¹. There is a relevant change of circumstance if, at any time during or after the first IAS year:

- 1386 (1) the company becomes a subsidiary undertaking¹² of another undertaking that does not prepare IAS group accounts¹³;
- 1387 (2) the company ceases to be a company with securities admitted to trading on a regulated market¹⁴ in an EEA state¹⁵; or
- 1388 (3) a parent undertaking¹⁶ of the company ceases to be an undertaking with securities admitted to trading on a regulated market in an EEA state¹⁷.

If, having changed to preparing Companies Act group accounts following a relevant change of circumstance, the directors again prepare IAS group accounts for the company, the above provisions¹⁸ apply again as if the first financial year for which such accounts are again prepared were the first IAS year¹⁹.

1 As to the duty to prepare group accounts see PARA 775.

2 As to the meaning of 'parent company' see PARA 26 note 2. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 Ie by the IAS Regulation art 4. As to the meaning of 'IAS Regulation' see PARA 693 note 1.

4 As to the meaning of 'international accounting standards' see PARA 693 note 1.

5 Companies Act 2006 s 403(1).

The provisions of the Companies Act 2006 ss 403, 406 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. Where an overseas company, or a credit or financial institution to which the Companies Act 2006 s 1050 applies (see PARA 1831), is not required to prepare and disclose accounts under parent law, ss 403, 406 are applied with modifications: see the Overseas Companies Regulations 2009, SI 2009/1801, regs 38, 53; and PARA 1830 et seq. As to the meaning of 'overseas company' see PARA 1824.

6 Ie the Companies Act 2006 s 404: see PARA 784.

7 Companies Act 2006 s 403(2). Note that the group accounts of a parent company that is a charity must be Companies Act group accounts: s 403(3). As to charities generally see **CHARITIES**.

8 As to the meaning of 'director' see PARA 478.

9 Companies Act 2006 s 406. As to notes to the accounts see PARA 792 et seq.

10 As to a company's financial year see PARA 711.

- 11 Companies Act 2006 s 403(4).
- 12 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.
- 13 Companies Act 2006 s 403(5)(a).
- 14 As to the meaning of 'regulated market' see PARA 334 note 11.
- 15 Companies Act 2006 s 403(5)(b). As to the meaning of 'EEA state' see PARA 29 note 5.
- 16 As to the meaning of 'parent undertaking' see PARA 26.
- 17 Companies Act 2006 s 403(5)(c).
- 18 Ie the Companies Act 2006 s 403(4), (5): see the text and notes 8-16.
- 19 Companies Act 2006 s 403(6).

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777. Consistency of financial reporting within group.

The directors¹ of a parent company² must secure that the individual accounts³ of the parent company and each of its subsidiary undertakings⁴ are all prepared using the same financial reporting framework⁵, except to the extent that in their opinion there are good reasons for not doing so⁶. This does not apply, however, if the directors do not prepare group accounts⁷ for the parent company⁸; nor does it apply to the individual accounts of a parent company where the directors of the parent company prepare IAS group accounts⁹ and IAS individual accounts¹⁰. Moreover, it only applies to accounts of subsidiary undertakings that are required to be prepared under Part 15¹¹ of the Companies Act 2006¹².

- 1 As to the meaning of 'director' see PARA 478.
- 2 As to the meaning of 'parent company' see PARA 26 note 2. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.
- 3 As to the meaning of 'individual accounts' see PARA 716.
- 4 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.
- 5 As to the financial reporting framework see PARA 776; and see also PARA 693.
- 6 Companies Act 2006 s 407(1). Note that this provision does not require accounts of undertakings that are charities to be prepared using the same financial reporting framework as accounts of undertakings which are not charities: s 407(4). As to charities generally see **CHARITIES**.
The provisions of the Companies Act 2006 s 407 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.
- 7 As to the duty to prepare group accounts see PARA 775.
- 8 Companies Act 2006 s 407(2).

- 9 As to the meaning of 'IAS group accounts' see PARA 776.
- 10 Companies Act 2006 s 407(5). As to the meaning of 'IAS individual accounts' see PARA 717.
- 11 Ie the Companies Act Pt 15 (ss 380-474).
- 12 Companies Act 2006 s 407(3).

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778. Treatment of individual profit and loss account where group accounts prepared.

Where a company¹ prepares group accounts² in accordance with the Companies Act 2006, and the notes to the company's individual balance sheet³ show the company's profit or loss for the financial year⁴ determined in accordance with that Act, then the company's individual profit and loss account⁵ need not contain certain information about employee numbers and costs⁶.

The company's individual profit and loss account must be approved⁷ but may be omitted from the company's annual accounts⁸.

The exemption conferred by these provisions is conditional upon its being disclosed in the company's annual accounts that the exemption applies⁹.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the duty to prepare group accounts see PARA 775.

3 As to the meaning of 'balance sheet' see PARA 715.

4 As to a company's financial year see PARA 711.

5 As to the meaning of 'profit and loss account' see PARA 715.

6 Companies Act 2006 s 408(1), (2) (s 408(2) amended by SI 2008/393). The information referred to in the text is information specified in the Companies Act 2006 s 411: see PARA 806.

The provisions of the Companies Act 2006 s 408 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

7 Ie in accordance with the Companies Act 2006 s 414(1) (approval by directors): see PARA 815.

8 See the Companies Act 2006 s 408(3). As to the meaning of 'annual accounts' see PARA 715.

9 Companies Act 2006 s 408(4).

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ACCOUNTS/(A) General Duty to Prepare Accounts/(a) Application of General Duty/779. Option to prepare group accounts for companies subject to the small companies regime.

779. Option to prepare group accounts for companies subject to the small companies regime.

If at the end of a financial year¹ a company² subject to the small companies regime³ is a parent company⁴ the directors⁵, as well as preparing individual accounts⁶ for the year, may prepare group accounts⁷ for the year⁸.

1 As to a company's financial year see PARA 711.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to the small companies regime see PARA 694.

4 As to the meaning of 'parent company' see PARA 26 note 2.

5 As to the meaning of 'director' see PARA 478.

6 As to the meaning of 'individual accounts' see PARA 716.

7 As to the duty to prepare group accounts see PARA 775.

8 Companies Act 2006 s 398.

The provisions of the Companies Act 2006 s 398 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

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780. Disclosures by company not required to prepare group accounts.

A company¹ that is not required to prepare group accounts² must comply with the following provisions³ as to information to be given in notes to the company's accounts⁴.

The reason why the company is not required to prepare group accounts must be stated⁵. If the reason is that all the subsidiary undertakings⁶ of the company fall within the statutory exclusions⁷, it must be stated with respect to each subsidiary undertaking which of those exclusions applies⁸.

There must be stated in relation to shares of each class held by the company in a subsidiary undertaking: (1) the identity of the class; and (2) the proportion of the nominal value of the shares of that class represented by those shares⁹. The shares held by or on behalf of the company itself must be distinguished from those attributed to the company which are held by or on behalf of a subsidiary undertaking¹⁰.

Where financial information is disclosed¹¹ with respect to a subsidiary undertaking not included in consolidated accounts, and that undertaking's financial year¹² does not end with that of the

company, then there must be stated in relation to that undertaking the date on which its last financial year ended (that is, last before the end of the company's financial year)¹³.

The financial information otherwise required¹⁴ in relation to significant holdings in undertakings other than subsidiary undertakings need not be given if: (a) the company is exempt¹⁵ from the requirement to prepare group accounts; and (b) the investment of the company in all undertakings in which it has such a holding is shown, in aggregate, in the notes to the accounts by way of the equity method of valuation¹⁶.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the requirement to prepare group accounts see PARA 775.

3 I.e. the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 2: reg 7(2).

4 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 7(1).

5 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 2 para 10(1).

6 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

7 I.e. the exclusions provided for in the Companies Act 2006 s 405: see PARA 783.

8 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 2 para 10(2).

9 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 2 para 11(1). As to the meaning of 'share' see PARA 1042. As to references to shares held by a company see PARA 804.

10 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 2 para 11(2).

11 I.e. under the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 2(1): see PARA 757.

12 As to a company's financial year see PARA 711.

13 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 2 para 12.

14 I.e. by the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 6: see PARA 760.

15 I.e. by virtue of the Companies Act 2006 s 400 or s 401 (parent company included in accounts of larger group): see PARAS 781-782.

16 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 2 para 13. As to the equity method of valuation see PARA 757 note 8.

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*(b) Exemptions***781. Exemption for company included in EEA group accounts of larger group.**

A company¹ is exempt from the requirement to prepare group accounts² if it is itself a subsidiary undertaking³ and its immediate parent undertaking⁴ is established under the law of an EEA state⁵, in the following cases:

- 1389 (1) where the company is a wholly-owned subsidiary of that parent undertaking⁶;
- 1390 (2) where that parent undertaking holds more than 50 per cent of the allotted shares⁷ in the company and notice requesting the preparation of group accounts has not been served on the company by shareholders holding in aggregate: (a) more than half of the remaining allotted shares in the company; or (b) 5 per cent of the total allotted shares in the company⁸.

Exemption is conditional upon compliance with all of the following conditions:

- 1391 (i) the company must be included in consolidated accounts for a larger group⁹ drawn up to the same date, or to an earlier date in the same financial year, by a parent undertaking established under the law of an EEA state¹⁰;
- 1392 (ii) those accounts must be drawn up and audited, and that parent undertaking's annual report must be drawn up, according to that law, in accordance with the relevant provisions¹¹ or in accordance with international accounting standards¹²;
- 1393 (iii) the company must disclose in its individual accounts¹³ that it is exempt from the obligation to prepare and deliver group accounts¹⁴;
- 1394 (iv) the company must state in its individual accounts the name of the parent undertaking that draws up the group accounts referred to above and: (A) if it is incorporated outside the United Kingdom¹⁵, the country in which it is incorporated; or (B) if it is unincorporated, the address of its principal place of business¹⁶;
- 1395 (v) the company must deliver to the registrar¹⁷, within the period for filing its accounts and reports for the financial year in question, copies of those group accounts and the parent undertaking's annual report, together with the auditor's report on them¹⁸;
- 1396 (vi) any requirement¹⁹ as to the delivery to the registrar of a certified translation into English must be met in relation to any document comprised in the accounts and reports delivered in accordance with head (v)²⁰.

The exemption does not apply to a company any of whose securities²¹ are admitted to trading on a regulated market²² in an EEA state²³.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the requirement to prepare group accounts see PARA 775.

3 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

4 As to the meaning of 'parent undertaking' see PARA 26.

5 As to the meaning of 'EEA state' see PARA 29 note 5.

6 Companies Act 2006 s 400(1)(a). As to the meaning of 'wholly-owned subsidiary' see PARA 25. Shares held by directors of a company for the purpose of complying with any share qualification requirement must be disregarded in determining for these purposes whether the company is a wholly-owned subsidiary: s 400(5). As to the meaning of 'share' see PARA 1042. As to the meaning of 'director' see PARA 478.

The provisions of the Companies Act 2006 s 400 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

7 As to the meaning of 'allotted' see PARA 1091. For the purposes of the Companies Act 2006 s 400(1)(b), shares held by a wholly-owned subsidiary of the parent undertaking, or held on behalf of the parent undertaking or a wholly-owned subsidiary, must be attributed to the parent undertaking: s 400(3).

8 Companies Act 2006 s 400(1)(b). Such notice must be served not later than six months after the end of the financial year before that to which it relates: s 400(1)(b). As to a company's financial year see PARA 711.

9 As to the meaning of 'group' see PARA 694 note 10.

10 Companies Act 2006 s 400(2)(a).

11 Ie the provisions of EEC Council Directive 83/349 on consolidated accounts (the 'Seventh Directive') (OJ L193, 18.7.1983, p 1) (as modified, where relevant, by the provisions of EEC Council Directive 86/635 on the annual accounts and consolidated accounts of banks and other financial institutions (the 'Bank Accounts Directive') (OJ L372, 31.12.1986, p 1) or EEC Council Directive 91/674 on the annual accounts and consolidated accounts of insurance undertakings (the 'Insurance Accounts Directive') (OJ L374, 31.12.1991, p 7)).

12 Companies Act 2006 s 400(2)(b). As to the meaning of 'international accounting standards' see PARA 693 note 1.

13 As to the meaning of 'individual accounts' see PARA 716.

14 Companies Act 2006 s 400(2)(c).

15 As to the meaning of 'United Kingdom' see PARA 1 note 5. As to companies incorporated outside the United Kingdom ('overseas companies') see PARA 1824 et seq.

16 Companies Act 2006 s 400(2)(d).

17 As to the meaning of 'registrar' see PARA 131 note 2.

18 Companies Act 2006 s 400(2)(e).

19 Ie any requirement of the Companies Act 2006 Pt 35 (ss 1059A-1120): see PARA 131 et seq.

20 Companies Act 2006 s 400(2)(f). As to documents that may be drawn up and delivered in other languages see s 1105; and PARA 164.

21 For the purposes of the Companies Act 2006 s 400(4), 'securities' includes:

260 (1) shares and stock (s 400(6)(a));

261 (2) debentures, including debenture stock, loan stock, bonds, certificates of deposit and other instruments creating or acknowledging indebtedness (s 400(6)(b));

262 (3) warrants or other instruments entitling the holder to subscribe for securities falling within head (1) or (2) (s 400(6)(c)); and

263 (4) certificates or other instruments that confer: (a) property rights in respect of a security falling within head (1), (2) or (3); (b) any right to acquire, dispose of, underwrite or convert a security, being a right to which the holder would be entitled if he held any such security to which the certificate or other instrument relates; or (c) a contractual right (other than an option) to acquire any such security otherwise than by subscription (s 400(6)(d)).

As to the meaning of 'debenture' see PARA 1299.

22 As to the meaning of 'regulated market' see PARA 334 note 11.

23 Companies Act 2006 s 400(4).

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782. Exemption for company included in non-EEA group accounts of larger group.

A company¹ is exempt from the requirement to prepare group accounts² if it is itself a subsidiary undertaking³ and its parent undertaking⁴ is not established under the law of an EEA state⁵, in the following cases:

- 1397 (1) where the company is a wholly-owned subsidiary of that parent undertaking⁶;
- 1398 (2) where that parent undertaking holds more than 50 per cent of the allotted shares⁷ in the company and notice requesting the preparation of group accounts has not been served on the company by shareholders holding in aggregate: (a) more than half of the remaining allotted shares in the company; or (b) 5 per cent of the total allotted shares in the company⁸.

Exemption is conditional upon compliance with all of the following conditions:

- 1399 (i) the company and all of its subsidiary undertakings must be included in consolidated accounts for a larger group⁹ drawn up to the same date, or to an earlier date in the same financial year, by a parent undertaking¹⁰;
- 1400 (ii) those accounts and, where appropriate, the group's annual report must be drawn up in accordance with the relevant provisions¹¹, or in a manner equivalent to consolidated accounts and consolidated annual reports so drawn up¹²;
- 1401 (iii) the group accounts must be audited by one or more persons authorised to audit accounts under the law under which the parent undertaking which draws them up is established¹³;
- 1402 (iv) the company must disclose in its individual accounts¹⁴ that it is exempt from the obligation to prepare and deliver group accounts¹⁵;
- 1403 (v) the company must state in its individual accounts the name of the parent undertaking which draws up the group accounts referred to above and: (A) if it is incorporated outside the United Kingdom¹⁶, the country in which it is incorporated; or (B) if it is unincorporated, the address of its principal place of business¹⁷;
- 1404 (vi) the company must deliver to the registrar¹⁸, within the period for filing its accounts and reports for the financial year in question, copies of the group accounts and, where appropriate, the consolidated annual report, together with the auditor's report on them¹⁹;
- 1405 (vii) any requirement²⁰ as to the delivery to the registrar of a certified translation into English must be met in relation to any document comprised in the accounts and reports delivered in accordance with head (vi)²¹.

The exemption does not apply to a company any of whose securities²² are admitted to trading on a regulated market²³ in an EEA state²⁴.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PRA 701 et seq.

- 2 As to the requirement to prepare group accounts see PARA 775.
- 3 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.
- 4 As to the meaning of 'parent undertaking' see PARA 26.
- 5 As to the meaning of 'EEA state' see PARA 29 note 5.
- 6 Companies Act 2006 s 401(1)(a). As to the meaning of 'wholly-owned subsidiary' see PARA 25. Shares held by directors of a company for the purpose of complying with any share qualification requirement must be disregarded in determining for these purposes whether the company is a wholly-owned subsidiary: s 401(5). As to the meaning of 'share' see PARA 1042. As to the meaning of 'director' see PARA 478.

The provisions of the Companies Act 2006 s 401 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.
- 7 As to the meaning of 'allotted' see PARA 1091. For the purposes of the Companies Act 2006 s 401(1)(b), shares held by a wholly-owned subsidiary of the parent undertaking, or held on behalf of the parent undertaking or a wholly-owned subsidiary, must be attributed to the parent undertaking: s 401(3).
- 8 Companies Act 2006 s 401(1)(b). Such notice must be served not later than six months after the end of the financial year before that to which it relates: s 401(1)(b). As to a company's financial year see PARA 711.
- 9 As to the meaning of 'group' see PARA 694 note 10.
- 10 Companies Act 2006 s 401(2)(a).
- 11 Ie the provisions of EEC Council Directive 83/349 on consolidated accounts (the 'Seventh Directive') (OJ L193, 18.7.1983, p 1) (as modified, where relevant, by the provisions of EEC Council Directive 86/635 on the annual accounts and consolidated accounts of banks and other financial institutions (the 'Bank Accounts Directive') (OJ L372, 31.12.1986, p 1) or EEC Council Directive 91/674 on the annual accounts and consolidated accounts of insurance undertakings (the 'Insurance Accounts Directive') (OJ L374, 31.12.1991, p 7)).
- 12 Companies Act 2006 s 401(2)(b).
- 13 Companies Act 2006 s 401(2)(c).
- 14 As to the meaning of 'individual accounts' see PARA 716.
- 15 Companies Act 2006 s 401(2)(d).
- 16 As to the meaning of 'United Kingdom' see PARA 1 note 5. As to companies incorporated outside the United Kingdom ('overseas companies') see PARA 1824 et seq.
- 17 Companies Act 2006 s 401(2)(e).
- 18 As to the meaning of 'registrar' see PARA 131 note 2.
- 19 Companies Act 2006 s 401(2)(f).
- 20 Ie any requirement of the Companies Act 2006 Pt 35 (ss 1059A-1120): see PARA 131 et seq. As to documents that may be drawn up and delivered in other languages see s 1105; and PARA 164.
- 21 Companies Act 2006 s 401(2)(g).
- 22 For the purposes of the Companies Act 2006 s 401(4), 'securities' includes:
 - 264 (1) shares and stock (s 401(6)(a));
 - 265 (2) debentures, including debenture stock, loan stock, bonds, certificates of deposit and other instruments creating or acknowledging indebtedness (s 401(6)(b));
 - 266 (3) warrants or other instruments entitling the holder to subscribe for securities falling within head (1) or (2) (s 401(6)(c)); and

- 267 (4) certificates or other instruments that confer: (a) property rights in respect of a security falling within head (1), (2) or (3); (b) any right to acquire, dispose of, underwrite or convert a security, being a right to which the holder would be entitled if he held any such security to which the certificate or other instrument relates; or (c) a contractual right (other than an option) to acquire any such security otherwise than by subscription (s 401(6)(d)).

As to the meaning of 'debenture' see PARA 1299.

23 As to the meaning of 'regulated market' see PARA 334 note 11.

24 Companies Act 2006 s 401(4).

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783. Exemption where subsidiary undertakings need not be included in the consolidation.

A parent company¹ is exempt from the requirement to prepare group accounts² if all of its subsidiary undertakings³ could be excluded from consolidation⁴ in Companies Act group accounts⁵.

Where a parent company prepares Companies Act group accounts, all the subsidiary undertakings of the company must be included in the consolidation⁶, subject to the following exceptions⁷:

- 1406 (1) a subsidiary undertaking may be excluded from consolidation if its inclusion is not material for the purpose of giving a true and fair view (but two or more undertakings may be excluded only if they are not material taken together)⁸;
- 1407 (2) a subsidiary undertaking may be excluded from consolidation where:
- 95
314. (a) severe long term restrictions substantially hinder the exercise of the rights of the parent company⁹ over the assets or management of that undertaking¹⁰; or
315. (b) the information necessary for the preparation of group accounts cannot be obtained without disproportionate expense or undue delay¹¹; or
316. (c) the interest of the parent company¹² is held exclusively with a view to subsequent resale¹³.

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1 As to the meaning of 'parent company' see PARA 26 note 2. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the requirement to prepare group accounts see PARA 775.

3 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

4 Ie excluded under the Companies Act 2006 s 405: see the text and notes 7-13. As to the meaning of 'excluded from consolidation' see also PARA 775 note 12.

5 Companies Act 2006 s 402. As to the meaning of 'Companies Act group accounts' see PARA 776.

The provisions of the Companies Act 2006 ss 402, 405 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the

meaning of 'unregistered company' see PARA 1665. Where an overseas company, or a credit or financial institution to which the Companies Act 2006 s 1050 applies (see PARA 1831), is not required to prepare and disclose accounts under parent law, ss 402, 405 are applied with modifications: see the Overseas Companies Regulations 2009, SI 2009/1801, regs 38, 53; and PARA 1830 et seq. As to the meaning of 'overseas company' see PARA 1824.

6 As to the meaning of 'included in the consolidation' see PARA 775 note 12.

7 Companies Act 2006 s 405(1).

8 Companies Act 2006 s 405(2).

9 The reference in the Companies Act 2006 s 405(3)(a) to the rights of the parent company and the reference in s 405(3)(c) (see head (c) in the text) to the interest of the parent company are, respectively, to rights and interests held by or attributed to the company for the purposes of the definition of 'parent undertaking' (see s 1162; and PARA 26) in the absence of which it would not be the parent company: s 405(4).

10 Companies Act 2006 s 405(3)(a).

11 Companies Act 2006 s 405(3)(b).

12 See note 8.

13 Companies Act 2006 s 405(3)(c).

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(B) FORM AND CONTENT OF COMPANIES ACT GROUP ACCOUNTS

784. Required form and content of Companies Act group accounts.

Companies Act group accounts¹ must comprise:

1408 (1) a consolidated balance sheet² dealing with the state of affairs of the parent company³ and its subsidiary undertakings⁴; and

1409 (2) a consolidated profit and loss account⁵ dealing with the profit or loss of the parent company and its subsidiary undertakings⁶.

The accounts must give a true and fair view⁷ of the state of affairs as at the end of the financial year⁸, and the profit or loss for the financial year, of the undertakings included in the consolidation⁹ as a whole, so far as concerns members of the company¹⁰.

The accounts must comply with provision made by the Secretary of State¹¹ by regulations¹² as to:

1410 (a) the form and content of the consolidated balance sheet and consolidated profit and loss account¹³; and

1411 (b) additional information to be provided by way of notes to the accounts¹⁴.

If compliance with the regulations, and any other provision made by or under the Companies Act 2006 as to the matters to be included in a company's group accounts or in notes to those accounts, would not be sufficient to give a true and fair view, the necessary additional

information must be given in the accounts or in a note to them¹⁵. If in special circumstances compliance with any of those provisions is inconsistent with the requirement to give a true and fair view, the directors must depart from that provision to the extent necessary to give a true and fair view; but particulars of any such departure, the reasons for it and its effect must be given in a note to the accounts¹⁶.

1 As to the meaning of 'Companies Act group accounts' see PARA 776. As to the requirement to prepare group accounts see PARA 775.

2 As to the meaning of 'balance sheet' see PARA 715.

3 As to the meaning of 'parent company' see PARA 26 note 2. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

4 Companies Act 2006 s 404(1)(a). As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

The provisions of the Companies Act 2006 s 404 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. Where an overseas company, or a credit or financial institution to which the Companies Act 2006 s 1050 applies (see PARA 1831), is not required to prepare and disclose accounts under parent law, s 404 is also applied with modifications: see the Overseas Companies Regulations 2009, SI 2009/1801, regs 38, 53; and PARA 1830 et seq. As to the meaning of 'overseas company' see PARA 1824.

5 As to the meaning of 'profit and loss account' see PARA 715.

6 Companies Act 2006 s 404(1)(b).

7 As to the need to give a true and fair view see also PARA 714.

8 As to a company's financial year see PARA 711.

9 As to the meaning of 'included in the consolidation' see PARA 775 note 12.

10 Companies Act 2006 s 404(2).

11 As to the Secretary of State see PARA 6.

12 Companies Act 2006 s 404(3). As to the regulations that have been made see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409; and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410.

Where the directors of a parent company prepare Companies Act group accounts under the Companies Act 2006 s 403 (see PARA 776), those accounts must comply with the provisions of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 (see PARA 785 et seq) as to the form and content of the consolidated balance sheet and consolidated profit and loss account, and additional information to be provided by way of notes to the accounts: reg 9(1). Where the directors of a parent company which is subject to the small companies regime, and which has prepared Companies Act individual accounts in accordance with the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 3 (see PARA 718), prepare Companies Act group accounts under the Companies Act 2006 s 398 (option to prepare group accounts: see PARA 779), those accounts must comply with the provisions of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 (see PARA 785 et seq) as to the form and content of the consolidated balance sheet and consolidated profit and loss account, and additional information to be provided by way of notes to the accounts: reg 8(1). As to the meaning of 'director' see PARA 478. As to the small companies regime see PARA 694. As to the meaning of 'Companies Act individual accounts' see PARA 717. As to notes to the accounts see PARA 792 et seq.

Accounts are treated as having complied with any provision of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 if they comply instead with the corresponding provision of the Large and Medium-Sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 8(2).

13 Companies Act 2006 s 404(3)(a).

- 14 Companies Act 2006 s 404(3)(b).
- 15 Companies Act 2006 s 404(4).
- 16 Companies Act 2006 s 404(5).

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785. General rules.

Group accounts¹ must comply so far as practicable with the provisions that apply to Companies Act individual accounts² as if the undertakings included in the consolidation³ (the 'group') were a single company⁴.

- 1 As to the requirement to prepare group accounts see PARA 775.
 - 2 I.e. the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1: see PARA 728 et seq. As to the meaning of 'Companies Act individual accounts' see PARA 717.
 - 3 As to the meaning of 'undertaking' see PARA 26 note 2; and as to the meaning of 'included in the consolidation' see PARA 775 note 12.
 - 4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 1(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 1(1). As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.
- In relation to small companies, item B III in each balance sheet format is modified for group accounts, so as to list under the heading 'Investments': (1) Shares in group undertakings; (2) Interests in associated undertakings; (3) Other participating interests; (4) Loans to group undertakings and undertakings in which a participating interest is held; (5) Other investments other than loans; (6) Others (see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 1(2)); and the items headed 'Income from participating interests' in the profit and loss account formats (see Format 1 item 8, Format 2 item 10, Format 3 item B 4, and Format 4 item B 6) are replaced by two items, namely 'Income from interests in associated undertakings' and 'Income from other participating interests' (see Sch 6 Pt 1 para 1(3)). As to small companies and groups see PARA 694. As to the balance sheet formats for small companies see PARAS 730-731; and as to the profit and loss account formats see PARAS 734-737.
- In relation to large and medium-sized companies, where the parent company is treated as an investment company for the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 5 (special provisions for investment companies: see PARA 707) the group must be similarly treated: Sch 6 Pt 1 para 1(2). As to large and medium-sized companies and groups see PARA 695. As to the meaning of 'parent company' see PARA 26 note 2.

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786. Consolidated accounts of holding company and subsidiaries.

The consolidated balance sheet¹ and profit and loss account² must incorporate in full the information contained in the individual accounts³ of the undertakings included in the consolidation⁴, subject to the authorised or required adjustments⁵ and to such other adjustments (if any) as may be appropriate in accordance with generally accepted accounting principles or practice⁶. If the financial year⁷ of a subsidiary undertaking⁸ included in the consolidation does not end with that of the parent company⁹, the group accounts¹⁰ must be made up: (1) from the accounts of the subsidiary undertaking for its financial year last ending before the end of the parent company's financial year, provided that year ended no more than three months before that of the parent company; or (2) from interim accounts prepared by the subsidiary undertaking as at the end of the parent company's financial year¹¹.

Where assets and liabilities to be included in the group accounts have been valued or otherwise determined by undertakings according to accounting rules differing from those used for the group accounts, the values or amounts must be adjusted so as to accord with the rules used for the group accounts¹². If it appears to the directors¹³ of the parent company that there are special reasons for departing from this provision¹⁴, they may do so; but particulars of any such departure, the reasons for it and its effect must be given in a note to the accounts¹⁵. Such adjustments need not be made if they are not material for the purpose of giving a true and fair view¹⁶.

Any differences of accounting rules as between a parent company's individual accounts for a financial year and its group accounts must be disclosed in a note to the latter accounts and the reasons for the difference given¹⁷.

Amounts that in the particular context of any statutory provision¹⁸ are not material may be disregarded for the purposes of that provision¹⁹.

1 As to the meaning of 'balance sheet' see PARA 715.

2 As to the meaning of 'profit and loss account' see PARA 715.

3 As to the meaning of 'individual accounts' see PARA 716.

4 As to the meaning of 'undertaking' see PARA 26 note 2; and as to the meaning of 'included in the consolidation' see PARA 775 note 12.

5 I.e. authorised or required by the provisions of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6.

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 2(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 2(1).

7 As to a company's financial year see PARA 711.

8 As to the meaning of 'subsidiary undertaking' see PARA 26.

9 As to the meaning of 'parent company' see PARA 26 note 2.

10 As to the requirement to prepare group accounts see PARA 775.

11 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 2(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 2(2).

12 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 3(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 3(1).

13 As to the meaning of 'director' see PARA 478.

14 In the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 3(1) or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 3(1).

15 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 3(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 3(2).

16 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 3(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 3(3). As to the need to give a true and fair view see PARA 714; and see also PARA 784.

17 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 4; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 4.

18 In any provision of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6.

19 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 5; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 5.

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787. Elimination of group transactions.

Debts and claims between undertakings included in the consolidation¹, and income and expenditure relating to transactions between such undertakings, must be eliminated in preparing the group accounts².

Where profits and losses resulting from transactions between undertakings included in the consolidation are included in the book value of assets, they must be eliminated in preparing the group accounts³. This elimination may be effected in proportion to the group's interest in the shares of the undertakings⁴.

The provisions described above need not be complied with if the amounts concerned are not material for the purpose of giving a true and fair view⁵.

1 As to the meaning of 'undertaking' see PARA 26 note 2; and as to the meaning of 'included in the consolidation' see PARA 775 note 12.

2 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 6(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 6(1). As to the requirement to prepare group accounts see PARA 775.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 6(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 6(2).

4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 6(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 6(3).

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 6(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 6(4). As to the need to give a true and fair view see PARA 714; and see also PARA 784.

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788. Acquisition and merger accounting.

The provisions described below apply where an undertaking¹ becomes a subsidiary undertaking² of the parent company³. That event is referred to in these provisions as an 'acquisition'; and references to the 'undertaking acquired' are to be construed accordingly⁴.

An acquisition must be accounted for by the acquisition method of accounting unless the conditions for accounting for it as a merger are met and the merger method of accounting is adopted⁵.

The acquisition method of accounting is as follows⁶. The identifiable assets and liabilities of the undertaking acquired must be included in the consolidated balance sheet⁷ at their fair values as at the date of acquisition⁸. The income and expenditure of the undertaking acquired must be brought into the group accounts⁹ only as from the date of the acquisition¹⁰. There must be set off against the acquisition cost of the interest in the shares¹¹ of the undertaking held by the parent company and its subsidiary undertakings the interest of the parent company and its subsidiary undertakings in the adjusted capital and reserves of the undertaking acquired¹². The resulting amount, if positive, is to be treated as goodwill and, if negative, as a negative consolidation difference¹³.

The conditions for accounting for an acquisition as a merger are:

- 1412 (1) that at least 90 per cent of the nominal value of the relevant shares¹⁴ in the undertaking acquired (excluding any shares in the undertaking held as treasury shares¹⁵) is held by or on behalf of the parent company and its subsidiary undertakings;
- 1413 (2) that the proportion referred to in head (1) above was attained pursuant to an arrangement providing for the issue of equity shares by the parent company or one or more of its subsidiary undertakings;
- 1414 (3) that the fair value of any consideration other than the issue of equity shares given pursuant to the arrangement by the parent company and its subsidiary undertakings did not exceed 10 per cent of the nominal value of the equity shares issued; and
- 1415 (4) that adoption of the merger method of accounting accords with generally accepted accounting principles or practice¹⁶.

The merger method of accounting is as follows¹⁷. The assets and liabilities of the undertaking acquired must be brought into the group accounts at the figures at which they stand in the undertaking's accounts, subject to any authorised or required¹⁸ adjustment¹⁹. The income and expenditure of the undertaking acquired must be included in the group accounts for the entire financial year²⁰, including the period before the acquisition²¹. The group accounts must show corresponding amounts relating to the previous financial year as if the undertaking acquired had been included in the consolidation throughout that year²². Against the aggregate of:

- 1416 (a) the appropriate amount in respect of qualifying shares²³ issued by the parent company or its subsidiary undertakings in consideration for the acquisition of shares in the undertaking acquired; and
- 1417 (b) the fair value of any other consideration for the acquisition of shares in the undertaking acquired, determined as at the date when those shares were acquired,

there must be set off the nominal value of the issued share capital²⁴ of the undertaking acquired held by the parent company and its subsidiary undertakings²⁵. The resulting amount must be shown as an adjustment to the consolidated reserves²⁶.

Where a group²⁷ is acquired, the provisions described above²⁸ apply with the following adaptations²⁹. References to shares of the undertaking acquired are to be construed as references to shares of the parent undertaking of the group³⁰. Other references to the undertaking acquired are to be construed as references to the group; and references to the assets and liabilities, income and expenditure and capital and reserves of the undertaking acquired are to be construed as references to the assets and liabilities, income and expenditure and capital and reserves of the group after making the set-offs and other adjustments required³¹ in the case of group accounts³².

The following information with respect to acquisitions taking place in the financial year must be given in a note to the accounts³³:

- 1418 (i) the name of the undertaking acquired or, where a group was acquired, the name of the parent undertaking of that group; and
- 1419 (ii) whether the acquisition has been accounted for by the acquisition or the merger method of accounting³⁴.

In relation to an acquisition which significantly affects the figures shown in the group accounts, the following further information must be given³⁵. The composition and fair value of the consideration for the acquisition given by the parent company and its subsidiary undertakings must be stated³⁶; and, where the acquisition method of accounting has been adopted, the book values immediately prior to the acquisition, and the fair values at the date of acquisition, of each class of assets and liabilities of the undertaking or group acquired must be stated in tabular form, including a statement of the amount of any goodwill or negative consolidation difference arising on the acquisition, together with an explanation of any significant adjustments made³⁷. There must also be stated in a note to the accounts the cumulative amount of goodwill resulting from acquisitions in that and earlier financial years which has been written off otherwise than in the consolidated profit and loss account³⁸ for that or any earlier financial year³⁹; and that figure must be shown net of any goodwill attributable to subsidiary undertakings or businesses disposed of prior to the balance sheet date⁴⁰. Where during the financial year there has been a disposal of an undertaking or group which significantly affects the figures shown in the group accounts, there must be stated in a note to the accounts: (A) the name of that undertaking or, as the case may be, of the parent undertaking of that group; and (B) the extent to which the profit or loss shown in the group accounts is attributable to profit or loss of that undertaking or group⁴¹. The information required by the provisions described above⁴² need not be disclosed with respect to an undertaking which is established under the law of a country outside the United Kingdom⁴³, or which carries on business outside the United Kingdom, if in the opinion of the directors⁴⁴ of the parent company the disclosure would be seriously prejudicial to the business of that undertaking or to the business of the parent company or any of its subsidiary undertakings and the Secretary of State⁴⁵ agrees that the information should not be disclosed⁴⁶.

1 As to the meaning of 'undertaking' see PARA 26 note 2.

- 2 As to the meaning of 'subsidiary undertaking' see PARA 26.
- 3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 7(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 7(1). As to the meaning of 'parent company' see PARA 26 note 2.
- 4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 7(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 7(2).
- 5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 8; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 8.
- 6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 9(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 9(1).
- 7 As to the meaning of 'balance sheet' see PARA 715.
- 8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 9(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 9(2).
- 9 As to the requirement to prepare group accounts see PARA 775.
- 10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 9(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 9(3).
- 11 As to the meaning of 'share' see PARA 1042.
- 12 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 9(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 9(4).
- 13 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 9(5); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 9(5).
- 14 For these purposes, the reference to the 'relevant shares' in an undertaking acquired is a reference to those carrying unrestricted rights to participate both in distributions and in the assets of the undertaking upon liquidation: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 10(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 10(2).
- 15 As to treasury shares see PARA 1251 et seq.
- 16 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 10(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 10(1).
- 17 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 11(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 11(1).
- 18 Ie authorised or required by the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6.
- 19 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 11(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 11(2).
- 20 As to a company's financial year see PARA 711.

21 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 11(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 11(3).

22 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 11(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 11(4).

23 For these purposes, 'qualifying shares' means: (1) shares in relation to which the Companies Act 1985 s 131 (repealed) or the Companies Act 2006 s 612 (merger relief: see PARA 1148) applies, in respect of which the appropriate amount is the nominal value; or (2) shares in relation to which the Companies Act 1985 s 132 (repealed) or the Companies Act 2006 s 611 (relief in respect of group reconstructions: see PARA 1147) applies, in respect of which the appropriate amount is the nominal value together with any minimum premium value (as to the meaning of which see PARA 1147): Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 11(7); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 11(7).

24 As to the meaning of 'issued share capital' see PARA 1045.

25 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 11(5); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 11(5).

26 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 11(6); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 11(6).

27 As to the meaning of 'group' see PARA 694 note 10.

28 In the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 paras 9-11 or Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 paras 9-11: see the text and notes 6-26.

29 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 12(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 12(1).

30 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 12(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 12(2).

31 Is required by the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6.

32 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 12(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 12(3).

33 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 13(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 13(1). As to notes to the accounts see PARA 792 et seq.

34 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 13(2)(a), (b); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 13(2)(a), (b).

35 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 13(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 13(2).

36 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 13(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 13(3).

37 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 13(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 13(4). In ascertaining for these purposes the profit or loss of a group, the book values

and fair values of assets and liabilities of a group or the amount of the assets and liabilities of a group, the set-offs and other adjustments required by the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 in the case of group accounts must be made: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 13(5); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 13(5).

38 As to the meaning of 'profit and loss account' see PARA 715.

39 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 14(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 14(1).

40 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 14(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 14(2). As to the meaning of 'balance sheet date' see PARA 718 note 12.

41 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 15; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 15.

42 In the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 13, 14 or 15 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 13, 14 or 15: see the text and notes 33-41.

43 As to the meaning of 'United Kingdom' see PARA 1 note 5.

44 As to the meaning of 'director' see PARA 478.

45 As to the Secretary of State see PARA 6.

46 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 16; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 16.

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789. Minority interests.

The statutory formats¹ have effect in relation to group accounts² with the following additions³.

In the balance sheet formats⁴ there must be shown, as a separate item and under an appropriate heading, the amount of capital and reserves attributable to shares⁵ in subsidiary undertakings included in the consolidation⁶ held by or on behalf of persons other than the parent company⁷ and its subsidiary undertakings⁸.

In the profit and loss account formats⁹ there must be shown, as a separate item and under an appropriate heading:

- 1420 (1) the amount of any profit or loss on ordinary activities; and
- 1421 (2) the amount of any profit or loss on extraordinary activities,

attributable to shares in subsidiary undertakings included in the consolidation held by or on behalf of persons other than the parent company and its subsidiary undertakings¹⁰.

- 1 le the formats set out in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1: see PARAS 730-737.
- 2 As to the requirement to prepare group accounts see PARA 775.
- 3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 17(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 17(1).
- 4 As to the balance sheet formats see PARAS 730-733. As to the meaning of 'balance sheet' see PARA 715.
- 5 As to the meaning of 'share' see PARA 1042.
- 6 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2. As to the meaning of 'included in the consolidation' see PARA 775 note 12.
- 7 As to the meaning of 'parent company' see PARA 26 note 2.
- 8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 17(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 17(2). For the purposes of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 4 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 4 (power to adapt or combine items: see PARA 729), the additional item required by the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 17(2) or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 17(2) is treated as one to which a letter is assigned: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 17(4)(a); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 17(4)(a).
- 9 As to the profit and loss account formats see PARAS 734-737. As to the meaning of 'profit and loss account' see PARA 715.
- 10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 17(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 17(3). For the purposes of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 1 Section A para 4 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 Section A para 4 (power to adapt or combine items: see PARA 729), the additional items required by heads (1) and (2) in the text are treated as ones to which an Arabic number is assigned: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 17(4)(b); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 17(4)(b).

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790. Joint ventures.

Where an undertaking included in the consolidation¹ manages another undertaking jointly with one or more undertakings not included in the consolidation, that other undertaking (the 'joint venture') may, if it is not a body corporate or a subsidiary undertaking² of the parent company³, be dealt with in the group accounts⁴ by the method of proportional consolidation⁵.

The statutory provisions relating to the preparation of consolidated accounts⁶ apply, with any necessary modifications, to proportional consolidation under these provisions⁷.

1 As to the meaning of 'undertaking' see PARA 26 note 2; and as to the meaning of 'included in the consolidation' see PARA 775 note 12.

2 As to the meaning of 'subsidiary undertaking' see PARA 26.

3 As to the meaning of 'parent company' see PARA 26 note 2. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

4 As to the requirement to prepare group accounts see PARA 775.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 18(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 18(1).

6 See the provisions of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6.

7 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 18(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 18(2).

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791. Associated undertakings.

An 'associated undertaking' is an undertaking¹ in which an undertaking included in the consolidation² has a participating interest and over whose operating and financial policy it exercises a significant influence, and which is not: (1) a subsidiary undertaking³ of the parent company⁴; or (2) a joint venture dealt with in accordance with the relevant provisions⁵. Where an undertaking holds 20 per cent or more of the voting rights in another undertaking⁶, it is presumed to exercise such an influence over it unless the contrary is shown⁷.

The interest of an undertaking in an associated undertaking, and the amount of profit or loss attributable to such an interest, must be shown by the equity method of accounting (including dealing with any goodwill)⁸. Where the associated undertaking is itself a parent undertaking, the net assets and profits or losses to be taken into account are those of the parent and its subsidiary undertakings (after making any consolidation adjustments)⁹. The equity method of accounting need not be applied if the amounts in question are not material for the purpose of giving a true and fair view¹⁰.

For these purposes, in relation to large and medium-sized companies¹¹, the statutory formats¹² have effect in relation to group accounts with modifications¹³; and the provisions relating to related party transactions¹⁴ apply to transactions which the parent company, or other undertakings included in the consolidation, have entered into with related parties, unless they are intra group transactions¹⁵.

1 As to the meaning of 'undertaking' see PARA 26 note 2.

2 As to the meaning of 'included in the consolidation' see PARA 775 note 12.

3 As to the meaning of 'subsidiary undertaking' see PARA 26.

4 As to the meaning of 'parent company' see PARA 26 note 2. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 19(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 19(1). The text refers to a joint venture dealt with in accordance with the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 18 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 18: see PARA 790. As to the meaning of 'joint venture' see PARA 790.

6 The provisions of the Companies Act 2006 Sch 7 paras 5-11 (parent and subsidiary undertakings: rights to be taken into account and attribution of rights) (see PARAS 26-27) apply in determining for these purposes whether an undertaking holds 20% or more of the voting rights in another undertaking: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 19(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 19(4). The voting rights in an undertaking means the rights conferred on shareholders in respect of their shares or, in the case of an undertaking not having a share capital, on members, to vote at general meetings of the undertaking on all, or substantially all, matters: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 19(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 19(3). As to the meanings of 'share' and 'share capital' see PARA 1042. As to company meetings see PARA 629 et seq; and as to voting rights see PARA 1507.

7 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 19(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 19(2).

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 20(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 21(1). The text refers to dealing with any goodwill arising in accordance with the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 Pt 2 Section B paras 17-20, 22 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 2 Section B paras 17-20, 22: see PARA 720.

9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 20(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 21(2).

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 20(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 21(3). As to the need to give a true and fair view see PARA 714; and see also PARA 784.

11 As to large and medium-sized companies and groups see PARA 695. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

12 Ie the formats set out in the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1: see PARAS 732-737.

13 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 20(1). In the balance sheet formats, the items headed 'Participating interests' (see Format 1 item B III 3, and Format 2 item B III 3 under the heading 'ASSETS') are replaced by two items, namely 'Interests in associated undertakings' and 'Other participating interests': Sch 6 Pt 1 para 20(2). In the profit and loss account formats, the items headed 'Income from participating interests' (see Format 1 item 8, Format 2 item 10, Format 3 item B 4, and Format 4 item B 6) are replaced by two items, namely 'Income from interests in associated undertakings' and 'Income from other participating interests': Sch 6 Pt 1 para 20(3). As to the balance sheet formats for large and medium-sized companies see PARAS 732-733; and as to the profit and loss account formats see PARAS 734-737.

14 Ie the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 72: see PARA 754.

15 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 22.

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(C) NOTES TO THE ACCOUNTS

(a) Special Provision where Company is a Parent Company or Subsidiary Undertaking

792. Guarantees and other financial commitments in favour of group undertakings.

In relation to large or medium-sized companies¹, commitments falling within the provisions relating to guarantees and other financial commitments² which are undertaken on behalf of or for the benefit of:

- 1422 (1) any parent undertaking³ or fellow subsidiary undertaking⁴; or
- 1423 (2) any subsidiary undertaking of the company,

must be stated separately from the other commitments within those provisions⁵; and commitments within head (1) above must also be stated separately from those within head (2) above⁶.

¹ As to large and medium-sized companies and groups see PARA 695. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

² Ie within any of the provisions of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 4 para 63(1)-(5): see PARA 748.

³ As to the meaning of 'parent undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

⁴ As to the meanings of 'fellow subsidiary undertaking' and 'subsidiary undertaking' see PARA 26.

⁵ Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 4 para 73.

⁶ Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 4 para 73.

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(b) Related Undertakings

793. Disclosure required in notes to accounts.

The Secretary of State¹ has power to make provision by regulations requiring information about related undertakings² to be given in notes to a company's annual accounts³. The regulations may make different provision according to whether or not the company prepares group accounts⁴; and may specify the descriptions of undertaking in relation to which they apply, and make different provision in relation to different descriptions of related undertaking⁵. Regulations have been made⁶, and Companies Act accounts and IAS accounts⁷ must comply with the relevant provisions⁸.

The required information need not be disclosed with respect to an undertaking that is established under the law of a country outside the United Kingdom⁹ or that carries on business outside the United Kingdom, if the following conditions are met¹⁰, namely that:

- 1424 (1) in the opinion of the directors¹¹ of the company the disclosure would be seriously prejudicial to the business of: (a) that undertaking; (b) the company; (c) any of the company's subsidiary undertakings¹²; or (d) any other undertaking which is included in the consolidation¹³;
- 1425 (2) the Secretary of State agrees that the information need not be disclosed¹⁴.

Where advantage is taken of any such exemption, that fact must be stated in a note to the company's annual accounts¹⁵.

Where the directors of a company are of the opinion that the number of undertakings in respect of which the company is required to disclose information under any provision of the regulations is such that compliance with that provision would result in information of excessive length being given in notes to the company's annual accounts¹⁶, the information need only be given in respect of: (i) the undertakings whose results or financial position, in the opinion of the directors, principally affected the figures shown in the company's annual accounts; and (ii) where the company prepares group accounts, undertakings excluded¹⁷ from consolidation¹⁸. If advantage is taken of this, then: (A) there must be included in the notes to the company's annual accounts a statement that the information is given only with respect to such undertakings; and (B) the full information (both that which is disclosed in the notes to the accounts and that which is not) must be annexed to the company's next annual return¹⁹. If a company fails to comply with head (B), an offence is committed by the company, and by every officer of the company who is in default²⁰.

1 As to the Secretary of State see PARA 6.

2 As to the meaning of 'undertaking' see PARA 26 note 2.

3 Companies Act 2006 s 409(1). As to the meaning of 'annual accounts' see PARA 715. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

The provisions of the Companies Act 2006 ss 409, 410 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10, but with the modifications to the Companies Act 2006 s 409 as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 2006 s 409(2)(a). As to the requirement to prepare group accounts see PARA 775.

5 Companies Act 2006 s 409(2)(b).

6 As to the regulations that have been made see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 10, Sch 6; the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 7, Sch 4; and PARA 794 et seq.

7 As to the meanings of 'Companies Act accounts' and 'IAS accounts' see PARAS 717, 776.

8 See the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 10(1); and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 7(1). As to the relevant provisions see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 (which applies to Companies Act or IAS group accounts: see reg 10(1)); the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 (which applies to Companies Act or IAS individual or group accounts: see reg 7(1), (2)); and PARA 794 et seq. As to the meaning of 'individual accounts' see PARA 716. As to the provision made in relation to individual accounts see PARA 755 et seq.

9 As to the meaning of 'United Kingdom' see PARA 1 note 5.

10 Companies Act 2006 s 409(3); Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 10(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 7(3). The Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 10(2) does not apply in relation to the information required by Sch 6 paras 26, 35 (see PARAS 798, 802) (see reg 10(2)); and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 7(3) does not apply in relation to the information otherwise required by Sch 4 para 3, 7 or 21 (see PARAS 758, 761, 801) (see reg 7(3)).

11 As to the meaning of 'director' see PARA 478.

12 As to the meaning of 'subsidiary undertaking' see PARA 26.

13 Companies Act 2006 s 409(4)(a). As to the meaning of 'included in the consolidation' see PARA 775 note 12.

14 Companies Act 2006 s 409(4)(b).

15 Companies Act 2006 s 409(5).

16 Companies Act 2006 s 410(1).

17 Ie under the Companies Act 2006 s 405(3): see PARA 783.

18 Companies Act 2006 s 410(2).

19 Companies Act 2006 s 410(3). As to the meaning of 'next annual return' see PARA 755 note 19.

20 Companies Act 2006 s 410(4). As to the meaning of 'officer' see PARA 607; and as to the liability of an officer in default see PARA 315. A person guilty of an offence under s 410(4) is liable on summary conviction to a fine not exceeding level 3 on the standard scale; and, for continued contravention, is liable to a daily default fine not exceeding one-tenth of level 3 on the standard scale: Companies Act 2006 s 410(5). As to the standard scale see PARA 1622. As to the meaning of 'daily default fine' see PARA 1622.

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794. Subsidiary undertakings.

In relation to small companies¹, the following information must be given with respect to the undertakings² that are subsidiary undertakings³ of the parent company⁴ at the end of the financial year⁵. The name of each undertaking must be stated⁶; and:

1426 (1) if the undertaking is incorporated outside the United Kingdom⁷, the country in which it is incorporated must be stated;

1427 (2) if it is unincorporated, the address of its principal place of business must be stated⁸.

It must also be stated whether the subsidiary undertaking is included in the consolidation⁹ and, if it is not, the reasons for excluding it from consolidation must be given¹⁰. It must be stated with respect to each subsidiary undertaking by virtue of which of the specified conditions¹¹ it is a subsidiary undertaking of its immediate parent undertaking¹².

In relation to large and medium-sized companies¹³, in addition to the required financial information¹⁴, the following information must also be given with respect to the undertakings which are subsidiary undertakings of the parent company at the end of the financial year¹⁵. It must be stated whether the subsidiary undertaking is included in the consolidation and, if it is not, the reasons for excluding it from consolidation must be given¹⁶. It must be stated with respect to each subsidiary undertaking by virtue of which of the specified conditions¹⁷ it is a subsidiary undertaking of its immediate parent undertaking¹⁸.

1 As to small companies and groups see PARA 694. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'undertaking' see PARA 26 note 2.

3 As to the meaning of 'subsidiary undertaking' see PARA 26.

4 As to the meaning of 'parent company' see PARA 26 note 2.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 22(1). As to a company's financial year see PARA 711.

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 22(2).

7 As to the meaning of 'United Kingdom' see PARA 1 note 5. As to companies incorporated outside the United Kingdom ('overseas companies') see PARA 1824 et seq.

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 22(3).

9 As to the meaning of 'included in the consolidation' see PARA 775 note 12.

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 22(4).

11 I.e. the conditions specified in the Companies Act 2006 s 1162(2) or (4): see PARA 26.

12 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 22(5). That information need not be given if the relevant condition is that specified in the Companies Act 2006 s 1162(2)(a) (holding of a majority of the voting rights: see PARA 26) and the immediate parent undertaking holds the same proportion of the shares in the undertaking as it holds voting rights: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 22(5). As to voting rights see PARA 1507.

13 As to large and medium-sized companies and groups see PARA 695.

14 I.e. the information required by the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 2: see PARA 757.

15 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 16(1).

16 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 16(2).

17 I.e. the conditions specified in the Companies Act 2006 s 1162(2) or (4): see PARA 26.

18 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 16(3). That information need not be given if the relevant condition is that specified in the Companies Act 2006 s 1162(2)(a) (holding of a majority of the voting rights: see PARA 26) and the immediate

parent undertaking holds the same proportion of the shares in the undertaking as it holds voting rights: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 16(3).

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795. Holdings in subsidiary undertakings.

The following information must be given with respect to the shares¹ of a subsidiary undertaking² held:

- 1428 (1) by the parent company³; and
- 1429 (2) by the group⁴,

and the information under heads (1) and (2) must (if different) be shown separately⁵. The information that must be stated is:

- 1430 (a) the identity of each class of shares held; and
- 1431 (b) the proportion of the nominal value of the shares of that class represented by those shares⁶.

1 As to the meaning of 'share' see PARA 1042.

2 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

3 As to the meaning of 'parent company' see PARA 26 note 2. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

4 For the purposes of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3, the 'group' means the group consisting of the parent company and its subsidiary undertakings: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 21; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 15.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 23(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 17(1).

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 23(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 17(2).

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796. Financial information about subsidiary undertakings not included in the consolidation.

In relation to a small company¹, there must be shown with respect to each subsidiary undertaking² not included in the consolidation³:

- 1432 (1) the aggregate amount of its capital and reserves as at the end of its relevant financial year⁴; and
- 1433 (2) its profit or loss for that year⁵.

However, that information need not be given if the group's⁶ investment in the undertaking is included in the accounts by way of the equity method of valuation⁷ or if:

- 1434 (a) the undertaking is not required by any provision of the Companies Act 2006 to deliver a copy of its balance sheet⁸ for its relevant financial year and does not otherwise publish that balance sheet in the United Kingdom⁹ or elsewhere; and
- 1435 (b) the holding of the group is less than 50 per cent of the nominal value of the shares¹⁰ in the undertaking¹¹,

nor need information otherwise required by these provisions be given if it is not material¹².

1 As to small companies and groups see PARA 694. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

3 As to the meaning of 'included in the consolidation' see PARA 775 note 12.

4 For the purposes of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 24, the 'relevant financial year' of a subsidiary undertaking is: (1) if its financial year ends with that of the company, that year; and (2) if not, its financial year ending last before the end of the company's financial year: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 24(4). As to a company's financial year see PARA 711.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 24(1).

6 As to the meaning of 'group' see PARA 795 note 4.

7 As to the equity method of valuation see PARA 757 note 8.

8 As to the meaning of 'balance sheet' see PARA 715.

9 As to the meaning of 'United Kingdom' see PARA 1 note 5.

10 As to the meaning of 'share' see PARA 1042.

11 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 24(2).

12 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 24(3).

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797. Shares and debentures of company held by subsidiary undertakings.

In relation to a small company¹, the number, description and amount of the shares² in the company held by or on behalf of its subsidiary undertakings³ must be disclosed⁴. This does not apply in relation to shares in the case of which the subsidiary undertaking is concerned as personal representative or as trustee⁵; but the exception for shares in relation to which the subsidiary undertaking is concerned as trustee does not apply if the company or any of its subsidiary undertakings is beneficially interested under the trust⁶, otherwise than by way of security only for the purposes of a transaction entered into by it in the ordinary course of a business which includes the lending of money⁷.

1 As to small companies and groups see PARA 694. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'share' see PARA 1042.

3 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 25(1).

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 25(2).

6 The Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 2 Pt 2 (see PARA 759) has effect for the interpretation of the reference to a beneficial interest under a trust: Sch 6 Pt 2 para 25(4).

7 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 25(3).

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798. Joint ventures.

The following information must be given where an undertaking¹ is dealt with in the consolidated accounts by the method of proportional consolidation²:

- 1436 (1) the name of the undertaking;
- 1437 (2) the address of the principal place of business of the undertaking;
- 1438 (3) the factors on which joint management of the undertaking is based; and
- 1439 (4) the proportion of the capital of the undertaking held by undertakings included in the consolidation³.

Where the financial year of the undertaking did not end with that of the company⁴, there must be stated the date on which a financial year of the undertaking last ended before that date⁵.

1 As to the meaning of 'undertaking' see PARA 26 note 2.

2 In accordance with the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 18 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 18: see PARA 790.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 26(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 18(1). As to the meaning of 'included in the consolidation' see PARA 775 note 12.

4 As to a company's financial year see PARA 711. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 26(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 18(2).

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799. Associated undertakings.

The following information must be given where an undertaking included in the consolidation¹ has an interest in an associated undertaking². The name of the associated undertaking must be stated³; and:

- 1440 (1) if the undertaking is incorporated outside the United Kingdom⁴, the country in which it is incorporated must be stated;
- 1441 (2) if it is unincorporated, the address of its principal place of business must be stated⁵.

The following information must be given with respect to the shares⁶ of the undertaking held:

- 1442 (a) by the parent company⁷; and
- 1443 (b) by the group⁸,

and the information under heads (a) and (b) must be shown separately⁹. The information that must be stated is:

- 1444 (i) the identity of each class of shares held; and
- 1445 (ii) the proportion of the nominal value of the shares of that class represented by those shares¹⁰.

1 As to the meaning of 'undertaking' see PARA 26 note 2. As to the meaning of 'included in the consolidation' see PARA 775 note 12.

2 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 27(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI

2008/410, Sch 4 Pt 3 para 19(1). For the purposes of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 27 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 19, 'associated undertaking' has the meaning given by the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 19 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 19 (see PARA 791); and the information required by the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 27 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 19 must be given notwithstanding that the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 1 para 20(3) or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 6 Pt 1 para 21(3) (see PARA 791) applies in relation to the accounts themselves: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 27(6); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 19(6).

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 27(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 19(2).

4 As to the meaning of 'United Kingdom' see PARA 1 note 5. As to companies incorporated outside the United Kingdom ('overseas companies') see PARA 1824 et seq.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 27(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 19(3).

6 As to the meaning of 'share' see PARA 1042.

7 As to the meaning of 'parent company' see PARA 26 note 2. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

8 As to the meaning of 'group' see PARA 795 note 4.

9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 27(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 19(4).

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 27(5); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 19(5).

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800. Other significant holdings of parent company or group.

In relation to small companies¹, the following information must be given where at the end of the financial year² the parent company³ has a significant holding⁴ in an undertaking which is not one of its subsidiary undertakings⁵ and does not fall within the provisions relating to joint ventures⁶ or associated undertakings⁷. The name of the undertaking must be stated⁸; and:

1446 (1) if the undertaking is incorporated outside the United Kingdom⁹, the country in which it is incorporated must be stated;

1447 (2) if it is unincorporated, the address of its principal place of business must be stated¹⁰.

As respects the shares of the undertaking held by the parent company, the identity of each class of shares held and the proportion of the nominal value of the shares of that class represented by those shares must be stated¹¹. The aggregate amount of the capital and reserves of the undertaking as at the end of its relevant financial year¹², and its profit or loss for that year, must also be stated¹³; but this information need not be given in respect of an undertaking if:

- 1448 (a) the undertaking is not required by any provision of the Companies Act 2006 to deliver a copy of its balance sheet¹⁴ for its relevant financial year and does not otherwise publish that balance sheet in the United Kingdom or elsewhere; and
- 1449 (b) the company's holding is less than 50 per cent of the nominal value of the shares in the undertaking¹⁵,

nor need information otherwise required by these provisions be given if it is not material¹⁶.

In relation to small companies, the following information must be given where at the end of the financial year the group¹⁷ has a significant holding¹⁸ in an undertaking which is not a subsidiary undertaking of the parent company and does not fall within the provisions relating to joint ventures¹⁹ or associated undertakings²⁰. The name of the undertaking must be stated²¹; and:

- 1450 (i) if the undertaking is incorporated outside the United Kingdom, the country in which it is incorporated;
- 1451 (ii) if it is unincorporated, the address of its principal place of business²².

As respects the shares of the undertaking held by the group, the identity of each class of shares held and the proportion of the nominal value of the shares of that class represented by those shares must be stated²³. The aggregate amount of the capital and reserves of the undertaking as at the end of its relevant financial year, and its profit or loss for that year, must also be stated²⁴; but this information need not be given if:

- 1452 (A) the undertaking is not required by any provision of the Companies Act 2006 to deliver a copy of its balance sheet for its relevant financial year²⁵ and does not otherwise publish that balance sheet in the United Kingdom or elsewhere; and
- 1453 (B) the holding of the group is less than 50 per cent of the nominal value of the shares in the undertaking²⁶,

nor need information otherwise required by these provisions be given if it is not material²⁷.

In relation to large and medium-sized companies²⁸, similar information²⁹ must be given where at the end of the financial year the group has a significant holding³⁰ in an undertaking which is not a subsidiary undertaking of the parent company and does not fall within the provisions relating to joint ventures³¹ or associated undertakings³².

1 As to small companies and groups see PARA 694. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to a company's financial year see PARA 711.

3 As to the meaning of 'parent company' see PARA 26 note 2; as to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

4 A holding is significant for this purpose if: (1) it amounts to 20% or more of the nominal value of any class of shares in the undertaking; or (2) the amount of the holding (as stated or included in the company's individual accounts) exceeds 20% of the amount of its assets (as so stated): Small Companies and Groups (Accounts and

Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 28(2). As to the meaning of 'share' see PARA 1042. As to the meaning of 'undertaking' see PARA 26 note 2. As to the meaning of 'individual accounts' see PARA 716.

5 As to the meaning of 'subsidiary undertaking' see PARA 26.

6 The provisions referred to in the text are those of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 26: see PARA 798.

7 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 28(1). The provisions referred to in the text are those of Sch 6 Pt 2 para 27: see PARA 799.

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 29(1).

9 As to the meaning of 'United Kingdom' see PARA 1 note 5. As to companies incorporated outside the United Kingdom ('overseas companies') see PARA 1824 et seq.

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 29(2).

11 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 29(3), (4).

12 For the purposes of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 30, the 'relevant financial year' of an undertaking is: (1) if its financial year ends with that of the company, that year; and (2) if not, its financial year ending last before the end of the company's financial year: Sch 6 Pt 2 para 30(4).

13 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 30(1).

14 As to the meaning of 'balance sheet' see PARA 715.

15 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 30(2).

16 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 30(3).

17 As to the meaning of 'group' see PARA 795 note 4.

18 A holding is significant for this purpose if: (1) it amounts to 20% or more of the nominal value of any class of shares in the undertaking; or (2) the amount of the holding (as stated or included in the group accounts) exceeds 20% of the amount of the group's assets (as so stated): Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 31(2).

19 The provisions referred to in the text are those of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 26: see PARA 798.

20 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 31(1). The provisions referred to in the text are those of Sch 6 Pt 2 para 27: see PARA 799.

21 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 32(1).

22 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 32(2).

23 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 32(3), (4).

24 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 33(1).

25 For the purposes of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 33, the 'relevant financial year' of an outside undertaking is: (1) if its financial year

ends with that of the parent company, that year; and (2) if not, its financial year ending last before the end of the parent company's financial year: Sch 6 Pt 2 para 33(4).

26 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 33(2).

27 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 33(3).

28 As to large and medium-sized companies and groups see PARA 695.

29 Is the information required by the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 paras 5, 6 (see PARA 760), which must be read as though the references to the company in those provisions were references to the group: Sch 4 Pt 3 para 20(1). For the purposes of those provisions as applied to a group, the 'relevant financial year' of an outside undertaking is: (1) if its financial year ends with that of the parent company, that year; and (2) if not, its financial year ending last before the end of the parent company's financial year: Sch 4 Pt 3 para 20(3).

30 A holding is significant for this purpose if: (1) it amounts to 20% or more of the nominal value of any class of shares in the undertaking; or (2) the amount of the holding (as stated or included in the group accounts) exceeds one-fifth of the amount of the group's assets (as so stated): Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 20(2).

31 The provisions referred to in the text are those of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 18: see PARA 798.

32 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 20(1). The provisions referred to in the text are those of Sch 4 Pt 3 para 19: see PARA 799.

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801. Parent company's or group's membership of certain undertakings.

In relation to small companies¹, the following information must be given where at the end of the financial year² the parent company³ or group⁴ is a member of a qualifying undertaking⁵. There must be stated:

- 1454 (1) the name and legal form of the undertaking; and
- 1455 (2) the address of the undertaking's registered office (whether in or outside the United Kingdom) or, if it does not have such an office, its head office (whether in or outside the United Kingdom)⁶,

although information otherwise required by heads (1) and (2) need not be given if it is not material⁷. Where the undertaking is a qualifying partnership there must also be stated either:

- 1456 (a) that a copy of the latest accounts of the undertaking has been or is to be appended to the copy of the company's accounts sent to the registrar⁸; or
- 1457 (b) the name of at least one body corporate (which may be the company) in whose group accounts⁹ the undertaking has been or is to be dealt with on a consolidated basis¹⁰,

although information otherwise required by head (b) need not be given if the notes to the company's accounts disclose that advantage has been taken of the statutory exemption¹¹.

In relation to large and medium-sized companies¹², the required information¹³ must also be given where at the end of the financial year the group is a member of a qualifying undertaking¹⁴.

1 As to small companies and groups see PARA 694. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to a company's financial year see PARA 711.

3 As to the meaning of 'parent company' see PARA 26 note 2.

4 As to the meaning of 'group' see PARA 795 note 4.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 34(1). For the purposes of Sch 6 Pt 2 para 34, 'qualifying undertaking' means:

268 (1) a qualifying partnership; or

269 (2) an unlimited company each of whose members is: (a) a limited company; (b) another unlimited company each of whose members is a limited company; or (c) a Scottish partnership each of whose members is a limited company,

and references in Sch 6 Pt 2 para 34 to a limited company, another unlimited company or a Scottish partnership include a comparable undertaking incorporated in or formed under the law of a country or territory outside the United Kingdom: Sch 6 Pt 2 para 34(6). As to the meaning of 'undertaking' see PARA 26 note 2. As to the meaning of 'United Kingdom' see PARA 1 note 5. For the purposes of Sch 6 Pt 2 para 34, 'member' and 'qualifying partnership' have the same meanings as in the Partnerships (Accounts) Regulations 2008, SI 2008/569 (see **PARTNERSHIP**): Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 34(6).

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 34(2).

7 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 34(4).

8 Ie under the Companies Act 2006 s 444: see PARA 871.

9 As to the duty to prepare group accounts see PARA 775.

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 34(3). For the purposes of Sch 6 Pt 2 para 34, 'dealt with on a consolidated basis' has the same meaning as in the Partnerships (Accounts) Regulations 2008, SI 2008/569 (see **PARTNERSHIP**): Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 34(6).

11 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 34(5) (amended by SI 2008/569). The statutory exemption mentioned in the text is the exemption conferred by the Partnerships (Accounts) Regulations 2008, SI 2008/569, reg 7: see **PARTNERSHIP**.

12 As to large and medium-sized companies and groups see PARA 695.

13 Ie the information required by the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 para 7: see PARA 761.

14 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 21.

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802. Parent undertaking drawing up accounts for larger group.

In relation to small companies¹, where the parent company² is itself a subsidiary undertaking³, the following information must be given with respect to that parent undertaking⁴ of the company which heads: (1) the largest group of undertakings for which group accounts⁵ are drawn up and of which that company is a member; and (2) the smallest such group of undertakings⁶. The name of the parent undertaking must be stated⁷; and:

- 1458 (a) if the undertaking is incorporated outside the United Kingdom⁸, the country in which it is incorporated;
- 1459 (b) if it is unincorporated, the address of its principal place of business⁹.

If copies of the group accounts referred to in head (1) above are available to the public, there must also be stated the addresses from which copies of the accounts can be obtained¹⁰.

1 As to small companies and groups see PARA 694. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'parent company' see PARA 26 note 2.

3 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

4 As to the meaning of 'parent undertaking' see PARA 26.

5 As to the duty to prepare group accounts see PARA 775.

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 35(1).

7 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 35(2).

8 As to the meaning of 'United Kingdom' see PARA 1 note 5. As to companies incorporated outside the United Kingdom ('overseas companies') see PARA 1824 et seq.

9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 35(3).

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 35(4).

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803. Identification of ultimate parent company.

In relation to small companies¹, where the parent company² is itself a subsidiary undertaking³, the following information must be given with respect to the company (if any) regarded by the directors⁴ as being that company's ultimate parent company⁵. The name of that company must

be stated⁶; and, if that company is incorporated outside the United Kingdom⁷, the country in which it is incorporated must be stated (if known to the directors)⁸.

1 As to small companies and groups see PARA 694. For the purposes of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 36, 'company' includes any body corporate: Sch 6 Pt 2 para 36(4). As to the meaning of 'company' generally see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'parent company' see PARA 26 note 2.

3 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

4 As to the meaning of 'director' see PARA 478.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 36(1).

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 36(2).

7 As to the meaning of 'United Kingdom' see PARA 1 note 5. As to companies incorporated outside the United Kingdom ('overseas companies') see PARA 1824 et seq.

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 36(3).

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804. References to shares held by parent company or group.

References¹ to shares² held by the parent company³ or the group⁴ are to be construed as follows⁵.

For the purposes of the provisions relating to information about holdings in subsidiary and other undertakings⁶:

1460 (1) there must be attributed to the parent company shares held on its behalf by any person; but

1461 (2) there must be treated as not held by the parent company shares held on behalf of a person other than the company⁷.

References to shares held by the group are references to any shares held by or on behalf of the parent company or any of its subsidiary undertakings; but any shares held on behalf of a person other than the parent company or any of its subsidiary undertakings are not to be treated as held by the group⁸.

Shares held by way of security must be treated as held by the person providing the security:

1462 (a) where apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights attached to the shares are exercisable only in accordance with his instructions⁹; and

1463 (b) where the shares are held in connection with the granting of loans as part of normal business activities and apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights attached to the shares are exercisable only in his interests¹⁰.

1 The references in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 or Sch 4 Pt 3.

2 As to the meaning of 'share' see PARA 1042.

3 As to the meaning of 'parent company' see PARA 26 note 2. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

4 As to the meaning of 'group' see PARA 795 note 4.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 37(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 22(1).

6 The Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 paras 23, 27(4), (5), 28-30 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 1 paras 4-6, Sch 4 Pt 2 para 12, Sch 4 Pt 3 paras 17, 19(4), (5): see PARAS 760, 780, 795, 799-800. As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

7 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 37(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 22(2).

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 37(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 22(3).

9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 37(4)(a); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 22(4)(a).

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 6 Pt 2 para 37(4)(b); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 4 Pt 3 para 22(4)(b).

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(c) Arrangements not reflected in the Balance Sheet

805. Information about arrangements not reflected in the balance sheet.

In the case of a company¹ that is not subject to the small companies regime², if in any financial year³:

1464 (1) the company is or has been party to arrangements that are not reflected in its balance sheet⁴; and

1465 (2) at the balance sheet date⁵ the risks or benefits arising from those arrangements are material,

the following information must be given in notes to the company's annual accounts⁶, namely:

- 1466 (a) the nature and business purpose of the arrangements; and
- 1467 (b) the financial impact of the arrangements on the company⁷.

The information need only be given to the extent necessary for enabling the financial position of the company to be assessed⁸.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the small companies regime see PARA 694.

3 As to a company's financial year see PARA 711.

4 As to the meaning of 'balance sheet' see PARA 715.

5 As to the meaning of 'balance sheet date' see PARA 718 note 12.

6 Companies Act 2006 s 410A(1) (s 410A added by SI 2008/393). As to the meaning of 'annual accounts' see PARA 715.

The provisions of the Companies Act 2006 s 410A apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

7 Companies Act 2006 s 410A(2) (as added: see note 6). If the company qualifies as medium-sized in relation to the financial year (see ss 465-467; and PARA 695) it need not comply with head (b) in the text: s 410A(4) (as so added).

Section 410A applies in relation to group accounts as if the undertakings included in the consolidation were a single company: s 410A(5) (as so added). As to the duty to prepare group accounts see PARA 775. As to the meaning of 'undertaking' see PARA 26 note 2; and as to the meaning of 'included in the consolidation' see PARA 775 note 12.

8 Companies Act 2006 s 410A(3) (as added: see note 6).

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(d) Employee Information

806. Information about employee numbers and costs.

In the case of a company¹ not subject to the small companies regime², the following information with respect to the employees of the company must be given in notes to the company's annual accounts³:

- 1468 (1) the average number of persons employed by the company in the financial year⁴; and

1469 (2) the average number of persons so employed within each category of persons employed by the company⁵.

The categories by reference to which the number required to be disclosed by head (2) is to be determined must be such as the directors⁶ may select having regard to the manner in which the company's activities are organised⁷.

The average number required by head (1) or head (2) is determined by dividing the relevant annual number by the number of months in the financial year⁸.

The relevant annual number is determined by ascertaining for each month in the financial year:

1470 (a) for the purposes of head (1), the number of persons employed under contracts of service by the company in that month (whether throughout the month or not);

1471 (b) for the purposes of head (2), the number of persons in the category in question of persons so employed,

and adding together all the monthly numbers⁹.

In respect of all persons employed by the company during the financial year who are taken into account in determining the relevant annual number for the purposes of head (1) there must also be stated the aggregate amounts respectively of: (i) wages and salaries paid or payable in respect of that year to those persons; (ii) social security costs¹⁰ incurred by the company on their behalf; and (iii) other pension costs¹¹ so incurred¹². This does not apply in so far as those amounts, or any of them, are stated elsewhere in the company's accounts¹³.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the small companies regime see PARA 694.

3 As to the meaning of 'annual accounts' see PARA 715.

4 As to a company's financial year see PARA 711.

5 Companies Act 2006 s 411(1). Section 411 applies in relation to group accounts as if the undertakings included in the consolidation were a single company: s 411(7) (substituted by SI 2008/393). As to the duty to prepare group accounts see PARA 775. As to the meaning of 'undertaking' see PARA 26 note 2; and as to the meaning of 'included in the consolidation' see PARA 775 note 12.

The provisions of the Companies Act 2006 s 411 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

6 As to the meaning of 'director' see PARA 478.

7 Companies Act 2006 s 411(2).

8 Companies Act 2006 s 411(3).

9 Companies Act 2006 s 411(4).

10 As to the meaning of 'social security costs' see PARA 766 note 10.

11 As to the meaning of 'pension costs' see PARA 766 note 11.

12 Companies Act 2006 s 411(5).

13 Companies Act 2006 s 411(5).

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(e) Information about Directors' Emoluments and Other Benefits

807. In general.

The Secretary of State¹ has power to make provision by regulations requiring information to be given in notes to a company's annual accounts² about directors' remuneration³. The matters about which information may be required include:

- 1472 (1) gains made by directors on the exercise of share options;
- 1473 (2) benefits received or receivable by directors under long term incentive schemes;
- 1474 (3) payments for loss of office⁴;
- 1475 (4) benefits receivable, and contributions for the purpose of providing benefits, in respect of past services of a person as director or in any other capacity while director;
- 1476 (5) consideration paid to or receivable by third parties for making available the services of a person as director or in any other capacity while director⁵.

Regulations have been made⁶, and Companies Act accounts and IAS accounts⁷ must comply with the relevant provisions⁸. The information is required to be given only so far as it is contained in the company's books and papers or the company has a right to obtain it from the persons concerned⁹; and any information is treated as shown if it is capable of being readily ascertained from other information which is shown¹⁰.

It is the duty of any director of a company, and any person who is or has at any time in the preceding five years been a director of the company, to give notice to the company of such matters relating to himself as may be necessary for the purposes of the regulations¹¹; and a person who makes default in complying with this duty commits an offence¹².

1 As to the Secretary of State see PARA 6.

2 As to the meaning of 'annual accounts' see PARA 715. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 Companies Act 2006 s 412(1). As to the meaning of 'director' see PARA 478. As to directors' remuneration see PARA 518 et seq; and as to directors' remuneration reports in respect of quoted companies see PARA 834 et seq. As to quoted companies see PARA 696.

For the purposes of s 412 and regulations made under it, amounts paid to or receivable by a person connected with a director, or a body corporate controlled by a director, are treated as paid to or receivable by the director; and for these purposes the expressions 'connected with' and 'controlled by' have the same meanings as in Pt 10 (ss 154-259) (see PARAS 481-482): s 412(4).

Without prejudice to the generality of s 412(1), regulations made under it may make any such provision as was made immediately before the commencement of Pt 15 (ss 380-474) by the Companies Act 1985 Sch 6 Pt 1: Companies Act 2006 s 412(3).

The provisions of the Companies Act 2006 s 412 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 le as defined in the Companies Act 2006 s 215: see PARA 578.

5 Companies Act 2006 s 412(2).

6 As to the regulations that have been made see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 9, Sch 3; the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 8, Sch 5; and PARA 808 et seq.

7 As to the meanings of 'Companies Act accounts' and 'IAS accounts' see PARAS 717, 776.

8 See the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 9; and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 8. As to the relevant provisions see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 (which applies to Companies Act or IAS individual or group accounts: see regs 5, 9); the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 (which applies to Companies Act or IAS individual or group accounts: see reg 8); and PARA 808 et seq. As to the meaning of 'individual accounts' see PARA 716; and as to the provision made in relation to individual accounts see PARA 767 et seq. As to the duty to prepare group accounts see PARA 775.

9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 4(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 6(1).

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 4(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 6(2).

11 Companies Act 2006 s 412(5).

12 Companies Act 2006 s 412(6). Such a person is liable on summary conviction to a fine not exceeding level 3 on the standard scale: see s 412(6). As to the standard scale see PARA 1622.

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808. Total amount of directors' remuneration etc.

In relation to small companies¹, the overall total of the following amounts must be shown:

- 1477 (1) the amount of remuneration² paid to or receivable by directors in respect of qualifying services³;
- 1478 (2) the amount of money paid to or receivable by directors, and the net value⁴ of assets (other than money, share options or shares) received or receivable by directors, under long term incentive schemes⁵ in respect of qualifying services⁶; and
- 1479 (3) the value of any company contributions⁷: (a) paid, or treated as paid, to a pension scheme⁸ in respect of directors' qualifying services⁹; and (b) by reference to which the rate or amount of any money purchase benefits¹⁰ that may become payable will be calculated¹¹.

There must also be shown the number of directors (if any) to whom retirement benefits¹² are accruing in respect of qualifying services under money purchase schemes¹³ and under defined benefit schemes¹⁴.

In relation to large and medium-sized companies¹⁵, there must be shown:

- 1480 (i) the aggregate amount of remuneration¹⁶ paid to or receivable by directors in respect of qualifying services¹⁷;
- 1481 (ii) the aggregate of the amount of gains made by directors on the exercise of share options¹⁸;
- 1482 (iii) the aggregate of the amount of money paid to or receivable by directors, and the net value¹⁹ of assets (other than money and share options) received or receivable by directors, under long term incentive schemes in respect of qualifying services²⁰; and
- 1483 (iv) the aggregate value of any company contributions²¹: (A) paid, or treated as paid, to a pension scheme²² in respect of directors' qualifying services²³; and (B) by reference to which the rate or amount of any money purchase benefits²⁴ that may become payable will be calculated²⁵.

There must also be shown the number of directors (if any) to whom retirement benefits²⁶ are accruing in respect of qualifying services under money purchase schemes²⁷ and under defined benefit schemes²⁸.

The amount to be shown²⁹ in each case includes all relevant sums, whether paid by or receivable from the company, any of the company's subsidiary undertakings or any other person³⁰. References to amounts paid to or receivable by a person include amounts paid to or receivable by a person connected with him or a body corporate controlled by him (but not so as to require an amount to be counted twice)³¹. Except as otherwise provided, the amounts to be shown for any financial year are: (aa) the sums receivable in respect of that year (whenever paid); or (bb) in the case of sums not receivable in respect of a period, the sums paid during that year³². Sums paid by way of expenses allowance that are charged to United Kingdom income tax after the end of the relevant financial year must be shown in a note to the first accounts in which it is practicable to show them and must be distinguished from the amounts otherwise required to be shown³³. Where it is necessary to do so for the purpose of making any distinction required in complying with the statutory provisions, the directors may apportion payments between the matters in respect of which they have been paid or are receivable in such manner as they think appropriate³⁴.

1 As to small companies and groups see PARA 694. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to directors' remuneration generally see PARA 518 et seq. As to the meaning of 'remuneration' for these purposes see PARA 768 note 2. For the purposes of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3, remuneration paid or receivable or share options granted in respect of a person's accepting office as a director are treated as emoluments paid or receivable or share options granted in respect of his services as a director: Sch 3 Pt 2 para 12(2). As to the meanings of 'shares' and 'share option' for these purposes see PARA 768 note 2. As to the meaning of 'director' see PARA 478.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 1(1)(a). As to the meaning of 'qualifying services' for these purposes see PARA 768 note 3.

4 As to the meaning of 'net value' for these purposes see PARA 768 note 4.

5 As to the meaning of 'long term incentive scheme' for these purposes see PARA 768 note 2.

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 1(1)(b).

- 7 As to the meaning of 'company contributions' for these purposes see PARA 768 note 2.
- 8 As to the meaning of 'pension scheme' for these purposes see PARA 768 note 2.
- 9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 1(1)(c)(i).
- 10 As to the meaning of 'money purchase benefits' for these purposes see PARA 768 note 7.
- 11 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 1(1)(c)(ii).
- 12 As to the meaning of 'retirement benefits' for these purposes see PARA 768 note 2.
- 13 As to the meaning of 'money purchase scheme' for these purposes see PARA 768 note 9.
- 14 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 1(2). As to the meanings of 'defined benefit scheme' and 'defined benefits' for these purposes see PARA 768 note 10.
- 15 As to large and medium-sized companies and groups see PARA 695. The provisions of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 1 apply to quoted and unquoted companies; the provisions of Sch 5 Pt 2 apply only to unquoted companies; and Sch 5 Pt 3 contains supplementary provisions: reg 8(2). As to quoted and unquoted companies see PARA 696.
In the case of a company which is not a quoted company and whose equity share capital is not listed on the market known as AIM: (1) Sch 5 Pt 1 para 1(1) has effect as if Sch 5 Pt 1 para 1(1)(b) (see head (ii) in the text) were omitted and as if, in Sch 5 Pt 1 para 1(1)(c) (see head (iii) in the text), 'assets' did not include shares; and (2) the number of each of the following (if any) must be shown, namely: (a) the directors who exercised share options; and (b) the directors in respect of whose qualifying services shares were received or receivable under long term incentive schemes: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 1 para 1(3). As to the meaning of 'equity share capital' see PARA 1047. As to the market known as AIM see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 75. As to the meanings of 'shares', 'share option', 'qualifying services' and 'long term incentive scheme' for these purposes see PARA 768 note 11.
- 16 As to the meaning of 'remuneration' for these purposes see PARA 768 note 12. For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5, remuneration paid or receivable or share options granted in respect of a person's accepting office as a director are treated as emoluments paid or receivable or share options granted in respect of his services as a director: Sch 5 Pt 3 para 15(3).
- 17 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 1 para 1(1)(a).
- 18 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 1 para 1(1)(b).
- 19 As to the meaning of 'net value' for these purposes see PARA 768 note 15.
- 20 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 1 para 1(1)(c).
- 21 As to the meaning of 'company contributions' for these purposes see PARA 768 note 12.
- 22 As to the meaning of 'pension scheme' for these purposes see PARA 768 note 12.
- 23 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 1 para 1(1)(d)(i).
- 24 As to the meaning of 'money purchase benefits' for these purposes see PARA 768 note 18.
- 25 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 1 para 1(1)(d)(ii).
- 26 As to the meaning of 'retirement benefits' for these purposes see PARA 768 note 11.
- 27 As to the meaning of 'money purchase scheme' for these purposes see PARA 768 note 20.

28 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 1 para 1(2). As to the meanings of 'defined benefit scheme' and 'defined benefits' for these purposes see PARA 768 note 21.

29 Ie under the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5.

30 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 5(1), (2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 7(1), (2). As to the meaning of 'subsidiary undertaking' see PARA 26; and see also PARA 768 notes 3, 11. As to the meaning of 'undertaking' see PARA 26 note 2.

The amounts to be shown under the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 do not include any sums that are to be accounted for: (1) to the company or any of its subsidiary undertakings; or (2) by virtue of the Companies Act 2006 s 219 and s 222(3) (payments in connection with share transfers: duty to account) (see PARAS 581, 583), to persons who sold their shares as a result of the offer made: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 6(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 8(1). Where any such sums are not shown in a note to the accounts for the relevant financial year on the ground that the person receiving them is liable to account for them, and the liability is afterwards wholly or partly released or is not enforced within a period of two years, then those sums, to the extent to which the liability is released or not enforced, must be shown in a note to the first accounts in which it is practicable to show them and must be distinguished from the amounts otherwise required to be shown: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 6(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 8(2). As to a company's financial year see PARA 711.

31 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 5(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 7(3). As to the meaning of references to a person being 'connected' with a director, and to a director 'controlling' a body corporate, see PARA 768 note 24.

32 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 5(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 7(4).

33 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 5(5); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 7(5). As to the meaning of 'United Kingdom' see PARA 1 note 5.

34 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 2 para 5(6); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 3 para 7(6).

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(18) ACCOUNTS AND REPORTS/(iv) Annual Accounts/C. GROUP ACCOUNTS/(C) Notes to the Accounts/(e) Information about Directors' Emoluments and Other Benefits/809. Compensation to directors for loss of office.

809. Compensation to directors for loss of office.

In relation to small companies¹, there must be shown the aggregate amount of any payments made to directors² or past directors for loss of office³.

In relation to unquoted⁴ large or medium-sized companies⁵, there must be shown the aggregate amount of any compensation to directors or past directors in respect of loss of office⁶. This includes compensation received or receivable by a director or past director:

- 1484 (1) for loss of office as director of the company; or
 1485 (2) for loss, while director of the company or on or in connection with his ceasing to be a director of it, of: (a) any other office in connection with the management of the company's affairs; or (b) any office as director or otherwise in connection with the management of the affairs of any subsidiary undertaking of the company⁷.

1 As to small companies and groups see PARA 694. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'director' see PARA 478.

3 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 2(1). 'Payment for loss of office' has the same meaning as in the Companies Act 2006 s 215 (see PARA 578): Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 2(2).

4 As to unquoted companies see PARA 696.

5 As to large and medium-sized companies and groups see PARA 695.

6 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 4(1).

For the purposes of Sch 5 Pt 2 para 4, references to compensation for loss of office include:

- 270 (1) compensation in consideration for, or in connection with, a person's retirement from office (Sch 5 Pt 2 para 4(3)(a)); and
 271 (2) where such a retirement is occasioned by a breach of the person's contract with the company or with a subsidiary undertaking of the company:
 3 (a) payments made by way of damages for the breach (Sch 5 Pt 2 para 4(3)(b)(i)); or
 4 (b) payments made by way of settlement or compromise of any claim in respect of the breach (Sch 5 Pt 2 para 4(3)(b)(ii)).
 4

References to compensation also include benefits otherwise than in cash, and in relation to such compensation references to its amount are to the estimated money value of the benefit: Sch 5 Pt 2 para 4(4). The nature of any such compensation must be disclosed: Sch 5 Pt 2 para 4(4). As to the meaning of 'subsidiary undertaking' for these purposes see PARA 768 note 11.

7 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 4(2).

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(18) ACCOUNTS AND REPORTS/(iv) Annual Accounts/C. GROUP ACCOUNTS/(C) Notes to the Accounts/(e) Information about Directors' Emoluments and Other Benefits/810. Sums paid to third parties in respect of directors' services.

810. Sums paid to third parties in respect of directors' services.

In relation to small companies¹ and unquoted² large or medium-sized companies³, there must be shown the aggregate amount of any consideration⁴ paid to or receivable by third parties⁵ for making available the services of any person:

- 1486 (1) as a director⁶ of the company; or

- 1487 (2) while director of the company:
 97
 317. (a) as director of any of its subsidiary undertakings⁷; or
 318. (b) otherwise in connection with the management of the affairs of the
 company or any of its subsidiary undertakings⁸.
 98

1 As to small companies and groups see PARA 694. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to unquoted companies see PARA 696.

3 As to large and medium-sized companies and groups see PARA 695.

4 For the purposes of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 3(1) and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 5(1), the reference to consideration includes benefits otherwise than in cash, and in relation to such consideration the reference to its amount is to the estimated money value of the benefit: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 3(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 5(2). The nature of any such consideration must be disclosed: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 3(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 5(2).

5 As to the meaning of 'third party' see PARA 770 note 5.

6 As to the meaning of 'director' see PARA 478.

7 As to the meaning of 'subsidiary undertaking' for these purposes see PARA 768 notes 3, 11.

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 3(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 5(1).

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(18) ACCOUNTS AND REPORTS/(iv) Annual Accounts/C. GROUP ACCOUNTS/(C) Notes to the Accounts/(e) Information about Directors' Emoluments and Other Benefits/811. Details of highest paid director's emoluments etc where company is unquoted.

811. Details of highest paid director's emoluments etc where company is unquoted.

In relation to unquoted¹ large or medium-sized companies², where the aggregates of payments to directors³ total £200,000 or more, there must be shown:

- 1488 (1) so much of the total of those aggregates as is attributable to the highest paid director⁴; and
 1489 (2) so much of the aggregate mentioned in relation to company contributions⁵ as is so attributable⁶.

Where the aggregates total £200,000 or more as mentioned above⁷, and the highest paid director has performed qualifying services⁸ during the financial year⁹ by reference to which the rate or amount of any defined benefits¹⁰ that may become payable will be calculated, there must also be shown:

- 1490 (a) the amount at the end of the year of his accrued pension¹¹; and
 1491 (b) where applicable, the amount at the end of the year of his accrued lump
 sum¹².

Where the aggregates total £200,000 or more as mentioned above¹³ in the case of a company which is not a listed company¹⁴, there must also be shown:

- 1492 (i) whether the highest paid director exercised any share options¹⁵; and
 1493 (ii) whether any shares¹⁶ were received or receivable by that director in
 respect of qualifying services under a long term incentive scheme¹⁷.

Where the highest paid director has not been involved in any of the transactions specified in heads (i) and (ii), that fact need not be stated¹⁸.

1 As to unquoted companies see PARA 696.

2 As to large and medium-sized companies and groups see PARA 695. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 I.e. the aggregates shown under the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 1(1)(a), (b) and (c): see PARA 808 heads (i)-(iii). As to the meaning of 'director' see PARA 478.

4 As to the meaning of 'highest paid director' see PARA 771 note 4.

5 I.e. the aggregate mentioned in the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 1(1)(d): see PARA 808 head (iv).

6 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 2(1).

7 I.e. where the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 2(1) applies: see the text and notes 1-6.

8 As to the meaning of 'qualifying services' for these purposes see PARA 768 note 11.

9 As to a company's financial year see PARA 711.

10 As to the meaning of 'defined benefits' for these purposes see PARA 768 note 21.

11 As to the meaning of 'accrued pension' see PARA 771 note 11.

12 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 2(2). As to the meaning of 'accrued lump sum' see PARA 771 note 11.

13 I.e. where the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 2(1) applies: see the text and notes 1-6.

14 The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 2(3) refers to 'a company which is not a listed company', but it is submitted that it may be intended to refer to 'a company which is not a quoted company'. As to official listing see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385 et seq.

15 As to the meaning of 'share option' for these purposes see PARA 768 note 11.

16 As to the meaning of 'shares' for these purposes see PARA 768 note 11.

17 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 2(3). As to the meaning of 'long term incentive scheme' see PARA 768 note 11.

18 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 2(4).

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(18) ACCOUNTS AND REPORTS/(iv) Annual Accounts/C. GROUP ACCOUNTS/(C) Notes to the Accounts/(e) Information about Directors' Emoluments and Other Benefits/812. Excess retirement benefits of directors and past directors of unquoted company.

812. Excess retirement benefits of directors and past directors of unquoted company.

In relation to unquoted¹ large or medium-sized companies², there must be shown the aggregate amount of:

- 1494 (1) so much of retirement benefits³ paid to or receivable by directors⁴ under pension schemes⁵; and
- 1495 (2) so much of retirement benefits paid to or receivable by past directors under such schemes,

as (in each case) is in excess of the retirement benefits to which they were respectively entitled on the date on which the benefits first became payable or 31 March 1997, whichever is the later⁶. However, amounts paid or receivable under a pension scheme need not be included in the aggregate amount if: (a) the funding of the scheme was such that the amounts were or, as the case may be, could have been paid without recourse to additional contributions; and (b) amounts were paid to or receivable by all pensioner members⁷ of the scheme on the same basis⁸.

1 As to unquoted companies see PARA 696.

2 As to large and medium-sized companies and groups see PARA 695. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 3, references to retirement benefits include benefits otherwise than in cash; and in relation to so much of retirement benefits as consists of a benefit otherwise than in cash, references to their amount are to the estimated money value of the benefit: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 3(4). The nature of any such benefit must also be disclosed: Sch 5 Pt 2 para 3(4).

4 As to the meaning of 'director' see PARA 478.

5 As to the meaning of 'pension scheme' for these purposes see PARA 768 note 12.

6 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 3(1).

7 As to the meaning of 'pensioner member' see PARA 772 note 7.

8 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 2 para 3(2).

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ACCOUNTS/(C) Notes to the Accounts/(f) Information about Directors' Advances, Credit and Guarantees/813. Information to be disclosed.

(f) Information about Directors' Advances, Credit and Guarantees

813. Information to be disclosed.

In the case of a parent company¹ that prepares group accounts², details of:

- 1496 (1) advances and credits granted to the directors³ of the parent company, by that company or by any of its subsidiary undertakings⁴; and
- 1497 (2) guarantees of any kind entered into on behalf of the directors of the parent company, by that company or by any of its subsidiary undertakings,

must be shown in the notes to the group accounts⁵.

The details required of an advance or credit are: (a) its amount; (b) an indication of the interest rate; (c) its main conditions; and (d) any amounts repaid⁶. The details required of a guarantee are: (i) its main terms; (ii) the amount of the maximum liability that may be incurred by the company (or its subsidiary); and (iii) any amount paid and any liability incurred by the company (or its subsidiary) for the purpose of fulfilling the guarantee (including any loss incurred by reason of enforcement of the guarantee)⁷.

There must also be stated in the notes to the accounts the totals of amounts stated under head (a), of amounts stated under head (d), of amounts stated under head (ii) and of amounts stated under head (iii)⁸.

The above requirements apply in relation to every advance, credit or guarantee subsisting at any time in the financial year to which the accounts relate: (A) whenever it was entered into; (B) whether or not the person concerned was a director of the company in question at the time it was entered into; and (c) in the case of an advance, credit or guarantee involving a subsidiary undertaking of that company, whether or not that undertaking was such a subsidiary undertaking at the time it was entered into⁹.

1 As to the meaning of 'parent company' see PARA 26 note 2. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the duty to prepare group accounts see PARA 775.

3 References in the Companies Act 2006 s 413 to the directors of a company are references to the persons who were a director at any time in the financial year to which the accounts relate: s 413(6). As to the meaning of 'director' generally see PARA 478. As to a company's financial year see PARA 711.

The provisions of the Companies Act 2006 s 413 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

5 Companies Act 2006 s 413(2).

6 Companies Act 2006 s 413(3).

7 Companies Act 2006 s 413(4).

8 Companies Act 2006 s 413(5).

9 Companies Act 2006 s 413(7). However, banking companies and the holding companies of credit institutions need only state the details required by s 413(3)(a) (see head (a) in the text) and s 413(4)(b) (see head (ii) in the text): s 413(8). As to the meaning of 'banking company' see PARA 701 note 1; and as to the meaning of 'credit institution' see PARA 146 note 21.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(18) ACCOUNTS AND REPORTS/(iv) Annual Accounts/C. GROUP ACCOUNTS/(C) Notes to the Accounts/(g) Information about Auditors' Remuneration and Liability Limitation Agreements/814. Disclosure of remuneration to, and liability limitation agreements made with, auditors.

(g) Information about Auditors' Remuneration and Liability Limitation Agreements

UPDATE

813 Information to be disclosed

NOTE 9--2006 Act s 413(8) amended: SI 2009/3022.

814. Disclosure of remuneration to, and liability limitation agreements made with, auditors.

Companies must, by way of a note to the company's annual accounts¹, disclose fees receivable by their auditors and their auditors' associates² and also disclose liability limitation agreements that they make with their auditors³.

Small and medium-sized companies⁴ must disclose the fee paid to their auditors for the audit itself⁵. Every other company must disclose both the audit fee and all other fees receivable by the auditors for services supplied by them and their associates to the company, its subsidiaries (except where its control over a subsidiary is subject to severe long-term restrictions) and associated pension schemes⁶. Consolidated group accounts (except those of small or medium-sized groups which are not ineligible) must disclose the types of services specified and the fees paid for them as if the group were a single company: but if that is done, the individual companies do not need to disclose them⁷.

A company which has made a liability limitation agreement with its auditors must disclose its principal terms and the date of the approval resolution (or resolution waiving the need for approval in the case of a private company) passed by the company's members⁸.

1 As to a company's annual accounts see PARA 714 et seq.

2 As to persons who are to be regarded as an associate or distant associate of a company's auditor for these purposes see PARA 922. As to the persons qualified to act as auditors see PARA 958 et seq.

3 See the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489; and PARA 921 et seq. See also the text and notes 4-7.

4 As to when a company qualifies as 'small' in relation to a financial year or 'medium-sized' in relation to a financial year for these purposes see PARA 923 note 3.

5 See the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 4; and PARA 923.

6 See the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 5; and PARA 923. Auditors must supply their company's directors with the information needed to enable the company to disclose the types of services specified and the fees paid for them: see reg 7; and PARA 923.

7 See the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 6; and PARA 923.

8 See the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 8; and PARA 923. The disclosure must be in a note to the accounts for the year in question or (if the agreement was entered into too late to be included in those accounts) in a note to the next year's accounts: see reg 8; and PARA 923.

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D. APPROVAL AND SIGNING OF ACCOUNTS

815. Approval and signing of accounts.

A company's annual accounts¹ must be approved by the board of directors² and signed on behalf of the board by a director of the company³. The signature must be on the company's balance sheet⁴, and the name of the person who signed must be stated on every published copy⁵.

If the accounts are prepared in accordance with the provisions applicable to companies subject to the small companies regime⁶, the balance sheet must contain a statement to that effect in a prominent position above the signature⁷.

If annual accounts are approved that do not comply with the relevant requirements⁸, every director of the company who knew that they did not comply or was reckless as to whether they complied, and who failed to take reasonable steps to secure compliance with those requirements or, as the case may be, to prevent the accounts from being approved, commits an offence⁹.

1 As to the meaning of 'annual accounts' see PARA 715. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'director' see PARA 478. Such approval must not be given unless the directors are satisfied that the accounts give a 'true and fair' view of the assets, liabilities, financial position and profit or loss etc of the company, or of the undertakings included in the consolidation as a whole: see the Companies Act 2006 s 393; and PARA 714.

3 Companies Act 2006 s 414(1). As to the approval and signing of the directors' report see PARA 831.

The provisions of the Companies Act 2006 s 414 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. Where an overseas company, or a credit or financial institution to which the Companies Act 2006 s 1050 applies (see PARA 1831), is not required to prepare and disclose accounts under parent law, s 414 is applied with modifications: see the Overseas Companies Regulations 2009, SI 2009/1801, regs 39, 54; and PARA 1830 et seq. As to the meaning of 'overseas company' see PARA 1824.

4 Companies Act 2006 s 414(2). As to the meaning of 'balance sheet' see PARA 715.

5 See the Companies Act 2006 ss 433, 436; and PARAS 861, 863. See also s 447(3); and PARA 875.

6 As to the small companies regime see PARA 694.

7 Companies Act 2006 s 414(3).

8 Ie the requirements of the Companies Act 2006 and, where applicable, of the IAS Regulation art 4. As to the meaning of 'IAS Regulation' see PARA 693 note 1.

9 Companies Act 2006 s 414(4). A person guilty of such an offence is liable, on conviction on indictment, to a fine or, on summary conviction, to a fine not exceeding the statutory maximum: s 414(5). As to the statutory maximum see PARA 1622.

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(v) Directors' Reports

A. GENERAL REQUIREMENTS

816. Duty to prepare directors' report.

The directors¹ of a company² (other than a small company³ which qualifies for exemption⁴) must prepare a directors' report for each financial year⁵ of the company⁶.

For a financial year in which the company is a parent company⁷, and the directors of the company prepare group accounts⁸, the directors' report must be a consolidated report (a 'group directors' report') relating to the undertakings included in the consolidation⁹.

A group directors' report may, where appropriate, give greater emphasis to the matters that are significant to the undertakings included in the consolidation, taken as a whole¹⁰.

In the case of failure to comply with the requirement to prepare a directors' report, an offence is committed by every person who: (1) was a director of the company immediately before the end of the period for filing accounts and reports for the financial year in question; and (2) failed to take all reasonable steps for securing compliance with that requirement¹¹.

1 As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to the small companies regime see PARA 694.

4 Ie pursuant to the Companies Act 2006 s 415A (see PARA 817).

5 As to a company's financial year see PARA 711.

6 Companies Act 2006 s 415(1). As to the content of the directors' report see PARA 818. As to the requirement for disclosure of qualifying indemnity provision see s 236; and PARA 597. As to liability for false or misleading statements in reports see PARA 868.

There is no longer a requirement for directors of quoted companies to prepare operating and financial reviews for financial years beginning on or after 1 April 2005: see the Companies Act 1985 (Operating and Financial Review) (Repeal) Regulations 2005, SI 2005/3442. As to quoted companies see PARA 696.

The provisions of the Companies Act 2006 s 415 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

- 7 As to the meaning of 'parent company' see PARA 26 note 2.
- 8 As to the requirement to prepare group accounts see PARA 775 et seq.
- 9 Companies Act 2006 s 415(2). As to the meaning of 'undertaking' see PARA 26 note 2; and as to the meaning of 'included in the consolidation' see PARA 775 note 12.
- 10 Companies Act 2006 s 415(3).
- 11 Companies Act 2006 s 415(4). A person guilty of an offence under s 415 is liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum: s 415(5).

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817. Limited exemption for small companies.

A company¹ is entitled to small companies exemption in relation to the directors' report² for a financial year³ if:

- 1498 (1) it is entitled to prepare accounts for the year in accordance with the small companies regime⁴; or
- 1499 (2) it would be so entitled but for being or having been a member of an ineligible group⁵.

The exemption is relevant to the requirement that the report should contain a statement of the amount recommended by way of dividend⁶, to the requirement that the report should contain a business review⁷, and to filing obligations⁸.

- 1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.
- 2 As to the duty to prepare a directors' report see PARA 816. As to the meaning of 'director' see PARA 478.
- 3 As to a company's financial year see PARA 711.
- 4 As to the small companies regime see PARA 694.
- 5 Companies Act 2006 s 415A(1) (s 415A added by SI 2008/393). As to the meaning of 'group' see PARA 694 note 10. As to ineligible groups see PARA 694.
The provisions of the Companies Act 2006 s 415A apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.
- 6 See the Companies Act 2006 s 416(3); and PARA 818.
- 7 See the Companies Act 2006 s 417; and PARA 819.
- 8 Companies Act 2006 s 415A(2) (as added: see note 5). The filing obligations referred to in the text are those under ss 444-446: see PARAS 871-874.

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B. CONTENTS

(A) ALL COMPANIES

818. Contents of directors' report generally.

The directors' report¹ for a financial year² must state:

- 1500 (1) the names of the persons who, at any time during the financial year, were directors of the company³; and
- 1501 (2) the principal activities of the company in the course of the year⁴.

Except in the case of a company entitled to the small companies exemption⁵, the report must state the amount (if any) that the directors recommend should be paid by way of dividend⁶.

The Secretary of State⁷ may make provision by regulations as to other matters that must be disclosed in a directors' report⁸. Regulations have been made⁹, and in addition to the information required¹⁰ as mentioned above, the directors' report must contain the specified information¹¹.

1 As to the duty to prepare a directors' report see PARA 816. As to the meaning of 'director' see PARA 478. As to liability for false or misleading statements in reports see PARA 868.

2 As to a company's financial year see PARA 711.

3 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

4 Companies Act 2006 s 416(1). In relation to a group directors' report head (2) in the text has effect as if the reference to the company were a reference to the undertakings included in the consolidation: s 416(2). As to the meaning of 'group directors' report' see PARA 816. As to the meaning of 'undertaking' see PARA 26 note 2; and as to the meaning of 'included in the consolidation' see PARA 775 note 12.

The provisions of the Companies Act 2006 s 416 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 As to the small companies exemption see PARA 817.

6 Companies Act 2006 s 416(3) (amended by SI 2008/393).

7 As to the Secretary of State see PARA 6.

8 Companies Act 2006 s 416(4). Without prejudice to the generality of this power, the regulations may make any such provision as was formerly made by the Companies Act 1985 Sch 7 (repealed) (matters to be dealt with in directors' report): see the Companies Act 2006 s 416(4).

9 As to the regulations made see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 7, Sch 5; the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 10, Sch 7; the text and note 11; and PARA 821 et seq.

10 Ie by the Companies Act 2006 s 416: see the text and notes 1-8.

11 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 7, Sch 5 para 1; Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 10, Sch 7 Pt 1 para 1. As to the additional information required see PARA 821 et seq.

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819. Directors' report to contain business review.

Unless the company¹ is entitled to the small companies exemption², the directors' report³ must contain a business review⁴. The purpose of the business review is to inform members of the company and help them assess how the directors have performed their duty⁵ to promote the success of the company⁶.

The business review must contain: (1) a fair review of the company's business; and (2) a description of the principal risks and uncertainties facing the company⁷. The review required is a balanced and comprehensive analysis of:

- 1502 (a) the development and performance of the company's business during the financial year; and
- 1503 (b) the position of the company's business at the end of that year,

consistent with the size and complexity of the business⁸.

In the case of a quoted company⁹, the business review must, to the extent necessary for an understanding of the development, performance or position of the company's business, include:

- 1504 (i) the main trends and factors likely to affect the future development, performance and position of the company's business; and
- 1505 (ii) information about:

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- 319. (A) environmental matters (including the impact of the company's business on the environment);

- 320. (B) the company's employees; and

- 321. (C) social and community issues,

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- 1506 including information about any policies of the company in relation to those matters and the effectiveness of those policies; and

- 1507 (iii) information about persons with whom the company has contractual or other arrangements which are essential to the business of the company¹⁰.

If the review does not contain information of each kind mentioned in heads (ii)(A), (ii)(B), (ii)(C) and (iii) above, it must state which of those kinds of information it does not contain¹¹.

The review must, to the extent necessary for an understanding of the development, performance or position of the company's business, include:

- 1508 (aa) analysis using financial key performance indicators¹²; and
- 1509 (bb) where appropriate, analysis using other key performance indicators, including information relating to environmental matters and employee matters¹³.

The review must, where appropriate, include references to, and additional explanations of, amounts included in the company's annual accounts¹⁴.

Nothing in the above provisions requires the disclosure of information about impending developments or matters in the course of negotiation if the disclosure would, in the opinion of the directors, be seriously prejudicial to the interests of the company¹⁵.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq. See also note 4.

2 As to the small companies exemption see PARA 817.

3 As to the duty to prepare a directors' report see PARA 816. As to the meaning of 'director' see PARA 478.

4 Companies Act 2006 s 417(1) (amended by SI 2008/393). In relation to a group directors' report, the Companies Act 2006 s 417 has effect as if the references to the company were references to the undertakings included in the consolidation: s 417(9). As to the meaning of 'group directors' report' see PARA 816. As to the meaning of 'undertaking' see PARA 26 note 2; and as to the meaning of 'included in the consolidation' see PARA 775 note 12.

5 Ie under the Companies Act 2006 s 172: see PARA 544.

6 Companies Act 2006 s 417(2).

7 Companies Act 2006 s 417(3).

8 Companies Act 2006 s 417(4).

9 As to quoted companies see PARA 696.

10 Companies Act 2006 s 417(5). Nothing in s 417(5)(c) (see head (iii) in the text) requires the disclosure of information about a person if the disclosure would, in the opinion of the directors, be seriously prejudicial to that person and contrary to the public interest: s 417(11).

11 Companies Act 2006 s 417(5).

12 'Key performance indicators' means factors by reference to which the development, performance or position of the company's business can be measured effectively: Companies Act 2006 s 417(6).

13 Companies Act 2006 s 417(6). Where a company qualifies as medium-sized in relation to a financial year, the directors' report for the year need not comply with the requirements of s 417(6) so far as they relate to non-financial information: s 417(7). As to medium-sized companies and groups see PARA 695. As to a company's financial year see PARA 711.

14 Companies Act 2006 s 417(8). As to the meaning of 'annual accounts' see PARA 715.

15 Companies Act 2006 s 417(9).

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820. Directors' report to contain statement as to disclosure to auditors.

Except where a company¹ is exempt for the financial year² in question from the requirements as to audit of accounts³, and the directors⁴ take advantage of that exemption⁵, the directors'

report⁶ must contain a statement to the effect that, in the case of each of the persons who are directors at the time the report is approved:

- 1510 (1) so far as the director is aware, there is no relevant audit information⁷ of which the company's auditor is unaware; and
 1511 (2) he has taken all the steps that he ought to have taken as a director in order to make himself aware of any relevant audit information and to establish that the company's auditor is aware of that information⁸.

Where a directors' report containing the required statement is approved but the statement is false, every director of the company who knew that the statement was false or was reckless as to whether it was false, and who failed to take reasonable steps to prevent the report from being approved, commits an offence⁹.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to a company's financial year see PARA 711.

3 In the requirements of the Companies Act 2006 Pt 16 (ss 475-539): see PARA 905 et seq. As to exemption from those requirements see PARA 908-911.

4 As to the meaning of 'director' see PARA 478.

5 Companies Act 2006 s 418(1).

The provisions of the Companies Act 2006 s 418 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

6 As to the duty to prepare a directors' report see PARA 816.

7 'Relevant audit information' means information needed by the company's auditor in connection with preparing his report: Companies Act 2006 s 418(3). As to the auditor's report see PARA 924 et seq.

8 Companies Act 2006 s 418(2). A director is regarded as having taken all the steps that he ought to have taken as a director in order to do the things mentioned in s 418(2)(b) (see head (2) in the text) if he has:

272 (1) made such inquiries of his fellow directors and of the company's auditors for that purpose; and

273 (2) taken such other steps (if any) for that purpose,

as are required by his duty as a director of the company to exercise reasonable care, skill and diligence: s 418(4). As to the duty of directors to exercise reasonable care, skill and diligence see PARA 548.

9 Companies Act 2006 s 418(5). A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine (or both), or on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or both): Companies Act 2006 s 418(6). As to the statutory maximum see PARA 1622.

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821. Political donations and expenditure.

If:

- 1512 (1) the company¹ (not being the wholly-owned subsidiary² of a company incorporated in the United Kingdom³) has in the financial year⁴: (a) made any political donation to any political party or other political organisation; (b) made any political donation to any independent election candidate; or (c) incurred any political expenditure⁵; and
- 1513 (2) the amount of the donation or expenditure, or (as the case may be) the aggregate amount of all donations and expenditure falling within head (1) above, exceeded £2,000⁶,

the directors' report⁷ for the year must contain the following particulars⁸, namely:

- 1514 (i) as respects donations falling within head (1)(a) or head (1)(b) above: (A) the name of each political party, other political organisation or independent election candidate to whom any such donation has been made; and (B) the total amount given to that party, organisation or candidate by way of such donations in the financial year⁹; and
- 1515 (ii) as respects expenditure falling within head (1)(c) above, the total amount incurred by way of such expenditure in the financial year¹⁰.

If at the end of the financial year the company has subsidiaries which have, in that year, made any donations or incurred any such expenditure as is mentioned in head (1) above, and it is not itself the wholly-owned subsidiary of a company incorporated in the United Kingdom, the directors' report for the year is not required¹¹ to contain the particulars specified in heads (i) and (ii) above¹². However, if the total amount of any such donations or expenditure (or both) made or incurred in that year by the company and the subsidiaries between them exceeds £2,000, the directors' report for the year must contain those particulars in relation to each body by whom any such donation or expenditure has been made or incurred¹³.

If the company (not being the wholly-owned subsidiary of a company incorporated in the United Kingdom) has in the financial year made any contribution¹⁴ to a non-EU political party¹⁵, the directors' report for the year must contain:

- 1516 (aa) a statement of the amount of the contribution; or
- 1517 (bb) if it has made two or more such contributions in the year, a statement of the total amount of the contributions¹⁶.

If at the end of the financial year the company has subsidiaries which have, in that year, made any such contributions as are mentioned above¹⁷, and it is not itself the wholly-owned subsidiary of a company incorporated in the United Kingdom, then the directors' report for the year is not required¹⁸ to contain any such statement as is mentioned above¹⁹, but it must instead contain a statement of the total amount of the contributions made in the year by the company and the subsidiaries between them²⁰.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'wholly-owned subsidiary' see PARA 25.

3 As to the meaning of 'United Kingdom' see PARA 1 note 5.

4 As to a company's financial year see PARA 711.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 2(1)(a); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 3(1)(a). Any expression used in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 2 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 3 which is also used in the Companies Act 2006 Pt 14 (ss 362-379) (control of political donations and expenditure: see PARA 688 et seq) has the same meaning as in that Part: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 2(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 3(4). As to the meaning of 'political donation' see PARA 688 note 2; as to the meaning of 'political expenditure' see PARA 688 note 4; and as to the meaning of 'political organisation' see PARA 688 note 8.

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 2(1)(b); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 3(1)(b).

7 As to the duty to prepare a directors' report see PARA 816. As to the meaning of 'director' see PARA 478.

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 2(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 3(1).

9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 2(2)(a); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 3(2)(a).

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 2(2)(b); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 3(2)(b).

11 Ie by virtue of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 2(1) or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 3(1): see the text and notes 1-8.

12 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 2(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 3(3).

13 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 2(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 3(3).

14 For these purposes, 'contribution', in relation to an organisation, means: (1) any gift of money to the organisation (whether made directly or indirectly); (2) any subscription or other fee paid for affiliation to, or membership of, the organisation; or (3) any money spent (otherwise than by the organisation or a person acting on its behalf) in paying any expenses incurred directly or indirectly by the organisation: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 3(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 4(3).

15 For these purposes, 'non-EU political party' means any political party which carries on, or proposes to carry on, its activities wholly outside the member states: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 3(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 4(4). As to the meaning of 'member states' see PARA 5.

16 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 3(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 4(1).

17 Ie any such contributions as are mentioned in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 3(1) or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 4(1): see the text and notes 14-16.

18 Ie by virtue of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 3(1) or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 4(1): see the text and notes 14-16.

19 le any such statement as is mentioned in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 3(1) or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 4(1): see the text and notes 14-16.

20 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 3(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 4(2).

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822. Charitable donations.

If the company¹ (not being the wholly-owned subsidiary² of a company incorporated in the United Kingdom³) has in the financial year⁴ given money for charitable purposes⁵, and the money given exceeded £2,000 in amount⁶, then the directors' report⁷ for the year must contain, in the case of each of the purposes for which money has been given, a statement of the amount of money given for that purpose⁸. This does not apply to the company if at the end of the financial year it has subsidiaries which have, in that year, given money for charitable purposes, and it is not itself the wholly-owned subsidiary of a company incorporated in the United Kingdom⁹. However, if the amount given in that year for charitable purposes by the company and the subsidiaries between them exceeds £2,000, the directors' report for the year must contain, in the case of each of the purposes for which money has been given by the company and the subsidiaries between them, a statement of the amount of money given for that purpose¹⁰.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'wholly-owned subsidiary' see PARA 25.

3 As to the meaning of 'United Kingdom' see PARA 1 note 5.

4 As to a company's financial year see PARA 711.

5 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 4(1)(a); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 5(1)(a). For these purposes, 'charitable purposes' means purposes which are exclusively charitable: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 4(4); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 5(4). As to charitable purposes see further **CHARITIES** vol 8 (2010) PARA 2 et seq.

6 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 4(1)(b); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 5(1)(b).

7 As to the duty to prepare a directors' report see PARA 816. As to the meaning of 'director' see PARA 478.

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 4(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 5(1). Money given for charitable purposes to a person who, when it was given, was ordinarily resident outside the United Kingdom is to be left out of account for these purposes: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 4(3); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 5(3).

9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 4(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 5(2).

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 4(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 5(2).

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823. Disclosure concerning employment etc of disabled persons.

Where the average number of persons employed¹ by the company² in each week during the financial year³ exceeded 250⁴, the directors' report⁵ must contain a statement describing such policy as the company has applied during the financial year:

- 1518 (1) for giving full and fair consideration to applications for employment by the company made by disabled persons⁶, having regard to their particular aptitudes and abilities⁷;
- 1519 (2) for continuing the employment of, and for arranging appropriate training for, employees of the company who have become disabled persons during the period when they were employed by the company⁸; and
- 1520 (3) otherwise for the training, career development and promotion of disabled persons employed by the company⁹.

1 For these purposes, 'employment' means employment other than employment to work wholly or mainly outside the United Kingdom; and 'employed' and 'employee' are to be construed accordingly: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 5(4)(a); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 3 para 10(4)(a).

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to a company's financial year see PARA 711.

4 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 5(1); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 3 para 10(1). The average number mentioned in the text is the quotient derived by dividing, by the number of weeks in the financial year, the number derived by ascertaining, in relation to each of those weeks, the number of persons who, under contracts of service, were employed in the week (whether throughout it or not) by the company, and adding up the numbers ascertained: Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 5(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 3 para 10(2).

5 As to the duty to prepare a directors' report see PARA 816. As to the meaning of 'director' see PARA 478.

6 For these purposes, 'disabled person' means the same as in the Disability Discrimination Act 1995 (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 511 et seq): Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 5(4)(b); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 3 para 10(4)(b).

7 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 5(3)(a); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 3 para 10(3)(a).

8 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 5(3)(b); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 3 para 10(3)(b).

9 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 5(3)(c); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 3 para 10(3)(c).

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824. Disclosure required by company acquiring its own shares or a charge on them.

Disclosure is required in the directors' report¹ where shares² in a company³:

- 1521 (1) are purchased by that company or are acquired by it by forfeiture⁴ or surrender in lieu of forfeiture⁵, or in pursuance of statutory powers⁶ to acquire its own shares⁷; or
- 1522 (2) are acquired by another person in circumstances where he is a nominee for the company⁸ or where he acquires the shares with financial assistance given by the company⁹ and the company has a beneficial interest in them¹⁰; or
- 1523 (3) are made subject to a lien or other charge taken, whether expressly or otherwise, by the company and permitted by any of the exceptions¹¹ from the general rule against a company having a lien or charge on its own shares¹².

In such circumstances, the directors' report with respect to a financial year¹³ must state:

- 1524 (a) the number and nominal value of the shares so purchased, the aggregate amount of the consideration paid by the company for such shares and the reasons for their purchase;
- 1525 (b) the number and nominal value of the shares so acquired by the company, acquired by another person in such circumstances, and so charged, respectively, during the financial year;
- 1526 (c) the maximum number and nominal value of shares which, having been so acquired by the company, acquired by another person in such circumstances or so charged (whether or not during that year), are held at any time by the company or that other person during that year;
- 1527 (d) the number and nominal value of the shares so acquired by the company, acquired by another person in such circumstances or so charged (whether or not during that year) which are disposed of by the company or that other person or cancelled by the company during that year;
- 1528 (e) where the number and nominal value of the shares of any particular description are stated in pursuance of any of heads (a) to (d) above, the percentage of the called up share capital¹⁴ which shares of that description represent;
- 1529 (f) where any of the shares have been so charged, the amount of the charge in each case; and

1530 (g) where any of the shares have been disposed of by the company or the person who acquired them in such circumstances for money or money's worth, the amount or value of the consideration in each case¹⁵.

1 As to the duty to prepare a directors' report see PARA 816. As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'share' see PARA 1042.

3 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

4 As to the forfeiture of shares see PARA 1213 et seq.

5 As to the surrender of shares see PARA 1213 et seq.

6 Ie the Companies Act 1985 s 143(3) (repealed) or the Companies Act 2006 s 659 (see PARA 1198).

7 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 6(1)(a); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 2 para 8(a).

8 Ie where the Companies Act 1985 s 146(1)(c) (repealed) or the Companies Act 2006 s 662(1)(d) (see PARA 1200) applies. The Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 6(1)(b) and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 2 para 8(b) refer to the Companies Act 2006 s 662(1)(c), but it is submitted that the reference should be a reference to s 662(1)(d).

9 Ie where the Companies Act 1985 s 146(1)(d) (repealed) or the Companies Act 2006 s 662(1)(e) (see PARA 1200) applies. The Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 6(1)(b) and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 2 para 8(b) refer to the Companies Act 2006 s 662(1)(d), but it is submitted that the reference should be a reference to s 662(1)(e).

10 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 6(1)(b); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 2 para 8(b).

11 Ie under the Companies Act 1985 s 150(2) or (4) (repealed) or the Companies Act 2006 s 670(2) or (4) (see PARA 1211).

12 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 6(1)(c); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 2 para 8(c). As to the general rule against a company having a lien or charge on its own shares see PARA 1206.

13 As to a company's financial year see PARA 711.

14 As to the meaning of 'called up share capital' see PARA 1048.

15 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 5 para 6(2); Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 2 para 9.

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(B) LARGE AND MEDIUM-SIZED COMPANIES AND GROUPS

825. Asset values.

If, in the case of such of the fixed assets¹ of a large or medium-sized company² as consist in interests in land, their market value (as at the end of the financial year³) differs substantially from the amount at which they are included in the balance sheet⁴, and the difference is, in the opinion of the directors⁵, of such significance as to require that the attention of members of the company or of holders of its debentures⁶ should be drawn to it, the directors' report⁷ must indicate the difference with such degree of precision as is practicable⁸.

1 As to the meaning of 'fixed assets' see PARA 720 note 2.

2 As to large and medium-sized companies and groups see PARA 695. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to a company's financial year see PARA 711.

4 As to the meaning of 'balance sheet' see PARA 715.

5 As to the meaning of 'director' see PARA 478.

6 As to the meaning of 'debenture' see PARA 1299.

7 As to the duty to prepare a directors' report see PARA 816.

8 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 2(1). In relation to a group directors' report this provision has effect as if the reference to the fixed assets of the company were a reference to the fixed assets of the company and of its subsidiary undertakings included in the consolidation: Sch 7 Pt 1 para 2(2). As to the meaning of 'group directors' report' see PARA 816. As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2. As to the meaning of 'included in the consolidation' see PARA 775 note 12.

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826. Financial instruments.

In relation to the use of financial instruments¹ by a large or medium-sized company², the directors' report³ must contain an indication of:

- 1531 (1) the financial risk management objectives and policies of the company, including the policy for hedging each major type of forecasted transaction for which hedge accounting⁴ is used; and
- 1532 (2) the exposure of the company to price risk, credit risk, liquidity risk and cash flow risk⁵,

unless such information is not material for the assessment of the assets, liabilities, financial position and profit or loss of the company⁶.

1 As to the meaning of 'financial instrument' see PARA 725 note 1.

2 As to large and medium-sized companies and groups see PARA 695. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to the duty to prepare a directors' report see PARA 816. As to the meaning of 'director' see PARA 478.

4 For these purposes, the expression 'hedge accounting' has the same meaning as it has in EEC Council Directive 78/660 on the annual accounts of certain types of companies (the 'Fourth Directive') (OJ L222, 14.8.1978, p 1) and EEC Council Directive 83/349 on consolidated accounts (the 'Seventh Directive') (OJ L193, 18.7.1983, p 1): Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 6(3).

5 For these purposes, the expressions 'price risk', 'credit risk', 'liquidity risk' and 'cash flow risk' have the same meanings as they have in EEC Council Directive 78/660 on the annual accounts of certain types of companies (the 'Fourth Directive') (OJ L222, 14.8.1978, p 1) and EEC Council Directive 83/349 on consolidated accounts (the 'Seventh Directive') (OJ L193, 18.7.1983, p 1): Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 6(3).

6 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 6(1). In relation to a group directors' report this provision has effect as if the references to the company were references to the company and its subsidiary undertakings included in the consolidation: Sch 7 Pt 1 para 6(2). As to the meaning of 'group directors' report' see PARA 816. As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2. As to the meaning of 'included in the consolidation' see PARA 775 note 12.

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827. Miscellaneous items.

In relation to a large or medium-sized company¹, the directors' report² must contain:

- 1533 (1) particulars of any important events affecting the company which have occurred since the end of the financial year³;
- 1534 (2) an indication of likely future developments in the business of the company;
- 1535 (3) an indication of the activities (if any) of the company in the field of research and development; and
- 1536 (4) unless the company is an unlimited company⁴, an indication of the existence of branches⁵ of the company outside the United Kingdom⁶.

1 As to large and medium-sized companies and groups see PARA 695. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the duty to prepare a directors' report see PARA 816. As to the meaning of 'director' see PARA 478.

3 As to a company's financial year see PARA 711.

4 As to the meaning of 'unlimited company' see PARA 102.

5 I.e. as defined in the Companies Act 2006 s 1046(3): see PARA 1826 note 8.

6 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 1 para 7(1). As to the meaning of 'United Kingdom' see PARA 1 note 5. In relation to a group directors' report heads (1)-(3) in the text have effect as if the references to the company were references to the company and its subsidiary undertakings included in the consolidation: Sch 7 Pt 1 para 7(2). As to the meaning of 'group directors' report' see PARA 816. As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2. As to the meaning of 'included in the consolidation' see PARA 775 note 12.

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828. Employee involvement.

Where the average number of persons employed by a large or medium-sized company¹ in each week during the financial year² exceeded 250³, the directors' report⁴ must contain a statement describing the action that has been taken during the financial year to introduce, maintain or develop arrangements aimed at:

- 1537 (1) providing employees⁵ systematically with information on matters of concern to them as employees;
- 1538 (2) consulting employees or their representatives on a regular basis so that the views of employees can be taken into account in making decisions which are likely to affect their interests;
- 1539 (3) encouraging the involvement of employees in the company's performance through an employees' share scheme or by some other means;
- 1540 (4) achieving a common awareness on the part of all employees of the financial and economic factors affecting the performance of the company⁶.

1 As to large and medium-sized companies and groups see PARA 695. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to a company's financial year see PARA 711.

3 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 4 para 11(1). The average number mentioned in the text is the quotient derived by dividing, by the number of weeks in the financial year, the number derived by ascertaining, in relation to each of those weeks, the number of persons who, under contracts of service, were employed in the week (whether throughout it or not) by the company, and adding up the numbers ascertained: Sch 7 Pt 4 para 11(2). See further note 5.

4 As to the duty to prepare a directors' report see PARA 816. As to the meaning of 'director' see PARA 478.

5 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 4 para 11(3), 'employee' does not include a person employed to work wholly or mainly outside the United Kingdom; and for the purposes of Sch 7 Pt 4 para 11(2) (see note 3) no regard is to be had to such a person: Sch 7 Pt 4 para 11(4). As to the meaning of 'United Kingdom' see PARA 1 note 5.

6 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 4 para 11(3).

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829. Policy and practice on the payment of creditors.

In relation to a large or medium-sized company¹, the following provisions apply to the directors' report² for a financial year³ if: (1) the company was at any time within the year a public company⁴; or (2) the company did not qualify as small⁵ or medium-sized in relation to the year⁶ and was at any time within the year a member of a group⁷ of which the parent company⁸ was a public company⁹.

The report must state, with respect to the next following financial year:

- 1541 (a) whether in respect of some or all of its suppliers¹⁰ it is the company's policy to follow any code or standard on payment practice and, if so, the name of the code or standard and the place where information about, and copies of, the code or standard can be obtained¹¹;
- 1542 (b) whether in respect of some or all of its suppliers it is the company's policy: (i) to settle the terms of payment with those suppliers when agreeing the terms of each transaction; (ii) to ensure that those suppliers are made aware of the terms of payment; and (iii) to abide by the terms of payment¹²;
- 1543 (c) where the company's policy is not as mentioned in head (a) or head (b) in respect of some or all of its suppliers, what its policy is with respect to the payment of those suppliers¹³.

If the company's policy is different for different suppliers or classes of suppliers, the report must identify the suppliers to which the different policies apply¹⁴.

The report must also state the number of days which bears to the number of days in the financial year the same proportion as X bears to Y, where X is the aggregate of the amounts which were owed to trade creditors at the end of the year¹⁵ and Y is the aggregate of the amounts in which the company was invoiced by suppliers during the year¹⁶.

1 As to large and medium-sized companies and groups see PARA 695. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the duty to prepare a directors' report see PARA 816. As to the meaning of 'director' see PARA 478.

3 As to a company's financial year see PARA 711.

4 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 5 para 12(1)(a). As to the meaning of 'public company' see PARA 102.

5 As to small companies and groups see PARA 694.

6 I.e. by virtue of the Companies Act 2006 s 382 (see PARA 694) or s 465 (see PARA 695).

7 As to the meaning of 'group' see PARA 694 note 10.

8 As to the meaning of 'parent company' see PARA 26 note 2.

9 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 5 para 12(1)(b).

10 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 5 para 12(2) and Sch 7 Pt 5 para 12(3) (see the text and note 15), a person is a supplier of the company at any time if:

274 (1) at that time, he is owed an amount in respect of goods or services supplied (Sch 7 Pt 5 para 12(4)(a)); and

275 (2) that amount would be included under the heading corresponding to item E 4 (trade creditors) in Format 1 (see PARA 732) if: (a) the company's accounts fell to be prepared as at that time; (b) those accounts were prepared in accordance with Sch 1 (see PARA 718 et seq); and (c) that format were adopted (Sch 7 Pt 5 para 12(4)(b)).

In Sch 7 Pt 5 para 12(2), references to the company's suppliers are references to persons who are or may become its suppliers: Sch 7 Pt 5 para 12(2).

11 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 5 para 12(2)(a).

12 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 5 para 12(2)(b).

13 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 5 para 12(2)(c).

14 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 5 para 12(2).

15 For these purposes, the aggregate of the amounts which at the end of the financial year were owed to trade creditors is taken to be:

- 276 (1) where in the company's accounts Format 1 of the balance sheet formats set out in the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 1 (see PARA 732) is adopted, the amount shown under the heading corresponding to item E 4 (trade creditors) in that format (Sch 7 Pt 5 para 12(5)(a));
- 277 (2) where Format 2 (see PARA 733) is adopted, the amount which, under the heading corresponding to item C 4 (trade creditors) in that format, is shown as falling due within one year (Sch 7 Pt 5 para 12(5)(b)); and
- 278 (3) where the company's accounts are prepared in accordance with Sch 2 (banking companies: see PARA 701) or Sch 3 (insurance companies: see PARA 701) or the company's accounts are IAS accounts, the amount which would be shown under the heading corresponding to item E 4 (trade creditors) in Format 1 if the company's accounts were prepared in accordance with Sch 1 and that format were adopted (Sch 7 Pt 5 para 12(5)(c)).

As to the meaning of 'balance sheet' see PARA 715. As to the meaning of 'IAS accounts' see PARAS 717, 776.

16 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 5 para 12(3).

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830. Disclosure required of certain publicly-traded companies by the Takeovers Directive.

In relation to a large or medium-sized company¹, the following provisions apply to the directors' report² for a financial year³ if the company had securities⁴ carrying voting rights⁵ admitted to trading on a regulated market⁶ at the end of that year⁷.

The report must contain detailed information, by reference to the end of that year, on the following matters:

- 1544 (1) the structure of the company's capital, including in particular: (a) the rights and obligations attaching to the shares or, as the case may be, to each class of shares in the company; and (b) where there are two or more such classes, the percentage of the total share capital represented by each class⁸;
- 1545 (2) any restrictions on the transfer of securities in the company, including in particular: (a) limitations on the holding of securities; and (b) requirements to

- obtain the approval of the company, or of other holders of securities in the company, for a transfer of securities⁹;
- 1546 (3) in the case of each person with a significant direct or indirect holding of securities in the company, such details as are known to the company of: (a) the identity of the person; (b) the size of the holding; and (c) the nature of the holding¹⁰;
- 1547 (4) in the case of each person who holds securities carrying special rights with regard to control of the company: (a) the identity of the person; and (b) the nature of the rights¹¹;
- 1548 (5) where the company has an employees' share scheme, and shares to which the scheme relates have rights with regard to control of the company that are not exercisable directly by the employees, how those rights are exercisable¹²;
- 1549 (6) any restrictions on voting rights, including in particular: (a) limitations on voting rights of holders of a given percentage or number of votes; (b) deadlines for exercising voting rights; and (c) arrangements by which, with the company's co-operation, financial rights carried by securities are held by a person other than the holder of the securities¹³;
- 1550 (7) any agreements between holders of securities that are known to the company and may result in restrictions on the transfer of securities or on voting rights¹⁴;
- 1551 (8) any rules that the company has about: (a) appointment and replacement of directors; or (b) amendment of the company's articles of association¹⁵;
- 1552 (9) the powers of the company's directors, including in particular any powers in relation to the issuing or buying back by the company of its shares¹⁶;
- 1553 (10) any significant agreements to which the company is a party that take effect, alter or terminate upon a change of control of the company following a takeover bid¹⁷, and the effects of any such agreements¹⁸;
- 1554 (11) any agreements between the company and its directors or employees providing for compensation for loss of office or employment (whether through resignation, purported redundancy or otherwise) that occurs because of a takeover bid¹⁹.

The directors' report must also contain any necessary explanatory material with regard to information that is required²⁰ to be included in the report²¹.

1 As to large and medium-sized companies and groups see PARA 695. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the duty to prepare a directors' report see PARA 816. As to the meaning of 'director' see PARA 478.

3 As to a company's financial year see PARA 711.

4 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 6 para 13, 'securities' means shares or debentures: Sch 7 Pt 6 para 13(6). As to the meaning of 'share' see PARA 1042; and as to the meaning of 'debenture' see PARA 1299.

5 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 6 para 13(6), 'voting rights' means rights to vote at general meetings of the company in question, including rights that arise only in certain circumstances: Sch 7 Pt 6 para 13(6). As to company meetings see PARA 629 et seq; and as to voting rights see PARA 653.

6 As to the meaning of 'regulated market' see PARA 334 note 11.

7 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 6 para 13(1). The provisions of Sch 7 Pt 6 para 13 and Sch 7 Pt 6 para 14 (see the text and notes 20-21) continue the implementation of European Parliament and EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) (the 'Takeovers Directive') (see art 10).

8 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 6 para 13(2)(a). For the purposes of Sch 7 Pt 6 para 13(2)(a), a company's capital includes any securities in the company that are not admitted to trading on a regulated market: Sch 7 Pt 6 para 13(3).

9 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 6 para 13(2)(b).

10 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 6 para 13(2)(c). For the purposes of Sch 7 Pt 6 para 13(2)(c), a person has an indirect holding of securities if: (1) they are held on his behalf; or (2) he is able to secure that rights carried by the securities are exercised in accordance with his wishes: Sch 7 Pt 6 para 13(4).

11 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 6 para 13(2)(d).

12 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 6 para 13(2)(e).

13 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 6 para 13(2)(f).

14 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 6 para 13(2)(g).

15 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 6 para 13(2)(h). As to articles of association see PARA 228 et seq.

16 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 6 para 13(2)(i).

17 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 6 para 13, 'takeover bid' has the same meaning as in European Parliament and EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) (the 'Takeovers Directive'): Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 6 para 13(6).

18 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 6 para 13(2)(j). This provision does not apply to an agreement if: (1) disclosure of the agreement would be seriously prejudicial to the company; and (2) the company is not under any other obligation to disclose it: Sch 7 Pt 6 para 13(5).

19 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 6 para 13(2)(k).

20 Ie required by the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 6: see the text and notes 1-19.

21 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 6 para 14.

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C. FORMAL APPROVAL ETC

831. Approval and signing of directors' report.

The directors' report¹ must be approved by the board of directors and signed on behalf of the board by a director or the secretary of the company², and the name of the person who signed must be stated on every published copy³.

If in preparing the directors' report advantage is taken of the small companies exemption⁴, it must contain a statement to that effect in a prominent position above the signature⁵.

If a directors' report is approved that does not comply with the requirements of the Companies Act 2006, every director of the company who knew that it did not comply or was reckless as to whether it complied, and who failed to take reasonable steps to secure compliance with those requirements or, as the case may be, to prevent the report from being approved, commits an offence⁶.

1 As to the duty to prepare a directors' report see PARA 816. As to the meaning of 'director' see PARA 478.

2 Companies Act 2006 s 419(1). As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq. As to the company secretary see PARA 601.

Regulations apply the provisions of s 419 to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq.

The provisions of the Companies Act 2006 s 419 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 See the Companies Act 2006 ss 433, 436; and PARAS 861, 863. See also s 447(3); and PARA 875.

4 As to the small companies exemption see PARA 817.

5 Companies Act 2006 s 419(2) (amended by SI 2008/393).

6 Companies Act 2006 s 419(3). A person guilty of such an offence is liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum: s 419(4). As to the statutory maximum see PARA 1622. As to civil liability for false or misleading statements in reports see PARA 868.

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832. Approval and signing of separate corporate governance statement.

Any separate corporate governance statement¹ must be approved by the board of directors² and signed on behalf of the board by a director or the secretary of the company³.

1 For the purposes of the Companies Act 2006 Pt 15 (ss 380-474), 'corporate governance statement' means the statement required by the Disclosure Rules and Transparency Rules Sourcebook issued by the Financial Services Authority (see DTR 7.2.1-7.2.11, which were added by Annex C of the Disclosure Rules and Transparency Rules Sourcebook (Corporate Governance Rules) Instrument 2008 made by the Financial Services Authority on 26 June 2008 (FSA 2008/32)): Companies Act 2006 s 472A(1), (2) (s 472A added by SI 2009/1581). A 'separate' corporate governance statement means one that is not included in the directors' report: Companies Act 2006 s 472A(3) (as so added). As to the Disclosure Rules and Transparency Rules sourcebook see PARA 435 note 3. As to the Financial Services Authority see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 4 et seq. As to the filing obligations with regard to separate statements see PARAS 874 (filing obligations of unquoted companies), 875 (filing obligations of quoted companies).

The provisions of the Companies Act 2006 ss 419A, 472A apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

2 As to the meaning of 'director' see PARA 478.

3 Companies Act 2006 s 419A (added by SI 2009/1581). As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq. As to the company secretary see PARA 601.

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833. Offences: false statements by directors.

Where an officer of a body corporate¹ (or person purporting to act as such), with intent to deceive members or creditors² of the body corporate about its affairs, publishes or concurs in publishing a written statement or account which to his knowledge is or may be misleading, false or deceptive in a material particular, he is liable on conviction on indictment to imprisonment for a term not exceeding seven years³, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the prescribed sum or both⁴.

Where the affairs of the body corporate are managed by its members, these provisions apply to any statement which a member publishes or concurs in publishing in connection with his functions of management as if he were an officer of the body corporate⁵.

1 The provisions of the Theft Act 1968 s 19 apply to an unincorporated association as they apply to a body corporate: see s 19(1), (3); and PARA 314.

2 For these purposes, a person who has entered into a security for the benefit of a body corporate is to be treated as a creditor of it: see the Theft Act 1968 s 19(2); and PARA 314.

3 See the Theft Act 1968 s 19(1); and PARA 314.

4 Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 28. As from a day to be appointed, the maximum term of imprisonment on summary conviction under these provisions is increased to 12 months: see s 32(1) (prospectively amended by the Criminal Justice Act 2003 s 282). At the date at which this volume states the law, no such day had been appointed. As to the prescribed sum see PARA 1622.

5 See the Theft Act 1968 s 19(3); and PARA 314.

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(vi) Directors' Remuneration Reports: Quoted Companies only

A. IN GENERAL

834. Duty to prepare directors' remuneration report.

The directors¹ of a quoted company² must prepare a directors' remuneration report for each financial year of the company³.

In the case of failure to comply with the requirement to prepare a directors' remuneration report, every person who was a director of the company immediately before the end of the period for filing accounts and reports for the financial year in question, and who failed to take all reasonable steps for securing compliance with that requirement, commits an offence⁴.

1 As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq. As to quoted companies see PARA 696.

3 Companies Act 2006 s 420(1). As to a company's financial year see PARA 711. As to directors' remuneration see PARA 518 et seq. As to disclosure requirements for companies other than quoted companies see PARA 523.

The provisions of the Companies Act 2006 s 420 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 2006 s 420(2). A person guilty of such an offence is liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum: s 420(3). As to the statutory maximum see PARA 1622. As to liability for false or misleading statements in reports see PARA 868.

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B. CONTENTS

(A) IN GENERAL

835. Required contents of directors' remuneration report.

The Secretary of State¹ may make provision by regulations as to:

- 1555 (1) the information that must be contained in a directors' remuneration report²;
- 1556 (2) how information is to be set out in the report; and
- 1557 (3) what is to be the auditable part of the report³.

Regulations have been made⁴ in relation to large and medium-sized companies⁵, and the directors' remuneration report must contain the specified information and comply with any requirement as to how information is to be set out in the report⁶. The information is required to be given only so far as it is contained in the company's books and papers, available to members of the public or the company has the right to obtain it⁷.

It is the duty of any director of a company, and any person who is or has at any time in the preceding five years been a director of the company, to give notice to the company of such matters relating to himself as may be necessary for the purposes of the regulations⁸; and a person who makes default in complying with this duty commits an offence⁹.

1 As to the Secretary of State see PARA 6.

2 As to the duty to prepare a directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq. As to the meaning of 'director' see PARA 478.

3 Companies Act 2006 s 421(1). Without prejudice to the generality of this power, the regulations may make any such provision as was made, immediately before the commencement of Pt 15 (ss 380-474), by the Companies Act 1985 Sch 7A: Companies Act 2006 s 421(2).

The provisions of the Companies Act 2006 s 421 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 As to the regulations made see the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 11, Sch 8; and PARA 836 et seq.

5 As to large and medium-sized companies and groups see PARA 695. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

6 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 11(1), (2), Sch 8 Pt 1 para 1(1). As to the information required see Sch 8 Pts 2, 3; and PARA 836 et seq. Information required to be shown in the report for or in respect of a particular person must be shown in the report in a manner that links the information to that person identified by name: Sch 8 Pt 1 para 1(2).

7 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 4 para 22.

8 Companies Act 2006 s 421(3).

9 Companies Act 2006 s 421(4). Such a person is liable on summary conviction to a fine not exceeding level 3 on the standard scale: see s 421(4). As to the standard scale see PARA 1622.

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(B) INFORMATION NOT SUBJECT TO AUDIT

836. Consideration by the directors of matters relating to directors' remuneration.

If a committee of the company's directors¹ has considered matters relating to the directors' remuneration² for the relevant financial year³, the directors' remuneration report⁴ must:

- 1558 (1) name each director who was a member of the committee at any time when the committee was considering any such matter⁵;
- 1559 (2) name any person⁶ who provided to the committee advice, or services, that materially assisted the committee in its consideration of any such matter⁷;
- 1560 (3) in the case of any person named under head (2) who is not a director of the company, state:
 - 101 322. (a) the nature of any other services that that person has provided to the company during the relevant financial year⁸; and
 - 323. (b) whether that person was appointed by the committee⁹.

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1 As to the meaning of 'director' see PARA 478. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to directors' remuneration see PARA 518 et seq.

Companies admitted to listing must comply with the Combined Code on Corporate Governance (June 2008), published by the Financial Reporting Council (as to which see PARA 699 note 2). While it is expected that companies will comply wholly or substantially with its provisions, it is recognised that non-compliance may be justified in particular circumstances if good governance can be achieved by other means. However, a condition of non-compliance is that the reasons for it should be explained to shareholders, who may wish to discuss the position with the company and whose voting intentions may be influenced as a result. This 'comply or explain' approach has been in operation since the Code's beginnings in 1992: see Preamble para 2. The Code Provisions require the board to establish a remuneration committee of at least three, or in the case of smaller companies two, independent non-executive directors: Code Provision B.2.1.

3 As to a company's financial year see PARA 711.

4 As to the duty to prepare a directors' remuneration report see PARA 834 et seq.

5 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 2(1)(a).

6 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 2(1)(b), 'person' includes (in particular) any director of the company who does not fall within Sch 8 Pt 2 para 2(1)(a) (see head (1) in the text): Sch 8 Pt 2 para 2(2).

7 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 2(1)(b).

8 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 2(1)(c)(i).

9 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 2(1)(c)(ii).

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837. Statement of company's policy on directors' remuneration.

The directors' remuneration report¹ must contain a statement of the company's² policy on directors' remuneration for the following financial year³ and for financial years subsequent to that⁴.

The policy statement must include:

1561 (1) for each director⁵, a detailed summary of any performance conditions to which any entitlement of the director to share options⁶, or under a long term incentive scheme⁷, is subject⁸;

1562 (2) an explanation as to why any such performance conditions were chosen⁹;

1563 (3) a summary of the methods to be used in assessing whether any such performance conditions are met and an explanation as to why those methods were chosen¹⁰;

1564 (4) if any such performance condition involves any comparison with factors external to the company: (a) a summary of the factors to be used in making each

such comparison; and (b) if any of the factors relates to the performance of another company, of two or more other companies or of an index on which the securities of a company or companies are listed, the identity of that company, of each of those companies or of the index¹¹;

1565 (5) a description of, and an explanation for, any significant amendment proposed to be made to the terms and conditions of any entitlement of a director to share options or under a long term incentive scheme¹²; and

1566 (6) if any entitlement of a director to share options, or under a long term incentive scheme, is not subject to performance conditions, an explanation as to why that is the case¹³.

The policy statement must, in respect of each director's terms and conditions relating to remuneration, explain the relative importance of those elements which are, and those which are not, related to performance¹⁴.

The policy statement must summarise, and explain, the company's policy on: (i) the duration of contracts with directors; and (ii) notice periods, and termination payments, under such contracts¹⁵.

1 As to the duty to prepare a directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq. As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to a company's financial year see PARA 711.

4 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 3(1).

5 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 3(2), (3), references to a director are references to any person who serves as a director of the company at any time in the period beginning with the end of the relevant financial year and ending with the date on which the directors' remuneration report is laid before the company in general meeting: Sch 8 Pt 2 para 3(5). As to company meetings see PARA 629 et seq.

6 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8, 'share option' means a right to acquire shares; and 'shares' means shares (whether allotted or not) in the company, or any undertaking which is a group undertaking in relation to the company, and includes a share warrant as defined by the Companies Act 2006 s 779(1) (see PARA 382): Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 4 para 17(1). As to the meaning of 'group undertaking' see PARA 27; and as to the meaning of 'undertaking' see PARA 26 note 2.

7 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8, 'long term incentive scheme' means any agreement or arrangement under which money or other assets may become receivable by a person and which includes one or more qualifying conditions with respect to service or performance that cannot be fulfilled within a single financial year; and for this purpose the following must be disregarded, namely: (1) any bonus the amount of which falls to be determined by reference to service or performance within a single financial year; (2) compensation in respect of loss of office, payments for breach of contract and other termination payments; and (3) retirement benefits: Sch 8 Pt 3 para 11(5), Pt 4 para 17(1).

For the purposes of Sch 8, 'compensation in respect of loss of office' includes compensation received or receivable by a person for:

279 (a) loss of office as director of the company (Sch 8 Pt 4 para 17(2)(a)); or

280 (b) loss, while director of the company or on or in connection with his ceasing to be a director of it, of:

5. (i) any other office in connection with the management of the company's affairs (Sch 8 Pt 4 para 17(2)(b)(i)); or
5
6. (ii) any office as director or otherwise in connection with the management of the affairs of any undertaking that, immediately before the loss, is a subsidiary undertaking of the company or an undertaking of which he is a director by virtue of the company's nomination (direct or indirect) (Sch 8 Pt 4 para 17(2)(b)(ii));
6
 - 281 (c) compensation in consideration for, or in connection with, a person's retirement from office (Sch 8 Pt 4 para 17(2)(c)); and
 - 282 (d) where such a retirement is occasioned by a breach of the person's contract with the company or with an undertaking that, immediately before the breach, is a subsidiary undertaking of the company or an undertaking of which he is a director by virtue of the company's nomination (direct or indirect):
7. (i) payments made by way of damages for the breach (Sch 8 Pt 4 para 17(2)(d)(i)); or
7
8. (ii) payments made by way of settlement or compromise of any claim in respect of the breach (Sch 8 Pt 4 para 17(2)(d)(ii)).
8

As to the meaning of 'subsidiary undertaking' see PARA 26.

References in Sch 8 to compensation include benefits otherwise than in cash; and in relation to such compensation references in Sch 8 to its amounts are to the estimated money value of the benefit: Sch 8 Pt 4 para 17(3).

For the purposes of Sch 8, 'retirement benefits' means relevant benefits within the meaning given by the Income and Corporation Taxes Act 1988 s 612(1) (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 741): Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 4 para 17(1).

8 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 3(2)(a).

9 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 3(2)(b).

10 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 3(2)(c).

11 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 3(2)(d).

12 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 3(2)(e).

13 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 3(2)(f).

14 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 3(3).

15 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 3(4).

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838. Statement of consideration of conditions elsewhere in company and group.

The directors' remuneration report¹ must contain a statement of how pay and employment conditions of employees of the company² and of other undertakings³ within the same group⁴ as the company were taken into account when determining directors' remuneration for the relevant financial year⁵.

1 As to the duty to prepare a directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq. As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to the meaning of 'undertaking' see PARA 26 note 2.

4 As to the meaning of 'group' see PARA 694 note 10.

5 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 4. As to a company's financial year see PARA 711.

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839. Performance graph.

The directors' remuneration report¹ must:

1567 (1) contain a line graph that shows for each of:

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324. (a) a holding of shares² of that class of the company's equity share capital³ whose listing, or admission to dealing, has resulted in the company falling within the definition of 'quoted company'⁴; and

325. (b) a hypothetical holding of shares made up of shares of the same kinds and number as those by reference to which a broad equity market index is calculated⁵,

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1568 a line drawn by joining up points plotted to represent, for each of the financial years⁶ in the relevant period⁷, the total shareholder return⁸ on that holding⁹; and

1569 (2) state the name of the index selected for the purposes of the graph and set out the reasons for selecting that index¹⁰.

1 As to the duty to prepare a directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq. As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'shares' see PARA 837 note 6.

3 As to the meaning of 'company' see PARA 24; and as to the meaning of 'equity share capital' see PARA 1047.

4 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 5(1)(a)(i). As to quoted companies see PARA 696.

5 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 5(1)(a)(ii).

6 As to a company's financial year see PARA 711.

7 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 5(1), (4), 'relevant period' means the five financial years of which the last is the relevant financial year: Sch 8 Pt 2 para 5(2). Where the relevant financial year is the company's second, third or fourth financial year, Sch 8 Pt 2 para 5(2) has effect with the substitution of 'two', 'three' or 'four' (as the case may be) for 'five': Sch 8 Pt 2 para 5(3)(a).

Where the relevant financial year is the company's first financial year, 'relevant period', for the purposes of Sch 8 Pt 2 para 5(1), (4), means the relevant financial year: Sch 8 Pt 2 para 5(3)(b).

8 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 5(1), the 'total shareholder return' for a relevant period (see note 7) on a holding of shares must be calculated using a fair method that: (1) takes as its starting point the percentage change over the period in the market price of the holding; (2) involves making the assumptions specified in Sch 8 Pt 2 para 5(5) as to reinvestment of income, and the assumption specified in Sch 8 Pt 2 para 5(7) as to the funding of liabilities; and (3) makes provision for any replacement of shares in the holding by shares of a different description: Sch 8 Pt 2 para 5(4). The same method must be used for each of the holdings mentioned in Sch 8 Pt 2 para 5(1): Sch 8 Pt 2 para 5(4).

The assumptions as to reinvestment of income are: (a) that any benefit in the form of shares of the same kind as those in the holding is added to the holding at the time the benefit becomes receivable; and (b) that any benefit in cash, and an amount equal to the value of any benefit not in cash and not falling within head (a) above, is applied at the time the benefit becomes receivable in the purchase at their market price of shares of the same kind as those in the holding and that the shares purchased are added to the holding at that time: Sch 8 Pt 2 para 5(5). For the purposes of Sch 8 Pt 2 para 5(5), 'benefit' means any benefit (including, in particular, any dividend) receivable in respect of any shares in the holding by the holder from the company of whose share capital the shares form part: Sch 8 Pt 2 para 5(6).

The assumption as to the funding of liabilities is that, where the holder has a liability to the company of whose capital the shares in the holding form part, shares are sold from the holding: (i) immediately before the time by which the liability is due to be satisfied; and (ii) in such numbers that, at the time of the sale, the market price of the shares sold equals the amount of the liability in respect of the shares in the holding that are not being sold: Sch 8 Pt 2 para 5(7). For the purposes of Sch 8 Pt 2 para 5(7), 'liability' means a liability arising in respect of any shares in the holding or from the exercise of a right attached to any of those shares: Sch 8 Pt 2 para 5(8).

9 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 5(1)(a).

10 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 5(1)(b).

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840. Service contracts.

The directors' remuneration report¹ must contain, in respect of the contract of service or contract for services of each person who has served as a director of the company² at any time during the relevant financial year³, the following information:

1570 (1) the date of the contract, the unexpired term and the details of any notice periods⁴;

1571 (2) any provision for compensation payable upon early termination of the contract⁵; and

1572 (3) such details of other provisions in the contract as are necessary to enable members⁶ of the company to estimate the liability of the company in the event of early termination of the contract⁷.

The directors' remuneration report must contain an explanation for any significant award made to a person⁸ as a past director⁹.

1 As to the duty to prepare a directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq. As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq. As to the contract of service etc generally see **EMPLOYMENT** vol 39 (2009) PARA 2.

3 As to a company's financial year see PARA 711.

4 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 6(1)(a).

5 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 6(1)(b).

6 As to the meaning of 'member' see PARA 321.

7 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 6(1)(c).

8 In the circumstances described in the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 15: see PARA 846.

9 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 6(2).

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(C) INFORMATION SUBJECT TO AUDIT

841. Amount of each director's emoluments and compensation in the relevant financial year.

The directors' remuneration report¹ must for the relevant financial year² show, for each person who has served as a director of the company³ at any time during that year, each of the following amounts⁴:

1573 (1) the total amount of salary and fees paid to or receivable by the person in respect of qualifying services⁵;

1574 (2) the total amount of bonuses so paid or receivable⁶;

1575 (3) the total amount of sums paid by way of expenses allowance that are: (a) chargeable to United Kingdom⁷ income tax (or would be if the person were an individual); and (b) paid to or receivable by the person in respect of qualifying services⁸;

- 1576 (4) the total amount of:
 105
 326. (a) any compensation for loss of office paid to or receivable by the person; and
 327. (b) any other payments paid to or receivable by the person in connection with
 the termination of qualifying services⁹;
 106
 1577 (5) the total estimated value of certain benefits¹⁰ received by the person
 otherwise than in cash that:
 107
 328. (a) are emoluments¹¹ of the person; and
 329. (b) are received by the person in respect of qualifying services¹²; and
 108
 1578 (6) the amount that is the total of the sums mentioned in heads (1) to (5)
 above¹³.

The directors' remuneration report must also show, for each person who has served as a director of the company at any time during the relevant financial year, the amount that for the financial year preceding the relevant financial year is the total of the sums mentioned in heads (1) to (5) above¹⁴.

The above information¹⁵ must be presented in tabular form¹⁶.

The directors' remuneration report must also state the nature of any element of a remuneration package which is not cash¹⁷.

1 As to the duty to prepare a directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq. As to the meaning of 'director' see PARA 478.

2 As to a company's financial year see PARA 711.

3 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

4 The following applies with respect to the amounts to be shown under the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8: Sch 8 Pt 4 para 19(1).

The amount in each case includes all relevant sums paid by or receivable from:

- 283 (1) the company; and
 284 (2) the company's subsidiary undertakings; and
 285 (3) any other person,

except sums to be accounted for to the company or any of its subsidiary undertakings or any other undertaking of which any person has been a director while director of the company, by virtue of the Companies Act 2006 s 219 (payment in connection with share transfer: requirement of members' approval: see PARA 581), to past or present members of the company or any of its subsidiaries or any class of those members: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 4 para 19(2). As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2. As to the meaning of 'member' see PARA 321.

Reference to amounts paid to or receivable by a person include amounts paid to or receivable by a person connected with him or a body corporate controlled by him (but not so as to require an amount to be counted twice): Sch 8 Pt 4 para 19(3). References in Sch 8 to a person being 'connected' with a director, and to a director 'controlling' a body corporate, are to be construed in accordance with the Companies Act 2006 ss 252-255 (see PARA 481): Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 4 para 17(4).

The amounts to be shown for any financial year under Sch 8 Pt 3 are the sums receivable in respect of that year (whenever paid) or, in the case of sums not receivable in respect of a period, the sums paid during that year: Sch 8 Pt 4 para 20(1). However, where:

- 286 (a) any sums are not shown in the directors' remuneration report for the relevant financial year on the ground that the person receiving them is liable to account for them as mentioned in Sch 8 Pt 4 para 19(2), but the liability is thereafter wholly or partly released or is not enforced within a period of two years; or
- 287 (b) any sums paid by way of expenses allowance are charged to United Kingdom income tax after the end of the relevant financial year or, in the case of any such sums paid otherwise than to an individual, it does not become clear until the end of the relevant financial year that those sums would be charged to such tax were the person an individual,

those sums must, to the extent to which the liability is released or not enforced or they are charged as mentioned above (as the case may be), be shown in the first directors' remuneration report in which it is practicable to show them and must be distinguished from the amounts to be shown apart from this provision: Sch 8 Pt 4 para 20(2). As to the meaning of 'United Kingdom' see PARA 1 note 5.

Where it is necessary to do so for the purpose of making any distinction required by the provisions of Sch 8 in an amount to be shown in compliance with Sch 8 Pt 4, the directors may apportion any payments between the matters in respect of which these have been paid or are receivable in such manner as they think appropriate: Sch 8 Pt 4 para 21.

5 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 7(1)(a). 'Qualifying services', in relation to any person, means his services as a director of the company, and his services at any time while he is a director of the company: (1) as a director of an undertaking that is a subsidiary undertaking of the company at that time; (2) as a director of any other undertaking of which he is a director by virtue of the company's nomination (direct or indirect); or (3) otherwise in connection with the management of the affairs of the company or any such subsidiary undertaking or any such other undertaking: Sch 8 Pt 4 para 17(1).

6 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 7(1)(b).

7 As to the meaning of 'United Kingdom' see PARA 1 note 5.

8 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 7(1)(c).

9 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 7(1)(d).

10 The benefits that do not fall within any of the provisions of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 7(1)(a)-(d) (see heads (1) to (4) in the text) or Sch 8 Pt 3 paras 8-12 (see PARAS 842-843).

11 'Emoluments' of a person includes salary, fees and bonuses, sums paid by way of expenses allowance (so far as they are chargeable to United Kingdom income tax or would be if the person were an individual); but does not include any of the following, namely: (1) the value of any share options granted to him or the amount of any gains made on the exercise of any such options; (2) any company contributions paid, or treated as paid, in respect of him under any pension scheme or any benefits to which he is entitled under any such scheme; or (3) any money or other assets paid to or received or receivable by him under any long term incentive scheme: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 4 para 17(1). 'Value', in relation to shares received or receivable on any day by a person who is or has been a director of the company, means the market price of the shares on that day; and 'amount', in relation to a gain made on the exercise of a share option, means the difference between the market price of the shares on the day on which the option was exercised and the price actually paid for the shares: Sch 8 Pt 4 para 17(1). As to the meanings of 'share option' and 'shares' see PARA 837 note 6. 'Company contributions', in relation to a pension scheme and a person, means any payments (including insurance premiums) made, or treated as made, to the scheme in respect of the person by anyone other than the person; and 'pension scheme' means a retirement benefits scheme within the meaning given by the Income and Corporation Taxes Act 1988 s 611 (repealed with savings) (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 741): Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 4 para 17(1). As to the meanings of 'retirement benefits' and 'long term incentive scheme' see PARA 837 note 7.

For the purposes of Sch 8 emoluments paid or receivable or share options granted in respect of a person's accepting office as a director are to be treated as emoluments paid or receivable or share options granted in respect of his services as a director: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 4 para 18(1).

12 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 7(1)(e).

13 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 7(1)(f).

14 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 7(2).

15 le the information required by the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 7(1), (2): see the text and notes 1-14.

16 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 7(4).

17 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 7(3).

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842. Share options.

The directors' remuneration report¹ must contain, in respect of each person who has served as a director of the company² at any time in the relevant financial year³, the following information⁴:

- 1579 (1) the number of shares⁵ that are subject to a share option⁶;
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330. (a) at the beginning of the relevant financial year or, if later, on the date of the appointment of the person as a director of the company; and
331. (b) at the end of the relevant financial year or, if earlier, on the cessation of the person's appointment as a director of the company,
- 110
- 1580 in each case differentiating between share options having different terms and conditions⁷;
- 1581 (2) information identifying those share options that have been awarded in the relevant financial year, those that have been exercised in that year, those that in that year have expired unexercised and those whose terms and conditions have been varied in that year⁸;
- 1582 (3) for each share option that is unexpired at any time in the relevant financial year:
- 111
332. (a) the price paid, if any, for its award⁹;
333. (b) the exercise price¹⁰;
334. (c) the date from which the option may be exercised¹¹; and
335. (d) the date on which the option expires¹²;
- 112
- 1583 (4) a description of any variation made in the relevant financial year in the terms and conditions of a share option¹³;
- 1584 (5) a summary of any performance criteria upon which the award or exercise of a share option is conditional, including a description of any variation made in such performance criteria during the relevant financial year¹⁴;

- 1585 (6) for each share option that has been exercised during the relevant financial year, the market price of the shares, in relation to which it is exercised, at the time of exercise¹⁵; and
- 1586 (7) for each share option that is unexpired at the end of the relevant financial year:
- 113
336. (a) the market price at the end of that year; and
337. (b) the highest and lowest market prices during that year,
- 114
- 1587 of each share that is subject to the option¹⁶.

The information specified in heads (1) to (3) above must be presented in tabular form in the report¹⁷.

However, if, in the opinion of the directors of the company, disclosure in accordance with the above provisions¹⁸ would result in a disclosure of excessive length then:

- 1588 (i) information disclosed for a person under head (1) above need not differentiate between share options having different terms and conditions¹⁹;
- 1589 (ii) for the purposes of disclosure in respect of a person under heads (3)(a), (3)(b) and (7), share options may be aggregated and (instead of disclosing prices for each share option) disclosure may be made of weighted average prices of aggregations of share options²⁰;
- 1590 (iii) for the purposes of disclosure in respect of a person under heads (3)(c) and (3)(d), share options may be aggregated and (instead of disclosing dates for each share option) disclosure may be made of ranges of dates for aggregation of share options²¹.

This does not apply (and accordingly, full disclosure must be made²²) in respect of share options that during the relevant financial year have been awarded or exercised or had their terms and conditions varied²³.

1 As to the duty to prepare a directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq. As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to a company's financial year see PARA 711.

4 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 8(1).

5 As to the meaning of 'shares' see PARA 837 note 6.

6 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 9, 'share option', in relation to a person, means a share option granted in respect of qualifying services of the person: Sch 8 Pt 3 para 8(4). As to the meaning of 'share option' see PARA 837 note 6. As to the meaning of 'qualifying services' see PARA 841 note 5.

7 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 9(a).

8 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 9(b).

9 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 9(c)(i).

10 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 9(c)(ii).

11 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 9(c)(iii).

12 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 9(c)(iv).

13 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 9(d).

14 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 9(e).

15 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 9(f).

16 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 9(g).

17 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 8(3).

18 In the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 paras 8, 9: see the text and notes 1-17.

19 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 paras 8(2), 10(1)(a).

20 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 paras 8(2), 10(1)(b). The provisions of Sch 8 Pt 3 para 10(1)(b), (c) (see heads (ii), (iii) in the text) do not permit the aggregation of share options in respect of shares whose market price at the end of the relevant financial year is below the option exercise price with share options in respect of shares whose market price at the end of the relevant financial year is equal to, or exceeds, the option exercise price: Sch 8 Pt 3 para 10(2).

21 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 paras 8(2), 10(1)(c). See note 20.

22 In accordance with the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 paras 8, 9: see the text and notes 1-17.

23 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 10(3).

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843. Long term incentive schemes.

The directors' remuneration report¹ must contain, in respect of each person who has served as a director of the company² at any time in the relevant financial year³, the following information⁴:

- 1591 (1) details of the scheme interests⁵ that the person has at the beginning of the relevant financial year or if later on the date of the appointment of the person as a director of the company⁶;

- 1592 (2) details of the scheme interests awarded to the person during the relevant financial year, including, if shares⁷ may become receivable in respect of the interest, the following: (a) the number of those shares; (b) the market price of each of those shares when the scheme interest was awarded; and (c) details of qualifying conditions that are conditions with respect to performance⁸;
- 1593 (3) details of the scheme interests that the person has at the end of the relevant financial year or if earlier on the cessation of the person's appointment as a director of the company⁹;
- 1594 (4) for each scheme interest within heads (1) to (3) above:
- 115 338. (a) the end of the period over which the qualifying conditions for that interest have to be fulfilled (or if there are different periods for different conditions, the end of whichever of those periods ends last)¹⁰; and
339. (b) a description of any variation made in the terms and conditions of the scheme interests during the relevant financial year¹¹; and
- 116 1595 (5) for each scheme interest that has vested¹² in the relevant financial year:
- 117 340. (a) the relevant details of any shares that have become receivable in respect of a scheme interest, namely: (i) the number of those shares; (ii) the date on which the scheme interest was awarded; (iii) the market price of each of those shares when the scheme interest was awarded; (iv) the market price of each of those shares when the scheme interest vested; and (v) details of qualifying conditions that were conditions with respect to performance¹³;
341. (b) the amount of any money¹⁴; and
342. (c) the value of any other assets¹⁵,
- 118 1596 that have become receivable in respect of the interest¹⁶.

This information must be presented in tabular form in the report¹⁷.

1 As to the duty to prepare a directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq. As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to a company's financial year see PARA 711.

4 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 11(1). This provision does not require the report to contain share option details that are contained in the report in compliance with Sch 8 Pt 3 paras 8-10 (see PARA 842): Sch 8 Pt 3 para 11(2).

5 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 12, 'scheme interest', in relation to a person, means an interest under a long term incentive scheme that is an interest in respect of which assets may become receivable under the scheme in respect of qualifying services of the person: Sch 8 Pt 3 para 11(4)(a). As to the meaning of 'long term incentive scheme' see PARA 837 note 7. As to the meaning of 'qualifying services' see PARA 841 note 5.

6 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 12(1)(a).

7 As to the meaning of 'shares' see PARA 837 note 6.

8 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 12(1)(b), (2).

9 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 12(1)(c).

10 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 12(1)(d)(i).

11 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 12(1)(d)(ii).

12 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 12, a scheme interest 'vests' at the earliest time when: (1) it has been ascertained that the qualifying conditions have been fulfilled; and (2) the nature and quantity of the assets receivable under the scheme in respect of the interest have been ascertained: Sch 8 Pt 3 para 11(4)(b).

13 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 12(1)(e)(i), (3).

14 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 12(1)(e)(ii).

15 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 12(1)(e)(iii).

16 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 12(1)(e).

17 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 11(3).

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844. Pensions.

The directors' remuneration report¹ must, for each person who has served as a director of the company² at any time during the relevant financial year³, contain the following information in respect of pensions⁴:

- 1597 (1) where the person has rights under a pension scheme⁵ that is a defined benefit scheme⁶ in relation to the person and any of those rights are rights to which he has become entitled in respect of qualifying services⁷ of his:
- 119
343. (a) details of any changes during the relevant financial year in the person's accrued benefits under the scheme, and of the person's accrued benefits under the scheme as at the end of that year⁸;
344. (b) the transfer value⁹ of the person's accrued benefits under the scheme at the end of the relevant financial year¹⁰;
345. (c) the transfer value of the person's accrued benefits under the scheme that in compliance with head (b) above was contained in the directors' remuneration report for the previous financial year or, if there was no such report or no such value was contained in that report, the transfer value¹¹ of the person's accrued benefits under the scheme at the beginning of the relevant financial year¹²;
346. (d) the amount obtained by subtracting the transfer value of the person's accrued benefits under the scheme that is required to be contained in the report by head (c) above from the transfer value of those benefits that is required to be contained in the report by head (b) above, and then subtracting from the result of

that calculation the amount of any contributions made to the scheme by the person in the relevant financial year¹³;

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1598 (2) where:

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347. (a) the person has rights under a pension scheme that is a money purchase scheme¹⁴ in relation to the person; and

348. (b) any of those rights are rights to which he has become entitled in respect of qualifying services of his,

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1599 details of any contribution to the scheme in respect of the person that is paid or payable by the company for the relevant financial year or paid by the company in that year for another financial year¹⁵.

1 As to the duty to prepare a directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq. As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to a company's financial year see PARA 711.

4 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 13(1).

5 As to the meaning of 'pension scheme' see PARA 841 note 11.

6 'Defined benefit scheme', in relation to a person, means a pension scheme which is not a money purchase scheme (see note 14) in relation to the person: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 4 para 17(1).

7 As to the meaning of 'qualifying services' see PARA 841 note 5.

8 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 13(2)(a).

9 Is calculated in accordance with the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, regs 7-7E: see the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 13(2)(b) (substituted by SI 2009/1581). As to transfer values see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 951 et seq.

10 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 13(2)(b) (as substituted: see note 9).

11 Is calculated in such a manner as is mentioned in the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 13(2)(b) (see note 9): Sch 8 Pt 3 para 13(2)(c).

12 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 13(2)(c).

13 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 13(2)(d).

14 'Money purchase scheme', in relation to a person, means a pension scheme under which all of the benefits that may become payable to or in respect of the person are money purchase benefits in relation to the person; and 'money purchase benefits', in relation to a person, means retirement benefits the rate or amount of which is calculated by reference to payments made, or treated as made, by the person or by any other person in respect of that person and which are not average salary benefits: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 4 para 17(1). As to the meaning of 'retirement benefits' see PARA 837 note 7.

Where a pension scheme provides for any benefits that may become payable to or in respect of a person to be whichever are the greater of:

- 288 (1) such benefits determined by or under the scheme as are money purchase benefits in relation to the person; and
- 289 (2) such retirement benefits determined by or under the scheme to be payable to or in respect of the person as are not money purchase benefits in relation to the person,

the company may assume for the purposes of Sch 8 that those benefits will be money purchase benefits in relation to the person, or not, according to whichever appears more likely at the end of the relevant financial year: Sch 8 Pt 4 para 18(2).

In determining for the purposes of Sch 8 whether a pension scheme is a money purchase scheme in relation to a person or a defined benefit scheme in relation to a person, any death in service benefits provided for by the scheme are to be disregarded: Sch 8 Pt 4 para 18(3).

15 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 13(3).

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845. Excess retirement benefits of directors and past directors.

The directors' remuneration report¹ must show in respect of each person who has served as a director of the company²:

- 1600 (1) at any time during the relevant financial year³; or
- 1601 (2) at any time before the beginning of that year,

the amount of so much of retirement benefits⁴ paid to or receivable by the person under pension schemes⁵ as is in excess of the retirement benefits to which he was entitled on the date on which the benefits first became payable or 31 March 1997, whichever is the later⁶.

However, amounts paid or receivable under a pension scheme need not be included in an amount required to be shown under the above provisions if: (a) the funding of the scheme was such that the amounts were or, as the case may be, could have been paid without recourse to additional contributions; and (b) amounts were paid to or receivable by all pensioner members⁷ of the scheme on the same basis⁸.

1 As to the duty to prepare a directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq. As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to a company's financial year see PARA 711.

4 For the purposes of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 14(1), 'retirement benefits' means retirement benefits to which the person became entitled in respect of qualifying services of his: Sch 8 Pt 3 para 14(2). As to the meaning of 'retirement benefits' see PARA 837 note 7. As to the meaning of 'qualifying services' see PARA 841 note 5.

In Sch 8 Pt 3 para 14, references to retirement benefits include benefits otherwise than in cash; and, in relation to so much of retirement benefits as consists of a benefit otherwise than in cash, references to their amount are to the estimated money value of the benefit: Sch 8 Pt 3 para 14(4). The nature of any such benefit must also be shown in the report: Sch 8 Pt 3 para 14(4).

5 As to the meaning of 'pension scheme' see PARA 841 note 10.

6 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 14(1).

7 For these purposes, 'pensioner member', in relation to a pension scheme, means any person who is entitled to the present payment of retirement benefits under the scheme: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 14(3).

8 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 14(3).

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846. Compensation for past directors.

The directors' remuneration report¹ must contain details of any significant award made in the relevant financial year² to any person who was not a director of the company³ at the time the award was made but had previously been a director of the company, including (in particular) compensation in respect of loss of office⁴ and pensions but excluding any sums which have already been shown⁵ in the report⁶.

1 As to the duty to prepare a directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq. As to the meaning of 'director' see PARA 478.

2 As to a company's financial year see PARA 711.

3 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

4 As to the meaning of 'compensation in respect of loss of office' see PARA 837 note 7.

5 I.e. under the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 7(1)(d): see PARA 841.

6 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 15.

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847. Sums paid to third parties in respect of a director's services.

The directors' remuneration report¹ must show, in respect of each person who served as a director of the company² at any time during the relevant financial year³, the aggregate amount of any consideration⁴ paid to or receivable by third parties⁵ for making available the services of the person:

- 1602 (1) as a director of the company⁶; or
- 1603 (2) while director of the company:
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- 349. (a) as director of any of its subsidiary undertakings⁷; or
- 350. (b) as director of any other undertaking of which he was (while director of the company) a director by virtue of the company's nomination (direct or indirect)⁸; or
- 351. (c) otherwise in connection with the management of the affairs of the company or any such other undertaking⁹.
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1 As to the duty to prepare a directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq. As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to a company's financial year see PARA 711.

4 The reference to consideration includes benefits otherwise than in cash; and in relation to such consideration the reference to its amount is to the estimated money value of the benefit: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 16(2). The nature of any such consideration must be shown in the report: Sch 8 Pt 3 para 16(2).

5 The reference to third parties is to persons other than: (1) the person himself or a person connected with him or a body corporate controlled by him; and (2) the company or any such other undertaking as is mentioned in head (b) in the text: Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 16(3). As to the meanings of a person being 'connected' with a director, and a director 'controlling' a body corporate, see PARA 841 note 4. As to the meaning of 'undertaking' see PARA 26 note 2.

6 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 16(1)(a).

7 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 16(1)(b)(i). As to the meaning of 'subsidiary undertaking' see PARA 26.

8 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 16(1)(b)(ii).

9 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 para 16(1)(b)(iii).

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C. FORMAL APPROVAL ETC

848. Approval and signing of directors' remuneration report.

The directors' remuneration report¹ must be approved by the board of directors and signed on behalf of the board by a director or the secretary of the company², and the name of the person who signed must be stated on every published copy³.

If a directors' remuneration report is approved that does not comply with the requirements of the Companies Act 2006, every director of the company who knew that it did not comply or was reckless as to whether it complied, and who failed to take reasonable steps to secure compliance with those requirements or, as the case may be, to prevent the report from being approved, commits an offence⁴.

1 As to the duty to prepare a directors' remuneration report see PARA 834; and as to directors' remuneration see PARA 518 et seq. As to the meaning of 'director' see PARA 478.

2 Companies Act 2006 s 422(1). As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq. As to the company secretary see PARA 601.

The provisions of the Companies Act 2006 s 422 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 See the Companies Act 2006 ss 433, 436; and PARAS 861, 863. See also s 447(3); and PARA 875.

4 Companies Act 2006 s 422(2). A person guilty of such an offence is liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum: s 422(3). As to the statutory maximum see PARA 1622. As to civil liability for false or misleading statements in reports see PARA 868.

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849. Members' approval of directors' remuneration report.

A quoted company¹ must, prior to the accounts meeting², give to the members³ of the company entitled to be sent notice of the meeting⁴ notice of the intention to move at the meeting, as an ordinary resolution⁵, a resolution approving the directors' remuneration report⁶ for the financial year⁷. The notice may be given in any manner permitted for the service on the member of notice of the meeting⁸.

The business that may be dealt with at the accounts meeting includes the resolution⁹, and this is so notwithstanding any default in complying with the above requirements¹⁰. The existing directors¹¹ must ensure that the resolution is put to the vote of the meeting¹².

No entitlement of a person to remuneration is made conditional on the resolution being passed by reason only of these provisions¹³.

In the event of default in complying with the above provisions, an offence is committed by every officer of the company who is in default¹⁴. If the resolution is not put to the vote of the accounts meeting¹⁵, an offence is committed by each existing director¹⁶; although it is a defence for a person charged with such an offence to prove that he took all reasonable steps for securing that the resolution was put to the vote of the meeting¹⁷.

1 As to quoted companies see PARA 696. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 For these purposes, 'accounts meeting' means the general meeting of the company before which the company's annual accounts for the financial year are to be laid: Companies Act 2006 s 439(6). As to the meaning of 'annual accounts' see PARA 715. As to company meetings see PARA 629 et seq. As to a company's financial year see PARA 711.

The provisions of the Companies Act 2006 ss 439, 440 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 As to the meaning of 'member' see PARA 321.

4 As to entitlement to notice of company meetings see PARA 635.

5 As to ordinary resolutions see PARA 613.

6 As to the duty to prepare a directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq. As to the meaning of 'director' see PARA 478.

7 Companies Act 2006 s 439(1).

8 Companies Act 2006 s 439(2).

9 Companies Act 2006 s 439(3).

10 Companies Act 2006 s 493(3). The text refers to the requirements of s 439(1) or (2): see the text and notes 1-8.

11 For these purposes, 'existing director' means a person who is a director of the company immediately before the meeting: Companies Act 2006 s 439(6).

12 Companies Act 2006 s 439(4).

13 Companies Act 2006 s 439(5).

14 Companies Act 2006 s 440(1). As to the meaning of 'officer' see PARA 112 note 1; and as to the liability of an officer in default see PARA 315. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 440(4). As to the standard scale see PARA 1622.

15 For these purposes, 'accounts meeting' means the general meeting of the company before which the company's annual accounts for the financial year are to be laid: Companies Act 2006 s 440(5).

16 Companies Act 2006 s 440(2). For these purposes, 'existing director' means a person who is a director of the company immediately before the meeting: s 440(5). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 440(4).

17 Companies Act 2006 s 440(3).

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(vii) Approval and Publication of Accounts and Reports

A. CIRCULATION OF COPIES OF ACCOUNTS AND REPORTS

850. Duty to circulate copies of accounts and reports.

Every company¹ must send a copy of its annual accounts and reports² for each financial year³ to: (1) every member⁴ of the company; (2) every holder of the company's debentures⁵; and (3) every person who is entitled to receive notice of general meetings⁶.

Copies need not be sent to a person for whom the company does not have a current address⁷; and, in the case of a company not having a share capital⁸, copies need not be sent to anyone who is not entitled to receive notices of general meetings of the company⁹.

Where copies are sent out over a period of days, references in the Companies Acts¹⁰ to the day on which copies are sent out are to be read as references to the last day of that period¹¹.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'annual accounts and reports' see PARA 715.

3 As to a company's financial year see PARA 711.

4 As to the meaning of 'member' see PARA 321.

5 As to the meaning of 'debenture' see PARA 1299.

6 Companies Act 2006 s 423(1). As to entitlement to notice of company meetings see PARA 635; and as to company meetings generally see PARA 629 et seq. As to the enjoyment and exercise by a nominated person of members' rights conferred under s 423 see s 145; and PARA 374. As to the penalty for default in complying with these provisions see PARA 852. Section 423 has effect subject to s 426 (option to provide summary financial statement: see PARA 853 et seq): s 423(6). Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq.

For the purposes of sending copies of the documents required to be sent to any person by s 423(1), a participating issuer may determine that persons entitled to receive such notices, or copies of such documents (as the case may be), are those persons entered on the relevant register of securities at the close of business on a day determined by him: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 41(3) (amended by SI 2009/1889). The day so determined by a participating issuer may not be more than 21 days before the day that the notices of the meeting are sent: Uncertificated Securities Regulations 2001, SI 2001/3755, reg 41(4). These provisions are without prejudice to the protection afforded by Sch 4 para 5(3) (see PARA 340) to a participating issuer which is a company and by Sch 4 paras 13(4), 15(3) (see PARA 425) to a participating issuer: reg 41(5). As to the meaning of 'participating issuer' see PARA 421 text and note 9. As to the meaning of 'register of securities' see PARA 421. As to the meaning of 'company' for these purposes see PARA 340 note 1. As to the Uncertificated Securities Regulations 2001, SI 2001/3755, generally see PARA 420.

The provisions of the Companies Act 2006 s 423 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

7 Companies Act 2006 s 423(2). A company has a 'current address' for a person if: (1) an address has been notified to the company by the person as one at which documents may be sent to him; and (2) the company has no reason to believe that documents sent to him at that address will not reach him: s 423(3).

8 I.e. a company limited by guarantee or an unlimited company without a share capital. As to the meanings of 'company limited by guarantee' and 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital', 'share' and 'share capital' see PARA 1042.

9 Companies Act 2006 s 423(4).

10 As to the meaning of 'Companies Acts' see PARA 16.

11 Companies Act 2006 s 423(5).

and Reports/A. CIRCULATION OF COPIES OF ACCOUNTS AND REPORTS/851. Time allowed for sending out copies of annual accounts and reports.

851. Time allowed for sending out copies of annual accounts and reports.

The time allowed for sending out copies of the company's annual accounts and reports¹ is as follows².

A private company³ must comply with the statutory requirements⁴ not later than the end of the period for filing accounts and reports⁵ or, if earlier, the date on which it actually delivers its accounts and reports to the registrar⁶.

A public company⁷ must comply with the statutory requirements⁸ at least 21 days before the date of the relevant accounts meeting⁹. If in the case of a public company copies are sent out later than is so required, they are, despite that, to be deemed to have been duly sent if it is so agreed by all the members¹⁰ entitled to attend and vote at the relevant accounts meeting¹¹.

Whether the time allowed is that for a private company or a public company is determined by reference to the company's status immediately before the end of the accounting reference period¹² by reference to which the financial year¹³ for the accounts in question was determined¹⁴.

1 As to the meaning of 'annual accounts and reports' see PARA 715. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 Companies Act 2006 s 424(1). As to the penalty for default in complying with these provisions see PARA 852.

Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq. The provisions of the Companies Act 2006 s 424 apply also to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 As to the meaning of 'private company' see PARA 102.

4 Ie the requirements of the Companies Act 2006 s 423: see PARA 850.

5 As to the period for filing accounts and reports see PARA 870.

6 Companies Act 2006 s 424(2).

7 As to the meaning of 'public company' see PARA 102.

8 Ie the requirements of the Companies Act 2006 s 423: see PARA 850.

9 Companies Act 2006 s 424(3). For the purposes of s 424, the 'relevant accounts meeting' means the accounts meeting of the company at which the accounts and reports in question are to be laid: s 424(6). As to the meaning of 'accounts meeting' see PARA 865 note 4.

10 As to the meaning of 'member' see PARA 321.

11 Companies Act 2006 s 424(4). As to entitlement to attend and vote see PARA 652.

12 As to the accounting reference period see PARA 712.

13 As to a company's financial year see PARA 711.

14 Companies Act 2006 s 424(5).

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852. Offences.

If default is made in complying with the provisions requiring the circulation of copies of annual accounts and reports¹, an offence is committed by the company², and by every officer of the company who is in default³.

1 le the provisions of the Companies Act 2006 s 423 (see PARA 850) or s 424 (see PARA 851). As to the meaning of 'annual accounts and reports' see PARA 715.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 Companies Act 2006 s 425(1). As to the meaning of 'officer' see PARA 112 note 1; and as to the liability of an officer in default see PARA 315. A person guilty of such an offence is liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum: s 425(2). As to the statutory maximum see PARA 1622.

Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq. The provisions of the Companies Act 2006 s 425 apply also to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

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B. SUMMARY FINANCIAL STATEMENTS

(A) OPTION TO PROVIDE SUMMARY FINANCIAL STATEMENTS

853. Provision of summary financial statement to shareholders.

A company¹ may, in such cases as may be specified by regulations made by the Secretary of State², and provided any conditions so specified are complied with, provide a summary financial statement instead of copies of the annual accounts and reports³ required⁴ to be sent out⁵. Copies of those accounts and reports must, however, be sent to any person entitled to be sent them who wishes to receive them⁶; and the Secretary of State may make provision by regulations as to the manner in which it is to be ascertained, whether before or after a person becomes entitled to be sent a copy of those accounts and reports, whether he wishes to receive them⁷. Regulations have been made⁸, permitting a summary financial statement to be sent instead of full accounts and reports⁹ to certain persons¹⁰.

A summary financial statement must comply with the statutory requirements¹¹ as to its form and contents¹².

If default is made in complying with these provisions¹³, or any provision of regulations made under them, an offence is committed by the company, and by every officer of the company who is in default¹⁴.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 Regulations under the Companies Act 2006 s 426 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 426(6), 1289. As to the Secretary of State see PARA 6.

The provisions of the Companies Act 2006 ss 426, 429 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10, but with the modifications to the Companies Act 2006 s 426 as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 As to the meaning of 'annual accounts and reports' see PARA 715.

4 Ie in accordance with the Companies Act 2006 s 423: see PARA 850.

5 Companies Act 2006 s 426(1). As to liability for false or misleading statements in summary financial statements see PARA 868.

Section 426 applies to copies of accounts and reports required to be sent out by virtue of s 146 (see PARA 375) to a person nominated to enjoy information rights as it applies to copies of accounts and reports required to be sent out in accordance with s 423 (see PARA 850) to a member of the company: s 426(5). As to the meaning of 'member' see PARA 321.

The statutory requirements in connection with publication of statutory and non-statutory accounts (see ss 434, 435; and PARA 862) do not apply in relation to the provision by a company of a summary financial statement: see ss 434(6), 435(7).

6 Companies Act 2006 s 426(2).

7 Companies Act 2006 s 426(3).

8 See the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374; and PARA 854 et seq.

9 'Full accounts and reports' means, in relation to a company, the annual accounts and reports, copies of which the company is required to send to the persons specified in the Companies Act 2006 s 423(1) (see PARA 850); and 'full' in relation to any balance sheet, profit and loss account, group accounts, directors' report or directors' remuneration report means any such document contained in the full accounts and reports: Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 2. As to the meanings of 'balance sheet' and 'profit and loss account' see PARA 715. As to group accounts see PARA 775 et seq. As to the directors' report see PARA 816 et seq; and as to the directors' remuneration report see PARA 834 et seq.

10 A summary financial statement may be sent to: (1) a person specified in the Companies Act 2006 s 423(1) (see PARA 850); and (2) a person nominated to enjoy information rights under s 146 (see PARA 375): Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 3.

Regulations 5-8 (see PARAS 855-857) apply to a person who is entitled, whether conditionally or unconditionally, to become a person specified in the Companies Act 2006 s 423(1) in relation to the company, but who has not yet become such a person, as they apply to a person specified in the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 3: reg 8(2).

11 Ie the requirements of the Companies Act 2006 s 427 (unquoted companies) or s 428 (quoted companies): see PARA 858.

12 Companies Act 2006 s 426(4).

13 Ie any provision of s 426, s 427 or s 428: see the text and notes 1-7, 10-11; and PARA 858.

14 Companies Act 2006 s 429(1). As to the meaning of 'officer' see PARA 112 note 1; and as to the liability of an officer in default see PARA 315. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 429(2). As to the standard scale see PARA 1622.

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854. Cases in which sending of summary financial statement prohibited.

In the following cases a company¹ may not send a summary financial statement² to a person³:

- 1604 (1) where it is prohibited from doing so by any relevant provision of its constitution⁴; and
- 1605 (2) in the case of a person who is the holder of a debenture⁵, where it is prohibited from doing so by a relevant provision in any instrument constituting or otherwise governing any of the company's debentures of which that person is a holder⁶.

In the following cases a company may not send a summary financial statement to a person⁷ in relation to any financial year⁸:

- 1606 (a) where, in relation to that year, no auditor's report⁹ has been made¹⁰ in respect of the annual accounts¹¹ of the company, or the directors' report¹², or the auditable part of the directors' remuneration report¹³, where relevant¹⁴;
- 1607 (b) where the period for filing accounts and reports for that year¹⁵ has expired¹⁶;
- 1608 (c) where the summary financial statement in respect of that financial year has not been approved by the board of directors and the original statement has not been signed on behalf of the board by a director of the company¹⁷.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the power to provide a summary financial statement see PARA 853.

3 I.e. a person specified in the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 3: see PARA 853 note 10.

4 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 4(1)(a). For the purposes of reg 4(1), any provision (however expressed) which requires copies of the full accounts and reports to be sent to a person specified in reg 3 (see PARA 853 note 10), or which forbids the sending of summary financial statements under the Companies Act 2006 s 426 (see PARA 853), is a relevant provision: Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 4(3). As to the meaning of 'full accounts and reports' see PARA 853 note 9. As to a company's constitution see PARA 227 et seq.

5 As to the meaning of 'debenture' see PARA 1622.

6 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 4(1)(b).

7 I.e. a person specified in the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 3: see PARA 853 note 10.

8 As to a company's financial year see PARA 711.

9 As to the auditor's report see PARA 924 et seq.

10 Ie under the Companies Act 2006 s 495 (auditor's report on company's annual accounts: see PARA 924), s 496 (auditor's report on directors' report: see PARA 925) and s 497 (auditor's report on auditable part of directors' remuneration report: see PARA 926) respectively.

11 As to the meaning of 'annual accounts' see PARA 715.

12 As to the directors' report see PARA 816 et seq. As to the meaning of 'director' see PARA 478.

13 As to the directors' remuneration report see PARA 834 et seq; and as to the auditable part of the directors' remuneration report see PARA 841 et seq.

14 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 4(2)(a).

15 Ie under the Companies Act 2006 s 442: see PARA 870.

16 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 4(2)(b).

17 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 4(1)(c).

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855. Ascertainment of entitled persons' wishes.

A company¹ may not send a summary financial statement² to a person³ unless the company has ascertained that the person does not wish to receive copies of its full annual accounts and reports⁴, and the following provisions⁵ apply for the ascertainment of whether or not such a person wishes to receive copies of the full accounts and reports for a financial year⁶.

Where a person⁷ has expressly notified the company either that he wishes to receive copies of the full accounts and reports or that he wishes, instead of copies of those documents, to receive summary financial statements, the company must send copies of the full accounts and reports or summary financial statement, as appropriate, to that person in respect of the financial years to which the notification applies⁸. Where there has been no such express notification to the company by such a person, that person may be taken to have elected to receive summary financial statements if he fails to respond to an opportunity to elect to receive copies of the full accounts and reports given to him either by a consultation notice⁹, or as part of a relevant consultation of his wishes¹⁰ by the company¹¹.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the power to provide a summary financial statement see PARA 853.

3 Ie a person specified in the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 3: see PARA 853 note 10.

4 As to the meaning of 'annual accounts and reports' see PARA 715.

5 Ie the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 5(2), (3): see the text and notes 7-11.

6 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 5(1). As to the meaning of 'full accounts and reports' see PARA 853 note 9. As to a company's financial year see PARA 711.

Subject to any requirement or contrary provision of Pt 2 (regs 4-8), the company communications provisions of the Companies Act 2006 (see PARA 678) apply to any notice or other communication required or authorised to be sent to or by the company by any provision in the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, Pt 2: reg 8(1).

7 Ie a person specified in the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 3: see PARA 853 note 10.

8 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 5(2). For the purposes of reg 5(2), a notification has effect in relation to a financial year if it relates to that year (whether or not it has been given at the invitation of the company) and if it has been received by the company not later than 28 days before the first date on which copies of the full accounts and reports for that year are sent to the persons specified in reg 3 (see PARA 853 note 10) in accordance with the Companies Act 2006 s 423 (see PARA 850): Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 5(4).

9 Ie under the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 6: see PARA 856.

10 Ie under the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 7: see PARA 857.

11 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 5(3).

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856. Consultation by notice.

A consultation notice is notice given by a company¹ to a person² which:

1609 (1) states that for the future³ he will be sent a summary financial statement⁴ for each financial year⁵ instead of a copy of the company's full annual accounts and reports⁶, unless he notifies the company that he wishes to receive full accounts and reports⁷;

1610 (2) states that the summary financial statement for a financial year will contain a summary of the company's or group's profit and loss account⁸, balance sheet⁹ and, in the case of a quoted company¹⁰, directors' remuneration report¹¹ for that year, and may contain additional information derived from the directors' report¹²;

1611 (3) states that the card or form accompanying the notice¹³ must be returned by a date specified in the notice, being a date at least 21 days after service of the notice and not less than 28 days before the first date on which copies of the full accounts and reports for the next financial year for which that person is entitled to receive them are sent out to persons¹⁴ in accordance with the statutory provisions¹⁵;

1612 (4) includes a statement in a prominent position to the effect that a summary financial statement will not contain sufficient information to allow as full an understanding of the results and state of affairs of the company or group as would be provided by the full annual accounts and reports and that persons¹⁶ requiring more detailed information have the right to obtain, free of charge, a copy of the company's last full accounts and reports¹⁷.

In the case of an unquoted company¹⁸ the notice must also state that the summary financial statement will:

- 1613 (a) contain a statement by the company's auditor¹⁹ of his opinion as to whether the summary financial statement:
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352. (i) is consistent with the company's annual accounts and, where information derived from the directors' report is included in the statement, with that report; and
353. (ii) complies with the statutory requirements as to the form and contents of summary financial statements for unquoted companies²⁰ and the requirements of the regulations²¹;
- 126
- 1614 (b) state whether the auditor's report²² on the annual accounts was unqualified or qualified²³.

In the case of a quoted company the notice must also state that the summary financial statement will:

- 1615 (A) contain a statement by the company's auditor of his opinion as to whether the summary financial statement:
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354. (aa) is consistent with the company's annual accounts and the directors' remuneration report and, where information derived from the directors' report is included in the statement, with that report; and
355. (bb) complies with the statutory requirements as to the form and contents of summary financial statements for quoted companies²⁴ and the requirements of the regulations²⁵;
- 128
- 1616 (B) state whether the auditor's report on the annual accounts was unqualified or qualified²⁶.

A notice given under these provisions must be accompanied by a card or form in respect of which, in the case of a card or form sent by post, any postage necessary for its return to the company has been, or will be, paid by the company²⁷; and it must be so worded as to enable a person²⁸, by marking a box and returning the card or form, to notify the company that he wishes to receive full accounts and reports for the next financial year for which he is entitled to receive them and for all future financial years after that²⁹.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 I.e a person specified in the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 3: see PARA 853 note 10.

3 I.e so long as he is a person specified in the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 3: see PARA 853 note 10.

4 As to the power to provide a summary financial statement see PARA 853.

5 As to a company's financial year see PARA 711.

6 As to the meaning of 'annual accounts and reports' see PARA 715.

7 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 6(1)(a). Cf reg 7(2)(a) (cited in PARA 857) which applies to a person who wishes to *continue to* receive full accounts and reports. As to the meaning of 'full accounts and reports' see PARA 853 note 9.

8 As to the meaning of 'profit and loss account' see PARA 715. As to the meaning of 'group' see PARA 694 note 10.

9 As to the meaning of 'balance sheet' see PARA 715.

10 As to quoted companies see PARA 696.

11 As to the directors' remuneration report see PARA 834 et seq. As to the meaning of 'director' see PARA 478.

12 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 6(1)(b). As to the directors' report see PARA 816 et seq.

13 In accordance with the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 8(3): see PARA 857.

14 In persons specified in the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 3: see PARA 853 note 10.

15 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 6(1)(c). The statutory provisions referred to in the text are those of the Companies Act 2006 s 423: see PARA 850.

16 In persons specified in the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 3: see PARA 853 note 10.

17 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 6(1)(d).

18 As to unquoted companies see PARA 696.

19 As to auditors and audit see PARA 905 et seq.

20 In the requirements of the Companies Act 2006 s 427: see PARA 858.

21 In the requirements of the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374.

22 As to the auditor's report see PARA 924 et seq.

23 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 6(2).

24 In the requirements of the Companies Act 2006 s 428: see PARA 858.

25 In the requirements of the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374.

26 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 6(3).

27 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 8(3)(a). The company need not pay the postage in respect of the return of the card or form in the following circumstances:

290 (1) if the address of a member to which notices are sent in accordance with the company's constitution is not within an EEA state (reg 8(4)(a));

291 (2) if the address of a debenture holder to which notices are sent in accordance with the terms of any instrument constituting or otherwise governing the debentures of which he is a holder is not within an EEA state (reg 8(4)(b)); or

292 (3) if the address of a person to whom reg 8(2) (see PARA 853 note 9) applies to which notices are sent, in accordance with the contractual provisions under which he has a right (conditionally or unconditionally) to become a person specified in the Companies Act 2006 s 423(1) (see PARA 850), is not within an EEA state (Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 8(4)(c)).

As to the meaning of 'EEA state' see PARA 29 note 5. As to the meaning of 'debenture' see PARA 1299.

28 In a person specified in the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 3: see PARA 853 note 10.

29 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 8(3)(b).

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857. Relevant consultation to ascertain a person's wishes.

A company¹ may conduct a relevant consultation to ascertain the wishes of a person². For these purposes, a relevant consultation of the wishes of a person is a notice given to that person which:

- 1617 (1) states that for the future³ he will be sent a summary financial statement⁴ instead of the full annual accounts and reports⁵ of the company, unless he notifies the company that he wishes to continue to receive full accounts and reports⁶;
- 1618 (2) accompanies a copy of the full accounts and reports⁷; and
- 1619 (3) accompanies a copy of a summary financial statement⁸ with respect to the financial year⁹ covered by those full accounts and reports and which is identified in the notice as an example of the document which that person will receive for the future¹⁰ unless he notifies the company to the contrary¹¹.

A notice given under these provisions must be accompanied by a card or form in respect of which, in the case of a card or form sent by post, any postage necessary for its return to the company has been, or will be, paid by the company¹²; and it must be so worded as to enable a person¹³, by marking a box and returning the card or form, to notify the company that he wishes to receive full accounts and reports for the next financial year for which he is entitled to receive them and for all future financial years after that¹⁴.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 7(1). The text refers to a person specified in the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 3: see PARA 853 note 10.

3 Ie so long as he is a person specified in the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 3: see PARA 853 note 10.

4 As to the power to provide a summary financial statement see PARA 853.

5 As to the meaning of 'annual accounts and reports' see PARA 715.

6 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 7(2)(a). Cf reg 6(1)(a) (cited in PARA 856) which applies to a person who wishes simply to receive (ie rather than to *continue to* receive) full accounts and reports. As to the meaning of 'full accounts and reports' see PARA 853 note 9.

7 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 7(2)(b).

8 Ie prepared in accordance with the Companies Act 2006 s 426 (see PARA 853), and s 427 or s 428 (see PARA 858), as appropriate, and the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374.

9 As to a company's financial year see PARA 711.

10 Ie so long as he is a person specified in the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 3: see PARA 853 note 10.

11 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 7(2)(c).

12 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 8(3)(a). The company need not pay the postage in respect of the return of the card or form in the following circumstances:

- 293 (1) if the address of a member to which notices are sent in accordance with the company's constitution is not within an EEA state (reg 8(4)(a));
- 294 (2) if the address of a debenture holder to which notices are sent in accordance with the terms of any instrument constituting or otherwise governing the debentures of which he is a holder is not within an EEA state (reg 8(4)(b)); or
- 295 (3) if the address of a person to whom reg 8(2) (see PARA 853 note 10) applies to which notices are sent, in accordance with the contractual provisions under which he has a right (conditionally or unconditionally) to become a person specified in the Companies Act 2006 s 423(1) (see PARA 850), is not within an EEA state (Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 8(4)(c)).

As to the meaning of 'EEA state' see PARA 29 note 5. As to the meaning of 'debenture' see PARA 1622.

13 Is a person specified in the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 3: see PARA 853 note 10.

14 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 8(3)(b).

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(B) FORM AND CONTENT

858. Form and content of summary financial statements.

A summary financial statement¹ by a company² that is not a quoted company³ must be derived from the company's annual accounts⁴, and must be prepared in accordance with the relevant statutory provisions⁵ and regulations made under them⁶. The summary financial statement must be in such form, and contain such information, as the Secretary of State⁷ may specify by regulations⁸. The regulations may require the statement to include information derived from the directors' report⁹. Nothing in the statutory provisions or regulations made under them prevents a company from including in a summary financial statement additional information derived from the company's annual accounts or the directors' report¹⁰. The summary financial statement must:

- 1620 (1) state that it is only a summary of information derived from the company's annual accounts;
 - 1621 (2) state whether it contains additional information derived from the directors' report and, if so, that it does not contain the full text of that report;
 - 1622 (3) state how a person entitled to them can obtain a full copy of the company's annual accounts and the directors' report;
 - 1623 (4) contain a statement by the company's auditor¹¹ of his opinion as to whether the summary financial statement:
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- 356. (a) is consistent with the company's annual accounts and, where information derived from the directors' report is included in the statement, with that report; and
 - 357. (b) complies with the requirements of the statutory provisions and regulations made under them;

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1624 (5) state whether the auditor's report¹² on the annual accounts was unqualified or qualified and, if it was qualified, set out the report in full together with any further material needed to understand the qualification;

1625 (6) state whether, in that report, the auditor's statement¹³ as to whether the directors' report was consistent with the accounts was qualified or unqualified and, if it was qualified, set out the qualified statement in full together with any further material needed to understand the qualification;

1626 (7) state whether that auditor's report contained:

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358. (a) a statement¹⁴ that accounting records or returns were inadequate or that accounts did not agree with records and returns; or

359. (b) a statement¹⁵ that he had failed to obtain necessary information and explanations,

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1627 and if so, set out the statement in full¹⁶.

Regulations may provide that any specified material may, instead of being included in the summary financial statement, be sent separately at the same time as the statement¹⁷.

A summary financial statement by a quoted company must be derived from the company's annual accounts and the directors' remuneration report¹⁸, and must be prepared in accordance with the relevant statutory provisions¹⁹ and regulations made under them²⁰. The summary financial statement must be in such form, and contain such information, as the Secretary of State may specify by regulations²¹. The regulations may require the statement to include information derived from the directors' report²². Nothing in the statutory provisions or regulations made under them prevents a company from including in a summary financial statement additional information derived from the company's annual accounts, the directors' remuneration report or the directors' report²³. The summary financial statement must:

1628 (i) state that it is only a summary of information derived from the company's annual accounts and the directors' remuneration report;

1629 (ii) state whether it contains additional information derived from the directors' report and, if so, that it does not contain the full text of that report;

1630 (iii) state how a person entitled to them can obtain a full copy of the company's annual accounts, the directors' remuneration report or the directors' report;

1631 (iv) contain a statement by the company's auditor of his opinion as to whether the summary financial statement:

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360. (A) is consistent with the company's annual accounts and the directors' remuneration report and, where information derived from the directors' report is included in the statement, with that report; and

361. (B) complies with the requirements of the statutory provisions and regulations made under them;

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1632 (v) state whether the auditor's report on the annual accounts and the auditable part of the directors' remuneration report²⁴ was unqualified or qualified and, if it was qualified, set out the report in full together with any further material needed to understand the qualification;

1633 (vi) state whether that auditor's report contained:

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362. (A) a statement²⁵ that accounting records or returns were inadequate or that accounts or the directors' remuneration report did not agree with records and returns; or
363. (B) a statement²⁶ that he had failed to obtain necessary information and explanations,
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- 1634 and if so, set out the statement in full;
- 1635 (vii) state whether, in that report, the auditor's statement²⁷ as to whether the directors' report was consistent with the accounts was qualified or unqualified and, if it was qualified, set out the qualified statement in full together with any further material needed to understand the qualification²⁸.

Regulations may provide that any specified material may, instead of being included in the summary financial statement, be sent separately at the same time as the statement²⁹.

If default is made in complying with these provisions³⁰, or any provision of regulations made under them, an offence is committed by the company, and by every officer of the company who is in default³¹.

1 As to the power to provide a summary financial statement see PARA 853.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to quoted and unquoted companies see PARA 696.

4 As to the meaning of 'annual accounts' see PARA 715.

5 Ie the Companies Act 2006 s 427.

6 Companies Act 2006 s 427(1).

The provisions of the Companies Act 2006 ss 427, 428 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

7 As to the Secretary of State see PARA 6.

8 Companies Act 2006 s 427(2). Regulations under s 427 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 427(6), 1289. As to the regulations made under s 427(2), (5) see the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374; and PARA 859 et seq.

9 Companies Act 2006 s 427(2). As to the directors' report see PARA 816 et seq. As to the meaning of 'director' see PARA 478.

10 Companies Act 2006 s 427(3).

11 As to auditors and audit see PARA 905 et seq.

12 As to the auditor's report see PARA 924 et seq.

13 Ie under the Companies Act 2006 s 496: see PARA 925.

14 Ie under the Companies Act 2006 s 498(2)(a) or (b): see PARA 928.

15 Ie under the Companies Act 2006 s 498(3): see PARA 928.

16 Companies Act 2006 s 427(4).

17 Companies Act 2006 s 427(5). See note 8.

- 18 As to the directors' remuneration report see PARA 834 et seq.
- 19 Ie the Companies Act 2006 s 428.
- 20 Companies Act 2006 s 428(1).
- 21 Companies Act 2006 s 428(2). Regulations under s 428 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 428(6), 1289. As to the regulations made under s 428(2), (5) see the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374; and PARA 859 et seq.
- 22 Companies Act 2006 s 428(2).
- 23 Companies Act 2006 s 428(3).
- 24 As to the auditable part of the directors' remuneration report see PARA 841 et seq.
- 25 Ie under the Companies Act 2006 s 498(2): see PARA 928.
- 26 Ie under the Companies Act 2006 s 498(3): see PARA 928.
- 27 Ie under the Companies Act 2006 s 496: see PARA 925.
- 28 Companies Act 2006 s 428(4).
- 29 Companies Act 2006 s 428(5). See note 21.
- 30 Ie any provision of s 427 or s 428: see the text and notes 1-29.
- 31 See the Companies Act 2006 s 429(1); and PARA 853. As to the meaning of 'officer' see PARA 112 note 1; and as to the liability of an officer in default see PARA 315. As to the penalty for such an offence see PARA 853 note 13.

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859. Prescribed form and content.

Every summary financial statement¹ issued by a company² in place of the full accounts and reports³ must comply with the following provisions⁴.

The summary financial statement must state the name of the person who signed it on behalf of the board⁵.

The summary financial statement of a company the directors⁶ of which do not prepare group accounts⁷ must include a statement in a prominent position to the effect that the summary financial statement does not contain sufficient information to allow as full an understanding of the results and state of affairs of the company, and of its policies and arrangements concerning directors' remuneration⁸ (where appropriate) as would be provided by the full annual accounts and reports, and that persons⁹ requiring more detailed information have the right to obtain, free of charge, a copy of the company's last full accounts and reports¹⁰. Similarly, the summary financial statement of a company the directors of which do prepare group accounts¹¹ must include a statement in a prominent position to the effect that the summary financial statement does not contain sufficient information to allow as full an understanding of the results of the group¹² and state of affairs of the company or of the group, and of their policies and arrangements concerning directors' remuneration (where appropriate) as would be provided by the full annual accounts and reports, and that persons¹³ requiring more detailed information

have the right to obtain, free of charge, a copy of the company's last full accounts and reports¹⁴.

The summary financial statement must contain a clear, conspicuous statement:

- 1636 (1) of how persons¹⁵ can obtain, free of charge, a copy of the company's last full accounts and reports¹⁶; and
- 1637 (2) of how such persons may elect to receive full accounts and reports in place of summary financial statements for all future financial years¹⁷.

The summary financial statement must contain the whole of, or a summary of, that portion of the notes to the accounts¹⁸ for the financial year in question which sets out the information required¹⁹ concerning the total amount of directors' remuneration etc²⁰.

The summary financial statement must contain any other information necessary to ensure that the statement is consistent with the full accounts and reports for the financial year in question²¹.

The summary financial statement must contain the prescribed information²² in such order, and under such headings, as the directors consider appropriate²³.

The summary financial statement of a company must be in such form, and contain such information, as is prescribed in relation to that company²⁴.

1 As to the power to provide a summary financial statement see PARA 853.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to the meaning of 'full accounts and reports' see PARA 853 note 9.

4 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 9(1).

5 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 9(2).

6 As to the meaning of 'director' see PARA 478.

7 Ie under the Companies Act 2006 Pt 15 (ss 380-474). As to group accounts see PARA 775 et seq.

8 As to directors' remuneration see PARA 518 et seq.

9 Ie persons specified in the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 3: see PARA 853 note 10.

10 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 9(3).

11 Ie under the Companies Act 2006 Pt 15. As to group accounts see PARA 775 et seq.

12 As to the meaning of 'group' see PARA 694 note 10.

13 Ie persons specified in the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 3: see PARA 853 note 10.

14 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 9(4).

15 Ie persons specified in the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 3: see PARA 853 note 10.

16 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 9(5)(a).

17 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 9(5)(b). As to a company's financial year see PARA 711.

18 As to notes to the accounts see PARAS 738 et seq, 792 et seq.

19 Ie required by the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 3 Pt 1 para 1 or the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 5 Pt 1 para 1, as the case may be: see PARA 768.

20 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 9(6).

21 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 9(8).

22 Ie prescribed in relation to the company by the provisions of the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, Pt 3 which apply to the company.

23 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 9(7).

24 Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 11(1).

As to the form and content of a company's summary financial statement where the directors of the company do not prepare group accounts but prepare IAS individual accounts see reg 11(8), Sch 7. As to the meaning of 'IAS individual accounts' see PARA 717; and as to individual accounts see PARA 716 et seq. As to the form and content of a company's summary financial statement where the directors of the company prepare IAS group accounts see reg 11(9), Sch 8. As to the meaning of 'IAS group accounts' see PARA 776.

As to the form and content of a company's summary financial statement where the directors do not prepare group accounts under the Companies Act 2006 Pt 15, but prepare Companies Act individual accounts under s 396 (see PARA 728), see the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 11(2), Sch 1. As to the meaning of 'Companies Act individual accounts' see PARA 717. As to the form and content of a parent company's summary financial statement where the directors prepare Companies Act group accounts under the Companies Act 2006 s 403 (see PARA 776) see the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 11(5), Sch 4. As to the meaning of 'parent company' see PARA 26 note 2. As to the meaning of 'Companies Act group accounts' see PARA 776.

As to the form and content of a banking company's summary financial statement where the directors do not prepare group accounts under the Companies Act 2006 Pt 15, but prepare Companies Act individual accounts under s 396 (see PARA 728), see the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 11(3), Sch 2. As to the meaning of 'banking company' see PARA 701 note 1. As to the form and content of the summary financial statement of the parent company of a banking group where the directors prepare Companies Act group accounts under the Companies Act 2006 s 403 (see PARA 776) see the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 11(6), Sch 5. As to the meaning of 'banking group' see PARA 702 note 2.

As to the form and content of an insurance company's summary financial statement where the directors do not prepare group accounts under the Companies Act 2006 Pt 15, but prepare Companies Act individual accounts under s 396 (see PARA 728), see the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 11(4), Sch 3. As to the meaning of 'insurance company' see PARA 701 note 4. As to the form and content of the summary financial statement of the parent company of an insurance group where the directors prepare Companies Act group accounts under the Companies Act 2006 s 403 (see PARA 776), see the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 11(7), Sch 6. As to the meaning of 'insurance group' see PARA 702 note 5.

The summary financial statement of a company having certain securities publicly traded as specified in the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 Pt 6 para 13 (see PARA 830) must: (1) include in the statement the explanatory material required to be included in the directors' report by Sch 7 Pt 6 para 14 (see PARA 830); or (2) send that material to the person receiving the summary financial statement at the same time as it sends the statement: Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 10(1). As to the directors' report see PARA 816 et seq.

The summary financial statement of a quoted company must contain the whole of, or a summary of, those portions of the directors' remuneration report for the financial year in question which set out the matters required by the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 2 para 3 (statement of company's policy on directors' remuneration: see PARA 837) and Sch 8 Pt 2 para 5 (performance graph: see PARA 839): Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 10(2). As to quoted companies see PARA 696. As to the directors' remuneration report see PARA 834 et seq.

COMPANIES ACTS/(18) ACCOUNTS AND REPORTS/(vii) Approval and Publication of Accounts and Reports/C. RIGHT TO DEMAND COPIES OF ACCOUNTS AND REPORTS/860. Right of member or debenture holder to demand copies.

C. RIGHT TO DEMAND COPIES OF ACCOUNTS AND REPORTS

860. Right of member or debenture holder to demand copies.

A member¹ of, or holder of debentures² of, an unquoted company³ is entitled to be provided, on demand and without charge, with a copy of:

- 1638 (1) the company's last annual accounts⁴;
- 1639 (2) the last directors' report⁵; and
- 1640 (3) the auditor's report⁶ on those accounts (including the statement on that report)⁷.

The entitlement under these provisions is to a single copy of those documents, but that is in addition to any copy to which a person may otherwise be entitled⁸. If a demand made under these provisions is not complied with within seven days of receipt by the company, an offence is committed by the company, and by every officer of the company who is in default⁹.

A member of, or holder of debentures of, a quoted company¹⁰ is entitled to be provided, on demand and without charge, with a copy of:

- 1641 (a) the company's last annual accounts;
- 1642 (b) the last directors' remuneration report¹¹;
- 1643 (c) the last directors' report; and
- 1644 (d) the auditor's report on those accounts (including the report on the directors' remuneration report and on the directors' report)¹².

The entitlement under these provisions is to a single copy of those documents, but that is in addition to any copy to which a person may otherwise be entitled¹³. If a demand made under these provisions is not complied with within seven days of receipt by the company, an offence is committed by the company, and by every officer of the company who is in default¹⁴.

1 As to the meaning of 'member' see PARA 321.

2 As to the meaning of 'debenture' see PARA 1299.

3 As to unquoted companies see PARA 696. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

4 As to the meaning of 'annual accounts' see PARA 715.

5 As to the directors' report see PARA 816 et seq. As to the meaning of 'director' see PARA 478.

6 As to the auditor's report see PARA 924 et seq.

7 Companies Act 2006 s 431(1).

Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq. The provisions of the Companies Act 2006 ss 431, 432 apply also to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

8 Companies Act 2006 s 431(2). The text refers to entitlement under s 423: see PARA 850.

9 Companies Act 2006 s 431(3). As to the meaning of 'officer' see PARA 112 note 1; and as to the liability of an officer in default see PARA 315. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 431(4). As to the standard scale see PARA 1622. As to the meaning of 'daily default fine' see PARA 1622.

10 As to quoted companies see PARA 696.

11 As to the directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq.

12 Companies Act 2006 s 432(1).

13 Companies Act 2006 s 432(2). The text refers to entitlement under s 423: see PARA 850.

14 Companies Act 2006 s 432(3). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 432(4).

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D. PUBLICATION OF ACCOUNTS AND REPORTS

861. Name of signatory to be stated in published accounts and reports.

Every copy of the following documents, namely:

1645 (1) in the case of an unquoted company¹:

137

364. (a) the company's balance sheet²; and

365. (b) the directors' report³;

138

1646 (2) in the case of a quoted company⁴:

139

366. (a) the company's balance sheet⁵;

367. (b) the directors' remuneration report⁶; and

368. (c) the directors' report⁷,

140

that is published⁸ by or on behalf of the company must state the name of the person who signed it on behalf of the board⁹.

If a copy is published without the required statement of the signatory's name, an offence is committed by the company, and by every officer of the company who is in default¹⁰.

1 As to unquoted companies see PARA 696. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 Companies Act 2006 s 433(2)(a). As to the meaning of 'balance sheet' see PARA 715.

The provisions of the Companies Act 2006 s 433 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Companies Act 2006 s 433(2)(b). As to the directors' report see PARA 816 et seq. As to the meaning of 'director' see PARA 478.

4 As to quoted companies see PARA 696.

5 Companies Act 2006 s 433(3)(a).

6 Companies Act 2006 s 433(3)(b). As to the directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq.

7 Companies Act 2006 s 433(3)(c).

8 As to the meaning of 'publication' see the Companies Act 2006 s 436; and PARA 863.

9 Companies Act 2006 s 433(1). Copies delivered to the registrar must also state the name of the person who signed on behalf of the board: see ss 444(6), 445(5), 446(3), 447(3); and PARAS 871, 873-875.

Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq.

As to the approval and signing of accounts see s 414; and PARA 815. As to the approval and signing of abbreviated accounts see s 450; and PARA 881. As to the approval and signing of directors' reports see s 419; and PARA 831. As to the approval and signing of directors' remuneration reports see s 422; and PARA 848.

10 Companies Act 2006 s 433(4). As to the meaning of 'officer' see PARA 112 note 1; and as to the liability of an officer in default see PARA 315. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 433(5). As to the standard scale see PARA 1622.

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862. Requirements for publication of statutory and non-statutory accounts.

If a company¹ publishes any of its statutory accounts², they must be accompanied by the auditor's report³ on those accounts (unless the company is exempt from audit⁴ and the directors⁵ have taken advantage of that exemption)⁶. A company that prepares statutory group accounts⁷ for a financial year must not publish its statutory individual accounts⁸ for that year without also publishing with them its statutory group accounts⁹. If a company contravenes any of these provisions, an offence is committed by the company, and by every officer of the company who is in default¹⁰.

If a company publishes non-statutory accounts¹¹, it must publish with them a statement indicating:

- 1647 (1) that they are not the company's statutory accounts¹²;
- 1648 (2) whether statutory accounts dealing with any financial year with which the non-statutory accounts purport to deal have been delivered to the registrar¹³; and
- 1649 (3) whether an auditor's report has been made on the company's statutory accounts for any such financial year¹⁴, and if so whether the report: (a) was qualified or unqualified, or included a reference to any matters to which the auditor drew attention by way of emphasis without qualifying the report¹⁵; or (b) contained a statement¹⁶ that the accounting records or returns were inadequate or the

accounts or directors' remuneration report¹⁷ were not in agreement with the records and returns, or a statement¹⁸ that the auditor had failed to obtain necessary information and explanations¹⁹.

The company must not publish with non-statutory accounts the auditor's report on the company's statutory accounts²⁰. If a company contravenes any of these provisions, an offence is committed by the company, and by every officer of the company who is in default²¹.

1 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 A company's 'statutory accounts' are its accounts for a financial year as required to be delivered to the registrar under the Companies Act 2006 s 441 (see PARA 869): Companies Act 2006 s 434(3). As to the meaning of 'registrar' see PARA 131 note 2. As to a company's financial year see PARA 711.

Section 434 does not apply in relation to the provision by a company of a summary financial statement: s 434(6). As to the provision of a summary financial statement see s 426; and PARA 853.

The provisions of the Companies Act 2006 ss 434, 435 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 As to the auditor's report see PARA 924 et seq.

4 As to exemption from audit see PARAS 908-911.

5 As to the meaning of 'director' see PARA 478.

6 Companies Act 2006 s 434(1).

7 As to group accounts see PARA 775 et seq.

8 As to individual accounts see PARA 716 et seq.

9 Companies Act 2006 s 434(2).

10 Companies Act 2006 s 434(4). As to the meaning of 'officer' see PARA 112 note 1; and as to the liability of an officer in default see PARA 315. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 434(5). As to the standard scale see PARA 1622.

11 References in the Companies Act 2006 s 435 to the publication by a company of 'non-statutory accounts' are references to the publication of:

296 (1) any balance sheet or profit and loss account relating to, or purporting to deal with, a financial year of the company; or

297 (2) an account in any form purporting to be a balance sheet or profit and loss account for a group headed by the company relating to, or purporting to deal with, a financial year of the company,

otherwise than as part of the company's statutory accounts: s 435(3). For these purposes, 'a group headed by the company' means a group consisting of the company and any other undertaking (regardless of whether it is a subsidiary undertaking of the company) other than a parent undertaking of the company: s 435(4). As to the meanings of 'balance sheet' and 'profit and loss account' see PARA 715. As to the meaning of 'undertaking' see PARA 26 note 2; and as to the meanings of 'subsidiary undertaking' and 'parent undertaking' see PARA 26.

Section 435 does not apply in relation to the provision by a company of a summary financial statement: s 435(7).

12 Companies Act 2006 s 435(1)(a).

13 Companies Act 2006 s 435(1)(b).

14 Companies Act 2006 s 435(1)(c).

15 Companies Act 2006 s 435(1)(c)(i).

16 Ie under the Companies Act 2006 s 498(2): see PARA 928.

17 As to the directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq.

18 Ie under the Companies Act 2006 s 498(3): see PARA 928.

19 Companies Act 2006 s 435(1)(c)(ii).

20 Companies Act 2006 s 435(2).

21 Companies Act 2006 s 435(5). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 435(6).

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863. Meaning of 'publication'.

For the purposes of:

1650 (1) the provisions requiring the name of the signatory to be stated in published copies of accounts and reports¹;

1651 (2) the requirements in connection with publication of statutory accounts²; and

1652 (3) the requirements in connection with publication of non-statutory accounts³,

a company⁴ is regarded as publishing a document if it publishes, issues or circulates it or otherwise makes it available for public inspection in a manner calculated to invite members of the public generally, or any class of members of the public, to read it⁵.

1 Ie the Companies Act 2006 s 433: see PARA 861.

2 Ie the Companies Act 2006 s 434: see PARA 862.

3 Ie the Companies Act 2006 s 435: see PARA 862.

4 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

5 Companies Act 2006 s 436(1), (2).

Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq. The provisions of the Companies Act 2006 s 436 apply also to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

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864. Annual accounts and reports of quoted companies to be made available on website.

A quoted company¹ must ensure that its annual accounts and reports² are made available on a website, and remain so available until the annual accounts and reports for the company's next financial year³ are made available in accordance with these provisions⁴. The annual accounts and reports must be made available on a website that: (1) is maintained by or on behalf of the company; and (2) identifies the company in question⁵. Access to the annual accounts and reports on the website, and the ability to obtain a hard copy⁶ of the annual accounts and reports from the website, must not be conditional on the payment of a fee, or otherwise restricted except so far as necessary to comply with any enactment or regulatory requirement (in the United Kingdom⁷ or elsewhere)⁸.

The annual accounts and reports must be made available as soon as reasonably practicable, and must be kept available throughout the period mentioned above⁹. A failure to make the annual accounts and reports available on a website throughout that period is disregarded if: (a) the annual accounts and reports are made available on the website for part of that period; and (b) the failure is wholly attributable to circumstances that it would not be reasonable to have expected the company to prevent or avoid¹⁰.

In the event of default in complying with these provisions, an offence is committed by every officer of the company who is in default¹¹.

1 As to quoted companies see PARA 696. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'annual accounts and reports' see PARA 715.

3 As to a company's financial year see PARA 711.

4 Companies Act 2006 s 430(1).

Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq. The provisions of the Companies Act 2006 s 430 apply also to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 Companies Act 2006 s 430(2).

6 As to the meaning of 'hard copy' see PARA 674 note 5.

7 As to the meaning of 'United Kingdom' see PARA 1 note 5.

8 Companies Act 2006 s 430(3).

9 Companies Act 2006 s 430(4).

10 Companies Act 2006 s 430(5).

11 Companies Act 2006 s 430(6). As to the meaning of 'officer' see PARA 112 note 1; and as to the liability of an officer in default see PARA 315. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 430(7). As to the standard scale see PARA 1622.

and Reports/E. LAYING OF ACCOUNTS AND REPORTS BY PUBLIC COMPANIES/865. Accounts and reports to be laid before company in general meeting.

E. LAYING OF ACCOUNTS AND REPORTS BY PUBLIC COMPANIES

865. Accounts and reports to be laid before company in general meeting.

The directors¹ of a public company² must lay before the company in general meeting³ copies of its annual accounts and reports⁴. This duty must be complied with not later than the end of the period for filing the accounts and reports in question⁵.

If the above requirements⁶ are not complied with before the end of the period allowed, every person who immediately before the end of that period was a director of the company commits an offence⁷. It is a defence for a person charged with such an offence to prove that he took all reasonable steps for securing that those requirements would be complied with before the end of that period⁸; but it is not a defence to prove that the documents in question were not in fact prepared as required by Part 15⁹ of the Companies Act 2006¹⁰.

1 As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to company meetings see PARA 629 et seq.

4 Companies Act 2006 s 437(1). In the Companies Acts 'accounts meeting', in relation to a public company, means a general meeting of the company at which the company's annual accounts and reports are (or are to be) laid in accordance with s 437: s 437(3). As to the meaning of 'annual accounts and reports' see PARA 715. As to the meaning of 'Companies Acts' see PARA 16.

Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq. The provisions of the Companies Act 2006 ss 437, 438 apply also to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 Companies Act 2006 s 437(2).

6 I.e. the requirements of the Companies Act 2006 s 437: see the text and notes 1-5.

7 Companies Act 2006 s 438(1). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 5 on the standard scale: s 438(4). As to the standard scale see PARA 1622. As to the meaning of 'daily default fine' see PARA 1622.

8 Companies Act 2006 s 438(2).

9 I.e. the Companies Act 2006 Pt 15 (ss 380-474).

10 Companies Act 2006 s 438(3).

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F. APPROVAL OF ACCOUNTS AND REPORTS

866. Approval of accounts and reports by directors.

A company's annual accounts¹ and abbreviated accounts², the directors' report³ and any separate corporate governance statement⁴, and the directors' remuneration report⁵ must be approved by the board of directors⁶. The annual accounts and abbreviated accounts must be signed on behalf of the board by a director of the company⁷, and the directors' report, any separate corporate governance statement and the directors' remuneration report must be signed on behalf of the board by a director or the secretary of the company⁸. Failure to secure compliance with the relevant requirements, or, as the case may be, to prevent accounts or reports that do not comply from being approved, is an offence⁹.

1 As to the meaning of 'annual accounts' see PARA 715. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to abbreviated accounts see PARA 878 et seq.

3 As to the directors' report see PARA 816 et seq. As to the meaning of 'director' see PARA 478.

4 As to the meaning of 'separate corporate governance statement' see PARA 832 note 1.

5 As to the directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq.

6 See the Companies Act 2006 ss 414(1), 419(1), 419A, 422(1), 450(1); and PARAS 815, 831, 848, 881.

7 See the Companies Act 2006 ss 414(1), (2), 450(1), (2); and PARAS 815, 881.

8 See the Companies Act 2006 ss 419(1), 419A, 422(1); and PARAS 831, 848.

9 See the Companies Act 2006 ss 414(4), (5), 419(3), (4), 422(2), (3), 450(4), (5); and PARAS 815, 831, 848, 881.

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867. Approval of directors' remuneration report by members of quoted company.

In the case of a quoted company¹, an ordinary resolution² approving the directors' remuneration report³ for the financial year⁴ must be put to the vote of members at the accounts meeting⁵. Failure to comply with the statutory requirements⁶ is an offence⁷.

1 As to quoted companies see PARA 696. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to ordinary resolutions see PARA 613.

3 As to the directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq. As to the meaning of 'director' see PARA 478.

4 As to a company's financial year see PARA 711.

5 See the Companies Act 2006 s 439; and PARA 849. As to the meaning of 'accounts meeting' for these purposes see PARA 849 note 2.

6 See the requirements of the Companies Act 2006 s 439: see PARA 849.

7 See the Companies Act 2006 s 440; and PARA 849.

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G. FALSE OR MISLEADING STATEMENTS IN REPORTS

868. Liability for false or misleading statements in reports.

A director¹ of a company² is liable to compensate the company for any loss suffered by it as a result of: (1) any untrue or misleading statement in a report³; or (2) the omission from a report of anything required to be included in it⁴. This applies to:

- 1653 (a) the directors' report⁵;
- 1654 (b) the directors' remuneration report⁶; and
- 1655 (c) a summary financial statement⁷ so far as it is derived from either of those reports⁸.

However, he is so liable only if: (i) he knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading⁹; or (ii) he knew the omission to be dishonest concealment of a material fact¹⁰.

No person is subject to any liability¹¹ to a person other than the company resulting from reliance, by that person or another, on information in a report to which these provisions apply¹².

These provisions do not affect liability for a civil penalty, or liability for a criminal offence¹³.

1 As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 Companies Act 2006 s 463(2)(a). As to false statements see also PARA 589.

The provisions of the Companies Act 2006 s 463 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 2006 s 463(2)(b).

5 Companies Act 2006 s 463(1)(a). Head (a) in the text does not extend to any statements contained in a separate corporate governance statement, not included in the directors' report. As to the directors' report see PARA 816 et seq.

6 Companies Act 2006 s 463(1)(b). As to the directors' remuneration report see PARA 834 et seq; and as to directors' remuneration see PARA 518 et seq.

7 As to summary financial statements see PARA 853 et seq.

8 Companies Act 2006 s 463(1)(c).

9 Companies Act 2006 s 463(3)(a).

10 Companies Act 2006 s 463(3)(b). As to liability for false statements generally see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 789.

11 The reference in the text to a person being subject to a liability includes a reference to another person being entitled as against him to be granted any civil remedy or to rescind or repudiate an agreement: Companies Act 2006 s 463(5).

12 Companies Act 2006 s 463(4). The text refers to the reports mentioned in heads (a)-(c) in the text.

13 Companies Act 2006 s 463(6).

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H. FILING OF ACCOUNTS AND REPORTS

(A) DUTY TO FILE ACCOUNTS AND REPORTS

869. Duty to file accounts and reports with the registrar.

The directors¹ of a company² must deliver to the registrar³ for each financial year⁴ the required accounts and reports⁵. However, in certain circumstances unlimited companies⁶ are exempt from the filing obligations⁷.

1 As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to the meaning of 'registrar' see PARA 131 note 2. As to delivery to the registrar of documents see PARA 141 et seq.

4 As to a company's financial year see PARA 711.

5 Companies Act 2006 s 441(1). The accounts and reports that must be delivered to the registrar are those required by s 444 (filing obligations of companies subject to small companies regime: see PARA 871), s 444A (filing obligations of companies entitled to small companies exemption in relation to directors' report: see PARA 872), s 445 (filing obligations of medium-sized companies: see PARA 873), s 446 (filing obligations of unquoted companies: see PARA 874), or s 447 (filing obligations of quoted companies: see PARA 875); see s 441(1) (amended by SI 2008/393). As to documents that may be drawn up and delivered in other languages see s 1105; and PARA 164.

Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq. The provisions of the Companies Act 2006 s 441 apply also to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. Where an overseas company, or a credit or financial institution to which the Companies Act 2006 s 1050 applies (see PARA 1831), is not required to prepare and disclose accounts under parent law, s 441 is applied with modifications: see the Overseas Companies Regulations 2009, SI 2009/1801, regs 40, 55; and PARA 1830 et seq. As to the meaning of 'overseas company' see PARA 1824.

6 As to the meaning of 'unlimited company' see PARA 102.

7 Companies Act 2006 s 441(2). As to the exemption for unlimited companies see s 448; and PARA 876.

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870. Period allowed for laying and delivering accounts and reports.

The period allowed for the directors¹ of a company² to comply with their obligation³ to deliver accounts and reports⁴ for a financial year⁵ to the registrar⁶ (referred to in the Companies Acts as the 'period for filing' those accounts and reports) is generally:

- 1656 (1) for a private company⁷, nine months after the end of the relevant accounting reference period⁸; and
- 1657 (2) for a public company⁹, six months after the end of that period¹⁰.

However, if the relevant accounting reference period is the company's first and is a period of more than 12 months, the period is:

- 1658 (a) nine months or six months, as the case may be, from the first anniversary of the incorporation of the company; or
- 1659 (b) three months after the end of the accounting reference period,

whichever last expires¹¹; and, if the relevant accounting reference period is treated as shortened by virtue of a notice given by the company¹², the period is:

- 1660 (i) that applicable in accordance with the above provisions; or
- 1661 (ii) three months from the date of the notice,

whichever last expires¹³.

If for any special reason the Secretary of State¹⁴ thinks fit he may, on an application made before the expiry of the period otherwise allowed, by notice in writing to a company extend that period by such further period as may be specified in the notice¹⁵.

1 As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 Ie under the Companies Act 2006 s 441: see PARA 869.

4 As to the accounts and reports to be filed see PARA 869 note 5. See further PARAS 871-875.

5 As to a company's financial year see PARA 711.

6 As to the meaning of 'registrar' see PARA 131 note 2.

7 As to the meaning of 'private company' see PARA 102.

8 For these purposes, the 'relevant accounting reference period' means the accounting reference period by reference to which the financial year for the accounts in question was determined: Companies Act 2006 s 442(7). As to a company's accounting reference period see PARA 712.

The provisions of the Companies Act 2006 ss 442, 443 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. Where an overseas company, or a credit or financial institution to which the Companies Act 2006 s 1050 applies (see PARA 1831), is not required to prepare and disclose accounts under parent law, s 442 is applied with modifications: see the Overseas Companies Regulations 2009, SI 2009/1801, regs 40, 55; and PARA 1830 et seq. As to the meaning of 'overseas company' see PARA 1824.

9 As to the meaning of 'public company' see PARA 102.

10 Companies Act 2006 s 442(1), (2). Whether the period allowed is that for a private company or a public company is determined by reference to the company's status immediately before the end of the relevant accounting reference period: s 442(6).

The following provisions apply for the purposes of calculating the period for filing a company's accounts and reports which is expressed as a specified number of months from a specified date or after the end of a specified previous period: s 443(1). Generally, the period ends with the date in the appropriate month corresponding to the specified date or the last day of the specified previous period: s 443(2). However, if the specified date, or the last day of the specified previous period, is the last day of a month, the period ends with the last day of the appropriate month (whether or not that is the corresponding date) (s 443(3)); and if the specified date, or the last day of the specified previous period, is not the last day of a month but is the twenty-ninth or thirtieth and the appropriate month is February, then the period ends with the last day of February (s 443(4)). For these purposes, the 'appropriate month' means the month that is the specified number of months after the month in which the specified date, or the end of the specified previous period, falls: s 443(5). The provisions of s 443 apply with modifications to limited liability partnerships: see the Companies (Late Filing Penalties) and Limited Liability Partnerships (Filing Periods and Late Filing Penalties) Regulations 2008, SI 2008/497, reg 6, Schedule. As to limited liability partnerships see PARA 706.

Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq.

11 Companies Act 2006 s 442(3).

12 Ie under the Companies Act 2006 s 392 (alteration of accounting reference date): see PARA 713.

13 Companies Act 2006 s 442(4).

14 As to the Secretary of State see PARA 6.

15 Companies Act 2006 s 442(5).

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871. Filing obligations of companies subject to small companies regime.

The directors¹ of a company² subject to the small companies regime³:

1662 (1) must deliver to the registrar⁴ for each financial year⁵ a copy of a balance sheet⁶ drawn up as at the last day of that year⁷; and

1663 (2) may also deliver to the registrar: (a) a copy of the company's profit and loss account⁸ for that year; and (b) a copy of the directors' report⁹ for that year¹⁰.

The copies of accounts and reports delivered to the registrar must be copies of the company's annual accounts and reports¹¹, except where the company prepares abbreviated accounts¹². Where the directors of a company subject to the small companies regime deliver to the registrar IAS accounts¹³, or Companies Act accounts¹⁴ that are not abbreviated accounts and, in accordance with these provisions, do not deliver to the registrar a copy of the company's profit and loss account or a copy of the directors' report, then the copy of the balance sheet delivered to the registrar must contain in a prominent position a statement that the company's annual accounts and reports have been delivered in accordance with the provisions applicable to companies subject to the small companies regime¹⁵. The copies of the balance sheet and any directors' report delivered to the registrar under these provisions must state the name of the person who signed it on behalf of the board¹⁶.

The directors must also deliver to the registrar a copy of the auditor's report¹⁷ on the accounts (and any directors' report) that it delivers¹⁸, although this does not apply if the company is exempt from audit¹⁹ and the directors have taken advantage of that exemption²⁰. The copy of the auditor's report delivered to the registrar must: (i) state the name of the auditor and (where the auditor is a firm) the name of the person who signed it as senior statutory auditor²¹; or (ii) if the conditions under which names may be omitted²² are met, state that a resolution has been passed and notified²³ to the Secretary of State²⁴.

1 As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to the small companies regime see PARA 694.

4 As to the meaning of 'registrar' see PARA 131 note 2.

5 As to a company's financial year see PARA 711.

6 As to the meaning of 'balance sheet' see PARA 715.

7 Companies Act 2006 s 444(1)(a). As to documents that may be drawn up and delivered in other languages see s 1105; and PARA 164.

Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq. The provisions of the Companies Act 2006 s 444 apply also to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

8 As to the meaning of 'profit and loss account' see PARA 715.

9 As to the directors' report see PARA 816 et seq.

10 Companies Act 2006 s 444(1)(b).

11 Companies Act 2006 s 444(3). As to the meaning of 'annual accounts and reports' see PARA 715.

12 See the Companies Act 2006 s 444(3); and PARA 878. As to the meaning of 'abbreviated accounts' see PARA 878.

If abbreviated accounts are delivered to the registrar the obligation to deliver a copy of the auditor's report on the accounts (see the text and notes 17-24) is to deliver a copy of the special auditor's report required by s 449 (see PARA 880): s 444(4).

13 As to the meaning of 'IAS accounts' see PARAS 717, 776.

14 As to the meaning of 'Companies Act accounts' see PARAS 717, 776.

15 Companies Act 2006 s 444(5).

- 16 Companies Act 2006 s 444(6).
- 17 As to auditors and audit see PARA 905 et seq; and as to the auditor's report see PARA 924 et seq.
- 18 Companies Act 2006 s 444(2) (amended by SI 2008/393). As to the need for the auditor's name to be stated see the Companies Act 2006 s 444(7) (see the text and notes 21-24); and see PARA 935.
- 19 As to exemption from audit see PARAS 908-911.
- 20 Companies Act 2006 s 444(2) (as amended: see note 18).
- 21 Companies Act 2006 s 444(7)(a). As to the senior statutory auditor see PARA 936.
- 22 In the conditions set out in the Companies Act 2006 s 506: see PARA 935.
- 23 In accordance with the Companies Act 2006 s 506: see PARA 935.
- 24 Companies Act 2006 s 444(7)(b). As to the Secretary of State see PARA 6.

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872. Filing obligations of companies entitled to small companies exemption in relation to directors' report.

The directors¹ of a company² that is entitled to small companies exemption³ in relation to the directors' report⁴ for a financial year⁵:

- 1664 (1) must deliver to the registrar⁶ a copy of the company's annual accounts⁷ for that year⁸; and
- 1665 (2) may also deliver to the registrar a copy of the directors' report⁹.

The copies of the balance sheet¹⁰ and directors' report delivered to the registrar under these provisions must state the name of the person who signed it on behalf of the board¹¹.

The directors must also deliver to the registrar a copy of the auditor's report¹² on the accounts (and any directors' report) that it delivers¹³, although this does not apply if the company is exempt from audit¹⁴ and the directors have taken advantage of that exemption¹⁵. The copy of the auditor's report delivered to the registrar must: (a) state the name of the auditor and (where the auditor is a firm) the name of the person who signed it as senior statutory auditor¹⁶; or (b) if the conditions under which names may be omitted¹⁷ are met, state that a resolution has been passed and notified¹⁸ to the Secretary of State¹⁹.

The above provisions do not apply to companies to which the filing obligations of companies subject to the small companies regime apply²⁰.

- 1 As to the meaning of 'director' see PARA 478.
- 2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.
- 3 As to the small companies exemption see PARA 817.

- 4 As to the directors' report see PARA 816 et seq.
- 5 As to a company's financial year see PARA 711.
- 6 As to the meaning of 'registrar' see PARA 131 note 2.
- 7 As to the meaning of 'annual accounts' see PARA 715.
- 8 Companies Act 2006 s 444A(1)(a) (s 444A added by SI 2008/393). As to documents that may be drawn up and delivered in other languages see the Companies Act 2006 s 1105; and PARA 164. The entitlement to exemption in relation to the directors' report applies only to companies that fall within s 415A(1) (limited exemption for small companies) (see PARA 817), but companies that fall within the first of the exempt categories (ie companies entitled to prepare accounts for the year in accordance with the small companies regime) are excluded from the application of s 444A by s 444A(5) (see the text and note 20) and, accordingly, the application of s 444A is limited to companies that fall within the second of the exempt categories set out in s 415A(1) (ie companies that would be entitled to prepare accounts for the year in accordance with the small companies regime, but for being or having been a member of an ineligible group).
- Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq. The provisions of the Companies Act 2006 s 444A apply also to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.
- 9 Companies Act 2006 s 444A(1)(b) (as added: see note 8).
- 10 As to the meaning of 'balance sheet' see PARA 715.
- 11 Companies Act 2006 s 444A(3) (as added: see note 8).
- 12 As to auditors and audit see PARA 905 et seq; and as to the auditor's report see PARA 924 et seq.
- 13 Companies Act 2006 s 444A(2) (as added: see note 8).
- 14 As to exemption from audit see PARAS 908-911.
- 15 Companies Act 2006 s 444A(2) (as added: see note 8).
- 16 Companies Act 2006 s 444A(4)(a) (s 444A as added (see note 8); and s 444A(4) substituted by SI 2009/1581). As to the senior statutory auditor see PARA 936.
- 17 Ie the conditions set out in the Companies Act 2006 s 506: see PARA 935.
- 18 Ie in accordance with the Companies Act 2006 s 506: see PARA 935.
- 19 Companies Act 2006 s 444A(4)(b) (as added and substituted: see notes 8, 16). As to the Secretary of State see PARA 6.
- 20 Companies Act 2006 s 444A(5) (as added: see note 8). The text refers to companies within s 444: see PARA 871. As to the small companies regime see PARA 694.

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873. Filing obligations of medium-sized companies.

The directors¹ of a company² that qualifies as a medium-sized company³ in relation to a financial year⁴ must deliver to the registrar⁵ a copy of:

- 1666 (1) the company's annual accounts⁶; and

1667 (2) the directors' report⁷.

Where the company prepares Companies Act accounts⁸, the directors may deliver abbreviated accounts⁹ to the registrar¹⁰. The copies of the balance sheet¹¹ and directors' report delivered to the registrar under these provisions must state the name of the person who signed it on behalf of the board¹².

The directors must also deliver to the registrar a copy of the auditor's report¹³ on those accounts (and on the directors' report)¹⁴, although this does not apply if the company is exempt from audit¹⁵ and the directors have taken advantage of that exemption¹⁶. The copy of the auditor's report delivered to the registrar must: (a) state the name of the auditor and (where the auditor is a firm) the name of the person who signed it as senior statutory auditor¹⁷; or (b) if the conditions under which names may be omitted¹⁸ are met, state that a resolution has been passed and notified¹⁹ to the Secretary of State²⁰.

The above provisions do not apply to companies to which the filing obligations of companies subject to the small companies regime²¹, or the filing obligations of companies entitled to small companies exemption²² in relation to the directors' report, apply²³.

1 As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to medium-sized companies and groups see PARA 695.

4 As to a company's financial year see PARA 711.

5 As to the meaning of 'registrar' see PARA 131 note 2.

6 Companies Act 2006 s 445(1)(a). As to documents that may be drawn up and delivered in other languages see s 1105; and PARA 164.

Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq. The provisions of the Companies Act 2006 s 445 apply also to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

7 Companies Act 2006 s 445(1)(b). As to the directors' report see PARA 816 et seq.

8 As to the meaning of 'Companies Act accounts' see PARAS 717, 776.

9 As to the meaning of 'abbreviated accounts' see PARA 878.

10 See the Companies Act 2006 s 445(3); and PARA 878.

If abbreviated accounts are delivered to the registrar the obligation to deliver a copy of the auditor's report on the accounts (see the text and notes 13-20) is to deliver a copy of the special auditor's report required by s 449 (see PARA 880): s 445(4).

11 As to the meaning of 'balance sheet' see PARA 715.

12 Companies Act 2006 s 445(5).

13 As to auditors and audit see PARA 905 et seq; and as to the auditor's report see PARA 924 et seq.

14 Companies Act 2006 s 445(2).

15 As to exemption from audit see PARAS 908-911.

16 Companies Act 2006 s 445(2).

- 17 Companies Act 2006 s 445(6)(a). As to the senior statutory auditor see PARA 936.
- 18 Ie the conditions set out in the Companies Act 2006 s 506: see PARA 935.
- 19 Ie in accordance with the Companies Act 2006 s 506: see PARA 935.
- 20 Companies Act 2006 s 445(6)(b). As to the Secretary of State see PARA 6.
- 21 As to the small companies regime see PARA 694.
- 22 As to the small companies exemption in relation to the directors' report see PARA 817.
- 23 Companies Act 2006 s 445(7) (substituted by SI 2008/393). The text refers to companies within the Companies Act 2006 s 444 (see PARA 871) or s 444A (see PARA 872).

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874. Filing obligations of unquoted companies.

The directors¹ of an unquoted company² must deliver to the registrar³ for each financial year⁴ of the company a copy of:

- 1668 (1) the company's annual accounts⁵;
- 1669 (2) the directors' report⁶; and
- 1670 (3) any separate corporate governance statement⁷.

The copies of the balance sheet⁸, directors' report and any separate corporate governance statement delivered to the registrar under these provisions must state the name of the person who signed it on behalf of the board⁹.

The directors must also deliver to the registrar a copy of the auditor's report¹⁰ on those accounts (and the directors' report and any separate corporate governance statement)¹¹, although this does not apply if the company is exempt from audit¹² and the directors have taken advantage of that exemption¹³. The copy of the auditor's report delivered to the registrar must: (a) state the name of the auditor and (where the auditor is a firm) the name of the person who signed it as senior statutory auditor¹⁴; or (b) if the conditions under which names may be omitted¹⁵ are met, state that a resolution has been passed and notified¹⁶ to the Secretary of State¹⁷.

The above provisions do not apply to companies to which the filing obligations of companies subject to the small companies regime¹⁸, the filing obligations of companies entitled to small companies exemption in relation to the directors' report¹⁹, or the filing obligations of medium-sized companies, apply²⁰.

1 As to the meaning of 'director' see PARA 478.

2 As to unquoted companies see PARA 696. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to the meaning of 'registrar' see PARA 131 note 2.

- 4 As to a company's financial year see PARA 711.
- 5 Companies Act 2006 s 446(1)(a). As to the meaning of 'annual accounts' see PARA 715. As to documents that may be drawn up and delivered in other languages see s 1105; and PARA 164.
- Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq. The provisions of the Companies Act 2006 s 446 apply also to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.
- 6 Companies Act 2006 s 446(1)(b). As to the directors' report see PARA 816 et seq.
- 7 Companies Act 2006 s 446(1)(c) (added by SI 2009/1581). As to the meaning of 'separate corporate governance statement' see PARA 832 note 1.
- 8 As to the meaning of 'balance sheet' see PARA 715.
- 9 Companies Act 2006 s 446(3) (amended by SI 2009/1581).
- 10 As to auditors and audit see PARA 905 et seq; and as to the auditor's report see PARA 924 et seq.
- 11 Companies Act 2006 s 446(2) (amended by SI 2009/1581).
- 12 As to exemption from audit see PARAS 908-911.
- 13 Companies Act 2006 s 446(2) (as amended: see note 11).
- 14 Companies Act 2006 s 446(4)(a). As to the senior statutory auditor see PARA 936.
- 15 In the conditions set out in the Companies Act 2006 s 506: see PARA 935.
- 16 In accordance with the Companies Act 2006 s 506: see PARA 935.
- 17 Companies Act 2006 s 446(4)(b). As to the Secretary of State see PARA 6.
- 18 As to the small companies regime see PARA 694.
- 19 As to the small companies exemption see PARA 817.
- 20 Companies Act 2006 s 446(5) (amended by SI 2008/393). The text refers to companies within the Companies Act 2006 s 444 (see PARA 871), s 444A (see PARA 872) or s 445 (see PARA 873).

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875. Filing obligations of quoted companies.

The directors¹ of a quoted company² must deliver to the registrar³ for each financial year⁴ of the company a copy of:

- 1671 (1) the company's annual accounts⁵;
- 1672 (2) the directors' remuneration report⁶;
- 1673 (3) the directors' report⁷; and
- 1674 (4) any separate corporate governance statement⁸.

The copies of the balance sheet⁹, the directors' remuneration report, the directors' report and any separate corporate governance statement delivered to the registrar under these provisions must state the name of the person who signed it on behalf of the board¹⁰.

The directors must also deliver a copy of the auditor's report¹¹ on those accounts (and on the directors' remuneration report, the directors' report and any separate corporate governance statement)¹². The copy of the auditor's report delivered to the registrar must: (a) state the name of the auditor and (where the auditor is a firm) the name of the person who signed it as senior statutory auditor¹³; or (b) if the conditions under which names may be omitted¹⁴ are met, state that a resolution has been passed and notified¹⁵ to the Secretary of State¹⁶.

1 As to the meaning of 'director' see PARA 478.

2 As to quoted companies see PARA 696. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to the meaning of 'registrar' see PARA 131 note 2.

4 As to a company's financial year see PARA 711.

5 Companies Act 2006 s 447(1)(a). As to the meaning of 'annual accounts' see PARA 715. As to documents that may be drawn up and delivered in other languages see s 1105; and PARA 164.

Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq. The provisions of the Companies Act 2006 s 447 apply also to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

6 Companies Act 2006 s 447(1)(b). As to the directors' remuneration report see PARA 834 et seq.

7 Companies Act 2006 s 447(1)(c). As to the directors' report see PARA 816 et seq.

8 Companies Act 2006 s 447(1)(d) (added by SI 2009/1581). As to the meaning of 'separate corporate governance statement' see PARA 832 note 1.

9 As to the meaning of 'balance sheet' see PARA 715.

10 Companies Act 2006 s 447(3) (amended by SI 2009/1581).

11 As to auditors and audit see PARA 905 et seq; and as to the auditor's report see PARA 924 et seq.

12 Companies Act 2006 s 447(2) (amended by SI 2009/1581).

13 Companies Act 2006 s 447(4)(a). As to the senior statutory auditor see PARA 936.

14 Ie the conditions set out in the Companies Act 2006 s 506: see PARA 935.

15 Ie in accordance with the Companies Act 2006 s 506: see PARA 935.

16 Companies Act 2006 s 447(4)(b). As to the Secretary of State see PARA 6.

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876. Unlimited companies may be exempt from requirement to deliver accounts and reports.

The directors¹ of an unlimited company² are not required to deliver accounts and reports to the registrar³ in respect of a financial year⁴ if, at no time during the relevant accounting reference period⁵:

- 1675 (1) has the company been, to its knowledge, a subsidiary undertaking⁶ of an undertaking which was then limited⁷;
- 1676 (2) have there been, to its knowledge, exercisable, by or on behalf of two or more undertakings which were then limited, rights which, if exercisable by one of them, would have made the company a subsidiary undertaking of it⁸; or
- 1677 (3) has the company been a parent company⁹ of an undertaking which was then limited¹⁰.

The references to an undertaking being limited at a particular time are references to an undertaking, under whatever law established, the liability of whose members is at that time limited¹¹.

This exemption does not apply if:

- 1678 (a) the company is a banking or insurance company¹² or the parent company of a banking or insurance group¹³; or
- 1679 (b) each of the members¹⁴ of the company is: (i) a limited company¹⁵; (ii) another unlimited company each of whose members is a limited company; or (iii) a Scottish partnership each of whose members is a limited company¹⁶.

1 As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'unlimited company' see PARA 102. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to the requirement to deliver accounts and reports to the registrar see PARA 869. As to the meaning of 'registrar' see PARA 131 note 2.

4 As to a company's financial year see PARA 711.

5 For these purposes, the 'relevant accounting reference period', in relation to a financial year, means the accounting reference period by reference to which that financial year was determined: Companies Act 2006 s 448(5). As to a company's accounting reference period see PARA 712.

6 As to the meaning of 'subsidiary undertaking' see PARA 26; and as to the meaning of 'undertaking' see PARA 26 note 2.

7 Companies Act 2006 s 448(1), (2)(a).

Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq. The provisions of the Companies Act 2006 s 448 apply also to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

8 Companies Act 2006 s 448(1), (2)(b).

9 As to the meaning of 'parent company' see PARA 26 note 2.

10 Companies Act 2006 s 448(1), (2)(c). Where a company is exempt by virtue of s 448 from the obligation to deliver accounts, s 434(3) and s 435(1)(b) (see PARA 862) have effect with modifications: see s 448(5).

11 Companies Act 2006 s 448(2).

12 As to the meaning of 'banking company' see PARA 701 note 1; and as to the meaning of 'insurance company' see PARA 701 note 4.

13 Companies Act 2006 s 448(3)(a). As to the meaning of 'banking group' see PARA 702 note 3; and as to the meaning of 'insurance group' see PARA 702 note 5.

14 As to the meaning of 'member' see PARA 321.

15 As to the meaning of 'limited company' see PARA 102.

16 Companies Act 2006 s 448(3)(b) (substituted by SI 2008/393). The references in the Companies Act 2006 s 448(3)(b) to a limited company, another unlimited company or a Scottish partnership include a comparable undertaking incorporated in or formed under the law of a country or territory outside the United Kingdom: s 448(3) (amended by SI 2008/393). As to the meaning of 'United Kingdom' see PARA 1 note 5.

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877. Delivery and publication of accounts in euros.

The amounts set out in the annual accounts¹ of a company² may also be shown in the same accounts translated into euros³.

When complying with their statutory duty to deliver accounts and reports to the registrar⁴, the directors⁵ of a company may deliver to the registrar an additional copy of the company's annual accounts in which the relevant amounts have been translated into euros⁶.

In both cases, the amounts must have been translated at the exchange rate prevailing on the date to which the balance sheet⁷ is made up, and that rate must be disclosed in the notes to the accounts⁸.

1 As to the meaning of 'annual accounts' see PARA 715.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 Companies Act 2006 s 469(1).

The provisions of the Companies Act 2006 s 469 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Under the Companies Act 2006 s 441: see PARA 869. As to the meaning of 'registrar' see PARA 131 note 2.

5 As to the meaning of 'director' see PARA 478.

6 Companies Act 2006 s 469(2). For the purposes of the provisions of ss 434, 435 (see PARA 862), any additional copy of the company's annual accounts delivered to the registrar under s 469(2) is treated as statutory accounts of the company; and, in the case of such a copy, references in those provisions to the auditors' report on the company's annual accounts are to be read as references to the auditors' report on the annual accounts of which it is a copy: s 469(4). As to the auditor's report see PARA 924 et seq.

7 As to the meaning of 'balance sheet' see PARA 715.

8 Companies Act 2006 s 469(3). As to notes to the accounts see PARAS 738 et seq, 792 et seq.

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(B) DELIVERY OF ABBREVIATED ACCOUNTS IN PLACE OF INDIVIDUAL ACCOUNTS

878. Facility to deliver abbreviated accounts.

Generally, the copies of accounts and reports delivered to the registrar¹ in respect of small companies² must be copies of the company's annual accounts and reports³; however, where the company prepares Companies Act accounts⁴:

- 1680 (1) the directors⁵ may deliver to the registrar a copy of a balance sheet⁶ drawn up in accordance with regulations made by the Secretary of State⁷; and
 1681 (2) there may be omitted from the copy profit and loss account⁸ delivered to the registrar such items as may be specified by the regulations⁹.

These are referred to as 'abbreviated accounts'¹⁰.

In relation to medium-sized companies¹¹, where the company prepares Companies Act accounts, the directors may deliver to the registrar a copy of the company's annual accounts for the financial year:

- 1682 (a) that includes a profit and loss account in which items are combined in accordance with regulations made by the Secretary of State¹²; and
 1683 (b) that does not contain items whose omission is authorised by the regulations¹³.

These are referred to as 'abbreviated accounts'¹⁴.

1 As to the requirement to deliver accounts and reports to the registrar see PARA 869. As to the meaning of 'registrar' see PARA 131 note 2.

2 As to small companies and groups see PARA 694. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 See the Companies Act 2006 s 444(3); and PARA 871. As to the meaning of 'annual accounts and reports' see PARA 715.

4 As to the meaning of 'Companies Act accounts' see PARAS 717, 776.

5 As to the meaning of 'director' see PARA 478.

6 As to the meaning of 'balance sheet' see PARA 715.

7 Companies Act 2006 s 444(3)(a). As to the Secretary of State see PARA 6. As to the regulations that have been made see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409; and PARAS 879.

The provisions of the Companies Act 2006 s 444 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

8 As to the meaning of 'profit and loss account' see PARA 715.

9 Companies Act 2006 s 444(3)(b).

10 Companies Act 2006 s 444(3).

11 As to medium-sized companies and groups see PARA 695.

12 Companies Act 2006 s 445(3)(a). As to the regulations that have been made see the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410; and PARAS 879.

13 Companies Act 2006 s 445(3)(b).

14 Companies Act 2006 s 445(3).

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879. Formats for abbreviated accounts and notes to those accounts.

In relation to a small company¹ for which Companies Act individual accounts² are being prepared, the directors³ may deliver to the registrar of companies⁴ a copy of a balance sheet⁵ which complies with special requirements⁶ rather than the usual requirements⁷. Special provision is made as to the notes to accompany the accounts⁸. Companies Act individual accounts and Companies Act group accounts⁹ need not give certain information that is usually required concerning shares of the company held by subsidiary undertakings and directors' benefits¹⁰.

In relation to a company which qualifies¹¹ as medium-sized¹² in relation to a financial year¹³, and for which Companies Act individual accounts are being prepared¹⁴ for that year, the individual accounts for the year need not comply with the provisions relating to disclosure with respect to compliance with accounting standards¹⁵ or those relating to related party transactions¹⁶. The directors of the company may deliver to the registrar of companies a copy of the accounts for the year which includes a profit and loss account¹⁷ in which certain items are combined as one item¹⁸, and which does not contain the information that is usually required concerning particulars of turnover¹⁹.

1 As to small companies and groups see PARA 694. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the meaning of 'Companies Act individual accounts' see PARA 717; and as to the meaning of 'individual accounts' see PARA 716.

3 As to the meaning of 'director' see PARA 478.

4 Ie under the Companies Act 2006 s 444: see PARA 871. As to the meaning of 'registrar' see PARA 131 note 2.

5 As to the meaning of 'balance sheet' see PARA 715.

6 As to the balance sheet formats for abbreviated accounts see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 4 Pt 1.

7 Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 6(1). The usual requirements referred to in the text are those of Sch 1: see PARA 716 et seq.

8 As to the notes to the abbreviated accounts see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 4 Pt 2.

9 As to the meaning of 'Companies Act group accounts' see PARA 776.

10 See the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, regs 6(2), 11. Companies Act individual accounts delivered to the registrar need not give the information required by Sch 2 Pt 1 para 4 (shares of company held by subsidiary undertakings: see PARA 758) or by Sch 3 (directors' benefits: see PARA 767 et seq): reg 6(2). Companies Act group accounts delivered to the registrar need not give the information required by Sch 3 (directors' benefits: see PARA 767 et seq) or by Sch 6 Pt 2 para 25 (shares of company held by subsidiary undertakings: see PARA 797): reg 11.

11 Ie under the Companies Act 2006 s 465: see PARA 695.

12 As to medium-sized companies and groups see PARA 695.

13 As to a company's financial year see PARA 711.

14 Ie under the Companies Act 2006 s 396: see PARA 728.

15 As to the provisions relating to disclosure with respect to compliance with accounting standards see the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 Pt 3 para 45; and PARA 739.

16 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 4(1), (2). As to the provisions relating to related party transactions see Sch 1 Pt 3 para 72; and PARA 754.

17 As to the meaning of 'profit and loss account' see PARA 715.

18 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 4(1), (3)(a). The following items listed in the profit and loss account formats set out in Sch 1 may be combined as one item: items 2, 3 and 6 in Format 1; items 2-5 in Format 2; items A.1 and B.2 in Format 3; and items A.1, A.2 and B.2-B.4 in Format 4: reg 4(3)(a). As to the profit and loss account formats set out in Sch 1 see PARAS 734-737.

19 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 4(1), (3)(b). As to the information that is usually required concerning particulars of turnover see Sch 1 Pt 3 para 68; and PARA 750.

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880. Special auditor's report where abbreviated accounts delivered.

Where the directors¹ of a company² deliver abbreviated accounts³ to the registrar⁴, and the company is not exempt from audit⁵ (or the directors have not taken advantage of any such exemption), the directors must also deliver to the registrar a copy of a special report of the company's auditor stating that in his opinion:

1684 (1) the company is entitled to deliver abbreviated accounts in accordance with the relevant provision; and

1685 (2) the abbreviated accounts to be delivered are properly prepared in accordance with regulations under that provision⁶.

The auditor's report on the company's annual accounts⁷ need not be delivered; but, if that report was qualified, the special report must set out that report in full together with any further material necessary to understand the qualification, and if that report contained:

- 1686 (a) a statement⁸ that accounting records or returns were inadequate or that accounts did not agree with records and returns; or
- 1687 (b) a statement⁹ that he had failed to obtain necessary information and explanations,

the special report must set out that statement in full¹⁰.

If abbreviated accounts are delivered to the registrar, the references in the statutory provisions concerning publication of accounts¹¹ to the auditor's report on the company's annual accounts must be read as references to the special auditor's report¹².

The provisions relating to the signing of the auditor's report¹³ and the provisions relating to offences in connection with the auditor's report¹⁴ apply to a special report as they apply to an auditor's report¹⁵ on the company's annual accounts¹⁶.

1 As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to the meaning of 'abbreviated accounts' see PARA 878.

4 Ie under the Companies Act 2006 s 444(3) or s 445(3): see PARA 878. As to the meaning of 'registrar' see PARA 131 note 2.

5 As to auditors and audit see PARA 905 et seq; and as to exemption from audit see PARAS 908-911.

6 Companies Act 2006 s 449(1), (2).

The provisions of the Companies Act 2006 s 449 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

7 As to the meaning of 'annual accounts' see PARA 715.

8 Ie under the Companies Act 2006 s 498(2)(a) or (b): see PARA 928.

9 Ie under the Companies Act 2006 s 498(3): see PARA 928.

10 Companies Act 2006 s 449(3).

11 Ie the Companies Act 2006 s 434 or s 435: see PARA 862.

12 Companies Act 2006 s 449(5).

13 Ie the Companies Act 2006 ss 503-506: see PARAS 935-936.

14 Ie the Companies Act 2006 ss 507-508: see PARA 937.

15 Ie prepared under the Companies Act 2006 Pt 16 (ss 475-539): see PARA 905 et seq.

16 Companies Act 2006 s 449(4).

COMPANIES ACTS/(18) ACCOUNTS AND REPORTS/(vii) Approval and Publication of Accounts and Reports/H. FILING OF ACCOUNTS AND REPORTS/(B) Delivery of Abbreviated Accounts in place of Individual Accounts/881. Approval and signing of abbreviated accounts.

881. Approval and signing of abbreviated accounts.

Abbreviated accounts¹ must be approved by the board of directors² and signed on behalf of the board by a director of the company³. The signature must be on the balance sheet⁴. The balance sheet must contain in a prominent position above the signature a statement to the effect that it is prepared in accordance with the special provisions of the Companies Act 2006⁵ relating (as the case may be) to companies subject to the small companies regime⁶ or to medium-sized companies⁷.

If abbreviated accounts are approved that do not comply with the requirements of the relevant regulations⁸, every director of the company who knew that they did not comply, or was reckless as to whether they complied, and who failed to take reasonable steps to prevent them from being approved, commits an offence⁹.

1 As to the meaning of 'abbreviated accounts' see PARA 878.

2 As to the meaning of 'director' see PARA 478.

3 Companies Act 2006 s 450(1). As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

The provisions of the Companies Act 2006 s 450 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 2006 s 450(2). As to the meaning of 'balance sheet' see PARA 715.

5 As to the special provisions see PARAS 878-881.

6 As to the small companies regime see PARA 694.

7 Companies Act 2006 s 450(3). As to medium-sized companies and groups see PARA 695.

8 As to the regulations see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409; the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410; and PARA 879.

9 Companies Act 2006 s 450(4). A person guilty of such an offence is liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum: s 450(5). As to the statutory maximum see PARA 1622.

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(C) FAILURE TO FILE ACCOUNTS AND REPORTS

882. Offences arising from default in filing accounts and reports.

If the statutory requirements¹ regarding the duty to deliver accounts and reports to the registrar² are not complied with in relation to a company's³ accounts and reports for a financial year⁴ before the end of the period for filing those accounts and reports⁵, every person who immediately before the end of that period was a director⁶ of the company commits an offence⁷.

It is a defence for a person charged with such an offence to prove that he took all reasonable steps for securing that those requirements would be complied with before the end of that period⁸. It is not a defence to prove that the documents in question were not in fact prepared as required by Part 15⁹ of the Companies Act 2006¹⁰.

1 le the requirements of the Companies Act 2006 s 441: see PARA 869.

2 As to the meaning of 'registrar' see PARA 131 note 2.

3 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

4 As to a company's financial year see PARA 711.

5 le under the Companies Act 2006 s 442: see PARA 870.

6 As to the meaning of 'director' see PARA 478.

7 Companies Act 2006 s 451(1). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 5 on the standard scale: s 451(4). As to the standard scale see PARA 1622. As to the meaning of 'daily default fine' see PARA 1622.

Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq. The provisions of the Companies Act 2006 s 451 apply also to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. Where an overseas company, or a credit or financial institution to which the Companies Act 2006 s 1050 applies (see PARA 1831), is not required to prepare and disclose accounts under parent law, s 451 is applied with modifications: see the Overseas Companies Regulations 2009, SI 2009/1801, regs 41, 56; and PARA 1830 et seq. As to the meaning of 'overseas company' see PARA 1824.

8 Companies Act 2006 s 451(2).

9 le the Companies Act 2006 Pt 15 (ss 380-474).

10 Companies Act 2006 s 451(3).

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883. Court order to make good default in filing accounts and reports.

If the statutory requirements¹ regarding the duty to deliver accounts and reports to the registrar² are not complied with in relation to a company's³ accounts and reports for a financial year⁴ before the end of the period for filing those accounts and reports⁵, and the directors⁶ of the company fail to make good the default within 14 days after the service of a notice on them requiring compliance, then the court⁷ may, on the application of any member⁸ or creditor of the company or of the registrar, make an order directing the directors (or any of them) to make

good the default within such time as may be specified in the order⁹. The court's order may provide that all costs of and incidental to the application are to be borne by the directors¹⁰.

1 Ie the requirements of the Companies Act 2006 s 441: see PARA 869.

2 As to the meaning of 'registrar' see PARA 131 note 2.

3 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

4 As to a company's financial year see PARA 711.

5 Ie under the Companies Act 2006 s 442: see PARA 870.

6 As to the meaning of 'director' see PARA 478.

7 As to the meaning of 'court' see PARA 212 note 1.

8 As to the meaning of 'member' see PARA 321.

9 Companies Act 2006 s 452(1).

Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq. The provisions of the Companies Act 2006 s 452 apply also to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

10 Companies Act 2006 s 452(2).

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884. Civil penalty for failure to deliver accounts and reports.

Where the statutory requirements¹ regarding the duty to deliver accounts and reports to the registrar² are not complied with in relation to a company's³ accounts and reports for a financial year⁴ before the end of the period for filing those accounts and reports⁵, the company is liable to a civil penalty⁶. The amount of the penalty is to be determined in accordance with regulations⁷ made by the Secretary of State⁸ by reference to:

1688 (1) the length of the period between the end of the period for filing the accounts and reports in question and the day on which the requirements are complied with; and

1689 (2) whether the company is a private or public company⁹.

The penalty may be recovered by the registrar and is to be paid into the Consolidated Fund¹⁰.

It is not a defence in proceedings under these provisions to prove that the documents in question were not in fact prepared as required by Part 15¹¹ of the Companies Act 2006¹².

1 Ie the requirements of the Companies Act 2006 s 441: see PARA 869.

2 As to the meaning of 'registrar' see PARA 131 note 2.

3 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

4 As to a company's financial year see PARA 711.

5 Ie under the Companies Act 2006 s 442: see PARA 870.

6 Companies Act 2006 s 453(1). This is in addition to any liability of the directors under s 451 (see PARA 882): see s 453(1). As to the meaning of 'director' see PARA 478.

Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq. The provisions of the Companies Act 2006 s 453 apply also to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

'Liable' means 'subject to a present obligation to pay the penalty': *R (on the application of the POW Trust) v Chief Executive and Registrar of Companies* [2002] EWHC 2783 (Admin), [2003] 2 BCLC 295 (where it was also held that the modest civil penalties imposed as sanctions for non-compliance with a vital regulatory requirement were clearly legitimate and proportionate and accordingly the statutory scheme was in compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179), First Protocol art 1 (protection of property) (incorporated into English law by the Human Rights Act 1998 s 1(3), Sch I Pt II).

7 Regulations under the Companies Act 2006 s 453 having the effect of increasing the penalty payable in any case are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): ss 453(5), 1290. Otherwise, the regulations are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 453(5), 1289. See further note 9.

8 As to the Secretary of State see PARA 6.

9 Companies Act 2006 s 453(2). As to the meanings of 'private company' and 'public company' see PARA 102. As to the regulations that have been made see the Companies (Late Filing Penalties) and Limited Liability Partnerships (Filing Periods and Late Filing Penalties) Regulations 2008, SI 2008/497, regs 4, 5.

10 Companies Act 2006 s 453(3). As to the Consolidated Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARAS 1028-1031.

11 Ie the Companies Act 2006 Pt 15 (ss 380-474).

12 Companies Act 2006 s 453(4).

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(viii) Revision of Defective Accounts and Reports

A. VOLUNTARY REVISION

885. Voluntary revision of defective accounts and reports.

If it appears to the directors¹ of a company² that:

1690 (1) the company's annual accounts³;

1691 (2) the directors' remuneration report⁴ or the directors' report⁵; or

1692 (3) a summary financial statement⁶ of the company⁷,

did not comply with the relevant requirements⁸, they may prepare revised accounts or a revised report or statement⁹.

Where copies of the previous accounts or report have been sent out to members¹⁰, delivered to the registrar¹¹ or (in the case of a public company¹²) laid before the company in general meeting¹³, the revisions must be confined to: (a) the correction of those respects in which the previous accounts or report did not comply with the requirements; and (b) the making of any necessary consequential alterations¹⁴.

The Secretary of State¹⁵ may make provision by regulations as to the application of the provisions of the Companies Act 2006 in relation to revised annual accounts, a revised directors' remuneration report or directors' report, or a revised summary financial statement¹⁶. The regulations may, in particular:

1693 (i) make different provision according to whether the previous accounts, report or statement are replaced or are supplemented by a document indicating the corrections to be made¹⁷;

1694 (ii) make provision with respect to the functions of the company's auditor¹⁸ in relation to the revised accounts, report or statement¹⁹;

1695 (iii) require the directors to take such steps as may be specified in the regulations where the previous accounts or report have been:

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369. (A) sent out²⁰ to members and others;

370. (B) laid before the company in general meeting; or

371. (C) delivered to the registrar,

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1696 or where a summary financial statement containing information derived from the previous accounts or report has been sent²¹ to members²²;

1697 (iv) apply the provisions of the Companies Act 2006 (including those creating criminal offences) subject to such additions, exceptions and modifications as are specified in the regulations²³.

1 As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 Companies Act 2006 s 454(1)(a). As to the meaning of 'annual accounts' see PARA 715.

4 As to the directors' remuneration report see PARA 834 et seq.

5 Companies Act 2006 s 454(1)(b). As to the directors' report see PARA 816 et seq.

6 As to summary financial statements see PARA 853 et seq.

7 Companies Act 2006 s 454(1)(c).

8 Ie the requirements of the Companies Act 2006 or, where applicable, of the IAS Regulation art 4. As to the meaning of 'IAS Regulation' see PARA 693 note 1.

9 Companies Act 2006 s 454(1). As to whether the court has an inherent power to permit the filing of revised accounts see *Re a Company (No 1389920)* [2004] EWHC 60 (Ch), [2004] 2 BCLC 434.

Regulations apply these provisions to community interest company reports: see PARA 90. As to community interest companies generally see PARA 82 et seq. The provisions of the Companies Act 2006 s 454 apply also to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1

para 10, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

10 As to the meaning of 'member' see PARA 321.

11 As to the meaning of 'registrar' see PARA 131 note 2.

12 As to the meaning of 'public company' see PARA 102.

13 As to company meetings see PARA 629 et seq.

14 Companies Act 2006 s 454(2).

15 As to the Secretary of State see PARA 6.

16 Companies Act 2006 s 454(3). Regulations under s 454 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 454(5), 1289. As to the regulations that have been made see the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373; and PARA 886 et seq.

17 Companies Act 2006 s 454(4)(a).

18 As to auditors and audit see PARA 905 et seq.

19 Companies Act 2006 s 454(4)(b).

20 Ie under the Companies Act 2006 s 423: see PARA 850.

21 Ie under the Companies Act 2006 s 426: see PARA 853.

22 Companies Act 2006 s 454(4)(c).

23 Companies Act 2006 s 454(4)(d).

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886. Content of revised accounts and reports.

The provisions¹ as to the matters to be included in the annual accounts² of a company³ apply to revised accounts⁴ as if the revised accounts were prepared and approved by the directors as at the date of the original annual accounts⁵, and the provisions⁶ as to the matters to be included in a directors' report or directors' remuneration report apply to a revised report as if the revised report was prepared and approved by the directors of the company as at the date of the original directors' report or directors' remuneration report⁷. In particular, provisions requiring accounts to give a true and fair view⁸ apply so as to require a true and fair view to be shown in the revised accounts of the matters referred to in those accounts, viewed as at the date of the original annual accounts⁹.

In the case of Companies Act accounts, certain provisions¹⁰ apply to revised accounts as if references to the date on which the accounts were signed were references to the date of the original annual accounts¹¹.

1 Ie the provisions of the Companies Act 2006 (see further note 5) and, where applicable, of the IAS Regulation art 4. As to the meaning of 'IAS Regulation' see PARA 693 note 1.

References in the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, to provisions or requirements of the Companies Act 2006 as to matters to be included in annual accounts and

reports include relevant provisions of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410: Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 2(3).

2 As to the meaning of 'annual accounts' see PARA 715.

3 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

4 'Revised accounts' means revised annual accounts of a company prepared by the directors under the Companies Act 2006 s 454 (see PARA 885), either through revision by replacement or revision by supplementary note; in the latter case the revised accounts comprise the original annual accounts together with the supplementary note: Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 2(1). 'Revision by replacement' means revision by the preparation of a replacement set of accounts, directors' report or directors' remuneration report, in substitution for the original annual accounts, directors' report or directors' remuneration report; and 'revision by supplementary note' means revision by the preparation of a note indicating corrections to be made to the original annual accounts, directors' report or directors' remuneration report: reg 2(1). 'Original', in relation to annual accounts, or a directors' report or directors' remuneration report, means the annual accounts or (as the case may be) directors' report or directors' remuneration report which are the subject of revision by, respectively, revised accounts or a revised report and, in relation to abbreviated accounts or a summary financial statement, means abbreviated accounts or a summary financial statement based on the original annual accounts or directors' report or directors' remuneration report: reg 2(1). 'Revised report' means a revised directors' report or directors' remuneration report prepared by the directors under the Companies Act 2006 s 454 (see PARA 885), either through revision by replacement or revision by supplementary note; in the latter case the revised report comprises the original directors' report or directors' remuneration report together with the supplementary note: Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 2(1). As to the directors' report see PARA 816 et seq; and as to the directors' remuneration report see PARA 834 et seq. As to abbreviated accounts see PARA 878 et seq; and as to summary financial statements see PARA 853 et seq. As to the meaning of 'director' see PARA 478.

5 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 3(1).

Where the provisions of the Companies Act 2006 as to the matters to be included in the annual accounts of a company or (as the case may be) in a directors' report or directors' remuneration report have been amended after the date of the original annual accounts or (as the case may be) directors' report or directors' remuneration report but prior to the date of revision, references in the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 3 and reg 7(3) (see PARA 889) to the provisions of the Companies Act 2006 are to be construed as references to the provisions of that Act as in force at the date of the original annual accounts or (as the case may be) directors' report or directors' remuneration report: Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 19(1). 'Date of the original annual accounts' means the date on which the original annual accounts were approved by the board of directors under the Companies Act 2006 s 414 (see PARA 815); 'date of the original directors' report' means the date on which the original directors' report was approved by the board of directors under s 419 (see PARA 831); 'date of the original directors' remuneration report' means the date on which the original directors' remuneration report was approved by the board of directors under s 422 (see PARA 848); and 'date of revision' means the date on which revised accounts are approved by the board of directors under the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 4 (see PARA 887) or (as the case may be) a revised directors' report or directors' remuneration report is approved by them under reg 5 or reg 6 (see PARA 888): reg 2(1).

6 Ie the provisions of the Companies Act 2006.

7 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 3(4).

8 Ie, in the case of Companies Act accounts, the Companies Act 2006 s 393 (see PARA 714), s 396(2) (see PARA 728) and s 404(2) (see PARA 784); and, in the case of IAS accounts, s 393 (see PARA 714) and international accounting standards (as to the meaning of which see PARA 693 note 1). As to the meanings of 'Companies Act accounts' and 'IAS accounts' see PARAS 717, 776.

9 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 3(2).

10 Ie the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 1 para 13(b) or (where applicable) the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 1 para 13(b): see PARA 718 head (3)(b).

11 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 3(3).

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887. Approval and signature of revised accounts.

The statutory provisions relating to the approval and signing of accounts¹ apply to revised accounts², save that in the case of revision by supplementary note³, they apply as if they required a signature on the supplementary note instead of on the company's balance sheet⁴.

Where copies of the original annual accounts⁵ have been sent out to members⁶, laid before the company in general meeting⁷ in the case of a public company⁸, or delivered to the registrar⁹, the directors¹⁰ must before approving the revised accounts¹¹, cause statements as to the following matters to be made in a prominent position in the revised accounts (or, in the case of a revision by supplementary note, in that note)¹²:

- 1698 (1) in the case of a revision by replacement¹³:
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 372. (a) that the revised accounts replace the original annual accounts for the financial year¹⁴ (specifying it)¹⁵;
 373. (b) that they are now the statutory accounts of the company for that financial year¹⁶;
 374. (c) that they have been prepared as at the date of the original annual accounts¹⁷ and not as at the date of revision¹⁸ and accordingly do not deal with events between those dates¹⁹;
 375. (d) the respects in which the original annual accounts did not comply with the requirements of the Companies Act 2006²⁰; and
 376. (e) any significant amendments made consequential upon the remedying of those defects²¹;
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 1699 (2) in the case of a revision by supplementary note:
 145
 377. (a) that the note revises in certain respects the original annual accounts of the company and is to be treated as forming part of those accounts²²; and
 378. (b) that the annual accounts have been revised as at the date of the original annual accounts and not as at the date of revision and accordingly do not deal with events between those dates²³;
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and must, when approving the revised accounts, cause the date on which the approval is given to be stated in them (or, in the case of revision by supplementary note, in that note)²⁴. Failure to comply with these provisions is an offence²⁵.

1 Ie the Companies Act 2006 s 414: see PARA 815.

2 As to the meaning of 'revised accounts' see PARA 886 note 4.

3 As to the meaning of 'revision by supplementary note' see PARA 886 note 4.

4 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 4(1). As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and

insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq. As to the meaning of 'balance sheet' see PARA 715.

5 As to the meaning of 'annual accounts' see PARA 715; and as to the meaning of 'original' see PARA 886 note 4.

6 Ie under the Companies Act 2006 s 423(1): see PARA 850. References in the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, to a member or members of a company include a reference to a person nominated to enjoy information rights under the Companies Act 2006 s 146 (traded companies: see PARA 371); Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 2(2). As to the meaning of 'member' generally see PARA 321.

7 Ie under the Companies Act 2006 s 437(1): see PARA 865. As to company meetings see PARA 629 et seq.

8 As to the meaning of 'public company' see PARA 102.

9 Ie under the Companies Act 2006 s 441(1): see PARA 869. As to the meaning of 'registrar' see PARA 131 note 2.

10 As to the meaning of 'director' see PARA 478.

11 Ie under the Companies Act 2006 s 414: see PARA 815.

12 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 4(2).

13 As to the meaning of 'revision by replacement' see PARA 886 note 4.

14 As to a company's financial year see PARA 711.

15 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 4(2)(a)(i).

16 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 4(2)(a)(ii).

17 As to the meaning of 'date of the original annual accounts' see PARA 886 note 5.

18 As to the meaning of 'date of revision' see PARA 886 note 5.

19 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 4(2)(a)(iii).

20 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 4(2)(a)(iv).

21 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 4(2)(a)(v).

22 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 4(2)(b)(i).

23 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 4(2)(b)(ii).

24 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 4(2).

25 The provisions of the Companies Act 2006 s 414(4), (5) (see PARA 815) apply with respect to a failure to comply with the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 4(2) as if the requirements of reg 4(2) were requirements of the Companies Act 2006 Pt 15 (ss 380-474): Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 4(2).

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888. Approval and signature of revised directors' report or revised remuneration report.

The statutory provisions relating to the approval and signing of the directors' report¹ apply to a revised directors' report² and those relating to the approval and signing of the directors' remuneration report³ apply to a revised directors' remuneration report, save that in the case of revision by supplementary note⁴ the provisions apply as if they required the signature to be on the supplementary note⁵.

Where copies of the original⁶ report have been sent out to members⁷, laid before the company in general meeting⁸ in the case of a public company⁹, or delivered to the registrar¹⁰, the directors must, before approving the revised report¹¹, cause statements as to the following matters to be made in a prominent position in the revised report (or, in the case of a revision by supplementary note, in that note)¹²:

- 1700 (1) in the case of a revision by replacement¹³:
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- 1700 (1) (a) that the revised report replaces the original report for the financial year¹⁴ (specifying it)¹⁵;
- 1700 (1) (b) that it has been prepared as at the date of the original directors' report¹⁶ or as at the date of the original directors' remuneration report¹⁷, as the case may be, and not as at the date of revision¹⁸ and accordingly does not deal with any events between those dates¹⁹;
- 1700 (1) (c) the respects in which the original report did not comply with the requirements of the Companies Act 2006²⁰; and
- 1700 (1) (d) any significant amendments made consequential upon the remedying of those defects²¹;
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- 1701 (2) in the case of a revision by supplementary note:
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- 1701 (2) (a) that the note revises in certain respects the original report of the company and is to be treated as forming part of that report²²; and
- 1701 (2) (b) that the report has been revised as at the date of the original directors' report or as at the date of the original directors' remuneration report, as the case may be, and not as at the date of the revision and accordingly does not deal with events between those dates²³;
- 150

and must, when approving the revised report, cause the date on which the approval is given to be stated in it (or, in the case of a revision by supplementary note, in that note)²⁴. Failure to comply with these provisions is an offence²⁵.

1 Ie the Companies Act 2006 s 419: see PARA 831. As to the directors' report see PARA 816 et seq. As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'revised report' see PARA 886 note 4.

3 Ie the Companies Act 2006 s 422: see PARA 848. As to the directors' remuneration report see PARA 834 et seq.

4 As to the meaning of 'revision by supplementary note' see PARA 886 note 4.

5 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, regs 5(1), 6(1).

6 As to the meaning of 'original' see PARA 886 note 4.

7 Ie under the Companies Act 2006 s 423(1): see PARA 850. As to members see PARA 887 note 6.

8 Ie under the Companies Act 2006 s 437(1): see PARA 865. As to company meetings see PARA 629 et seq. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and

insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

9 As to the meaning of 'public company' see PARA 102.

10 le under the Companies Act 2006 s 441(1): see PARA 869. As to the meaning of 'registrar' see PARA 131 note 2.

11 le under the Companies Act 2006 s 419 (see PARA 831) or s 422 (see PARA 848), as the case may be.

12 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, regs 5(2), 6(2).

13 As to the meaning of 'revision by replacement' see PARA 886 note 4.

14 As to a company's financial year see PARA 711.

15 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, regs 5(2)(a)(i), 6(2)(a)(i).

16 As to the meaning of 'date of the original directors' report' see PARA 886 note 5.

17 As to the meaning of 'date of the original directors' remuneration report' see PARA 886 note 5.

18 As to the meaning of 'date of revision' see PARA 886 note 5.

19 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, regs 5(2)(a)(ii), 6(2)(a)(ii).

20 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, regs 5(2)(a)(iii), 6(2)(a)(iii).

21 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, regs 5(2)(a)(iv), 6(2)(a)(iv).

22 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, regs 5(2)(b)(i), 6(2)(b)(i).

23 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, regs 5(2)(b)(ii), 6(2)(b)(ii).

24 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, regs 5(2), 6(2).

25 The provisions of the Companies Act 2006 s 419(3), (4) (see PARA 831) apply with respect to a failure to comply with the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 5(2) as if the requirements of reg 5(2) were requirements of the Companies Act 2006 Pt 15 (ss 380-474): Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 5(2). The provisions of the Companies Act 2006 s 422(2), (3) (see PARA 848) apply with respect to a failure to comply with the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 6(2) as if the requirements of reg 6(2) were requirements of the Companies Act 2006 Pt 15: Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 6(2).

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889. Auditors' report on revised accounts and revised report.

A company's current auditor¹ must make a report or (as the case may be) further report² to the company's members³ on any revised accounts⁴. However, where the auditor's report on the original annual accounts⁵ was not made by the company's current auditor, the directors⁶ of the

company may resolve that the report required by these provisions is to be made by the person or persons who made that report, provided that that person or those persons agree to do so and would be qualified for appointment as auditor of the company⁷.

An auditor's report under these provisions must state whether in the auditor's opinion the revised accounts have been properly prepared in accordance with the relevant provisions⁸, and in particular whether a true and fair view, seen as at the date the original annual accounts were approved, is given by the revised accounts with respect to the specified matters⁹. The report must also state whether in the auditor's opinion the original annual accounts failed to comply with the relevant requirements¹⁰ in the respects identified¹¹ by the directors¹².

The auditor must state whether the information contained in the directors' report¹³ for the financial year¹⁴ for which the annual accounts are prepared (which is, if the report has been revised¹⁵, that revised report) is consistent with those accounts¹⁶.

The provisions relating to the signing of the auditor's report¹⁷ apply¹⁸ to an auditor's report under these provisions, with any necessary modifications¹⁹.

Upon being signed²⁰, an auditor's report under these provisions is, as from the date of signature, the auditor's report on the annual accounts of the company in place of the report on the original annual accounts²¹.

Where as a result of the revisions to the accounts, the company is no longer entitled to exemption from audit²², the company must cause an auditor's report on the revised accounts to be prepared²³. The auditor's report must be delivered to the registrar²⁴ within 28 days after the date of revision²⁵ of the accounts²⁶. The provisions relating to default in filing accounts²⁷ apply, with modifications, with respect to a failure to comply with these requirements²⁸.

1 As to auditors and audit see PARA 905 et seq. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 Ie under the Companies Act 2006 s 495 (auditor's report on company's annual accounts): see PARA 924.

3 As to members see PARA 887 note 6.

4 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 7(1). The text refers to revised accounts prepared under the Companies Act 2006 s 454: see PARA 885. As to the meaning of 'revised accounts' see PARA 886 note 4.

The provisions of s 498 (see PARA 928) apply with any necessary modifications, and the provisions of s 495(1) (see PARA 924) do not apply with respect to the revised accounts: see the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 7(1).

5 As to the meaning of 'annual accounts' see PARA 715; and as to the meaning of 'original' see PARA 886 note 4.

6 As to the meaning of 'director' see PARA 478.

7 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 7(2).

8 Ie the provisions of the Companies Act 2006 and, where applicable, the IAS Regulation art 4 as they have effect under the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373. As to the meaning of 'IAS Regulation' see PARA 693 note 1.

9 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 7(3). See reg 19(1); and PARA 886 note 5. The text refers to the matters set out in the Companies Act 2006 s 495(3)(a)-(c): see PARA 924.

10 Ie the requirements of the Companies Act 2006 and, where applicable, the IAS Regulation art 4.

11 Ie, in the case of a revision by replacement, in the statement required by the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 4(2)(a)(iv) (see PARA 887 head (d)) or, in

the case of a revision by supplementary note, in the supplementary note. As to the meanings of 'revision by replacement' and 'revision by supplementary note' see PARA 886 note 4.

12 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 7(3). See reg 19(1); and PARA 886 note 5.

13 As to the directors' report see PARA 816 et seq.

14 As to a company's financial year see PARA 711.

15 Ie under the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373.

16 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 7(4).

17 Ie the Companies Act 2006 ss 503-506: see PARA 935 et seq.

18 Ie as they apply to an auditor's report under the Companies Act 2006 s 495(1): see PARA 924.

19 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 7(5).

20 Ie under the Companies Act 2006 s 503 (see PARA 935) as applied (see the text and notes 17-19).

21 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 7(6).

22 Ie under the Companies Act 2006 Pt 16 Ch 1 (ss 475-484). As to exemption from audit see PARAS 908-911.

23 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 8(1).

24 As to the meaning of 'registrar' see PARA 131 note 2.

25 As to the meaning of 'date of revision' see PARA 886 note 5.

26 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 8(2).

27 Ie the Companies Act 2006 s 451 (default in filing accounts and reports: offences) and s 452 (default in filing accounts: court order): see PARAS 882-883.

28 See the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 8(3). The provisions of the Companies Act 2006 ss 451, 452 (see PARAS 882-883) apply with respect to a failure to comply with the requirements of the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 8 as they apply with respect to a failure to comply with the requirements of the Companies Act 2006 s 441 (see PARA 869), but as if the references in s 451(1) and in s 452(1)(a) to 'the period for filing those accounts and reports' were references to the period of 28 days referred to in the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 8(2) (and the references in the Companies Act 2006 s 451(1), (2) to 'that period' are to be construed accordingly), and as if the references in s 451(3) to 'the documents in question' and 'this Part' were, respectively, a reference to the auditor's report referred to in the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 8(2) and the provisions of the Companies Act 2006 Pt 16 as applied by the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373: reg 8(3).

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890. Auditors' report on revised reports alone.

A company's current auditor¹ must make a report or (as the case may be) further report² to the company's members³ on any revised report⁴ if the relevant annual accounts⁵ have not been revised at the same time⁶. However, where the auditor's report on the annual accounts for the financial year⁷ covered by the revised report was not made by the company's current auditor, the directors⁸ of the company may resolve that the report required by these provisions is to be

made by the person or persons who made that report, provided that that person or those persons agree to do so and would be qualified for appointment as auditor of the company⁹.

Where a revised directors' report¹⁰ is prepared¹¹, the auditor's report must state whether in his opinion the information given in that revised report is consistent with the annual accounts for the relevant year (specifying it)¹². Where a revised directors' remuneration report¹³ is prepared¹⁴, the auditor's report must state whether in his opinion any auditable part¹⁵ of that revised report has been properly prepared¹⁶.

The provisions relating to the signing of the auditor's report¹⁷ apply¹⁸ to an auditor's report under these provisions, with any necessary modifications¹⁹.

1 As to auditors and audit see PARA 905 et seq. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 Ie under the Companies Act 2006 s 496 (see PARA 925) or s 497 (see PARA 926), as the case may be.

3 As to members see PARA 887 note 6.

4 Ie a revised directors' remuneration report or directors' report prepared under the Companies Act 2006 s 454: see PARA 885. As to the meaning of 'revised report' see PARA 886 note 4.

5 As to the meaning of 'annual accounts' see PARA 715.

6 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 9(1).

7 As to a company's financial year see PARA 711.

8 As to the meaning of 'director' see PARA 478.

9 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 9(2).

10 As to the directors' report see PARA 816 et seq.

11 Ie under the Companies Act 2006 s 454: see PARA 885.

12 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 9(3).

13 As to the directors' remuneration report see PARA 834 et seq.

14 Ie under the Companies Act 2006 s 454: see PARA 885.

15 'Auditable part' means a part containing information required by the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 8 Pt 3 (see PARA 841 et seq): Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 9(4).

16 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 9(4).

17 Ie the Companies Act 2006 ss 503-506: see PARA 935 et seq.

18 Ie as they apply to an auditor's report under the Companies Act 2006 s 495: see PARA 924.

19 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 9(5).

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891. Effect of revision of accounts.

Upon the directors¹ approving revised accounts², the provisions of the Companies Act 2006 have effect as if the revised accounts were, as from the date of their approval, the annual accounts³ of the company⁴ in place of the original⁵ annual accounts⁶.

In particular, the revised accounts are as from that date the company's annual accounts for the relevant financial year⁷ for the purposes of the statutory provisions relating to: (1) the right to demand copies of accounts and reports⁸; (2) the requirements in connection with the publication of accounts⁹; and (3) the duty to circulate copies of accounts and reports¹⁰, the duty to lay accounts and reports before the company in general meeting¹¹, and the duty to file accounts and reports with the registrar¹², if the requirements of those provisions have not been complied with prior to the date of revision¹³.

1 As to the meaning of 'director' see PARA 478.

2 Ie under the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 4: see PARA 887. As to the meaning of 'revised accounts' see PARA 886 note 4.

3 As to the meaning of 'annual accounts' see PARA 715.

4 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

5 As to the meaning of 'original' see PARA 886 note 4.

6 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 10(1).

7 As to a company's financial year see PARA 711.

8 Ie the Companies Act 2006 ss 431, 432: see PARA 860.

9 Ie the Companies Act 2006 s 434(3): see PARA 862.

10 Ie the Companies Act 2006 s 423: see PARA 850.

11 Ie the Companies Act 2006 s 437: see PARA 865. As to company meetings see PARA 629 et seq.

12 Ie the Companies Act 2006 s 441: see PARA 869. As to the meaning of 'registrar' see PARA 131 note 2.

13 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 10(2). As to the meaning of 'date of revision' see PARA 886 note 5.

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892. Effect of revision of report.

Upon the directors¹ approving a revised report² the provisions of the Companies Act 2006 have effect as if the revised report was, as from the date of its approval, the directors' report³ or the directors' remuneration report⁴ (as the case may be) in place of the original⁵ directors' report or directors' remuneration report (as the case may be)⁶. In particular, the revised report is as from that date the directors' report or the directors' remuneration report for the relevant financial year⁷ for the purposes of the statutory provisions relating to: (1) the right to demand copies of accounts and reports⁸, the duty to circulate copies of accounts and reports⁹; and (2) the duty to

lay accounts and reports before the company in general meeting¹⁰, and the duty to file accounts and reports with the registrar¹¹, if the requirements of those provisions have not been complied with prior to the date of revision¹².

1 As to the meaning of 'director' see PARA 478.

2 Ie under the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 5 or 6: see PARA 888. As to the meaning of 'revised report' see PARA 886 note 4.

3 As to the directors' report see PARA 816 et seq.

4 As to the directors' remuneration report see PARA 834 et seq.

5 As to the meaning of 'original' see PARA 886 note 4.

6 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 11(1).

7 As to a company's financial year see PARA 711.

8 Ie the Companies Act 2006 ss 431, 432: see PARA 860.

9 Ie the Companies Act 2006 s 423: see PARA 850.

10 Ie the Companies Act 2006 s 437: see PARA 865. As to company meetings see PARA 629 et seq. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

11 Ie the Companies Act 2006 s 441: see PARA 869. As to the meaning of 'registrar' see PARA 131 note 2.

12 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 11(2). As to the meaning of 'date of revision' see PARA 886 note 5.

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893. Publication of revised accounts and reports.

Where the directors¹ have prepared revised accounts or a revised report² and copies of the original³ annual accounts or report⁴ have been sent⁵ to any person, the directors must, not more than 28 days after the date of revision⁶, send to that person:

1702 (1) in the case of a revision by replacement⁷, a copy of the revised accounts, or (as the case may be) the revised report, together with a copy of the auditor's report on those accounts, or (as the case may be) on that report⁸; or

1703 (2) in the case of a revision by supplementary note⁹, a copy of that note together with a copy of the auditor's report on the revised accounts, or (as the case may be) on the revised report¹⁰.

The directors must also, not more than 28 days after the revision, send a copy of the revised accounts or (as the case may be) revised report, together with a copy of the auditor's report on those accounts or (as the case may be) on that report, to any person who is not a person entitled to receive a copy under the above provisions but who, as at the date of revision, is:

1704 (a) a member of the company¹¹;

- 1705 (b) a holder of the company's debentures¹²; or
 1706 (c) a person who is entitled to receive notice of general meetings¹³,

unless the company would be entitled at that date to send¹⁴ to that person a summary financial statement¹⁵.

The statutory provisions relating to default in sending out copies of accounts and reports¹⁶ apply to a default in complying with these requirements¹⁷.

1 As to the meaning of 'director' see PARA 478.

2 Ie under the Companies Act 2006 s 454: see PARA 885. As to the meanings of 'revised accounts' and 'revised report' see PARA 886 note 4.

3 As to the meaning of 'original' see PARA 886 note 4.

4 As to the meaning of 'annual accounts and reports' see PARA 715.

5 Ie under the Companies Act 2006 s 423 (see PARA 850) or s 146 (see PARA 371).

6 As to the meaning of 'date of revision' see PARA 886 note 5.

7 As to the meaning of 'revision by replacement' see PARA 886 note 4.

8 As to the auditor's report see PARAS 889-890. As to auditors and audit generally see PARA 905 et seq.

9 As to the meaning of 'revision by supplementary note' see PARA 886 note 4.

10 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 12(1), (2).

Where, prior to the date of revision of the original annual accounts, the company had completed sending out copies of those accounts under the Companies Act 2006 s 423 (see PARA 850), references in the Act to the day on which accounts are sent out under s 423 are to be construed as referring to the day on which the original accounts were sent out (applying s 423(5) as necessary) notwithstanding that those accounts have been revised; where the company had not completed, prior to the date of revision, the sending out of copies of those accounts under s 423, such references are to the day, or the last day, on which the revised accounts are sent out: Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 12(5). As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

11 As to members see PARA 887 note 6.

12 As to the meaning of 'debenture' see PARA 1299.

13 As to the persons who are entitled to receive notice of general meetings see PARA 635. As to company meetings see PARA 629 et seq.

14 Ie under the Companies Act 2006 s 426: see PARA 853.

15 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 12(3). As to summary financial statements see PARA 853 et seq.

The provisions of the Companies Act 2006 s 423(2)-(4) (see PARA 850) apply to the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 12(3) as they apply to the Companies Act 2006 s 423(1): Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 12(3).

16 Ie the Companies Act 2006 s 425 (default in sending out copies of accounts and reports: offences): see PARA 852.

17 The Companies Act 2006 s 425 (see PARA 852) applies to a default in complying with the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 12 as if the provisions of reg 12 were provisions of the Companies Act 2006 s 423 (see PARA 850) and as if the references in s 425 to 'the company' and 'every officer of the company who is in default' were a reference to each of the directors who approved the revised accounts under the Companies (Revision of Defective Accounts and Reports) Regulations

2008, SI 2008/373, reg 4 (see PARA 887) or the revised report under reg 5 or 6 (see PARA 888): Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 12(4).

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894. Laying of revised accounts and reports.

Where the directors¹ of a public company² have prepared revised accounts or a revised report³ and copies of the original⁴ annual accounts or report⁵ have been laid before a general meeting⁶, a copy of the revised accounts or (as the case may be) the revised report, together with a copy of the auditor's report on those accounts or (as the case may be) on that report⁷, must be laid before the next general meeting of the company held after the date of revision⁸ at which any annual accounts for a financial year⁹ are laid, unless the revised accounts, or (as the case may be) the revised report, have already been laid before an earlier general meeting¹⁰.

The statutory provisions relating to failure to lay accounts and reports¹¹ apply to a default in complying with these requirements¹².

1 As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 Ie under the Companies Act 2006 s 454: see PARA 885. As to the meanings of 'revised accounts' and 'revised report' see PARA 886 note 4.

4 As to the meaning of 'original' see PARA 886 note 4.

5 As to the meaning of 'annual accounts and reports' see PARA 715.

6 Ie under the Companies Act 2006 s 437: see PARA 865. As to company meetings see PARA 629 et seq.

7 As to the auditor's report see PARAS 889-890. As to auditors and audit generally see PARA 905 et seq.

8 As to the meaning of 'date of revision' see PARA 886 note 5.

9 As to a company's financial year see PARA 711.

10 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 13(1), (2).

11 Ie the Companies Act 2006 s 438 (public companies: offence of failure to lay accounts and reports): see PARA 865.

12 The Companies Act 2006 s 438 (see PARA 865) applies with respect to a failure to comply with the requirements of the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 13 as it has effect with respect to a failure to comply with the requirements of the Companies Act 2006 s 437 (see PARA 865), but as if the reference in s 438(1) to 'the period allowed' was a reference to the period between the date of revision of the revised accounts or (as the case may be) the revised report and the date of the next general meeting of the company held after the date of revision at which any annual accounts for a financial year are laid (and references in s 438(1), (2) to 'that period' are to be construed accordingly), and as if the references in s 438(3) to 'the documents in question' and 'this Part' were, respectively, a reference to the documents referred to in the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 13(2) and the provisions of the Companies Act 2006 Pt 15 (ss 380-474) as applied by the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373: reg 13(3).

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895. Delivery to the registrar of revised accounts and reports.

Where the directors¹ have prepared revised accounts or a revised report² and a copy of the original³ annual accounts or report⁴ has been delivered to the registrar⁵, the directors of the company⁶ must, within 28 days of the date of revision⁷, deliver to the registrar:

- 1707 (1) in the case of a revision by replacement⁸, a copy of the revised accounts or (as the case may be) the revised report, together with a copy of the auditor's report on those accounts or (as the case may be) on that report⁹; or
- 1708 (2) in the case of a revision by supplementary note¹⁰, a copy of that note, together with a copy of the auditor's report on the revised accounts or (as the case may be) on the revised report¹¹.

The statutory provisions relating to default in filing accounts and reports¹² apply to a default in complying with these requirements¹³.

1 As to the meaning of 'director' see PARA 478.

2 I.e. under the Companies Act 2006 s 454: see PARA 885. As to the meanings of 'revised accounts' and 'revised report' see PARA 886 note 4.

3 As to the meaning of 'original' see PARA 886 note 4.

4 As to the meaning of 'annual accounts and reports' see PARA 715.

5 I.e. under the Companies Act 2006 s 441(1): see PARA 869. As to the meaning of 'registrar' see PARA 131 note 2.

6 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

7 As to the meaning of 'date of revision' see PARA 886 note 5.

8 As to the meaning of 'revision by replacement' see PARA 886 note 4.

9 As to the auditor's report see PARAS 889-890. As to auditors and audit generally see PARA 905 et seq.

10 As to the meaning of 'revision by supplementary note' see PARA 886 note 4.

11 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 14(1), (2).

12 I.e. the Companies Act 2006 s 451 (default in filing accounts and reports: offences) and s 452 (default in filing accounts: court order): see PARAS 882-883.

13 The Companies Act 2006 s 451 (see PARA 882) and s 452 (see PARA 883) apply with respect to a failure to comply with the requirements of the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 14 as they apply with respect to a failure to comply with the requirements of the Companies Act 2006 s 441 (see PARA 869), but as if the references in s 451(1) and in s 452(1)(a) to 'the period for filing those accounts and reports' were references to the period of 28 days referred to in the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 14(2) (and the references in the Companies Act 2006 s 451(1), (2) to 'that period' are to be construed accordingly), and as if the references in s 451(3) to 'the documents in question' and 'this Part' were, respectively, a reference to the documents

referred to in the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 14(2) and the provisions of the Companies Act 2006 Pt 15 (ss 380-474) as applied by the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373: reg 14(3).

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896. Abbreviated accounts of small and medium-sized companies.

The following provisions apply where the directors¹ have prepared revised accounts² and the company³ has, prior to the date of revision⁴, delivered to the registrar⁵ accounts which are abbreviated accounts⁶. Where the abbreviated accounts so delivered to the registrar would, if they had been prepared by reference to the revised accounts, not comply with the provisions of the Companies Act 2006 (whether because the company would not have qualified as a small or (as the case may be) medium-sized company⁷ in the light of the revised accounts or because the accounts have been revised in a manner which affects the content of the abbreviated accounts), the directors of the company must cause the company either: (1) to deliver to the registrar a copy of the revised accounts, together with a copy of the directors' report⁸ and the auditor's report⁹ on the revised accounts¹⁰; or (2) if on the basis of the revised accounts they would be entitled under the Companies Act 2006 to do so, to prepare further abbreviated accounts drawn up in accordance with the provisions of the Companies Act 2006 and deliver them to the registrar together with a statement as to the effect of the revisions made¹¹. Where the abbreviated accounts would, if they had been prepared by reference to the revised accounts, comply with the requirements of the Companies Act 2006, the directors of the company must cause the company to deliver to the registrar a note stating that the annual accounts¹² of the company for the relevant financial year¹³ (specifying it) have been revised in a respect which has no bearing on the abbreviated accounts delivered for that year, together with a copy of any auditor's report on the revised accounts¹⁴. Revised abbreviated accounts or a note under these provisions must be delivered to the registrar within 28 days after the date of revision of the revised accounts¹⁵.

Where the directors have delivered to the registrar abbreviated accounts which do not comply with the provisions of the Companies Act 2006 for reasons other than those specified above¹⁶, the directors of the company must cause the company: (a) to prepare further abbreviated accounts¹⁷; and (b) to deliver those accounts to the registrar within 28 days after the date of revision together with a statement as to the effect of the revisions made¹⁸.

The statutory provisions relating to default in filing accounts and reports¹⁹ apply to a default in complying with these requirements²⁰.

1 As to the meaning of 'director' see PARA 478.

2 Ie under the Companies Act 2006 s 454: see PARA 885. As to the meaning of 'revised accounts' see PARA 886 note 4.

3 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

4 As to the meaning of 'date of revision' see PARA 886 note 5.

5 As to the meaning of 'registrar' see PARA 131 note 2.

6 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 15(1). The text refers to abbreviated accounts within the meaning of the Companies Act 2006 s 444(3), (4) (filing obligations of companies subject to small companies regime: see PARA 871) or s 445(3), (4) (filing obligations of medium-sized companies: see PARA 873). As to the meaning of 'abbreviated accounts' see PARA 878.

Where the provisions of s 444(3), (4) and s 445(3), (4) as to the matters to be included in abbreviated accounts have been amended after the date of delivery of the original abbreviated accounts but prior to the date of revision of the revised accounts or report, references in the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 15 and reg 16 (see the text and notes 16-20) to the provisions of the Companies Act 2006 or to any particular provisions of that Act are to be construed as references to the provisions of that Act, or to the particular provision, as in force at the date of the delivery of the original abbreviated accounts: Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 19(2). As to the meaning of 'original' see PARA 886 note 4.

7 As to small companies and groups see PARA 694; and as to medium-sized companies and groups see PARA 695.

8 As to the directors' report see PARA 816 et seq.

9 As to the auditor's report see PARA 889. As to auditors and audit generally see PARA 905 et seq.

10 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 15(2)(a).

11 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 15(2)(b).

12 As to the meaning of 'annual accounts' see PARA 715.

13 As to a company's financial year see PARA 711.

14 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 15(3).

15 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 15(4).

16 Ie specified in the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 15(2): see the text and notes 7-11.

17 Ie in accordance with the provisions of the Companies Act 2006 s 444(3), (4) (see PARA 871) or s 445(3), (4) (see PARA 873), as the case may be.

18 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 16(1), (2). See note 6.

19 Ie the Companies Act 2006 s 451 (default in filing accounts and reports: offences) and s 452 (default in filing accounts: court order): see PARAS 882-883.

20 The Companies Act 2006 s 451 (see PARA 882) and s 452 (see PARA 883) apply with respect to a failure to comply with the requirements of the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 15 or reg 16 as they apply with respect to a failure to comply with the requirements of the Companies Act 2006 s 441 (see PARA 869), but as if the references in s 451(1) and in s 452(1)(a) to 'the period for filing those accounts and reports' were references to the period of 28 days referred to in the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 15(4) or reg 16(2), as the case may be (and the references in the Companies Act 2006 s 451(1), (2) to 'that period' are to be construed accordingly), and as if the references in s 451(3) to 'the documents in question' and 'this Part' were, respectively, a reference to the documents referred to in the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 15(4) or reg 16(2), as the case may be, and the provisions of the Companies Act 2006 Pt 15 (ss 380-474) as applied by the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373: regs 15(5), 16(3).

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897. Summary financial statements.

Where a summary financial statement¹ has been sent to any person², which does not comply with the relevant requirements³ or if it had been prepared by reference to revised accounts⁴ or a revised report⁵ would not have complied with those requirements, the directors⁶ of the company⁷ must cause the company to prepare a further summary financial statement⁸ and to send that statement to any person who received a copy of the original summary financial statement and any person to whom the company would be entitled, as at the date the revised summary financial statement is prepared, to send a summary financial statement for the current financial year⁹. A summary financial statement prepared under these provisions must contain a short statement of the revisions made and their effect¹⁰. Where the summary financial statement would, if it had been prepared by reference to the revised accounts or revised report, comply with the relevant requirements¹¹, the directors of the company must cause the company to send to the persons mentioned above a note stating that the annual accounts¹² of the company for the relevant financial year (specifying it) or (as the case may be) the directors' report¹³ or directors' remuneration report¹⁴ for that year have or has been revised in a respect which has no bearing on the summary financial statement for that year¹⁵; and if the auditor's report¹⁶ on the revised accounts or revised report is qualified, a copy of that report must be attached to that note¹⁷.

The directors of the company may, instead of causing the company to prepare a further summary financial statement under these provisions, cause the company to prepare and send to the persons mentioned above a supplementary note indicating the corrections to the original summary financial statement¹⁸. A supplementary note prepared under these provisions must contain a statement that it revises the original summary financial statement in certain respects and is to be treated as forming part of that statement¹⁹.

A summary financial statement revised, or a note prepared, under these provisions must be sent to the persons mentioned above within 28 days after the date of revision of the revised accounts or revised report²⁰.

The statutory provisions relating to default in complying with the requirements as to summary financial statements²¹ apply to a default in complying with the requirements set out above²².

1 As to summary financial statements see PARA 853 et seq.

2 I.e. any person specified in the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374, reg 3: see PARA 853 note 10.

3 I.e. the requirements of the Companies Act 2006 s 426 (see PARA 853) or the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374 (see PARA 853 et seq).

4 As to the meaning of 'revised accounts' see PARA 886 note 4.

5 As to the meaning of 'revised report' see PARA 886 note 4.

6 As to the meaning of 'director' see PARA 478.

7 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

8 I.e. under the Companies Act 2006 s 426: see PARA 853.

9 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 17(1), (2). As to a company's financial year see PARA 711.

The provisions of the Companies Act 2006 s 426(1)-(4) (see PARA 853) and ss 434(6), 435(7) (see PARA 862) apply with necessary modifications to a summary financial statement under the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 17: reg 17(2).

Where the provisions of the Companies Act 2006 s 426 (see PARA 853) or of the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374 (see PARA 853 et seq) as to the matters to be included in a summary financial statement have been amended after the date of the sending out of the original summary financial statement but prior to the date of revision of the revised accounts or report, references in reg 17 to the Companies Act 2006 s 426 or to those regulations are to be construed as references to s 426 or those regulations as in force at the date of the sending out of the original summary financial statements: Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 19(3). As to the meaning of 'date of revision' see PARA 886 note 5.

10 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 17(3).

11 In the requirements of the Companies Act 2006 s 426 (see PARA 853) and the Companies (Summary Financial Statement) Regulations 2008, SI 2008/374.

12 As to the meaning of 'annual accounts' see PARA 715.

13 As to the directors' report see PARA 816 et seq.

14 As to the directors' remuneration report see PARA 834 et seq.

15 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 17(6).

16 In under the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 7, reg 8 or reg 9: see PARAS 889-890. As to auditors and audit generally see PARA 905 et seq.

17 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 17(6).

18 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 17(4). The provisions of the Companies Act 2006 s 426(1), (2) (see PARA 853) and ss 434(6), 435(7) (see PARA 862) apply with necessary modifications to such a supplementary note: Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 17(4).

19 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 17(5).

20 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 17(7).

21 In the Companies Act 2006 s 429 (summary financial statements: offences): see PARA 853.

22 The Companies Act 2006 s 429 (see PARA 853) applies with respect to a failure to comply with the requirements of the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 17 as if the provisions of reg 17 were provisions of the Companies Act 2006 s 429, and as if the reference in s 429 to 'the company' and 'every officer of the company who is in default' were references to each of the directors of the company who approved the revised accounts under the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 4 (see PARA 887), the revised directors' report under reg 5 (see PARA 888) or the revised directors' remuneration report under reg 6 (see PARA 888): reg 17(8).

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898. Certain categories of small companies exempt from audit.

Where, in respect of any financial year¹, a small company² is exempt³ from the requirements of the Companies Act 2006 relating to the audit of accounts⁴, the regulations concerning the revision of defective accounts and reports⁵ apply as if they omitted any reference to an auditor's report⁶, or to the making of such a report⁷.

1 As to a company's financial year see PARA 711.

2 As to small companies and groups see PARA 694. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 Ie under the Companies Act 2006 s 477: see PARA 908.

4 As to auditors and audit see PARA 905 et seq.

5 Ie the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373.

6 As to the auditor's report see PARA 924 et seq.

7 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 18.

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899. Dormant companies.

Where, in respect of any financial year¹, a dormant company² is exempt³ from the requirements of the Companies Act 2006 relating to the audit of accounts⁴, the regulations concerning the revision of defective accounts and reports⁵ apply as if they omitted any reference to an auditor's report⁶, or to the making of such a report⁷.

1 As to a company's financial year see PARA 711.

2 As to dormant companies see PARA 910 et seq. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 Ie under the Companies Act 2006 s 480: see PARA 910.

4 As to auditors and audit see PARA 905 et seq.

5 Ie the Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373.

6 As to the auditor's report see PARA 924 et seq.

7 Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373, reg 18.

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B. REVISION FOLLOWING SECRETARY OF STATE'S NOTICE

900. Secretary of State's notice in respect of accounts or reports.

Where copies of a company's annual accounts¹ or directors' report² have been sent out³ or a copy of a company's annual accounts or directors' report has been delivered to the registrar⁴ or (in the case of a public company⁵) laid before the company in general meeting⁶, and it appears

to the Secretary of State⁷ that there is, or may be, a question whether the accounts or report comply with the relevant requirements⁸, the Secretary of State may give notice to the directors of the company indicating the respects in which it appears that such a question arises or may arise⁹.

The notice must specify a period of not less than one month for the directors to give an explanation of the accounts or report or prepare revised accounts or a revised report¹⁰. If at the end of the specified period, or such longer period as the Secretary of State may allow, it appears to the Secretary of State that the directors have not given a satisfactory explanation of the accounts or report, or have not revised the accounts or report so as to comply with the relevant requirements¹¹, the Secretary of State may apply to the court¹².

These provisions apply equally to revised annual accounts and revised directors' reports, in which case they have effect as if the references to revised accounts or reports were references to further revised accounts or reports¹³.

1 As to the meaning of 'annual accounts' see PARA 715. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

2 As to the directors' report see PARA 816 et seq; and as to the meaning of 'director' see PARA 478.

3 Ie under the Companies Act 2006 s 423: see PARA 850.

4 As to the meaning of 'registrar' see PARA 131 note 2.

5 As to the meaning of 'public company' see PARA 102.

6 As to company meetings see PARA 629 et seq.

7 As to the Secretary of State see PARA 6.

8 Ie the requirements of the Companies Act 2006 or, where applicable, of the IAS Regulation art 4. As to the meaning of 'IAS Regulation' see PARA 693 note 1.

9 Companies Act 2006 s 455(1), (2).

The provisions of the Companies Act 2006 s 455 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

10 Companies Act 2006 s 455(3).

11 Ie the requirements of the Companies Act 2006 or, where applicable, of the IAS Regulation art 4.

12 Companies Act 2006 s 455(4). As to the meaning of 'court' see PARA 212 note 1.

13 Companies Act 2006 s 455(5).

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C. APPLICATION TO THE COURT

901. Application to the court in respect of defective accounts or reports.

An application may be made to the court¹:

- 1709 (1) by the Secretary of State²; or
- 1710 (2) by a person authorised by the Secretary of State for these purposes³,

for a declaration that the annual accounts⁴ of a company⁵ do not comply, or a directors' report⁶ does not comply, with the relevant requirements⁷ and for an order requiring the directors⁸ of the company to prepare revised accounts or a revised report⁹. Notice of the application, together with a general statement of the matters at issue in the proceedings, must be given by the applicant to the registrar¹⁰ for registration¹¹.

If the court orders the preparation of revised accounts, it may give directions as to:

- 1711 (a) the auditing of the accounts¹²;
- 1712 (b) the revision of any directors' remuneration report¹³, directors' report or summary financial statement¹⁴;
- 1713 (c) the taking of steps by the directors to bring the making of the order to the notice of persons likely to rely on the previous accounts; and
- 1714 (d) such other matters as the court thinks fit¹⁵.

If the court orders the preparation of a revised directors' report it may give directions as to:

- 1715 (i) the review of the report by the auditors;
- 1716 (ii) the revision of any summary financial statement;
- 1717 (iii) the taking of steps by the directors to bring the making of the order to the notice of persons likely to rely on the previous report; and
- 1718 (iv) such other matters as the court thinks fit¹⁶.

If the court finds that the accounts or report did not comply with the relevant requirements¹⁷ it may order that all or part of:

- 1719 (A) the costs of and incidental to the application; and
- 1720 (B) any reasonable expenses incurred by the company in connection with or in consequence of the preparation of revised accounts or a revised report,

are to be borne by such of the directors as were party to the approval of the defective accounts or report¹⁸. Where the court makes such an order, it must have regard to whether the directors party to the approval of the defective accounts or report knew or ought to have known that the accounts or report did not comply with the relevant requirements¹⁹, and it may exclude one or more directors from the order or order the payment of different amounts by different directors²⁰.

On the conclusion of proceedings on an application under these provisions, the applicant must send to the registrar for registration a copy of the court order or, as the case may be, give notice to the registrar that the application has failed or been withdrawn²¹.

These provisions apply equally to revised annual accounts and revised directors' reports, in which case they have effect as if the references to revised accounts or reports were references to further revised accounts or reports²².

1 As to the meaning of 'court' see PARA 212 note 1.

2 Ie after having complied with the Companies Act 2006 s 455: see PARA 900. As to the Secretary of State see PARA 6.

- 3 As to the persons so authorised see PARA 902.
- 4 As to the meaning of 'annual accounts' see PARA 715.
- 5 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.
- 6 As to the directors' report see PARA 816 et seq.
- 7 Ie the requirements of the Companies Act 2006 or, where applicable, of the IAS Regulation art 4. As to the meaning of 'IAS Regulation' see PARA 693 note 1.
- 8 As to the meaning of 'director' see PARA 478.
- 9 Companies Act 2006 s 456(1). In relation to an application for a declaration under s 456(1), the claimant must notify any former director who was a director at the time of the approval of the annual accounts or directors' report of the application: *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 12.
The provisions of the Companies Act 2006 s 456 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.
- 10 As to the meaning of 'registrar' see PARA 131 note 2.
- 11 Companies Act 2006 s 456(2).
- 12 As to auditors and audit see PARA 905 et seq.
- 13 As to the directors' remuneration report see PARA 834 et seq.
- 14 As to summary financial statements see PARA 853 et seq.
- 15 Companies Act 2006 s 456(3).
- 16 Companies Act 2006 s 456(4).
- 17 Ie the requirements of the Companies Act 2006 or, where applicable, of the IAS Regulation art 4.
- 18 Companies Act 2006 s 456(5). For this purpose every director of the company at the time of the approval of the accounts or report is to be taken to have been a party to the approval unless he shows that he took all reasonable steps to prevent that approval: see s 456(5).
- 19 Ie the requirements of the Companies Act 2006 or, where applicable, of the IAS Regulation art 4.
- 20 Companies Act 2006 s 456(6).
- 21 Companies Act 2006 s 456(7).
- 22 Companies Act 2006 s 456(8).

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902. Persons authorised to apply to the court.

The Secretary of State¹ may by order² (an 'authorisation order') authorise for the purposes of the statutory provisions³ relating to applications to court⁴ in respect of defective accounts or reports any person appearing to him:

- 1721 (1) to have an interest in, and to have satisfactory procedures directed to securing, compliance by companies⁵ with the relevant requirements⁶ relating to accounts and directors' reports⁷;
- 1722 (2) to have satisfactory procedures for receiving and investigating complaints about companies' annual accounts⁸ and directors' reports⁹; and
- 1723 (3) otherwise to be a fit and proper person to be authorised¹⁰.

A person may be authorised generally or in respect of particular classes of case, and different persons may be authorised in respect of different classes of case¹¹. The Secretary of State may refuse to authorise a person if he considers that his authorisation is unnecessary having regard to the fact that there are one or more other persons who have been or are likely to be authorised¹².

An authorisation order may contain such requirements or other provisions relating to the exercise of functions by the authorised person as appear to the Secretary of State to be appropriate¹³; and no such order is to be made unless it appears to the Secretary of State that the person would, if authorised, exercise his functions as an authorised person in accordance with the provisions proposed¹⁴.

If the authorised person is an unincorporated association, proceedings brought in, or in connection with, the exercise of any function by the association as an authorised person may be brought by or against the association in the name of a body corporate whose constitution provides for the establishment of the association¹⁵.

Where authorisation is revoked, the revoking order may make such provision as the Secretary of State thinks fit with respect to pending proceedings¹⁶.

The Financial Reporting Review Panel has been authorised for these purposes¹⁷.

1 As to the Secretary of State see PARA 6.

2 As to the order that has been made see the Companies (Defective Accounts and Directors' Reports) (Authorised Person) and Supervision of Accounts and Reports (Prescribed Body) Order 2008, SI 2008/623; and the text and note 17. An order under the Companies Act 2006 s 457 is subject to negative resolution procedure (ie the statutory instrument containing the order is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 457(7), 1289.

The provisions of the Companies Act 2006 s 457 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Ie the provisions of the Companies Act 2006 s 456: see PARA 901.

4 As to the meaning of 'court' see PARA 212 note 1.

5 As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

6 Ie the requirements of the Companies Act 2006 or, where applicable, of the IAS Regulation art 4. As to the meaning of 'IAS Regulation' see PARA 693 note 1.

7 Companies Act 2006 s 457(1)(a). As to the directors' report see PARA 816 et seq.

8 As to the meaning of 'annual accounts' see PARA 715.

9 Companies Act 2006 s 457(1)(b).

10 Companies Act 2006 s 457(1)(c).

11 Companies Act 2006 s 457(2).

12 Companies Act 2006 s 457(3).

13 Companies Act 2006 s 457(5).

14 Companies Act 2006 s 457(5).

15 Companies Act 2006 s 457(4).

16 Companies Act 2006 s 457(6).

17 See the Companies (Defective Accounts and Directors' Reports) (Authorised Person) and Supervision of Accounts and Reports (Prescribed Body) Order 2008, SI 2008/623, art 2. The Financial Reporting Review Panel is established under the articles of association of the Financial Reporting Council Limited (see PARA 699 note 2).

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D. POWER OF AUTHORISED PERSON TO REQUIRE DOCUMENTS ETC

903. Power of authorised person to require documents, information and explanations.

Where it appears to an authorised person¹ that there is, or may be, a question whether a company's annual accounts² or directors' report³ comply with the relevant requirements⁴, the authorised person may require any of the persons mentioned below to produce any document⁵ or to provide him with any information or explanations that he may reasonably require for the purpose of discovering whether there are grounds for an application to the court⁶, or deciding whether to make such an application⁷. The persons referred to above are:

1724 (1) the company⁸;

1725 (2) any officer, employee, or auditor of the company⁹;

1726 (3) any persons who fell within head (2) at a time to which the document or information required by the authorised person relates¹⁰.

If a person fails to comply with such a requirement, the authorised person may apply to the court¹¹. If it appears to the court that the person has failed to comply with such a requirement, it may order the person to take such steps as it directs for securing that the documents are produced or the information or explanations are provided¹².

A statement made by a person in response to a requirement or an order under the above provisions may not be used in evidence against him in any criminal proceedings¹³; and nothing in these provisions compels any person to disclose documents or information in respect of which a claim to legal professional privilege¹⁴ could be maintained in legal proceedings¹⁵.

1 Ie a person who is authorised under the Companies Act 2006 s 457: see PARA 902.

2 As to the meaning of 'annual accounts' see PARA 715. As to the meaning of 'company' see PARA 24; and as to the special provision that is made in relation to banking and insurance companies and groups, partnerships, limited liability partnerships and investment companies see PARA 701 et seq.

3 As to the directors' report see PARA 816 et seq.

4 le the requirements of the Companies Act 2006 or, where applicable, of the IAS Regulation art 4. As to the meaning of 'IAS Regulation' see PARA 693 note 1.

5 For these purposes, 'document' includes information recorded in any form: Companies Act 2006 s 459(8).

The provisions of the Companies Act 2006 ss 458, 459 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

6 le under the Companies Act 2006 s 456: see PARA 901. As to the meaning of 'court' see PARA 212 note 1.

7 Companies Act 2006 s 459(1), (2). As to the disclosure of information by tax authorities to an authorised person for the purpose of facilitating the taking of steps by that person to discover whether there are grounds for an application to the court under s 456 (see PARA 901), or for the purpose of facilitating a decision by the authorised person whether to make such an application, see s 458 (amended by SI 2008/948).

8 Companies Act 2006 s 459(3)(a).

9 Companies Act 2006 s 459(3)(b). As to auditors and audit see PARA 905 et seq.

10 Companies Act 2006 s 459(3)(c).

11 Companies Act 2006 s 459(4).

12 Companies Act 2006 s 459(5).

13 Companies Act 2006 s 459(6).

14 As to legal professional privilege see **CIVIL PROCEDURE** vol 11 (2009) PARA 558 et seq; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1479.

15 Companies Act 2006 s 459(7).

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904. Disclosure of information obtained under compulsory powers.

Information (in whatever form) obtained in pursuance of a requirement or order¹ and which relates to the private affairs of an individual or to any particular business may not, during the lifetime of that individual or so long as that business continues to be carried on, be disclosed without the consent of that individual or the person for the time being carrying on that business². This does not apply to permitted disclosure³ or to the disclosure of information that is or has been available to the public from another source⁴.

A person who discloses information in contravention of these provisions commits an offence, unless: (1) he did not know, and had no reason to suspect, that the information had been disclosed under the statutory power to require information⁵; or (2) he took all reasonable steps and exercised all due diligence to avoid the commission of the offence⁶. Where such an offence is committed by a body corporate, every officer of the body who is in default also commits the offence⁷; and proceedings for an offence alleged to have been committed by an unincorporated body must be brought in the name of the body, and not in that of any of its members⁸.

1 le under the Companies Act 2006 s 459: see PARA 903.

2 Companies Act 2006 s 460(1), (2).

The provisions of the Companies Act 2006 ss 460-462 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 10: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 The disclosure permitted by the Companies Act 2006 s 461, which provides that the prohibition in s 460 of the disclosure of information obtained in pursuance of a requirement or order under s 459 (see PARA 903) that relates to the private affairs of an individual or to any particular business has effect subject to the following exceptions (see s 461(1)).

The prohibition does not apply to the disclosure of information for the purpose of facilitating the carrying out by the authorised person of his functions under s 456 (see PARA 901): s 461(2).

It does not apply to disclosure to the Secretary of State, the Treasury, the Bank of England, the Financial Services Authority, or the Commissioners for Her Majesty's Revenue and Customs: s 461(3). As to the Secretary of State see PARA 6. As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the Bank of England see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 793 et seq. As to the Financial Services Authority see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 4 et seq. As to the Commissioners for Her Majesty's Revenue and Customs see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 900 et seq; **INCOME TAXATION**.

It does not apply to disclosure:

- 298 (1) for the purpose of assisting a body designated by an order under s 1252 (delegation of functions of the Secretary of State: see PARA 960) to exercise its functions under Pt 42 (ss 1209-1264) (statutory auditors: see PARA 958 et seq) (s 461(4)(a) (amended by SI 2008/948));
- 299 (2) with a view to the institution of, or otherwise for the purposes of, disciplinary proceedings relating to the performance by an accountant or auditor of his professional duties (Companies Act 2006 s 461(4)(b));
- 300 (3) for the purpose of enabling or assisting the Secretary of State or the Treasury to exercise any of his or its functions under any of the following: (a) the Companies Acts (as to the meaning of which see PARA 16); (b) the Criminal Justice Act 1993 Pt V (ss 52-64) (insider dealing) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**); (c) the Insolvency Act 1986; (d) the Company Directors Disqualification Act 1986; (e) the Financial Services and Markets Act 2000 (Companies Act 2006 s 461(4)(c));
- 301 (4) for the purpose of enabling or assisting the Bank of England to exercise its functions (s 461(4)(e));
- 302 (5) for the purpose of enabling or assisting the Commissioners for Her Majesty's Revenue and Customs to exercise their functions (s 461(4)(f));
- 303 (6) for the purpose of enabling or assisting the Financial Services Authority to exercise its functions under any of the following: (a) the legislation relating to friendly societies or to industrial and provident societies; (b) the Building Societies Act 1986; (c) the Companies Act 1989 Pt 7 (ss 154-191); (d) the Financial Services and Markets Act 2000 (Companies Act 2006 s 461(4)(g)); or
- 304 (7) in pursuance of any Community obligation (s 461(4)(h)).

It does not apply to disclosure to a body exercising functions of a public nature under legislation in any country or territory outside the United Kingdom that appear to the authorised person to be similar to his functions under s 456 (see PARA 901) for the purpose of enabling or assisting that body to exercise those functions: s 461(5). As to the meaning of 'United Kingdom' see PARA 1 note 5. In determining whether to disclose information to a body in accordance with s 461(5), the authorised person must have regard to the following considerations: (i) whether the use which the body is likely to make of the information is sufficiently important to justify making the disclosure; (ii) whether the body has adequate arrangements to prevent the information from being used or further disclosed other than for the purposes of carrying out the functions mentioned in s 461(5), or for other purposes substantially similar to those for which information disclosed to the authorised person could be used or further disclosed: s 461(6).

Nothing in s 461 authorises the making of a disclosure in contravention of the Data Protection Act 1998 (see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 503 et seq): s 461(7).

The Secretary of State may by order amend s 461(3), (4) and (5): s 462(1). Such an order must not:

- 305 (A) amend s 461(3) (UK public authorities) by specifying a person unless the person exercises functions of a public nature (whether or not he exercises any other function) (s 462(2)(a));

306 (b) amend s 461(4) (purposes for which disclosure permitted) by adding or modifying a description of disclosure unless the purpose for which the disclosure is permitted is likely to facilitate the exercise of a function of a public nature (s 462(2)(b));

307 (c) amend s 461(5) (overseas regulatory authorities) so as to have the effect of permitting disclosures to be made to a body other than one that exercises functions of a public nature in a country or territory outside the United Kingdom (s 462(2)(c)).

An order under s 462 is subject to negative resolution procedure (ie the statutory instrument containing the order is subject to annulment in pursuance of a resolution of either House of Parliament): ss 462(3), 1289.

4 Companies Act 2006 s 460(3).

5 Ie under the Companies Act 2006 s 459: see PARA 903.

6 Companies Act 2006 s 460(4). No proceedings may be brought under s 460 except by or with the consent of the Secretary of State or the Director of Public Prosecutions: see s 1126; and PARA 1624.

A person guilty of an offence under s 460 is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine (or both), or on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or both): s 460(5). As to the statutory maximum see PARA 1622.

7 Companies Act 2006 s 460(6) (added by SI 2008/948). For this purpose, any person who purports to act as director, manager or secretary of the body is treated as an officer of the body; and if the body is a company, any shadow director is treated as an officer of the company: Companies Act 2006 s 460(6) (as so added). As to the liability of an officer in default see PARA 315.

8 See the Companies Act 2006 s 1130; and PARA 1627.

UPDATE

904 Disclosure of information obtained under compulsory powers

NOTE 3--For **CRIMINAL LAW, EVIDENCE AND PROCEDURE** read **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 574A.

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(19) AUDITORS AND AUDIT

(i) Requirement for Audited Accounts

A. GENERAL PROVISION FOR AUDITING OF ACCOUNTS

905. Requirement for company accounts to be audited.

A company's¹ annual accounts² for a financial year³ are required to be audited⁴ unless the company is exempt from audit because it is a small or dormant company⁵ or because it is a non-profit-making company which is subject to public sector audit and correspondingly⁶ exempt

from these requirements⁷, although a company is not entitled to any such exemption unless its balance sheet contains a statement by the directors to that effect⁸.

1 As to the meaning of 'company' see PARA 24.

2 As to a company's accounts see PARA 693 et seq.

3 As to the meaning of 'financial year' see PARA 711.

4 Ie in accordance with the Companies Act 2006 Pt 16 (ss 475-539): see PARA 906 et seq.

The Secretary of State may by regulations amend Pt 16 Ch 1 (ss 475-484) or s 539 (minor definitions) so far as applying thereto by adding, altering or repealing provisions (s 484(1)), and such regulations may make consequential amendments or repeals in other provisions of the Companies Act 2006 or in other enactments (s 484(2)). Regulations under s 484 imposing new requirements, or rendering existing requirements more onerous, are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament) (ss 484(3), 1290); other regulations thereunder are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament) (ss 484(4), 1289). For the regulations so made see the Companies Act 2006 (Amendment) (Accounts and Reports) Regulations 2008, SI 2008/393; and PARA 23. As to the Secretary of State see PARA 6.

The provisions of the Companies Act 2006 ss 475, 484 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 Companies Act 2006 s 475(1)(a). Small companies are exempt from audit under s 477 (see PARAS 908) and dormant companies are exempt from audit under the Companies Act 2006 s 480 (see PARA 28). A company is not entitled to exemption under these provisions unless its balance sheet contains a statement by the directors to the effect that the members have not required the company to obtain an audit of its accounts for the year in question in accordance with s 476 (see PARA 906) and the directors acknowledge their responsibilities for complying with the requirements of the Companies Act 2006 with respect to accounting records and the preparation of accounts: s 475(3). The statement required by this provision must appear on the balance sheet above the signature required by s 414 (see PARA 815): s 475(4). As to the meanings of 'director' and 'member' see PARAS 478, 321.

6 Ie by virtue of the Companies Act 2006 s 482: see PARA 911.

7 Companies Act 2006 s 475(1)(b).

8 Companies Act 2006 s 475(2). The statement required by this provision must appear on the balance sheet above the signature required by s 414: s 475(4).

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906. Right of members to require audit.

The members¹ of a company² that would otherwise be entitled to exemption from audit³ may⁴ require it to obtain an audit of its accounts for a financial year⁵. Notification of such a requirement must be given by:

1727 (1) members representing not less in total than 10 per cent in nominal value of the company's issued share capital⁶, or any class of it⁷; or

1728 (2) if the company does not have a share capital, not less than 10 per cent in number of the members of the company⁸.

The notice may not be given before the financial year to which it relates and must be given not later than one month before the end of that year⁹.

1 As to the meaning of 'member' see PARA 321.

2 As to the meaning of 'company' see PARA 24.

3 le under any of the provisions mentioned in the Companies Act 2006 s 475(1)(a): see PARA 905.

4 le by notice under the Companies Act 2006 s 476.

5 Companies Act 2006 s 476(1). As to the meaning of 'financial year' see PARA 711.

The provisions of the Companies Act 2006 s 476 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

6 As to 'issued share capital', and references to a company having issued share capital, see the Companies Act 2006 ss 545, 546(1)(a), (2); and PARAS 1045.

7 Companies Act 2006 s 476(2)(a).

8 Companies Act 2006 s 476(2)(b).

9 Companies Act 2006 s 476(3).

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907. Power of Secretary of State to require second audit.

Where a person appointed as statutory auditor of a company¹ was not eligible for appointment as such² the Secretary of State³ may direct the company concerned to retain an eligible person to conduct a second audit or to review the first audit and to report whether a second audit is needed, and to take the necessary steps for the carrying out of such a second audit in the event that one is needed⁴.

1 As to the appointment of statutory auditors see PARA 957 et seq.

2 As to eligibility for appointment as a statutory auditor see PARA 969.

3 As to the Secretary of State see PARA 6.

4 See the Companies Act 2006 ss 1248, 1249; and PARA 974.

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EXEMPTIONS FROM AUDIT/(A) Certain Categories of Small Company/908. Conditions for exemption from audit.

B. EXEMPTIONS FROM AUDIT

(A) CERTAIN CATEGORIES OF SMALL COMPANY

908. Conditions for exemption from audit.

Subject to specified exceptions relating to certain public or financial companies, special register bodies and employers' associations¹ and to other statutory audit requirements², a company³ is exempt from the requirements relating to the audit of accounts⁴ for any financial year⁵ if in respect of that financial year:

- 1729 (1) it qualifies as a small company in relation to that year⁶;
- 1730 (2) its turnover⁷ in that year is not more than £6.5m⁸; and
- 1731 (3) its balance sheet total for that year is not more than £3.26m⁹.

1 By virtue of the Companies Act 2006 s 478 (amended by SI 2007/2932), a company is not entitled to the exemption conferred by s 477 (see the text and notes 2-9) if it was at any time within the financial year in question:

- 308 (1) a public company (see PARA 102);
- 309 (2) a company that is an authorised insurance company, a banking company, an e-money issuer, a MiFID investment firm or a UCITS management company;
- 310 (3) a company that carries on insurance market activity; or
- 311 (4) a special register body as defined in the Trade Union and Labour Relations (Consolidation) Act 1992 s 117(1) (see **EMPLOYMENT** vol 40 (2009) PARA 854) or an employers' association as defined in s 122 (see **EMPLOYMENT** vol 40 (2009) PARA 1028) or corresponding Northern Ireland provisions.

As to the meaning of 'public company' see PARA 102; as to the meaning of 'authorised insurance company' see PARA 701; as to the meaning of 'banking company' see PARA 701; and as to the meaning of 'insurance market activity' see PARA 701. 'E-money issuer' means a person who has permission under the Financial Services and Markets Act 2000 Pt 4 (ss 40-55: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 348 et seq) to carry on the activity of issuing electronic money within the meaning of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9B; 'MiFID investment firm' means an investment firm within the meaning of EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments, art 4.1.1, other than a company to which that Directive does not apply by virtue of art 2, a company which is an 'exempt investment firm' within the meaning of the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2007, SI 2007/126, reg 4A(3), and any other company which fulfils all the requirements set out in reg 4C(3); and 'UCITS management company' has the meaning given by the Glossary forming part of the Handbook made by the Financial Services Authority under the Financial Services and Markets Act 2000: Companies Act 2006 s 539 (amended by SI 2007/2932).

The provisions of the Companies Act 2006 ss 477, 478 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

2 By virtue of the Companies Act 2006 s 477(5), s 477 (see the text and notes 3-9) has effect subject to 475(2), (3) (requirements as to statements to be contained in balance sheet: see PARA 905), s 476 (right of members to require audit: see PARA 906), s 478 (companies excluded from small companies exemption: see note 1) and s 479 (availability of small companies exemption in case of group company: see PARA 909).

3 As to the meaning of 'company' see PARA 24.

4 See PARA 905 et seq.

5 As to the meaning of 'financial year' see PARA 711.

6 Companies Act 2006 s 477(1), (2)(a). Whether a company qualifies as a 'small company' for these purposes is determined in accordance with s 382(1)-(6) (see PARA 694): s 477(4)(a).

7 For the purposes of the Companies Act 2006 Pt 16 (ss 475-539: see PARA 905 et seq) 'turnover', in relation to a company, means the amounts derived from the provision of goods and services falling within the company's ordinary activities after deduction of trade discounts, value added tax and any other taxes based on the amounts so derived: s 539.

8 Companies Act 2006 s 477(2)(b) (amended by SI 2008/393). For a period which is a company's financial year but not in fact a year the maximum figure for turnover must be proportionately adjusted: Companies Act 2006 s 477(3).

9 Companies Act 2006 s 477(2)(c) (amended by SI 2008/393). As to the meaning of 'balance sheet total' for this purpose see the Companies Act 2006 s 382; and PARA 694 (definition applied by s 477(4)(b)).

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909. Availability of small companies exemption in case of group company.

A company¹ is not entitled to the small companies exemption² in respect of a financial year³ during any part of which it was a group company⁴ unless:

- 1732 (1) the group⁵ qualifies as a small group⁶ in relation to that financial year and was not at any time in that year an ineligible group⁷;
- 1733 (2) the group's aggregate turnover⁸ in that year is not more than £6.5m net (or £7.8m gross)⁹; and
- 1734 (3) the group's aggregate balance sheet total¹⁰ for that year is not more than £3.26m net (or £3.9m gross)¹¹,

or unless throughout the whole of the period or periods during the financial year when it was a group company it was both a subsidiary undertaking and dormant¹².

1 As to the meaning of 'company' see PARA 24.

2 Ie the exemption conferred by the Companies Act 2006 s 477: see PARA 908.

3 As to the meaning of 'financial year' see PARA 711.

4 For these purposes 'group company' means a company that is a parent company or a subsidiary undertaking: Companies Act 2006 s 479(4)(a). As to the meaning of 'parent company' see PARA 26; as to the meaning of 'subsidiary undertaking' see PARA 26.

The provisions of the Companies Act 2006 s 479 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 For these purposes 'the group', in relation to a group company, means that company together with all its associated undertakings: Companies Act 2006 s 479(4)(b). Undertakings are 'associated' if one is a subsidiary undertaking of the other or both are subsidiary undertakings of a third undertaking: s 477.

6 For these purposes whether a group qualifies as 'small' is determined in accordance with the Companies Act 2006 s 383 (parent companies: see PARA 102) applied for these purposes as if all the bodies corporate in the group were companies: s 479(5)(a), (6).

7 Companies Act 2006 s 479(1)(a), (2)(a). For these purposes 'ineligible group' has the meaning given by s 384(2), (3), applied for these purposes as if all the bodies corporate in the group were companies: s 479(5)(b), (6).

8 As to the meaning of 'turnover' see PARA 908 note 7. For these purposes a group's aggregate turnover is determined as for the purposes of the Companies Act 2006 s 383, applied for these purposes as if all the bodies corporate in the group were companies: s 479(5)(c), (6).

9 Companies Act 2006 s 479(2)(b) (amended by SI 2008/393). For these purposes 'net' and 'gross' have the same meanings as in the Companies Act 2006 s 383, applied for these purposes as if all the bodies corporate in the group were companies, and a company may meet any relevant requirement on the basis of either the gross or the net figure: s 479(5)(d), (e), (6).

10 For these purposes a group's aggregate balance sheet total is determined as for the purposes of the Companies Act 2006 s 383, applied for these purposes as if all the bodies corporate in the group were companies: s 479(5)(c), (6).

11 Companies Act 2006 s 479(2)(c) (amended by SI 2008/393).

12 Companies Act 2006 s 479(1)(b), (3). As to dormant companies see PARA 910 et seq.

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(B) DORMANT COMPANIES

910. Dormant companies.

Subject to specified exceptions relating to certain financial companies¹ and to other statutory audit requirements², a company³ is exempt from the provisions relating to the audit of accounts⁴ in respect of a financial year⁵ if:

- 1735 (1) it has been dormant⁶ since its formation⁷; or
- 1736 (2) it has been dormant since the end of the previous financial year⁸ and:
- 151 385. (a) is entitled as regards its individual accounts⁹ for the financial year in question to prepare accounts in accordance with the special provision for small companies¹⁰, or would be so entitled but for having been a public company¹¹ or a member of an ineligible group¹²; and
- 386. (b) is not required to prepare group accounts¹³ for that year¹⁴.
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1 By virtue of the Companies Act 2006 s 481 (amended by SI 2007/2932), a company is not entitled to the exemption conferred by s 480 (see the text and notes 2-14) if it was at any time within the financial year in question:

- 312 (1) a company that is an authorised insurance company, a banking company, an e-money issuer, a MiFID investment firm or a UCITS management company; or
- 313 (2) a company that carries on insurance market activity.

As to the meaning of 'authorised insurance company' see PARA 701; as to the meaning of 'banking company' see PARA 701; as to the meanings of 'e-money issuer', 'MiFID investment firm' and 'UCITS management company' see PARA 908 note 1; as to the meaning of 'insurance market activity' see PARA 701.

The provisions of the Companies Act 2006 ss 480, 481 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

2 By virtue of the Companies Act 2006 s 480(3), s 480 (see the text and notes 3-14) has effect subject to 475(2), (3) (requirements as to statements to be contained in balance sheet: see PARA 905), s 476 (right of members to require audit: see PARA 906) and s 481 (companies excluded from dormant companies exemption: see the text and note 1).

3 As to the meaning of 'company' see PARA 24.

4 See PARA 905 et seq.

5 As to the meaning of 'financial year' see PARA 711.

6 As to dormant companies see the Companies Act 2006 s 1169; and PARA 28.

7 Companies Act 2006 s 480(1)(a).

8 Companies Act 2006 s 480(1)(b).

9 As to the duty to prepare individual accounts see the Companies Act 2006 s 394; and PARA 716.

10 See the Companies Act 2006 ss 381-384; and PARAS 694.

11 As to the meaning of 'public company' see PARA 102.

12 Companies Act 2006 s 480(2)(a). As to the companies which are ineligible for the small companies regime see the Companies Act 2006 s 384; and PARA 694.

13 As to group accounts see the Companies Act 2006 s 399; and PARA 775.

14 Companies Act 2006 s 480(2)(b).

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(C) COMPANIES SUBJECT TO PUBLIC SECTOR AUDIT

911. Non-profit-making companies subject to public sector audit.

The requirements as to audit of accounts¹ do not apply to a company² for a financial year³ if it is non-profit-making⁴ and its accounts are subject to audit by the Comptroller and Auditor General⁵ or the Auditor General for Wales⁶ or corresponding Scottish or Northern Irish officers⁷, although in the case of a company that is a parent company⁸ or a subsidiary undertaking⁹ this exemption applies only if every group undertaking¹⁰ is non-profit-making¹¹.

1 ie the requirements of the Companies Act 2006 Pt 16 (ss 475-539): see PARA 905 et seq.

2 As to the meaning of 'company' see PARA 24.

3 As to the meaning of 'financial year' see PARA 711.

4 As to the meaning of 'non-profit-making' see the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 48 (definition applied by the Companies Act 2006 s 482(3)).

5 le by virtue of an order under the Government Resources and Accounts Act 2000 s 25(6).

6 le by virtue of an order under the Government of Wales Act 1998 s 144, or by virtue of the Government of Wales Act 2006 Sch 8 para 18 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**).

7 Companies Act 2006 s 482(1) (amended as from 6 November 2009 by SI 2009/2958). These provisions have effect subject to the Companies Act 2006 s 475(2) (balance sheet to contain statement that company entitled to exemption under s 482: see PARA 905); s 482(4).

8 As to the meaning of 'parent company' see PARA 26.

9 As to the meaning of 'subsidiary undertaking' see PARA 26.

10 As to the meaning of 'group undertaking' see PARA 27.

11 Companies Act 2006 s 482(2).

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(ii) Appointment of Auditors

A. PRIVATE COMPANIES

912. Appointment of auditors of private company.

An auditor or auditors of a private company¹ must be appointed for each financial year² of the company, unless the directors³ reasonably resolve otherwise on the ground that audited accounts⁴ are unlikely to be required⁵. The directors may appoint an auditor or auditors of the company:

- 1737 (1) at any time before the company's first period for appointing auditors⁶;
- 1738 (2) following a period during which the company (being exempt from audit) did not have any auditor, at any time before the company's next period for appointing auditors⁷; or
- 1739 (3) to fill a casual vacancy in the office of auditor⁸,

and the members⁹ may appoint an auditor or auditors by ordinary resolution¹⁰:

- 1740 (a) during a period for appointing auditors¹¹;
- 1741 (b) if the company should have appointed an auditor or auditors during a period for appointing auditors but failed to do so¹²; or
- 1742 (c) where the directors had power to appoint¹³ but have failed to make an appointment¹⁴.

The Secretary of State¹⁵ may make provision by regulations for securing the disclosure of the terms on which a company's auditor is appointed, remunerated or performs his duties¹⁶.

1 As to the meanings of 'company' and 'private company' see PARAS 24, 102.

2 As to the meaning of 'financial year' see PARA 711.

3 As to the meaning of 'director' see PARA 478.

4 As to a company's accounts see PARA 693 et seq.

5 Companies Act 2006 s 485(1). An auditor or auditors of a private company may be appointed only in accordance with s 485 or s 486 (default power of Secretary of State: see PARA 913): s 485(5). This is without prejudice to any deemed re-appointment under s 487 (see PARA 914, which is concerned with the auditors' term of office): s 485(5). See further PARA 913 (appointment of auditors by the Secretary of State) and PARA 915 (prevention by members of deemed re-appointment of auditors); and in connection with the appointment of a partnership as statutory auditors see s 1216; and PARA 973.

The provisions of the Companies Act 2006 ss 485, 493 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

6 Companies Act 2006 s 485(3)(a). For each financial year for which an auditor is or auditors are to be appointed (other than the company's first financial year), the appointment must be made before the end of the period of 28 days beginning with the end of the time allowed for sending out copies of the company's annual accounts and reports for the previous financial year (see the Companies Act 2006 s 424; and PARA 421) or, if earlier, the day on which copies of the company's annual accounts and reports for the previous financial year are sent out under s 423 (see PARA 850); this is the 'period for appointing auditors': s 485(2). See further s 486(2); and PARA 913. As to a company's annual accounts see s 471; and PARA 715.

7 Companies Act 2006 s 485(3)(b).

8 Companies Act 2006 s 485(3)(c).

9 As to the meaning of 'member' see PARA 321.

10 As to the meaning of 'ordinary resolution' see PARA 613.

11 Companies Act 2006 s 485(4)(a).

12 Companies Act 2006 s 485(4)(b).

13 Ie under the Companies Act 2006 s 485(3) (see the text and notes 6-8).

14 Companies Act 2006 s 485(4)(c).

15 As to the Secretary of State see PARA 6.

16 Companies Act 2006 s 493(1). At the date at which this volume states the law no such regulations had been made. The regulations may require disclosure of a copy of any terms that are in writing and a written memorandum setting out any terms that are not in writing, require disclosure to be at such times, in such places and by such means as are specified in the regulations, and require the place and means of disclosure to be stated in a note to the company's annual accounts (in the case of its individual accounts) or in such manner as is specified in the regulations (in the case of group accounts), in the directors' report or in the auditor's report on the company's annual accounts: s 493(2). The provisions of s 493 apply to a variation of the terms mentioned in s 493(1) as they apply to the original terms: s 493(3). Nothing in these provisions affects the generality of the power conferred by s 493(1): s 493(1).

Regulations have been made under s 494 (see PARA 921) requiring companies, by way of a note to the company's annual accounts, to disclose fees receivable by their auditors and their auditors' associates and also to disclose liability limitation agreements that they make with their auditors: see the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489; and PARA 921 et seq.

913. Appointment of auditors of private company by the Secretary of State.

If a private company¹ fails to appoint an auditor or auditors² the Secretary of State³ may appoint one or more persons to fill the vacancy⁴. Where an appointment is required to be made within the period for appointing auditors⁵ and the company fails to make the necessary appointment before the end of that period, the company must within one week of the end of that period give notice to the Secretary of State of his power having become exercisable⁶: failure to give such notice is an offence⁷.

1 As to the meanings of 'company' and 'private company' see PARAS 24, 102.

2 In accordance with the Companies Act 2006 s 485: see PARA 912.

3 As to the Secretary of State see PARA 6.

4 Companies Act 2006 s 486(1).

The provisions of the Companies Act 2006 s 486 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 In where the Companies Act 2006 s 485(2) (see PARA 912) applies.

6 Companies Act 2006 s 486(2).

7 Companies Act 2006 s 486(3). The offence is committed by the company and every officer of the company who is in default (s 486(3)), and a person guilty of the offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of that level 3 (s 486(4)). As to the meaning of 'officer' see PARA 607; as to the meaning of 'officer in default' see PARA 315; as to the meaning of 'daily default fine' see PARA 1622; as to the standard scale see PARA 1622.

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914. Term of office of auditors of private company.

An auditor or auditors of a private company¹ hold office in accordance with the terms of their appointment, subject to the requirements that they do not take office until any previous auditor or auditors cease to hold office and they cease to hold office at the end of the next period for appointing auditors² unless re-appointed³. Where no auditor has been appointed by the end of the next period for appointing auditors, any auditor in office immediately before that time is deemed to be re-appointed at that time unless:

- 1743 (1) he was appointed by the directors⁴;
- 1744 (2) the company's articles⁵ require actual re-appointment⁶;
- 1745 (3) the deemed re-appointment is prevented⁷ by the members⁸;
- 1746 (4) the members have resolved that he should not be re-appointed⁹; or
- 1747 (5) the directors have resolved that no auditor or auditors should be appointed for the financial year¹⁰ in question¹¹.

No account may be taken of any loss of the opportunity of deemed re-appointment under these provisions in ascertaining the amount of any compensation or damages payable to an auditor on his ceasing to hold office for any reason¹².

1 As to the meanings of 'company' and 'private company' see PARAS 24, 102.

2 As to the period for appointing auditors see PARA 912 note 6.

3 Companies Act 2006 s 487(1). These provisions are without prejudice to the provisions of Pt 16 (ss 475-539) as to removal and resignation of auditors (see PARA 938 et seq): s 487(3).

The provisions of the Companies Act 2006 s 487 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 2006 s 487(2)(a). As to the meaning of 'director' see PARA 478.

5 As to the meaning of 'articles' see PARA 228.

6 Companies Act 2006 s 487(2)(b).

7 Ie under the Companies Act 2006 s 488: see PARA 915.

8 Companies Act 2006 s 487(2)(c). As to the meaning of 'member' see PARA 321.

9 Companies Act 2006 s 487(2)(d).

10 As to the meaning of 'financial year' see PARA 711.

11 Companies Act 2006 s 487(2)(e).

12 Companies Act 2006 s 487(4).

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915. Prevention by members of deemed re-appointment of auditor.

An auditor of a private company¹ is not deemed to be re-appointed² if the company has received notices³ from members⁴ representing at least the requisite percentage⁵ of the total voting rights of all members who would be entitled to vote on a resolution that the auditor should not be re-appointed⁶.

1 As to the meanings of 'company' and 'private company' see PARAS 24, 102.

2 Ie under the Companies Act 2006 s 487(2): see PARA 914.

3 Ie under the Companies Act 2006 s 488. Such a notice may be in hard copy or electronic form, must be authenticated by the person or persons giving it and must be received by the company before the end of the accounting reference period immediately preceding the time when the deemed re-appointment would have effect: s 488(3). As to the accounting reference period see s 391; and PARA 712. As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form see PARA 679.

The provisions of the Companies Act 2006 s 488 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 As to the meaning of 'member' see PARA 321.

5 le 5%, or such lower percentage as is specified for this purpose in the company's articles: Companies Act 2006 s 488(2). As to the meaning of 'articles' see PARA 228.

6 Companies Act 2006 s 488(1).

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B. PUBLIC COMPANIES

916. Appointment of auditors of public company.

An auditor or auditors of a public company¹ must be appointed for each financial year² of the company, unless the directors³ reasonably resolve otherwise on the ground that audited accounts⁴ are unlikely to be required⁵. The directors may appoint an auditor or auditors of the company:

- 1748 (1) at any time before the company's first accounts meeting⁶;
- 1749 (2) following a period during which the company (being exempt from audit) did not have any auditor, at any time before the company's next accounts meeting⁷; or
- 1750 (3) to fill a casual vacancy in the office of auditor⁸,

and the members⁹ may appoint an auditor or auditors by ordinary resolution¹⁰:

- 1751 (a) at an accounts meeting¹¹;
- 1752 (b) if the company should have appointed an auditor or auditors at an accounts meeting but failed to do so¹²; or
- 1753 (c) where the directors had power to appoint¹³ but have failed to make an appointment¹⁴.

The Secretary of State¹⁵ may make provision by regulations for securing the disclosure of the terms on which a company's auditor is appointed, remunerated or performs his duties¹⁶.

1 As to the meanings of 'company' and 'public company' see PARAS 24, 102.

2 As to the meaning of 'financial year' see PARA 711.

3 As to the meaning of 'director' see PARA 478.

4 As to a company's accounts see PARA 693 et seq.

5 Companies Act 2006 s 489(1). An auditor or auditors of a public company may be appointed only in accordance with s 489 or s 490 (default power of Secretary of State: see PARA 917): s 489(5). See further PARA 918 (term of office); and in connection with the appointment of a partnership as statutory auditors see s 1216; and PARA 973.

The provisions of the Companies Act 2006 ss 489, 493 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

6 Companies Act 2006 s 489(3)(a). For each financial year for which an auditor is or auditors are to be appointed (other than the company's first financial year), the appointment must be made before the end of the accounts meeting of the company at which the company's annual accounts and reports for the previous financial year are laid: s 489(2). As to the meaning of 'accounts meeting' see PARA 865 note 4. As to a company's annual accounts see s 471; and PARA 715.

7 Companies Act 2006 s 489(3)(b).

8 Companies Act 2006 s 489(3)(c).

9 As to the meaning of 'member' see PARA 321.

10 As to the meaning of 'ordinary resolution' see PARA 613.

11 Companies Act 2006 s 489(4)(a).

12 Companies Act 2006 s 489(4)(b).

13 Ie under the Companies Act 2006 s 489(3) (see the text and notes 6-8).

14 Companies Act 2006 s 489(4)(c).

15 As to the Secretary of State see PARA 6.

16 Companies Act 2006 s 493(1). At the date at which this volume states the law no such regulations had been made. See further s 493(2), (3); and PARA 912 note 16.

Regulations have been made under s 494 (see PARA 921) requiring companies, by way of a note to the company's annual accounts, to disclose fees receivable by their auditors and their auditors' associates and also to disclose liability limitation agreements that they make with their auditors: see the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489; and PARA 921 et seq.

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917. Appointment of auditors of public company by the Secretary of State.

If a public company¹ fails to appoint an auditor or auditors² the Secretary of State³ may appoint one or more persons to fill the vacancy⁴. Where an appointment is required to be made within the specified period⁵ and the company fails to make the necessary appointment before the end of the accounts meeting⁶, the company must within one week of the end of that period give notice to the Secretary of State of his power having become exercisable⁷: failure to give such notice is an offence⁸.

1 As to the meanings of 'company' and 'public company' see PARAS 24, 102.

2 Ie in accordance with the Companies Act 2006 s 489: see PARA 916.

3 As to the Secretary of State see PARA 6.

4 Companies Act 2006 s 490(1).

The provisions of the Companies Act 2006 s 490 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 le where the Companies Act 2006 s 489(2) (see PARA 916) applies.

6 As to the meaning of 'accounts meeting' see PARA 865 note 4.

7 Companies Act 2006 s 490(2).

8 Companies Act 2006 s 490(3). The offence is committed by the company and every officer of the company who is in default (s 490(3)), and a person guilty of the offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of that level 3 (s 490(4)). As to the meaning of 'officer' see PARA 607; as to the meaning of 'officer in default' see PARA 315; as to the meaning of 'daily default fine' see PARA 1622; as to the standard scale see PARA 1622.

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918. Term of office of auditors of public company.

An auditor or auditors of a public company¹ hold office in accordance with the terms of their appointment, subject to the requirements that they do not take office until any previous auditor or auditors cease to hold office and they cease to hold office at the conclusion of the accounts meeting² next following their appointment, unless re-appointed³.

1 As to the meanings of 'company' and 'public company' see PARAS 24, 102.

2 As to the meaning of 'accounts meeting' see PARA 865 note 4.

3 Companies Act 2006 s 491(1). These provisions are without prejudice to the provisions of Pt 16 (ss 475-539) as to removal and resignation of auditors (see PARA 938 et seq): s 491(2).

The provisions of the Companies Act 2006 s 491 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

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C. STATUS OF AUDITORS

919. Auditors' position as officers of the company.

Auditors are not agents of the company so as to affect the members with knowledge which they have acquired while auditing the accounts, as, for example, of directors' unauthorised acts¹. Nevertheless, an auditor is an officer of a company for the purposes of a misfeasance

summons under the misfeasance provisions of the Insolvency Act 1986². The court has the same power of granting relief to auditors in respect of negligence, default, breach of duty or breach of trust as it has of granting relief to directors³.

1 *Leeds Estate Building and Investment Co v Shepherd* (1887) 36 ChD 787; *Re London and General Bank (No 2)* [1895] 2 Ch 673 at 683, CA, per Lindley LJ. The older authorities establish that an auditor must show reasonable skill, care and caution in the performance of his duties, but he is not bound to be a detective, and is 'a watch-dog, not a bloodhound': *Re Kingston Cotton Mill Co (No 2)* [1896] 2 Ch 279 at 288, CA, per Lopes LJ. He must come to his task with an inquiring mind, suspecting that someone may have made a mistake somewhere: *Fomento (Sterling Area) Ltd v Selsdon Fountain Pen Co Ltd* [1958] 1 All ER 11 at 23, [1958] 1 WLR 45 at 61, HL, per Lord Denning, and see at 15 and 51 per Viscount Simonds. See also *Squire, Cash Chemist v Ball, Baker & Co* (1911) 106 LT 197, CA; *Fox & Son v Morrish, Grant & Co* (1918) 35 TLR 126. Standards of auditing are now more stringent and the older cases must be read with this in mind: *Re Thomas Gerrard & Son Ltd* [1968] Ch 455, [1967] 2 All ER 525. See also PARA 929.

2 See under the Insolvency Act 1986 s 212: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688 et seq; and see *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] UKHL 39 at [190], [2009] 3 WLR 455 at [190] per Lord Walker; *Re London and General Bank (No 2)* [1895] 2 Ch 673, CA; and *Re Kingston Cotton Mill Co* [1896] 1 Ch 6, CA. See also *Re Western Counties Steam Bakeries and Milling Co* [1897] 1 Ch 617, CA. As to criminal liability see *R v Shacter* [1960] 2 QB 252, [1960] 1 All ER 61, CCA.

3 See the Companies Act 2006 s 1157; and PARA 600. See also *Barings plc (in liquidation) v Coopers & Lybrand (a firm), Barings Futures (Singapore) Pte Ltd (in liquidation) v Mattar* [2003] EWHC 1319 (Ch) at [1133]-[1135], [2003] Lloyd's Rep IR 566 at [1133]-[1135], [2003] All ER (D) 142 (Jun) at [1133]-[1135] per Evans-Lombe J (although auditors may be found to have acted negligently, they may have acted reasonably for the purposes of the Companies Act 2006 s 1157 (formerly the Companies Act 1985 s 727) if they acted in good faith and their negligence was technical or minor in character, and not pervasive and compelling; however, the court should not apply the Companies Act 2006 s 1157 so as to negate the basic principles of liability); *Maelor Jones v Heywood-Smith* (1989) 54 SASR 285 (regarding an Australian statute which was in similar terms to the Companies Act 1985 s 727), cited in *Barings plc (in liquidation) v Coopers & Lybrand (a firm), Barings Futures (Singapore) Pte Ltd (in liquidation) v Mattar*.

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D. REMUNERATION OF AUDITORS

920. Fixing of auditor's remuneration.

The remuneration¹ of an auditor appointed by the members of a company² must be fixed by the members by ordinary resolution³ or in such manner as the members may by ordinary resolution determine⁴; the remuneration of an auditor appointed by the directors of a company⁵ must be fixed by the directors⁶; and the remuneration of an auditor appointed by the Secretary of State⁷ must be fixed by the Secretary of State⁸.

1 For these purposes 'remuneration' includes sums paid in respect of expenses, and these provisions apply in relation to benefits in kind as to payments of money: Companies Act 2006 s 492(4), (5).

The provisions of the Companies Act 2006 s 492 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

2 As to the appointment of auditors by the members of a company see PARAS 912, 916. As to the meaning of 'member' see PARA 321. As to the meaning of 'company' see PARA 24.

3 As to the meaning of 'ordinary resolution' see PARA 613.

4 Companies Act 2006 s 492(1).

5 As to the appointment of auditors by the directors of a company see PARAS 912, 916. As to the meaning of 'director' see PARA 478.

6 Companies Act 2006 s 492(2).

7 As to the appointment of auditors by the Secretary of State see PARAS 913, 917. As to the Secretary of State see PARA 6.

8 Companies Act 2006 s 492(3).

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921. Disclosure of services provided by auditor or associates and related remuneration.

The Secretary of State may make provision by regulations¹ for securing the disclosure of:

- 1754 (1) the nature of any services provided for a company² by the company's auditor (whether in his capacity as auditor or otherwise) or by his associates³; and
- 1755 (2) the amount of any remuneration received or receivable by a company's auditor, or his associates, in respect of any such services⁴.

Such regulations may:

- 1756 (a) provide for disclosure of the nature of any services provided to be made by reference to any class or description of services specified in the regulations (or any combination of services, however described)⁵;
 - 1757 (b) provide for the disclosure of amounts of remuneration received or receivable in respect of services of any class or description specified in the regulations (or any combination of services, however described)⁶;
 - 1758 (c) provide for the disclosure of separate amounts so received or receivable by the company's auditor or any of his associates, or of aggregate amounts so received or receivable by all or any of those persons⁷;
 - 1759 (d) provide that 'remuneration' includes sums paid in respect of expenses⁸;
 - 1760 (e) apply to benefits in kind as well as to payments of money, and require the disclosure of the nature of any such benefits and their estimated money value⁹;
 - 1761 (f) apply to services provided for associates of a company as well as to those provided for a company¹⁰;
 - 1762 (g) define 'associate' in relation to an auditor and a company respectively¹¹; and
 - 1763 (h) provide that any disclosure required by the regulations is to be made:
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- 387. (i) in a note to the company's annual accounts¹² (in the case of its individual accounts) or in such manner as is specified in the regulations (in the case of group accounts)¹³;

388. (ii) in the directors' report¹⁴; or
 389. (iii) in the auditor's report on the company's annual accounts¹⁵.

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1 As to the Secretary of State see PARA 6. Nothing in the Companies Act 2006 s 494 (see the text and notes 3-15) affects the generality of the Secretary of State's power under these provisions: s 494(1). For the regulations so made see the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489 (made in exercise of the powers conferred by the European Communities Act 1972 s 2(2)(a) and the Companies Act 2006 ss 494, 538, 1292(1)(a), and revoking the Companies (Disclosure of Auditor Remuneration) Regulations 2005, SI 2005/2417, which ceased to apply to the accounts of a company for any financial year beginning after 6 April 2008 (see the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 2)); and PARAS 922, 923.

The provisions of the Companies Act 2006 s 494 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

2 As to the meaning of 'company' see PARA 24.

3 Companies Act 2006 s 494(1)(a).

4 Companies Act 2006 s 494(1)(b).

5 Companies Act 2006 s 494(2)(a).

6 Companies Act 2006 s 494(2)(b).

7 Companies Act 2006 s 494(2)(c).

8 Companies Act 2006 s 494(3)(a).

9 Companies Act 2006 s 494(3)(b).

10 Companies Act 2006 s 494(3)(c).

11 Companies Act 2006 s 494(3)(d).

12 As to a company's annual accounts see s 471; and PARA 715.

13 Companies Act 2006 s 494(4)(a). If the regulations provide that any such disclosure is to be made as mentioned in s 494(4)(a) or (b), the regulations may require the auditor to supply the directors of the company with any information necessary to enable the disclosure to be made: s 494(5).

14 Companies Act 2006 s 494(4)(b). See note 13.

15 Companies Act 2006 s 494(4)(c).

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922. Persons who are to be regarded as associate or distant associate of company's auditor.

A person is¹ an associate², or a distant associate³, of a company's auditor if he is:

- 1764 (1) any person controlled⁴ by the company's auditor or by any associate of the company's auditor (whether alone or through two or more persons acting together to secure or exercise control), but only if that control does not arise solely by virtue of the company's auditor or any associate of the company's auditor acting as an insolvency practitioner⁵ in relation to any person, in the capacity of a receiver, or a receiver or manager, of the property of a company or other body corporate⁶ or as a judicial factor on the estate of any person⁷;
- 1765 (2) any person who, or group of persons acting together which, has control of the company's auditor⁸;
- 1766 (3) any person using a trading name which is the same as or similar to a trading name used by the company's auditor, but only if the company's auditor uses that trading name with the intention of creating the impression of a connection between the auditor and that other person⁹; and
- 1767 (4) any person who is a party to an arrangement with the company's auditor, with or without any other person, under which costs, profits, quality control, business strategy or significant professional resources are shared¹⁰.

Where a company's auditor is a partnership¹¹, each of the following is also regarded as an associate of the auditor:

- 1768 (a) any other partnership which has a partner in common with the company's auditor¹²;
- 1769 (b) any partner in the company's auditor¹³;
- 1770 (c) any body corporate which is in the same group as a body corporate¹⁴ which is a partner in the company's auditor¹⁵;
- 1771 (d) any body corporate which is in the same group as a body corporate which is a partner in a partnership which has a partner in common with the company's auditor¹⁶; and
- 1772 (e) any body corporate of which a partner in the company's auditor is a director¹⁷.

Where a company's auditor is a body corporate (other than one which is also a partnership¹⁸), each of the following is also regarded as an associate of the auditor:

- 1773 (i) any other body corporate which has a director in common with the company's auditor¹⁹;
- 1774 (ii) any director of the company's auditor²⁰;
- 1775 (iii) any body corporate which is in the same group as a body corporate which is a director of the company's auditor²¹;
- 1776 (iv) any body corporate which is in the same group as a body corporate which has a director in common with the company's auditor²²;
- 1777 (v) any partnership in which a director of the company's auditor is a partner²³;
- 1778 (vi) any body corporate which is in the same group as the company's auditor²⁴; and
- 1779 (vii) any partnership in which any body corporate which is in the same group as the company's auditor is a partner²⁵.

1. See for the purposes of the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, as to the making of which see PARA 921.

2. References to an 'associate' of a company are references to any subsidiary of that company, other than a subsidiary in respect of which severe long-term restrictions substantially hinder the exercise of the rights of the company over the assets or management of that subsidiary, and to any scheme which is an associated pension scheme in relation to that company: Companies (Disclosure of Auditor Remuneration and Liability Limitation

Agreements) Regulations 2008, SI 2008/489, reg 3(2)(c). 'Subsidiary' means a subsidiary undertaking (as defined in the Companies Act 2006 s 1162 (see PARA 26)) which is a body corporate; and 'subsidiary company' means a subsidiary which is a company: Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 3(1).

'Associated pension scheme' means, in relation to a company, a scheme for the provision of benefits for or in respect of directors or employees (or former directors or employees) of the company or any subsidiary of the company where the benefits consist of or include any pension, lump sum, gratuity or other like benefit given or to be given on retirement or on death or in anticipation of retirement or, in connection with past service, after retirement or death, and either a majority of the trustees are appointed by, or by a person acting on behalf of, the company or a subsidiary of the company, or the company, or a subsidiary of the company, exercises a dominant influence over the appointment of the auditor (if any) of the scheme: reg 3(1).

3 A 'distant associate' of a company's auditor is a person who is an associate of that auditor by reason only that that person is an associate within one or more of:

314 (1) the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 1(a) (see the text and notes 4-6) where the person in question is controlled by a distant associate of the company's auditor but not by the auditor or by an associate who is not a distant associate (Sch 1 para 4(a));

315 (2) Sch 1 para 2(a), (d) or (e) (see the text and notes 12-17) (Sch 1 para 4(b)); or

316 (3) Sch 1 para 3(a), (d) or (e) (see the text and notes 19-23) (Sch 1 para 4(c)).

4 A person able, directly or indirectly to control or materially to influence the operating and financial policy of another person is treated as having 'control' of that other person for these purposes: Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 5(e).

5 'Acting as an insolvency practitioner' is construed in accordance with the Insolvency Act 1986 s 388 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 8) or corresponding Northern Ireland provisions: Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 5(a).

6 A reference to 'a receiver, or a receiver or manager, of the property of a company or other body corporate' includes a receiver, or (as the case may be) a receiver or manager, of part only of that property: Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 5(d).

7 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 3(2)(d), Sch 1 para 1(a).

8 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 1(b).

9 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 1(c).

10 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 1(d).

11 'Partner' includes a member of a limited liability partnership and 'partnership' includes a limited liability partnership and a partnership constituted under the law of a country or a territory outside the United Kingdom: Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 5(b), (c). As to limited liability partnerships see **PARTNERSHIP** vol 79 (2008) PARAS 234-247.

12 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 2(a).

13 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 2(b).

14 A body corporate is in the same group as another body corporate if it is a parent or subsidiary of that body corporate, or a subsidiary of a parent of that body corporate: Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 5(f). 'Parent' means a parent undertaking (as defined in the Companies Act 2006 s 1162 (see PARA 26)) which is a body corporate; and 'parent company' means a parent which is a company: Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 3(1).

15 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 2(c).

16 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 2(d).

17 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 2(e).

18 le as defined in the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 5(c): see note 11.

19 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 3(a).

20 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 3(b).

21 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 3(c).

22 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 3(d).

23 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 3(e).

24 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 3(f).

25 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 1 para 3(g).

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923. Disclosure of remuneration for audit and non-audit work.

A note to the annual accounts¹ of a company must disclose the amount of any remuneration² receivable by the company's auditor for the auditing of those accounts³, and a note to the annual accounts of a company which is not a small or medium-sized company must additionally disclose the amount of any remuneration receivable in respect of the period to which the accounts relate by the company's auditor or any person who was, at any time during the period to which the accounts relate, an associate of the company's auditor, for the supply of other services to the company or any associate of the company⁴.

Where the company is not a small or medium-sized company, separate disclosure is required in respect of the auditing of the accounts in question and of each type of service specified⁵, but not in respect of each service falling within a type of service⁶, and in respect of services supplied to the company and its subsidiaries on the one hand and to associated pension schemes⁷ on the other⁸.

1 As to a company's annual accounts see the Companies Act 2006 s 471; and PARA 715.

2 'Remuneration' includes payments in respect of expenses and benefits in kind (Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 3(1)); and for

these purposes where the remuneration includes benefits in kind, the nature and estimated money-value of those benefits must also be disclosed in a note (regs 4(2), 5(3)).

3 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, regs 4(1), 5(1)(a). Where more than one person has been appointed as a company's auditor in respect of the period to which the accounts relate, separate disclosure is required in respect of the remuneration of each such person and (where the company is not a small or medium-sized company) his associates: regs 4(3), 5(5). A company is 'small' in relation to a financial year if the small companies regime (as defined in the Companies Act 2006 s 381: see PARA 694) applies to it for that year; and a company is 'medium-sized' in relation to a financial year if it qualifies as medium-sized in relation to that year under s 465 (see PARA 695) and is not excluded from being medium-sized under s 467(1) (see PARA 695) (Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 3(2)(a)); and a company is 'medium-sized' in relation to a financial year if it qualifies as medium-sized in relation to that year under the Companies Act 2006 s 465 (see PARA 695) and is not excluded from being medium-sized under s 467(1) (see PARA 695) (Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 3(2)(b)).

For the purposes of the Companies Act 2006 s 1224 (power of Secretary of State to call for information: see PARA 1011) the functions of the Secretary of State under Pt 42 (ss 1209-1264: see PARAS 958) include (without prejudice to the generality of s 1224) consideration of the total remuneration receivable by the auditor of a medium-sized company for the supply by the auditor to the company of assurance services other than the auditing of the company's accounts, tax advisory services and other services, where that remuneration is not disclosed in a note to the company's annual accounts: Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 4(4).

4 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 5(1)(b). Group accounts must comply with reg 5(1)(b) as if the undertakings included in the consolidation were a single company except where the group qualifies as small or medium-sized under the Companies Act 2006 s 383 or s 466 and is not an ineligible group under s 384(2) (see PARA 694) or s 467(2) (see PARA 695): Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 6(1). A note to the individual accounts of a parent company that is required to prepare, and does prepare, group accounts in accordance with the Companies Act 2006, and a note to the individual accounts of a subsidiary company where its parent is required to prepare, and does prepare, group accounts in accordance therewith, and the company is included in the consolidation, does not have to disclose the information required by Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 5(1)(b) if the group accounts are required to comply with reg 6(1) and the individual accounts state that the group accounts are so required: reg 6(2), (3). As to the meanings of 'parent', 'parent company', 'subsidiary' and 'subsidiary company' see PARA 922 notes 2, 14.

The auditor of a company must supply the directors of the company with such information as is necessary to enable the disclosure required by regs 5(1)(b), 6(1) to be made: reg 7.

5 le the services specified by virtue of the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, Sch 2:

- 317 (1) the auditing of accounts of associates of the company pursuant to legislation (including that of countries and territories outside the United Kingdom);
- 318 (2) other services supplied pursuant to such legislation;
- 319 (3) other services relating to taxation;
- 320 (4) services relating to information technology;
- 321 (5) internal audit services;
- 322 (6) valuation and actuarial services;
- 323 (7) services relating to litigation;
- 324 (8) services relating to recruitment and remuneration;
- 325 (9) services relating to corporate finance transactions entered into or proposed to be entered into on behalf of the company or any of its associates; and
- 326 (10) all other services.

Disclosure is not required of remuneration receivable for the supply of services falling within head (10) above supplied by a distant associate of the company's auditor where the total remuneration receivable for all of those

services supplied by that associate does not exceed either £10,000 or 1% of the total audit remuneration received by the company's auditor in the most recent financial year of the auditor which ended no later than the end of the financial year of the company to which the accounts relate: reg 5(6). As to the meanings of 'associate of a company's auditor' and 'distant associate of a company's auditor' see PARA 922. For this purpose 'financial year of the auditor' means the period of not more than 18 months in respect of which the auditor's profit and loss account is required to be made up (whether by law or by or in accordance with the auditor's constitution (if any)), or, failing any such requirement, the period of 12 months beginning with 1 April; and 'total audit remuneration received' means the total remuneration received for the auditing pursuant to legislation (including that of countries and territories outside the United Kingdom) of any accounts of any person: reg 5(7).

6 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 5(3).

7 As to the meaning of 'associated pension scheme' see PARA 922 note 2.

8 Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489, reg 5(4).

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(iii) Functions of Auditor

A. AUDITOR'S REPORT

924. Auditor's report on company's annual accounts.

A company's¹ auditor must make a report to the company's members² on all annual accounts³ of the company of which copies are, during his tenure of office:

- 1780 (1) in the case of a private company, to be sent out⁴ to members⁵;
- 1781 (2) in the case of a public company, to be laid before the company⁶ in general meeting⁷.

The auditor's report must include:

- 1782 (a) an introduction identifying the annual accounts that are the subject of the audit and the financial reporting framework that has been applied in their preparation⁸; and
- 1783 (b) a description of the scope of the audit identifying the auditing standards in accordance with which the audit was conducted⁹,

and must state clearly whether, in the auditor's opinion, the annual accounts:

- 1784 (i) give a true and fair view of the state of the company's affairs¹⁰;
- 1785 (ii) have been properly prepared in accordance with the relevant financial reporting framework¹¹; and
- 1786 (iii) have been prepared in accordance with the applicable statutory requirements¹².

The report must be signed¹³.

The report must be either qualified¹⁴ or unqualified and must include a reference to any matters to which the auditor wishes to draw attention by way of emphasis without qualifying the report¹⁵.

Where the company prepares a separate corporate governance statement¹⁶ in respect of a financial year, the auditor must state in his report on the company's annual accounts for that year whether, in his opinion, the information given in the statement, regarding information about internal control and risk management systems in relation to financial reporting processes and about share capital structures¹⁷, is consistent with those accounts¹⁸. The auditor must also state in his report on the company's annual accounts whether in his opinion the information given in the directors' report for the financial year for which the accounts are prepared is consistent with those accounts¹⁹. If the company is a quoted company²⁰, the auditor, in his report on the company's annual accounts for the financial year, must report to the company's members on the auditable part of the directors' remuneration report²¹, and he must state whether in his opinion that part of the directors' remuneration report has been properly prepared²².

It is an offence to include a false or misleading matter in an auditor's report²³.

1 As to the meanings of 'company', 'private company' and 'public company' see PARAS 24, 102.

2 As to the meaning of 'member' see PARA 321. As to the auditors' common law duty of care arising from the obligation to report see PARA 930.

3 As to a company's annual accounts see the Companies Act 2006 s 471; and PARA 715.

4 Ie under the Companies Act 2006 s 423: see PARA 850.

5 Companies Act 2006 s 495(1)(a).

The provisions of the Companies Act 2006 s 495 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

6 Ie under the Companies Act 2006 s 437: see PARA 865.

7 Companies Act 2006 s 495(1)(b).

8 Companies Act 2006 s 495(2)(a).

9 Companies Act 2006 s 495(2)(b).

10 Companies Act 2006 s 495(3)(a). Pursuant to this requirement the report must give a true and fair view of:

327 (1) in the case of an individual balance sheet, the state of affairs of the company as at the end of the financial year (s 495(3)(a)(i));

328 (2) in the case of an individual profit and loss account, the profit or loss of the company for the financial year (s 495(3)(a)(ii)); and

329 (3) in the case of group accounts, the state of affairs as at the end of the financial year and of the profit or loss for the financial year of the undertakings included in the consolidation as a whole, so far as concerns members of the company (s 495(3)(a)(iii)).

As to the meanings of 'balance sheet', 'profit and loss account' and 'included in the consolidation' see ss 472(2), 474; and PARA 715 (definitions applied by s 495(3)); as to the meaning of 'undertaking' see PARA 26; as to the meaning of 'financial year' see PARA 711. As to group accounts see the Companies Act 2006 s 399; and PARA 775. As to the meaning of 'true and fair' see PARA 714.

11 Companies Act 2006 s 495(3)(b).

12 Companies Act 2006 s 495(3)(c). The 'applicable statutory requirements' are the requirements of the Companies Act 2006 (and, where applicable, EC Council Regulation 1606/2002 (OJ L243, 11.09.2002, p 1) on the application of international accounting standards, art 4): Companies Act 2006 s 495(3)(c).

13 See PARAS 935, 936.

14 'Qualified', in relation to an auditor's report (or a statement contained in an auditor's report), means that the report or statement does not state the auditor's unqualified opinion that the accounts have been properly prepared in accordance with the Companies Act 2006 or, in the case of an undertaking not required to prepare accounts in accordance therewith, under any corresponding legislation under which it is required to prepare accounts: s 539.

15 Companies Act 2006 s 495(4).

16 As to the meaning of 'corporate governance statement' for these purposes see PARA 927 note 2. As to the approval and signing of a separate corporate governance statement see PARA 832.

17 Is the information given in compliance with the requirements of the Disclosure Rules and Transparency Rules sourcebook issued by the Financial Services Authority (see DTR 7.2.5, 7.2.6): see the Companies Act 2006 s 497A(1); and PARA 927 note 5.

18 See the Companies Act 2006 s 497A; and PARA 927.

19 See the Companies Act 2006 s 496; and PARA 925.

20 As to the meaning of 'quoted company' see PARA 696.

21 As to the directors' remuneration report see the Companies Act 2006 Pt 15 Ch 6 (ss 420-422); and PARA 834 et seq. As to the 'auditable part of the directors' remuneration report' see PARA 926 note 5.

22 See the Companies Act 2006 s 497; and PARA 926.

23 See the Companies Act 2006 s 507; and PARA 937.

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925. Auditor's report on directors' report.

The auditor must state in his report¹ on the company's annual accounts² whether in his opinion the information given in the directors' report³ for the financial year⁴ for which the accounts are prepared is consistent with those accounts⁵.

1 As to the auditor's report see PARA 924.

2 As to the meaning of 'company' see PARA 24. As to a company's annual accounts see the Companies Act 2006 s 471; and PARA 715.

3 As to the directors' report see the Companies Act 2006 Pt 15 Ch 5 (ss 415-419); and PARA 816 et seq. As to the auditor's report on the directors' report see further ss 427(4), 428(4), 431, 432, 434; and PARAS 858, 860, 862.

4 As to the meaning of 'financial year' see PARA 711.

5 Companies Act 2006 s 496.

The provisions of the Companies Act 2006 s 496 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

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926. Auditor's report on auditable part of directors' remuneration report.

If the company¹ is a quoted company², the auditor, in his report on the company's annual accounts for the financial year³, must:

- 1787 (1) report to the company's members⁴ on the auditable part of the directors' remuneration report⁵; and
- 1788 (2) state whether in his opinion that part of the directors' remuneration report has been properly⁶ prepared⁷.

1 As to the meaning of 'company' see PARA 24.

2 As to the meaning of 'quoted company' see PARA 696.

3 As to the auditor's report see PARA 924. As to a company's annual accounts see the Companies Act 2006 s 471; and PARA 715. As to the meaning of 'financial year' see PARA 711.

4 As to the meaning of 'member' see PARA 321.

5 Companies Act 2006 s 497(1)(a). As to the directors' remuneration report see Pt 15 Ch 6 (ss 420-422); and PARA 834 et seq. The 'auditable part' of a directors' remuneration report is the part identified as such by regulations under s 421 (see PARA 835): s 497(2). The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, provide that the 'auditable part' of a directors' remuneration report is the part containing the information required by Sch 8 Pt 3 (see PARAS 841-847): reg 11(3).

The provisions of the Companies Act 2006 s 497 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

6 ie in accordance with the Companies Act 2006.

7 Companies Act 2006 s 497(1)(b).

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927. Auditor's report on separate corporate governance statement.

Where the company¹ prepares a separate corporate governance statement² in respect of a financial year³, the auditor must state in his report on the company's annual accounts for that

year⁴ whether, in his opinion, the information given in the statement, regarding information about internal control and risk management systems in relation to financial reporting processes and about share capital structures⁵, is consistent with those accounts⁶.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 For the purposes of the Companies Act 2006 Pt 16 (ss 475-539) (see PARA 905 et seq), 'corporate governance statement' means the statement required by the Disclosure Rules and Transparency Rules sourcebook issued by the Financial Services Authority (see DTR 7.2.1-7.2.11, which were added by the Disclosure Rules and Transparency Rules Sourcebook (Corporate Governance Rules) Instrument 2008 Annex C made by the Financial Services Authority on 26 June 2008 (FSA 2008/32)): Companies Act 2006 s 538A(1), (2) (s 538A added by SI 2009/1581). A 'separate' corporate governance statement means one that is not included in the directors' report: Companies Act 2006 s 538A(3) (as so added). As to the approval and signing of a separate corporate governance statement see PARA 832. As to the auditor's report on the directors' report see further ss 427(4), 428(4), 431, 432, 434; and PARAS 858, 860, 862. As to the Disclosure Rules and Transparency Rules sourcebook see PARA 435 note 3. As to the Financial Services Authority see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 4 et seq.

3 As to the meaning of 'financial year' see PARA 711. The Companies Act 2006 s 497A applies in relation to financial years beginning on or after 29 June 2008 which have not ended before 1 October 2009 (ie before the date of coming into force of the Companies Act 2006 (Accounts, Reports and Audit) Regulations 2009, SI 2009/1581: see reg 1(2)): see reg 1(3).

4 As to the auditor's report see PARA 924. As to a company's annual accounts see the Companies Act 2006 s 471; and PARA 715.

5 Ie the information given in compliance with the requirements of the Disclosure Rules and Transparency Rules sourcebook issued by the Financial Services Authority (see DTR 7.2.5, 7.2.6): see the Companies Act 2006 s 497A(1) (s 497A added by SI 2009/1581). DTR 7.2.5, 7.2.6 were added by the Disclosure Rules and Transparency Rules Sourcebook (Corporate Governance Rules) Instrument 2008 Annex C made by the Financial Services Authority on 26 June 2008 (FSA 2008/32)): Companies Act 2006 s 497A(2) (as so added).

6 Companies Act 2006 s 497A(1) (as added: see note 5).

The provisions of the Companies Act 2006 s 497A apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

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B. DUTIES AND RIGHTS OF AUDITOR

(A) DUTIES

928. Duties of auditor in preparing report.

A company's auditor, in preparing his report on the company's annual accounts¹, must carry out such investigations as will enable him to form an opinion as to:

- 1789 (1) whether adequate accounting records have been kept by the company and returns adequate for their audit have been received from branches not visited by him²;

- 1790 (2) whether the company's individual accounts are in agreement with the accounting records and returns³; and
- 1791 (3) in the case of a quoted company⁴, whether the auditable part of the company's directors' remuneration report⁵ is in agreement with the accounting records and returns⁶,

and if the auditor is of the opinion:

- 1792 (a) that adequate accounting records have not been kept, or that returns adequate for their audit have not been received from branches not visited by him⁷;
- 1793 (b) that the company's individual accounts are not in agreement with the accounting records and returns⁸; or
- 1794 (c) in the case of a quoted company, that the auditable part of its directors' remuneration report is not in agreement with the accounting records and returns⁹,

he must state that fact in his report¹⁰.

If the auditor fails to obtain all the information and explanations which, to the best of his knowledge and belief, are necessary for the purposes of his audit, he must also state that fact in his report¹¹.

If the requirements relating to the disclosure of directors' benefits¹² are not complied with in the annual accounts¹³ or, in the case of a quoted company, the requirements relating to information forming the auditable part of the directors' remuneration report¹⁴ are not complied with in that report, the auditor must include in his report, so far as he is reasonably able to do so, a statement giving the required particulars¹⁵.

If the directors of the company have prepared accounts in accordance with the small companies regime¹⁶ or have taken advantage of small companies exemption¹⁷ in preparing the directors' report, and in the auditor's opinion they were not entitled to do so, the auditor must state that fact in his report¹⁸.

Where the company is required to prepare a corporate governance statement¹⁹ in respect of a financial year²⁰, and no such statement is included in the directors' report²¹: (i) the company's auditor, in preparing his report on the company's annual accounts for that year, must ascertain whether a corporate governance statement has been prepared²²; and (ii) if it appears to the auditor that no such statement has been prepared, he must state that fact in his report²³.

1 As to the auditor's report on the company's annual accounts see PARA 924. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 498(1)(a).

The provisions of the Companies Act 2006 ss 498, 498A apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Companies Act 2006 s 498(1)(b).

4 As to the meaning of 'quoted company' see PARA 696.

5 As to the directors' remuneration report and the 'auditable part' of a directors' remuneration report see PARA 926 note 5.

6 Companies Act 2006 s 498(1)(c).

7 Companies Act 2006 s 498(2)(a).

- 8 Companies Act 2006 s 498(2)(b). It is an offence to omit the statement required by s 498(2)(b): see s 507(2)(a), (3), (4); and PARA 937.
- 9 Companies Act 2006 s 498(2)(c).
- 10 Companies Act 2006 s 498(2).
- 11 Companies Act 2006 s 498(3). It is an offence to omit the statement required by s 498(3): see s 507(2)(b), (3), (4); and PARA 937.
- 12 Ie the requirements of regulations under the Companies Act 2006 s 412: see PARA 767.
- 13 As to a company's annual accounts see the Companies Act 2006 s 471; and PARA 715.
- 14 Ie the requirements of regulations under the Companies Act 2006 s 421: see PARA 835.
- 15 Companies Act 2006 s 498(4).
- 16 As to the small companies regime see the Companies Act 2006 ss 381-384; and PARA 694.
- 17 See the Companies Act 2006 s 415A; and PARA 872.
- 18 Companies Act 2006 s 498(5). It is an offence to omit the statement required by s 498(5): see s 507(2)(c), (3), (4); and PARA 937.
- 19 As to the meaning of 'corporate governance statement' for these purposes see PARA 927 note 2.
- 20 As to the meaning of 'financial year' see PARA 711. The Companies Act 2006 s 498A applies in relation to financial years beginning on or after 29 June 2008 which have not ended before 1 October 2009 (ie before the date of coming into force of the Companies Act 2006 (Accounts, Reports and Audit) Regulations 2009, SI 2009/1581: see reg 1(2)): see reg 1(3).
- 21 Companies Act 2006 s 498A (added by SI 2009/1581). As to the auditor's report on the directors' report see further the Companies Act 2006 ss 427(4), 428(4), 431, 432, 434; and PARAS 858, 860, 862.
- 22 Companies Act 2006 s 498A(a) (as added: see note 21).
- 23 Companies Act 2006 s 498A(b) (as added: see note 21).

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929. Auditors' duties; in general.

It is the duty of an auditor to verify not merely the arithmetical accuracy of the balance sheet, but its substantial accuracy¹, and to see that it includes the particulars required by the articles² and by statute, and contains a correct representation of the state of the company's affairs. While, therefore, it is not his duty to consider whether the business is prudently conducted, he is bound to consider and report to the shareholders whether the balance sheet shows the company's true financial position. To do this he must examine the books and take reasonable care to see that their contents are substantially accurate³. Except in special cases he should place before the shareholders the necessary information as to the company's true financial position, and not merely indicate the means of acquiring it⁴.

Apart from his statutory duty to report to the members⁵, which cannot be removed by the articles or an agreement, the exact duties of an auditor are regulated by the contract under which he is employed⁶. The statutory duty is not absolute but depends upon the explanations

furnished and information given; but an auditor must ask for information on matters which call for further explanation⁷. An auditor must take steps to learn his statutory duties and, if there are any, his duties under the articles⁸.

It is his duty to consider whether payments made by the company before the audit were authorised by the articles⁹, and he will be liable for improper payments made by the directors and naturally resulting from his breach of duty¹⁰. So an auditor who reports confidentially to the directors the insufficiency of the securities on which the capital is invested and the difficulty of realisation, but who only reports to the shareholders that the value depends on realisation, with the result that the shareholders ignorantly approve an improper dividend, is liable to make good the amount paid¹¹. An auditor should not be content with a certificate that securities are in the possession of any person or body of persons, however trustworthy, unless the certificate is given by a bank or other person who in the ordinary course of business would usually be entrusted with securities¹².

An auditor has a duty to report immediately to the management a fraud on the company; and, where he suspects the management condones the fraud, he has a duty to report his suspicions to a third party without the management's knowledge or consent, the usual duty of confidentiality being overridden in such a case¹³.

1 See *Fomento (Sterling Area) Ltd v Selsdon Fountain Pen Co Ltd* [1958] 1 All ER 11 at 23, [1958] 1 WLR 45 at 61, HL, per Lord Denning.

2 As to the meaning of 'articles' see PARA 228.

3 *Re London and General Bank (No 2)* [1895] 2 Ch 673, CA; *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 501, CA, per Pollock MR (where the duties of auditors are discussed and the previous decisions on the subject are collected). See also *Lloyd Cheyham & Co Ltd v Littlejohn & Co* [1987] BCLC 303; *Barings plc v Coopers & Lybrand* [1997] 1 BCLC 427, CA (task is so to conduct the audit as to make it probable that material misstatements in financial documents would be detected).

4 *Re London and General Bank (No 2)* [1895] 2 Ch 673, CA.

5 I.e. the auditor's duty under the Companies Act 2006 s 495 to report to the company's members on all annual accounts of the company: see PARA 924.

6 *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 501, CA, per Pollock MR. As to the duties of auditors employed to check the amount of royalties payable under a special agreement see *Fomento (Sterling Area) Ltd v Selsdon Fountain Pen Co Ltd* [1958] 1 All ER 11, [1958] 1 WLR 45, HL; *Haig v Bamford* (1976) 72 DLR (3d) 68, Can SC. See also *Equitable Life Assurance Society v Ernst & Young (a firm)* [2003] EWCA Civ 1114, [2003] 2 BCLC 603 (implied duty of care).

7 See note 6. Auditors have extensive rights to obtain information: see PARA 931.

8 *Re Republic of Bolivia Exploration Syndicate Ltd* [1914] 1 Ch 139 (auditors held entitled to rely on the special circumstances of the case). See also *Thomas v Devonport Corpn* [1900] 1 QB 16, CA.

9 See note 8.

10 *Spackman v Evans* (1868) LR 3 HL 171 at 235-236 per Lord Chelmsford.

11 *Re London and General Bank (No 2)* [1895] 2 Ch 673, CA.

12 *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 501, CA, per Pollock MR.

13 *Sasea Finance Ltd (in liquidation) v KPMG* [2000] 1 All ER 676, [2000] 1 BCLC 236, CA (arguable in law that auditor's failure to report caused the continued losses). Cf *Galoo Ltd v Bright Grahame Murray* [1995] 1 All ER 16, [1994] 1 WLR 1360 (breach of duty allowed losses to continue but did not cause the losses in law) (distinguished in *Sasea Finance Ltd (in liquidation) v KPMG*, and in *Equitable Life Assurance Society v Ernst & Young (a firm)* [2003] EWCA Civ 1114 at [133], [2003] 2 BCLC 603 at [133] per Brooke LJ). See also *Johnson v Gore Wood & Co (a firm)* [2003] EWCA Civ 1728 at [91], [2003] All ER (D) 58 (Dec) at [91] per Arden LJ (the courts have moved away from characterising questions as to the measure of damages for the tort of negligence as questions of causation and remoteness, and they now analyse such questions by enquiring whether the duty

which the tortfeasor owed was a duty in respect of the kind of loss of which the victim complains; the same test applies whether the duty of care is contractual or tortious).

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930. Auditors' duty of care.

The duty of care owed by auditors¹ to members² of a company³ arises by reason of their statutory position and obligations⁴. That duty is towards shareholders collectively, in their capacity as shareholders⁵. Whether the auditors of a company owe a duty of care to a member of the public at large should be approached by applying either⁶ the 'threefold' test of foreseeability, proximity and what is just and reasonable⁷ or the 'assumption of responsibility' test⁸.

The auditors of a public company owe no duty of care to a member of the public at large who relies on the company's accounts to buy shares in the company because the court will not deduce a relationship of proximity between the auditors and a member of the public when to do so would give rise to unlimited liability on the part of the auditors⁹. Nor do auditors owe a duty of care to an individual shareholder in the company who wishes to buy more shares in the company, since an individual shareholder is in no better a position than a member of the public at large and the auditors' statutory duty to prepare accounts is owed to the body of shareholders as a whole, the purpose for which accounts are prepared and audited being to enable the shareholders as a body to exercise informed control of the company and not to enable individual shareholders to buy shares with a view to profit¹⁰. However, where auditors are carrying out a special duty for a specific purpose, such as where representations are made after an identified bidder in a take-over has emerged, the necessary criteria may be met to establish a duty of care¹¹.

Where the auditors, on the evidence, have no reason to know that the company intends to supply the auditors' reports to potential investors, there is no relationship between the auditors and potential or existing investors who are not company shareholders, even though the auditors' reports may foreseeably come into their hands and be relied upon¹². Likewise, in general, auditors owe no duty of care to the company's creditors, actual or potential¹³.

In determining a claimant's prospects for success, the criteria are¹⁴:

- 1795 (1) whether a legally enforceable duty of care exists¹⁵;
- 1796 (2) if such a duty exists, what the scope of that duty is¹⁶;
- 1797 (3) what the prospective harm is from which the person to whom the duty is owed ought to be protected¹⁷;
- 1798 (4) whether there been a breach of that duty¹⁸; and
- 1799 (5) if there has been such a breach, whether the loss complained of was caused by that breach, or whether it was caused by some other event or events unconnected with the breach¹⁹.

Auditors may plead *ex turpi causa in oritur actio* in defence to a claim alleging negligence on their part²⁰ in failing to detect a fraud perpetrated by the company's sole director and shareholder because, in those exceptional circumstances, his knowledge and acts are the acts of the company, such that the company is the villain and not the victim of the fraud; against

the company, the auditors can properly plead *ex turpi causa* so as to have the claim against them struck out²¹.

1 As to a company's duty to appoint auditors annually see PARA 912 et seq.

2 As to who qualifies as a 'member' of a company PARA 321.

3 As to the meaning of 'company' see PARA 24.

4 As to the auditors' position generally see PARA 958 et seq. A claim may also arise, of course, between auditors and their clients in contract: see **CONTRACT**. As to the auditor's duty under the Companies Act 2006 s 495 to report to the company's members on all annual accounts of the company see PARA 924.

5 *Caparo Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568, HL. The statutory function of an auditor is narrow, being to protect the company who has engaged him to audit its accounts from the consequences of undetected errors and wrongdoing and to inform shareholders with reliable information to enable them to exercise their collective powers: *Caparo Industries plc v Dickman* at 630 and 583 per Lord Oliver.

6 See *Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Price Waterhouse (a firm)* [1998] BCC 617 at 634, CA, per Sir Brian Neill.

7 *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 632-633, [1990] 1 All ER 568 at 584-585, HL, per Lord Bridge, and at 637-638 and 589 per Lord Oliver. The decision in *Caparo Industries plc v Dickman* largely reflects the dissenting judgment of Denning LJ in *Candler v Crane Christmas & Co* [1951] 2 KB 164 at 179-184, [1951] 1 All ER 426 at 433-436, CA, described as a 'masterly analysis [which required] little, if any, amplification or modification in the light of later authority' by Lord Bridge of Harwich in *Caparo Industries plc v Dickman* at 623 and 577. A claimant who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply; he must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered: *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 at 211, sub nom *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1996] 3 All ER 365 at 370, HL, per Lord Hoffmann, citing *Caparo Industries plc v Dickman*. See also *Barings plc (in liquidation) v Coopers & Lybrand (a firm), Barings Futures (Singapore) Pte Ltd (in liquidation) v Mattar* [2002] 2 BCLC 364 at 381-382 per Evans-Lombe J (to perfect his cause of action for negligent misstatement, a claimant must establish that the defendant had in contemplation the transaction by which the claimant suffered loss in order for the defendant to have assumed a duty to exercise due care and skill to protect the claimant from the loss resulting from it). However, when auditors undertake for reward to perform services and they are found to be negligent in the way they perform those services, the client is not required to show that it asked for specific advice before being able to recover damages for the foreseeable losses suffered by it: *Equitable Life Assurance Society v Ernst & Young* [2003] EWCA Civ 1114 at [129], [2003] 2 BCLC 603 at [129] per Brooke LJ. The contributory negligence of a company's directors may reduce any liability of the auditors: see *Barings plc (in liquidation) v Coopers & Lybrand (a firm), Barings Futures (Singapore) Pte Ltd (in liquidation) v Mattar* [2003] EWHC 1319 (Ch) at [1059], [2003] Lloyd's Rep IR 566 at [1059], [2003] All ER (D) 142 (Jun) at [1059] per Evans-Lombe J.

8 See *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 181, [1994] 3 All ER 506 at 521, HL, per Lord Goff of Chieveley (applying *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL); *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 WLR 830, HL; PARA 1087; and **NEGLIGENCE** vol 78 (2010) PARA 13 et seq. See also *Peach Publishing Ltd v Slater & Co* [1998] BCC 139, CA. Whether there has been an assumption of responsibility for the task is a matter to be considered objectively: *Electra Private Equity Partners v KPMG Peat Marwick* [2001] 1 BCLC 589; and see *Royal Bank of Scotland plc v Bannerman Johnstone Maclay (a firm)* 2005 SLT 579, IH (affg 2003 SLT 181, OH) (the absence of a disclaimer may be a relevant circumstance pointing to an assumption of responsibility). Where specific reporting obligations are carried out to meet a statutory requirement, the duty of care may be owed to the regulatory authority: *Law Society v KPMG Peat Marwick* [2000] 4 All ER 540, [2000] 1 WLR 1921, CA (accountants); *Andrew v Kounnis Freeman* [1999] 2 BCLC 641, CA (auditors). See also the Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001, SI 2001/2587; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 766.

9 *Caparo Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568, HL.

10 *Caparo Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568, HL; *James McNaughton Papers Group Ltd v Hicks Anderson & Co* [1991] 2 QB 113, [1991] 1 All ER 134, CA (no duty of care owed by auditors to possible take-over bidders).

11 *Morgan Crucible Co plc v Hill Samuel & Co Ltd* [1991] Ch 295, sub nom *Morgan Crucible Co Ltd v Hill Samuel Bank Ltd* [1991] 1 All ER 148, CA (if during the course of a contested take-over bid the directors and

financial advisers of the target company made express representations after an identified bidder had emerged intending that the bidder would rely on those representations, they owed the bidder a duty of care not to be negligent in making representations which might mislead him). See also *ADT v BDO Binder Hamlyn* [1996] BCC 808 (possible for an auditor to assume a wider duty of care in special cases where the purpose of the audit work has been widened so that it is no longer confined to the statutory one); *Barings plc (in liquidation) v Coopers & Lybrand (a firm)* [2002] 2 BCLC 364.

12 *Caparo Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568, HL. See also *Electra Private Equity Partners v KPMG Peat Marwick* [2001] 1 BCLC 589.

13 *Al Saudi Banque v Clark Pixley (a firm)* [1990] Ch 313, [1989] 3 All ER 361.

14 See *Equitable Life Assurance Society v Ernst & Young* [2003] EWCA Civ 1114 at [105], [2003] 2 BCLC 603 at [105] per Brooke LJ. These criteria were crafted from a careful study of the leading case law cited to the court: see *Equitable Life Assurance Society v Ernst & Young* at [135] per Brooke LJ. However, the court acknowledged that, in terms of the concepts used to limit the scope of the legal consequences of negligence or of legal responsibility for negligence, the law is at present in a state of development and flux and sensitive to the facts: see *Equitable Life Assurance Society v Ernst & Young* at [107] per Brooke LJ.

15 See note 14.

16 See note 14.

17 See note 14. The issue, whether the duty which the tortfeasor owed was a duty in respect of the kind of loss of which the victim complains, is now the preferred approach of the courts (see *Johnson v Gore Wood & Co (a firm)* [2003] EWCA Civ 1728 at [91], [2003] All ER (D) 58 (Dec) at [91] per Arden LJ (cited in PARA 929 note 13)); and see *MAN Nutzfahrzeuge AG v Freightliner Ltd* [2007] EWCA Civ 910, [2008] 2 BCLC 22 (senior employee made fraudulent representations to the purchaser of a company as to the accuracy of the company's accounts, which representations he knew to be false because of his undiscovered fraud, giving rise to liability on the part of the vendor to the purchaser in misrepresentation and deceit; auditors were not liable because, while they may undertake a duty of care as to the use of the accounts in the sale of a business, they do not undertake a duty of care as to the use which a dishonest employee may make of the accounts; and the losses suffered by the vendor arose from the fraudulent misrepresentations rather than the inaccuracies in the accounts themselves and the auditors owed no duty in respect of those representations).

18 See note 14.

19 See note 14. The importance of this question is diminished by a focus on the scope of the duty and loss as a component of the scope of the duty, rather than on issues of causation: see note 17.

20 See generally **TORT** vol 45(2) (Reissue) PARA 376.

21 *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] UKHL 39, [2009] 3 WLR 455.

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(B) RIGHTS

931. Auditor's general right to information.

An auditor of a company¹ has a right of access at all times to the company's books, accounts and vouchers (in whatever form they are held)² and may require any of the following persons to provide him with such information or explanations as he thinks necessary for the performance of his duties as auditor³:

1800 (1) any officer⁴ or employee of the company⁵;

- 1801 (2) any person holding or accountable for any of the company's books, accounts or vouchers⁶;
- 1802 (3) any subsidiary undertaking⁷ of the company which is a body corporate⁸ incorporated in the United Kingdom⁹;
- 1803 (4) any officer, employee or auditor of any such subsidiary undertaking or any person holding or accountable for any books, accounts or vouchers of any such subsidiary undertaking¹⁰; and
- 1804 (5) any person who fell within any of heads (1) to (4) at a time to which the information or explanations required by the auditor relates or relate¹¹.

A person commits an offence who knowingly or recklessly makes to an auditor of a company a statement (oral or written) that conveys or purports to convey any information or explanations which the auditor requires, or is entitled to require, under these provisions, and is misleading, false or deceptive in a material particular¹², and a person who fails to comply with a requirement under these provisions without delay commits an offence unless it was not reasonably practicable for him to provide the required information or explanations¹³.

1 As to the meaning of 'company' see PARA 24.

2 Companies Act 2006 s 499(1)(a).

The provisions of the Companies Act 2006 ss 499, 501 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Companies Act 2006 s 499(1)(b). A statement made by a person in response to a requirement under s 499 may not be used in evidence against him in criminal proceedings except proceedings for an offence under s 501 (see the text and notes 12-13): s 499(3). Nothing in s 499 compels a person to disclose information in respect of which a claim to legal professional privilege could be maintained in legal proceedings: s 499(4). As to legal professional privilege see **CIVIL PROCEDURE** vol 11 (2009) PARA 558 et seq; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1479.

4 As to the meaning of 'officer' see PARA 607.

5 Companies Act 2006 s 499(2)(a).

6 Companies Act 2006 s 499(2)(b).

7 As to the meaning of 'subsidiary undertaking' see PARA 26.

8 As to the meaning of 'body corporate' see PARA 1 note 5.

9 Companies Act 2006 s 499(2)(c).

10 Companies Act 2006 s 499(2)(d).

11 Companies Act 2006 s 499(2)(e).

12 Companies Act 2006 s 501(1). A person guilty of this offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine (or both) and on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or both): s 501(2). As to the statutory maximum see PARA 1622. Nothing in s 501 affects any right of an auditor to apply for an injunction to enforce any of his rights under s 499: s 501(6).

13 Companies Act 2006 s 501(3). A person guilty of this offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 501(5). As to the standard scale see PARA 1622.

COMPANIES ACTS/(19) AUDITORS AND AUDIT/(iii) Functions of Auditor/B. DUTIES AND RIGHTS OF AUDITOR/(B) Rights/932. Auditor's right to information from overseas subsidiaries.

932. Auditor's right to information from overseas subsidiaries.

Where a parent company¹ has a subsidiary undertaking² that is not a body corporate³ incorporated in the United Kingdom, the auditor of the parent company may require it to obtain such information or explanations as he may reasonably require for the purposes of his duties as auditor from any of⁴:

- 1805 (1) the undertaking⁵;
- 1806 (2) any officer⁶, employee or auditor of the undertaking⁷;
- 1807 (3) any person holding or accountable for any of the undertaking's books, accounts or vouchers⁸; and
- 1808 (4) any person who fell within head (2) or (3) at a time to which the information or explanations relates or relate⁹;

and if so required, the parent company must take all such steps as are reasonably open to it to obtain the information or explanations from the person concerned¹⁰.

If a parent company fails to comply with these requirement an offence is committed by the company and every officer of the company who is in default¹¹.

1 As to the meaning of 'parent company' see PARA 26.

2 As to the meaning of 'subsidiary undertaking' see PARA 26.

3 As to the meaning of 'body corporate' see PARA 1 note 5.

4 Companies Act 2006 s 500(1)(a). A statement made by a person in response to a requirement under s 500 may not be used in evidence against him in criminal proceedings except proceedings for an offence under s 501 (see the text and notes 11): s 500(4). Nothing in s 500 compels a person to disclose information in respect of which a claim to legal professional privilege could be maintained in legal proceedings: s 500(5). As to legal professional privilege see **CIVIL PROCEDURE** vol 11 (2009) PARA 558 et seq; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1479.

The provisions of the Companies Act 2006 ss 500, 501 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 Companies Act 2006 s 500(2)(a).

6 As to the meaning of 'officer' see PARA 607.

7 Companies Act 2006 s 500(2)(b).

8 Companies Act 2006 s 500(2)(c).

9 Companies Act 2006 s 500(2)(d).

10 Companies Act 2006 s 500(3).

11 Companies Act 2006 s 501(4). A person guilty of this offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 501(5). As to the meaning of 'officer' see PARA 607; as to the meaning of 'officer in default' see PARA 315; as to the standard scale see PARA 1622. Nothing in s 501 affects any right of an auditor to apply for an injunction to enforce any of his rights under s 500: s 501(6).

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933. Property rights regarding auditors' working papers.

The working papers prepared by a firm of accountants in the course of producing a balance sheet for a company for audit purposes are the property of the accountants and not of the company, and may be ordered to be produced under the rules relating to disclosure and inspection of documents in litigation between the firm and one of their employees engaged in the audit¹. Correspondence in which the firm was acting as agent for the company is, however, the property of the company and is not to be produced².

1 As to disclosure and the production of documents generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 538 et seq.

2 *Chantrey Martin (a firm) v Martin* [1953] 2 QB 286, [1953] 2 All ER 691, CA (where the production of working papers was ordered subject to an undertaking by the person seeking the discovery not to disclose their contents otherwise than for the purposes of the litigation; the court considered that a plea that the discovery should not be ordered by reason of the embodiment of information which was the subject of professional confidence between the firm and its clients was not a ground for refusing the order). See also *Jay v Wilder Coe (a firm)* [2003] EWHC 1786 (QB), [2003] All ER (D) 526 (Jul) (former client entitled to disclosure of auditors' working papers where the documents sought related directly to the professional work alleged to have been negligently performed).

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934. Auditor's rights in relation to resolutions and meetings.

In relation to a written resolution proposed to be agreed to by a private company¹, the company's auditor is entitled to receive all such communications relating to the resolution as are required to be supplied² to a member³ of the company⁴. A company's auditor is also entitled:

- 1809 (1) to receive all notices of, and other communications relating to, any general meeting which a member of the company is entitled to receive⁵;
- 1810 (2) to attend any general meeting of the company⁶; and
- 1811 (3) to be heard at any general meeting which he attends on any part of the business of the meeting which concerns him as auditor⁷.

1 As to the meanings of 'company' and 'private company' see PARAS 24, 102.

2 Ie by virtue of any provision of the Companies Act 2006 Pt 13 Ch 2 (ss 288-300): see PARAS 623.

3 As to the meaning of 'member' see PARA 321.

4 Companies Act 2006 s 502(1).

The provisions of the Companies Act 2006 s 502 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 Companies Act 2006 s 502(2)(a).

6 Companies Act 2006 s 502(2)(b). Where the auditor is a firm, the right to attend or be heard at a meeting is exercisable by an individual authorised by the firm in writing to act as its representative at the meeting: s 502(3). As to the meaning of 'firm' see PARA 969 note 1.

7 Companies Act 2006 s 502(2)(c).

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C. SIGNATURE OF AUDITOR'S REPORT

935. Name of auditor to be published with report.

The auditor's report must state the name of the auditor¹ and be signed and dated², although the auditor's name³ may be omitted from published copies of the report and the copy of the report delivered to the registrar⁴ if the company⁵:

1812 (1) considering on reasonable grounds that statement of the name would create or be likely to create a serious risk that the auditor or senior statutory auditor, or any other person, would be subject to violence or intimidation, has resolved that the name should not be stated⁶; and

1813 (2) has given notice of such resolution to the Secretary of State⁷.

Every copy of the auditor's report that is published by or on behalf of the company⁸ and the copy of the auditor's report delivered to the registrar⁹ must state the name of the auditor¹⁰ or, if the conditions under which names may be omitted¹¹ are met, state that a resolution has been passed and notified to the Secretary of State accordingly¹². Failure to comply with this requirement is an offence¹³.

1 Where the auditor is an individual, the report must be signed by him and where the auditor is a firm, the report must be signed by the senior statutory auditor in his own name, for and on behalf of the auditor: Companies Act 2006 s 503(2), (3). As to the meaning of 'firm' see PARA 969 note 1. As to the senior statutory auditor see s 504; and PARA 936.

The provisions of the Companies Act 2006 ss 503, 505, 506 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

2 Companies Act 2006 s 503(1).

3 Where the auditor is a firm this is a reference to the name of the person who signed the report as senior statutory auditor: see the Companies Act 2006 s 444(7) (see PARA 871), s 444A(5) (see PARA 872), s 445(6) (see PARA 873), s 446(4) (see PARA 874), s 447(4) (see PARA 875), ss 505(1)(a), 506(1), (2)(b)(iii).

4 ie under the Companies Act 2006 Pt 15 Ch 10 (ss 441-453): see PARA 869 et seq. As to the registrar see PARA 131.

5 As to the meaning of 'company' see PARA 24.

6 Companies Act 2006 s 506(1), (2)(a).

7 Companies Act 2006 s 506(2)(b). As to the Secretary of State see PARA 6. The notice must state the name and registered number of the company, the financial year of the company to which the report relates and the name of the auditor (see note 3): Companies Act 2006 s 506(2)(b)(i)-(iii). As to the meaning of 'financial year' see PARA 711.

8 For these purposes a company is regarded as 'publishing' the report if it publishes, issues or circulates it or otherwise makes it available for public inspection in a manner calculated to invite members of the public generally, or any class of members of the public, to read it: Companies Act 2006 s 505(2).

9 I.e. under the Companies Act 2006 s 444 (filing obligations of companies subject to small companies regime) (see PARA 871), s 444A (filing obligations of companies entitled to small companies exemption in relation to directors' report) (see PARA 872), s 445 (filing obligations of medium-sized companies) (see PARA 873), s 446 (filing obligations of unquoted companies) (see PARA 874), s 447 (Filing obligations of quoted companies) (see PARA 875).

10 See note 3.

11 I.e. the conditions set out in the Companies Act 2006 s 506: see the text and notes 3-7.

12 Companies Act 2006 s 444(7) (see PARA 871), s 444A(5)(see PARA 872), s 445(6) (see PARA 873), s 446(4) (see PARA 874), s 447(4) (see PARA 875), s 505(1).

13 If a copy of the auditor's report is published without the statement required by the Companies Act 2006 s 505 an offence is committed by the company and every officer of the company who is in default: s 505(3). A person guilty of this offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 505(4). As to the meaning of 'officer' see PARA 607; as to the meaning of 'officer in default' see PARA 315; as to the standard scale see PARA 1622.

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936. Senior statutory auditor.

The 'senior statutory auditor' is the individual identified by the firm¹ as senior statutory auditor in relation to the audit in accordance with standards issued by the European Commission² or, if there is no applicable standard so issued, any relevant guidance issued by the Secretary of State³ or a body appointed by order of the Secretary of State⁴. The person identified as senior statutory auditor must be eligible for appointment as auditor of the company⁵ in question⁶ and is not, by reason of being named or identified as senior statutory auditor or by reason of his having signed the auditor's report⁷, subject to any civil liability to which he would not otherwise be subject⁸.

1 As to the meaning of 'firm' see PARA 969 note 1.

2 Companies Act 2006 s 504(1)(a).

The provisions of the Companies Act 2006 s 504 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Companies Act 2006 s 504(1)(b)(i).

4 Companies Act 2006 s 504(1)(b)(ii). As to the Secretary of State see PARA 6. The body known as the Auditing Practices Board established under the articles of association of The Financial Reporting Council Limited

is appointed for the purposes of s 504(1)(b)(ii): see the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, art 11 (made in exercise of the powers conferred the Companies Act 1989 s 46(4) and the Companies Act 2006 ss 504(1)(b)(ii), 1252(1), (4)(a), (5), (8), 1253(4), Sch 13 paras 7(3), 11(2), (3)(a)).

5 As to the meaning of 'company' see PARA 24.

6 Companies Act 2006 s 504(2). As to eligibility for appointment as auditor see Pt 42 Ch 2 (ss 1212-1225); and PARA 969.

7 See PARA 935.

8 Companies Act 2006 s 504(3).

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D. OFFENCES IN CONNECTION WITH AUDITOR'S REPORT

937. Offences in connection with auditor's report.

An auditor¹ commits an offence² if he knowingly or recklessly causes a report on the company's annual accounts³ to include any matter that is misleading, false or deceptive in a material particular⁴ or if he knowingly or recklessly causes such a report to omit a required statement that:

- 1814 (1) the company's accounts do not agree with accounting records and returns⁵;
- 1815 (2) necessary information and explanations have not been obtained⁶; or
- 1816 (3) the directors wrongly took advantage of an exemption from the obligation to prepare group accounts⁷.

The Secretary of State⁸ may issue guidance⁹ for the purpose of helping relevant regulatory and prosecuting authorities¹⁰ to determine how they should carry out their functions in cases where behaviour occurs that appears to involve the commission of an offence¹¹ described above and has been, is being or may be¹² investigated¹³.

1 These provisions (ie the Companies Act 2006 s 507: see the text and notes 2-7) apply:

330 (1) where the auditor is an individual, to that individual and any employee or agent of his who is eligible for appointment as auditor of the company (s 507(3)(a)); and

331 (2) where the auditor is a firm, to any director, member, employee or agent of the firm who is eligible for appointment as auditor of the company (s 507(3)(b)).

As to the meaning of 'company' see PARA 24; as to the meaning of 'firm' see PARA 969 note 1; as to the meaning of 'director' see PARA 478.

The provisions of the Companies Act 2006 ss 507, 508 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

2 A person guilty of this offence is liable on conviction on indictment to a fine and on summary conviction to a fine not exceeding the statutory maximum: Companies Act 2006 s 507(4). As to the statutory maximum see PARA 1622.

- 3 le a report under the Companies Act 2006 s 495: see PARA 924.
- 4 Companies Act 2006 s 507(1).
- 5 Companies Act 2006 s 507(2)(a). This statement is required under s 498(2)(b): see PARA 928.
- 6 Companies Act 2006 s 507(2)(b). This statement is required under s 498(3): see PARA 928.
- 7 Companies Act 2006 s 507(2)(b). This statement is required under s 498(5): see PARA 928.
- 8 As to the Secretary of State see PARA 6.
- 9 The Secretary of State must obtain the consent of the Attorney General before issuing any such guidance: Companies Act 2006 s 508(2).
- 10 le:
- 332 (1) supervisory bodies within the meaning of the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARA 975) (s 508(3)(a));
- 333 (2) bodies to which the Secretary of State may make grants under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 16(1) (bodies concerned with accounting standards etc: see PARA 699) (Companies Act 2006 s 508(3)(b));
- 334 (3) the Director of the Serious Fraud Office (s 508(3)(c));
- 335 (4) the Director of Public Prosecutions or the Director of Public Prosecutions for Northern Ireland (s 508(3)(d)); and
- 336 (5) the Secretary of State (s 508(3)(e)).
- 11 le an offence under the Companies Act 2006 s 507: see the text and notes 1-6.
- 12 le pursuant to arrangements under the Companies Act 2006 Sch 10 para 15 (investigation of complaints against auditors and supervisory bodies: see PARA 988) or of a kind mentioned in Sch 10 para 24 (independent investigation for disciplinary purposes of public interest cases: see PARA 989).
- 13 Companies Act 2006 s 508(1).

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(iv) Removal, Resignation etc of Auditors

A. REMOVAL; FAILURE TO RE-APPOINT

938. Removal of auditors.

The members¹ of a company² may remove an auditor from office at any time, either by ordinary resolution³ at a meeting⁴ or by special notice of resolution⁵ to remove the auditor⁶. An auditor may not be removed from office before the expiration of his term of office except by such resolution⁷. Where such a resolution is passed the company must give notice of that fact to the registrar⁸ within 14 days⁹: failure to comply with this requirement is an offence¹⁰.

1 As to the meaning of 'member' see PARA 321.

2 As to the meaning of 'company' see PARA 24.

3 As to the meaning of 'ordinary resolution' see PARA 613.

4 Companies Act 2006 s 510(1), (2)(a). Nothing in s 510 is to be taken as depriving the person removed of compensation or damages payable to him in respect of the termination of his appointment as auditor or of any appointment terminating with that as auditor: s 510(3). An auditor who has been removed by resolution under s 510 has, notwithstanding his removal, the rights conferred by s 502(2) (see PARA 934) in relation to any general meeting of the company at which his term of office would otherwise have expired or at which it is proposed to fill the vacancy caused by his removal: s 513(1). In such a case the references in s 502 to matters concerning the auditor as auditor are construed as references to matters concerning him as a former auditor: s 513(2).

The provisions of the Companies Act 2006 ss 510, 512, 513 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 le under the Companies Act 2006 s 511: see PARA 939. As to the special notice that is required see PARA 617.

6 Companies Act 2006 s 510(2)(a).

7 Companies Act 2006 s 510(4). A resolution under s 510 removing an auditor before the expiration of his term of office may not be passed as a written resolution: see s 288(2); and PARA 623.

8 As to the registrar see PARA 131.

9 Companies Act 2006 s 512(1).

10 If a company fails to give the notice required by the Companies Act 2006 s 512 (see the text and note 8) an offence is committed by the company and every officer of it who is in default: s 512(2). A person guilty of this offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 512(3). As to the meaning of 'officer' see PARA 607; as to the meaning of 'officer in default' see PARA 315; as to the meaning of 'daily default fine' see PARA 1622; as to the standard scale see PARA 1622.

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939. Required procedure where auditor removed or not reappointed.

Special notice is required for a resolution at a general meeting of a company¹ removing an auditor from office². On receipt of notice of such an intended resolution the company must immediately send a copy of it to the auditor proposed to be removed³, who may make with respect to the intended resolution representations⁴ to the company and request their notification to members⁵ of the company⁶.

Where a resolution is proposed as a written resolution of a private company⁷ whose effect would be to appoint a person as auditor in place of a person (the 'outgoing auditor') whose term of office has expired, or is to expire, at the end of the period for appointing auditors⁸, the company must send a copy of the proposed resolution to the person proposed to be appointed and to the outgoing auditor if:

- 1817 (1) no period for appointing auditors has ended since the outgoing auditor ceased to hold office⁹; or

1818 (2) such a period has ended and an auditor or auditors should have been appointed but were not¹⁰;

and the outgoing auditor may, within 14 days after receiving the notice, make with respect to the proposed resolution representations to the company¹¹ and request their circulation to members of the company¹².

Special notice may also be required of a resolution at a general meeting of a company whose effect would be to appoint a person as auditor in place of a person (the 'outgoing auditor') whose term of office has ended, or is to end, either at the end of the period for appointing auditors (in the case of a private company) or at the end of the next accounts meeting¹³ (in the case of a public company)¹⁴. In the case of a private company special notice will be required if no period for appointing auditors has ended since the outgoing auditor ceased to hold office or such a period has ended and an auditor or auditors should have been appointed but were not¹⁵; and in the case of a public company special notice will be required if there has been no accounts meeting of the company since the outgoing auditor ceased to hold office or there has been an accounts meeting at which an auditor or auditors should have been appointed but were not¹⁶. On receipt of such a notice the company must forthwith send a copy of it to the person proposed to be appointed and to the outgoing auditor¹⁷, who may make with respect to the intended resolution representations to the company¹⁸ and request their notification to members of the company¹⁹.

1 As to the meaning of 'company' see PARA 24.

2 Companies Act 2006 s 511(1). See further PARA 938. As to the special notice that is required see s 312; and PARA 617.

The provisions of the Companies Act 2006 ss 511, 514, 515 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Companies Act 2006 s 511(2).

4 Representations must be in writing and must not exceed a reasonable length: Companies Act 2006 ss 511(3), 514(4), 515(4).

5 As to the meaning of 'member' see PARA 321.

6 Companies Act 2006 s 511(3). The company must (unless the representations are received by it too late for it to do so) in any notice of the resolution given to members of the company, state the fact of the representations having been made and send a copy of the representations to every member of the company to whom notice of the meeting is or has been sent: s 511(4). If a copy of any such representations is not sent out as required because received too late or because of the company's default, the auditor may (without prejudice to his right to be heard orally) require that the representations be read out at the meeting: s 511(5). Copies of the representations need not be sent out and the representations need not be read at the meeting if, on the application either of the company or of any other person claiming to be aggrieved, the court is satisfied that the auditor is using the provisions of s 511 to secure needless publicity for defamatory matter: s 511(6). The court may order the company's costs on the application to be paid in whole or in part by the auditor, notwithstanding that he is not a party to the application: s 511(6). In relation to an application for an order under s 511(6), the claimant must notify the auditor of the application: *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 13.

7 As to the meaning of 'private company' see PARA 102. As to a written resolution see the Companies Act 2006 s 288(1); and PARA 623.

8 As to the period for appointing auditors see PARA 912 note 6.

9 Companies Act 2006 s 514(1), (2)(a), (3).

10 Companies Act 2006 s 514(2)(b).

11 See note 4.

12 Companies Act 2006 s 514(4). The company must circulate the representations together with the copy or copies of the resolution circulated in accordance with s 291 (resolution proposed by directors: see PARA 624) or s 293 (resolution proposed by members: see PARA 625): s 514(5). In such circumstances, the period allowed under s 293(3) for service of copies of the proposed resolution is 28 days instead of 21 days, and the provisions of s 293(5), (6) (offences) apply in relation to a failure to comply with s 514(5) as in relation to a default in complying with s 293: s 514(6). Copies of the representations need not be circulated if, on the application either of the company or of any other person claiming to be aggrieved, the court is satisfied that the auditor is using the provisions of s 514 to secure needless publicity for defamatory matter: s 514(7). The court may order the company's costs on the application to be paid in whole or in part by the auditor, notwithstanding that he is not a party to the application: s 514(7). In relation to an application for an order under s 514(7), the claimant must notify the auditor of the application: *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 13.

If any requirement of s 514 is not complied with, the resolution is ineffective: Companies Act 2006 s 514(8).

13 As to the meaning of 'accounts meeting' see PARA 865 note 4.

14 Companies Act 2006 s 515(1). As to the meaning of 'public company' see PARA 102.

15 Companies Act 2006 s 515(2)(a).

16 Companies Act 2006 s 515(2)(b).

17 Companies Act 2006 s 515(3).

18 See note 4.

19 Companies Act 2006 s 514(4). The company must (unless the representations are received by it too late for it to do so) in any notice of the resolution given to members of the company, state the fact of the representations having been made and send a copy of the representations to every member of the company to whom notice of the meeting is or has been sent: s 515(5). If a copy of any such representations is not sent out as required because received too late or because of the company's default, the auditor may (without prejudice to his right to be heard orally) require that the representations be read out at the meeting: s 515(6). Copies of the representations need not be sent out and the representations need not be read at the meeting if, on the application either of the company or of any other person claiming to be aggrieved, the court is satisfied that the auditor is using the provisions of s 515 to secure needless publicity for defamatory matter: s 515(7). The court may order the company's costs on the application to be paid in whole or in part by the auditor, notwithstanding that he is not a party to the application: s 515(7). In relation to an application for an order under s 515(7), the claimant must notify the auditor of the application: *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 13.

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B. RESIGNATION

940. Resignation of auditors.

An auditor of a company¹ may resign his office by depositing a notice in writing to that effect at the company's registered office². An effective notice of resignation³ operates to bring the auditor's term of office to an end as of the date on which the notice is deposited or on such later date as may be specified in it⁴.

1 As to the meaning of 'company' see PARA 24.

2 Companies Act 2006 s 516(1).

The provisions of the Companies Act 2006 s 516 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 The notice is not effective unless it is accompanied by the statement required by the Companies Act 2006 s 519 (see PARA 943): s 516(2).

4 Companies Act 2006 s 516(3).

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941. Notice to registrar of resignation of auditor.

Where an auditor resigns¹ the company² must within 14 days of the deposit of a notice of resignation send a copy of the notice to the registrar of companies³. Failure to comply with this requirement is an offence⁴.

1 See PARA 940.

2 As to the meaning of 'company' see PARA 24.

3 Companies Act 2006 s 517(1). As to the registrar of companies see s 1060(3); and PARA 131.

The provisions of the Companies Act 2006 s 517 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 If default is made in complying with the Companies Act 2006 s 517 an offence is committed by the company and every officer of the company who is in default (s 517(2)), and a person guilty of an offence under s 517 is liable on conviction on indictment to a fine and on summary conviction to a fine not exceeding the statutory maximum and, for continued contravention, a daily default fine not exceeding one-tenth of the statutory maximum (s 517(3)). As to the meaning of 'officer' see PARA 607; as to the meaning of 'officer in default' see PARA 315; as to the meaning of 'daily default fine' see PARA 1622; as to the statutory maximum see PARA 1622; as to the standard scale see PARA 1622.

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942. Rights of resigning auditors.

Where an auditor's notice of resignation¹ is accompanied by a statement of the circumstances connected with his resignation² he may deposit with the notice a signed requisition calling on the directors³ of the company⁴ forthwith duly to convene a general meeting of the company for the purpose of receiving and considering such explanation of the circumstances connected with his resignation as he may wish to place before the meeting⁵, and may request the company to circulate to its members, either before the meeting convened on his requisition or before any general meeting at which his term of office would otherwise have expired or at which it is

proposed to fill the vacancy caused by his resignation, a statement⁶ of the circumstances connected with his resignation⁷.

The directors must within 21 days from the date of the deposit of a requisition under these provisions proceed duly to convene a meeting for a day not more than 28 days after the date on which the notice convening the meeting is given⁸.

1 See PARA 940.

2 See the Companies Act 2006 s 519; and PARA 943.

3 As to the meaning of 'director' see PARA 478.

4 As to the meaning of 'company' see PARA 24.

5 Companies Act 2006 s 518(1), (2).

The provisions of the Companies Act 2006 s 518 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

6 The statement must be in writing and must not exceed a reasonable length: Companies Act 2006 s 518(3).

7 Companies Act 2006 s 518(3). The company must (unless the statement is received too late for it to comply) in any notice of the meeting given to members of the company, state the fact of the statement having been made and send a copy of the statement to every member of the company to whom notice of the meeting is or has been sent: s 518(4). If a copy of the statement is not sent out as required because received too late or because of the company's default, the auditor may (without prejudice to his right to be heard orally) require that the statement be read out at the meeting: s 518(8). Copies of a statement need not be sent out and the statement need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the court is satisfied that the auditor is using the provisions of this section to secure needless publicity for defamatory matter: s 518(9). The court may order the company's costs on such an application to be paid in whole or in part by the auditor, notwithstanding that he is not a party to the application: s 518(9). In relation to an application for an order under s 518(9), the claimant must notify the auditor of the application: *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 13.

An auditor who has resigned has, notwithstanding his resignation, the rights conferred by the Companies Act 2006 s 502(2) (see PARA 934) in relation to any such general meeting of the company as is mentioned in s 518(3): s 518(10). In such a case the references in s 502 to matters concerning the auditor as auditor are construed as references to matters concerning him as a former auditor: s 518(10).

8 Companies Act 2006 s 518(5). If default is made in complying with s 518(5), every director who failed to take all reasonable steps to secure that a meeting was convened commits an offence (s 518(6)), and a person guilty of such an offence is liable on conviction on indictment to a fine and on summary conviction to a fine not exceeding the statutory maximum (s 518(7)). As to the statutory maximum see PARA 1622.

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C. STATEMENT AND NOTIFICATION REQUIREMENTS WHERE AUDITOR CEASES TO HOLD OFFICE

943. Statement by auditor ceasing to hold office to be deposited with company.

Where an auditor of a quoted or unquoted company¹ ceases for any reason to hold office, he must deposit at the company's registered office a statement of the circumstances connected with his ceasing to hold office². The statement must be deposited:

- 1819 (1) in the case of resignation, along with the notice of resignation³;
- 1820 (2) in the case of failure to seek re-appointment, not less than 14 days before the end of the time allowed for next appointing an auditor⁴; or
- 1821 (3) in any other case, not later than the end of the period of 14 days beginning with the date on which he ceases to hold office⁵.

A person ceasing to hold office as auditor who fails to comply with these requirements commits an offence⁶.

1 As to the meanings of 'company', 'quoted company' and 'unquoted company' see PARAS 24, 696.

2 Companies Act 2006 s 519(1), (3). The provision set out in the text does not apply, however, to an auditor of an unquoted company if he considers that there are no circumstances in connection with his ceasing to hold office that need to be brought to the attention of members or creditors of the company (see s 519(1); but, if he so considers, he must deposit at the company's registered office a statement to that effect (s 519(2)). As to the meaning of 'member' see PARA 321.

Where the statement deposited under s 519 states the circumstances connected with the auditor's ceasing to hold office, the company must within 14 days of the deposit of the statement either send a copy of it to every person who under s 423 (see PARA 850) is entitled to be sent copies of the accounts, or apply to the court for a direction that copies need not be sent: s 520(1), (2). If it applies to the court, the company must notify the auditor of the application: s 520(3). If the court is satisfied that the auditor is using the provisions of s 519 to secure needless publicity for defamatory matter it must direct that copies of the statement need not be sent out and may further order the company's costs on the application to be paid in whole or in part by the auditor, even if he is not a party to the application, and the company must within 14 days of the court's decision send a statement setting out the effect of the order to every person who under s 423 is entitled to be sent copies of the accounts: s 520(4). If no such direction is made the company must, within 14 days of the court's decision or, as the case may be, of the discontinuance of the proceedings, send copies of the statement to every person who under s 423 is entitled to be sent copies of the accounts: s 520(5).

In the event of default in complying with s 520 an offence is committed by every officer of the company who is in default (s 520(6)), and a person guilty of this offence is liable on conviction on indictment to a fine and on summary conviction to a fine not exceeding the statutory maximum (s 520(8)). As to the meaning of 'officer' see PARA 607; as to the meaning of 'officer in default' see PARA 315; as to the statutory maximum see PARA 1622. In proceedings for such an offence it is a defence for the person charged to show that he took all reasonable steps and exercised all due diligence to avoid the commission of the offence: s 520(7). See further s 521(1), (2); and PARA 944.

The provisions of the Companies Act 2006 ss 519, 520 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Companies Act 2006 s 519(4)(a).

4 Companies Act 2006 s 519(4)(b).

5 Companies Act 2006 s 519(4)(c).

6 Companies Act 2006 s 519(5). A person guilty of an offence under s 519 is liable on conviction on indictment to a fine and on summary conviction, to a fine not exceeding the statutory maximum: s 519(7). Where the offence is committed by a body corporate, every officer of the body who is in default also commits the offence: s 519(8) (added by SI 2008/948). For this purpose any person who purports to act as director, manager or secretary of the body is treated as an officer of the body and if the body is a company, any shadow director is treated as an officer of the company: Companies Act 2006 s 519(8) (as so added). In proceedings for an offence under s 519 it is a defence for the person charged to show that he took all reasonable steps and exercised all due diligence to avoid the commission of the offence: s 519(6).

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944. Copy of statement to be sent to registrar.

An auditor who has ceased to hold office is required to send a copy of the statement regarding his ceasing to hold office¹ to the registrar². Unless he receives notice of an application to the court³ within 21 days beginning with the day on which he deposited the statement, the auditor must send the required copy to the registrar within a further seven days⁴; and if an application to the court is so made and the auditor subsequently receives notice⁵ of the conclusion or discontinuance of proceedings he must send a copy of the statement to the registrar within seven days of receiving that notice⁶. An auditor who fails to comply with these requirements commits an offence⁷.

1 Ie the statement under the Companies Act 2006 s 519: see PARA 943.

2 Companies Act 2006 s 521(1). As to the registrar see PARA 131.

The provisions of the Companies Act 2006 s 521 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Ie an application under the Companies Act 2006 s 520: see PARA 943.

4 Companies Act 2006 s 521(1). See also *P & P Design plc v PricewaterhouseCoopers* [2002] EWHC 446 (Ch), [2002] 2 BCLC 648 (time limit for making application to the court is mandatory and the court has no power to extend the period).

5 Ie under the Companies Act 2006 s 520(5): see PARA 943.

6 Companies Act 2006 s 521(2). If proceedings are brought to an end by a discontinuance, the date of the court's decision is the date on which notice of discontinuation was served: *Jarvis plc v PricewaterhouseCoopers (a firm)* [2000] 2 BCLC 368.

7 Companies Act 2006 s 521(3). A person guilty of an offence under s 521 is liable on conviction on indictment to a fine and on summary conviction, to a fine not exceeding the statutory maximum: s 521(5). As to the statutory maximum see PARA 1622. Where the offence is committed by a body corporate, every officer of the body who is in default also commits the offence: s 521(6) (added by SI 2008/948). For this purpose any person who purports to act as director, manager or secretary of the body is treated as an officer of the body and if the body is a company, any shadow director is treated as an officer of the company: Companies Act 2006 s 521(6) (as so added). As to the meaning of 'officer' see PARA 607; as to the meaning of 'officer in default' see PARA 321. In proceedings for an offence under s 521 it is a defence for the person charged to show that he took all reasonable steps and exercised all due diligence to avoid the commission of the offence: s 521(4).

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945. Duty of auditor to notify appropriate audit authority.

Where in the case of a major audit¹ an auditor ceases for any reason to hold office or, in the case of an audit that is not a major audit, an auditor ceases to hold office before the end of his term of office, the auditor ceasing to hold office must notify the appropriate audit authority². The notice must inform the appropriate audit authority that he has ceased to hold office and be accompanied by a copy of the statement relating to his ceasing to hold office deposited by him³ at the company's registered office⁴. In the case of a major audit, the auditor must comply with these requirements at the same time as he deposits the statement regarding his ceasing to hold office at the company's registered office⁵; in the case of an audit that is not a major audit the auditor must comply with these requirements at such time (not being earlier than the time he deposits the statement) as the appropriate audit authority may require⁶.

A person ceasing to hold office as auditor who fails to comply with these requirements commits an offence⁷.

1 For these purposes 'major audit' means a statutory audit conducted in respect of a company any of whose securities have been admitted to the official list (within the meaning of the Financial Services and Markets Act 2000 Pt 6 (ss 72-103: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 385-436) (Companies Act 2006 s 525(2)(a)) or any other person in whose financial condition there is a major public interest (s 525(2)(b)). In determining whether an audit is a major audit within s 525(2)(b), regard must be had to any guidance issued by any of the appropriate audit authorities: s 525(3).

In ss 522-524, 'appropriate audit authority' means:

- 337 (1) in the case of a major audit (other than one conducted by an Auditor General), either the Secretary of State or, if the Secretary of State has delegated functions under s 1252 (see PARA 960) to a body whose functions include receiving the notice in question, that body (s 525(1)(a) (s 525(1) amended by SI 2007/3494));
- 338 (2) in the case of an audit (other than one conducted by an Auditor General) that is not a major audit, the relevant supervisory body (Companies Act 2006 s 525(1)(b) (as so amended)); and
- 339 (3) in the case of an audit conducted by an Auditor General, the Independent Supervisor (s 525(1)(c)).

'Supervisory body' and 'Independent Supervisor' have the same meaning as in Pt 42 (ss 1209-1264) (statutory auditors: see PARA 958) (see ss 1217, 1228; and PARAS 975, 1018): s 525(1). Further to head (1) above, see the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496 (as to which see also PARA 961 et seq). This Order delegates most of the Secretary of State's functions relating to the regulation of statutory auditors under the Companies Act 2006 Pt 42 (ss 1209-1264) to the Professional Oversight Board, one of the operating bodies of the Financial Reporting Council (as to which see PARA 699 note 2). The functions of the body known as the Professional Oversight Board (ie as established under the articles of association of the Financial Reporting Council Limited) (the 'second designated body') include the receipt of notices under the Companies Act 2006 s 522 and s 523 (see PARA 946) (notice of auditor ceasing to hold office) and accordingly the second designated body is the appropriate authority under s 525(1)(a) (notices concerning auditors ceasing to hold office) (see head (1) above): Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, art 5.

The provisions of the Companies Act 2006 ss 522, 525 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

2 Companies Act 2006 s 522(1).

3 In accordance with the Companies Act 2006 s 519: see PARA 943.

4 Companies Act 2006 s 522(2). If the statement so deposited is to the effect that the outgoing auditor considers that there are no circumstances in connection with his ceasing to hold office that need to be brought to the attention of members or creditors of the company, the notice must also be accompanied by a statement of the reasons for his ceasing to hold office: s 522(3). As to the meanings of 'company' and 'member' see PARAS 24, 321.

5 In accordance with the Companies Act 2006 s 519: see PARA 943.

6 Companies Act 2006 s 522(4).

7 Companies Act 2006 s 522(5). A person guilty of an offence under s 522 is liable on conviction on indictment to a fine and on summary conviction, to a fine not exceeding the statutory maximum: s 522(8). As to the statutory maximum see PARA 1622. If the person is a firm the offence is committed by the firm and every officer of the firm who is in default: s 522(6). As to the meaning of 'firm' see PARA 969 note 1. In proceedings for an offence under s 522 it is a defence for the person charged to show that he took all reasonable steps and exercised all due diligence to avoid the commission of the offence: s 522(7).

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946. Duty of company to notify appropriate audit authority.

Where an auditor ceases to hold office before the end of his term of office, the company¹ must notify the appropriate audit authority² not later than 14 days after the date on which the auditor's statement regarding his ceasing to hold office is deposited³ at the company's registered office⁴. The notice must:

- 1822 (1) inform the appropriate audit authority that the auditor has ceased to hold office⁵; and
- 1823 (2) be accompanied by a statement by the company of the reasons for his ceasing to hold office or, if the copy of the statement deposited by the auditor at the company's registered office⁶ contains a statement of circumstances in connection with his ceasing to hold office that need to be brought to the attention of members⁷ or creditors of the company, a copy of that statement⁸.

Failure to comply with these requirements is an offence⁹.

1 As to the meaning of 'company' see PARA 24.

2 Companies Act 2006 s 523(1). As to the meaning of 'appropriate audit authority' see PARA 945 note 1.

The provisions of the Companies Act 2006 s 523 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 In accordance with the Companies Act 2006 s 519: see PARA 943.

4 Companies Act 2006 s 523(3). As to the company's registered office see PARA 129.

5 Companies Act 2006 s 523(2)(a).

6 In accordance with the Companies Act 2006 s 519: see PARA 943.

7 As to the meaning of 'member' see PARA 321.

8 Companies Act 2006 s 523(2)(b).

9 If a company fails to comply with the Companies Act 2006 s 523 an offence is committed by the company and every officer of the company who is in default: s 523(6). As to the meaning of 'officer' see PARA 607; as to the meaning of 'officer in default' see PARA 315. A person guilty of the offence is liable on conviction on indictment to a fine and on summary conviction to a fine not exceeding the statutory maximum: s 523(4). As to the statutory maximum see PARA 1622. In proceedings for such an offence it is a defence for the person charged to show that he took all reasonable steps and exercised all due diligence to avoid the commission of the offence: s 523(5).

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947. Information to be given to accounting authorities.

On receiving notice¹ of an auditor's ceasing to hold office the appropriate audit authority² must inform the accounting authorities³ and may, if it thinks fit, forward to those authorities a copy of the statement or statements accompanying the notice⁴.

1 le under the Companies Act 2006 s 522 (see PARA 945) or s 523 (see PARA 946).

2 As to the meaning of 'appropriate audit authority' see PARA 945 note 1.

3 le the Secretary of State and any person authorised by the Secretary of State for the purposes of the Companies Act 2006 s 456 (revision of defective accounts: persons authorised to apply to court: see PARA 901): Companies Act 2006 s 524(2). The Financial Reporting Review Panel (as to which see PARA 699 note 2) has been authorised for the purposes of s 456: see the Companies (Defective Accounts and Directors' Reports) (Authorised Person) and Supervision of Accounts and Reports (Prescribed Body) Order 2008, SI 2008/623, reg 2; and PARA 902.

If either of the accounting authorities is also the appropriate audit authority, it is only necessary to comply with the Companies Act 2006 s 524 as regards any other accounting authority: s 524(3).

The provisions of the Companies Act 2006 s 524 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 2006 s 524(1). If the court has made an order under s 520(4) (see PARA 943) directing that copies of the statement need not be sent out by the company, the provisions governing restriction on further disclosure (ss 460, 461: see PARA 904) apply in relation to the copies sent to the accounting authorities as they apply to information obtained under s 459 (power to require documents etc: see PARA 903): s 524(4).

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948. Effect of casual vacancies caused by auditor ceasing to hold office.

If an auditor ceases to hold office for any reason, any surviving or continuing auditor or auditors may continue to act¹.

1 Companies Act 2006 s 526.

The provisions of the Companies Act 2006 s 526 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

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(v) Quoted Companies: Right of Members to raise Audit Concerns

949. Members' power to require website publication of audit concerns.

The members¹ of a quoted company² may require the company to publish on a website a statement setting out any matter relating to the audit of the company's accounts (including the auditor's report and the conduct of the audit) that are to be laid before the next accounts meeting, or any circumstances connected with an auditor of the company ceasing to hold office since the previous accounts meeting, that the members propose to raise at the next accounts meeting of the company³. A company is required to do so once it has received requests to that effect from members representing at least 5 per cent of the total voting rights of all the members who have a relevant right to vote (excluding any voting rights attached to any shares in the company held as treasury shares) or at least 100 members who have such a right and hold shares in the company on which there has been paid up an average sum, per member, of at least £100⁴.

The information must be made available on a website that is maintained by or on behalf of the company and identifies the company in question⁵, and access to the information on the website, and the ability to obtain a hard copy of the information from the website, must not be conditional on the payment of a fee or otherwise restricted⁶. The statement itself must be made available within three working days of the company being required to publish it on a website⁷ and must be kept available until after the meeting to which it relates⁸.

Failure to comply with the requirements as to website publication⁹ or a company's supplementary duties in relation to a request for website publication¹⁰ is an offence¹¹, although a quoted company is not required¹² to place a statement on a website if, on an application by the company or another person who claims to be aggrieved, the court is satisfied that the rights conferred¹³ are being abused¹⁴.

1 As to the meaning of 'member' see PARA 321.

2 For the purposes of the Companies Act 2006 Pt 16 Ch 5 (ss 527-531: see the text and notes 3-14) a company is a 'quoted company' if it is a quoted company in accordance with s 385 (quoted and unquoted companies for the purposes of Pt 15: see PARA 696) in relation to the financial year to which the accounts to be laid at the next accounts meeting relate: s 531(1). As to the meaning of 'financial year' see PARA 711. As to the meaning of 'accounts meeting' see PARA 865. The provisions of s 385(4)-(6) (power to amend definition by regulations: see PARA 696) apply in relation to the provisions of Pt 16 Ch 5 as in relation to the provisions of Pt 15: s 531(2). As to the meaning of 'company' see PARA 24.

The provisions of the Companies Act 2006 ss 527-531 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Companies Act 2006 s 527(1). As to the meaning of 'accounts meeting' see PARA 865 note 4.

A company may not require the members requesting website publication to pay its expenses in complying with s 527 or s 528 (see the text and notes 5-8; cf the text and notes 12-14) (s 529(2)); where a company is required to place a statement on a website under s 527, it must forward the statement to the company's auditor not later than the time when it makes the statement available on the website (s 529(3)); and the business which may be dealt with at the accounts meeting includes any statement that the company has been required under s

527 to publish on a website (s 529(4)). A quoted company must in the notice it gives of the accounts meeting draw attention to: (1) the possibility of a statement being placed on a website in pursuance of members' requests under s 527 (s 529(1)(a)); and (2) the effect of s 529(2)-(4) (s 529(1)(b)). As to the exercise of members' rights under s 529 where the shares are held on behalf of others see s 153; and PARA 377.

4 Companies Act 2006 s 527(2). For these purposes, a 'relevant right to vote' means a right to vote at the accounts meeting; s 527(3). A request made in accordance with s 527(2): (1) may be sent to the company in hard copy or electronic form (s 527(4)(a)); (2) must identify the statement to which it relates (s 527(4)(b)); (3) must be authenticated by the person or persons making it (s 527(4)(c)); and (4) must be received by the company at least one week before the meeting to which it relates (s 527(4)(d)). As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form see PARA 679.

5 Companies Act 2006 s 528(1), (2).

6 Companies Act 2006 s 528(3).

7 Companies Act 2006 s 528(4)(a).

8 Companies Act 2006 s 528(4)(b). A failure to make information available on a website throughout the period specified in s 528(4)(b) is disregarded if the information is made available on the website for part of that period and the failure is wholly attributable to circumstances that it would not be reasonable to have expected the company to prevent or avoid: s 528(5).

9 Ie the requirements of the Companies Act 2006 s 528 (see the text and notes 5-8).

10 Ie the requirements of the Companies Act 2006 s 529 (see notes 3-4).

11 Companies Act 2006 s 530(1). The offence is committed by every officer of the company who is in default, and a person guilty of the offence is liable (on conviction on indictment) to a fine and (on summary conviction) to a fine not exceeding the statutory maximum: s 530(2). As to the meaning of 'officer' see PARA 607; as to the meaning of 'officer in default' see PARA 315; as to the statutory maximum see PARA 1622.

12 Ie under the Companies Act 2006 s 527 (see the text and notes 1-4).

13 Ie by the Companies Act 2006 s 527 (see the text and notes 1-4).

14 Companies Act 2006 s 527(5). Where an application is made under s 527(5), the claimant must, unless the court orders otherwise, notify each member who requested a statement to be placed on the website of the application: *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 14. The court may order the members requesting website publication to pay the whole or part of the company's costs on an application under the Companies Act 2006 s 527(5), even if they are not parties to the application: s 527(6).

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(vi) Auditors' Liability

A. IN GENERAL

950. General provision.

The articles of association of a company¹ sometimes make provision for audit and the duties of auditors². As regards indemnity clauses in articles or in contracts, auditors are in the same position as directors³. Companies may be required by their members to publicise audit concerns on their website⁴.

- 1 As to a company's articles of association see PARA 228. As to the meaning of 'company' see PARA 24.
- 2 This was the position under the Companies Act 1948 Sch 1, Table A art 130 but the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A (see PARA 18) makes no such provision. As to the articles impliedly forming part of the contract between the company and its auditors see *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 520-521, CA, per Warrington LJ; and PARA 245.
- 3 See the Companies Act 2006 ss 532, 533; and PARAS 951, 952. See also the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489; and PARAS 921-923.
- 4 See the Companies Act 2006 ss 527-531; and PARA 949.

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B. PROVISIONS INTENDED TO PROTECT AUDITORS FROM LIABILITY

951. Voidness of provisions protecting auditors from liability.

Any provision, whether contained in a company's¹ articles² or in any contract with the company or otherwise³:

- 1824 (1) for exempting an auditor of a company (to any extent) from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company occurring in the course of the audit of accounts⁴; or
- 1825 (2) by which a company directly or indirectly provides an indemnity (to any extent) for an auditor of the company, or of an associated company⁵, against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company of which he is auditor occurring in the course of the audit of accounts⁶,

is void except as permitted by the provisions relating to the indemnification of the costs of successfully defending proceedings or to liability limitation agreements⁷.

- 1 As to the meaning of 'company' see PARA 24.
 - 2 As to the meaning of 'articles' see PARA 228. The model articles make no such provision.
 - 3 Companies Act 2006 s 532(3). The words 'or otherwise' must be construed *eiusdem generis* with the preceding words, the genus being any arrangement between the company and its officers: *Burgoine v Waltham Forest London Borough Council* [1997] 2 BCLC 612 (decided under the Companies Act 1985 s 310: see now the Companies Act 2006 ss 232, 532; and see also PARAS 594, 951). The prohibition applies only to indemnities given by the company concerned and not to indemnities given by third parties: *Burgoine v Waltham Forest London Borough Council* [1997] 2 BCLC 612.
- The provisions of the Companies Act 2006 s 532 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 2006 s 532(1)(a). See also *Mutual Reinsurance Co Ltd v Peat Marwick Mitchell & Co* [1997] 1 Lloyd's Rep 253, [1997] 1 BCLC 1, CA. As to the auditors' duty of care see PARA 930.

5 For these purposes companies are 'associated' if one is a subsidiary of the other or both are subsidiaries of the same body corporate: Companies Act 2006 s 532(4). As to the meaning of 'subsidiary' see PARA 25; as to the meaning of 'body corporate' see PARA 1.

6 Companies Act 2006 s 532(1)(b).

7 Companies Act 2006 s 532(2). The provision relating to the indemnification of the costs of successfully defending proceedings is s 533 (see PARA 952) and the provisions relating to liability limitation agreements are ss 534-536 (see PARAS 953, 955).

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C. INDEMNITY FOR COSTS OF DEFENDING PROCEEDINGS

952. Indemnity for costs of successfully defending proceedings.

The general voidness of provisions protecting auditors from liability¹ does not prevent a company² from indemnifying an auditor against any liability incurred by him in defending proceedings (whether civil³ or criminal) in which judgment is given in his favour or he is acquitted⁴, or in connection with an application for relief in the case of honest and reasonable conduct⁵ in which relief is granted to him by the court⁶.

1 Ie under the Companies Act 2006 s 532: see PARA 951.

2 As to the meaning of 'company' see PARA 24.

3 The article may be so framed as to cover proceedings for liability for ultra vires acts: *Viscount of the Royal Court of Jersey v Shelton* [1986] 1 WLR 985, PC, disapproving dictum of Lindley LJ in *Cullerne v London and Suburban General Permanent Building Society* (1890) 25 QBD 485 at 488, CA, and applying *Re Claridge's Patent Asphalte Co Ltd* [1921] 1 Ch 543.

4 Companies Act 2006 s 533(a).

The provisions of the Companies Act 2006 s 533 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 Ie an application under the Companies Act 2006 s 1157 (see PARA 600).

6 Companies Act 2006 s 533(b).

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D. LIABILITY LIMITATION AGREEMENTS

953. Terms of liability limitation agreement and its effect.

The general voidness of provisions protecting auditors from liability¹ does not affect the validity of a liability limitation agreement that both complies with the provisions governing the terms of such an agreement² and is authorised by the members³ of the company⁴. For these purposes, a 'liability limitation agreement' is an agreement that purports to limit the amount of a liability owed to a company by its auditor in respect of any negligence, default, breach of duty or breach of trust, occurring in the course of the audit of accounts, of which the auditor may be guilty in relation to the company⁵.

1 le under the Companies Act 2006 s 532: see PARA 951.

2 le the Companies Act 2006 s 535 and any regulations thereunder: see note 5.

3 As to the meaning of 'member' see PARA 321.

4 Companies Act 2006 s 534(2). As to authorisation by members of the company as mentioned in the text see s 536; and PARA 955. As to the meaning of 'company' see PARA 24.

The provisions of the Companies Act 2006 s 534 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 Companies Act 2006 s 534(1). A liability limitation agreement must not apply in respect of acts or omissions occurring in the course of the audit of accounts for more than one financial year and must specify the financial year in relation to which it applies: s 535(1). The Secretary of State may by regulations require liability limitation agreements to contain provisions specified in the regulations or provisions of a description specified in the regulations and prohibit liability limitation agreements from containing such specified provisions or provisions of a specified description: s 535(2). Without prejudice to the generality of the power conferred by s 535(2), that power may be exercised with a view to preventing adverse effects on competition: s 535(3). Subject to s 535(1)-(3), it is immaterial how a liability limitation agreement is framed (in particular, the limit on the amount of the auditor's liability need not be a sum of money, or a formula, specified in the agreement): s 535(4). At the date at which this volume states the law no such regulations had been made. As to the meaning of 'financial year' see PARA 711. As to the Secretary of State see PARA 6.

A liability limitation agreement effective to the extent provided by s 537 (see s 534(3)(a); and PARA 954) and is not subject to the Unfair Contract Terms Act 1977 ss 2(2), 3(2)(a) (see **CONTRACT** vol 9(1) (Reissue) PARAS 822, 823) (Companies Act 2006 s 534(3)(b)).

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954. Effect of liability limitation agreement.

A liability limitation agreement¹ is not effective to limit the auditor's liability to less than such amount as is fair and reasonable in all the circumstances of the case² having regard (in particular) to:

- 1826 (1) the auditor's responsibilities under the audit requirements³;
- 1827 (2) the nature and purpose of the auditor's contractual obligations to the company⁴; and
- 1828 (3) the professional standards expected of him⁵,

and a liability limitation agreement that purports to limit the auditor's liability to less than this amount has effect as if it limited his liability to that amount⁶.

1 As to the meaning of 'liability limitation agreement' see PARA 953 note 5.

2 In determining what is fair and reasonable in all the circumstances of the case no account is to be taken of matters arising after the loss or damage in question has been incurred or matters (whenever arising) affecting the possibility of recovering compensation from other persons liable in respect of the same loss or damage: Companies Act 2006 s 537(3).

The provisions of the Companies Act 2006 s 537 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Companies Act 2006 s 537(1)(a). The 'audit requirements' are the requirements of Pt 16 (ss 475-539) (see PARA 905 et seq). As to the auditors' duty of care see PARA 930.

4 Companies Act 2006 s 537(1)(b). As to the meaning of 'company' see PARA 24.

5 Companies Act 2006 s 537(1)(c).

6 Companies Act 2006 s 537(2).

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955. Authorisation of agreement by members of the company.

A liability limitation agreement¹ between a private company² and its auditor may be authorised:

1829 (1) by the company passing a resolution³, before it enters into the agreement, waiving the need for approval⁴;

1830 (2) by the company passing a resolution, before it enters into the agreement, approving the agreement's principal terms⁵; or

1831 (3) by the company passing a resolution, after it enters into the agreement, approving the agreement⁶.

A liability limitation agreement between a public company⁷ and its auditor may be authorised:

1832 (a) by the company passing a resolution in general meeting, before it enters into the agreement, approving the agreement's principal terms⁸; or

1833 (b) by the company passing a resolution in general meeting, after it enters into the agreement, approving the agreement⁹.

Authorisation under these provisions may be withdrawn by the company passing an ordinary resolution to that effect:

1834 (i) at any time before the company enters into the agreement¹⁰; or

1835 (ii) if the company has already entered into the agreement, before the beginning of the financial year¹¹ to which the agreement relates¹².

A liability limitation agreement is authorised by the members¹³ of the company if it has been authorised under these provisions and that authorisation has not been withdrawn¹⁴.

1 As to the meaning of 'liability limitation agreement' see PARA 953 note 5.

2 As to the meanings of 'private company' and 'company' see PARAS 102, 24.

3 Where a provision of the Companies Acts requires a resolution of a company, and does not specify what kind of resolution is required, what is required is an ordinary resolution unless the company's articles require a higher majority (or unanimity): see the Companies Act 2006 s 281(3); and PARA 617.

4 Companies Act 2006 s 536(2)(a).

The provisions of the Companies Act 2006 s 536 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 Companies Act 2006 s 536(2)(b). The 'principal terms' of an agreement are terms specifying, or relevant to the determination of:

340 (1) the kind (or kinds) of acts or omissions covered (s 536(4)(a));

341 (2) the financial year to which the agreement relates (s 536(4)(b)); or

342 (3) the limit to which the auditor's liability is subject (s 536(4)(c)).

6 Companies Act 2006 s 536(2)(c).

7 As to the meaning of 'public company' see PARA 102.

8 Companies Act 2006 s 536(3)(a).

9 Companies Act 2006 s 536(3)(b).

10 Companies Act 2006 s 536(5)(a).

11 As to the meaning of 'financial year' see PARA 711.

12 Companies Act 2006 s 536(5)(b). This provision has effect notwithstanding anything in the agreement: s 536(5).

13 As to the meaning of 'member' see PARA 321.

14 Companies Act 2006 s 536(1).

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956. Disclosure of agreement by company.

A company¹ which has entered into a liability limitation agreement² must make such disclosure in connection with the agreement as the Secretary of State³ may require by regulations⁴. Such regulations may provide, in particular, that any disclosure required by the regulations be made: (1) in a note to the company's annual accounts (in the case of its individual accounts) or in such manner as is specified in the regulations (in the case of group accounts)⁵; or (2) in the directors' report⁶.

- 1 As to the meaning of 'company' see PARA 24.
- 2 As to the meaning of 'liability limitation agreement' see PARA 953 note 5.
- 3 As to the Secretary of State see PARA 6.
- 4 Companies Act 2006 s 538(1). As to the regulations so made see the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008, SI 2008/489; and PARA 921 et seq.
The provisions of the Companies Act 2006 s 538 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 11, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.
- 5 Companies Act 2006 s 538(2)(a). See note 4.
- 6 Companies Act 2006 s 538(2)(b). See note 4.

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(vii) Statutory Auditors and Regulatory Matters

A. IN GENERAL

957. Purposes of the statutory provisions relating to statutory auditors.

The main purposes of the provisions regulating statutory auditors¹ are to secure that only persons who are properly supervised and appropriately qualified are appointed as statutory auditors and to secure that audits by persons so appointed are carried out properly, with integrity and with a proper degree of independence².

¹ ie the main purposes of the Companies Act 2006 Pt 42 (ss 1209-1264) (see also PARA 958 et seq): see s 1209. As to the meaning of 'statutory auditor' see PARA 958.

² Companies Act 2006 s 1209.

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958. Meaning of 'statutory auditor'.

For these purposes¹, 'statutory auditor' means a person appointed as auditor by a company², a building society³, a friendly society⁴, a Lloyd's syndicate⁵, an insurance undertaking⁶ or a bank⁷ and a person appointed as auditor of a prescribed person⁸ under a prescribed enactment authorising or requiring the appointment⁹. A person is eligible for appointment as a statutory

auditor only if he is so eligible by virtue of the provisions governing individuals and firms¹⁰ or the Comptroller and Auditor General¹¹.

1 le for the purposes of the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARA 959 et seq): see s 1210(1).

2 le a person appointed as auditor under the Companies Act 2006 Pt 16 (ss 475-539) (see PARAS 905-956): s 1210(1)(a). For the purposes of Pt 42 'company' means any company or other body the accounts of which must be audited in accordance with Pt 16: s 1261(1). As to the meaning of 'company' generally see PARA 1.

3 le a person appointed as auditor under the Building Societies Act 1986 s 77 or Sch 11 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 1998-2002): Companies Act 2006 s 1210(1)(b).

4 le a person appointed as auditor of an insurer that is a friendly society under the Friendly Societies Act 1992 s 72 or Sch 14 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 2332-2342): Companies Act 2006 s 1210(1)(c). 'Friendly society' means a friendly society within the meaning of the Friendly Societies Act 1992 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2082); and 'insurer' means a person who is an insurance undertaking within the meaning given by EC Council Directive 91/674 (OJ L374, 31.12.91, p 7) on the annual accounts and consolidated accounts of insurance undertakings, art 2.1: Companies Act 2006 s 1210(3).

5 le a person appointed as auditor for the purposes of the Insurance Accounts Directive (Lloyd's Syndicate and Aggregate Accounts) Regulations 2008, SI 2008/1950, reg 5, or appointed to report on the 'aggregate accounts' within the meaning of those regulations: Companies Act 2006 s 1210(1)(e) (substituted by SI 2008/1950). In relation to financial years beginning before 1 January 2009, a person appointed as auditor for the purposes of the Insurance Accounts Directive (Lloyd's Syndicate and Aggregate Accounts) Regulations 2004, SI 2004/3219, reg 3, or appointed to report on the 'aggregate accounts' within the meaning of those regulations, may be a statutory auditor: see the Companies Act 2006 s 1210(1)(e); Insurance Accounts Directive (Lloyd's Syndicate and Aggregate Accounts) Regulations 2008, SI 2008/1950, reg 1(2).

6 le a person appointed as auditor of an insurance undertaking for the purposes of the Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 2008, SI 2008/565: Companies Act 2006 s 1210(1)(f) (substituted by SI 2008/565).

7 le a person appointed as auditor of a bank for the purposes of the Bank Accounts Directive (Miscellaneous Banks) Regulations 2008, SI 2008/567: Companies Act 2006 s 1210(1)(g) (substituted by SI 2008/567). 'Bank' means a person who is a credit institution within the meaning given by EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions, art 4.1(a), and is a company or a firm as defined in the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179), art 48: Companies Act 2006 s 1210(3).

8 'Prescribed' means prescribed, or of a description prescribed, by order made by the Secretary of State for the purposes of the Companies Act 2006 s 1210(1)(h): s 1210(3). For the purposes of s 1210(1)(h), an unregistered company is a prescribed person, and Pt 16 (ss 475-539) (see PARAS 905-956) as applied to unregistered companies by the Unregistered Companies Regulations 2009, SI 2009/2436 (see PARA 1666) is a prescribed enactment: reg 6. Accordingly, a person appointed as auditor of an unregistered company under the Companies Act 2006 Pt 16 (as so applied) is a statutory auditor: Unregistered Companies Regulations 2009, SI 2009/2436, reg 6. As to the meaning of 'unregistered company' for these purposes see PARA 1666 note 10. See also the Partnerships (Accounts) Regulations 2008, SI 2008/569, reg 14; the Limited Liability Partnerships (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008, SI 2008/1911, reg 48; and **PARTNERSHIP**. As to the Secretary of State see PARA 6. Most of the functions of the Secretary of State under Pt 42 are transferred to the Professional Oversight Board: see the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, arts 1-10; and PARA 960.

9 Companies Act 2006 s 1210(1)(h). See note 8.

10 le the Companies Act 2006 Pt 42 Ch 2 (ss 1212-1225) (see PARAS 969-974).

11 Companies Act 2006 s 1211. For the provisions governing the Comptroller and Auditor General see Pt 42 Ch 3 (ss 1226-1238); and PARAS 1016-1025.

Matters/A. IN GENERAL/959. Service of notices on any person other than the Secretary of State.

959. Service of notices on any person other than the Secretary of State.

Any notice, direction or other document required or authorised, by or by virtue of the statutory provisions which govern statutory auditors¹, to be given to or served on any person other than the Secretary of State² may be given to or served on the person in question by delivering it to him, by leaving it at his proper address³ or by sending it by post to him at that address⁴. Any such document may:

- 1836 (1) in the case of a body corporate, be given to or served on an officer of that body⁵;
- 1837 (2) in the case of a partnership, be given to or served on any partner⁶; and
- 1838 (3) in the case of an unincorporated association other than a partnership, be given to or served on any member of the governing body of that association⁷.

Where these provisions⁸ authorise the giving or sending of a notice, direction or other document by its delivery to a particular person (the 'recipient') and the notice, direction or other document is transmitted to the recipient by means of an electronic communications network⁹ or by other means but in a form that requires the use of apparatus by the recipient to render it intelligible, the transmission has effect for these purposes¹⁰ as a delivery of the notice, direction or other document to the recipient, but only if the recipient has indicated to the person making the transmission his willingness to receive the notice, direction or other document in the form and manner used¹¹.

1 Ie by or by virtue of the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARA 958).

2 As to the Secretary of State see PARA 6. Most of the functions of the Secretary of State under the Companies Act 2006 Pt 42 are transferred to the Professional Oversight Board: see PARA 960.

3 'Address' means: (1) in relation to an individual, his usual residential or business address; and (2) in relation to a firm, its registered or principal office in the United Kingdom: Companies Act 2006 s 1261(1). For the purposes of s 1258 and the Interpretation Act 1978 s 7 (service of documents by post: see **STATUTES** vol 44(1) (Reissue) PARA 1388) in its application thereto, the 'proper address' of any person is his last known address (whether of his residence or of a place where he carries on business or is employed) and also: (a) in the case of a person who is eligible under the rules of a recognised supervisory body for appointment as a statutory auditor and who does not have a place of business in the United Kingdom, the address of that body; (b) in the case of a body corporate or an officer of that body, the address of the registered or principal office of that body in the United Kingdom; and (c) in the case of an unincorporated association other than a partnership or a member of its governing body, its principal office in the United Kingdom: s 1258(4). As to the meaning of 'statutory auditor' see PARA 958. As to the meaning of 'body corporate' see PARA 6. As to the recognition of supervisory bodies for the purposes of Pt 42 see s 1217; and PARA 975.

4 Companies Act 2006 s 1258(1), (2).

5 Companies Act 2006 s 1258(3)(a).

6 Companies Act 2006 s 1258(3)(b).

7 Companies Act 2006 s 1258(3)(c).

8 Ie the Companies Act 2006 s 1258: see the text and notes 1-6.

9 As to the meaning of 'electronic communications network' for these purposes see the Communications Act 2003 ss 32(1), 405(1); and **TELECOMMUNICATIONS** vol 97 (2010) PARA 60 (definition applied by the Companies Act 2006 s 1259(4)).

10 le for the purposes of the Companies Act 2006 Pt 42.

11 Companies Act 2006 s 1259(1), (2). An indication to a person for these purposes:

343 (1) must be given to the person in such manner as he may require (s 1259(3)(a));

344 (2) may be a general indication or an indication that is limited to notices, directions or other documents of a particular description (s 1259(3)(b));

345 (3) must state the address to be used (s 1259(3)(c));

346 (4) must be accompanied by such other information as the person requires for the making of the transmission (s 1259(3)(d)); and

347 (5) may be modified or withdrawn at any time by a notice given to the person in such manner as he may require (s 1259(3)(e)).

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B. DELEGATION OF SECRETARY OF STATE'S FUNCTIONS

960. Delegation of functions of the Secretary of State.

The Secretary of State¹ may² make an order³ for the purpose of enabling functions of the Secretary of State relating to the regulation of statutory auditors⁴ to be exercised by a body designated by the order⁵, which may be either a body corporate⁶ which is established by the order⁷ or a body (whether a body corporate or an unincorporated association) which is already in existence (an 'existing body')⁸. A delegation order has the effect of transferring to the body designated by it all relevant functions of the Secretary of State⁹ subject to such exceptions and reservations as may be specified in the order¹⁰, excepting the Secretary of State's functions in relation to the body itself¹¹ and his functions¹² relating to the appointment of an Independent Supervisor¹³, and confers on the designated body further powers to designate public authorities¹⁴; a delegation order may also confer on the designated body such other functions supplementary or incidental to those transferred as appear to the Secretary of State to be appropriate¹⁵.

Pursuant to these provisions an order has been made delegating most of the Secretary of State's functions relating to the regulation of statutory auditors¹⁶ to the Professional Oversight Board¹⁷.

1 As to the Secretary of State see PARA 6.

2 le under the Companies Act 2006 s 1252: see the text and notes 3-15.

3 le a 'delegation order'. A delegation order may be amended or, if it appears to the Secretary of State that it is no longer in the public interest that the order should remain in force, revoked by a further order under these provisions: s 1252(8).

4 le functions under the Companies Act 2006 Pt 42 (ss 1209-1264). As to statutory auditors see PARA 958.

5 Companies Act 2006 s 1252(1).

6 As to the meaning of 'body corporate' see PARA 6.

7 Companies Act 2006 s 1252(2)(a).

8 Companies Act 2006 s 1252(2)(b). The Secretary of State may make a delegation order under s 1252(2)(b) which designates an existing body if it appears to him that the body is able and willing to exercise the functions that would be transferred by the order, and the body has arrangements in place relating to the exercise of those functions which are such as to be likely to ensure that the following conditions are met (ss 1252(2)(b), 1253(1), (2)):

348 (1) that the functions in question will be exercised effectively (s 1253(3)(a)); and

349 (2) where the delegation order is to contain any requirements or other provisions relating to the exercise of the functions by the designated body as appear to the Secretary of State to be appropriate (ie as specified under s 1253(4), which enables the order to contain such functions), that those functions will be exercised in accordance with any such requirements or provisions (s 1253(3)(b)).

An existing body may be designated by a delegation order under s 1252 and may accordingly exercise functions of the Secretary of State in pursuance of the order despite any involvement of the body in the exercise of any functions under arrangements within Sch 10 paras 21-22B, 23(1) or 24(1) (see PARA 981) or Sch 12 paras 1 or 2 (see PARA 1026): s 1253(5) (amended by SI 2007/3494).

9 See note 4. Any transfer of functions under s 1224 (power to call for information from recognised bodies etc: see PARA 1011), s 1244 (power to call for information from registered third country auditors: see PARA 1028) or s 1254 (directions to comply with international obligations: see PARA 1014) must be subject to the reservation that the functions remain exercisable concurrently by the Secretary of State (s 1235(6)), and any transfer of the function of refusing to make a declaration under s 1221(1) (approval of third country qualifications: see PARA 1007) on the grounds referred to in s 1221(4) (lack of comparable treatment: see PARA 1007), or the function of withdrawing such a declaration under s 1221(7) on those grounds, must be subject to the reservation that the function is exercisable only with the consent of the Secretary of State (s 1235(7)).

Where functions are transferred or resumed, the Secretary of State may by order confer or, as the case may be, take away such other functions supplementary or incidental to those transferred or resumed as appear to him to be appropriate: s 1235(9).

10 Companies Act 2006 s 1252(4)(a).

11 Companies Act 2006 s 1252(4)(b)(i).

12 ie under the Companies Act 2006 s 1228 (see PARA 1018).

13 Companies Act 2006 s 1252(4)(b)(ii).

14 Companies Act 2006 s 1252(3), providing that a delegation order has the effect of making the body by the order designated under the Freedom of Information Act 2000 s 5 (see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 583).

15 Companies Act 2006 s 1252(5).

16 See note 4.

17 See the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496; and PARAS 961-966.

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961. Status.

Where a delegation order¹ is made, supplementary provisions² have effect with respect to:

- 1839 (1) the status of the body designated by the order³ in exercising functions of the Secretary of State⁴ relating to the regulation of statutory auditors⁵;
- 1840 (2) the constitution and proceedings of the body where it is established by the order⁶;
- 1841 (3) the exercise by the body of certain functions transferred to it⁷; and
- 1842 (4) other supplementary matters⁸.

¹ See PARA 960.

² I.e. the Companies Act 2006 Sch 13: see the text and note 3; and PARAS 962-968. Schedule 13 has effect in relation to a body designated by a delegation order under s 1252 as follows:

- 350 (1) Sch 13 paras 2-12 (see below; and PARA 962 et seq) have effect in relation to the body where it is established by the order (Sch 13 para 1(1)(a));
- 351 (2) Sch 13 paras 2, 6-11 (see below; and PARA 965 et seq) have effect in relation to the body where it is an existing body (and, in their operation in accordance with this provision, Sch 13 paras 2, 6 apply only in relation to things done by or in relation to the body in or in connection with the exercise of functions transferred to it by the delegation order and functions of the body which are functions so transferred) (Sch 13 para 1(1)(b), (2));
- 352 (3) Sch 13 para 13 (see PARA 968) has effect in relation to the body where it is an existing body that is an unincorporated association (Sch 13 para 1(1)(c)).

Any power conferred by Sch 13 to make provision by order is a power to make provision by an order under s 1252: Sch 13 para 1(3).

³ I.e. the Professional Oversight Board: see PARA 960. The designated body is not to be regarded as acting on behalf of the Crown and its members, officers and employees are not to be regarded as Crown servants: Companies Act 2006 Sch 13 para 2.

⁴ I.e. functions under the Companies Act 2006 Pt 42 (ss 1209-1264). As to statutory auditors see PARA 958. As to the Secretary of State see PARA 6.

⁵ Companies Act 2006 s 1252(10)(a).

⁶ Companies Act 2006 s 1252(10)(b).

⁷ Companies Act 2006 s 1252(10)(c).

⁸ Companies Act 2006 s 1252(10)(d).

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962. Name, members and chairman.

The designated body¹ is to be known by such name as may be specified in the delegation order² and is to consist of such persons (not being less than eight) as the Secretary of State³ may appoint after such consultation as he thinks appropriate⁴. The chairman of the body is to be such person as the Secretary of State may appoint from among its members⁵.

1 le the body designated for the purposes of the Companies Act 2006 Pt 42 (ss 1209-1264): see PARA 960 et seq.

2 Companies Act 2006 Sch 13 para 3(1). The specified name of the body so designated is the Professional Oversight Board: see the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, art 2; and PARA 960.

3 As to the Secretary of State see PARA 6.

4 Companies Act 2006 Sch 13 para 3(2). The Secretary of State may make provision by order as to the terms on which the members of the body are to hold and vacate office: Sch 13 para 3(4)(a). The Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, does not make provision in this regard, and at the date at which this volume states the law no further orders had been made.

5 Companies Act 2006 Sch 13 para 3(3). The Secretary of State may make provision by order as to the terms on which a person appointed as chairman is to hold and vacate the office of chairman: Sch 13 para 3(4)(b). The Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, do not make provision in this regard, and at the date at which this volume states the law no further orders had been made.

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963. Financial provisions.

The designated body¹ must pay to its chairman and members² such remuneration, and such allowances in respect of expenses properly incurred by them in the performance of their duties, as the Secretary of State³ may determine⁴, and as regards any chairman or member in whose case the Secretary of State so determines the body must pay or make provision for the payment of:

- 1843 (1) such pension, allowance or gratuity to or in respect of that person on his retirement or death⁵; or
- 1844 (2) such contributions or other payment towards the provision of such a pension, allowance or gratuity⁶,

as the Secretary of State may determine⁷.

Where:

- 1845 (a) a person ceases to be a member of the body otherwise than on the expiry of his term of office⁸; and
- 1846 (b) it appears to the Secretary of State that there are special circumstances which make it right for that person to receive compensation⁹,

the body must make a payment to him by way of compensation of such amount as the Secretary of State may determine¹⁰.

1 le the body designated for the purposes of the Companies Act 2006 Pt 42 (ss 1209-1264): see PARA 960 et seq.

2 See PARA 962.

- 3 As to the Secretary of State see PARA 6.
- 4 Companies Act 2006 Sch 13 para 4(1).
- 5 Companies Act 2006 Sch 13 para 4(2)(a).
- 6 Companies Act 2006 Sch 13 para 4(2)(b).
- 7 Companies Act 2006 Sch 13 para 4(2).
- 8 Companies Act 2006 Sch 13 para 4(3)(a).
- 9 Companies Act 2006 Sch 13 para 4(3)(b).
- 10 Companies Act 2006 Sch 13 para 4(3).

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964. Proceedings.

The delegation order¹ may contain such provision as the Secretary of State² considers appropriate with respect to the proceedings of the designated body³ and may, in particular:

- 1847 (1) authorise the body to discharge any functions by means of committees consisting wholly or partly of members of the body⁴; and
- 1848 (2) provide that the validity of proceedings of the body, or of any such committee, is not affected by any vacancy among the members or any defect in the appointment of any member⁵.

¹ See PARA 960.

² As to the Secretary of State see PARA 6.

³ Companies Act 2006 Sch 13 para 5(1). The 'designated body' is the body designated for the purposes of Pt 42 (ss 1209-1264): see PARA 960 et seq. Accordingly, the body known as the Professional Oversight Board established under the articles of association of the Financial Reporting Council Limited (the 'second designated body') must publish a work programme at least once in every calendar year: Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, art 7. Further, the body known as the Professional Oversight Board established under the articles of association of the Professional Oversight Board Limited (the 'first designated body') and the second designated body must have satisfactory arrangements for recording decisions made in the exercise of the functions transferred by the Order, and for the safekeeping of those records: art 8.

⁴ Companies Act 2006 Sch 13 para 5(2)(a). As to the members see PARA 962.

⁵ Companies Act 2006 Sch 13 para 5(2)(b).

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965. Fees.

The designated body¹ may retain fees payable to it². The fees must be applied for meeting the expenses of the body in discharging its functions³ and any purposes incidental to those functions⁴.

1 The 'designated body' is the body designated for the purposes of the Companies Act 2006 Pt 42 (ss 1209-1264): see PARA 960 et seq.

2 Companies Act 2006 Sch 13 para 6(1).

3 Companies Act 2006 Sch 13 para 6(2)(a). Those expenses include any expenses incurred by the body on such staff, accommodation, services and other facilities as appear to it to be necessary or expedient for the proper performance of its functions: Sch 13 para 6(3). In prescribing the amount of fees in the exercise of the functions transferred to it the body must prescribe such fees as appear to it sufficient to defray those expenses, taking one year with another: Sch 13 para 6(4). Any exercise by the body of the power to prescribe fees requires the approval of the Secretary of State: Sch 13 para 6(5). The Secretary of State may, after consultation with the body, by order vary or revoke any regulations prescribing fees made by the body: Sch 13 para 6(6). As to the Secretary of State see PARA 6.

4 Companies Act 2006 Sch 13 para 6(2)(b).

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966. Legislative functions: instruments in writing.

Regulations or an order made by the designated body¹ in the exercise of the functions transferred to it must be made by instrument in writing, but not by statutory instrument². The Secretary of State³ may by order impose such requirements as he thinks necessary or expedient as to the circumstances and manner in which the body must consult on any regulations or order it proposes to make⁴.

The production of a printed copy of an instrument purporting to be made by the body on which is endorsed a certificate signed by an officer⁵ of the body authorised by it for the purpose and stating:

- 1849 (1) that the instrument was made by the body⁶;
- 1850 (2) that the copy is a true copy of the instrument⁷; and
- 1851 (3) that on a specified date the instrument was made available⁸ to the public⁹,

is evidence of the facts stated in the certificate¹⁰, and any person wishing in any legal proceedings to cite an instrument made by the body may require the body to cause a copy of it to be endorsed with such a certificate¹¹.

1 The 'designated body' is the body designated for the purposes of the Companies Act 2006 Pt 42 (ss 1209-1264): see PARA 960 et seq.

2 Companies Act 2006 Sch 13 para 7(1). The instrument must specify the provision of Pt 42 under which it is made: Sch 13 para 7(2). Immediately after an instrument is made it must be printed and made available to the

public with or without payment (Sch 13 para 8(1)), and a person is not to be taken to have contravened any regulation or order if he shows that at the time of the alleged contravention the instrument containing the regulation or order had not been made available as required by Sch 13 para 8 (Sch 13 para 8(2)).

3 As to the Secretary of State see PARA 6.

4 Companies Act 2006 Sch 13 para 7(3). For the requirements so imposed see the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, art 6.

5 'Officer', in relation to a body corporate, includes a director, a manager, a secretary or, where the affairs of the body are managed by its members, a member; and 'director', in relation to a body corporate, includes any person occupying in relation to it the position of a director (by whatever name called) and any person in accordance with whose directions or instructions (not being advice given in a professional capacity) the directors of the body are accustomed to act: Companies Act 2006 s 1261(1). As to the meaning of 'body corporate' see PARA 6. A certificate purporting to be so signed is to be deemed to have been duly signed unless the contrary is shown: Sch 13 para 9(2).

6 Companies Act 2006 Sch 13 para 9(1)(a).

7 Companies Act 2006 Sch 13 para 9(1)(b).

8 le as required by the Companies Act 2006 Sch 13 para 8 (see the text and note 2).

9 Companies Act 2006 Sch 13 para 9(1)(c).

10 Companies Act 2006 Sch 13 para 9(1).

11 Companies Act 2006 Sch 13 para 9(3).

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967. Report and accounts.

The designated body¹ must, at least once in each calendar year for which the delegation order² is in force, make a report to the Secretary of State³ on the discharge of the functions transferred to it⁴ and such other matters as the Secretary of State may by order require⁵.

Where the designated body is established by the delegation order the Secretary of State may, with the consent of the Treasury, give directions to it with respect to its accounts and the audit of its accounts⁶. Where the designated body is an existing body⁷, then unless it is a company⁸ under a duty to prepare individual company accounts⁹ the Secretary of State may, with the consent of the Treasury, give directions to the body with respect to its accounts and the audit of its accounts¹⁰, and whether or not the body is a company under a duty to prepare individual company accounts¹¹, the Secretary of State may direct that any statutory provisions¹² specified in the directions are to apply to the body, with or without any modifications so specified¹³.

1 The 'designated body' is the body designated for the purposes of the Companies Act 2006 Pt 42 (ss 1209-1264): see PARA 960 et seq.

2 See PARA 960. The delegation order may modify the Companies Act 2006 Sch 13 para 10(1) as it has effect in relation to the calendar year in which the order comes into force or is revoked: Sch 13 para 10(2).

3 As to the Secretary of State see PARA 6.

4 Companies Act 2006 Sch 13 para 10(1)(a).

5 Companies Act 2006 Sch 13 para 10(1)(b).

6 Companies Act 2006 Sch 13 para 10(4)(a), (5). A person may only be appointed as auditor of the body if he is eligible for appointment as a statutory auditor: Sch 13 para 10(6). As to eligibility for appointment as a statutory auditor see PARA 969.

7 See PARA 960.

8 As to the meaning of 'company' see PARA 958 note 2. As to the meaning of 'company' generally see PARA 1.

9 Is a company to which the Companies Act 2006 s 394 (see PARA 716) applies.

10 Companies Act 2006 Sch 13 para 10(4)(b), (7).

11 See note 9.

12 Is any provision of the Companies Act 2006.

13 Companies Act 2006 Sch 13 para 10(8).

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968. Other supplementary provisions.

The transfer of a function to a body designated by a delegation order¹ does not affect anything previously done in the exercise of the function transferred; and the resumption of a function so transferred does not affect anything previously done in exercise of the function resumed². The Secretary of State³ may by order make such transitional and other supplementary provision as he thinks necessary or expedient in relation to the transfer or resumption of a function⁴.

Where a delegation order is revoked, the Secretary of State may by order make provision for the payment of compensation to persons ceasing to be employed by the body established by the delegation order, and as to the winding up and dissolution of the body⁵.

Where the body is an unincorporated association, any relevant proceedings may be brought by or against the body in the name of any body corporate whose constitution provides for the establishment of the body⁶.

1 See PARA 960 et seq.

2 Companies Act 2006 Sch 13 para 11(1).

3 As to the Secretary of State see PARA 6.

4 Companies Act 2006 Sch 13 para 11(2). The provision that may be made in connection with the transfer of a function includes, in particular, provision:

353 (1) for modifying or excluding any provision of Pt 42 (ss 1209-1264) in its application to the function transferred (Companies Act 2006 Sch 13 para 11(3)(a); and see the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, regs 3, 4);

- 354 (2) for applying to the body designated by the delegation order, in connection with the function transferred, any provision applying to the Secretary of State which is contained in or made under any other enactment (Companies Act 2006 Sch 13 para 11(3)(b));
- 355 (3) for the transfer of any property, rights or liabilities from the Secretary of State to that body (Sch 13 para 11(3)(c));
- 356 (4) for the carrying on and completion by that body of anything in the process of being done by the Secretary of State when the order takes effect (Sch 13 para 11(3)(d)); and
- 357 (5) for the substitution of that body for the Secretary of State in any instrument, contract or legal proceedings (Sch 13 para 11(3)(e)).

The provision that may be made in connection with the resumption of a function includes, in particular, provision:

- 358 (a) for the transfer of any property, rights or liabilities from that body to the Secretary of State (Sch 13 para 11(4)(a));
- 359 (b) for the carrying on and completion by the Secretary of State of anything in the process of being done by that body when the order takes effect (Sch 13 para 11(4)(b)); and
- 360 (c) for the substitution of the Secretary of State for that body in any instrument, contract or legal proceedings (Sch 13 para 11(4)(c)).

5 Companies Act 2006 Sch 13 para 12.

6 Companies Act 2006 Sch 13 para 13(1), (2). In relation to such proceedings, any reference in Sch 13 para 11(3)(e) (see note 4 head(5)) or Sch 13 para 11(4)(c) (see note 4 head (c)) to the body replacing or being replaced by the Secretary of State in any legal proceedings is to be read with the appropriate modifications: Sch 13 para 13(4). For these purposes, 'relevant proceedings' means proceedings brought in or in connection with the exercise of any transferred function: Sch 13 para 13(3).

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C. INDIVIDUALS AND FIRMS AS STATUTORY AUDITOR

(A) REQUIREMENTS FOR APPOINTMENT

969. Eligibility for appointment as statutory auditor.

An individual or firm¹ is eligible for appointment as a statutory auditor² if the individual or firm:

- 1852 (1) is a member of a recognised supervisory body³; and
- 1853 (2) is eligible for appointment under the rules of that body⁴.

1 For the purposes of the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARA 960 et seq) 'firm' means any entity, whether or not a legal person, which is not an individual and includes a body corporate, a corporation sole and a partnership or other unincorporated association: s 1261(1).

2 As to the meaning of 'statutory auditor' see PARA 958. In the cases to which the Companies Act 2006 s 1222 applies (individuals retaining only Companies Act 1967 authorisation: see PARA 1008), a person's eligibility for appointment as a statutory auditor is restricted as mentioned in the Companies Act 2006 s 1222: s 1212(2). References to a person eligible for appointment as a statutory auditor by virtue of Pt 42 in enactments relating

to eligibility for appointment as auditor of a person other than a company do not include a person to whom s 1222 (eligibility of persons holding Companies Act 1967 authorisation: see PARA 1008) applies: s 1222(3).

3 Companies Act 2006 s 1212(1)(a). As to the meanings of 'supervisory body', 'member of a supervisory body' and 'recognised supervisory body' see PARA 975.

4 Companies Act 2006 s 1212(1)(b). As to the rules of a supervisory body see PARA 975.

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970. Effect of ineligibility to be statutory auditor.

No person may act as statutory auditor¹ of an audited person² if he is ineligible for appointment as a statutory auditor³, and commits an offence if he does so act⁴. If at any time during his term of office a statutory auditor becomes ineligible for appointment as a statutory auditor, he must immediately resign his office (with immediate effect)⁵ and give notice in writing to the audited person that he has resigned by reason of his becoming ineligible for appointment⁶.

1 As to the meaning of 'statutory auditor' see PARA 958.

2 As to the meaning of 'audited person' see PARA 971 note 2.

3 Companies Act 2006 s 1213(1). The text refers to a person ineligible with respect to the requirements of s 1212 (see PARA 969). A suspension notice does not make an Auditor General ineligible for appointment as a statutory auditor for the purposes of s 1213: see s 1235(3); and PARA 1023.

4 By virtue of the Companies Act 2006 s 1213(3)(a), (5) a person is guilty of an offence if:

361 (1) he acts as a statutory auditor in contravention of s 1213(1);

362 (2) having been convicted of such an offence he continues to act as a statutory auditor in contravention of s 1213(1); and

363 (3) having been convicted of the second offence he continues to act as a statutory auditor in contravention of s 1213(1).

A person guilty of an offence under s 1213(3) (ie the initial offence referred to in head (1) above and in note 6 head (1)) is liable on conviction on indictment to a fine and on summary conviction to a fine not exceeding the statutory maximum; and a person guilty of the second or third offence (referred to in the respective heads (2), (3)) is liable on conviction on indictment to a fine and on summary conviction, to a fine not exceeding one-tenth of the statutory maximum for each day on which the act or the failure continues: s 1213(4), (7). As to the statutory maximum see PARA 1622. In proceedings against a person for an offence under s 1213 it is a defence for him to show that he did not know and had no reason to believe that he was, or had become, ineligible for appointment as a statutory auditor: s 1213(8).

5 Companies Act 2006 s 1213(2)(a).

6 Companies Act 2006 s 1213(2)(b). By virtue of s 1213(3)(b), (6) a person is guilty of an offence if:

364 (1) he fails to give notice in accordance with s 1213(2)(b);

365 (2) having been convicted of such an offence he continues to fail to give the notice mentioned in s 1213(2)(b); and

366 (3) having been convicted of the second offence he continues to fail to give the notice.

As to punishment and proceedings see note 4.

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971. Independence requirement to act as statutory auditor.

A person may not act as statutory auditor¹ of an audited person², and commits an offence if he does so act³, if:

- 1854 (1) he is an officer⁴ or employee of the audited person⁵ or a partner or employee of such a person, or a partnership of which such a person is a partner⁶;
- 1855 (2) he is an officer or employee of an associated undertaking⁷ of the audited person⁸ or a partner or employee of such a person, or a partnership of which such a person is a partner⁹; or
- 1856 (3) there exists, between him or an associate¹⁰ of his and the audited person or an associated undertaking of the audited person, a connection of any such description as may be specified by regulations made by the Secretary of State¹¹.

1 As to the meaning of 'statutory auditor' see PARA 958.

2 For the purposes of the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARA 960 et seq) 'audited person' means the person in respect of whom a statutory audit is conducted: s 1210(2). 'Statutory audit' is to be construed with the definition 'statutory auditor' (see PARA 958): s 1210(1).

3 By virtue of the Companies Act 2006 s 1215(2)(a), (4) a person is guilty of an offence if:

- 367 (1) he acts as a statutory auditor in contravention of s 1214(1);
- 368 (2) having been convicted of such an offence he continues to act as a statutory auditor in contravention of s 1214(1); and
- 369 (3) having been convicted of the second offence he continues to act as a statutory auditor in contravention of s 1214(1).

A person guilty of an offence under s 1215(2) (ie the initial offence referred to in head (1) above) is liable on conviction on indictment to a fine and on summary conviction to a fine not exceeding the statutory maximum; and a person guilty of the second or third offence (referred to in the respective heads (2), (3)) is liable on conviction on indictment to a fine and on summary conviction, to a fine not exceeding one-tenth of the statutory maximum for each day on which the act or the failure continues: s 1215(3), (6). As to the statutory maximum see PARA 1622. In proceedings against a person for an offence under s 1215 it is a defence for him to show that he did not know and had no reason to believe that he was, or had become, prohibited from acting as statutory auditor of the audited person by s 1214(1): s 1215(7).

4 As to the meaning of 'officer' see PARA 966 note 5.

5 Companies Act 2006 s 1214(1), (2)(a). An auditor of an audited person is not to be regarded as an officer or employee of the person for the purposes of s 1214(2), (3): s 1214(5).

6 Companies Act 2006 s 1214(2)(b).

7 In the Companies Act 2006 s 1214 'associated undertaking', in relation to an audited person, means a parent undertaking or subsidiary undertaking of the audited person or a subsidiary undertaking of a parent undertaking of the audited person: s 1214(6). 'Parent undertaking' and 'subsidiary undertaking' are to be read in accordance with s 1162, Sch 7 (see PARA 26): s 1261(1).

8 Companies Act 2006 s 1214(3)(a).

9 Companies Act 2006 s 1214(3)(b).

10 In the Companies Act 2006 Pt 42 'associate', in relation to an individual, means:

370 (1) that individual's spouse, civil partner or minor child or step-child (s 1260(1), (2)(a));

371 (2) any body corporate of which that individual is a director (or, in the case of a body corporate which is a limited liability partnership, a member) (s 1260(2)(b). (6)); and

372 (3) any employee or partner of that individual (s 1260(2)(c)).

In relation to a body corporate 'associate' means:

373 (a) any body corporate of which that body is a director (or, in the case of a body corporate which is a limited liability partnership, a member) (s 1260(3)(a));

374 (b) any body corporate in the same group as that body (s 1260(3)(b)); and

375 (c) any employee or partner of that body or of any body corporate in the same group (s 1260(3)(c)).

As to the meaning of 'body corporate' see PARA 6. As to the meaning of 'director' see PARA 966 note 5. 'Group', in relation to a body corporate, means the body corporate, any other body corporate which is its holding company or subsidiary and any other body corporate which is a subsidiary of that holding company; and 'holding company' and 'subsidiary' are to be read in accordance with s 1159, Sch 6 (see PARA 25): s 1261(1).

In relation to a partnership constituted under the law of Scotland, or any other country or territory in which a partnership is a legal person, 'associate' means:

376 (i) any body corporate of which that partnership is a director (or, in the case of a body corporate which is a limited liability partnership, a member) (s 1260(4)(a));

377 (ii) any employee of or partner in that partnership (s 1260(4)(b)); and

378 (iii) any person who is an associate of a partner in that partnership (s 1260(4)(c)).

In relation to a partnership constituted under the law of England and Wales or Northern Ireland, or the law of any other country or territory in which a partnership is not a legal person, 'associate' means any person who is an associate of any of the partners: s 1260(5).

11 Companies Act 2006 s 1214(4). At the date at which this volume states the law no such regulations had been made. As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

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972. Effect of lack of independence.

If at any time during his term of office, a statutory auditor¹ becomes prohibited from acting as such in relation to an audited person², he must immediately resign his office (with immediate effect)³ and give notice in writing to the audited person that he has resigned by reason of his lack of independence⁴.

¹ As to the meaning of 'statutory auditor' see PARA 958.

- 2 As to the meaning of 'audited person' see PARA 971 note 2.
- 3 Companies Act 2006 s 1215(1)(a).
- 4 Companies Act 2006 s 1215(1)(b). By virtue of s 1215(2)(b), (5) a person is guilty of an offence if:
- 379 (1) he fails to give notice in accordance with s 1215(1)(b);
- 380 (2) having been convicted of such an offence he continues to fail to give the notice mentioned in s 1215(1)(b); and
- 381 (3) having been convicted of the second offence he continues to fail to give the notice.

A person guilty of an offence under s 1215(2) (ie the initial offence referred to in head (1) above) is liable on conviction on indictment to a fine and on summary conviction to a fine not exceeding the statutory maximum; and a person guilty of the second or third offence (referred to in the respective heads (2), (3)) is liable on conviction on indictment to a fine and on summary conviction, to a fine not exceeding one-tenth of the statutory maximum for each day on which the act or the failure continues: s 1215(3), (6). As to the statutory maximum see PARA 1622. In proceedings against a person for an offence under s 1215 it is a defence for him to show that he did not know and had no reason to believe that he was, or had become, prohibited from acting as statutory auditor of the audited person by s 1214(1): s 1215(7).

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973. Effect of appointment of partnership.

Where a partnership¹ is appointed² as statutory auditor³ of an audited person⁴ then, unless a contrary intention appears, the appointment is an appointment of the partnership as such and not of the partners⁵. Where the partnership ceases, the appointment is to be treated as extending to any appropriate partnership⁶ which succeeds to the practice of that partnership⁷ or any other appropriate person who succeeds to that practice having previously carried it on in partnership⁸.

1 Ie a partnership constituted under the law of England and Wales, Northern Ireland, or any other country or territory in which a partnership is not a legal person: Companies Act 2006 s 1216(1). As to partnership generally see **PARTNERSHIP**.

2 Ie by virtue of the Companies Act 2006 Pt 42 Ch 2 (ss 1212-1225): see PARA 969 et seq.

3 As to the meaning of 'statutory auditor' see PARA 958.

4 As to the meaning of 'audited person' see PARA 971 note 2.

5 Companies Act 2006 s 1216(2).

6 For these purposes a partnership or other person is 'appropriate' if it or he is eligible for appointment as a statutory auditor by virtue of the Companies Act 2006 Pt 42 Ch 2 (see PARA 969) and is not prohibited by s 1214(1) (see PARA 971) from acting as statutory auditor of the audited person: s 1216(6).

7 For these purposes a partnership is to be regarded as 'succeeding' to the practice of another partnership only if the members of the successor partnership are substantially the same as those of the former partnership and a partnership or other person is to be regarded as succeeding to the practice of a partnership only if it or he succeeds to the whole or substantially the whole of the business of the former partnership: Companies Act 2006 s 1216(4).

8 Companies Act 2006 s 1216(3). Where the partnership ceases and the appointment is not treated under s 1216(3) as extending to any partnership or other person, the appointment may with the consent of the audited person be treated as extending to an appropriate partnership, or other appropriate person, who succeeds to the business of the former partnership or such part of it as is agreed by the audited person is to be treated as comprising the appointment: s 1216(5).

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974. Secretary of State's power to require second company audit.

Where a person appointed as statutory auditor¹ of a company² was not an appropriate person³ for any part of the period during which the audit was conducted the Secretary of State⁴ may direct⁵ the company concerned to retain an appropriate person to conduct a second audit of the relevant accounts⁶ or to review the first audit and to report (giving his reasons) whether a second audit is needed⁷. The company must send a copy of such a report to the registrar of companies⁸ and if the report states that a second audit is needed, take such steps as are necessary for the carrying out of that audit⁹. It is an offence to fail to comply with a direction, to fail to send a copy of a report to the registrar or to take any steps deemed necessary¹⁰.

1 As to the meaning of 'statutory auditor' see PARA 958.

2 As to the meaning of 'company' see PARA 958 note 2. As to the meaning of 'company' generally see PARA 1.

3 A person is 'appropriate' for these purposes if he is eligible for appointment as a statutory auditor (see PARA 969) or, if the person is an Auditor General (see the Companies Act 2006 s 1226; and PARA 1016), for appointment as statutory auditor of the company and not prohibited by s 1214(1) (independence requirement: see PARA 971) from acting as statutory auditor of the company: s 1248(3). If a person accepts an appointment, or continues to act, as statutory auditor of a company at a time when he knows he is not an appropriate person, the company may recover from him any costs incurred by it in complying with the requirements of s 1248: s 1249(1).

4 As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

5 The Secretary of State must send a copy of a direction under the Companies Act 2006 s 1248(2) to the registrar of companies: s 1248(4). As to the meaning of 'registrar of companies' see s 1060; and PARA 131 (definition applied by s 1248(9)). Such a direction is, on the application of the Secretary of State, enforceable by injunction: s 1249(3).

6 Companies Act 2006 s 1248(1), (2)(a).

7 Companies Act 2006 s 1248(2)(b).

8 Companies Act 2006 s 1248(6)(a).

9 Companies Act 2006 s 1248(6)(b). Where a second audit is carried out under s 1248, any statutory or other provision applying in relation to the first audit applies also, in so far as practicable, in relation to the second audit: s 1249(2).

10 The company is guilty of an offence if:

382 (1) it fails to comply with a direction under s 1248(2) within the period of 21 days beginning with the date on which it is given (s 1248(5)(a));

- 383 (2) it has been convicted of a previous offence under s 1248(5) and the failure to comply with the direction which led to the conviction continues after the conviction (s 1248(5)(b));
- 384 (3) it fails to send a copy of a report under s 1248(2)(b) to the registrar within the period of 21 days beginning with the date on which it receives it (s 1248(7)(a));
- 385 (4) in a case within s 1248(6)(b), it fails to take the steps mentioned immediately it receives the report (s 1248(7)(b)); or
- 386 (5) it has been convicted of a previous offence under s 1248(7) and the failure to send a copy of the report, or take the steps, which led to the conviction continues after the conviction (s 1248(7)(c)).

A company guilty of an offence under s 1248 is liable on summary conviction:

- 387 (a) in a case within s 1248(5)(a) or (7)(a) or (b), to a fine not exceeding level 5 on the standard scale (s 1248(8)(a)); and
- 388 (b) in a case within s 1248(5)(b) or (7)(c), to a fine not exceeding one-tenth of level 5 on the standard scale for each day on which the failure continues (s 1248(8)(b)).

As to the standard scale see PARA 1622.

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(B) SUPERVISORY BODIES

975. Supervisory bodies.

A 'supervisory body' is¹ a body established in the United Kingdom² (whether a body corporate³ or an unincorporated association) which maintains and enforces rules⁴ as to the eligibility of persons for appointment as a statutory auditor⁵ and the conduct of statutory audit work⁶ which are binding on persons seeking appointment or acting as a statutory auditor because they are members of that body⁷.

1 Ie for the purposes of the Companies Act 2006 Pt 42 (ss 1209-1264): see PARA 960 et seq.

2 For the purposes of the Companies Act 2006 Pt 42 a body is regarded as 'established in the United Kingdom' if and only if it is incorporated or formed under the law of the United Kingdom or a part of the United Kingdom or its central management and control are exercised in the United Kingdom; and any reference to a qualification 'obtained in the United Kingdom' is to a qualification obtained from such a body: s 1261(2). As to the meaning of 'United Kingdom' see PARA 1 note 5.

3 As to the meaning of 'body corporate' see PARA 6.

4 In the Companies Act 2006 Pt 42 references to the 'rules' of a supervisory body are to the rules (whether or not laid down by the body itself) which the body has power to enforce and which are relevant for the purposes of Pt 42: s 1217(3). This includes rules relating to the admission or expulsion of members of the body, so far as relevant for the purposes of Pt 42: s 1217(3).

5 As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969.

6 'Statutory audit work' is to be construed with the definitions 'statutory auditor' (see PARA 958) and 'statutory audit' (see PARA 971 note 2): s 1210(1).

7 Companies Act 2006 s 1217(1) (amended by SI 2007/3494). In the Companies Act 2006 Pt 42 references to the 'members' of a supervisory body are to the persons who, whether or not members of the body, are subject to its rules in seeking appointment or acting as a statutory auditor: s 1217(2). Certain rules must also be binding on persons who have sought appointment or acted as a statutory auditor and have been members of the body at any time after the commencement of Pt 42: see s 1217(1A), Sch 10 paras 9(3)(b), 10C(3)(a); and PARAS 980, 981.

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976. Exemption from liability for damages.

No recognised supervisory body¹, no officer² or employee of a recognised supervisory body, and no member of the governing body of a recognised supervisory body³, is liable in damages for anything done or omitted in the discharge or purported discharge of the functions of a recognised supervisory body so far as relating to, or to matters arising out of, any of:

- 1857 (1) rules, practices, powers and arrangements of the body to which the provisions governing recognition⁴ apply⁵;
- 1858 (2) the obligations of the body relating to the promotion and maintenance of standards⁶;
- 1859 (3) any guidance issued by the body⁷; and
- 1860 (4) the obligations imposed⁸ on the body⁹.

These provisions do not, however, apply if the act or omission is shown to have been in bad faith¹⁰; nor do they apply so as to prevent an award of damages in respect of an act or omission of a public authority that was found to be unlawful¹¹ on grounds on incompatibility with European Convention rights¹².

1 As to the meaning of 'supervisory body' see PARA 975. As to the recognition of supervisory bodies see PARA 977 et seq.

2 As to the meaning of 'officer' see PARA 966 note 5.

3 As to the members of a supervisory body see PARA 975 note 7.

4 I.e. the requirements of the Companies Act 2006 Sch 10 Pt 2 (paras 6-20) (see PARA 978 et seq.).

5 Companies Act 2006 s 1218(1), (2), (3)(a).

6 Companies Act 2006 s 1218(3)(b). These are the obligations with which Sch 10 para 20 (see PARA 994) requires the body to comply: s 1218(3)(b).

7 Companies Act 2006 s 1218(3)(c). The reference in s 1218(3)(c) to guidance issued by a recognised supervisory body is a reference to any guidance or recommendation which is issued or made by it to all or any class of its members or persons seeking to become members and relevant for the purposes of Pt 16, including any guidance or recommendation relating to the admission or expulsion of members of the body, so far as relevant for the purposes of Pt 16: s 1218(4).

8 I.e. by or by virtue of the Companies Act 2006 Pt 42 (ss 1209-1264): see PARA 960 et seq.

9 Companies Act 2006 s 1218(3)(d).

10 Companies Act 2006 s 1218(5)(a).

11 Ie as a result of the Human Rights Act 1998 s 6(1) (acts of public authorities incompatible with Convention rights: see **JUDICIAL REVIEW** vol 61 (2010) PARA 651).

12 Companies Act 2006 s 1218(5)(b).

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977. Application for recognition of supervisory body.

A supervisory body¹ may apply to the Secretary of State² for an order declaring it to be³ a recognised supervisory body (a 'recognition order')⁴. Any such application must be made in such manner as the Secretary of State may direct⁵ and accompanied by such information as the Secretary of State may reasonably require for the purpose of determining the application⁶, and must be accompanied by a copy of the applicant's rules⁷ and a copy of any guidance issued by the applicant in writing⁸.

1 As to the meaning of 'supervisory body' see PARA 975.

2 As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

3 Ie for the purposes of the Companies Act 2006 Pt 42 (ss 1209-1264): see PARA 960 et seq.

4 Companies Act 2006 Sch 10 para 1(1).

5 Companies Act 2006 Sch 10 para 1(2)(a). Directions given under Sch 10 para 1(2) may differ as between different applications: Sch 10 para 1(4). The Secretary of State may require any information to be furnished under Sch 10 para 1 to be in such form or verified in such manner as he may specify: Sch 10 para 1(5).

An applicant for a recognition order is required to pay such fee in respect of his application as the Secretary of State may by regulations prescribe, and no application is to be regarded as duly made unless this subsection is complied with (s 1251(1)); the Secretary of State may also by regulations prescribe periodical fees to be paid by every recognised supervisory body (s 1251(2)(a)). At the date at which this volume states the law no such fees had been prescribed (the Company Auditors (Recognition Orders) (Application Fees) Regulations 1990, SI 1990/1206, which previously made provision in this regard, having been revoked by the Company Auditors (Recognition Orders) (Application Fees) and the Companies Act 1989 (Recognised Supervisory Bodies) (Periodical Fees) (Revocation) Regulations 2005, SI 2005/2243). The powers of the Secretary of State in relation to the making of recognition orders have been transferred to the Professional Oversight Board (see note 2; and PARA 960) which accordingly has the function of determining whether to prescribe any fee to replace the fees prescribed in the revoked regulations. Such fees will not be prescribed by statutory instrument. Fees received by the Secretary of State by virtue of the Companies Act 2006 Pt 42 are to be paid into the Consolidated Fund: s 1251(3).

6 Companies Act 2006 Sch 10 para 1(2)(b). At any time after receiving an application and before determining it the Secretary of State may require the applicant to furnish additional information: Sch 10 para 1(3). Requirements so imposed may differ as between different applications: Sch 10 para 1(4).

7 Companies Act 2006 Sch 10 para 1(6)(a).

8 Companies Act 2006 Sch 10 para 1(6)(b). The reference in Sch 10 para 1(6)(b) to guidance issued by the applicant is a reference to any guidance or recommendation issued or made by it to all or any class of its members or persons seeking to become members, relevant for the purposes Pt 42 and intended to have continuing effect, including any guidance or recommendation relating to the admission or expulsion of members of the body, so far as relevant for the purposes of Pt 42: Sch 10 para 1(7). As to the members of a supervisory body see PARA 975 note 7.

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978. Holding of appropriate qualification to be statutory auditors.

A body which applies for recognition as a supervisory body¹ must have rules to the effect that a person is not eligible for appointment as a statutory auditor² unless:

- 1861 (1) in the case of an individual other than an EEA auditor³, he holds an appropriate qualification⁴;
- 1862 (2) in the case of an individual who is an EEA auditor he holds an appropriate qualification⁵ or has been authorised⁶ or passed an aptitude test⁷; or
- 1863 (3) in the case of a firm each individual responsible for statutory audit work⁸ on behalf of the firm is eligible for appointment as a statutory auditor and the firm is controlled by qualified persons⁹.

1 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

2 As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969.

3 'EEA auditor' means an individual who is approved in accordance with EC Council Directive 2006/43 (OJ L157, 9.6.2006, p 87) on statutory audits of annual accounts and consolidated accounts (the 'Audit Directive') by an EEA competent authority to carry out audits of annual accounts or consolidated accounts required by Community law; and 'EEA competent authority' means a competent authority within the meaning of art 2.10 of the Audit Directive of an EEA State other than the United Kingdom: Companies Act 2006 s 1261(1) (definitions added by SI 2007/3494). For these purposes Gibraltar is treated as if it were an EEA State: Companies Act 2006 s 1261(2A) (definition added by SI 2007/3494).

4 Companies Act 2006 Sch 10 para 6(1)(a) (amended by SI 2007/3494). As to the recognition of professional qualifications see PARA 997 et seq.

5 Companies Act 2006 Sch 10 para 6(1)(aa)(i) (added by SI 2007/3494).

6 Companies Act 2006 Sch 10 para 6(1)(aa)(ii) (added by SI 2007/3494). A person has been 'authorised' for these purposes if he has been authorised on or before 5 April 2008 to practise the profession of company auditor pursuant to the European Communities (Recognition of Professional Qualifications) (First General System) Regulations 2005, SI 2005/18, and has fulfilled any requirements imposed pursuant to reg 6: Companies Act 2006 Sch 10 para 6(1)(aa)(ii) (as so added).

7 Companies Act 2006 Sch 10 para 6(1)(aa)(iii) (added by SI 2007/3494). The person must have passed an aptitude test which tested his knowledge of subjects that are covered by a recognised professional qualification, that are not covered by the professional qualification already held by the person and the knowledge of which is essential for the pursuit of the profession of statutory auditor: Companies Act 2006 Sch 10 para 6(2)(a) (added by SI 2007/3494). The test in question may also test the person's knowledge of rules of professional conduct, but must not test his knowledge of any other matters: Companies Act 2006 Sch 10 para 6(2)(b), (c) (added by SI 2007/3494). No aptitude test is required for these purposes if the subjects that are covered by a recognised

professional qualification and the knowledge of which is essential for the pursuit of the profession of statutory auditor are covered by the professional qualification already held by the person: Companies Act 2006 Sch 10 para 6(2A) (added by SI 2007/3494).

8 As to the meaning of 'statutory audit work' see PARA 975 note 6.

9 Companies Act 2006 Sch 10 para 6(1)(b). A firm which has ceased to comply with the conditions mentioned in Sch 10 para 6(1)(b) may be permitted to remain eligible for appointment as a statutory auditor for a period of not more than three months: Sch 10 para 6(3).

For this purpose a firm is to be treated as controlled by 'qualified persons' if, and only if, a majority of the members of the firm are qualified persons and where the firm's affairs are managed by a board of directors, committee or other management body, a majority of that body are qualified persons or, if the body consists of two persons only, at least one of them is a qualified person: Sch 10 para 7(1), (3). References to a person being 'qualified' are:

389 (1) in relation to an individual, to his holding an appropriate qualification or a corresponding qualification to audit accounts under the law of an EEA State, or part of an EEA State, other than the United Kingdom (Sch 10 para 7(2)(a) (amended by SI 2007/3494)); and

390 (2) in relation to a firm, to its being eligible for appointment as a statutory auditor or being eligible for a corresponding appointment as an auditor under the law of an EEA State, or part of an EEA State, other than the United Kingdom (Companies Act 2006 Sch 10 para 7(2)(b) (amended by SI 2007/3494)).

A 'majority' of the members of a firm means:

391 (a) where under the firm's constitution matters are decided upon by the exercise of voting rights, members holding a majority of the rights to vote on all, or substantially all, matters (Companies Act 2006 Sch 10 para 7(4)(a)); and

392 (b) in any other case, members having such rights under the constitution of the firm as enable them to direct its overall policy or alter its constitution (Sch 10 para 7(4)(b)).

A 'majority' of the members of the management body of a firm means:

393 (i) where matters are decided at meetings of the management body by the exercise of voting rights, members holding a majority of the rights to vote on all, or substantially all, matters at such meetings (Sch 10 para 7(5)(a)); and

394 (ii) in any other case, members having such rights under the constitution of the firm as enable them to direct its overall policy or alter its constitution (Sch 10 para 7(5)(b)).

As to the meaning of 'firm' see PARA 969 note 1. As to the members of a supervisory body see PARA 975 note 7. Sch 7 paras 5-11 (rights to be taken into account and attribution of rights: see PARA 27) apply for these purposes: Sch 10 para 7(6).

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979. Auditors to be fit and proper persons.

A body which applies for recognition as a supervisory body¹ must have adequate rules² and practices designed to ensure that the persons eligible under its rules for appointment as a statutory auditor³ are fit and proper persons to be so appointed⁴. The matters which the body may take into account for this purpose in relation to a person must include:

- 1864 (1) any matter relating to any person who is or will be employed by or associated with him⁵ for the purposes of or in connection with statutory audit work⁶;
- 1865 (2) in the case of a body corporate⁷, any matter relating to any director⁸ or controller⁹ of the body, any other body corporate in the same group¹⁰ or any director or controller of any such other body¹¹; and
- 1866 (3) in the case of a partnership, any matter relating to any of the partners, any director or controller of any of the partners, any body corporate in the same group as any of the partners or any director or controller of any such other body¹².

1 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

2 As to the rules of a supervisory body see PARA 975.

3 As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969.

4 Companies Act 2006 Sch 10 para 8(1).

5 As to an 'associate' see PARA 971 note 10.

6 Companies Act 2006 Sch 10 para 8(2)(a). As to the meaning of 'statutory audit work' see PARA 975 note 6.

7 As to the meaning of 'body corporate' see PARA 6.

8 As to the meaning of 'director' see PARA 966 note 5. Where the person is a limited liability partnership this reference to a 'director' is to be read as a reference to a 'member': Companies Act 2006 Sch 10 para 8(3).

9 In the Companies Act 2006 Sch 10 para 8(2)(b), (c) 'controller', in relation to a body corporate, means a person who either alone or with an associate or associates is entitled to exercise or control the exercise of 15% or more of the rights to vote on all, or substantially all, matters at general meetings of the body or another body corporate of which it is a subsidiary: Sch 10 para 8(4). As to the meaning of 'subsidiary' see PARA 971 note 10.

10 As to the meaning of 'group' see PARA 971 note 10.

11 Companies Act 2006 Sch 10 para 8(2)(b).

12 Companies Act 2006 Sch 10 para 8(2)(c).

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980. Professional integrity and independence.

A body which applies for recognition as a supervisory body¹ must have adequate rules² and practices designed to ensure that:

- 1867 (1) statutory audit work³ is conducted properly and with integrity⁴;
- 1868 (2) persons are not appointed as statutory auditors⁵ in circumstances in which they have an interest likely to conflict with the proper conduct of the audit⁶;
- 1869 (3) persons appointed as statutory auditors take steps to safeguard their independence from any significant threats to it⁷;

- 1870 (4) persons appointed as statutory auditors record any such threats and the steps taken to safeguard the proper conduct of the audit from them⁸;
- 1871 (5) remuneration received or receivable by a statutory auditor in respect of statutory audit work is not influenced or determined by the statutory auditor providing other services to the audited person or on a contingent fee basis⁹;
- 1872 (6) no firm¹⁰ is eligible under its rules for appointment as a statutory auditor unless the firm has arrangements to prevent any person from being able to exert any influence over the way in which a statutory audit¹¹ is conducted in circumstances in which that influence would be likely to affect the independence or integrity of the audit¹²;
- 1873 (7) any rule of law relating to the confidentiality of information received in the course of statutory audit work by persons appointed as statutory auditors is complied with¹³; and
- 1874 (8) a person ceasing to hold office as a statutory auditor makes available to his successor in that office all relevant information which he holds in relation to that office¹⁴.

The body must participate in arrangements for setting standards relating to professional integrity and independence¹⁵, and the rules and practices required in this regard¹⁶ must include provision requiring compliance with any standards for the time being determined under such arrangements¹⁷.

1 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

2 As to the rules of a supervisory body see PARA 975.

3 As to the meaning of 'statutory audit work' see PARA 975 note 6.

4 Companies Act 2006 Sch 10 para 9(1)(a).

5 As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969.

6 Companies Act 2006 Sch 10 para 9(1)(b).

7 Companies Act 2006 Sch 10 para 9(1)(c) (added by SI 2007/3494).

8 Companies Act 2006 Sch 10 para 9(1)(d) (added by SI 2007/3494).

9 Companies Act 2006 Sch 10 para 9(1)(e) (added by SI 2007/3494).

10 As to the meaning of 'firm' see PARA 969 note 1.

11 As to the meaning of 'statutory audit' see PARA 971 note 2.

12 Companies Act 2006 Sch 10 para 9(3)(a) (substituted by SI 2007/3494).

13 Companies Act 2006 Sch 10 para 9(3)(b) (substituted by SI 2007/3494). The rules referred to in the Companies Act 2006 Sch 10 para 9(3)(b) must apply to persons who are no longer members of the body as they apply to members and any fine imposed in the enforcement of those rules must be recoverable by the body as a debt due to it from the person obliged to pay it: Sch 10 para 9(4) (added by SI 2007/3494). Those rules must also be binding on persons who have sought appointment or acted as a statutory auditor and have been members of the body at any time after the commencement of the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARA 960 et seq): s 1217(1A) (added by SI 2007/3494).

14 Companies Act 2006 Sch 10 para 9(3)(c) (substituted by SI 2007/3494).

15 le appropriate arrangements for the determining of standards for the purposes of the rules and practices mentioned in the Companies Act 2006 Sch 10 para 9(1) (see the text and notes 1-9) and for ensuring that the determination of those standards is done independently of the body: Sch 10 para 21. Arrangements for

ensuring that the determination of standards is done independently of the body are not to be regarded as appropriate for the purpose of ensuring that a thing is done independently of the body unless they are designed to ensure that the body will have no involvement in the appointment or selection of any of the persons who are to be responsible for doing that thing and will not otherwise be involved in the doing of that thing: Sch 10 para 25(1)(a), (2). This imposes a minimum requirement and does not preclude the possibility that additional criteria may need to be satisfied in order for the arrangements to be regarded as appropriate for the purpose in question: Sch 10 para 25(3). Arrangements may qualify as arrangements within Sch 10 para 21 even though the matters for which they provide are more extensive in any respect than those mentioned therein: Sch 10 para 27. The body must pay any of the costs of maintaining any arrangements within Sch 10 para 21 which the arrangements provide are to be paid by it: Sch 10 para 26.

16 le the rules and practices mentioned in the Companies Act 2006 Sch 10 para 9(1) (see the text and notes 1-9).

17 Companies Act 2006 Sch 10 para 9(2).

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981. Public interest entity independence requirements.

A body which applies for recognition as a supervisory body¹ must have adequate rules² and practices designed to ensure that:

- 1875 (1) an individual does not accept an appointment by a public interest entity³ as statutory auditor⁴ if he has been the statutory auditor of the entity for a continuous period of more than seven years and less than two years have passed since he was last the statutory auditor of the entity⁵;
- 1876 (2) where a firm⁶ has been appointed by a public interest entity as statutory auditor, an individual may not be a key audit partner⁷ if he has been a key audit partner in relation to audits of the entity for a continuous period of more than seven years and less than two years have passed since he was last the key audit partner in relation to an audit of the entity⁸;
- 1877 (3) an individual who has been appointed by a public interest entity as statutory auditor may not be appointed as a director or other officer of the entity⁹ during a period of two years commencing on the date on which his appointment as statutory auditor ended¹⁰; and
- 1878 (4) a key audit partner of a firm which has been appointed by a public interest entity as statutory auditor may not be appointed as a director or other officer of the entity during a period of two years commencing on the date on which his work as key audit partner ended¹¹.

The body must participate in arrangements for setting standards¹², and the rules and practices¹³ must include provision requiring compliance with any standards for the time being determined under such arrangements¹⁴.

1 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

2 As to the rules of a supervisory body see PARA 975.

3 'Public interest entity' means an issuer whose transferable securities are admitted to trading on a regulated market and the audit of which is a statutory audit (see the Companies Act 2006 s 1210(1); and PARA 971 note 2); 'issuer' and 'regulated market' have the same meaning as in the Financial Services and Markets Act 2000 Pt 6 (see ss 102A-103; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385); and 'transferable securities' means anything which is a transferable security for the purposes of EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments: Companies Act 2006 Sch 10 para 20A (Sch 10 paras 10C, 20A, 22B added by SI 2004/3494).

4 As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969.

5 Companies Act 2006 Sch 10 para 10C(1)(a) (as added: see note 3).

6 As to the meaning of 'firm' see PARA 969 note 1.

7 For these purposes a 'key audit partner' is an individual identified by a firm appointed as statutory auditor as being primarily responsible for the statutory audit, and a key audit partner of a firm appointed as statutory auditor of a parent undertaking or a material subsidiary undertaking of a public interest entity is to be treated as if he were a key audit partner of the firm appointed as statutory auditor of the public interest entity: Companies Act 2006 Sch 10 para 10C(6) (as added: see note 3). As to the meanings of 'parent undertaking' and 'subsidiary undertaking' see PARA 971 note 7.

8 Companies Act 2006 Sch 10 para 10C(1)(b) (as added: see note 3).

9 An auditor of a public interest entity is not to be regarded as an 'officer' of the entity for the purposes of the Companies Act 2006 Sch 10 para 10C(3)(a), (b): Sch 10 para 10C(5) (as so added).

10 Companies Act 2006 Sch 10 para 10C(3)(a) (as added: see note 3). The rules referred to in Sch 10 para 10C(3) must apply to persons who are no longer members of the body as they apply to members and any fine imposed in the enforcement of those rules must be recoverable by the body as a debt due to it from the person obliged to pay it: Sch 10 para 10C(4) (as so added). Those rules must also be binding on persons who have sought appointment or acted as a statutory auditor and have been members of the body at any time after the commencement of the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARA 960 et seq): s 1217(1A) (added by SI 2007/3494).

11 Companies Act 2006 Sch 10 para 10C(3)(b) (as added: see note 3). See note 10.

12 Ie appropriate arrangements for the determining of standards for the purposes of the rules and practices mentioned in the Companies Act 2006 Sch 10 para 10C(1) and for ensuring that the determination of those standards is done independently of the body: Sch 10 para 22B (as so added).

13 Ie the rules and practices mentioned in the Companies Act 2006 Sch 10 para 10C(1) (see the text and notes 1-8).

14 Companies Act 2006 Sch 10 para 10C(2) (as added: see note 3).

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982. Public interest entity reporting requirements.

A body which applies for recognition as a supervisory body¹ must have adequate rules² and practices designed to ensure that persons appointed as statutory auditors³ of public interest entities⁴ report to the entity's audit committee⁵ (if it has one) at least once in each calendar year at any time during which they hold the office of statutory auditor⁶. The report must include:

- 1879 (1) a statement in writing confirming the person's independence from the public interest entity⁷;
- 1880 (2) a description of any services provided by the person to the public interest entity other than in his capacity as statutory auditor⁸;
- 1881 (3) a description of any significant threats to the person's independence⁹;
- 1882 (4) an explanation of the steps taken by the person to safeguard his independence from those threats¹⁰;
- 1883 (5) a description of any material weaknesses arising from the statutory audit¹¹ in the public interest entity's internal control in relation to the preparation of accounts¹²; and
- 1884 (6) any other significant matters arising from the statutory audit¹³.

The body must participate in arrangements for setting standards¹⁴, and the rules and practices¹⁵ must include provision requiring compliance with any standards for the time being determined under such arrangements¹⁶.

1 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

2 As to the rules of a supervisory body see PARA 975.

3 As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969.

4 As to the meaning of 'public interest entity' see PARA 981 note 3.

5 I.e. a body which performs the functions referred to in art 41.2 of the Audit Directive (see PARA 978 note 3) or equivalent functions: Companies Act 2006 Sch 10 para 10B(4) (Sch 10 paras 10B, 22A added by SI 2004/3494).

6 Companies Act 2006 Sch 10 para 10B(1) (as added: see note 5).

7 Companies Act 2006 Sch 10 para 10B(2)(a) (as added: see note 5).

8 Companies Act 2006 Sch 10 para 10B(2)(b) (as added: see note 5).

9 Companies Act 2006 Sch 10 para 10B(2)(c) (as added: see note 5).

10 Companies Act 2006 Sch 10 para 10B(2)(d) (as added: see note 5).

11 As to the meaning of 'statutory audit' see PARA 971 note 2.

12 Companies Act 2006 Sch 10 para 10B(2)(e) (as added: see note 5).

13 Companies Act 2006 Sch 10 para 10B(2)(f) (as added: see note 5).

14 I.e. appropriate arrangements for the determining of standards for the purposes of the rules and practices mentioned in the Companies Act 2006 Sch 10 para 10B(1) (see the text and notes 1-6) and for ensuring that the determination of those standards is done independently of the body: Sch 10 para 22A (as added: see note 5).

15 I.e. the rules and practices mentioned in the Companies Act 2006 Sch 10 para 10B(1) (see the text and notes 1-8).

16 Companies Act 2006 Sch 10 para 10B(3) (as added: see note 5).

Matters/C. INDIVIDUALS AND FIRMS AS STATUTORY AUDITOR/(B) Supervisory Bodies/983.
Technical standards.

983. Technical standards.

A body which applies for recognition as a supervisory body¹ must have rules² and practices:

- 1885 (1) as to the technical standards to be applied in statutory audit work³ and the manner in which those standards are to be applied in practice⁴;
- 1886 (2) as to technical standards ensuring that group auditors⁵ review for the purposes of a group audit the audit work conducted by other persons and record that review⁶; and
- 1887 (3) ensuring that group auditors retain copies of any documents necessary for the purposes of the review that they have received from third country auditors⁷ who are not covered⁸ by working arrangements⁹ or agree with those third country auditors proper and unrestricted access to those documents on request¹⁰.

The body must participate in arrangements for the independent determination of applicable standards¹¹, and the rules and practices¹² must include provision requiring compliance with any standards for the time being determined under such arrangements¹³.

1 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

2 As to the rules of a supervisory body see PARA 975.

3 As to the meaning of 'statutory audit work' see PARA 975 note 6.

4 Companies Act 2006 Sch 10 para 10(1).

5 For these purposes 'group auditor' means a person appointed as statutory auditor to conduct an audit of group accounts; and 'group' has the same meaning as in the Companies Act 2006 Pt 15 (ss 380-474) (see s 474; and PARA 205); Sch 10 para 10A(7) (Sch 10 para 10A added, Sch 10 para 22 amended, by SI 2007/3494).

6 Companies Act 2006 Sch 10 para 10A(1) (as added: see note 5).

7 'Third country auditor' means a person, other than a person eligible for appointment as a statutory auditor, who is eligible to conduct audits of the accounts of bodies corporate incorporated or formed under the law of a third country in accordance with the law of that country; and 'third country' means a country or territory that is not an EEA State or part of an EEA State: Companies Act 2006 s 1261(1) (amended by SI 2007/3494). As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969. As to 'EEA State' see PARA 978 note 3.

8 I.e. under the Companies Act 2006 s 1253E: see PARA 1037.

9 Companies Act 2006 Sch 10 para 10A(3)(a) (as added: see note 5). The body's rules and practices must ensure that group auditors make the documents referred to in Sch 10 para 10A(3) available on request to the body, any other body with which the body has entered into arrangements for the purposes of Sch 10 para 23 or 24 (independent arrangements for monitoring and investigation: see PARA 986), and the Secretary of State: Sch 10 para 10A(4). The body may provide that the rules and practices referred to in Sch 10 para 10A(3), (4) do not apply if, after taking all reasonable steps, a group auditor is unable to obtain the copies of the documents or the access to the documents necessary for the review: Sch 10 para 10A(5). If the body does so provide, its rules and practices must ensure that the group auditor records the steps taken to obtain copies of or access to those documents, the reasons why the copies or access could not be obtained and any evidence of those steps or those reasons: Sch 10 para 10A(6). As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

10 Companies Act 2006 Sch 10 para 10A(3)(b) (as added: see note 9).

11 le appropriate arrangements for the determining of standards for the purposes of the rules and practices mentioned in Sch 10 para 10(1) and Sch 10 para 10A(1) and for ensuring that the determination of those standards is done independently of the body: Sch 10 para 22 (as amended: see note 5). Arrangements for ensuring that the determination of standards is done independently of the body are not to be regarded as appropriate for the purpose of ensuring that a thing is done independently of the body unless they are designed to ensure that the body will have no involvement in the appointment or selection of any of the persons who are to be responsible for doing that thing and will not otherwise be involved in the doing of that thing: Sch 10 para 25(1)(b), (2). This imposes a minimum requirement and does not preclude the possibility that additional criteria may need to be satisfied in order for the arrangements to be regarded as appropriate for the purpose in question: Sch 10 para 25(3). Arrangements may qualify as arrangements within Sch 10 para 22 even though the matters for which they provide are more extensive in any respect than those mentioned therein: Sch 10 para 27. The body must pay any of the costs of maintaining any arrangements within Sch 10 para 22 which the arrangements provide are to be paid by it: Sch 10 para 26.

12 le the rules and practices mentioned in the Companies Act 2006 Sch 10 para 10(1) (see the text and notes 1-8) and Sch 10 para 10A(1) (see the text and notes 5-6).

13 Companies Act 2006 Sch 10 paras 10(2), 10A(2) (as added: see note 5).

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984. Procedures for maintaining competence.

A body which applies for recognition as a supervisory body¹ must have rules² and practices designed to ensure that persons eligible under its rules for appointment as a statutory auditor³ continue to maintain an appropriate level of competence in the conduct of statutory audits⁴.

1 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

2 As to the rules of a supervisory body see PARA 975.

3 As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969.

4 Companies Act 2006 Sch 10 para 11. As to the meaning of 'statutory audit' see PARA 971 note 2.

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985. Monitoring and enforcement.

A body which applies for recognition as a supervisory body¹ must:

- 1888 (1) have adequate resources and arrangements for the effective monitoring and enforcement of compliance with its rules²;
- 1889 (2) ensure that such resources may not be influenced improperly by the persons monitored³; and
- 1890 (3) ensure that such arrangements operate independently of the persons monitored⁴.

The arrangements for monitoring may make provision for that function to be performed on behalf of the body (and without affecting its responsibility) by any other body or person who is able and willing to perform it⁵, and the arrangements for enforcement must include provision for sanctions⁶ and for the body making available to the public information relating to steps it has taken to ensure the effective enforcement of its rules⁷.

1 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

2 Companies Act 2006 Sch 10 para 12(1)(a), (1A)(a) (Sch 10 para 12(1) substituted, Sch 10 para 12(1A), (3) added, by SI 2007/3494). As to the rules of a supervisory body see PARA 975.

3 Companies Act 2006 Sch 10 para 12(1)(b) (as substituted: see note 2).

4 Companies Act 2006 Sch 10 para 12(1A)(b) (as added: see note 2).

5 Companies Act 2006 Sch 10 para 12(2).

6 Companies Act 2006 Sch 10 para 12(3)(a) (as added: see note 2). Sanctions must include the withdrawal of eligibility for appointment as a statutory auditor and any other disciplinary measures necessary to ensure the effective enforcement of the body's rules: Sch 10 para 12(3)(a), (i), (ii) (as so added).

7 Companies Act 2006 Sch 10 para 12(3)(b) (as added: see note 2).

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986. Monitoring of audits.

A body which applies for recognition as a supervisory body¹ must:

- 1891 (1) in the case of members of the body² who do not perform any statutory audit functions³ in respect of major audits⁴, have adequate arrangements for enabling the performance by its members of statutory audit functions to be monitored by means of inspections⁵; and
- 1892 (2) in the case of members of the body who perform any statutory audit functions in respect of major audits, participate in arrangements⁶ for the independent monitoring of performance⁷.

The arrangements referred to in head (1) above must include an inspection which is conducted in relation to each person eligible for appointment as a statutory auditor at least once every six years⁸, and the arrangements referred to in head (2) above must include provision for an

inspection conducted in relation to each such person at least once every three years⁹. Provision is made for the content of such inspections¹⁰.

A body which applies for recognition as a supervisory body must also have rules¹¹ designed to ensure that members of the body take such steps as may reasonably be required of them to enable their performance of any statutory audit functions to be monitored by means of inspections¹².

1 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

2 As to the meaning of 'member of a supervisory body' see PARA 975.

3 'Statutory audit function' means any function performed as a statutory auditor: Companies Act 2006 Sch 10 paras 13(10), 23(2) (Sch 10 para 13 substituted, Sch 10 para 23(1) amended, Sch 10 para 23(1A)-(1F) added, by SI 2007/3494). As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969. As to the meaning of 'statutory audit' see PARA 971 note 2.

4 'Major audit' means a statutory audit conducted in respect of a public interest entity or any other person in whose financial condition there is a major public interest: Companies Act 2006 Sch 10 paras 13(10), 23(2) (Sch 10 para 13(10) as substituted: see note 3).

5 Companies Act 2006 Sch 10 para 13(1)(a) (as substituted: see note 3). In connection with this requirement see further note 9.

6 The appropriate arrangements for enabling the performance by members of the body of statutory audit functions in respect of major audits to be monitored by means of inspections carried out under the arrangements and for ensuring that the carrying out of such monitoring and inspections is done independently of the body: Companies Act 2006 Sch 10 para 23(1) (as amended: see note 3). Arrangements for ensuring that the carrying out of monitoring and inspections is done independently of the body are not to be regarded as appropriate for the purpose of ensuring that a thing is done independently of the body unless they are designed to ensure that the body will have no involvement in the appointment or selection of any of the persons who are to be responsible for doing that thing and will not otherwise be involved in the doing of that thing: Sch 10 para 25(1)(c), (2). This imposes a minimum requirement and does not preclude the possibility that additional criteria may need to be satisfied in order for the arrangements to be regarded as appropriate for the purpose in question: Sch 10 para 25(3). Arrangements may qualify as arrangements within Sch 10 para 23 even though the matters for which they provide are more extensive in any respect than those mentioned therein: Sch 10 para 27. The body must pay any of the costs of maintaining any arrangements within Sch 10 para 23 which the arrangements provide are to be paid by it: Sch 10 para 26.

7 Companies Act 2006 Sch 10 para 13(1)(b) (as substituted: see note 3). Any monitoring of members of the body under the arrangements within Sch 10 para 23(1) (see note 6) is to be regarded (so far as their performance of statutory audit functions in respect of major audits is concerned) as monitoring of compliance with the body's rules for the purposes of Sch 10 para 12(1), (1A) (see PARA 985): Sch 10 para 13(2) (as so substituted).

8 Companies Act 2006 Sch 10 para 13(3) (as substituted: see note 3). If pursuant to Sch 10 para 23(1D) or (1E) (see note 9) the supervisory body is ensuring that the arrangements referred to in Sch 10 para 13(1)(a) (see the text and notes 1-5) apply in relation to a member in relation to whom an entire inspection is not required, the arrangements referred to in head (1) in the text must include an inspection which is conducted in relation to each eligible person at least once every three years rather than six: Sch 10 para 23(1D), (1E), (1F) (as so added).

9 Companies Act 2006 Sch 10 para 23(1A) (as added: see note 3). This is subject to the requirement that such arrangements may provide that the body performing the inspections may decide that all or part of the inspection referred to in Sch 10 para 23(1A) is not required in the case of a member of a supervisory body who performs statutory audit functions in respect of ten or fewer major audits per year: Sch 10 para 23(1C) (as so added). If the arrangements make the provision referred to in Sch 10 para 23(1C) and the body performing the inspections decides that all or part of an inspection is not required in relation to a member, the supervisory body must ensure that the arrangements referred to in Sch 10 para 13(1)(a) (see the text and notes 1-5) apply in relation to that member, subject to the modification specified in note 5: Sch 10 para 23(1D), (1E) (as so added).

10 All inspections under the Companies Act 2006 Sch 10 paras 13(3), 23(1A) must be conducted by persons who have an appropriate professional education, have experience of statutory audit work or equivalent work on the audit of accounts under the law of an EEA State, or part of an EEA State, other than the United Kingdom,

have received adequate training in the conduct of inspections and do not have any interests likely to conflict with the proper conduct of the inspection: Sch 10 paras 13(4), 23(1B) (as substituted and added: see note 3). The inspection must review one or more statutory audits in which the person to whom the inspection relates has participated (Sch 10 para 13(5)), and must include an assessment of:

- 395 (1) the person's compliance with the body's rules established for the purposes of Sch 10 para 9 (professional integrity and independence: see PARA 980), Sch 10 para 10 (technical standards: see PARA 983), Sch 10 para 10A (technical standards for group audits: see PARA 983) and Sch 10 para 10C (public interest entity independence requirements: see PARA 981) (Sch 10 para 13(6)(a));
- 396 (2) the resources allocated by the person to statutory audit work (Sch 10 para 13(6)(b));
- 397 (3) in the case of an inspection in relation to a firm, its internal quality control system (Sch 10 para 13(6)(c)); and
- 398 (4) the remuneration received by the person in respect of statutory audit work (Sch 10 para 13(6)(d)).

An inspection conducted in relation to a firm may be treated as an inspection of all individuals responsible for statutory audit work on behalf of that firm, if the firm has a common quality assurance policy with which each such individual is required to comply: Sch 10 para 13(7). The main conclusions of the inspection must be recorded in a report which is made available to the person to whom the inspection relates and the body: Sch 10 para 13(8). The body must, at least once in every calendar year, deliver to the Secretary of State a summary of the results of inspections conducted under these provisions: Sch 10 para 13(9). The Secretary of State must, at least once in every calendar year, publish a report containing a summary of the results of inspections that are delivered to him by a recognised supervisory body under Sch 10 para 13(9): s 1251A(b) (added by SI 2007/3494). As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

11 As to the rules of a supervisory body see PARA 975.

12 Companies Act 2006 Sch 10 para 13(1)(c) (as substituted: see note 3).

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987. Membership, eligibility and discipline.

The rules¹ and practices of a body which applies for recognition as a supervisory body² relating to the admission and expulsion of members³, the grant and withdrawal of eligibility for appointment as a statutory auditor⁴ and the discipline it exercises over its members must be fair and reasonable and include adequate provision for appeals⁵.

1 As to the rules of a supervisory body see PARA 975. As to the meaning of 'supervisory body' see PARA 975.

2 As to applications for recognition as a supervisory body see PARA 977 et seq.

3 As to the meaning of 'member of a supervisory body' see PARA 975.

4 As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969.

5 Companies Act 2006 Sch 10 para 14.

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988. Investigation of complaints.

A body which applies for recognition as a supervisory body¹ must have effective arrangements² for the investigation of complaints against persons who are eligible under its rules for appointment as a statutory auditor³ and the body in respect of matters arising out of its functions as a supervisory body⁴.

1 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

2 Such arrangements may make provision for the whole or part of this function to be performed by and to be the responsibility of a body or person independent of the body itself: Companies Act 2006 Sch 10 para 15(2).

3 As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969.

4 Companies Act 2006 Sch 10 para 15(1).

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989. Independent investigation of public interest cases.

A body which applies for recognition as a supervisory body¹ must participate in appropriate arrangements²:

- 1893 (1) for the carrying out of investigations into public interest cases³ arising in connection with the performance of statutory audit functions⁴ by members of the body⁵;
- 1894 (2) for the holding of disciplinary hearings relating to members of the body which appear to be desirable following the conclusion of such investigations⁶;
- 1895 (3) for requiring such hearings to be held in public except where the interests of justice otherwise require⁷;
- 1896 (4) for the persons before whom such hearings have taken place to decide whether (and, if so, what) disciplinary action should be taken against the members to whom the hearings related⁸; and
- 1897 (5) for ensuring that the carrying out of those investigations, the holding of those hearings and the taking of those decisions are done independently of the body⁹.

A body which applies for recognition as a supervisory body must also have rules¹⁰ and practices designed to ensure that, where the designated persons¹¹ have decided that any particular disciplinary action should be taken against a member of the body following the conclusion of an investigation under such arrangements, that decision is to be treated as if it were a decision made by the body in disciplinary proceedings against the member¹².

1 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

2 Arrangements may qualify as arrangements within the Companies Act 2006 Sch 10 para 24 (see the text and notes 3-9) even though the matters for which they provide are more extensive in any respect than those mentioned therein: Sch 10 para 27. The body must pay any of the costs of maintaining any arrangements within Sch 10 para 24 which the arrangements provide are to be paid by it: Sch 10 para 26.

3 I.e. matters which raise or appear to raise important issues affecting the public interest: Companies Act 2006 Sch 10 para 24(2).

4 'Statutory audit function' means any function performed as a statutory auditor: Companies Act 2006 Sch 10 para 24(2). As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969.

5 Companies Act 2006 Sch 10 paras 16(1)(a), 24(1)(a). As to the meaning of 'member of a supervisory body' see PARA 975.

6 Companies Act 2006 Sch 10 para 24(1)(b).

7 Companies Act 2006 Sch 10 para 24(1)(c).

8 Companies Act 2006 Sch 10 para 24(1)(d).

9 Companies Act 2006 Sch 10 para 24(1)(e). Arrangements for ensuring that the carrying out of investigations, holding of hearings and taking of decisions is done independently of the body are not to be regarded as appropriate for the purpose of ensuring that a thing is done independently of the body unless they are designed to ensure that the body will have no involvement in the appointment or selection of any of the persons who are to be responsible for doing that thing and will not otherwise be involved in the doing of that thing: Sch 10 para 25(1)(d), (2). This imposes a minimum requirement and does not preclude the possibility that additional criteria may need to be satisfied in order for the arrangements to be regarded as appropriate for the purpose in question: Sch 10 para 25(3).

10 As to the rules of a supervisory body see PARA 975.

11 I.e. the persons who, under the arrangements, have the function of deciding whether (and if so, what) disciplinary action should be taken against a member of the body in the light of an investigation carried out under the arrangements: Companies Act 2006 Sch 10 para 16(2).

12 Companies Act 2006 Sch 10 para 16(1)(a)

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990. Transfer of working papers to third country competent authority.

A body which applies for recognition as a supervisory body¹ must have adequate rules² and practices designed to ensure that persons eligible under its rules for appointment as a

statutory auditor³ deliver audit working papers⁴ to a third country competent authority⁵ only if the authority has entered into working arrangements with the Secretary of State⁶ and:

- 1898 (1) the competent authority has requested the audit working papers for the purposes of an investigation⁷;
- 1899 (2) the competent authority has given to the Secretary of State notice of its request⁸;
- 1900 (3) the papers relate to the audit of a body which has issued securities in the country or territory in which the competent authority is established or forms part of a group issuing statutory consolidated accounts in that country or territory⁹; and
- 1901 (4) no legal proceedings have been brought (whether continuing or not) in relation to the auditor or audit to which the working papers relate¹⁰.

The body must also have adequate rules and practices designed to ensure that a person eligible under its rules for appointment as a statutory auditor may refuse to deliver audit working papers to a third country competent authority if the Secretary of State certifies that the delivery of the papers would adversely affect the sovereignty, security or public order of the United Kingdom¹¹.

1 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

2 As to the rules of a supervisory body see PARA 975.

3 As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969.

4 'Audit working papers' means any documents which are or have been held by a statutory auditor or a third country auditor and are related to the conduct of an audit conducted by that auditor: Companies Act 2006 s 1261(1) (amended by SI 2007/3494). As to the meanings of 'third country' and 'third country auditor' see PARA 983 note 7.

5 'Third country competent authority' means a body established in a third country exercising functions related to the regulation or oversight of auditors: Companies Act 2006 s 1261(1) (amended by SI 2007/3494).

6 In accordance with the Companies Act 2006 s 1253E (see PARA 986). As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

7 Companies Act 2006 Sch 10 para 16A(1), (2)(a) (Sch 10 para 16A added by SI 2007/3494).

8 Companies Act 2006 Sch 10 para 16A(2)(b) (as added: see note 7).

9 Companies Act 2006 Sch 10 para 16A(2)(c) (as added: see note 7).

10 Companies Act 2006 Sch 10 para 16A(2)(d) (as added: see note 7).

11 Companies Act 2006 Sch 10 para 16A(3) (as added: see note 7).

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991. Meeting of claims arising out of audit work.

A body which applies for recognition as a supervisory body¹ must have adequate rules² or arrangements designed to ensure that persons eligible under its rules for appointment as a statutory auditor³ take such steps as may reasonably be expected of them to secure that they are able to meet claims against them arising out of statutory audit work⁴. This may be achieved by professional indemnity insurance or other appropriate arrangements⁵.

1 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

2 As to the rules of a supervisory body see PARA 975.

3 As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969.

4 Companies Act 2006 Sch 10 para 17(1). As to the meaning of 'statutory audit work' see PARA 975 note 6.

5 Companies Act 2006 Sch 10 para 17(2).

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992. Register of auditors; disclosure of information.

A body which applies for recognition as a supervisory body¹ must have rules² requiring persons eligible under its rules for appointment as a statutory auditor³ to comply with any obligations imposed on them pursuant to:

- 1902 (1) the Secretary of State's power to call for information⁴;
- 1903 (2) regulations⁵ dealing with the register of auditors⁶; and
- 1904 (3) regulations⁷ dealing with making available to the public certain specified information required of a person who is eligible for such appointment as a statutory auditor (or who is a member of a specified class of such persons)⁸.

1 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

2 As to the rules of a supervisory body see PARA 975.

3 As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969.

4 Companies Act 2006 Sch 10 para 18(1)(a). This is a reference to any obligations imposed on the body by requirements under s 1224 (see PARA 1011). As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

5 I.e regulations under the Companies Act 2006 s 1239 (see PARA 1032).

6 Companies Act 2006 Sch 10 para 18(1)(b).

7 I.e regulations under the Companies Act 2006 s 1240 (see PARA 1033).

8 Companies Act 2006 Sch 10 para 18(1)(c). Head (3) in the text refers to information made available to the public as specified in s 1240(1)(a)-(d) (see PARA 1033).

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993. Taking account of costs of compliance.

A body which applies for recognition as a supervisory body¹ must have satisfactory arrangements for taking account, in framing its rules², of the cost to those to whom the rules would apply of complying with those rules and any other controls to which they are subject³.

1 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

2 As to the rules of a supervisory body see PARA 975.

3 Companies Act 2006 Sch 10 para 19.

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994. Promotion and maintenance of standards.

A body which applies for recognition as a supervisory body¹ must be able and willing to promote and maintain high standards of integrity in the conduct of statutory audit work² and to co-operate, by the sharing of information and otherwise, with the Secretary of State³ and any other authority, body or person having responsibility in the United Kingdom for the qualification, supervision or regulation of auditors⁴.

1 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

2 As to the meaning of 'statutory audit work' see PARA 975 note 6.

3 As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

4 Companies Act 2006 Sch 10 para 20.

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995. Grant and refusal of recognition.

The Secretary of State¹ may, on an application duly made² and after being furnished with all such information as he may require³, make or refuse to make a recognition order⁴ in respect of the applicant⁵. The Secretary of State may make a recognition order only if it appears to him, from the information furnished by the body and having regard to any other information in his possession, that the requirements for recognition⁶ are satisfied in the case of that body⁷, and may refuse to make a recognition order in respect of a body⁸ if he considers that its recognition is unnecessary having regard to the existence of one or more other bodies which:

- 1905 (1) maintain and enforce rules⁹ as to the appointment and conduct of statutory auditors¹⁰; and
- 1906 (2) have been or are likely to be recognised¹¹.

1 As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

2 Ie in accordance with the Companies Act 2006 Sch 10 para 1 (see PARA 977).

3 Ie under the Companies Act 2006 Sch 10 para 1 (see PARA 977).

4 As to the meaning of 'recognition order' see PARA 977. A recognition order must state the date on which it takes effect: Companies Act 2006 Sch 10 para 2(5).

5 Companies Act 2006 Sch 10 para 2(1).

6 Ie the requirements of the Companies Act 2006 Sch 10 Pt 2 (paras 6-20A) (see PARAS 978-994).

7 Companies Act 2006 Sch 10 para 2(2).

8 Where the Secretary of State refuses an application for a recognition order he must give the applicant a written notice to that effect specifying which requirements, in the opinion of the Secretary of State, are not satisfied, or stating that the application is refused on the ground mentioned in the Companies Act 2006 Sch 10 para 2(3) (see the text and notes 9-11): Sch 10 para 2(4).

9 As to the rules of a supervisory body see PARA 975.

10 Companies Act 2006 Sch 10 para 2(3)(a). As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969.

11 Companies Act 2006 Sch 10 para 2(3)(b).

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996. Revocation of recognition.

A recognition order¹ may be revoked by a further order made by the Secretary of State² if at any time it appears to him:

- 1907 (1) that any of the recognition requirements³ is not satisfied in the case of the body to which the recognition order relates (the 'recognised body')⁴;
- 1908 (2) that the body has failed to comply with any obligation imposed on it by or by virtue of the statutory provisions⁵ relating to statutory auditors⁶; or
- 1909 (3) that the continued recognition of the body is undesirable having regard to the existence of one or more other bodies which have been or are to be recognised⁷.

Before revoking a recognition order the Secretary of State must:

- 1910 (a) give written notice⁸ of his intention to do so to the recognised body⁹;
- 1911 (b) take such steps as he considers reasonably practicable for bringing the notice to the attention of the members of the body¹⁰; and
- 1912 (c) publish the notice in such manner as he thinks appropriate for bringing it to the attention of any other persons who are in his opinion likely to be affected¹¹.

Persons affected by the revocation¹² may¹³ make written representations to the Secretary of State and, if desired, oral representations to a person appointed for that purpose by the Secretary of State¹⁴, and the Secretary of State must have regard to any representations so made in determining whether to revoke the recognition order¹⁵.

An order revoking a recognition order must state the date on which it takes effect, which must be after the period of three months beginning with the date on which the revocation order is made¹⁶, although the Secretary of State may revoke a recognition order without regard to this restriction if in any case he considers it essential to do so in the public interest¹⁷.

A recognition order may also be revoked at the request or with the consent of the recognised body¹⁸.

1 As to the meaning of 'recognition order' see PARA 977.

2 As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

An order revoking a recognition order may contain such transitional provision as the Secretary of State thinks necessary or expedient: Companies Act 2006 Sch 10 para 3(9). On making an order revoking a recognition order in respect of a body the Secretary of State must give written notice of the making of the order to the body, take such steps as he considers reasonably practicable for bringing the making of the order to the attention of the members of the body, and publish a notice of the making of the order in such manner as he thinks appropriate for bringing it to the attention of any other persons who are in his opinion likely to be affected: Sch 10 para 3(11).

3 I.e. the requirements of the Companies Act 2006 Sch 10 Pt 2 (paras 6-20A) (see PARAS 978-994). If the recognition requirements are not complied with the Secretary of State may, as an alternative to revoking the recognition under these provisions, apply for a compliance order: see s 1225; and PARA 1013.

4 Companies Act 2006 Sch 10 para 3(1)(a).

5 I.e. the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARAS 959-968).

6 Companies Act 2006 Sch 10 para 3(1)(b).

7 Companies Act 2006 Sch 10 para 3(1)(c).

8 A notice under the Companies Act 2006 Sch 10 para 3(3) must state the reasons for which the Secretary of State proposes to act and give particulars of the rights conferred by Sch 10 para 3(5) (see the text and notes 13-18): Sch 10 para 3(4).

9 Companies Act 2006 Sch 10 para 3(3)(a).

10 Companies Act 2006 Sch 10 para 3(3)(b).

11 Companies Act 2006 Sch 10 para 3(3)(c).

12 Ie the recognised body on which a notice is served under the Companies Act 2006 Sch 10 para 3(3) (see the text and notes 8-12), any member of the body and any other person who appears to the Secretary of State to be affected: Sch 10 para 3(6). As to the members of a supervisory body see PARA 975 note 7.

13 Ie within the period of three months beginning with the date of service or publication of the notice under the Companies Act 2006 Sch 10 para 3(3) or such longer period as the Secretary of State may allow: Sch 10 para 3(5).

14 Companies Act 2006 Sch 10 para 3(5).

15 Companies Act 2006 Sch 10 para 3(7).

16 Companies Act 2006 Sch 10 para 3(2).

17 Companies Act 2006 Sch 10 para 3(8). The Secretary of State may revoke a recognition order in these circumstances even if no notice has been given or published under Sch 10 para 3(3) (see the text and notes 8-12) or the period of time for making representations in pursuance of such a notice has not expired: Sch 10 para 3(8).

18 Companies Act 2006 Sch 10 para 3(10). Any such revocation is not subject to the restrictions imposed by Sch 10 para 3(1), (2) (see the text and notes 1-7, 16) or the requirements of Sch 10 para 3(3)-(5), (7) (see the text and notes 8-14): Sch 10 para 3(10).

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(C) RECOGNITION OF PROFESSIONAL QUALIFICATIONS

997. Meaning of 'appropriate qualifications'.

A person holds an 'appropriate qualification' for these purposes¹ if and only if:

1913 (1) he holds a recognised professional qualification² obtained in the United Kingdom³;

1914 (2) immediately before the commencement of these provisions⁴ he held an appropriate qualification under the former legislation⁵;

1915 (3) he holds an approved professional qualification in accountancy obtained within specified dates⁶; or

1916 (4) he is regarded for these purposes⁷ as holding an approved third country qualification⁸.

1 Ie for the purposes of the Companies Act 2006 Pt 42 Ch 2 (ss 1212-1225): see PARA 969 et seq.

2 As to the recognition of a professional qualification offered by a qualifying body see the Companies Act 2006 s 1220, Sch 11; and PARA 998 et seq.

3 Companies Act 2006 s 1219(1)(a).

4 The Companies Act 2006 Pt 42 Ch 2 was brought substantively into force on 6 April 2008 by the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, art 3(1)(u); see also art 9, Sch 4 para 41(2).

5 Companies Act 2006 s 1219(1)(b), (c). The reference in the text to 'holding an appropriate qualification under the former legislation' is a reference to holding an appropriate qualification for the purposes of the Companies Act 1989 Pt 2 (ss 24-54) (eligibility for appointment as company auditor) (repealed) by virtue of s 31(1)(a) or (c) or being treated as holding an appropriate qualification for those purposes by virtue of s 31(2), (3) or (4), or to holding or being treated as holding an appropriate qualification under corresponding Northern Ireland legislation: Companies Act 2006 s 1219(1)(b), (c).

6 Companies Act 2006 s 1219(1)(d). A person is within this requirement if:

399 (1) before 1 January 1990, he began a course of study or practical training leading to a professional qualification in accountancy offered by a body established in the United Kingdom (s 1219(2)(a));

400 (2) he obtained that qualification on or after 1 January 1990 and before 1 January 1996 (s 1219(2)(b)); and

401 (3) the Secretary of State approves his qualification as an appropriate qualification for these purposes (s 1219(2)(c)).

As to the meaning of 'established in the United Kingdom' see PARA 975 note 2. As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq. The Secretary of State may approve a qualification under s 1219(2)(c) only if he is satisfied that, at the time the qualification was awarded, the body concerned had adequate arrangements to ensure that the qualification was awarded only to persons educated and trained to a standard equivalent to that required, at that time, in the case of a recognised professional qualification under the Companies Act 1989 Pt 2 (repealed): Companies Act 2006 s 1219(3).

7 See note 1. This provision is subject to any direction under the Companies Act 2006 s 1221(5) (see PARA 1007); s 1219(1)(f) (amended by SI 2007/3494).

8 Companies Act 2006 s 1219(1)(f) (amended by SI 2007/3494). As to approved third country qualifications see s 1221; and PARA 1007. As to the meaning of 'third country' see PARA 983 note 7.

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998. Qualifying bodies and recognised professional qualifications.

For these purposes¹ a 'qualifying body' means a body established in the United Kingdom² (whether a body corporate³ or an unincorporated association) which offers a professional qualification in accountancy⁴. References to the 'rules' of a qualifying body are to the rules (whether or not laid down by the body itself) which the body has power to enforce and which are relevant for these purposes, including so far as so relevant rules relating to:

- 1917 (1) admission to or expulsion from a course of study leading to a qualification⁵;
- 1918 (2) the award or deprivation of a qualification⁶; or

1919 (3) the approval of a person for the purposes of giving practical training or the withdrawal of such approval⁷.

1 le for the purposes of the Companies Act 2006 Pt 42 (ss 1209-1264); see PARA 959 et seq.

2 As to the meaning of 'established in the United Kingdom' see PARA 975 note 2.

3 As to the meaning of 'body corporate' see PARA 6.

4 Companies Act 2006 s 1220(1).

5 Companies Act 2006 s 1220(2)(a).

6 Companies Act 2006 s 1220(2)(b).

7 Companies Act 2006 s 1220(2)(c).

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999. Application for recognition of professional qualification.

A qualifying body¹ may apply to the Secretary of State² for an order declaring a qualification offered by it to be a recognised professional qualification for these purposes³ (a 'recognition order')⁴. Any such application must be made in such manner as the Secretary of State may direct⁵ and accompanied by such information as the Secretary of State may reasonably require⁶ for the purpose of determining the application⁷. Every application must be accompanied by a copy of the applicant's rules and a copy of any guidance⁸ issued by the applicant in writing⁹.

1 As to the meaning of 'qualifying body' see PARA 998.

2 As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

3 le for the purposes of the Companies Act 2006 Pt 42 (ss 1209-1264); see PARA 959 et seq.

4 Companies Act 2006 s 1220(3), Sch 11 para 1(1). In Pt 42 'a recognised qualifying body' means a qualifying body offering a recognised professional qualification: Sch 11 para 1(2). The Secretary of State may by regulations prescribe periodical fees to be paid by every recognised qualifying body (s 1251(2)(b)). At the date at which this volume states the law no such fees had been prescribed (the Company Auditors (Recognition Orders) (Application Fees) Regulations 1990, SI 1990/1206, which previously made provision in this regard, having been revoked by the Company Auditors (Recognition Orders) (Application Fees) and the Companies Act 1989 (Recognised Supervisory Bodies) (Periodical Fees) (Revocation) Regulations 2005, SI 2005/2243). The powers of the Secretary of State in relation to the making of recognition orders have been transferred to the Professional Oversight Board (see note 2; and PARA 960) which accordingly has the function of determining whether to prescribe any fee to replace the fees prescribed in the revoked regulations. Such fees will not be prescribed by statutory instrument. Fees received by the Secretary of State by virtue of the Companies Act 2006 Pt 42 are to be paid into the Consolidated Fund: s 1251(3).

5 The directions and requirements given or imposed under the Companies Act 2006 Sch 11 para 1(3), (4) may differ as between different applications: Sch 11 para 1(5).

6 See note 5.

7 Companies Act 2006 Sch 11 para 1(3). The Secretary of State may require any information to be furnished under Sch 11 para 1 to be in such form or verified in such manner as he may specify (Sch 11 para 1(6)) and at any time after receiving an application and before determining it may require the applicant to furnish additional information (Sch 11 para 1(4)). In the case of examination standards, the verification required may include independent moderation of the examinations over such a period as the Secretary of State considers necessary: Sch 11 para 1(7).

8 le any guidance or recommendation:

402 (1) issued or made by it to all or any class of persons holding or seeking to hold a qualification, or approved or seeking to be approved by the body for the purposes of giving practical training (Sch 11 para 1(9)(a));

403 (2) relevant for the purposes of Pt 42 (Sch 11 para 1(9)(b)); and

404 (3) intended to have continuing effect (Sch 11 para 1(9)(c)),

including any guidance or recommendation relating to:

405 (a) admission to or expulsion from a course of study leading to a qualification (Sch 11 para 1(10)(a));

406 (b) the award or deprivation of a qualification (Sch 11 para 1(10)(b)); and

407 (c) the approval of a person for the purposes of giving practical training or the withdrawal of such an approval (Sch 11 para 1(10)(c)),

so far as relevant for the purposes of Pt 42 (Sch 11 para 1(10)).

9 Companies Act 2006 Sch 11 para 1(8).

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1000. Entry requirements.

In order to be recognisable as a professional qualification¹ a qualification must only be open to persons who have attained university entrance level² or have a sufficient period of professional experience³.

¹ As to the requirement for a recognised professional qualification see PARA 997. As to applications for the recognition of a professional qualification see PARA 999 et seq.

² In relation to a person who has not been admitted to a university or other similar establishment in the United Kingdom, 'attaining university entrance level' means:

408 (1) being educated to such a standard as would entitle him to be considered for such admission on the basis of academic or professional qualifications obtained in the United Kingdom and recognised by the Secretary of State to be of an appropriate standard or academic or professional qualifications obtained outside the United Kingdom which the Secretary of State considers to be of an equivalent standard (Companies Act 2006 Sch 11 para 6(2)(a)); or

409 (2) being assessed, on the basis of written tests of a kind appearing to the Secretary of State to be adequate for the purpose (with or without oral examination), as of such a standard of ability as would entitle him to be considered for such admission (Sch 11 para 6(2)(b)).

The assessment, tests and oral examination referred to in Sch 11 para 6(2)(b) may be conducted by the qualifying body or some other body approved by the Secretary of State: Sch 11 para 6(3). As to the meaning of

'qualifying body' see PARA 998. As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

3 Companies Act 2006 Sch 11 para 6(1). The reference to 'a sufficient period of professional experience' is to not less than seven years' experience in a professional capacity in the fields of finance, law and accountancy: Sch 11 para 6(3).

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1001. Requirement for theoretical instruction or sufficient period of professional experience.

In order to be recognisable as a professional qualification¹ a qualification must be restricted to persons who have completed a course of theoretical instruction in the prescribed subjects² or have a sufficient period of professional experience³.

1 As to the requirement for a recognised professional qualification see PARA 997. As to applications for the recognition of a professional qualification see PARA 999 et seq.

2 I.e. the subjects prescribed for the purposes of the Companies Act 2006 Sch 11 para 8: see PARA 1002.

3 Companies Act 2006 Sch 11 para 7(1). The reference to 'a sufficient period of professional experience' is to not less than seven years' experience in a professional capacity in the fields of finance, law and accountancy (Sch 11 para 7(2)), although periods of theoretical instruction in the fields of finance, law and accountancy may be deducted from the required period of professional experience provided the instruction lasted at least one year and is attested by an examination recognised by the Secretary of State for these purposes (Sch 11 para 10(1)). The period of professional experience may not be so reduced by more than four years: Sch 11 para 10(1). The period of professional experience together with the practical training required in the case of persons satisfying the requirement in Sch 11 para 7 by virtue of having a sufficient period of professional experience must not be shorter than the course of theoretical instruction referred to in Sch 11 para 7 and the practical training required in the case of persons satisfying the requirement thereof by virtue of having completed such a course: Sch 11 para 10(2).

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1002. Examination.

In order to be recognisable as a professional qualification¹ a qualification must be restricted to persons who have passed an examination (at least part of which is in writing) testing:

- 1920 (1) theoretical knowledge of the subjects prescribed for these purposes by regulations made by the Secretary of State²; and
 1921 (2) ability to apply that knowledge in practice³,

and requiring a standard of attainment at least equivalent to that required to obtain a degree from a university or similar establishment in the United Kingdom⁴.

1 As to the requirement for a recognised professional qualification see PARA 997. As to applications for the recognition of a professional qualification see PARA 999 et seq.

2 Companies Act 2006 Sch 11 para 8(1)(a). The qualification may be awarded to a person without his theoretical knowledge of a subject being tested by examination if he has passed a university or other examination of equivalent standard in that subject or holds a university degree or equivalent qualification in it: Sch 11 para 8(2).

As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq. Pursuant to the transfer of the Secretary of State's powers to the Professional Oversight Board, the Board (which is part of the Financial Reporting Council) has made the Statutory Auditors (Examination) Instrument 2008 (Ref: POB 03/2008). This instrument is made by the Professional Oversight Board subject to the provisions of the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, art 3(1)(c), and the Companies Act 2006 Sch 13. The instrument is available at the Financial Reporting Council's website which, at the date at which this volume states the law, is <http://www.frc.org.uk>.

3 Companies Act 2006 Sch 11 para 8(1)(b). The qualification may be awarded to a person without his ability to apply his theoretical knowledge of a subject in practice being tested by examination if he has received practical training in that subject which is attested by an examination or diploma recognised by the Secretary of State for these purposes: Sch 11 para 8(3).

4 Companies Act 2006 Sch 11 para 8(1).

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1003. Practical training.

In order to be recognisable as a professional qualification¹ a qualification must be restricted to persons who have completed at least three years' practical training² of which:

- 1922 (1) part was spent being trained in statutory audit work³; and
 1923 (2) a substantial part was spent being trained in statutory audit work or other audit work of a description approved by the Secretary of State as being similar to statutory audit work⁴.

1 As to the requirement for a recognised professional qualification see PARA 997. As to applications for the recognition of a professional qualification see PARA 999 et seq.

2 The training must be given by persons approved by the body offering the qualification as persons whom the body is satisfied, in the light of undertakings given by them and the supervision to which they are subject (whether by the body itself or some other body or organisation), will provide adequate training: Companies Act 2006 Sch 11 para 9(3). At least two-thirds of the training must be given by a person eligible for appointment as a statutory auditor or eligible for a corresponding appointment as an auditor under the law of an EEA State, or part of an EEA State, other than the United Kingdom: Sch 11 para 9(4) (amended by SI 2004/3494). As to the

meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969. As to 'EEA State' see PARA 978 note 3.

3 Companies Act 2006 Sch 11 para 9(1)(a). For these purposes 'statutory audit work' includes the work of a person appointed as the auditor of a person under the law of a country or territory outside the United Kingdom where it appears to the Secretary of State that the law and practice with respect to the audit of accounts is similar to that in the United Kingdom: Sch 11 para 9(2). As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

4 Companies Act 2006 Sch 11 para 9(1)(b).

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1004. The body offering the qualification.

In order for a qualification to be recognisable as a professional qualification¹ the body offering the qualification must have:

- 1924 (1) rules² and arrangements adequate to ensure compliance with the requirements³ relating to entry, instruction, examination and training⁴; and
- 1925 (2) adequate arrangements for the effective monitoring of its continued compliance with those requirements⁵.

1 As to the requirement for a recognised professional qualification see PARA 997. As to applications for the recognition of a professional qualification see PARA 999 et seq.

2 As to the rules of a qualifying body see PARA 998.

3 ie the requirements of the Companies Act 2006 Sch 11 paras 6-10: see PARAS 1000-1001.

4 Companies Act 2006 Sch 11 para 11(1)(a).

5 Companies Act 2006 Sch 11 para 11(1)(b). The arrangements must include arrangements for monitoring the standard of the body's examinations and the adequacy of the practical training given by the persons approved by it for that purpose: Sch 11 para 11(2).

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1005. Grant and refusal of recognition.

The Secretary of State¹ may, on an application duly made² and after being furnished with all such information as he may require³, make or refuse to make a recognition order⁴ in respect of

the qualification in relation to which the application was made⁵. The Secretary of State may make a recognition order only if it appears to him, from the information furnished by the applicant and having regard to any other information in his possession, that the recognition requirements⁶ are satisfied in relation to the qualification⁷.

1 As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

2 In accordance with the Companies Act 2006 Sch 11 para 1: see PARA 999.

3 See note 2.

4 As to the meaning of 'recognition order' see PARA 999.

5 Companies Act 2006 Sch 11 para 2(1). As to the requirement for a recognised professional qualification see PARA 997. As to applications for the recognition of a professional qualification see PARA 999 et seq. A recognition order must state the date on which it takes effect: Sch 11 para 2(4).

6 In the requirements of the Companies Act 2006 Sch 11 Pt 2 (paras 6-11) (see PARAS 1000-1004).

7 Companies Act 2006 Sch 11 para 2(2). Where the Secretary of State refuses an application for a recognition order he must give the applicant a written notice to that effect specifying which requirements, in his opinion, are not satisfied: Sch 11 para 2(4).

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1006. Revocation of recognition.

A recognition order¹ may be revoked by a further order made by the Secretary of State² if at any time it appears to him:

1926 (1) that any of the recognition requirements³ is not satisfied in relation to the qualification to which the recognition order relates⁴; or

1927 (2) that the qualifying body has failed to comply with any obligation imposed on it by or by virtue of the statutory provisions⁵ relating to statutory auditors⁶.

Before revoking a recognition order the Secretary of State must:

1928 (a) give written notice⁷ of his intention to do so to the qualifying body⁸;

1929 (b) take such steps as he considers reasonably practicable for bringing the notice to the attention of persons holding the qualification or in the course of studying for it⁹; and

1930 (c) publish the notice in such manner as he thinks appropriate for bringing it to the attention of any other persons who are in his opinion likely to be affected¹⁰.

Persons affected by the revocation¹¹ may¹² make written representations to the Secretary of State and, if desired, oral representations to a person appointed for that purpose by the Secretary of State¹³, and the Secretary of State must have regard to any representations so made in determining whether to revoke the recognition order¹⁴.

An order revoking a recognition order must state the date on which it takes effect, which must be after the period of three months beginning with the date on which the revocation order is made¹⁵, although the Secretary of State may revoke a recognition order without regard to this restriction if in any case he considers it essential to do so in the public interest¹⁶.

A recognition order may also be revoked at the request or with the consent of the recognised body¹⁷.

1 As to the meaning of 'recognition order' see PARA 999.

2 As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

An order revoking a recognition order may contain such transitional provision as the Secretary of State thinks necessary or expedient: Companies Act 2006 Sch 11 para 3(9). On making an order revoking a recognition order the Secretary of State must give written notice of the making of the order to the qualifying body, take such steps as he considers reasonably practicable for bringing the making of the order to the attention of persons holding the qualification or in the course of studying for it, and publish a notice of the making of the order in such manner as he thinks appropriate for bringing it to the attention of any other persons who are in his opinion likely to be affected: Sch 11 para 3(11). As to the meaning of 'qualifying body' see PARA 998.

3 Ie the requirements of the Companies Act 2006 Sch 11 Pt 2 (paras 6-11) (see PARAS 1000-1004). If the recognition requirements are not complied with the Secretary of State may, as an alternative to revoking the recognition under these provisions, apply for a compliance order: see s 1225; and PARA 1013.

4 Companies Act 2006 Sch 11 para 3(1)(a).

5 Ie the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARAS 959-968).

6 Companies Act 2006 Sch 11 para 3(1)(b).

7 A notice under the Companies Act 2006 Sch 11 para 3(3) must state the reasons for which the Secretary of State proposes to act and give particulars of the rights conferred by Sch 11 para 3(5) (see the text and notes 13-17): Sch 11 para 3(4).

8 Companies Act 2006 Sch 11 para 3(3)(a).

9 Companies Act 2006 Sch 11 para 3(3)(b).

10 Companies Act 2006 Sch 11 para 3(3)(c).

11 Ie the qualifying body on which a notice is served under the Companies Act 2006 Sch 11 para 3(3) (see the text and notes 7-10), any person holding the qualification or in the course of studying for it and any other person who appears to the Secretary of State to be affected: Sch 11 para 3(6).

12 Ie within the period of three months beginning with the date of service or publication of the notice under the Companies Act 2006 Sch 11 para 3(3) or such longer period as the Secretary of State may allow: Sch 11 para 3(5).

13 Companies Act 2006 Sch 11 para 3(5).

14 Companies Act 2006 Sch 11 para 3(7).

15 Companies Act 2006 Sch 11 para 3(2).

16 Companies Act 2006 Sch 11 para 3(8). The Secretary of State may revoke a recognition order in these circumstances even if no notice has been given or published under Sch 10 para 3(3) (see the text and notes 7-10) or the period of time for making representations in pursuance of such a notice has not expired: Sch 11 para 3(8).

17 Companies Act 2006 Sch 11 para 3(10). Any such revocation is not subject to the restrictions imposed by Sch 11 para 3(1), (2) (see the text and notes 1-6, 15) or the requirements of Sch 11 para 3(3)-(5), (7) (see the text and notes 7-14): Sch 11 para 3(10).

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1007. Approval of third country qualifications.

The Secretary of State¹ may declare that:

- 1931 (1) persons who are qualified to audit accounts under the law of a specified third country²; or
- 1932 (2) persons who hold a specified professional qualification in accountancy obtained in a specified third country³,

are to be regarded⁴ as holding an approved third country qualification⁵. The Secretary of State may make such a declaration only if he is satisfied that the holding of the qualification in question⁶ affords an assurance of professional competence equivalent to that afforded by a recognised professional qualification⁷ and that the treatment that the persons who are the subject of the declaration will receive as a result of it is comparable to the treatment which is, or is likely to be, afforded to comparable persons⁸ in the specified third country or a part of it⁹. Any declaration under these provisions must be expressed to be subject to the requirement that any person to whom the declaration relates must pass an aptitude test¹⁰, unless an aptitude test is not required¹¹.

The Secretary of State may¹² withdraw a declaration¹³ in relation to persons becoming qualified to audit accounts under the law of the specified third country after such date as he may specify or persons obtaining the specified professional qualification after such date as he may specify¹⁴.

1 As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

2 Companies Act 2006 s 1221(1)(a) (s 1221(1), (3)-(7) amended, s 1221(1A), (7A), (7B) added, by SI 2007/3494).

3 Companies Act 2006 s 1221(1)(b) (as amended: see note 2). A declaration under s 1221(1)(b) may be expressed to be subject to the satisfaction of any specified requirement or requirements: s 1221(2). The Secretary of State may, if he thinks fit, having regard to the considerations mentioned in s 1221(3), (4) (see the text and notes 6-9), vary or revoke a requirement specified under s 1221(2) from such date as he may specify: s 1221(8).

4 Ie for the purposes of the Companies Act 2006 Pt 42 Ch 2 (ss 1212-1225): see PARA 969 et seq.

5 Companies Act 2006 s 1221(1) (as amended: see note 2). The Secretary of State may direct that persons holding an approved third country qualification are not to be treated as holding an appropriate qualification for the purposes of Pt 42 Ch 2 unless they hold such additional educational qualifications as the Secretary of State may specify for the purpose of ensuring that such persons have an adequate knowledge of the law and practice in the United Kingdom relevant to the audit of accounts: s 1221(5) (as so amended). The Secretary of State may give different directions in relation to different approved third country qualifications: s 1221(6) (as so amended).

6 Ie, in the case of a declaration under the Companies Act 2006 s 1221(1)(a), the fact that the persons in question are qualified to audit accounts under the law of the specified third country, or in the case of a declaration under s 1221(1)(b), the specified professional qualification taken with any requirement or requirements to be specified under s 1221(2): s 1221(3) (as amended: see note 2).

7 Companies Act 2006 s 1221(3) (as amended: see note 2). As to the requirement for a recognised professional qualification see PARA 997. As to applications for the recognition of a professional qualification see PARA 999 et seq.

8 Ie, in the case of a declaration under the Companies Act 2006 s 1221(1)(a), some or all persons who are eligible to be appointed as a statutory auditor, and in the case of a declaration under s 1221(1)(b), some or all persons who hold a corresponding recognised professional qualification: s 1221(4) (as amended: see note 2). As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969.

9 Companies Act 2006 s 1221(4) (as amended: see note 2).

10 Ie in accordance with the Companies Act 2006 s 1221(7A) (as added: see note 2), which provides that an aptitude test required for these purposes:

410 (1) must test the person's knowledge of subjects that are covered by a recognised professional qualification, that are not covered by the professional qualification already held by the person and the knowledge of which is essential for the pursuit of the profession of statutory auditor;

411 (2) may test the person's knowledge of rules of professional conduct; and

412 (3) must not test the person's knowledge of any other matters.

11 Companies Act 2006 s 1221(1A) (as added: see note 2). No aptitude test is required for these purposes if the subjects that are covered by a recognised professional qualification and the knowledge of which is essential for the pursuit of the profession of statutory auditor are covered by the professional qualification already held by the person: s 1221(7B) (as so added).

12 Ie if he thinks fit and having regard to the considerations mentioned in the Companies Act 2006 s 1221(3), (4) (see the text and notes 6-9).

13 Ie a declaration under the Companies Act 2006 s 1221(1) (see the text and notes 1-5).

14 Companies Act 2006 s 1221(7) (as amended: see note 2).

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1008. Eligibility of individuals retaining only authorisation under the Companies Act 1967.

A person whose only appropriate qualification is based on his retention of an authorisation originally granted¹ by the Board of Trade or the Secretary of State² is eligible only for appointment as auditor of an unquoted company³.

1 Ie under the Companies Act 1967 s 13(1) (repealed).

2 As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

3 Companies Act 2006 s 1222(1). A company is 'unquoted' if, at the time of the person's appointment, neither the company, nor any parent undertaking of which it is a subsidiary undertaking, is a quoted company within the meaning of s 385(2) (see PARA 77): s 1222(2). As to the meaning of 'company' see PARA 24. As to the meanings of 'parent undertaking' and 'subsidiary undertaking' see PARA 971 note 7. References to a person

eligible for appointment as a statutory auditor by virtue of Pt 42 (ss 1209-1264) (see PARAS 959-968) in enactments relating to eligibility for appointment as auditor of a person other than a company do not include a person to whom s 1222 applies: s 1222(3).

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(D) REQUIRED DISCLOSURES

1009. Secretary of State's power to require matters to be notified to him.

The Secretary of State¹ may require a recognised supervisory body² or a recognised qualifying body³:

1933 (1) to notify him immediately of the occurrence of such events as he may specify in writing and to give him such information in respect of those events as is so specified⁴; and

1934 (2) to give him, at such times or in respect of such periods as he may specify in writing, such information as is so specified⁵.

1 As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

2 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

3 As to the meaning of 'qualifying body' see PARA 998. As to applications for recognition as a qualifying body see PARA 998 et seq.

4 Companies Act 2006 s 1223(1)(a). The notices and information required to be given must be such as the Secretary of State may reasonably require for the exercise of his functions under Pt 42 (ss 1209-1264) (see PARAS 959-968): s 1223(2). The Secretary of State may require information given under s 1223 to be given in a specified form or verified in a specified manner: s 1223(3). Any notice or information required to be given under s 1223 must be given in writing unless the Secretary of State specifies or approves some other manner: s 1223(4). Accordingly, if the body known as the Professional Oversight Board established under the articles of association of the Financial Reporting Council Limited (the 'second designated body') requires a notification or the provision of information for the purposes of s 1223(1), it must notify the Secretary of State of the requirement without undue delay: Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, art 9(1). If the Secretary of State so requests, the second designated body must send to him a copy of any such notification or information received pursuant to the requirement: art 9(2).

5 Companies Act 2006 s 1223(1)(b). See note 4.

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1010. Notification of matters relevant to other EEA States.

A recognised supervisory body¹ must notify the Secretary of State² of any withdrawal of a notifiable person's³ eligibility for appointment as a statutory auditor⁴ and the reasons for the withdrawal⁵. A recognised supervisory body must also notify the Secretary of State of any reasonable grounds it has for suspecting that:

- 1935 (1) a person has contravened the law of the United Kingdom, or any other EEA State⁶ or part of an EEA State, implementing the Audit Directive⁷; and
- 1936 (2) the act or omission constituting that contravention took place on the territory of an EEA State other than the United Kingdom⁸.

1 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

2 As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

3 'Notifiable person' means a member of the recognised supervisory body in question who is also an EEA auditor and in respect of whom the EEA competent authority is not the recognised supervisory body itself: Companies Act 2006 s 1223A(3). As to the meanings of 'EEA auditor' and 'EEA competent authority' see PARA 978 note 3.

4 Companies Act 2006 s 1223A(1)(a) (s 1223A added by SI 2007/3494). As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969.

5 Companies Act 2006 s 1223A(1)(b) (as added: see note 4).

6 As to 'EEA State' see PARA 978 note 3.

7 Companies Act 2006 s 1223A(2)(a) (as added: see note 4). As to the Audit Directive see PARA 978 note 3.

8 Companies Act 2006 s 1223A(2)(b) (as added: see note 4).

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1011. Secretary of State's power to call for information.

The Secretary of State¹ may by notice in writing require:

- 1937 (1) any recognised supervisory body²;
- 1938 (2) any recognised qualifying body³; and
- 1939 (3) any person eligible⁴ for appointment as a statutory auditor⁵,

to give him such information as he may reasonably require for the exercise of his functions⁶. The Secretary of State may require that any information which he so requires is to be given within such reasonable time and verified in such manner as he may specify⁷.

- 1 As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.
- 2 Companies Act 2006 s 1224(2)(a). As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.
- 3 Companies Act 2006 s 1224(2)(b). As to the meaning of 'qualifying body' see PARA 998. As to applications for recognition as a qualifying body see PARA 998 et seq.
- 4 le by virtue of the Companies Act 2006 Pt 42 Ch 2 (ss 1212-1225): see PARA 969 et seq.
- 5 Companies Act 2006 s 1224(2)(c). As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969.
- 6 Companies Act 2006 s 1224(1). The 'functions' of the Secretary of State referred to in the text are his functions under Pt 42 (ss 1209-1264) (see PARAS 959-968).
- 7 Companies Act 2006 s 1224(3).

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1012. Restrictions on disclosure.

No information¹ relating to the private affairs of an individual or to any particular business that is provided to:

- 1940 (1) a recognised supervisory body²;
- 1941 (2) a recognised qualifying body³;
- 1942 (3) a body performing functions⁴ relating to monitoring and investigation⁵;
- 1943 (4) the Independent Supervisor⁶; or
- 1944 (5) the Secretary of State or a body designated by the Secretary of State⁷,

in connection with the exercise of its functions⁸ may, during the lifetime of the individual or so long as the business continues to be carried on, be disclosed without the consent of that individual or (as the case may be) the person for the time being carrying on that business⁹. This restriction does not, however, apply to:

- 1945 (a) any disclosure of information that is made for the purpose of facilitating the carrying out by the body of any of its functions¹⁰;
- 1946 (b) any disclosure of information that is made to a specified person¹¹;
- 1947 (c) any disclosure of information that is of a specified description¹²;
- 1948 (d) any disclosure of information that is made to a specified overseas regulatory body¹³;
- 1949 (e) the disclosure by an EEA competent authority of information disclosed to it¹⁴ by the body¹⁵; or
- 1950 (f) the disclosure of such information by anyone who has obtained it directly or indirectly from an EEA competent authority¹⁶.

Failure to comply with these requirements is an offence¹⁷ unless the person who discloses the information did not know, and had no reason to suspect, that the information had been

provided as described above¹⁸ or took all reasonable steps and exercised all due diligence to avoid the commission of the offence¹⁹.

1 le information in whatever form: Companies Act 2006 s 1224A(1) (ss 1224A, 1224B, Sch 11A added by SI 2007/3494).

2 Companies Act 2006 s 1224A(1), (2)(a) (as added: see note 1). As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

3 Companies Act 2006 s 1224A(2)(b) (as added: see note 1). As to the meaning of 'qualifying body' see PARA 998. As to applications for recognition as a qualifying body see PARA 998 et seq.

4 le for the purposes of arrangements within the Companies Act 2006 Sch 10 para 23(1) (independent monitoring of certain audits: see PARA 986) or Sch 10 para 24(1) (independent investigation of public interest cases: see PARA 989).

5 Companies Act 2006 s 1224A(2)(c) (as added: see note 1).

6 Companies Act 2006 s 1224A(2)(d) (as added: see note 1). As to the Independent Supervisor see PARA 1018.

7 Companies Act 2006 s 1224A(2)(e), (f) (as added: see note 1). As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

8 le under the Companies Act 2006 Pt 42 Ch 2 (ss 1212-1225) (see PARA 969 et seq) or ss 522-524 (notification to appropriate audit authority of resignation or removal of auditor: see PARAS 945-948).

9 Companies Act 2006 s 1224A(3) (as added: see note 1). Section 1224A does not prohibit the disclosure of information if the information is or has been available to the public from any other source: s 1224A(6) (as so added). Nothing in s 1224A authorises the making of a disclosure in contravention of the Data Protection Act 1998: s 1224A(6) (as so added).

10 Companies Act 2006 s 1224A(4)(a) (as added: see note 1).

11 Companies Act 2006 s 1224A(4)(b) (as added: see note 1). By virtue of Sch 11A Pt 1 (paras 1-17) (as so added) the specified persons are:

413 (1) the Secretary of State;

414 (2) the Department of Enterprise, Trade and Investment for Northern Ireland;

415 (3) the Treasury;

416 (4) the Bank of England;

417 (5) the Financial Services Authority;

418 (6) the Commissioners for Her Majesty's Revenue and Customs.

419 (7) the Lord Advocate;

420 (8) the Director of Public Prosecutions;

421 (9) the Director of Public Prosecutions for Northern Ireland;

422 (10) a constable;

423 (11) a procurator fiscal;

424 (12) the Scottish Ministers;

425 (13) a body designated by the Secretary of State under s 1252 (delegation of the Secretary of State's functions: see PARA 960 et seq);

426 (14) a recognised supervisory body;

- 427 (15) a recognised qualifying body;
- 428 (16) a body with which a recognised supervisory body is participating in arrangements for the purposes of Sch 10 para 23 (independent monitoring of audits: see PARA 986) or Sch 10 para 24 (independent investigation for disciplinary purposes: see PARA 989); and
- 429 (17) the Independent Supervisor.

12 Companies Act 2006 s 1224A(4)(c) (as added: see note 1). By virtue of Sch 11A Pt 2 (paras 18-78) (as so added) the specified descriptions of disclosure are:

- 430 (1) a disclosure for the purpose of enabling or assisting a person authorised under s 457 (persons authorised to apply to court in respect of defective accounts and reports under s 456: see PARA 902) to exercise his functions;
- 431 (2) a disclosure for the purpose of enabling or assisting an inspector appointed under the Companies Act 1985 Pt 14 (ss 431-453D) (investigation of companies and their affairs, etc: see PARA 1541) to exercise his functions;
- 432 (3) a disclosure for the purpose of enabling or assisting a person authorised under s 447 (power to require production of documents: see PARA 1558) or the Companies Act 1989 s 84 (exercise of powers by officer etc: see PARA 1570) to exercise his functions;
- 433 (4) a disclosure for the purpose of enabling or assisting a person appointed under the Financial Services and Markets Act 2000 s 167 (general investigations: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 449) to conduct an investigation to exercise his functions;
- 434 (5) a disclosure for the purpose of enabling or assisting a person appointed under s 168 (investigations in particular cases: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 449) to conduct an investigation to exercise his functions;
- 435 (6) a disclosure for the purpose of enabling or assisting a person appointed under s 169(1)(b) (investigation in support of overseas regulator: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 450) to conduct an investigation to exercise his functions;
- 436 (7) a disclosure for the purpose of enabling or assisting the body corporate responsible for administering the scheme referred to in s 225 (the ombudsman scheme: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 575) to exercise its functions;
- 437 (8) a disclosure for the purpose of enabling or assisting a person appointed under Sch 17 para 4 (the panel of ombudsmen: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 576) or Sch 17 para 5 (the Chief Ombudsman: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 576) to exercise his functions;
- 438 (9) a disclosure for the purpose of enabling or assisting a person appointed under regulations made under s 262(1), (2)(k) (investigations into open-ended investment companies: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 621) to conduct an investigation to exercise his functions;
- 439 (10) a disclosure for the purpose of enabling or assisting a person appointed under s 284 (investigations into affairs of certain collective investment schemes: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 683) to conduct an investigation to exercise his functions;
- 440 (11) a disclosure for the purpose of enabling or assisting the investigator appointed under Sch 1 para 7 (arrangements for investigation of complaints: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 36) to exercise his functions;
- 441 (12) a disclosure for the purpose of enabling or assisting a person appointed by the Treasury to hold an inquiry into matters relating to financial services (including an inquiry under s 15: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 11) to exercise his functions;
- 442 (13) a disclosure for the purpose of enabling or assisting the Secretary of State or the Treasury to exercise any of their functions under the Companies Acts, ie the Criminal Justice Act 1993 Pt V (ss 52-64) (insider dealing) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**), the Insolvency Act 1986 (see **COMPANY AND PARTNERSHIP INSOLVENCY**), the Company Directors Disqualification Act 1986 (see PARA 1575 et seq), the Companies Act 2006 Pt 42 (statutory auditors), the Companies Act 1989 Pt III (ss 55-91) (investigations and powers to obtain information: see PARAS 1568 et seq) or Pt VII (ss 154-191) (financial markets and insolvency: see **FINANCIAL SERVICES AND**

INSTITUTIONS vol 48 (2008) PARA 509 et seq) or the Financial Services and Markets Act 2000 (see **FINANCIAL SERVICES AND INSTITUTIONS**);

- 443 (14) a disclosure for the purpose of enabling or assisting the Scottish Ministers to exercise their functions under the enactments relating to insolvency;
- 444 (15) a disclosure for the purpose of enabling or assisting the Department of Enterprise, Trade and Investment for Northern Ireland to exercise any powers conferred on it by the enactments relating to companies or insolvency;
- 445 (16) a disclosure for the purpose of enabling or assisting a person appointed or authorised by the Department of Enterprise, Trade and Investment for Northern Ireland under the enactments relating to companies or insolvency to exercise his functions;
- 446 (17) a disclosure for the purpose of enabling or assisting the Pensions Regulator to exercise the functions conferred on it by or by virtue of any of the Pension Schemes Act 1993, the Pensions Act 1995, the Welfare Reform and Pensions Act 1999, the Pensions Act 2004 or any enactment in force in Northern Ireland corresponding to any of those enactments (see **SOCIAL SECURITY AND PENSIONS**);
- 447 (18) a disclosure for the purpose of enabling or assisting the Board of the Pension Protection Fund to exercise the functions conferred on it by or by virtue of the Pensions Act 2004 Pt 2 (ss 107-220) (see **SOCIAL SECURITY AND PENSIONS**) or any enactment in force in Northern Ireland corresponding to Pt 2;
- 448 (19) a disclosure for the purpose of enabling or assisting the Bank of England, the European Central Bank or the central bank of any country or territory outside the United Kingdom, to exercise its functions;
- 449 (20) a disclosure for the purpose of enabling or assisting the Commissioners for Her Majesty's Revenue and Customs to exercise their functions;
- 450 (21) a disclosure for the purpose of enabling or assisting organs of the Society of Lloyd's (being organs constituted by or under the Lloyd's Act 1982) to exercise their functions under or by virtue of the Lloyd's Acts 1871 to 1982 (see **INSURANCE** vol 25 (2003 Reissue) PARA 24);
- 451 (22) a disclosure for the purpose of enabling or assisting the Office of Fair Trading to exercise its functions under any of the Fair Trading Act 1973 (see **COMPETITION**), the Consumer Credit Act 1974 (see **CONSUMER CREDIT**), the Estate Agents Act 1979 (see **AGENCY** vol 1 (2008) PARAS 239-281), the Competition Act 1980 (see **COMPETITION**), the Competition Act 1998 (see **COMPETITION**), the Financial Services and Markets Act 2000 (see **FINANCIAL SERVICES AND INSTITUTIONS**), the Enterprise Act 2002 (see **COMPETITION**), the Control of Misleading Advertisements Regulations 1988, SI 1988/915 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 731-739), or the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 452-466);
- 452 (23) a disclosure for the purpose of enabling or assisting the Competition Commission to exercise its functions under any of the Fair Trading Act 1973, the Competition Act 1980, the Competition Act 1998 or the Enterprise Act 2002;
- 453 (24) a disclosure with a view to the institution of, or otherwise for the purposes of, proceedings before the Competition Appeal Tribunal;
- 454 (25) a disclosure for the purpose of enabling or assisting an enforcer under the Enterprise Act 2002 Pt 8 (ss 210-236) (enforcement of consumer legislation: see **COMPETITION** vol 18 (2009) PARA 339 et seq) to exercise its functions under Pt 8;
- 455 (26) a disclosure for the purpose of enabling or assisting the Takeover Panel to perform any of its functions under the Companies Act 2006 Pt 28 (ss 942-992) (takeovers etc: see PARAS 1480-1520);
- 456 (27) a disclosure for the purpose of enabling or assisting the Charity Commission to exercise its functions;
- 457 (28) a disclosure for the purpose of enabling or assisting the Attorney General to exercise his functions in connection with charities;

- 458 (29) a disclosure for the purpose of enabling or assisting the National Lottery Commission to exercise its functions under the National Lottery etc Act 1993 ss 5-10 (licensing: see **LICENSING AND GAMBLING** vol 68 (2008) PARA 691 et seq), 15 (power of Secretary of State to require information: see **LICENSING AND GAMBLING** vol 67 (2008) PARA 7);
- 459 (30) a disclosure by the National Lottery Commission to the National Audit Office for the purpose of enabling or assisting the Comptroller and Auditor General to carry out an examination under the National Audit Act 1983 Pt 2 (ss 6-9) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 717, 724, 726) into the economy, effectiveness and efficiency with which the National Lottery Commission has used its resources in discharging its functions under the National Lottery etc Act 1993 ss 5-10;
- 460 (31) a disclosure for the purpose of enabling or assisting a qualifying body under the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 452-466), to exercise its functions thereunder;
- 461 (32) a disclosure for the purpose of enabling or assisting an enforcement authority under the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 673-678), to exercise its functions thereunder;
- 462 (33) a disclosure for the purpose of enabling or assisting an enforcement authority under the Financial Services (Distance Marketing) Regulations 2004, SI 2004/2095 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 84) to exercise its functions thereunder;
- 463 (34) a disclosure for the purpose of enabling or assisting a local weights and measures authority in England and Wales to exercise its functions under the Enterprise Act 2002 s 230(2) (notice of intention to prosecute, etc: see **COMPETITION** vol 18 (2009) PARA 359);
- 464 (35) a disclosure for the purpose of enabling or assisting the Financial Services Authority to exercise its functions under any of the legislation relating to friendly societies or to industrial and provident societies, the Building Societies Act 1986 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1856 et seq), the Companies Act 1989 Pt VII (ss 154-191) (financial markets and insolvency: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 509 et seq) or the Financial Services and Markets Act 2000 (see **FINANCIAL SERVICES AND INSTITUTIONS**);
- 465 (36) a disclosure for the purpose of enabling or assisting the competent authority for the purposes of the Financial Services and Markets Act 2000 Pt 6 (ss 72-103) (official listing: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 385-436) to exercise its functions thereunder;
- 466 (37) a disclosure for the purpose of enabling or assisting a body corporate established in accordance with the Financial Services and Markets Act 2000 s 212(1) (compensation scheme manager: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 583) to exercise its functions;
- 467 (38) a disclosure for the purpose of enabling or assisting a recognised investment exchange (as defined by s 285: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 684) or a recognised clearing house (as defined by s 285) to exercise its functions as such;
- 468 (39) a disclosure for the purpose of enabling or assisting a person approved under the Uncertificated Securities Regulations 2001, SI 2001/3755 as an operator of a relevant system (within the meaning thereof) (see PARA 421) to exercise his functions;
- 469 (40) a disclosure for the purpose of enabling or assisting a body designated under the Financial Services and Markets Act 2000 s 326(1) (designated professional bodies: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 749) to exercise its functions in its capacity as a body designated thereunder;
- 470 (41) a disclosure with a view to the institution of, or otherwise for the purposes of, civil proceedings arising under or by virtue of the Financial Services and Markets Act 2000;
- 471 (42) a disclosure for the purpose of enabling or assisting a body designated by order under the Companies Act 2006 s 1252 (delegation of functions of Secretary of State: see PARA 960) to exercise its functions under Pt 42 (statutory auditors);
- 472 (43) a disclosure for the purpose of enabling or assisting a recognised supervisory or qualifying body, within the meaning of Pt 42 (see notes 2, 3), to exercise its functions as such;

- 473 (44) a disclosure for the purpose of making available to an audited person information relating to a statutory audit of that person's accounts;
- 474 (45) a disclosure for the purpose of making available to the public information relating to monitoring or inspections carried out under arrangements within Sch 10 para 23(1) (arrangements for independent monitoring of audits of listed companies and other major bodies: see PARA 986), provided such information does not identify any audited person;
- 475 (46) a disclosure for the purpose of enabling or assisting an official receiver (including the Accountant in Bankruptcy in Scotland and the Official Assignee in Northern Ireland) to exercise his functions under the enactments relating to insolvency;
- 476 (47) a disclosure for the purpose of enabling or assisting the Insolvency Practitioners Tribunal to exercise its functions under the Insolvency Act 1986;
- 477 (48) a disclosure for the purpose of enabling or assisting a body that is for the time being a recognised professional body for the purposes of the Insolvency Act 1986 s 391 (recognised professional bodies: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 48; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 14) to exercise its functions as such;
- 478 (49) a disclosure for the purpose of enabling or assisting an overseas regulatory authority (as defined in the Companies Act 1989 s 82: see PARA 1568) to exercise its regulatory functions (as so defined);
- 479 (50) a disclosure for the purpose of enabling or assisting the Regulator of Community Interest Companies to exercise functions under the Companies (Audit, Investigations and Community Enterprise) Act 2004 (see PARA 83);
- 480 (51) a disclosure with a view to the institution of, or otherwise for the purposes of, criminal proceedings;
- 481 (52) a disclosure for the purpose of enabling or assisting a person authorised by the Secretary of State under the Proceeds of Crime Act 2002 Pt 2 (ss 6-91) (see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 391 et seq), or corresponding Scottish or Northern Irish provisions, to exercise his functions;
- 482 (53) a disclosure with a view to the institution of, or otherwise for the purposes of, proceedings on an application under the Company Directors Disqualification Act 1986 s 6, 7 or 8 (disqualification for unfitness: see PARA 1592 et seq);
- 483 (54) a disclosure with a view to the institution of, or otherwise for the purposes of, proceedings before the Financial Services and Markets Tribunal;
- 484 (55) a disclosure for the purposes of proceedings before the Financial Services Tribunal by virtue of the Financial Services and Markets Act 2000 (Transitional Provisions) (Partly Completed Procedures) Order 2001, SI 2001/3592 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 2047-2050);
- 485 (56) a disclosure for the purposes of proceedings before the Pensions Regulator Tribunal;
- 486 (57) a disclosure for the purpose of enabling or assisting a body appointed under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 14 (supervision of periodic accounts and reports of issuers of listed securities: see PARA 698) to exercise functions mentioned in s 14(2);
- 487 (58) a disclosure with a view to the institution of, or otherwise for the purposes of, disciplinary proceedings relating to the performance by a relevant lawyer (ie a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes a reserved legal activity (within the meaning of that Act: see **LEGAL PROFESSIONS** vol 65 (2008) PARA 512), a solicitor or barrister in Northern Ireland or a solicitor or advocate in Scotland), foreign lawyer (ie a person (other than a relevant lawyer) who is a foreign lawyer within the meaning of the Courts and Legal Services Act 1990 s 89(9)), auditor, accountant, valuer or actuary of his professional duties;
- 488 (59) a disclosure with a view to the institution of, or otherwise for the purposes of, disciplinary proceedings relating to the performance by a public servant (ie an officer or employee of the Crown) of his duties;

489 (60) a disclosure for the purpose of the provision of a summary or collection of information framed in such a way as not to enable the identity of any person to whom the information relates to be ascertained; and

490 (61) a disclosure in pursuance of any Community obligation.

13 Companies Act 2006 s 1224A(4)(d) (as added: see note 1). By virtue of Sch 11A Pt 3 (paras 79-80) (as so added) a disclosure is within the scope of this exclusion if:

491 (1) it is made to an EEA competent authority in accordance with s 1253B (requests from EEA competent authorities: see PARA 1035);

492 (2) it is a transfer of audit working papers to a third country competent authority in accordance with rules imposed under Sch 10 para 16A (transfer of papers to third countries); or

493 (3) it is a disclosure other than a transfer of audit working papers made to a third country competent authority for the purpose of enabling or assisting the authority to exercise its functions.

As to the meaning of 'EEA competent authority' see PARA 978 note 3. As to the meaning of 'audit working papers' see PARA 990 note 4. As to the meaning of 'third country competent authority' see PARA 990 note 5. As to the meaning of 'third country' see PARA 983 note 7.

14 Ie in reliance on the Companies Act 2006 s 1224A(4) (see the text and notes 10-13).

15 Companies Act 2006 s 1224A(5)(a) (as added: see note 1).

16 Companies Act 2006 s 1224A(5)(b) (as added: see note 1).

17 Companies Act 2006 s 1224B(1) (as added: see note 1). A person guilty of this offence is liable on conviction on indictment, to imprisonment for a term not exceeding two years or a fine (or both) and on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding the statutory maximum, or both: s 1224B(2) (as so added). As to the statutory maximum see PARA 1622.

18 Ie as mentioned in the Companies Act 2006 s 1224A(1): see the text and notes 1-17.

19 Companies Act 2006 s 1224B(1)(a), (b) (as added: see note 1).

UPDATE

1012 Restrictions on disclosure

NOTE 12--For **CRIMINAL LAW, EVIDENCE AND PROCEDURE** read **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 574A.

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(E) ENFORCEMENT

1013. Compliance orders.

If at any time it appears to the Secretary of State¹:

- 1951 (1) in the case of a recognised supervisory body², that any of the recognition requirements³ is not satisfied⁴;
- 1952 (2) in the case of a recognised professional qualification⁵, that any relevant requirement⁶ is not satisfied⁷; or
- 1953 (3) that a recognised supervisory body or a recognised qualifying body⁸ has failed to comply with a relevant obligation⁹,

he may, instead of revoking the relevant recognition order, make an application to the High Court, and if on such an application the court decides that the requirement in question is not satisfied or, as the case may be, that the body has failed to comply with the obligation in question, it may order the body to take such steps as the court directs for securing that the requirement is satisfied or that the obligation is complied with¹⁰.

1 As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

2 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

3 I.e. the requirements of the Companies Act 2006 Sch 10: see PARA 977 et seq.

4 Companies Act 2006 s 1225(1)(a).

5 As to the requirement for a recognised professional qualification see PARA 997. As to applications for the recognition of a professional qualification see PARA 999 et seq.

6 I.e. any requirement of the Companies Act 2006 Sch 11: see PARA 999 et seq.

7 Companies Act 2006 s 1225(1)(b).

8 As to the meaning of 'qualifying body' see PARA 998. As to applications for recognition as a qualifying body see PARA 998 et seq.

9 Companies Act 2006 s 1225(1)(c). A 'relevant obligation' is one to which the body is subject under or by virtue of Pt 42 (ss 1209-1264) (statutory auditors: see PARA 958).

10 Companies Act 2006 s 1225(2), (3).

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1014. Directions to comply with international obligations.

If it appears to the Secretary of State¹:

- 1954 (1) that any action proposed to be taken by a recognised supervisory body² or a recognised qualifying body³, the Independent Supervisor⁴ or the body designated⁵ to carry out the functions of the Secretary of State, would be incompatible with Community obligations or any other international obligations of the United Kingdom⁶; or

1955 (2) that any action which that body has power to take is required for the purpose of implementing any such obligations⁷,

he may direct the body not to take or, as the case may be, to take the action in question⁸.

1 As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

2 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

3 As to the meaning of 'qualifying body' see PARA 998. As to applications for recognition as a qualifying body see PARA 998 et seq.

4 See PARA 945.

5 ie by order under the Companies Act 2006 s 1252: see note 1.

6 Companies Act 2006 s 1254(1)(a) (amended by SI 2007/3494).

7 Companies Act 2006 s 1254(1)(b).

8 Companies Act 2006 s 1254(1). A direction given to the Independent Supervisor or a body designated by order under s 1252 is enforceable on the application of the Secretary of State by injunction: s 1254(3). A direction may include such supplementary or incidental requirements as the Secretary of State thinks necessary or expedient: s 1254(2).

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1015. Power to make provision in consequence of changes affecting accountancy bodies.

The Secretary of State¹ may by regulations² make such amendments of enactments as appear to him to be necessary or expedient in consequence of any change of name, merger or transfer of engagements affecting:

1956 (1) a recognised supervisory body³ or recognised qualifying body⁴; or
1957 (2) a body of accountants referred to in, or approved, authorised or otherwise recognised for the purposes of, any other enactment⁵.

1 As to the Secretary of State see PARA 6; and as to the delegation to the Professional Oversight Board of the Secretary of State's functions relating to the regulation of statutory auditors see PARA 960 et seq.

2 As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. At the date at which this volume states the law, no such regulations have been made in exercise of the power conferred by s 1263.

3 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

4 Companies Act 2006 s 1263(1)(a). As to the meaning of 'qualifying body' see PARA 998. As to applications for recognition as a qualifying body see PARA 998 et seq.

5 Companies Act 2006 s 1263(1)(b).

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D. AUDITORS GENERAL AS STATUTORY AUDITOR

(A) APPOINTMENT AS STATUTORY AUDITOR

1016. Eligibility of Auditors General for appointment as statutory auditor.

'Auditor General' means¹ the Comptroller and Auditor General² or the Auditor General for Wales³. An Auditor General is⁴ eligible for appointment as a statutory auditor⁵.

1 Ie for the purposes of the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARAS 959-968).

2 Companies Act 2006 s 1226(1)(a).

3 Companies Act 2006 s 1226(1)(c).

4 Ie subject to any suspension notice having effect under the Companies Act 2006 s 1234 (notices suspending eligibility for appointment as a statutory auditor: see PARA 1023): s 1226(3).

5 Companies Act 2006 s 1226(2). As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969.

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(B) CONDUCT OF AUDITS

1017. Individuals responsible for audit work on behalf of Auditors General.

An Auditor General¹ must secure that each individual responsible for statutory audit work² on behalf of that Auditor General is³ eligible for appointment as a statutory auditor⁴.

¹ As to the meaning of 'Auditor General' see PARA 1016.

² As to the meaning of 'statutory audit work' see PARA 975 note 6.

3 le by virtue of the Companies Act 2006 Pt 42 Ch 2 (ss 1212-1225): see PARA 969 et seq.

4 Companies Act 2006 s 1227.

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(C) SUPERVISION OF AUDITORS GENERAL

1018. Supervision of Auditors General by the Independent Supervisor.

The Secretary of State¹ has appointed the Professional Oversight Board to supervise the performance by each Auditor General² of his functions as a statutory auditor³ (the 'supervision function')⁴. The Board must discharge that duty by establishing supervision arrangements⁵ itself or entering into supervision arrangements with one or more bodies⁶. For this purpose 'supervision arrangements' are arrangements⁷ in accordance with which the Board or the body:

- 1958 (1) determines standards relating to professional integrity and independence which must be applied by an Auditor General in statutory audit work⁸;
- 1959 (2) determines technical standards which must be applied by an Auditor General in statutory audit work and the manner in which those standards are to be applied in practice⁹;
- 1960 (3) monitors the performance of statutory audits¹⁰ carried out by an Auditor General¹¹;
- 1961 (4) investigates any matter arising from the performance by an Auditor General of a statutory audit¹²;
- 1962 (5) holds disciplinary hearings in respect of an Auditor General which appear to be desirable following the conclusion of such investigations¹³; and
- 1963 (6) decides whether (and, if so, what) disciplinary action should be taken against an Auditor General to whom such a hearing related¹⁴.

1 As to the Secretary of State see PARA 6.

² As to the meaning of 'Auditor General' see PARA 1016.

3 As to the meaning of 'statutory auditor' and as to eligibility for appointment as a statutory auditor see PARAS 958, 969.

4 Independent Supervisor Appointment Order 2007, SI 2007/3534, art 3. The Board must, at least once in each calendar year, prepare and publish in such manner as it sees fit financial statements of its expenditure which must be audited by a person other than an Auditor General who is eligible for appointment as a statutory auditor: Independent Supervisor Appointment Order 2007, SI 2007/3534, art 5. The Board must have satisfactory arrangements for recording decisions made in the exercise of the supervision function and for the safekeeping of those records which ought to be preserved: art 7.

The Professional Oversight Board is the 'Independent Supervisor' required to be appointed by the Secretary of State under the Companies Act 2006 in order to discharge 'the supervision function' mentioned in s 1229(1) (according to which the Independent Supervisor must supervise the performance by each Auditor General of his functions as a statutory auditor): see ss 1228(1), 1229(1). A body may be so appointed only if it is a body corporate or an unincorporated association which appears to the Secretary of State to be willing and able to discharge the supervision function (s 1228(4)(a)) and to have arrangements in place relating to the discharge of that function which are such as to be likely to ensure that the supervision function will be exercised effectively

and, where the order is to contain any requirements or other provisions specified under s 1228(6) (see note 3), that that function will be exercised in accordance with any such requirements or provisions (s 1228(4)(b), (5)). As to the meaning of 'body corporate' see PARA 1 note 5.

An appointment under s 1228 must be made by order (s 1228(2)), which has the effect of making the body so appointed designated under the Freedom of Information Act 2000 s 5 (further powers to designate public authorities: see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 583) (Companies Act 2006 s 1228(3)). An order under s 1228 may contain such requirements or other provisions relating to the exercise of the supervision function by the Independent Supervisor as appear to the Secretary of State to be appropriate: s 1228(6).

5 The requirements of Sch 10 paras 9-10A, 12-15 (requirements for recognition of a supervisory body: see PARAS 980, 983, 985, 986, 987, 988) apply in relation to supervision arrangements as they apply in relation to the rules, practices and arrangements of supervisory bodies: s 1229(3A) (s 1229(2) substituted, ss 1229(2A), (3A), (5A), 1251A added, s 1229(3), (5) amended, by SI 2007/3494).

6 Companies Act 2006 s 1229(2) (as substituted: see note 5). The Board must consult with the Auditors General and such other persons as seem to it to be appropriate before establishing or entering into a supervision arrangement for the purposes of s 1229: Independent Supervisor Appointment Order 2007, SI 2007/3534, art 6(1). Any consultation carried out for this purpose before 6 April 2008 (ie the date on which the Independent Supervisor Appointment Order 2007, SI 2007/3534, came into force, including by the Board, is treated as if it had been carried out under art 6: art 6(2). The Board may enter into supervision arrangements with a body despite any relationship that may exist between the Board and that body: Companies Act 2006 s 1229(4). If the Board enters into supervision arrangements with one or more bodies, it must oversee the effective operation of those supervision arrangements: s 1229(2A) (as so added). The Board must notify each Auditor General in writing of any supervision arrangements that it establishes or enters into under s 1229: s 1229(5) (as so amended).

7 The arrangements established by the Board or entered into by the Board with a body for the purposes of the Companies Act 2006 s 1229 (see the text and notes 5-6): s 1229(3) (as so amended).

8 Companies Act 2006 s 1229(3)(a) (s 1229(3) as amended: see note 5). As to the meaning of 'statutory audit work' see PARA 975 note 6.

9 Companies Act 2006 s 1229(3)(b) (s 1229(3) as amended: see note 5).

10 As to the meaning of 'statutory audit' see PARA 971 note 2.

11 Companies Act 2006 s 1229(3)(c) (s 1229(3) as amended: see note 5). The Board must, at least once in every calendar year, deliver to the Secretary of State a summary of the results of any inspections conducted for the purposes of s 1229(3)(c) (s 1229(5A) (as so added)) and the Secretary of State must, at least once in every calendar year, publish a report containing a summary of the results of inspections that are so delivered to him (s 1251A(a) (as so added)).

12 Companies Act 2006 s 1229(3)(d) (s 1229(3) as amended: see note 5).

13 Companies Act 2006 s 1229(3)(e) (s 1229(3) as amended: see note 5).

14 Companies Act 2006 s 1229(3)(f) (s 1229(3) as amended: see note 5). Supervision arrangements within s 1229(3)(f) may, in particular, provide for the payment by an Auditor General of a fine to any person: s 1229(6). Any fine received by the Independent Supervisor under supervision arrangements is to be paid into the Consolidated Fund: s 1229(7).

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1019. Duties of Auditors General in relation to supervision arrangements.

Each Auditor General¹ must:

- 1964 (1) comply with any standards relating to professional integrity and independence² and technical standards for statutory audit work³ determined under the supervision arrangements⁴;
- 1965 (2) take such steps as may be reasonably required of that Auditor General to enable his performance of statutory audits⁵ to be monitored by means of inspections carried out under the supervision arrangements⁶; and
- 1966 (3) comply with any decision about disciplinary action⁷ made under the supervision arrangements⁸.

Each Auditor General must also pay to the Independent Supervisor⁹ or to any body with whom the Independent Supervisor has entered into supervision arrangements such proportion of the costs incurred by the Independent Supervisor or body for the purposes of the arrangements as the Independent Supervisor may notify to him in writing¹⁰.

¹ As to the meaning of 'Auditor General' see PARA 1016.

² I.e. any standards of the kind mentioned in the Companies Act 2006 s 1229(3)(a): see PARA 1018.

³ I.e. any standards of the kind mentioned in the Companies Act 2006 s 1229(3)(b): see PARA 1018. As to the meaning of 'statutory audit work' see PARA 975 note 6.

⁴ Companies Act 2006 s 1230(1)(a). 'Supervision arrangements' means the arrangements established or entered into under s 1229: s 1230(4) (amended by SI 2007/3494).

⁵ As to the meaning of 'statutory audit' see PARA 971 note 2.

⁶ Companies Act 2006 s 1230(1)(b).

⁷ I.e. any decision of the kind mentioned in the Companies Act 2006 s 1229(3)(f): see PARA 1018. As to the meaning of 'statutory audit work' see PARA 975 note 6.

⁸ Companies Act 2006 s 1230(1)(c).

⁹ I.e. the Professional Oversight Board: see PARA 1018.

¹⁰ Companies Act 2006 s 1230(2) (substituted by SI 2007/3494). Expenditure under this provision is, in the case of expenditure of the Comptroller and Auditor General, to be regarded as expenditure of the National Audit Office for the purposes of the National Audit Act 1983 s 4(1) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 720): Companies Act 2006 s 1230(3)(a).

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1020. Reports by the Independent Supervisor.

The Independent Supervisor¹ must, at least once in each calendar year, prepare a report on the discharge of its functions². The report must include:

- 1967 (1) an account of how the Independent Supervisor has discharged the supervision function³, including why it considers that this function has been discharged effectively⁴;

- 1968 (2) an account of the extent to which each Auditor General⁵ has complied with its duties under the Companies Act 2006⁶;
- 1969 (3) an account of any matters notified to the Independent Supervisor⁷;
- 1970 (4) an account of the Independent Supervisor's enforcement activity, including the issue of any suspension notices⁸ and any applications for compliance orders⁹; and
- 1971 (5) an account of the activities carried out by the Independent Supervisor as a consequence of its status as a public authority for the purpose of the Freedom of Information Act 2000¹⁰.

The Independent Supervisor must give a copy of each report to the Secretary of State¹¹ and the First Minister for Wales¹². The Secretary of State must lay before each House of Parliament a copy of each report received by him¹³, and the First Minister for Wales must lay a copy of each report received by him before the National Assembly for Wales¹⁴.

1 le the Professional Oversight Board: see PARA 1018.

2 Companies Act 2006 s 1231(1). In relation to a calendar year during which an appointment of a body as the Independent Supervisor is made or revoked by an order under s 1228 (see PARA 1018), s 1231 applies with such modifications as may be specified in the order: s 1231(4).

3 As to the meaning of 'supervision function' see PARA 1018.

4 Independent Supervisor Appointment Order 2007, SI 2007/3534, art 4(a).

5 As to the meaning of 'Auditor General' see PARA 1016.

6 Independent Supervisor Appointment Order 2007, SI 2007/3534, art 4(b).

7 Independent Supervisor Appointment Order 2007, SI 2007/3534, art 4(c). Matters are notified to the Independent Supervisor under the Companies Act 2006 s 1232 (see PARA 1021).

8 See PARA 1023.

9 Independent Supervisor Appointment Order 2007, SI 2007/3534, art 4(d). As to compliance orders see PARA 1024.

10 Independent Supervisor Appointment Order 2007, SI 2007/3534, art 4(e). As to such activities see PARA 1018.

11 As to the Secretary of State see PARA 6.

12 Companies Act 2006 s 1231(2) (amended as from 6 November 2009 by SI 2009/2958).

13 Companies Act 2006 s 1231(3).

14 Companies Act 2006 s 1231(3A) (added as from 6 November 2009 by SI 2009/2958). This does not apply to calendar years before 2010: see the Government of Wales Act 2006 (Consequential Modifications, Transitional Provisions and Saving) Order 2009, SI 2009/2958, art 12(4).

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1021. Matters to be notified to the Independent Supervisor.

The Independent Supervisor¹ may require an Auditor General² to notify the Independent Supervisor immediately of the occurrence of such events as it may specify in writing and to give it such information in respect of those events as is so specified³. The Independent Supervisor may also require an Auditor General to give the Independent Supervisor, at such times or in respect of such periods as it may specify in writing, such information as is so specified⁴.

The notices and information required to be given must be such as the Independent Supervisor may reasonably require for the exercise of the functions conferred on it⁵. The Independent Supervisor may require information to be given in a specified form or verified in a specified manner⁶. Any notice or information required to be given must be given in writing unless the Independent Supervisor specifies or approves some other manner⁷.

1 Ie the Professional Oversight Board: see PARA 1018.

2 As to the meaning of 'Auditor General' see PARA 1016.

3 Companies Act 2006 s 1232(1)(a).

4 Companies Act 2006 s 1232(1)(b).

5 Companies Act 2006 s 1232(2). Functions are conferred on the Independent Supervisor by or by virtue of Pt 42 (ss 1209-1264) (see PARA 1018 et seq).

6 Companies Act 2006 s 1232(3).

7 Companies Act 2006 s 1232(4).

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1022. Independent Supervisor's power to call for information.

The Independent Supervisor¹ may by notice in writing require an Auditor General² to give it such information as it may reasonably require for the exercise of the functions conferred on it³. The Independent Supervisor may require that any information which it requires is to be given within such reasonable time and verified in such manner as it may specify⁴.

1 Ie the Professional Oversight Board: see PARA 1018.

2 As to the meaning of 'Auditor General' see PARA 1016.

3 Companies Act 2006 s 1233(1). Functions are conferred on the Independent Supervisor by or by virtue of Pt 42 (ss 1209-1264) (see PARA 1018 et seq).

4 Companies Act 2006 s 1233(2).

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1023. Enforcement by suspension notice.

The Independent Supervisor¹ may issue a suspension notice suspending an Auditor General's² eligibility for appointment as a statutory auditor³ in relation to all persons, or any specified⁴ person or persons, indefinitely or until a date specified in the notice⁵. The Independent Supervisor may also issue a notice amending or revoking a suspension notice previously issued to an Auditor General⁶.

In determining whether it is appropriate to issue a suspension notice, the Independent Supervisor must have regard to the Auditor General's performance of the obligations imposed on him⁷, and to the Auditor General's performance of his functions as a statutory auditor⁸.

Before issuing a suspension notice, the Independent Supervisor must give written notice of its intention to do so to the Auditor General⁹ and publish that notice in such manner as it thinks appropriate for bringing it to the attention of any other persons who are likely to be affected¹⁰. The notice of intention must: (1) state the reasons for which the Independent Supervisor proposes to act; and (2) state that the Auditor General and any other person who appears to the Independent Supervisor to be affected may, within the period of three months beginning with the date of service or publication of the notice of intention or such longer period as the Independent Supervisor may allow, make written representations to the Independent Supervisor and, if desired, oral representations to a person appointed for that purpose by the Independent Supervisor¹¹. The Independent Supervisor must have regard to any representations made in determining whether to issue a suspension notice and the terms of any such notice¹².

If in any case the Independent Supervisor considers it appropriate to do so in the public interest it may issue a suspension notice¹³, even if no notice of intention has been given or published¹⁴, or the period of time for making representations in pursuance of such a notice has not expired¹⁵.

On issuing a suspension notice, the Independent Supervisor must give a copy of the notice to the Auditor General, and must publish the notice in such manner as it thinks appropriate for bringing it to the attention of persons likely to be affected¹⁶.

An Auditor General must not act as a statutory auditor at any time when a suspension notice issued to him in respect of the audited person¹⁷ has effect¹⁸. If at any time during an Auditor General's term of office as a statutory auditor a suspension notice issued to him in respect of the audited person takes effect, he must immediately resign his office (with immediate effect), and give notice in writing to the audited person that he has resigned by reason of his becoming ineligible for appointment¹⁹.

1 Ie the Professional Oversight Board: see PARA 1018.

2 As to the meaning of 'Auditor General' see PARA 1016.

3 As to the meaning of 'statutory auditor' see PARA 958.

4 For this purpose, 'specified' means specified in, or of a description specified in, the suspension notice in question: Companies Act 2006 s 1234(11).

- 5 Companies Act 2006 s 1234(1)(a). A notice under s 1234(1) must be in writing, and state the date on which it takes effect (which must be after the period of three months beginning with the date on which it is issued): s 1234(3).
- 6 Companies Act 2006 s 1234(1)(b). See note 4.
- 7 le by or by virtue of the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARA 1018 et seq).
- 8 Companies Act 2006 s 1234(2).
- 9 Companies Act 2006 s 1234(4)(a).
- 10 Companies Act 2006 s 1234(4)(b).
- 11 Companies Act 2006 s 1234(5), (6), (7).
- 12 Companies Act 2006 s 1234(8).
- 13 le without regard to the time restriction in the Companies Act 2006 s 1234(3) (see note 5).
- 14 le under the Companies Act 2006 s 1234(4) (see the text to notes 9-10).
- 15 Companies Act 2006 s 1234(9).
- 16 Companies Act 2006 s 1234(10).
- 17 As to the meaning of 'audited person' see PARA 971 note 2.
- 18 Companies Act 2006 s 1235(1). A suspension notice does not make an Auditor General ineligible for appointment as a statutory auditor for the purposes of s 1213 (effect of ineligibility: criminal offences) (see PARA 970): s 1235(3).
- 19 Companies Act 2006 s 1235(2).

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1024. Enforcement by compliance orders.

If at any time it appears to the Independent Supervisor¹ that an Auditor General² has failed to comply with an obligation imposed on him³, the Independent Supervisor may make an application to the High Court⁴.

If on an application the court decides that the Auditor General has failed to comply with the obligation in question, it may order the Auditor General to take such steps as the court directs for securing that the obligation is complied with⁵.

- 1 le the Professional Oversight Board: see PARA 1018.
- 2 As to the meaning of 'Auditor General' see PARA 1016.
- 3 le by or by virtue of the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARA 1018 et seq).
- 4 Companies Act 2006 s 1236(1), (3).
- 5 Companies Act 2006 s 1236(2).

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1025. Proceedings involving the independent supervisor.

If the Independent Supervisor¹ is an unincorporated association², any proceedings brought in or in connection with the exercise of any function by the body as the Independent Supervisor³ may be brought by or against it in the name of any body corporate⁴ whose constitution provides for the establishment of the body⁵.

Where an appointment of an Independent Supervisor is revoked⁶, the revoking order may make such provision as the Secretary of State⁷ thinks fit with respect to pending proceedings⁸.

- 1 Ie the Professional Oversight Board: see PARA 1018.
- 2 As to unincorporated associations see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1001.
- 3 Ie any 'relevant proceedings' for this purpose: see the Companies Act 2006 s 1237(2).
- 4 As to the meaning of 'body corporate' see PARA 1 note 5.
- 5 Companies Act 2006 s 1237(1).
- 6 Ie under the Companies Act 2006 s 1228 (see PARA 1018).
- 7 As to the Secretary of State see PARA 6.
- 8 Companies Act 2006 s 1237(3).

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E. REGISTERED THIRD COUNTRY AUDITORS

(A) DUTIES

1026. Duties of registered third country auditors.

A registered third country auditor¹ who audits the accounts of a UK-traded non-EEA company² must participate in arrangements for independent monitoring of audits³, and arrangements for independent investigation for disciplinary purposes of public interest cases⁴.

A registered third country auditor must take such steps as may be reasonably required of it to enable its performance of audits of accounts of UK-traded non-EEA companies to be monitored by means of inspections carried out under the arrangements for independent monitoring of audits, and must comply with any decision as to disciplinary action to be taken against it⁵.

The Secretary of State may direct in writing that the provisions set out above are not to apply, in whole or in part, in relation to a particular registered third country auditor or class of registered third country auditors⁶.

1 'Registered third country auditor' means a third country auditor who is entered in the register kept in accordance with regulations under the Companies Act 2006 s 1239(1) (see PARA 1031): s 1241(1). As to the meaning of 'third country auditor' see PARA 983 note 7.

2 For the purposes of the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARAS 957 et seq, 1027 et seq), 'UK-traded non-EEA company' means a body corporate: (1) which is incorporated or formed under the law of a third country; (2) whose transferable securities are admitted to trading on a regulated market situated or operating in the United Kingdom; and (3) which has not been excluded, or is not of a description of bodies corporate which has been excluded, from this definition by an order made by the Secretary of State: s 1241(2) (amended by SI 2007/3494). For these purposes, 'regulated market' means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, in the system and in accordance with its non-discretionary rules, in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provisions of European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) Title III (arts 36-47) (see further **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 88 et seq): art 4.1(14); definition applied by the Companies Act 2006 s 1241(3). 'Transferable securities' means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as: (a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares; (b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities; (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures: European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) art 4.1(18); definition applied by the Companies Act 2006 s 1241(3). As to the Secretary of State see PARA 6.

An order under s 1241 is subject to negative resolution procedure (ie the statutory instrument containing the order is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1241(4), 1289.

See the Statutory Auditors and Third Country Auditors Regulations 2007, SI 2007/3494 (amended by SI 2008/499; SI 2008/2639; SI 2009/2798).

3 The arrangements referred to are appropriate arrangements: (1) for enabling the performance by the registered third country auditor of functions related to the audit of UK-traded non-EEA companies to be monitored by means of inspections carried out under the arrangements; and (2) for ensuring that the carrying out of such monitoring and inspections is done independently of the registered third country auditor: Companies Act 2006 s 1242(3), Sch 12 para 1 (amended by SI 2007/3494).

For the purposes of the Companies Act 2006 Sch 12 para 1(1)(b) (see head (2)) or Sch 12 para 2(1)(e) (see note 4 head (5)), arrangements are not to be regarded as appropriate for the purpose of ensuring that a thing is done independently of the registered third country auditor unless they are designed to ensure that the registered third country auditor: (a) will have no involvement in the appointment or selection of any of the persons who are to be responsible for doing that thing; and (b) will not otherwise be involved in the doing of that thing: Sch 12 para 3(1), (2). This provision imposes a minimum requirement and does not preclude the possibility that additional criteria may need to be satisfied in order for the arrangements to be regarded as appropriate for the purpose in question: Sch 12 para 3(3).

4 Companies Act 2006 s 1242(1). The arrangements referred to are appropriate arrangements (see Sch 12 para 2(1) (amended by SI 2007/3494)):

494 (1) for the carrying out of investigations into matters arising in connection with the performance of functions related to the audit of UK-traded non-EEA companies by the registered third country auditor;

495 (2) for the holding of disciplinary hearings relating to the registered third country auditor which appear to be desirable following the conclusion of such investigations;

- 496 (3) for requiring such hearings to be held in public except where the interests of justice otherwise require;
- 497 (4) for the persons before whom such hearings have taken place to decide whether (and, if so, what) disciplinary action should be taken against the registered third country auditor; and
- 498 (5) for ensuring that the carrying out of those investigations, the holding of those hearings and the taking of those decisions are done independently of the registered third country auditor.

'Disciplinary action' includes the imposition of a fine: Companies Act 2006 Sch 12 para 2(2).

5 Companies Act 2006 s 1242(2) (amended by SI 2007/3494).

6 Companies Act 2006 s 1242(4). The functions of the Secretary of State under s 1242 have been transferred to the Professional Oversight Board (see PARA 1018): see the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, arts 2, 4(1).

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(B) DISCLOSURE

1027. Matters to be notified to the Secretary of State.

The Secretary of State¹ may require a registered third country auditor²: (1) to notify him immediately of the occurrence of such events as he may specify in writing and to give him such information in respect of those events as is so specified³; and (2) to give him, at such times or in respect of such periods as he may specify in writing, such information as is so specified⁴. The notices and information required to be given must be such as the Secretary of State may reasonably require for the exercise of his functions in relation to statutory auditors⁵. The Secretary of State may require the information to be given in a specified form or verified in a specified manner⁶. Any notice or information required must be given in writing unless the Secretary of State specifies or approves some other manner⁷.

1 As to the Secretary of State see PARA 6. The functions of the Secretary of State under s 1243 have been transferred to the Professional Oversight Board (see PARA 1018): see the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, arts 2, 4(1).

2 As to the meaning of 'registered third country auditor' see PARA 1026 note 1.

3 Companies Act 2006 s 1243(1)(a). Accordingly, if the body known as the Professional Oversight Board established under the articles of association of the Financial Reporting Council Limited (the 'second designated body') requires a notification or the provision of information for the purposes of s 1243(1), it must notify the Secretary of State of the requirement without undue delay: Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, art 9(1). If the Secretary of State so requests, the second designated body must send to him a copy of any such notification or information received pursuant to the requirement: art 9(2).

4 Companies Act 2006 s 1243(1)(b). See note 3.

5 Companies Act 2006 s 1243(2). The functions of the Secretary of State in relation to statutory auditors are those in Pt 42 (ss 1209-1264) (see PARAS 960-968).

6 Companies Act 2006 s 1243(3).

7 Companies Act 2006 s 1243(4).

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1028. Secretary of State's power to call for information.

The Secretary of State¹ may by notice in writing require a registered third country auditor² to give him such information as he may reasonably require for the exercise of his functions in relation to statutory auditors³. The Secretary of State may require that any information which he requires is to be given within such reasonable time and verified in such manner as he may specify⁴.

1 As to the Secretary of State see PARA 6.

2 As to the meaning of 'registered third country auditor' see PARA 1026 note 1.

3 Companies Act 2006 s 1244(1). The functions of the Secretary of State in relation to statutory auditors are those in Pt 42 (ss 1209-1264) (see PARAS 960-968).

4 Companies Act 2006 s 1244(2).

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(C) ENFORCEMENT

1029. Enforcement by compliance orders.

If at any time it appears to the Secretary of State¹ that a registered third country auditor² has failed to comply with an obligation imposed on him³, the Secretary of State may make an application to the High Court for a compliance order⁴.

If on an application the court decides that the auditor has failed to comply with the obligation in question, it may order the auditor to take such steps as the court directs for securing that the obligation is complied with⁵.

1 As to the Secretary of State see PARA 6. The functions of the Secretary of State under s 1245 have been transferred to the Professional Oversight Board (see PARA 1018): see the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, arts 2, 4(1).

2 As to the meaning of 'registered third country auditor' see PARA 1026 note 1.

3 ie by or by virtue of the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARA 1026).

- 4 Companies Act 2006 s 1245(1), (3).
- 5 Companies Act 2006 s 1245(2).

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1030. Removal of third country auditors from the register of auditors.

The Secretary of State¹ may, by regulations, confer on the person keeping the register² power to remove a third country auditor³ from the register⁴. The regulations must require the person keeping the register, in determining whether to remove a third country auditor from the register, to have regard to the auditor's compliance with obligations imposed⁵ on him⁶. Regulations under these provisions are subject to negative resolution procedure (the statutory instrument containing the regulations being subject to annulment in pursuance of a resolution of either House of Parliament)⁷.

- 1 As to the Secretary of State see PARA 6.
- 2 I.e. in accordance with regulations under the Companies Act 2006 s 1239(1) (see PARA 1031). Where provision is made under s 1239(4) (different parts of the register to be kept by different persons) (see PARA 1031), references in s 1246 to the person keeping the register are to the person keeping that part of the register which relates to third country auditors: s 1246(3).
- 3 As to the meaning of 'third country auditor' see PARA 983 note 7.
- 4 Companies Act 2006 s 1246(1). See the Statutory Auditors and Third Country Auditors Regulations 2007, SI 2007/3494, reg 40.
- 5 I.e. by or by virtue of the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARA 1026).
- 6 Companies Act 2006 s 1246(2).
- 7 Companies Act 2006 ss 1246(4), 1289.

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F. THE REGISTER OF AUDITORS

1031. Duty to keep register of persons eligible for appointment as a statutory auditor.

The Secretary of State¹ must make regulations requiring the keeping of a register of the persons eligible for appointment as a statutory auditor².

The regulations must require each person's entry in the register to contain³:

- 1972 (1) his name and address⁴;
- 1973 (2) in the case of an individual eligible for appointment as a statutory auditor, the specified⁵ information relating to any firm on whose behalf he is responsible for statutory audit work⁶;
- 1974 (3) in the case of a firm eligible for appointment as a statutory auditor, the specified information relating to the individuals responsible for statutory audit work on its behalf⁷;
- 1975 (4) in the case of an individual or firm eligible for appointment as a statutory auditor⁸, the name of the relevant supervisory body⁹;
- 1976 (5) in the case of a firm eligible for appointment as a statutory auditor¹⁰, details of the firm¹¹; and
- 1977 (6) in the case of a third country auditor which is a firm, the name and address of each person who is an owner or shareholder of the firm, or a member of the firm's administrative or management body¹².

The regulations may require each person's entry to contain other specified information¹³.

The regulations may provide that different parts of the register are to be kept by different persons¹⁴.

The regulations may impose such obligations as the Secretary of State thinks fit on¹⁵:

- 1978 (a) recognised supervisory bodies¹⁶;
- 1979 (b) any body to whom the Secretary of State has delegated¹⁷ his functions¹⁸;
- 1980 (c) persons eligible for appointment as a statutory auditor¹⁹;
- 1981 (d) third country auditors²⁰;
- 1982 (e) any person with whom arrangements are made by one or more recognised supervisory bodies, or by any designated body, with respect to the keeping of the register²¹; or
- 1983 (f) the Independent Supervisor²².

The regulations may include provision requiring that specified entries in the register be open to inspection at times and places specified or determined in accordance with the regulations²³.

They may also include provision enabling a person to require a certified copy of specified entries in the register²⁴ and provision authorising the charging of fees for inspection, or the provision of copies, of such reasonable amount as may be specified or determined in accordance with the regulations²⁵.

The Secretary of State may direct in writing that the requirements imposed by the regulations, or such of those requirements as are specified in the direction, are not to apply, in whole or in part, in relation to a particular registered third country auditor or class of registered third country auditors²⁶.

1 As to the Secretary of State see PARA 6. The functions of the Secretary of State under s 1239, apart from s 1239(1)(b) and s 1239(8) (which remains exercisable concurrently by the Secretary of State), have been transferred to the Professional Oversight Board (see PARA 1018): see the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, arts 2, 3(1)(a), 4(1)-(3).

2 Companies Act 2006 s 1239(1)(a). As to the meaning of 'statutory auditor' see PARA 958.

3 Companies Act 2006 s 1239(2).

4 Companies Act 2006 s 1239(2)(a). For these purposes, 'address' means (in relation to an individual) his usual residential or business address and (in relation to a firm) its registered or principal office in the United Kingdom: see s 1261(1); and PARA 959 note 3.

5 'Specified' means specified by regulations under the Companies Act 2006 s 1239: s 1239(9). Regulations under s 1239 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1239(10), 1289.

In exercise of the power under the Companies Act 2006 s 1239(1)(a) to make regulations requiring the keeping of a register of the persons eligible for appointment as a statutory auditor, the Professional Oversight Board (see PARA 1018) has made the Statutory Auditors (Registration) Instrument 2008 (POB 02/2008). This instrument is made by the Professional Oversight Board subject to the provisions of the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, and the Companies Act 2006 s 1252, Sch 13. The instrument is available at the Financial Reporting Council's website which, at the date at which this volume states the law, is <http://www.frc.org.uk>.

6 Companies Act 2006 s 1239(2)(b).

7 Companies Act 2006 s 1239(2)(c).

8 Ie by virtue of the Companies Act 2006 Pt 42 Ch 2 (ss 1212-1225) (see PARA 969 et seq).

9 Companies Act 2006 s 1239(2)(d) (amended by SI 2007/3494).

10 See note 8.

11 Companies Act 2006 s 1239(2)(e) (amended by SI 2007/3494). The information referred to in the Companies Act 2006 s 1239(2)(e) is: (1) in relation to a body corporate, except where head (2) applies, the name and address of each person who is a director of the body or holds any shares in it; (2) in relation to a limited liability partnership, the name and address of each member of the partnership; (3) in relation to a corporation sole, the name and address of the individual for the time being holding the office by the name of which he is the corporation sole; (4) in relation to a partnership, the name and address of each partner: s 1239(3).

12 Companies Act 2006 s 1239(2)(f) (amended by SI 2007/3494).

13 Companies Act 2006 s 1239(2).

14 Companies Act 2006 s 1239(4).

15 Companies Act 2006 s 1239(5).

16 Companies Act 2006 s 1239(5)(a). As to the meaning of 'supervisory body' see PARA 975.

17 Ie designated by order under the Companies Act 2006 s 1252 (see PARA 960).

18 Companies Act 2006 s 1239(5)(b). The obligations imposed by regulations on such persons as are mentioned in s 1239(5)(b) or (e) (see head (e) in the text) are enforceable on the application of the Secretary of State by injunction: s 1239(8).

19 Companies Act 2006 s 1239(5)(c).

20 Companies Act 2006 s 1239(5)(d).

21 Companies Act 2006 s 1239(5)(e). See note 18.

22 Companies Act 2006 s 1239(5)(f). The Independent Supervisor is appointed under s 1228 (see PARA 1018).

23 Companies Act 2006 s 1239(6)(a).

24 Companies Act 2006 s 1239(6)(b).

25 Companies Act 2006 s 1239(6)(c).

26 Companies Act 2006 s 1239(7) (amended by SI 2007/3494).

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1032. Duty to keep register of third country auditors.

The Secretary of State¹ must make regulations requiring the keeping of a register of third country auditors² who apply to be registered in the specified³ manner and in relation to whom specified requirements are met⁴.

1 As to the Secretary of State see PARA 6.

2 As to the meaning of 'third country auditor' see PARA 983 note 7.

3 Ie specified by regulations under the Companies Act 2006 s 1239: s 1239(9). Regulations under s 1239 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1239(10), 1289. See the Statutory Auditors and Third Country Auditors Regulations 2007, SI 2007/3494, Pt 5 (regs 29-40) (amended by SI 2008/499; and SI 2008/2639).

In exercise of the power conferred on the Secretary of State by the Companies Act 2006 s 1251(2) to make regulations prescribing periodical fees to be paid by (amongst others) third country auditors, the Professional Oversight Board (see PARA 1018) has made the Third Country Auditors (Fees) Instrument 2008 (POB 02/2008). This instrument is made by the Professional Oversight Board subject to the provisions of the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, and the Companies Act 2006 s 1252, Sch 13, and with the approval of the Secretary of State. The instrument is available at the Financial Reporting Council's website which, at the date at which this volume states the law, is <http://www.frc.org.uk>.

4 Companies Act 2006 s 1239(1)(b). As to the details that must be required see s 1239(2)-(10); and PARA 1031.

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1033. Power to provide for publication of other information to be made available to the public.

The Secretary of State¹ may make regulations requiring a person eligible for appointment as a statutory auditor², or a member of a specified³ class of such persons, to keep and make available to the public specified information, including information regarding⁴:

- 1984 (1) the person's ownership and governance⁵;
- 1985 (2) the person's internal controls with respect to the quality and independence of its audit work⁶;
- 1986 (3) the person's turnover⁷; and
- 1987 (4) the audited persons of whom the person has acted as statutory auditor⁸.

The regulations may impose such obligations as the Secretary of State thinks fit on persons eligible for appointment as a statutory auditor⁹ and may require the information to be made available to the public in a specified manner¹⁰.

1 As to the Secretary of State see PARA 6. The functions of the Secretary of State under s 1240 have been transferred to the Professional Oversight Board (see PARA 1018): see the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, arts 2, 3(1)(b).

2 As to the meaning of 'statutory auditor' see PARA 958.

3 'Specified' means specified by regulations under the Companies Act 2006 s 1240: s 1240(3).

4 Companies Act 2006 s 1240(1). Regulations under s 1240 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1240(4), 1289.

In exercise of the power conferred on the Secretary of State by s 1240, to make regulations requiring a person eligible for appointment as a statutory auditor, or a member of a specified class of such persons, to keep and make available to the public specified information, the Professional Oversight Board has made the Statutory Auditors (Transparency) Instrument 2008 (POB 01/2008). This instrument is made by the Professional Oversight Board subject to the provisions of the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, and the Companies Act 2006 s 1252, Sch 13. The instrument is available at the Financial Reporting Council's website which, at the date at which this volume states the law, is <http://www.frc.org.uk>.

5 Companies Act 2006 s 1240(1)(a).

6 Companies Act 2006 s 1240(1)(b).

7 Companies Act 2006 s 1240(1)(c).

8 Companies Act 2006 s 1240(1)(d).

9 Companies Act 2006 s 1240(2)(a).

10 Companies Act 2006 s 1240(2)(b).

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G. COOPERATION WITH FOREIGN COMPETENT AUTHORITIES

1034. Requests to foreign competent authorities.

The Secretary of State¹ may request from an EEA competent authority² or a third country competent authority³ such assistance, information or investigation as he may reasonably require in connection with the exercise of his functions in relation to statutory auditors⁴.

1 As to the Secretary of State see PARA 6. The functions of the Secretary of State under s 1253A have been transferred to the Professional Oversight Board (see PARA 1018), with the reservation that the functions remain exercisable concurrently by the Secretary of State: see the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, arts 2, 4(1)(c), (3)(d).

2 As to the meaning of 'EEA competent authority' see PARA 978 note 3.

3 As to the meaning of 'third country competent authority' see PARA 990 note 5.

4 Companies Act 2006 s 1253A (added by SI 2007/3494). The Secretary of State's functions in relation to statutory auditors are those set out in the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARAS 960-968).

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1035. Requests from EEA competent authorities.

The Secretary of State¹ must take all necessary steps to ensure that an investigation is carried out, or provide any other assistance or information, if requested² to do so by an EEA competent authority³. Within 28 days following the date on which he receives the request, the Secretary of State must provide the assistance or information required by the EEA competent authority, or notify the EEA competent authority which made the request of the reasons why he has not done so⁴.

However, the Secretary of State need not take steps to comply with a request by an EEA competent authority if: (1) he considers that complying with the request may prejudice the sovereignty, security or public order of the United Kingdom⁵; (2) legal proceedings have been brought in the United Kingdom (whether continuing or not) in relation to the persons and matters to which the request relates; or (3) disciplinary action has been taken by a recognised supervisory body⁶ in relation to the persons and matters to which the request relates⁷.

1 As to the Secretary of State see PARA 6. The functions of the Secretary of State under s 1253B have been transferred to the Professional Oversight Board (see PARA 1018), with the reservation that the function of refusing to comply with a request under s 1253B(1) (requests from EEA competent authorities) on the grounds referred to in s 1253B(3)(a) (prejudice to sovereignty, security or public order) remain exercisable concurrently by the Secretary of State: see the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, arts 2, 4(1), (4).

2 In accordance with the Audit Directive art 36 (cooperation between member state authorities). As to the meaning of 'Audit Directive' see PARA 978 note 3.

3 Companies Act 2006 s 1253B(1) (s 1253B added by SI 2007/3494). As to the meaning of 'EEA competent authority' see PARA 978 note 3.

4 Companies Act 2006 s 1253B(2) (as added: see note 3).

5 As to the meaning of 'United Kingdom' see PARA 1 note 5.

6 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

7 Companies Act 2006 s 1253B(3) (as added: see note 3).

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1036. Notification to competent authorities of other EEA States.

The Secretary of State¹ must notify the relevant EEA competent authority² if he receives notice³ from a recognised supervisory body⁴ of the withdrawal of a person's eligibility for appointment as a statutory auditor⁵. The notification must include the name of the person concerned and the reasons for the withdrawal of his eligibility for appointment as statutory auditor⁶.

The Secretary of State must notify the relevant EEA competent authority⁷ if he has reasonable grounds for suspecting that a person has contravened the law of the United Kingdom⁸, or any other EEA state or part of an EEA state, implementing the Audit Directive⁹, and the act or omission constituting that contravention took place on the territory of an EEA state other than the United Kingdom¹⁰. The notification must include the name of the person concerned and the grounds for the Secretary of State's suspicion¹¹.

1 As to the Secretary of State see PARA 6. The functions of the Secretary of State under s 1253C have been transferred to the Professional Oversight Board (see PARA 1018): see the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, arts 2, 4(1).

2 For the purposes of the Companies Act 2006 s 1253C(1), the 'relevant EEA competent authority' means the EEA competent authority which has approved the person concerned in accordance with the Audit Directive to carry out audits of annual accounts or consolidated accounts required by Community law: Companies Act 2006 s 1253C(2) (s 1253C added by SI 2007/3494). As to the meanings of 'EEA competent authority' and 'Audit Directive' see PARA 978 note 3.

3 I.e. under the Companies Act 2006 s 1223A(1) (notification of withdrawal of eligibility for appointment) (see PARA 1010).

4 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.

5 Companies Act 2006 s 1253C(1) (as added: see note 2). As to the meaning of 'statutory auditor' see PARA 958.

6 Companies Act 2006 s 1253C(3) (as added: see note 2).

7 For the purposes of the Companies Act 2006 s 1253C(4), the 'relevant EEA competent authority' means the EEA competent authority for the EEA state in which the suspected contravention took place: s 1253C(5) (as added: see note 2).

8 As to the meaning of 'United Kingdom' see PARA 1 note 5.

9 Companies Act 2006 s 1253C(4)(a) (as added: see note 2).

10 Companies Act 2006 s 1253C(4)(b) (as added: see note 2).

11 Companies Act 2006 s 1253C(6) (as added: see note 2).

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1037. Arrangements for transfer of audit working papers to third countries.

Audit working papers¹ must not be transferred to a third country competent authority² by any person other than a statutory auditor³ acting in accordance with rules imposed⁴ in relation to the transfer of papers to third countries⁵.

The Secretary of State⁶ may enter into arrangements with a third country competent authority relating to the transfer of audit working papers: (1) from the third country competent authority or third country auditors⁷ regulated by that authority to the Secretary of State; and (2) from statutory auditors to the third country competent authority⁸. The arrangements must provide that the Secretary of State has the following rights and duties in relation to papers he requests from the third country competent authority or third country auditors, and the third country competent authority has comparable rights and duties in relation to papers it requests from statutory auditors⁹. The rights and duties are as follows:

- 1988 (a) any request by the Secretary of State for audit working papers from the third country competent authority or a third country auditor must be accompanied by a statement explaining the reasons for the request¹⁰;
- 1989 (b) the Secretary of State may use the audit working papers he receives in response to a request only in connection with quality assurance functions¹¹, investigation or disciplinary functions¹², or public oversight functions¹³;
- 1990 (c) the Secretary of State, a person exercising the functions of the Secretary of State and persons employed in discharging those functions must be subject to obligations of professional secrecy in relation to audit papers supplied to the Secretary of State by a third country competent authority or a third country auditor¹⁴.

If the Secretary of State enters into working arrangements¹⁵, he must publish on a website without undue delay the name of the third country competent authority with which he has entered into such arrangements, and the country or territory in which it is established¹⁶.

1 As to the meaning of 'audit working papers' see PARA 990 note 4.

2 As to the meaning of 'third country competent authority' see PARA 990 note 5.

3 As to the meaning of 'statutory auditor' see PARA 958.

4 I.e. under the Companies Act 2006 Sch 10 para 16A (transfer of papers to third countries) (see PARA 990).

5 Companies Act 2006 s 1253D (added by SI 2007/3494).

6 As to the Secretary of State see PARA 6. The functions of the Secretary of State under the Companies Act 2006 s 1253E have been transferred to the Professional Oversight Board (see PARA 1018): see the Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, arts 2, 4(1).

7 As to the meaning of 'third country auditor' see PARA 983 note 7.

8 Companies Act 2006 s 1253E(1) (s 1253E added by SI 2007/3494).

9 Companies Act 2006 s 1253E(2) (as added: see note 8).

10 Companies Act 2006 s 1253E(3) (as added: see note 8).

11 I.e. quality assurance functions which meet requirements equivalent to those of the Audit Directive art 29. As to the meaning of 'Audit Directive' see PARA 978 note 3.

12 I.e. functions which meet requirements equivalent to those of the Audit Directive art 30 (investigations and penalties).

13 Companies Act 2006 s 1253E(4) (as added: see note 8). Public oversight functions are those which meet requirements equivalent to those of the Audit Directive art 32.

- 14 Companies Act 2006 s 1253E(5) (as added: see note 8).
- 15 Ie in accordance with the Companies Act 2006 s 1253E (see the text and notes 8-14).
- 16 Companies Act 2006 s 1253F (added by SI 2007/3494).

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H. OFFENCES

1038. False and misleading statements.

A person is guilty of an offence if: (1) for the purposes of or in connection with any application made in relation to statutory auditors¹; or (2) in purported compliance with any requirement imposed on him by or by virtue of the statutory provisions relating to statutory auditors², he knowingly or recklessly furnishes information which is misleading, false or deceptive in a material particular³.

It is also an offence⁴:

- 1991 (a) for a person whose name does not appear on the register of auditors⁵ to describe himself as a registered auditor or so to hold himself out as to indicate, or be reasonably understood to indicate, that he is a registered auditor⁶;
- 1992 (b) for a person whose name does not appear on the register of auditors⁷ to describe himself as a registered third country auditor⁸ or so to hold himself out as to indicate, or be reasonably understood to indicate, that he is a registered third country auditor⁹;
- 1993 (c) for a body which is not a recognised supervisory body¹⁰ or a recognised qualifying body¹¹ to describe itself as so recognised or so to describe itself or hold itself out as to indicate, or be reasonably understood to indicate, that it is so recognised¹².

It is a defence for a person charged with an offence under head (a), (b) or (c) to show that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence¹³.

- 1 Ie any application under the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARA 957 et seq).
- 2 Ie any requirement imposed under the Companies Act 2006 Pt 42 (see PARA 957 et seq).
- 3 Companies Act 2006 s 1250(1). A person guilty of an offence under s 1250(1) is liable on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine (or both), or on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or both): s 1250(5). As to the statutory maximum see PARA 1622.
- 4 A person guilty of an offence under the Companies Act 2006 s 1250(2), (3) or (4) (see heads (a)-(c) in the text) is liable on summary conviction to imprisonment for a term not exceeding 51 weeks or to a fine not exceeding level 5 on the standard scale (or both): s 1250(6). However, where a contravention of s 1250(2), (3) or (4) involves a public display of the offending description, the maximum fine that may be imposed is an amount equal to level 5 on the standard scale multiplied by the number of days for which the display has continued: s 1250(7). As to the standard scale see PARA 1622.

- 5 le the register of auditors kept under regulations under the Companies Act 2006 s 1239 in an entry made under s 1239(1)(a) (see PARA 1031).
- 6 Companies Act 2006 s 1250(2). See note 4.
- 7 le the register of auditors kept under regulations under the Companies Act 2006 s 1239 in an entry made under s 1239(1)(b) (see PARA 1031).
- 8 As to the meaning of 'registered third country auditor' see PARA 1026 note 1.
- 9 Companies Act 2006 s 1250(3). See note 4.
- 10 As to the meaning of 'supervisory body' see PARA 975. As to applications for recognition as a supervisory body see PARA 977 et seq.
- 11 As to the meaning of 'recognised qualifying body' see PARA 999 note 4.
- 12 Companies Act 2006 s 1250(4). See note 4.
- 13 Companies Act 2006 s 1250(8).

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1039. Offences by bodies corporate, partnerships and unincorporated associations.

Where an offence in relation to statutory auditors¹ committed by a body corporate² is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, an officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly³.

Where an offence in relation to statutory auditors committed by a partnership is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a partner, he as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly⁴.

Where an offence in relation to statutory auditors committed by an unincorporated association (other than a partnership) is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any officer of the association or any member of its governing body, he as well as the association is guilty of the offence and liable to be proceeded against and punished accordingly⁵.

- 1 le an offence under the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARA 957 et seq).
- 2 As to the meaning of 'body corporate' see PARA 1 note 5.
- 3 Companies Act 2006 s 1255(1).
- 4 Companies Act 2006 s 1255(2).
- 5 Companies Act 2006 s 1255(3).

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1040. Time limit for prosecution of offences.

An information relating to an offence in relation to statutory auditors¹ which is triable by a magistrates' court in England and Wales² may be so tried if it is laid at any time within the period of 12 months beginning with the date on which evidence sufficient in the opinion of the Director of Public Prosecutions³ or the Secretary of State⁴ to justify the proceedings comes to his knowledge⁵. However, this does not authorise the trial of an information laid more than three years after the commission of the offence⁶.

A certificate of the Director of Public Prosecutions, the Lord Advocate, the Director of Public Prosecutions for Northern Ireland or the Secretary of State as to the date on which such evidence as is referred to above came to his knowledge is conclusive evidence⁷.

Nothing in the above provisions affects the statutory provisions⁸ setting the usual time limits for criminal proceedings⁹.

1 Ie an offence under the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARA 957 et seq).

2 See **MAGISTRATES** vol 29(2) (Reissue) PARA 653 et seq.

3 As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1066, 1079 et seq.

4 References in the Companies Act 2006 s 1256(1), (2), (4), (6) to the Secretary of State have effect as if they were references to the Secretary of State or the Professional Oversight Board (see PARA 1018): Statutory Auditors (Delegation of Functions etc) Order 2008, SI 2008/496, arts 2, 10. As to the Secretary of State see PARA 6.

5 Companies Act 2006 s 1256(1). As to proceedings in Scotland see s 1256(2), (3); and as to proceedings in Northern Ireland see s 1256(4).

6 Companies Act 2006 s 1256(5).

7 Companies Act 2006 s 1256(6).

8 Ie the Magistrates' Courts Act 1980 s 127(1) (see **MAGISTRATES** vol 29(2) (Reissue) PARA 589).

9 Companies Act 2006 s 1256(7).

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1041. Jurisdiction and procedure in respect of offences.

Summary proceedings for an offence in relation to statutory auditors¹ may, without prejudice to any other jurisdiction exercisable, be taken against a body corporate² or unincorporated association at any place at which it has a place of business, and against an individual at any place where he is for the time being³.

Proceedings for such an offence alleged to have been committed by an unincorporated association must be brought in the name of the association (and not in that of any of its members), and for the purposes of any such proceedings any rules of court relating to the service of documents apply as in relation to a body corporate⁴.

A fine imposed on an unincorporated association on its conviction of such an offence must be paid out of the funds of the association⁵.

1 le an offence under the Companies Act 2006 Pt 42 (ss 1209-1264) (see PARA 957 et seq).

2 As to the meaning of 'body corporate' see PARA 6.

3 Companies Act 2006 s 1257(1). The Criminal Justice Act 1925 s 33 and the Magistrates' Courts Act 1980 Sch 3 (procedure on charge of offence against a corporation: see **MAGISTRATES** vol 29(2) (Reissue) PARA 666) apply in a case in which an unincorporated association is charged in England and Wales with an offence under the Companies Act 2006 Pt 42 as they apply in the case of a corporation: s 1257(3). As to the meanings of 'England' and 'Wales' see PARA 1 note 5. Similar provision is made in relation to Northern Ireland: see s 1257(4).

4 Companies Act 2006 s 1257(2).

5 Companies Act 2006 s 1257(6).

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(20) SHARE CAPITAL

(i) In general

1042. Meaning of 'share' and 'capital'.

In the Companies Acts¹, 'share', in relation to a company², means share in the company's share capital³; and references in the Companies Acts to a 'company having a share capital' are to a company that has power under its constitution⁴ to issue shares⁵.

The word 'capital', as used in the Companies Act 2006 and the statutes which it replaces⁶, if unqualified, always means 'share capital' as distinct, for example, from borrowed money, which is sometimes referred to as 'loan capital'⁷. The word 'capital' sometimes means the 'nominal' capital of the company⁸.

The word 'capital' is also used to mean such of the assets of a company, as, for example, its land, works, book debts and stock in trade, as represent the money subscribed or deemed to have been paid on its issued share capital⁹. Profits do not cease to be such (in the sense of their being distributable among the shareholders) by having been used for a length of time in the company's business¹⁰.

The terms 'fixed capital' and 'circulating capital' have also been used, principally with reference to the subject of paying dividends out of capital, in relation to which they are no longer material¹¹.

- 1 As to the meaning of the 'Companies Acts' see PARA 16.
- 2 As to the meaning of 'company' under the Companies Acts see PARA 24.
- 3 Companies Act 2006 s 540(1). In the Companies Acts, references to shares include stock except where a distinction between share and stock is express or implied (s 540(4)(a)); and references to a number of shares include an amount of stock where the context admits of the reference to shares being read as including stock (s 540(4)(b)). As to the meaning of 'stock' see PARA 1163. A company's shares may no longer be converted into stock: s 540(2). However, stock created before 1 October 2009 (ie the date that Pt 17 (ss 540-657) was fully commenced: see the Companies Act 2006 (Commencement No 1, Transitional Provisions and Savings) Order 2006, SI 2006/3428, art 3(3); the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, art 2(3)(c); the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, art 3(1)(f), (3)(b); the Companies Act 2006 (Commencement No 7, Transitional Provisions and Savings) Order 2008, SI 2008/1886, arts 2(a), 6; and the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3(k)) may be reconverted into shares in accordance with the Companies Act 2006 s 620 (see PARA 1164): s 540(3).
- 4 As to the meaning of references in the Companies Acts to a company's constitution see PARA 227. As to the effect of a company's constitution see PARA 243 et seq.
- 5 Companies Act 2006 s 545.
In the Companies Acts, references to shares: (1) in relation to an undertaking with capital but no share capital, are references to rights to share in the capital of the undertaking (see s 1161(2)(a); and PARA 26); and (2) in relation to an undertaking without capital, are references to interests conferring any right to share in the profits or liability to contribute to the losses of the undertaking, or to interests giving rise to an obligation to contribute to the debts or expenses of the undertaking in the event of a winding up (see s 1161(2)(b); and PARA 26). As to the meaning of 'undertaking' see PARA 26 note 2. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.
- 6 As to the Companies Act 2006 and the legislation which preceded it see PARA 9 et seq.
- 7 The company is not a debtor to capital; the capital is not a debt of the company even to the shareholders: *Lee v Neuchatel Asphalte Co* (1889) 41 ChD 1 at 23, CA, per Lindley LJ; *Verner v General and Commercial Investment Trust* [1894] 2 Ch 239 at 263-264, CA, per Lindley LJ.
- 8 As to the nominal value of shares see PARA 1044.
- 9 *Verner v General and Commercial Investment Trust* [1894] 2 Ch 239 at 265, CA. As to the meaning of references in the Companies Acts to 'issued share capital' see PARA 1045.
- 10 *Bouch v Sproule* (1887) 12 App Cas 385, HL; *Re Bridgewater Navigation Co* [1891] 2 Ch 317, CA; *Re Hoare & Co Ltd and Reduced* [1904] 2 Ch 208 at 214, CA.
- 11 As to distributions and dividends generally see PARA 1390 et seq.

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1043. Authorised minimum share capital of public companies.

The initial requirement¹ for a public company² to have allotted³ share capital of a nominal value not less than the authorised minimum⁴ must be met either by reference to allotted share capital denominated in sterling or by reference to allotted share capital denominated in Euros (but not partly in one and partly in the other)⁵.

1. The requirement specified in the Companies Act 2006 s 761(2) (see PARA 74) for the issue of a trading certificate, or the requirement specified in s 91(1)(a) (see PARA 169) for re-registration as a public company: see s 765(1); and PARA 75. As to the meaning of 'trading certificate' see PARA 74.

2. As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3. As to the meaning of 'allotment' and related expressions see PARA 1091.

4. The subject to any exercise of the power to alter the authorised minimum conferred by the Companies Act 2006 s 764 (see PARA 75): see s 763(6); and PARA 75.

5. See the Companies Act 2006 s 765(1); and PARA 75.

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1044. Nominal value of shares.

The word 'capital' sometimes means the 'nominal' capital of the company¹.

Shares² in a limited company having a share capital³ must each have a fixed nominal value⁴. They may be denominated in any currency (other than shares allotted to meet the authorised minimum share capital requirement for public companies⁵), and different classes of shares⁶ may be denominated in different currencies⁷. An allotment of a share that does not have a fixed nominal value is void⁸.

If a company purports to allot shares in contravention of these requirements⁹, an offence is committed by every officer of the company who is in default¹⁰; and a person guilty of such an offence is liable (on conviction on indictment) to a fine or (on summary conviction) to a fine not exceeding the statutory maximum¹¹.

1. See PARA 1042.

2. As to the meaning of 'share' in the Companies Acts see PARA 1042.

3. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. As to the meaning of 'limited company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4. Companies Act 2006 s 542(1). Shares may not be issued at a price lower than their nominal value, or, where there is no nominal value, their accountable par: see EC Council Directive 77/91 (OJ L26, 31.01.77, p 1) art 8; and PARA 23.

Under the model articles of association that are prescribed for the purposes of the Companies Act 2006 for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), no share is to be issued for less than the aggregate of its nominal value and any premium to be paid to the company in consideration for its issue: Sch 1 art 21(1). However, this does not apply to shares taken on the formation of the company by the subscribers to the company's memorandum: Sch 1 art 21(2). As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 104 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. As to the meanings of 'company limited by shares' and 'private company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. However, no equivalent provision is made in the legacy articles.

5. See PARA 1043. The initial requirement specified in the Companies Act 2006 s 761(2) (see PARA 74) for the issue of a trading certificate, or the requirement specified in s 91(1)(a) (see PARA 169) for re-registration as a

public company, for a public company to have allotted share capital of a nominal value not less than the authorised minimum must be met either by reference to allotted share capital denominated in sterling or by reference to allotted share capital denominated in Euros (but not partly in one and partly in the other): see ss 542(3), 765(1); and PARA 75. This requirement is subject to any exercise of the power to alter the authorised minimum conferred by s 764 (see PARA 75): see s 763(6); and PARA 75. As to the meaning of 'allotted share capital' see PARA 1045. As to the meaning of 'allotment' see PARA 1091. As to the meaning of 'trading certificate' see PARA 74. As to the meaning of 'public company' see PARA 102.

6 As to the meaning of 'class of shares' see PARA 1057.

7 Companies Act 2006 s 542(3).

8 Companies Act 2006 s 542(2).

9 In contravention of the Companies Act 2006 s 542: see s 542(4).

10 Companies Act 2006 s 542(4). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

11 Companies Act 2006 s 542(5). As to the meaning of the 'statutory maximum' see PARA 1622.

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1045. Meaning of references to 'issued' and 'allotted' shares and capital.

References in the Companies Acts to 'issued share capital' are to shares¹ of a company² that have been issued³; and references to 'issued' shares, or to 'issued' share capital, include shares taken on the formation of the company by the subscribers to the company's memorandum of association⁴. References in the Companies Acts to 'allotted share capital' are to shares of a company that have been allotted⁵; and references to 'allotted' shares, or to 'allotted' share capital, also include shares taken on the formation of the company by the subscribers to the company's memorandum⁶.

The shares subscribed for when the company is formed⁷ are at once issued capital⁸. Shares registered in any person's name⁹, or in respect of which a share certificate has been issued¹⁰, are part of the issued capital¹¹. A matter of some difficulty is the distinction between when shares are 'allotted'¹² and when shares are 'issued'¹³.

At common law, the term 'issue' in relation to shares means something distinct from allotment and imports that some subsequent act has been done whereby the title of the allottee has been completed¹⁴. The allotment creates an enforceable contract for the issue of the shares¹⁵. The shares are issued when an application to the company has been followed by allotment and notification to the purchaser and completed by entry on the register of members¹⁶.

Even when capital has been issued, the result is not always a contribution to the company's assets. In the absence of special regulations requiring the signatories of the memorandum to pay for their shares, they are not liable to do so until a call has been regularly made upon them¹⁷.

1 As to the meaning of 'share' in the Companies Acts see PARA 1042.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 Companies Act 2006 s 546(1)(a).

4 Companies Act 2006 s 546(2). As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 104 et seq.

5 See the Companies Act 2006 s 546(1)(b); and PARA 1091.

6 See the Companies Act 2006 s 546(2); and PARA 1091. See also note 7.

7 A company limited by shares cannot be registered on formation unless it submits a statement of capital and initial shareholdings: see the Companies Act 2006 s 10; and PARA 113. Amongst other things, this must state, with respect to each subscriber to the memorandum of association, the number, nominal value (of each share) and class of shares to be taken by him on formation; and the amount to be paid up and the amount (if any) to be unpaid on each share (whether on account of the nominal value of the share or by way of premium): see s 10; and PARA 113. As to the meaning of 'company limited by shares' see PARA 102. As to the meaning of 'class of shares' see PARA 1057. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.

8 *Dalton Time Lock Co v Dalton* (1892) 66 LT 704, CA; *Re Whitehead & Bros Ltd* [1900] 1 Ch 804; *Re Ebenezer Timmins & Sons Ltd* [1902] 1 Ch 238; *Re FW Jarvis & Co Ltd* [1899] 1 Ch 193; *Re Archibald D Dawney Ltd* [1900] WN 152. As to the meaning of 'share capital' see PARA 1045.

9 *Blyth's Case* (1876) 4 ChD 140, CA; *Re Ambrose Lake Tin and Copper Co, Clarke's Case* (1878) 8 ChD 635 at 641, CA, per Cotton LJ. See also PARA 1092.

10 *Bush's Case* (1874) 9 Ch App 554. As to the effect of a share certificate see PARA 381.

11 The cases cited in notes 8-10 were decided on the construction of the Companies Act 1867 s 25 (repealed).

12 As to the meaning of 'allotment' see PARA 1091; and see the text and notes 5-6.

13 It would seem that the meaning of 'issue' depends on the context of the enactment in which the word occurs: see the text and notes 1-4; and see PARA 1092. See also *National Westminster Bank plc v IRC, Barclays Bank plc v IRC* [1995] 1 AC 119, [1994] 3 All ER 1, HL.

14 *National Westminster Bank plc v IRC, Barclays Bank plc v IRC* [1995] 1 AC 119, [1994] 3 All ER 1, HL; *Re Ambrose Lake Tin and Copper Co, Clarke's Case* (1878) 8 ChD 635 at 638, CA, per Cockburn LCJ. See also PARA 1092.

15 *National Westminster Bank plc v IRC, Barclays Bank plc v IRC* [1995] 1 AC 119 at 126, [1994] 3 All ER 1 at 6, HL, per Lord Templeman. See also PARA 1092.

16 *National Westminster Bank plc v IRC, Barclays Bank plc v IRC* [1995] 1 AC 119, [1994] 3 All ER 1, HL (tax relief to investors in shares in companies set up under the business expansion scheme was altered in respect of shares 'issued' after 16 March 1993; shares had been allotted before, but registration took place after, that date; shares were held to have been 'issued' after that date). See also PARA 1092. As to the register of members see PARA 335 et seq.

17 *Alexander v Automatic Telephone Co* [1900] 2 Ch 56, CA. See also PARA 322. As to calls see PARA 1132 et seq.

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1046. Former requirement for authorised capital.

Formerly, a company was required to state in the memorandum of association¹ the amount of its authorised share capital² divided into shares of a fixed nominal value, this amount operating as a limit on the number of shares which could be issued, subject to the power of the company

to increase this figure³. The Companies Act 2006 contains no such requirement, although a company may choose in its articles to limit the power of the directors to allot additional shares⁴. For existing companies⁵, the position is subject to transitional provision⁶.

1 As to the meaning of 'memorandum of association' see PARA 104.

2 See PARA 75.

3 The power to increase the number of shares was effected by way of a resolution under the Companies Act 1985 s 121 (repealed) (see now the Companies Act 2006 ss 617, 618; and PARA 1159 et seq) (alteration of share capital). See also note 6.

4 See the Companies Act 2006 s 550 (cited in PARA 1094), s 551 (cited in PARA 1096).

5 Ie for companies formed under the Companies Act 1985 and its predecessors: see PARA 18.

6 Any provision of a company's memorandum as to the amount of a company's authorised share capital that is in force immediately before 1 October 2009, as altered by anything done by virtue of the Companies Act 1985 s 121 (repealed) (see now the Companies Act 2006 ss 617, 618; and PARA 1159 et seq) (alteration of share capital) and in force immediately before that date, is treated on and after 1 October 2009 as a provision of the company's articles setting the maximum amount of shares that may be allotted by the company, and may be amended or revoked by the company by ordinary resolution: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 42(1), (2). The Companies Act 2006 Pt 3 Ch 3 (ss 29-30) (resolutions and agreements affecting a company's constitution) (see PARA 231) applies to any such resolution: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 42(3). However, the power of a company by special resolution to adopt new articles, with effect from 1 October 2009 or any later date, that make no provision as to the maximum number of shares that may be allotted by the company, is not affected by this provision: Sch 2 para 42(4). An amendment of a company's articles on or after 1 October 2009 authorising the directors to allot shares in excess of the amount allowed by any such provision of a company's memorandum as to the amount of a company's authorised share capital has effect although not expressed as amending or revoking it: Sch 2 para 42(6).

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1047. Meaning of 'equity share capital'.

In the Companies Acts¹, 'equity share capital', in relation to a company², means its issued share capital³ excluding any part of that capital that, neither as respects dividends nor as respects capital, carries any right to participate beyond a specified amount in a distribution⁴.

1 As to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 As to the meaning of references to 'issued share capital' in the Companies Acts see PARA 1045. As to the meaning of 'share capital' see PARA 1042.

4 Companies Act 2006 s 548. As to distributions and dividends generally see PARA 1389 et seq.

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1048. Meanings of 'called up', 'paid up' etc share capital.

Companies which invite the public to subscribe for their shares¹ invariably require something on account of their nominal amount² to be paid on application, and some other sum to be paid on allotment³. The sums so paid represent 'partly paid' capital.

Calls may be made for the difference between what has been paid and the nominal amount of shares⁴. When that difference has been paid, the share is 'fully paid', and the aggregate amount of such payments of application moneys, allotment moneys, and calls (if paid) represents 'paid up' capital⁵. Contributions, voluntary or enforced, of any person becoming a member render the shares which he takes partly paid or paid up capital, as the case may be⁶.

In the Companies Acts⁷, 'called up share capital', in relation to a company⁸, means so much of its share capital⁹ as equals the aggregate amount of the calls made on its shares (whether or not those calls have been paid), together with any share capital paid up without being called, and any share capital to be paid on a specified future date under the articles¹⁰, the terms of allotment of the relevant shares or any other arrangements for payment of those shares¹¹.

The Companies Act 2006 limits the liability of the members of any company¹² that is limited by shares¹³ to the amount, if any, unpaid¹⁴ on the shares respectively held by them¹⁵. This means that the liability continues so long as anything remains unpaid on a share, and may only be ended by payment in full¹⁶. When that payment in full is made, the amount paid represents 'paid up' capital¹⁷.

1 As to public offers of securities see PARA 1066 et seq. As to the meaning of 'share' in the Companies Acts see PARA 1042.

2 As to the nominal value of shares see PARA 1044.

3 As to the meaning of 'allotment' see PARA 1091. As to the meaning of 'allotted' capital see PARA 1045. Under the model articles of association that are prescribed for the purposes of the Companies Act 2006 for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), no share is to be issued for less than the aggregate of its nominal value and any premium to be paid to the company in consideration for its issue (although this does not apply to shares taken on the formation of the company by the subscribers to the company's memorandum): see Sch 1 art 21; and PARA 1044.

4 As to calls see PARA 1132 et seq. As to whether a company is estopped by representation or convention from denying shares that have been fully paid up see *Hunter v Senate Support Services Ltd* [2004] EWHC 1085 (Ch), [2005] 1 BCLC 175.

5 Where shares are issued at a premium, the sums paid up will partly represent the premium, and the shares will not be 'fully paid' until the full nominal amount has been paid in addition to the premium. As to the meaning of 'premium' see PARA 1146. As to the share premium account see PARA 1146.

6 As to membership of a company see PARA 321 et seq. An allotment of shares is not considered to be a condition precedent to a person becoming a member: see PARA 321.

7 As to the meaning of the 'Companies Acts' see PARA 16.

8 As to the meaning of 'company' under the Companies Acts see PARA 24.

9 As to the meaning of 'share capital' see PARA 1042.

10 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

11 Companies Act 2006 s 547. 'Uncalled share capital' is to be construed accordingly: s 547.

12 As to the meaning of 'member of a company' see PARA 321.

13 As to the meaning of 'company limited by shares' see PARA 78.

14 As to when shares in a company are deemed paid up see PARA 1091; and as to the means of payment generally see PARA 1113 et seq.

15 See the Companies Act 2006 s 3; and PARA 102. As to members' liability see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 715; and see also *Edmonton Country Club Ltd v Case* [1974] 4 WWR 626, Can SC (amendments to the articles purporting to require shareholders to pay an annual assessment on pain of forfeiture of their shares held ultra vires and void ab initio).

16 *Oregum Gold Mining Co of India v Roper* [1892] AC 125 at 145, HL, per Lord Macnaghten. As to the allotment of shares at a discount see PARA 1111.

17 See also PARA 1048.

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1049. Payment of interest on advances of capital.

A company¹, if so authorised by its articles², may accept from any member³ the whole or a part of the amount remaining unpaid on any shares⁴ held by him, although no part of that amount has been called up⁵.

The articles may provide that the company may pay interest on money so advanced, until the same would, but for such advance, become presently payable⁶. In such a case, the interest may be paid out of capital⁷.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

3 As to the meaning of 'member of a company' see PARA 321.

4 As to the meaning of 'share' in the Companies Acts see PARA 1042. As to when shares in a company are deemed paid up see PARA 1091; and as to the means of payment generally see PARA 1113 et seq.

5 See the Companies Act 2006 s 581(b); and PARA 1112. As to the meaning of 'called up' see PARA 1048.

6 See PARA 1112. The model articles, however, make no such provision: see PARA 228 et seq.

7 *Lock v Queensland Investment and Land Mortgage Co* [1896] AC 461, HL (the articles permitted interest to be paid and the directors made the payment in good faith and in the honest exercise of their discretion). The interest is due to the shareholder in the character of a creditor: *Lock v Queensland Investment and Land Mortgage Co*, approving *Dale v Martin* (1883) 11 LR 371. Cf *Re AM Wood's Ships' Woodite Protection Co Ltd* (1890) 62 LT 760.

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1050. Numbering of shares.

Each share¹ in a company having a share capital² must be distinguished³ by its appropriate number⁴; except that, if at any time all the issued shares⁵ in a company, or if all the issued shares of a particular class⁶ in a company, are fully paid up⁷ and rank *pari passu* for all purposes⁸, none of those shares need thereafter have a distinguishing number so long as it remains fully paid up and ranks *pari passu* for all purposes with all shares of the same class for the time being issued and fully paid up⁹.

The fixed amount of a share must be a monetary amount, but it is not necessary for the shares to be all of the same amount¹⁰.

1 As to the meaning of 'share' in the Companies Acts see PARA 1042; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. As to the meaning of 'company' under the Companies Acts see PARA 24.

3 I.e. when it is issued. As to a joint stock company, whose shares are not numbered, see PARA 39.

4 Companies Act 2006 s 543(1). The number is usually called the 'denoting number'. The provision is merely directory, to enable the title of particular persons to be traced: *Ind's Case* (1872) 7 Ch App 485. Cf *Wolverhampton New Waterworks Co v Hawksford* (1860) 7 CBNS 795 at 812-813 (affd (1861) 11 CBNS 456); *East Gloucestershire Rly Co v Bartholomew* (1867) LR 3 Exch 15 at 21 per Kelly CB.

5 As to the meaning of 'issued' shares see PARA 1045.

6 As to the meaning of 'class of shares' see PARA 1057.

7 As to the meaning of 'paid up' shares see PARA 1091.

8 See the Companies Act 2006 s 543(2).

9 Companies Act 2006 s 543(2).

10 The change into decimal currency was merely a change of label, involving no formalities: *Re Harris and Sheldon Group Ltd* [1971] 2 All ER 87n, [1971] 1 WLR 899.

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1051. Alterations to capital.

A limited company¹ having a share capital² may not alter its share capital except in the following ways³. The company may:

- 1994 (1) increase its share capital by allotting new shares in accordance with Part 17⁴ of the Companies Act 2006⁵ or reduce its share capital in accordance with the relevant provisions⁶ of that Part⁷;
- 1995 (2) sub-divide or consolidate⁸ all or any of its share capital⁹ or reconvert¹⁰ stock into shares¹¹;
- 1996 (3) redenominate all or any of its shares¹² and may reduce its share capital¹³ in connection with such a redenomination¹⁴.

1 As to the meaning of 'limited company' under the Companies Acts see PARA 102.

2 As to the meaning of 'company having a share capital' see PARA 1042.

- 3 See the Companies Act 2006 s 617(1); and PARA 1159.
- 4 le in accordance with the Companies Act 2006 Pt 17 (ss 540-657): see PARA 1042 et seq. See also PARA 1160.
- 5 See the Companies Act 2006 s 617(2)(a); and PARA 1159.
- 6 le in accordance with the Companies Act 2006 Pt 17 Ch 10 (ss 641-653): see PARA 1173 et seq.
- 7 See the Companies Act 2006 s 617(2)(b); and PARA 1159.
- 8 le in accordance with the Companies Act 2006 s 618: see PARA 1161.
- 9 See the Companies Act 2006 s 617(3)(a); and PARA 1159.
- 10 le in accordance with the Companies Act 2006 s 620: see PARA 1164.
- 11 See the Companies Act 2006 s 617(3)(b); and PARA 1159.
- 12 le in accordance with the Companies Act 2006 s 622: see PARA 1167.
- 13 le in accordance with the Companies Act 2006 s 626: see PARA 1170.
- 14 See the Companies Act 2006 s 617(4); and PARA 1159.

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1052. Redeemable shares.

A limited company¹ having a share capital² may issue shares³ that are to be redeemed or are liable to be redeemed at the option of the company or the shareholder⁴ ('redeemable shares'), subject to the following provisions⁵:

- 1997 (1) the articles of a private limited company⁶ may exclude or restrict the issue of redeemable shares⁷;
- 1998 (2) a public limited company⁸ may only issue redeemable shares if it is authorised to do so by its articles⁹;
- 1999 (3) no redeemable shares may be issued at a time when there are no issued shares of the company that are not redeemable¹⁰.

1 As to the meaning of 'limited company' see PARA 102.

2 As to the meaning of 'share capital' see PARA 1045.

3 As to the meaning of 'issue' in relation to shares see PARA 1045. As to the meaning of 'share' in the Companies Acts see PARA 1042.

4 As to shareholders and membership of companies generally see PARA 321 et seq.

5 See the Companies Act 2006 s 684(1); and PARA 1229.

6 As to articles of association generally see PARA 228 et seq. As to the meaning of 'private limited company' see PARA 102.

7 See the Companies Act 2006 s 684(2); and PARA 1229.

8 As to the meaning of 'public limited company' see PARA 102.

9 See the Companies Act 2006 s 684(3); and PARA 1229.

10 See the Companies Act 2006 s 684(4); and PARA 1229.

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1053. Bonus shares.

Fully paid bonus shares¹ may be allotted to members in the following ways²:

- 2000 (1) the company may use the share premium account³ to pay up new shares to be allotted to members as fully paid bonus shares⁴;
- 2001 (2) the redenomination reserve⁵ may be applied by the company in paying up shares to be allotted to members as fully paid bonus shares⁶;
- 2002 (3) the company may use the capital redemption reserve⁷ to pay up new shares to be allotted to members as fully paid bonus shares⁸.

The prohibitions against providing financial assistance⁹ for the acquisition of shares in a public company¹⁰ or a private company¹¹ do not prohibit an allotment of bonus shares¹²; nor does the restriction imposed¹³ on a company allotting equity securities¹⁴ not to do so, unless certain conditions are met in relation to existing shareholders, apply in relation to the allotment of bonus shares¹⁵.

An issue of shares as fully or partly paid bonus shares is not regarded as a distribution for the purposes of the Companies Act 2006¹⁶; and nothing in the provisions of that Act relating to the effect of holding treasury shares¹⁷ prevents an allotment of shares as fully paid bonus shares in respect of treasury shares¹⁸.

1 As to the meaning of 'share' see PARA 1042. As to the meaning of 'fully paid' see PARA 1048. The usual restriction that requires shares allotted by a company, and any premium on them, to be paid up in money or money's worth does not prevent a company from allotting bonus shares to its members: see the Companies Act 2006 s 582; and PARA 1113. See also s 586(3), (4); and PARA 1116. As to the meaning of 'allotment' and related expressions see PARA 1091. As to the meaning of 'member' see PARA 321. As to the meaning of 'premium' see PARA 1146.

2 See also PARA 1420, citing the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 art 36 and reg 4, Sch 3 art 78, which provide that any undivided profits available for dividend may be capitalised and distributed among the shareholders. See also the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 105; and PARA 1420.

3 As to the share premium account see PARA 1146.

4 See the Companies Act 2006 s 610(3); and PARA 1146.

5 As to the redenomination reserve see PARA 1172.

6 See the Companies Act 2006 s 628(2); and PARA 1172.

7 As to the capital redemption reserve see PARA 1236.

8 See the Companies Act 2006 s 733(5); and PARA 1236.

9 As to the meaning of 'financial assistance' see PARA 1223.

10 See under the Companies Act 2006 s 678 (see PARA 1224). As to the meaning of 'public company' see PARA 102.

11 le under the Companies Act 2006 s 679 (see PARA 1225). As to the meaning of 'private company' see PARA 102.

12 See the Companies Act 2006 s 681(2)(b); and PARA 1227.

13 le by the Companies Act 2006 s 561(1): see PARA 1098.

14 As to the meanings of 'equity securities' and the 'allotment of equity securities' for these purposes see PARA 1098 note 4.

15 See the Companies Act 2006 s 564; and PARA 1099.

16 See the Companies Act 2006 s 829(2)(a); and PARA 1389.

17 le nothing in the Companies Act 2006 s 726 (see PARA 1251): see s 726(4); and PARA 1251.

18 See the Companies Act 2006 s 726(4); and PARA 1251. Shares allotted as fully paid bonus shares in respect of the treasury shares are treated as if purchased by the company, at the time they were allotted, in circumstances in which s 724(1) (see PARA 1251) applied: see s 726(5); and PARA 1251.

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1054. Duty of directors on serious loss of capital.

Where the net assets of a public company¹ are half or less of its called up share capital², the directors³ of the company must call a general meeting⁴ of the company to consider whether any, and if so what, steps should be taken to deal with the situation⁵. They must do so not later than 28 days from the earliest day on which that fact is known to a director of the company⁶; and the meeting must be convened for a date not later than 56 days from that day⁷.

If there is a failure to convene a meeting as so required⁸, each of the directors of the company who knowingly authorises or permits the failure⁹ or who, after the period during which the meeting should have been convened, knowingly authorises or permits the failure to continue¹⁰, commits an offence¹¹. A person who is guilty of such an offence is liable (on conviction on indictment) to a fine or (on summary conviction) to a fine not exceeding the statutory maximum¹².

Nothing in these provisions authorises the consideration, at a meeting so convened¹³, of any matter that could not have been considered at that meeting apart from these provisions¹⁴.

1 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of references to 'called up share capital' in the Companies Acts see PARA 1048. As to the meaning of 'share capital' see PARA 1042.

3 As to the meaning of 'director' see PARA 478.

4 As to general meetings of the company see PARA 629.

5 Companies Act 2006 s 656(1). The Secretary of State may by regulations modify s 656: s 657(1). As to the Secretary of State see PARA 6. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 657 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 657(4), 1290. The regulations may amend or repeal s 656, or make such other provision as appears to the Secretary of State appropriate in place of s 656 (s

657(2)); and may make consequential amendments or repeals in other provisions of the Companies Act 2006, or in other enactments (s 657(3)). As to the meaning of 'enactment' see PARA 17 note 2. At the date at which this volume states the law, no such regulations had been made for these purposes.

6 Companies Act 2006 s 656(2).

7 Companies Act 2006 s 656(3).

8 le as required by the Companies Act 2006 s 656: see s 656(4).

9 Companies Act 2006 s 656(4)(a).

10 Companies Act 2006 s 656(4)(b).

11 Companies Act 2006 s 656(4).

12 Companies Act 2006 s 656(5). As to the meaning of the 'statutory maximum' see PARA 1622.

13 le convened in pursuance of the Companies Act 2006 s 656(1) (see the text and notes 1-5): see s 656(6).

14 Companies Act 2006 s 656(6).

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(ii) Nature of Shares

1055. Personal property and transferability of shares.

A share¹ is a right to a specified amount of the share capital² of a company³, carrying with it certain rights and liabilities while the company is a going concern and in its winding up⁴.

The shares or other interest of any member⁵ in a company are personal property (and are not in the nature of real estate)⁶. They are transferable in accordance with the company's articles⁷, but their transfer is subject to the Stock Transfer Act 1963 (which enables securities of certain descriptions to be transferred by a simplified process)⁸ and to regulations made under the Companies Act 2006⁹ (which enable title to securities to be evidenced and transferred without a written instrument)¹⁰.

1 As to the meaning of 'share' in the Companies Acts see PARA 1042; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'share capital' see PARA 1042.

3 As to the meaning of 'company' under the Companies Acts see PARA 24. A share cannot properly be likened to a sum of money, settled upon and subject to executory limitations to arise in the future; it is the interest of the holder in the company, measured, for the purposes of liability and dividend, by a sum of money: *Borland's Trustee v Steel Bros & Co Ltd* [1901] 1 Ch 279. See also *IRC v Crossman* [1937] AC 26 at 40-41, [1936] 1 All ER 762 at 769, HL, per Viscount Hailsham LC, and at 66 and 787 per Lord Russell of Killowen; *IRC v Laird Group plc* [2003] UKHL 54 at [42], [2003] 4 All ER 669 at [42], [2003] 1 WLR 2476 per Lord Millett. In the Companies Acts, references to shares include stock except where a distinction between share and stock is express or implied, but a company's shares may no longer be converted into stock: see s 540; and PARA 1042.

4 A share is often described as a 'bundle of rights': see *Re Banque des Marchands de Moscou (Koupetschesky)* [1958] Ch 182 at 220, [1957] 3 All ER 182 at 191 per Roxburgh J. See also *Government of Mauritius v Union Flacq Sugar Estates Co Ltd* [1992] 1 WLR 903, PC (the property owned by a shareholder is his share and his right to vote in general meetings of the company is not property in its own right or an interest in

or right over property but merely an incident of the ownership of a share). As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

5 As to the meaning of 'member of a company' see PARA 321.

6 Companies Act 2006 s 541. Shares are 'goods' which the court may order to be sold: *Evans v Davies* [1893] 2 Ch 216. As to the words sufficient to include shares in a gift by will see **WILLS** vol 50 (2005 Reissue) PARA 586. Shares transferable only by deed were choses in action within the meaning of the Bankruptcy Act 1914 s 38(c) (now repealed): *Colonial Bank v Whinney* (1886) 11 App Cas 426, HL.

7 Companies Act 2006 s 544(1). As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq. As to transfers see PARA 389 et seq.

8 Companies Act 2006 s 544(2)(a). As to the Stock Transfer Act 1963 see PARAS 400, 430.

9 See under the Companies Act 2006 Pt 21 Ch 2 (ss 783-790) (see PARA 420 et seq): see s 544(2)(b).

10 Companies Act 2006 s 544(2)(b). As regards share transfers generally see Pt 21 (ss 768-790) (see PARA 381 et seq): see s 544(3).

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1056. Contracts to take shares.

The principles applicable to a contract to take or subscribe¹ for shares² in a company are identical with those which apply to other contracts³; and specific performance of an agreement to take and pay for shares may be obtained⁴.

1 As to the common law meaning of 'subscribe' see *Arnison v Smith* (1889) 41 ChD 348 at 357, CA, per Kekewich J (cited in PARA 1151). Cf *Re London and Colonial Finance Corp Ltd* (1897) 77 LT 146 at 147, CA ('subscribe' as used in a memorandum of association held to mean to take personally or to find someone else to take); *Whitwam v Watkin* (1898) 78 LT 188.

2 As to shares generally see PARA 1042.

3 See PARAS 326-327.

4 See PARA 332; and see **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 826 et seq.

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(iii) Classes of Share and Class Rights

1057. Classes of share.

'Class rights' are particular rights which are annexed to certain shares¹ and may be varied in accordance with certain provisions of the Companies Act 2006². Where all the shares fall into only one class, there are no 'class rights' only 'shareholder rights'³.

Under a company's articles of association⁴, but subject to those articles and without prejudice to the rights attached to any existing share, the company may issue shares with such rights or restrictions as may be determined by ordinary resolution⁵. The company may⁶ issue shares which are to be redeemed, or are liable to be redeemed at the option of the company or the holder, and the directors may⁷ determine the terms, conditions and manner of redemption of any such shares⁸.

1 As to shares generally see PARA 1042. Rights or benefits which, although not attached to any particular shares, are conferred on the person concerned in his capacity as a member or shareholder of the company are for this purpose rights attached to a class of shares: *Cumbrian Newspapers Group Ltd v Cumberland and Westmorland Herald Newspaper and Printing Co Ltd* [1987] Ch 1, [1986] 2 All ER 816. A right conferred on an individual unrelated to any shareholding cannot be described as a class right: *Re Blue Arrow plc* [1987] BCLC 585 at 590. As to shareholders and membership of companies generally see PARA 321 et seq. As to the application of the provisions which govern general meetings to class meetings see PARA 631.

As to the application of EC law to the use of 'golden shares' which allow control to be retained over a company see Joined Cases C-367/98 *EC Commission v Portugal*, C-483/99 *EC Commission v France*, C-503/99 *EC Commission v Belgium* [2003] QB 233, [2003] All ER (EC) 126, ECJ; Case C-98/01 *EC Commission v UK* [2003] All ER (EC) 878, [2003] 2 CMLR 598, ECJ.

2 Ie the Companies Act 2006 s 630 (see PARA 1060). Note, however, that the term 'class rights' is not defined in the Companies Act 2006.

3 As to the meaning of 'shares of one class' see PARA 1058.

4 As to a company's articles of association generally see PARA 228 et seq. As to the model articles of association that have been prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

5 Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A art 2; Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 22(1); Sch 3 art 43(1). As to ordinary resolutions see PARA 613. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 2 is applied by reg 2, Table D part III in relation to companies limited by guarantee and having a share capital and by reg 2, Table E art 1 in relation to unlimited companies having a share capital but Table A art 2 is disapplied by reg 2, Table C art 1 in relation to companies limited by guarantee and not having a share capital. As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

A right granted to a holder of particular shares imposed by a shareholders' agreement for the protection of a minority shareholder was a class right and had the same effect as if the right had been set out as class rights in the articles: *Harman v BML Group Ltd* [1994] 1 WLR 893, [1994] 2 BCLC 674, CA (a shareholders' meeting was not quorate without the presence of the holder of 'B' shares or his proxy). Typical class rights relate to a preference as to dividend payments and as to a return of capital on a winding up: see eg *Will v United Lankat Plantations Co Ltd* [1914] AC 11, HL. As to preference shares see PARA 1059.

6 Ie subject to the Companies Act 2006 s 684(2) (articles of a private limited company may exclude or restrict the issue of redeemable shares) and s 684(3) (public limited company may only issue redeemable shares if it is authorised to do so by its articles) (see PARA 1229).

7 Ie subject to the Companies Act 2006 s 685(1) (directors of a limited company may determine the terms, conditions and manner of redemption of shares if they are authorised to do so by the company's articles, or by a resolution of the company) (see PARA 1230).

8 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 22(2); Sch 3 art 43(2). The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 3 makes similar provision except that redemption must be made on such terms and in such manner as may be provided by the articles. Table A art 3 is applied by Table D part III in relation to companies limited by guarantee and having a share capital but is disapplied by Table C art 1 in relation to companies limited by guarantee and not having a share capital.

capital and by Table E art 1 in relation to unlimited companies having a share capital. As to redeemable shares see the Companies Act 2006 s 684(1); and PARA 1229.

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1058. Meaning of 'shares of one class'.

For the purposes of the Companies Acts¹, shares² are of one class if the rights attached to them are in all respects uniform³. For this purpose, the rights attached to shares are not regarded as different from those attached to other shares by reason only that they do not carry the same rights to dividends in the 12 months immediately following their allotment⁴.

1 As to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'share' in the Companies Acts see PARA 1042.

3 Companies Act 2006 s 629(1). This provision is relevant eg to s 550 (see PARA 1094) and s 569 (see PARA 1102), which specifically apply where a company has only one class of shares.

4 Companies Act 2006 s 629(2). As to the meaning of 'allotment' see PARA 1091. As to distributions and dividends see PARA 1390 et seq.

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1059. Preference shares.

There is no implied term that equal rights and privileges should be attached to all shares¹; some may be preferential either as to capital² or as to dividend³, or as to both, or may have peculiar privileges in the matter of voting, or in other respects⁴. Under a company's articles of association⁵, but subject to those articles and without prejudice to the rights attached to any existing share, a company is free to issue shares with such rights or restrictions as may be determined by ordinary resolution⁶.

Where the company's constitution⁷ merely gives express power to issue preference shares as part of the original capital, the exercise of that power is governed by the articles⁸.

Where a preferential dividend of a specified amount is attached to shares, the holders of the shares are (unless the articles or the terms of issue contain clear indications to the contrary) limited to the fixed dividend and not entitled to participate in profits to any greater extent⁹.

If preference shares confer a preferential right in respect of dividend, the dividend is *prima facie* cumulative, that is to say, if the moneys applicable to dividend in one year are not sufficient to pay the preference dividend, the deficiency, including arrears, must be made good out of moneys so applicable in future years, before anything is paid as dividend to the holders of other shares ranking after such preference shares¹⁰. This dividend belongs to the holders of the shares when it is declared, not to the holders of the shares when the arrears accrued due, and no lapse of time will bar the right to payment of arrears in full before payment of any

dividends on junior ranking shares¹¹. The dividend may, however, be non-cumulative if the articles or terms of issue upon their true construction so provide¹².

Prima facie, a preference share gives only a right to a preferential dividend and not a right to a preferential payment of the amount of the share out of capital in case of a winding up¹³. A preference as to repayment of capital may, however, be given¹⁴.

Preference shares may be created having a priority over other preference shares, unless there is any provision in the company's constitution to prevent it, either on the original issue of both classes of shares or by an increase of capital¹⁵.

1 *Andrews v Gas Meter Co* [1897] 1 Ch 361, CA (overruling *Hutton v Scarborough Cliff Hotel Co Ltd* (1865) 2 Drew & Sm 521); *Sime v Coats* 1908 SC 751, Ct of Sess. See also *British and American Trustee and Finance Corp v Couper* [1894] AC 399 at 417, HL, per Lord Macnaghten; *Harrison v Mexican Rly Co* (1875) LR 19 Eq 358; *Guinness v Land Corp of Ireland* (1882) 22 ChD 349 at 377, CA, per Cotton LJ; *Re South Durham Brewery Co* (1885) 31 ChD 261 at 270, CA, per Lindley LJ; *Humboldt Redwood Co Ltd (Liquidator) v Coats* 1908 SC 751, Ct of Sess; *Galloway v Hallé Concerts Society* [1915] 2 Ch 233 at 239 per Sargant J. As to shares generally see PARA 1042.

2 As to a company's capital generally see PARA 1042 et seq.

3 As to dividends generally see PARA 1408 et seq.

4 These are generally called 'preference' shares, as distinguished from those which are not so privileged, generally called 'ordinary' shares. A company may also have 'deferred' shares, deferred in priority to the ordinary shares. There may be preference, ordinary and deferred shares, or shares of more classes than three, each of which has particular rights and conditions attached to it. Founders' shares were sometimes issued to recompense 'founders' or promoters of the company. They were usually shares of small nominal amount, which, although deferred in priority as to dividends, entitled the holders to the whole or a large percentage of the surplus profits remaining after payment of fixed dividends on the shares having priority to the founders' shares. As to voting rights generally see PARA 652 et seq.

5 As to a company's articles of association generally see PARA 228 et seq.

6 See the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A art 2; Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 22; Sch 3 art 43; and see PARA 1057 note 5.

7 As to the meaning of references in the Companies Acts to a company's constitution see PARA 227. As to the effect of a company's constitution see PARA 243 et seq.

8 *Campbell v Rofe* [1933] AC 91, PC.

9 *Will v United Lankat Plantations Co Ltd* [1914] AC 11, HL. Cf *Steel Co of Canada Ltd v Ramsay* [1931] AC 270, PC.

10 *Henry v Great Northern Rly Co* (1857) 1 De G & J 606; *Webb v Earle* (1875) LR 20 Eq 556; *Miln v Arizona Copper Co* (1898) 36 SLR 741; *Patrick, Hillhead and Maryhill Gas Co Ltd v Taylor* (1888) 15 R 711; *Foster v Coles and MB Foster & Sons Ltd* (1906) 22 TLR 555; *Ferguson and Forester Ltd v Buchanan* 1920 SC 154.

11 *Godfrey Phillips Ltd v Investment Trust Corp Ltd* [1953] Ch 449, [1953] 1 All ER 7. As to the priority of dividends on preference shares see PARA 1418.

12 *Staples v Eastman Photographic Materials Co* [1896] 2 Ch 303, CA; *Adair v Old Bushmills Distillery Co* [1908] WN 24; *Jl Thornycroft & Co Ltd v Thornycroft* (1927) 44 TLR 9.

13 *Re London Indiarubber Co* (1868) LR 5 Eq 519.

14 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 833.

15 *Underwood v London Music Hall Ltd* [1901] 2 Ch 309.

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1060. Variation of class rights in companies having a share capital.

Rights attached to a class of shares¹ in a company having a share capital² may only be varied³:

- 2003 (1) in accordance with provision in the company's articles for the variation of those rights⁴; or
- 2004 (2) where the company's articles contain no such provision, if the holders of shares⁵ of that class consent to the variation⁶.

The consent required for these purposes on the part of the holders of a class of a company's shares is⁷:

- 2005 (a) consent in writing from the holders of at least three-quarters in nominal value of the issued shares⁸ of that class (excluding any shares held as treasury shares)⁹; or
- 2006 (b) a special resolution¹⁰ passed at a separate general meeting of the holders of that class¹¹ sanctioning the variation¹².

Any amendment of a provision contained in a company's articles for the variation of the rights attached to a class of shares, or the insertion of any such provision into the articles, is itself to be treated as a variation of those rights¹³.

Nothing in the provisions as to variation of class rights in companies having a share capital¹⁴ affects the power of the court¹⁵ under the provisions of the Companies Act 2006 which govern applications to cancel a resolution for a public company to be re-registered as private¹⁶, or which govern arrangements and reconstructions¹⁷, or which govern the protection of members of a company against unfair prejudice¹⁸.

The enjoyment of rights of preference shareholders¹⁹ is affected as a matter of business by the issue of additional preference shares with the same voting rights per share as those already existing, since the votes of the existing preference shareholders are diminished in power, but the voting rights as such are not varied²⁰; nor are the rights of preference stockholders affected by the issue of additional ordinary shares, although the position of ordinary shareholders is thereby strengthened as against the preference stockholders²¹. Similarly, there is no variation of the rights of the holders of existing sub-divided shares where the company, in accordance with its articles, sub-divides further shares, all sub-divided shares having the same voting rights, with the result that the holders of the existing sub-divided shares lose their power of enforcing control²².

The repayment of capital on a reduction of capital²³ in accordance with the priorities as to the return of capital on a winding up does not constitute a variation or abrogation of the rights of preference shareholders but their fulfilment²⁴; nor does such prior repayment of capital modify, commute, affect or deal with the rights of preference shareholders so as to require the consent of the class under the articles²⁵. Preference shareholders may protect themselves by a provision in the articles providing that a repayment of capital on a reduction of capital shall be deemed to be a variation of the rights attached to the affected shares²⁶.

The company may validly make a payment to the shareholders whose rights are adversely varied to secure their acquiescence²⁷.

1 As to the meaning of 'share' in the Companies Acts see PARA 1042; and as to the meaning of the 'Companies Acts' see PARA 16. As to classes of shares see PARA 1057.

2 The Companies Act 2006 s 630 is concerned with the variation of the rights attached to a class of shares in a company having a share capital: s 630(1). As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. As to the meaning of 'company' under the Companies Acts see PARA 24. As to variation of class rights in companies without a share capital see PARA 1062; as to the right to object to variation see PARA 1061; and as to the notice required of a new name or variation of class rights see PARA 1064.

In s 630, and (except where the context otherwise requires) in any provision in a company's articles for the variation of the rights attached to a class of shares, references to the variation of those rights include references to their abrogation: s 630(6). As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq. As to the distinction between variation and abrogation of rights see the guidance in *Re House of Fraser plc* [1987] BCLC 293 at 301, Ct of Sess, per Lord Justice Clerk Ross. The variation of a right presupposes the existence of the right, the variation of the right, and the subsequent continued existence of the right as varied; abrogation presupposes the termination of rights without satisfaction or fulfilment: *Re House of Fraser plc* at 301. For these purposes, a distinction must be drawn between the rights of shareholders on the one hand and the results of exercising them or the enjoyment of the rights on the other hand: *White v Bristol Aeroplane Co Ltd* [1953] Ch 65 at 74, [1953] 1 All ER 40 at 44, CA, per Evershed MR, and at 82 and 49 per Romer LJ.

3 Companies Act 2006 s 630(1), (2). This is without prejudice to any other restrictions on the variation of the rights: s 630(3). See note 2.

4 Companies Act 2006 s 630(2)(a). See note 2.

5 As to shareholders generally see PARA 321 et seq.

6 Companies Act 2006 s 630(2)(b). The consent referred to in head (2) in the text is consent to the variation made in accordance with s 630 (see the text and notes 7-12): see s 630(2)(b). See note 2.

7 Companies Act 2006 s 630(4). See note 2.

8 As to the meaning of 'issued' shares see PARA 1045. As to the nominal value of shares see PARA 1044.

9 Companies Act 2006 s 630(4)(a). See note 2. As to treasury shares see PARA 1251.

10 As to the meaning of 'special resolution' see PARA 614.

11 As to meetings of members see PARA 629 et seq. As to the application of the provisions which govern general meetings to class meetings see PARA 631.

12 Companies Act 2006 s 630(4)(b). See note 2.

13 Companies Act 2006 s 630(5). See note 2.

14 Ie nothing in the Companies Act 2006 s 630 (see the text and notes 1-13): see s 632.

15 As to the meaning of 'court' see PARA 212 note 1.

16 Ie under the Companies Act 2006 s 98 (see PARA 174): see s 632. As to the meaning of 'private company' see PARA 102.

17 Ie under the Companies Act 2006 Pt 26 (ss 895-901) (see PARA 1425 et seq): see s 632.

18 Companies Act 2006 s 632. The text refers to the provisions which govern the protection of members against unfair prejudice that are contained in Pt 30 (ss 994-999) (see PARA 466 et seq): see s 632.

19 As to preference shares see PARA 1059.

20 *White v Bristol Aeroplane Co Ltd* [1953] Ch 65, [1953] 1 All ER 40, CA, applying *Re Mackenzie & Co Ltd* [1916] 2 Ch 450 (rateable reduction on all shares, preference and ordinary, in pursuance of clause in articles authorising reduction of capital; not an alteration of the rights of preference shareholders although diminishing the actual preferential dividend).

21 *White v Bristol Aeroplane Co Ltd* [1953] Ch 65, [1953] 1 All ER 40, CA; *Re John Smith's Tadcaster Brewery Co Ltd* [1953] Ch 308, [1953] 1 All ER 518, CA.

22 *Greenhalgh v Arderne Cinemas Ltd* [1946] 1 All ER 512, CA. As to the sub-division of shares see PARA 1162.

23 As to reduction of capital see PARA 1173 et seq.

24 *Re House of Fraser plc* [1987] BCLC 293, Ct of Sess; *Re Saltdean Estate Co Ltd* [1968] 3 All ER 829, [1968] 1 WLR 1844; and see PARA 1181.

25 *House of Fraser plc v ACGE Investments Ltd* [1987] AC 387, [1987] 2 WLR 1083, HL; *Re Saltdean Estate Co Ltd* [1968] 3 All ER 829, [1968] 1 WLR 1844; and see PARA 1181. The words 'modify, commute, affect or deal with' contemplate that after the relevant transaction the shareholders in question will continue to possess some rights albeit of a different nature from those which they possessed before the transaction and do not cover the situation where there is a complete cancellation of the shares: *House of Fraser plc v ACGE Investments Ltd*.

26 See *Re Northern Engineering Industries plc* [1994] 2 BCLC 704, CA (reduction of capital so specified as a variation). In a protective provision of this type, 'reduction' encompasses both piecemeal reduction of capital and repayment of an entire class on a reduction to zero.

27 *Caledonian Insurance Co v Scottish-American Investment Co Ltd* 1951 SLT 23.

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1061. Rights to object to variation: companies having a share capital.

Where the rights attached to any class of shares¹ in a company having a share capital² are varied³, the holders of not less in the aggregate than 15 per cent of the issued shares⁴ of the class in question (being persons who did not consent to or vote in favour of the resolution for the variation⁵) may apply to the court⁶ to have the variation cancelled⁷.

If such an application is made, the variation has no effect unless and until it is confirmed by the court⁸. Application to the court must be made within 21 days after the date on which the consent was given or the resolution was passed (as the case may be)⁹, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose¹⁰.

The court, after hearing the applicant and any other persons who apply to the court to be heard and who appear to the court to be interested in the application, may (if satisfied having regard to all the circumstances of the case that the variation would unfairly prejudice the shareholders of the class represented by the applicant) disallow the variation and must (if not so satisfied) confirm it¹¹. The decision of the court on any such application is final¹².

The company must within 15 days after the making of an order by the court on such an application¹³, objecting to a variation of class rights, forward a copy of the order to the registrar of companies¹⁴. If default is made in complying with this requirement¹⁵, an offence is committed by the company, and by every officer of the company who is in default¹⁶. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹⁷ and (for continued contravention) a daily default fine¹⁸ not exceeding one-tenth of level 3 on the standard scale¹⁹.

1 As to the meaning of 'share' in the Companies Acts see PARA 1042; and as to the meaning of the 'Companies Acts' see PARA 16. As to classes of shares see PARA 1057.

2 As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. As to the meaning of 'company' under the Companies Acts see PARA 24. As to variation of class rights in companies

having a share capital see PARA 1060; and as to the notice required of a new name or variation of class rights see PARA 1064.

3 In under the Companies Act 2006 s 630 (see PARA 1060): see s 633(1). References in s 633 to the variation of the rights of holders of a class of shares include references to their abrogation: s 633(6). See the cases cited in PARA 1060 note 2. As to shareholders generally see PARA 321 et seq.

4 As to the meaning of 'issued' shares see PARA 1045. For this purpose, any of the company's share capital held as treasury shares is disregarded: Companies Act 2006 s 633(2). As to treasury shares see PARA 1251.

5 In under the Companies Act 2006 s 630(4) (see PARA 1060): see s 633(2).

6 As to the meaning of 'court' see PARA 212 note 1.

7 Companies Act 2006 s 633(1), (2). As to the procedure for applications made under the Companies Act 2006 generally see PARA 305.

8 Companies Act 2006 s 633(3).

9 Companies Act 2006 s 633(4)(a).

10 Companies Act 2006 s 633(4)(b). See *Re Suburban and Provincial Stores Ltd* [1943] Ch 156, [1943] 1 All ER 342, CA (the applicant must show on the face of his petition his title to sue and, if he does not himself hold the necessary 15% of the shares, the petition must show that he has been appointed in writing by the necessary percentage of dissentient members; a later appointment is invalid); *Re Sound City (Films) Ltd* [1947] Ch 169, [1946] 2 All ER 521 (the authority must have been communicated to the applicant before the presentation of the petition).

11 Companies Act 2006 s 633(5).

12 Companies Act 2006 s 633(5).

13 In under the Companies Act 2006 s 633 (see the text and notes 1-12): see s 635(1).

14 Companies Act 2006 s 635(1). As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

15 In complying with the Companies Act 2006 s 635 (see the text and notes 13-14): see s 635(2).

16 Companies Act 2006 s 635(2). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

17 As to the meaning of the 'standard scale' see PARA 1622.

18 As to the meaning of 'daily default fine' see PARA 1622.

19 Companies Act 2006 s 635(3).

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1062. Variation of class rights in companies without share capital.

Rights of a class of members of a company¹ not having a share capital² may only be varied³:

2007 (1) in accordance with provision in the company's articles for the variation of those rights⁴; or

2008 (2) where the company's articles contain no such provision, if the members of that class consent to the variation⁵.

The consent required for these purposes on the part of the members of a class is⁶:

- 2009 (a) consent in writing from at least three-quarters of the members of the class⁷; or
- 2010 (b) a special resolution⁸ passed at a separate general meeting of the members of that class⁹ sanctioning the variation¹⁰.

Any amendment of a provision contained in a company's articles for the variation of the rights of a class of members, or the insertion of any such provision into the articles, is itself to be treated as a variation of those rights¹¹.

Nothing in the provisions as to variation of class rights in companies without a share capital¹² affects the power of the court¹³ under the provisions of the Companies Act 2006 which govern applications to cancel a resolution for a public company to be re-registered as private¹⁴, or which govern arrangements and reconstructions¹⁵, or which govern the protection of members of a company against unfair prejudice¹⁶.

1 As to the meaning of 'member of a company' see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie a company limited by guarantee or an unlimited company without a share capital. As to the meanings of 'company limited by guarantee' and 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital', 'share' and 'share capital' see PARA 1042. As to variation of class rights in companies having a share capital, and as to case law that may be relevant to variation in both cases, see PARA 1060; as to the right to object to variation see PARA 1061; and as to the notice required of a new name or variation of class rights see PARA 1065.

In s 631, and (except where the context otherwise requires) in any provision in a company's articles for the variation of the rights attached to a class of members, references to the variation of those rights include references to their abrogation: s 631(6). As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

3 Companies Act 2006 s 631(1), (2). This is without prejudice to any other restrictions on the variation of the rights: s 631(3).

4 Companies Act 2006 s 631(2)(a).

5 Companies Act 2006 s 631(2)(b). The consent referred to in head (2) in the text is consent to the variation made in accordance with s 631 (see the text and notes 6-10): see s 631(2)(b).

6 Companies Act 2006 s 631(4).

7 Companies Act 2006 s 631(4)(a).

8 As to the meaning of 'special resolution' see PARA 614.

9 As to meetings of members see PARA 629 et seq. As to the application of the provisions which govern general meetings to class meetings see PARA 631.

10 Companies Act 2006 s 631(4)(b).

11 Companies Act 2006 s 631(5).

12 Ie nothing in the Companies Act 2006 s 631 (see the text and notes 1-11): see s 632.

13 As to the meaning of 'court' see PARA 212 note 1.

14 Ie under the Companies Act 2006 s 98 (see PARA 174): see s 632. As to the meaning of 'private company' see PARA 102.

15 Ie under the Companies Act 2006 Pt 26 (ss 895-901) (see PARA 1425 et seq): see s 632.

16 Companies Act 2006 s 632. The text refers to the provisions which govern the protection of members against unfair prejudice contained in Pt 30 (ss 994-999) (see PARA 466 et seq): see s 632.

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1063. Rights to object to variation: companies not having share capital.

Where the rights of any class of members of a company¹ not having a share capital² are varied³, members amounting to not less than 15 per cent of the members of the class in question (being persons who did not consent to or vote in favour of the resolution for the variation⁴) may apply to the court⁵ to have the variation cancelled⁶.

If such an application is made, the variation has no effect unless and until it is confirmed by the court⁷. Application to the court must be made within 21 days after the date on which the consent was given or the resolution was passed (as the case may be), and may be made on behalf of the members entitled to make the application by such one or more of their number as they may appoint in writing for the purpose⁸.

The court, after hearing the applicant and any other persons who apply to the court to be heard and who appear to the court to be interested in the application, may (if satisfied having regard to all the circumstances of the case that the variation would unfairly prejudice the members of the class represented by the applicant) disallow the variation and must (if not so satisfied) confirm it⁹. The decision of the court on any such application is final¹⁰.

The company must within 15 days after the making of an order by the court on such an application¹¹, objecting to a variation of class rights, forward a copy of the order to the registrar of companies¹². If default is made in complying with this requirement¹³, an offence is committed by the company, and by every officer of the company who is in default¹⁴. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹⁵ and (for continued contravention) a daily default fine¹⁶ not exceeding one-tenth of level 3 on the standard scale¹⁷.

1 As to the meaning of 'member of a company' see PARA 321. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 I.e. a company limited by guarantee or an unlimited company without a share capital. As to the meanings of 'company limited by guarantee' and 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital', 'share' and 'share capital' see PARA 1042. As to variation of class rights in companies having a share capital see PARA 1060.

3 I.e. under the Companies Act 2006 s 631 (see PARA 1062): see s 634(1). References in s 634 to the variation of the rights of a class of members include references to their abrogation: s 634(6). See also PARA 1060 note 2.

4 I.e. under the Companies Act 2006 s 631(4) (see PARA 1062): see s 634(2).

5 As to the meaning of 'court' see PARA 212 note 1.

6 Companies Act 2006 s 634(1), (2). As to the procedure for applications made under the Companies Act 2006 generally see PARA 305.

7 Companies Act 2006 s 634(3).

8 Companies Act 2006 s 634(4). See the cases cited in PARA 1061 note 10.

9 Companies Act 2006 s 634(5).

- 10 Companies Act 2006 s 634(5).
- 11 le under the Companies Act 2006 s 634 (see the text and notes 1-10): see s 635(1).
- 12 Companies Act 2006 s 635(1). As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.
- 13 le in complying with the Companies Act 2006 s 635 (see the text and notes 11-12): see s 635(2).
- 14 Companies Act 2006 s 635(2). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.
- 15 As to the meaning of the 'standard scale' see PARA 1622.
- 16 As to the meaning of 'daily default fine' see PARA 1622.
- 17 Companies Act 2006 s 635(3).

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1064. Notice of new name or variation of class rights: companies having a share capital.

Where a company¹ assigns a name or other designation, or a new name or other designation, to any class or description of its shares², it must within one month from doing so deliver to the registrar of companies³ a notice giving particulars of the name or designation so assigned⁴. If default is made in complying with this requirement⁵, an offence is committed by the company, and by every officer of the company who is in default⁶. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale⁷ and (for continued contravention) a daily default fine⁸ not exceeding one-tenth of level 3 on the standard scale⁹.

Where the rights attached to any shares of a company are varied¹⁰, the company must within one month from the date on which the variation is made deliver to the registrar a notice giving particulars of the variation¹¹. If default is made in complying with this requirement¹², an offence is committed by the company, and by every officer of the company who is in default¹³. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale and (for continued contravention) a daily default fine not exceeding one-tenth of level 3 on the standard scale¹⁴.

- 1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.
- 2 As to the meaning of 'share' in the Companies Acts see PARA 1042. As to classes of shares see PARA 1057.
- 3 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.
- 4 Companies Act 2006 s 636(1). Any notice delivered under s 636 (notice of new name of class of shares) is subject to the disclosure requirements in s 1078: see PARA 144.
- 5 le in complying with the Companies Act 2006 s 636 (see the text and notes 1-4): see s 636(2).

6 Companies Act 2006 s 636(2). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

7 As to the meaning of the 'standard scale' see PARA 1622.

8 As to the meaning of 'daily default fine' see PARA 1622.

9 Companies Act 2006 s 636(3).

10 Ie under the Companies Act 2006 s 630: see PARA 1060.

11 Companies Act 2006 s 637(1). Any notice delivered under s 637 (notice of variation of rights attached to shares) is subject to the disclosure requirements in s 1078: see PARA 144.

12 Ie in complying with the Companies Act 2006 s 637 (see the text and notes 10-11): see s 637(2).

13 Companies Act 2006 s 637(2).

14 Companies Act 2006 s 637(3).

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1065. Notice of newly created class or rights or their variation: companies without share capital.

If a company¹ not having a share capital² creates a new class of members³, the company must within one month from the date on which the new class is created deliver to the registrar of companies⁴ a notice containing particulars of the rights attached to that class⁵. If default is made in complying with this requirement⁶, an offence is committed by the company, and by every officer of the company who is in default⁷. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale⁸ and (for continued contravention) a daily default fine⁹ not exceeding one-tenth of level 3 on the standard scale¹⁰.

Where a company not having a share capital assigns a name or other designation, or a new name or other designation, to any class of its members, it must within one month from doing so deliver to the registrar a notice giving particulars of the name or designation so assigned¹¹. If default is made in complying with this requirement¹², an offence is committed by the company, and by every officer of the company who is in default¹³. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale and (for continued contravention) a daily default fine not exceeding one-tenth of level 3 on the standard scale¹⁴.

If the rights of any class of members of a company not having a share capital are varied¹⁵, the company must within one month from the date on which the variation is made deliver to the registrar a notice containing particulars of the variation¹⁶. If default is made in complying with this requirement¹⁷, an offence is committed by the company, and by every officer of the company who is in default¹⁸. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale and (for continued contravention) a daily default fine not exceeding one-tenth of level 3 on the standard scale¹⁹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 le a company limited by guarantee or an unlimited company without a share capital. As to the meanings of 'company limited by guarantee' and 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital', 'share' and 'share capital' see PARA 1042.

3 As to the meaning of 'member of a company' see PARA 321. As to variation of class rights in companies not having a share capital see PARA 1062.

4 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

5 Companies Act 2006 s 638(1).

6 le in complying with the Companies Act 2006 s 638 (see the text and notes 1-5): see s 638(2).

7 Companies Act 2006 s 638(2). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

8 As to the meaning of the 'standard scale' see PARA 1622.

9 As to the meaning of 'daily default fine' see PARA 1622.

10 Companies Act 2006 s 638(3).

11 Companies Act 2006 s 639(1).

12 le in complying with the Companies Act 2006 s 639 (see the text and note 11): see s 639(2).

13 Companies Act 2006 s 639(2).

14 Companies Act 2006 s 639(3).

15 le under the Companies Act 2006 s 631: see PARA 1062.

16 Companies Act 2006 s 640(1).

17 le in complying with the Companies Act 2006 s 640 (see the text and notes 15-16): see s 640(2).

18 Companies Act 2006 s 640(2).

19 Companies Act 2006 s 640(3).

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(iv) Public Offers of Securities and Admission to Regulated Markets

1066. Prohibition on public offers by private companies.

The Companies Act 2006 prohibits public offers by a private company¹.

A private company limited by shares² or limited by guarantee³ and having a share capital⁴ must not: (1) offer to the public⁵ any securities of the company⁶; or (2) allot or agree to allot any securities of the company with a view to their being offered to the public⁷.

Unless the contrary is proved, an allotment or agreement to allot securities is presumed to be made with a view to their being offered to the public if an offer of the securities (or any of them) to the public is made: (a) within six months after the allotment or agreement to allot; or

(b) before the receipt by the company of the whole of the consideration to be received by it in respect of the securities⁸.

A company does not contravene this provision⁹ if: (i) it acts in good faith in pursuance of arrangements under which it is to re-register as a public company before the securities are allotted; or (ii) as part of the terms of the offer it undertakes to re-register as a public company within a specified period, and that undertaking is complied with¹⁰.

If it appears to the court, on an application¹¹ or in proceedings under Part 30 of the Companies Act 2006¹², that a company is proposing to act in contravention of the above provision¹³, the court must make an order¹⁴.

If it appears to the court, on an application¹⁵ or in proceedings under Part 30, that a company has acted in contravention of the above provision¹⁶, the court must make an order requiring the company to re-register as a public company unless it appears to the court that the company does not meet the requirements for re-registration as a public company; and that it is impractical or undesirable to require it to take steps to do so¹⁷. If it does not make an order for re-registration, the court may make either or both of the following, a remedial order¹⁸ or an order for the compulsory winding up of the company¹⁹.

The Financial Services and Markets Act 2000 also prohibits a person, in the course of business, from communicating an invitation or inducement to engage in investment activity (the 'financial promotion prohibition')²⁰.

1 Ie the Companies Act Pt 20 Ch 1 (ss 755-760). As to the meaning of 'private company' see PARA 102.

2 As to the meaning of 'limited by shares' see PARA 102.

3 As to the meaning of 'limited by guarantee' see PARA 102.

4 As to share capital in general see PARA 1042 et seq.

5 For the purposes of the Companies Act 2006 Pt 20 Ch 1 (ss 755-760), 'offer to the public' includes an offer to any section of the public, however selected: Companies Act 2006 s 756(1), (2). An offer is not regarded as an offer to the public if it can properly be regarded, in all the circumstances, as (1) not being calculated to result, directly or indirectly, in securities of the company becoming available to persons other than those receiving the offer; or (2) otherwise being a private concern of the person receiving it and the person making it: s 756(3). An offer is to be regarded (unless the contrary is proved) as being a private concern of the person receiving it and the person making it if (a) it is made to a person already connected with the company and, where it is made on terms allowing that person to renounce his rights, the rights may only be renounced in favour of another person already connected with the company; or (b) it is an offer to subscribe for securities to be held under an employees' share scheme and, where it is made on terms allowing that person to renounce his rights, the rights may only be renounced in favour of (i) another person entitled to hold securities under the scheme; or (ii) a person already connected with the company: s 756(4). For these purposes 'person already connected with the company' means (A) an existing member or employee of the company; (B) a member of the family of a person who is or was a member or employee of the company; (C) the widow or widower, or surviving civil partner, of a person who was a member or employee of the company; (D) an existing debenture holder of the company; or (E) a trustee (acting in his capacity as such) of a trust of which the principal beneficiary is a person within any of heads (A) to (D) above: s 756(5). For the purposes of head (B) above the members of a person's family are the person's spouse or civil partner and children (including step-children) and their descendants: s 756(6). For the purposes of Pt 20 Ch 1 'securities' means shares or debentures: s 755(5).

6 As to the meaning of 'company' see PARA 24.

7 Companies Act 2006 s 755(1). Nothing in Pt 20 Ch 1 (ss 755-760) affects the validity of any allotment or sale of securities or of any agreement to allot or sell securities: s 760. As to allotments of shares or securities see PARA 1042 et seq. The provisions of the Companies Act 1985 that imposed criminal sanctions with regard to public offers made by private companies (see ss 81(2), 730, Sch 24 (repealed)) have not been reproduced in the Companies Act 2006. However, criminal liability may still arise on other grounds, such as breach of the 'financial promotion prohibition' (see the text and note 20).

8 Companies Act 2006 s 755(2).

9 Ie the Companies Act 2006 s 755: see the text and notes 2-10.

10 Companies Act 2006 s 755(3). The specified period for the purposes of head (ii) in the text must be a period ending not later than six months after the day on which the offer is made (or, in the case of an offer made on different days, first made): s 755(4). As to re-registration as a public company see PARA 168 et seq.

11 Ie under the Companies Act 2006 s 757. Application for an order under s 757 may be made by (1) a member or creditor of the company; or (2) the Secretary of State: s 757(3). As to the Secretary of State see PARA 6.

12 Ie under Companies Act 2006 Pt 30 (ss 994-999) (protection of members against unfair prejudice): see PARA 466 et seq.

13 Ie the Companies Act 2006 s 755: see the text and notes 2-10.

14 Companies Act 2006 s 757(1). This would be an order under s 757. Such an order is an order restraining the company from contravening s 755: s 757(2).

As to provisions which enable the courts, in proceedings under ss 757, 758 or under Pt 30, to make a determination in certain circumstances about the exchange rates to be applied in working out whether a public company satisfies the authorised minimum requirement, see the Companies (Authorised Minimum) Regulations 2009, SI 2009/2425, regs 6, 7.

15 Ie under the Companies Act 2006 s 758. An application under s 758 may be made by (1) a member of the company who (a) was a member at the time the offer was made (or, if the offer was made over a period, at any time during that period); or (b) became a member as a result of the offer; (2) a creditor of the company who was a creditor at the time the offer was made (or, if the offer was made over a period, at any time during that period); or (3) the Secretary of State: s 758(4).

16 See note 12.

17 Companies Act 2006 s 758(1), (2).

18 A 'remedial order' is an order for the purpose of putting a person affected by anything done in contravention of the Companies Act 2006 s 755 (see the text and notes 2-10) in the position he would have been in if it had not been done: s 759(1).

The following provisions (see below) are without prejudice to the generality of the power to make such an order: s 759(2). Where a private company has (1) allotted securities pursuant to an offer to the public; or (2) allotted or agreed to allot securities with a view to their being offered to the public, a remedial order may require any person knowingly concerned in the contravention of s 755 to offer to purchase any of those securities at such price and on such other terms as the court thinks fit: s 759(3). A remedial order may be made (a) against any person knowingly concerned in the contravention, whether or not an officer of the company; (b) notwithstanding anything in the company's constitution (which includes, for this purpose, the terms on which any securities of the company are allotted or held); (c) whether or not the holder of the securities subject to the order is the person to whom the company allotted or agreed to allot them: s 759(4). Where a remedial order is made against the company itself, the court may provide for the reduction of the company's capital accordingly: s 759(5). As to reduction of capital see PARA 1173 et seq. See note 14.

19 Companies Act 2006 s 758(3). As to compulsory winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 438 et seq.

20 See the Financial Services and Markets Act 2000 ss 21, 25; and PARA 1067. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 225.

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1067. Offers to the public of transferable securities.

It is unlawful for transferable securities¹ other than (1) certain listed securities²; (2) such other transferable securities as may be specified in prospectus rules³, to be offered to the public in

the United Kingdom⁴ unless an approved prospectus⁵ has been made available to the public before the offer is made⁶. A person who contravenes these provisions is guilty of an offence and liable to a penalty⁷. A person does not contravene those provisions in the case of an exempt offer⁸.

The Financial Services and Markets Act 2000 contains a number of important provisions about prospectuses, for the most part derived from the Prospectus Regulations 2005⁹.

The Financial Services and Markets Act 2000 states the criteria by which the Financial Services Authority will approve a prospectus¹⁰. The Authority has power to authorise the omission of information which a prospectus would otherwise have to contain¹¹.

The Financial Services and Markets Act 2000 has a number of provisions dealing with the powers of the Financial Services Authority in the context of prospectuses. These include requirements imposed as a condition of approval¹², the power to suspend or prohibit offers to the public¹³, the power to suspend or prohibit admission to trading on a regulated market¹⁴ and the power publicly to censure the issuer and others¹⁵. Some of these powers¹⁶ may be exercised in certain circumstances at the request of the competent authority of another EEA state¹⁷. There is also a requirement for the establishment and maintenance of a register of investors¹⁸.

Note should also be taken of the financial promotion prohibition in the Financial Services and Markets Act 2000, namely that a person must not, in the course of business, communicate an invitation or inducement to engage in investment activity unless the person making the communication is an authorised person or the content of the communication is approved by an authorised person¹⁹. A person contravening this prohibition is guilty of an offence²⁰.

1 As to transferable securities see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 395.

2 I.e. those listed in the Financial Services and Markets Act 2000 Sch 11A: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 395. In the case of the issue or offer to the public of certain transferable securities a person may elect, in accordance with prospectus rules, to have a prospectus in relation to those securities: see s 87; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 398.

3 As to the meaning of 'prospectus rules' see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385.

4 As to the meaning of 'United Kingdom' see PARA 1 note 5.

5 'Approved prospectus' means, in relation to transferable securities to which the Financial Services and Markets Act 2000 s 85 applies, a prospectus approved by the competent authority of the home state in relation to the issuer of the securities: see s 85(7); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 397. As to the competent authority see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385. As to the Financial Services Authority see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 4, 6 et seq.

6 See the Financial Services and Markets Act 2000 s 85(1); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 397. Where a person agrees to buy or subscribe for transferable securities in circumstances where the final offer price or the amount of transferable securities to be offered to the public is not included in the prospectus, he may withdraw his acceptance before the end of the withdrawal period, subject to limited exceptions: see s 87Q; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 413.

7 See the Financial Services and Markets Act 2000 s 85(3); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 397.

⁸ See the Financial Services and Markets Act 2000 s 86; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 397.

9 The Prospectus Regulations 2005, SI 2005/1433, substitute and add new provisions in the Financial Services and Markets Act 2000 (ss 84-87R, Sch 11A). The 2005 Regulations implement in the United Kingdom European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectus to be published when securities are offered to the public or admitted to trading (the 'Prospectus Directive'). As to admission to trading on a regulated market see PARA 1068. See also the Financial Services Authority's Handbook of Rules and Guidance (including Listing, Disclosure and Prospectus Rules).

¹⁰ See the Financial Services and Markets Act 2000 s 87A; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 399. There are time limits during which applications for approval of a prospectus need to be processed and the Authority is permitted to seek further information in relation to such applications (see s 87C; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 401); and there is a procedure to be followed when the Authority approves, proposes not to approve or decides not to approve a prospectus (see s 87D; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 401). Provision is made for applications for approval to be transferred between competent authorities within the EEA (see ss 87E, 87F; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 402); and in certain circumstances a supplementary prospectus must be produced (see s 87G; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 403). Prospectuses approved by the competent authorities of other EEA states are treated in the same way as those approved by the Financial Services Authority provided there is compliance with certain conditions (and this is part of what is known as 'passporting'): see ss 87H, 87I; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 404.

¹¹ See the Financial Services and Markets Act 2000 s 87B; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 400.

¹² See the Financial Services and Markets Act 2000 s 87J; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 405.

¹³ See the Financial Services and Markets Act 2000 ss 87K, 87N, 87O; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 406.

¹⁴ See the Financial Services and Markets Act 2000 ss 87L, 87O; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 407.

¹⁵ See the Financial Services and Markets Act 2000 ss 87M, 87N; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 406.

¹⁶ Ie those under the Financial Services and Markets Act 2000 ss 87K, 87L.

¹⁷ See the Financial Services and Markets Act 2000 87P; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 409.

¹⁸ See the Financial Services and Markets Act 2000 s 87R; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 414.

¹⁹ See the Financial Services and Markets Act 2000 s 21; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 225.

²⁰ See the Financial Services and Markets Act 2000 s 25; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 225.

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1068. Admission to trading on regulated market.

As part of the prospectus requirements¹, the Financial Services and Markets Act 2000 provides that it is unlawful to request the admission of transferable securities² other than (1) certain listed securities³; (2) such other transferable securities as may be specified in prospectus rules⁴, to trading on a regulated market⁵ situated or operating in the United Kingdom⁶ unless an approved prospectus⁷ has been made available to the public before the request is made⁸.

¹ See the Financial Services and Markets Act 2000 ss 84-87R, Sch 11A; and PARA 1067.

² As to transferable securities see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 395.

³ Ie those listed in the Financial Services and Markets Act 2000 Sch 11A Pt 1 (paras 7-9): see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 395.

4 See the Financial Services and Markets Act 2000 s 85(6(a), (b)); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 397. As to the meaning of 'prospectus rules' see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385.

5 As to the meaning of 'regulated market' see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385.

6 As to the meaning of 'United Kingdom' see PARA 1 note 5.

7 As to the meaning of 'approved prospectus' see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 397. See PARA 1067 note 6.

8 See the Financial Services and Markets Act 2000 s 85(2); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 397.

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1069. Admission to listing.

The Financial Services Authority¹ exercises the functions conferred on the competent authority² by the statutory provisions relating to official listing³. The general functions are, in relation to official listing: (1) its function of making rules; (2) its functions in relation to the giving of general guidance; (3) its function of determining the general policy and principles by reference to which it performs particular functions⁴. In discharging its general functions, the competent authority must have regard to a number of specific matters⁵. The competent authority may make rules ('Part VI rules') for the purposes of Part VI of the Financial Services and Markets Act 2000⁶. In the case of infringement of these rules where the United Kingdom is a host member state the competent authority may act to protect investors subject to various specific notice and other requirements⁷.

The competent authority must maintain the official list⁸ and may admit to the official list such securities⁹ and other things as it considers appropriate¹⁰. Part VI rules may make different provision for different cases and there are a number of general provisions relating to such rules including about copies and certificates¹¹.

Admission to the official list may be granted only on an application made to the competent authority in such manner as may be required by listing rules and no application for listing may be entertained by the competent authority unless it is made by, or with the consent of, the issuer of the securities concerned, nor may any application for listing be entertained by the competent authority in respect of securities which are to be issued by a body of a prescribed kind¹². The competent authority may not grant an application for listing unless it is satisfied that the requirements of listing rules and any other requirements imposed by the authority in relation to the application, are complied with¹³. There is scope for the authority to refuse the application including in the interests of investors and for non-compliance with obligations in an official listing in another EEA state¹⁴. There are provisions as to notice in regard to the decisions of the competent authority about the application and in the case of refusal the applicant may refer the matter to the Financial Services and Markets Tribunal¹⁵.

The competent authority may, in accordance with listing rules, discontinue or suspend the listing of any securities in certain circumstances and there are detailed requirements as to notice and procedure and if the authority discontinues or suspends the listing of any securities, on its own initiative, the issuer may refer the matter to the Financial Services and Markets Tribunal¹⁶.

Listing particulars¹⁷ submitted to the competent authority must contain all such information as investors and their professional advisers would reasonably require, and reasonably expect to find there, for the purpose of making an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the issuer of the securities, and of the rights attaching to the securities¹⁸. There is a requirement for supplementary listing particulars in the case of significant change or new matters¹⁹. The competent authority may authorise the omission from listing particulars of any information, the inclusion of which would otherwise be required, on the ground that its disclosure would be contrary to the public interest, its disclosure would be seriously detrimental to the issuer or, in the case of securities of a kind specified in listing rules, its disclosure is unnecessary for persons of the kind who may be expected normally to buy or deal in securities of that kind²⁰.

There are a number of offences relevant to admission to listing. A person who: (a) makes a statement, promise or forecast which he knows to be misleading, false or deceptive in a material particular; (b) dishonestly conceals any material facts whether in connection with a statement, promise or forecast made by him or otherwise; or (c) recklessly makes (dishonestly or otherwise) a statement, promise or forecast which is misleading, false or deceptive in a material particular, is guilty of an offence if he makes the statement, promise or forecast or conceals the facts for the purpose of inducing, or is reckless as to whether it may induce, another person (whether or not the person to whom the statement, promise or forecast is made) to enter or offer to enter into, or to refrain from entering or offering to enter into, a relevant agreement, or to exercise, or refrain from exercising, any rights conferred by a relevant investment²¹. In addition any person who does any act or engages in any course of conduct which creates a false or misleading impression as to the market in or the price or value of any relevant investments is guilty of an offence if he does so for the purpose of creating that impression and of thereby inducing another person to acquire, dispose of, subscribe for or underwrite those investments or to refrain from doing so or to exercise, or refrain from exercising, any rights conferred by those investments²². A person who, in purported compliance with any requirement imposed by or under the Financial Services and Markets Act 2000, knowingly or recklessly gives the Financial Services Authority information which is false or misleading in a material particular is guilty of an offence²³.

Where an officer of a body corporate²⁴ (or a person purporting to act as such), with intent to deceive members or creditors²⁵ of the body corporate about its affairs, publishes or concurs in publishing a written statement or account which to his knowledge is or may be misleading, false or deceptive in a material particular, he is liable on conviction on indictment to imprisonment for a term not exceeding seven years, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the prescribed sum, or to both²⁶.

Where the affairs of the body corporate are managed by its members, these provisions apply to any statement which a member publishes or concurs in publishing in connection with his functions of management as if he were an officer of the body corporate²⁷.

1 As to the Financial Services Authority see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 4, 6 et seq.

2 As to the competent authority see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385.

3 Ie the provisions of the Financial Services and Markets Act 2000 Pt VI (ss 72-103).

4 See the Financial Services and Markets Act 2000 s 73(2); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385.

5 See the Financial Services and Markets Act 2000 s 73(1); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385.

- 6 See the Financial Services and Markets Act 2000 s 73A; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385. Provisions of Part VI rules expressed to relate to the official list are referred to in Pt VI as 'listing rules', Part VI rules expressed to relate to disclosure of information in respect of financial instruments which have been admitted to trading on a regulated market or for which a request for admission to trading on such a market has been made, are referred to in Pt VI as 'disclosure rules' and provisions of Part VI rules expressed to relate to transferable securities are referred to in Pt VI as 'prospectus rules': see ss 73A(2), (3), (4), 103(1); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385. See also the Financial Services Authority's Handbook of Rules and Guidance (including Listing, Disclosure and Prospectus Rules). As to transferable securities see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 395.
- 7 See the Financial Services and Markets Act 2000 s 100A; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385. As to the meaning of 'United Kingdom' see PARA 1 note 5.
- 8 'Official list' means the list maintained by the competent authority as that list has effect for the time being and 'listing' means being included in the official list in accordance with the Financial Services and Markets Act 2000 Pt VI: see ss 74(5), 103(1); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 387.
- 9 As to the meaning of 'securities' see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385.
- 10 See the Financial Services and Markets Act 2000 s 74(2), (3); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 387.
- 11 See the Financial Services and Markets Act 2000 s 101; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 387.
- 12 See the Financial Services and Markets Act 2000 s 75(1)-(3); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 388.
- 13 See the Financial Services and Markets Act 2000 s 75(4); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 388.
- 14 See the Financial Services and Markets Act 2000 s 75(5), (6); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 388.
- 15 See the Financial Services and Markets Act 2000 s 76; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 388. As to the Financial Services and Markets Tribunal see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 43 et seq.
- 16 See the Financial Services and Markets Act 2000 ss 77, 78, 78A; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 389.
- 17 Is a document in such form and containing such information as may be specified in listing rules: see the Financial Services and Markets Act 2000 ss 79(2), 103(1); **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 391.
- 18 See the Financial Services and Markets Act 2000 s 80; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 392.
- 19 See the Financial Services and Markets Act 2000 s 81; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 393.
- 20 See the Financial Services and Markets Act 2000 s 82; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 394.
- 21 See the Financial Services and Markets Act 2000 s 397(1), (2); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 568.
- 22 See the Financial Services and Markets Act 2000 s 397(3); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 568.
- 23 See the Financial Services and Markets Act 2000 s 398; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 569. In addition the Competition Act 1998 s 44 (false or misleading information) (see **COMPETITION** vol 18 (2009) PARA 141) applies in relation to any function of the Office of Fair Trading under the Financial Services and Markets Act 2000 as if it were a function under the Competition Act 1998 Pt I (ss 1-60) (see **COMPETITION** vol 18 (2009) PARA 115 et seq): see the Financial Services and Markets Act 2000 s 399; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 569.

24 The provisions of the Theft Act 1968 s 19 apply to an unincorporated association as they apply to a body corporate: see s 19(1)-(3).

25 For these purposes, a person who has entered into a security for the benefit of a body corporate is to be treated as a creditor of it: Theft Act 1968 s 19(2).

26 Theft Act 1968 s 19(1); Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 28. As to the prescribed sum see PARA 1622.

27 Theft Act 1968 s 19(3).

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(v) Remedies for False, etc Statements in Public Offer Documents

A. COMPENSATION FOR FALSE AND MISLEADING STATEMENTS

1070. Statutory compensation for false and misleading statements etc in listing particulars, prospectus etc.

Any person responsible for listing particulars¹ is liable to pay compensation to a person who has: (1) acquired securities² to which the particulars apply³; and (2) suffered loss in respect of them as a result of any untrue or misleading statement in the particulars or as a result of the omission from the particulars of any matter required to be included⁴, but subject to a wide range of exceptions⁵.

Any person who fails to comply with the provision relating to supplementary listing particulars⁶ is liable to pay compensation to any person who has: (a) acquired securities of the kind in question⁷; and (b) suffered loss in respect of them as a result of the failure⁸. No person may, by reason of being a promoter of a company or otherwise, incur any liability for failing to disclose information which he would not be required to disclose in listing particulars in respect of a company's securities: (i) if he were responsible for those particulars⁹; or (ii) if he is responsible for them, which he is entitled to omit¹⁰.

The provisions described above do not affect any liability which may otherwise be incurred¹¹.

These provisions apply with modifications in relation to a prospectus and a supplementary prospectus¹².

The issuer¹³ of certain securities that are traded on a regulated market¹⁴ is liable to pay compensation to a person who has: (A) acquired¹⁵ such securities issued by it¹⁶; and (B) suffered loss¹⁷ in respect of them as a result of any untrue or misleading statement in certain publications¹⁸, or the omission from any such publication of any matter required to be included in it¹⁹. The issuer is so liable only if a person discharging managerial responsibilities²⁰ within the issuer in relation to the publication: (aa) knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading²¹; or (bb) knew the omission to be dishonest concealment of a material fact²². These provisions²³ do not affect certain powers in regard to restitution²⁴, liability for a civil penalty and liability for a criminal offence²⁵.

The Treasury²⁶ may by regulations make provision about the liability of issuers of securities traded on a regulated market, and other persons, in respect of information published to holders of securities, to the market or to the public generally²⁷.

The effect of the statutory provisions, as with earlier statutory provisions to like effect, appears to be not to alter the tortious nature of the acts in respect of which there is to be a liability, but, speaking generally, to render it easier to establish liability against those responsible for listing particulars or a prospectus²⁸.

1 As to listing particulars, and the persons responsible for them, see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 391 et seq.

2 As to the meaning of 'securities' for these purposes see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385.

3 See the Financial Services and Markets Act 2000 s 90(1)(a); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427.

4 See the Financial Services and Markets Act 2000 s 90(1)(b); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427. Matters are required to be included by s 80 or s 81 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 392, 393); s 90(1)(b). If listing particulars are required to include information about the absence of a particular matter, the omission from the particulars of that information is to be treated as a statement in the listing particulars that there is no such matter: see s 90(3); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427.

5 Is subject to exemptions provided by the Financial Services and Markets Act 2000 s 90, Sch 10 (and, in particular, the defence of reasonable belief that the statement was true and not misleading): see s 90(2); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 428.

6 Is the Financial Services and Markets Act 2000 s 81 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 393): see s 90(4); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427.

7 See the Financial Services and Markets Act 2000 s 90(4)(a); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427. Section 90(4) is subject to exemptions provided by Sch 10 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 428): see s 90(5); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427.

8 See the Financial Services and Markets Act 2000 s 90(4)(b); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427. See note 7.

9 See the Financial Services and Markets Act 2000 s 90(8)(a); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427. The reference in s 90(8) to a person incurring liability includes a reference to any other person being entitled as against that person to be granted any civil remedy or to rescind or repudiate an agreement: see s 90(9); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427.

10 See the Financial Services and Markets Act 2000 s 90(8)(b); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427. Particulars may be omitted by virtue of s 82: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 394. See note 9.

11 See the Financial Services and Markets Act 2000 s 90(6); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427. Cf s 90A(6) (cited in note 17). In respect of liability so incurred, apart from any compensation or damages that may be available under the statutory provisions, the remedies for misrepresentation open to an allottee of shares are:

- 499 (1) rescission of the contract (see PARA 1071 et seq);
- 500 (2) rectification of the register of members and consequent relief (see PARA 1079 et seq);
- 501 (3) damages in proceedings for deceit (see PARA 1081 et seq) or for negligent misrepresentation or negligent misstatement (see PARA 1087);
- 502 (4) criminal proceedings, eg under the Financial Services and Markets Act 2000 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 332) or under the Theft Act 1968 s 19 (false statements by company directors, etc) (see PARA 314).

However, these remedies are not open necessarily to a transferee of an allottee's shares (see *Hyslop v Morel* (1891) 7 TLR 263; *Andrews v Mockford* [1896] 1 QB 372, CA), or to a person in whose favour an allotment of shares is renounced (see *Collins v Associated Greyhound Racecourses Ltd* [1930] 1 Ch 1 at 19 per Luxmoore J; affd [1930] 1 Ch 24, CA).

12 See the Financial Services and Markets Act 2000 s 90(11); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427. As to prospectuses see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 395 et seq. In relation to a prospectus, the references in the Financial Services and Markets Act 2000 s 90 or in Sch 10 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 428) to listing particulars are to a prospectus, the references to supplementary listing particulars are to a supplementary prospectus (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 403) and the references to securities are to transferable securities (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 395); and in relation to a prospectus, the references to s 80 or s 81 are to s 87A (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 399) or s 87G (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 403); see s 90(11); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427.

A person is not to be subject to civil liability solely on the basis of a summary (including any translation of it) in a prospectus unless the summary is misleading, inaccurate or inconsistent when read with the rest of the prospectus: see s 90(12); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427.

13 As to the meaning of 'issuer' for these purposes see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385.

14 The securities to which the Financial Services and Markets Act 2000 s 90A applies are: (1) securities that are traded on a regulated market situated or operating in the United Kingdom; and (2) securities that (a) are traded on a regulated market situated or operating outside the United Kingdom; and (b) are issued by an issuer for which the United Kingdom is the home member state within the meaning of the Transparency Obligations Directive (ie European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38) relating to the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market: see PARA 23) art 2.1(i); see the Financial Services and Markets Act 2000 s 90A(2); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427. As to the meaning of 'regulated market' for these purposes see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385.

15 For these purposes, references in the Financial Services and Markets Act 2000 s 90A to the acquisition by a person of securities include his contracting to acquire them or any interest in them: see s 90A(9)(b); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427.

16 See the Financial Services and Markets Act 2000 s 90A(3)(a); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427.

17 A loss is not regarded as suffered as a result of the statement or omission in the publication unless the person suffering it acquired the relevant securities (1) in reliance on the information in the publication; and (2) at a time when, and in circumstances in which, it was reasonable for him to rely on that information: see the Financial Services and Markets Act 2000 s 90A(5); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427. Except as mentioned in s 90A(8) (see the text and notes 23-25), (a) the issuer is not subject to any other liability than that provided for by s 90A in respect of loss suffered as a result of reliance by any person on an untrue or misleading statement in a publication to which this section applies, or the omission from any such publication of any matter required to be included in it; and (b) a person other than the issuer is not subject to any liability, other than to the issuer, in respect of any such loss: see s 90A(6); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427. Cf s 90(6) (cited in note 11). Any reference in s 90A(6) to a person being subject to a liability includes a reference to another person being entitled as against him to be granted any civil remedy or to rescind or repudiate an agreement: see s 90A(7); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427.

18 The publications to which the Financial Services and Markets Act 2000 s 90A applies are: (1) any reports and statements published in response to a requirement imposed by a provision implementing the Transparency Obligations Directive (ie European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38)) art 4, 5 or 6 (ie, respectively, the annual financial report, the half-yearly financial report, and the interim management statements); and (2) any preliminary statement made in advance of a report or statement to be published in response to a requirement imposed by a provision implementing art 4, to the extent that it contains information that it is intended (a) will appear in the report or statement; and (b) will be presented in the report or statement in substantially the same form as that in which it is presented in the preliminary statement: see the Financial Services and Markets Act 2000 s 90A(1); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427.

19 See the Financial Services and Markets Act 2000 s 90A(3)(b); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427.

20 For these purposes, the following are persons 'discharging managerial responsibilities' in relation to a publication: (1) any director of the issuer (or person occupying the position of director, by whatever name called); (2) in the case of an issuer whose affairs are managed by its members, any member of the issuer; (3) in the case of an issuer that has no persons within head (1) or (2) above, any senior executive of the issuer having responsibilities in relation to the publication: see the Financial Services and Markets Act 2000 s 90A(9)(a); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427.

21 See the Financial Services and Markets Act 2000 s 90A(4)(a); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427.

22 See the Financial Services and Markets Act 2000 s 90A(4)(b); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427.

23 See the Financial Services and Markets Act 2000 s 90A.

24 See the powers conferred by the Financial Services and Markets Act 2000 s 382 (power of court to make restitution order) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 472) and s 384 (power of Financial Services Authority to require restitution) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 474).

25 See the Financial Services and Markets Act 2000 s 90A(8); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427.

26 As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517.

27 See the Financial Services and Markets Act 2000 s 90B(1); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 427. At the date at which this volume states the law, no such regulations had been made.

28 See *Geipel v Peach* [1917] 2 Ch 108 at 114 per Sargant J (with regard to the Companies (Consolidation) Act 1908 s 84 (repealed)). As to the liability of directors for false statements etc in offer documents etc see PARA 589.

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B. CLAIM FOR RESCISSION

1071. Grounds for claim for rescission.

If a subscription for shares, not being those which are subscribed for by a signatory to the memorandum of association¹, or debentures, is obtained by a material misrepresentation of fact, the contract is voidable at the election of the person deceived², and the court will in a claim by the subscriber rescind the contract to take the shares or debentures and order restitution of the money paid under the contract with interest³. To obtain rescission the untrue statement need not be fraudulent or made with intent to deceive⁴.

The contract may be rescinded on the ground of misrepresentation by the company's directors or other general agents, or special agents acting within the scope of their authority⁵, but not by unauthorised persons making promises purporting to be made on its behalf⁶. The company will be liable where the offer documents, on the faith of which⁷ subscriptions have to the knowledge of the company been made, were issued by promoters without the authority of and before the incorporation of the company, and even if the contents are not known to the directors⁸. The company will also be liable where, before the contract to take the shares is completed, the company becomes affected with knowledge that it has been induced by misrepresentation, even though made without authority⁹.

In offer documents, no misstatement, or concealment of any material facts or circumstances, is permitted. The public, invited thereby to join in any new adventure, ought to have the same opportunity of judging everything materially bearing on its true character as the promoters themselves possess; and the utmost honesty and candour ought to characterise the statements in the offer documents¹⁰.

- 1 *Lord Lurgan's Case* [1902] 1 Ch 707. The contract of a signatory to the memorandum is of a very special kind; it is a contract whose existence is the basis of the creation of the corporation: *Lord Lurgan's Case* at 710 per Buckley J. As to the memorandum of association see PARA 104 et seq.
- 2 *Western Bank of Scotland v Addie* (1867) LR 1 Sc & Div 145, HL.
- 3 *Central Rly Co of Venezuela (Directors etc) v Kisch* (1867) LR 2 HL 99; *Gover's Case* (1875) 1 ChD 182 at 198-199, CA.
- 4 *Smith's Case* (1867) 2 Ch App 604 (affd sub nom *Reese River Silver Mining Co Ltd v Smith* (1869) LR 4 HL 64 at 79 per Lord Cairns); *Re London and Staffordshire Fire Insurance Co* (1883) 24 ChD 149; *Mathias v Yetts* (1882) 46 LT 497 at 506, CA, per Lindley LJ. Cf *Jackson v Turquand* (1869) LR 4 HL 305. As to loss of the right to rescind see PARA 1074.
- 5 *Gover's Case* (1875) 1 ChD 182, CA; *New Brunswick and Canada Railway and Land Co v Conybeare* (1862) 9 HL Cas 711; *Lynde v Anglo-Italian Hemp Spinning Co* [1896] 1 Ch 178. See also *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392, CA; *Re Royal British Bank, Nicol's Case* (1859) 3 De G & J 387 at 430 per Lord Chelmsford LC; *Re Royal British Bank, Mixer's Case* (1859) 4 De G & J 575; *Henderson v Lacon* (1867) LR 5 Eq 249 at 261 per Page Wood V-C.
- 6 *Re United Kingdom Shipowners' Co, Felgate's Case* (1865) 11 LT 613, CA. The company's secretary has no general authority to make representations: *Newlands v National Employers' Accident Association Ltd* (1885) 54 LJQB 428, CA; *Barnett v South London Tramways Co* (1887) 18 QBD 815 at 817, CA, per Lord Esher MR.
- 7 The misrepresentation must be an inducing cause to the contract: *Arnison v Smith* (1889) 41 ChD 348 at 369, CA, per Lord Halsbury LC; *Drincqbier v Wood* [1899] 1 Ch 393 at 404 per Byrne J.
- 8 *Hilo Manufacturing Co Ltd v Williamson* (1911) 28 TLR 164, CA; *Stewart's Case* (1866) 1 Ch App 574; *Downes v Ship* (1868) LR 3 HL 343; *Re Metropolitan Coal Consumers' Association, Karberg's Case* [1892] 3 Ch 1, CA; *Re Canadian Direct Meat Co, Tamplin's Case* (1892) 9 TLR 7, CA; *Lynde v Anglo-Italian Hemp Spinning Co* [1896] 1 Ch 178 at 183 per Romer J; *Collins v Associated Greyhound Racecourses Ltd* [1930] 1 Ch 1 at 23, CA, per Luxmoore J, explaining the last two cases. There is no doubt that *Re Canadian Direct Meat Co* creates a difficulty, as in the Court of Appeal there was no finding that the company knew that the subscriptions had been made on the faith of the prospectus complained of, but relief was granted.
- 9 *Lynde v Anglo-Italian Hemp Spinning Co* [1896] 1 Ch 178.
- 10 *Central Rly Co of Venezuela (Directors etc) v Kisch* (1867) LR 2 HL 99 at 113 per Lord Chelmsford LC; *New Brunswick and Canada Rly etc Co v Muggeridge* (1860) 1 Drew & Sm 363; *Henderson v Lacon* (1867) LR 5 Eq 249; *Denton v Macneil* (1866) LR 2 Eq 352. See also *Aaron's Reefs Ltd v Twiss* [1896] AC 273, HL. As to statements deemed to be untrue see PARA 1083; and as to the effect of false or misleading statements, including the omission of matters required by statute to be included in the offer documents see PARA 1070. As to the materiality of statements see PARA 1073.

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1072. Misrepresentation must be of fact.

To afford ground for relief, a misrepresentation must be one of fact and not of law¹, although a statement of facts which involves a conclusion of law is a statement of fact². A representation as to the state of a person's mind, for example, as to his belief, although difficult of proof, is a statement of fact³ and language expressed in the form of hope and expectation may be a representation of fact⁴, although statements as to what will occur in the future are not usually statements of fact⁵. Although a statement may be true when made, if it becomes untrue before it is acted on, the claim will be sustainable if the statement was intended to be then acted on⁶. Conversely, if a representation which was false when made becomes, by virtue of supervening

facts, true when acted upon, the person acting thereon is not deceived thereby and no claim is maintainable⁷.

If a company does not intend that a report, set out in an offer document, should form the basis of the contract to take shares, it must dissociate itself from it in the clearest terms and make it clear that it does not vouch for the accuracy of the statements made in the report; thus, where a director or an agent makes a report which is published by the company and that report whether fraudulently or innocently contains untrue statements, the mere fact that the company states that it will not act on the report until verified is not a sufficiently clear statement that the company does not vouch for the accuracy of the report⁸.

1 *Beattie v Lord Ebury* (1874) LR 7 HL 102 (assertion by implication that company directors had power to overdraw the company's bank account was not a misrepresentation of fact which the persons making it were bound to make good, but only a mistaken representation of the law).

2 *Eaglesfield v Marquis of Londonderry* (1876) 4 ChD 693 at 703, CA, per Jessel MR; *New Brunswick and Canada Rly and Land Co v Conybeare* (1862) 9 HL Cas 711; *West London Commercial Bank Ltd v Kitson* (1884) 13 QBD 360, CA; *Derry v Peek* (1889) 14 App Cas 337, HL. As to representations which may include a statement of law see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 711.

3 *Edgington v Fitzmaurice* (1885) 29 ChD 459 at 483, CA, per Bowen LJ.

4 *Aaron's Reefs Ltd v Twiss* [1896] AC 273, HL. Cf *Jorden v Money* (1854) 5 HL Cas 185; *Citizens' Bank of Louisiana v First National Bank of New Orleans* (1873) LR 6 HL 352; *Maddison v Alderson* (1883) 8 App Cas 467, HL.

5 *Hallows v Fernie* (1868) 3 Ch App 467; *Beattie v Lord Ebury* (1874) LR 7 HL 102; *Bellairs v Tucker* (1884) 13 QBD 562; *Maddison v Alderson* (1883) 8 App Cas 467, HL; *Knox v Hayman* (1892) 67 LT 137, CA; *Bentley & Co v Black* (1893) 9 TLR 580, CA. Cf *Jorden v Money* (1854) 5 HL Cas 185; *Citizens' Bank of Louisiana v First National Bank of New Orleans* (1873) LR 6 HL 352; *Collins v Associated Greyhound Racecourses Ltd* [1930] 1 Ch 1 per Luxmoore J (approved on another point by the Court of Appeal where this point was not discussed [1930] 1 Ch 1 at 28).

6 *Anderson's Case* (1881) 17 ChD 373; *Re Scottish Petroleum Co* (1883) 23 ChD 413, CA; *With v O'Flanagan* [1936] Ch 575, [1936] 1 All ER 727, CA. Cf *Hallows v Fernie* (1868) 3 Ch App 467.

7 *Ship v Crosskill* (1870) LR 10 Eq 73 at 85-86 per Lord Romilly MR.

8 *Mair v Rio Grande Rubber Estates Ltd* [1913] AC 853, HL; *Re Pacaya Rubber and Produce Co Ltd, Burns' Application* [1914] 1 Ch 542.

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1073. Materiality of statements.

Any statement will be construed in the natural and reasonable sense in which other persons are likely to read it¹. The untrue statement must be material², that is to say of some importance³, and the subscriber must be materially influenced by it, although it need not be the only inducement to subscribe⁴.

If a person is induced to subscribe by a material misstatement, it is no defence to a claim for rescission that he had the means of discovering and might with reasonable diligence have discovered that the statement was untrue⁵.

The omission of facts is not a ground for rescission unless it is of such a nature as to make what is actually stated misleading⁶.

1 *Arkwright v Newbold* (1881) 17 ChD 301, CA; *Arnison v Smith* (1889) 41 ChD 348, CA; *Smith v Chadwick* (1884) 9 App Cas 187, HL.

2 *Gover's Case* (1875) 1 ChD 182, CA. The following cases are referred to as showing what are material statements:

- 503 (1) as to shares alleged to be subscribed see *Ross v Estates Investment Co* (1868) 3 Ch App 682; *Henderson v Lacon* (1867) LR 5 Eq 249; *Croydon v Prudential Loan and Discount Co Ltd* (1886) 2 TLR 535, CA; *Arnison v Smith* (1889) 41 ChD 348, CA; *Taylor v Oil and Ozokerite Co Ltd* (1913) 29 TLR 515;
- 504 (2) as to contracts to purchase property see *Ross v Estates Investment Co*; *Central Rly Co of Venezuela (Directors etc) v Kisch* (1867) LR 2 HL 99;
- 505 (3) as to property really non-existent see *Scott v Snyder Dynamite Projectile Co Ltd* (1892) 67 LT 104, CA;
- 506 (4) as to property subject to a town planning resolution registered as a land charge see *Coles v White City (Manchester) Greyhound Association Ltd* (1929) 45 TLR 230, CA;
- 507 (5) as to the amount of purchase money paid see *Capel & Co v Sim's Ships Compositions Co Ltd* (1888) 57 LJ Ch 713;
- 508 (6) as to the value of property see *Reese River Silver Mining Co v Smith* (1869) LR 4 HL 64; *Re British Burmah Land Co Ltd* (1888) 4 TLR 631;
- 509 (7) as to the persons by whom valuers of property have been employed see *Angus v Clifford* [1891] 2 Ch 449 at 456-458 per Romer J (affd [1891] 2 Ch 449, 461 at 469, CA, per Bowen LJ);
- 510 (8) as to the object of issuing debentures offered for subscription see *Edgington v Fitzmaurice* (1885) 29 ChD 459, CA;
- 511 (9) as to the amount of net profits of a business see *Glasier v Rolls* (1889) 42 ChD 436, CA;
- 512 (10) as to the existence of parliamentary powers see *Peek v Derry* (1887) 37 ChD 541, CA (revsd without reference to this point sub nom *Derry v Peek* (1889) 14 App Cas 337, HL);
- 513 (11) as to the non-payment of promotion money see *Lodwick v Earl of Perth* (1884) 1 TLR 76;
- 514 (12) as to the names of directors and others connected or to be connected with the company see *Re Metropolitan Coal Consumers' Association*, *Wainwright's Case* (1890) 63 LT 429, CA; *Karberg's Case* [1892] 3 Ch 1, CA;
- 515 (13) as to the company having obtained contracts or orders see *Snook v Self-Acting Sewing Machine Co* (1887) 3 TLR 612; *Greenwood v Leather Shod Wheel Co* [1900] 1 Ch 421, CA; and
- 516 (14) as to the guarantee of dividends see *Kent v Freehold Land and Brickmaking Co* (1867) LR 4 Eq 588 (revsd on another point (1868) 3 Ch App 493); *Knox v Hayman* (1892) 67 LT 137, CA.

Statements as to certain persons being directors may or may not be material: see *Re Life Association of England*, *Blake's Case* (1865) 34 Beav 639; *Re Land Credit Co of Ireland*, *Munster's Case* (1866) 14 WR 957; *Hallows v Fernie* (1868) 3 Ch App 467; *Anderson's Case* (1881) 17 ChD 373; *Smith v Chadwick* (1882) 20 ChD 27, CA; *Re Scottish Petroleum Co* (1883) 23 ChD 413, CA; *Re Kent County Gas Light and Coke Co*, ex p *Brown* (1906) 95 LT 756.

3 *Smith v Chadwick* (1882) 20 ChD 27, CA.

4 *Edgington v Fitzmaurice* (1885) 29 ChD 459, CA; *Re London and Leeds Bank*, ex p *Carling*, *Carling v London and Leeds Bank* (1887) 56 LJ Ch 321; *Robson v Earl of Devon* (1857) 4 Jur NS 245.

5 *Redgrave v Hurd* (1881) 20 ChD 1, CA. Cf *Aaron's Reefs Ltd v Twiss* [1896] AC 273, HL.

6 *Peek v Gurney* (1873) LR 6 HL 377 at 403 per Lord Cairns; *Re Christineville Rubber Estates* (1911) 81 LJ Ch 63; *McKeown v Boudard-Peveril Gear Co* (1896) 65 LJ Ch 735, CA; *Aaron's Reefs Ltd v Twiss* [1896] AC 273, HL; *Components' Tube Co v Naylor* [1900] 2 IR 1; *New Brunswick and Canada Rly and Land Co v Conybeare* (1862) 9 HL Cas 711; *New Brunswick and Canada Rly and Land Co v Muggeridge* (1860) 1 Drew & Sm 363; *Oakes v Turquand and Harding*, *Peek v Same*, *Re Overend*, *Gurney & Co* (1867) LR 2 HL 325 at 341-345 per Lord

Chelmsford LC, and at 368 per Lord Cranworth; *Arkwright v Newbold* (1881) 17 ChD 301 at 311, CA, per Fry J; *Jury v Stoker and Jackson* (1882) 9 LR 385; *Edgington v Fitzmaurice* (1885) 29 ChD 459 at 472, CA, per Denman J; *Re Mount Morgan (West) Gold Mine Ltd, ex p West* (1887) 56 LT 622 at 623 per Kay J; *Derry v Peek* (1889) 14 App Cas 337, HL; *Scott v Snyder Dynamite Projectile Co Ltd* (1892) 67 LT 104, CA; *Re Dunlop-Truffault Cycle and Tube Manufacturing Co, ex p Shearman* (1896) 66 LJ Ch 25; *Cackett v Keswick* [1902] 2 Ch 456 at 476, CA. See also PARA 1083.

As to the effect of the omission of matters required by statute to be included in the offer documents see PARA 1070.

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1074. Loss of right to rescind.

The right of a shareholder to rescission is lost by his doing anything inconsistent with the right to repudiate after notice¹ of the misrepresentation, such as attempting to sell the shares², receiving dividends on them³, or making further payments in respect of them⁴. Any such acts done before the notice of the misrepresentation will not affect his right to rescind⁵, and the right is not affected by his attending a meeting of the company or opposing a winding-up petition as a shareholder after he has taken proceedings for rectification⁶. A person who has been induced to subscribe for shares by misrepresentations, and whose shares have, before he discovered the true facts, been forfeited for non-payment of calls, is not prejudiced by any subsequent delay in repudiating the contract⁷.

The right to rescind is lost if the parties cannot be restored to their original positions⁸. The right to rescind is also lost by the commencement of the winding up of the company⁹, whether the winding up is voluntary or not¹⁰, or by the company becoming insolvent and stopping payment¹¹, unless in either case the shareholder has previously repudiated the shares, and has commenced proceedings for rescission or agreed with the company to be bound by such proceedings brought by some other person¹², or has taken other appropriate steps to have his name removed from the register¹³.

The right is also lost on the failure of the shareholder to repudiate his shares within a reasonable time after he receives notice of the misrepresentation¹⁴. What is a reasonable time is a question of fact but delay in repudiating which is caused by reasonable negotiations with the company is excusable¹⁵. If there are several misrepresentations, the fact that the shareholder is precluded by delay as regards one is not a ground for refusing relief in respect of others subsequently discovered if proceedings as to these are commenced without undue delay¹⁶.

The circumstances already mentioned in which the right to rescind is lost are applicable in the case of a voidable contract, and not where the contract to take shares is not merely voidable but void¹⁷.

As an alternative to granting rescission, the court, if it is of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the company, may declare the contract subsisting and award damages in lieu of rescission¹⁸.

If on the facts it appears that a shareholder has a right, of which he was ignorant, to claim rescission, the cancellation of an allotment to him, though on invalid grounds, will stand¹⁹.

1 In some cases, the notice of the misrepresentation is given in a circular sent out by the company; but such a notice will not destroy the right of rescission unless it is proved to have been received by the shareholder: *Re London and Staffordshire Fire Insurance Co* (1883) 24 ChD 149. Cf *Arnison v Smith* (1889) 41 ChD 348, CA (where the circular was held not to have explained the misrepresentation).

2 *Re Hop and Malt Exchange and Warehouse Co, ex p Briggs* (1866) LR 1 Eq 483. As to a sale of shares in another company included in the same contract see *Maturin v Tredinnick* (1864) 4 New Rep 15.

3 *Scholey v Venezuela Central Rly Co* (1868) LR 9 Eq 266n.

4 *Re Dunlop-Truffault Cycle etc Manufacturing Co, ex p Shearman* (1896) 66 LJ Ch 25.

5 *Re Mount-Morgan (West) Gold Mine Ltd, ex p West* (1887) 56 LT 622.

6 *Re Metropolitan Coal Consumers' Association, ex p Edwards* (1891) 64 LT 561; *Foulkes v Quartz Hill Consolidated Gold Mining Co* (1883) Cab & El 156, CA; *Re Thomas Edward Brinsmead & Sons, Tomlin's Case* [1898] 1 Ch 104.

7 *Aaron's Reefs Ltd v Twiss* [1896] AC 273, HL. As to restraining forfeiture after proceedings for rescission see PARA 1077.

8 See eg *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317 at 331, HL, per Lord Hatherley; and see generally **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 826 et seq. As to damages see PARA 1086.

9 *Oakes v Turquand and Harding, Peek v Turquand and Harding, Re Overend, Gurney & Co* (1867) LR 2 HL 325; *Kent v Freehold Land and Brickmaking Co* (1868) 3 Ch App 493; *Re London And County General Agency Association, Hare's Case* (1869) 4 Ch App 503 at 512, 513 per Giffard LJ; *Re Hull and County Bank, Burgess's Case* (1880) 15 ChD 507 (where there were assets in excess of the amount required to satisfy the creditors); *Re Lennox Publishing Co, ex p Storey* (1890) 6 TLR 357; *Re Scottish Petroleum Co* (1883) 23 ChD 413 at 436, CA, per Lindley LJ; *Reese River Silver Mining Co v Smith* (1869) LR 4 HL 64; *Thomson's Case* (1898) 5 Mans 282. After the winding up has commenced, a shareholder suing for rescission may not amend his statement of claim in order to allege further misrepresentation discovered after the winding up commenced: see *Cocksedge v Metropolitan Coal Consumers' Association* [1891] WN 148, CA. As to the effect of commencement of winding up generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 489-490.

10 *Stone v City and County Bank* (1877) 3 CPD 282 at 295, CA, per Lindley J.

11 *Tennent v City of Glasgow Bank* (1879) 4 App Cas 615, HL (where notice was given a day before the winding up commenced). Cf *Re London and Leeds Bank, ex p Carling, Carling v London and Leeds Bank* (1887) 56 LJ Ch 321.

12 *Pawle's Case* (1869) 4 Ch App 497; *Re Scottish Petroleum Co* (1883) 23 ChD 413 at 436, CA, per Lindley LJ. See also *Ashley's Case* (1870) LR 9 Eq 263; *McNiell's Case* (1870) LR 10 Eq 503; *First National Reinsurance Co Ltd v Greenfield* [1921] 2 KB 260.

13 *Re General Railway Syndicate, Whiteley's Case* [1900] 1 Ch 365 at 369, CA, per Lindley MR (where the defendant had obtained leave to defend prior to the winding up on an affidavit setting up misrepresentation). Cf *Re Cleveland Iron Co, ex p Stevenson* (1867) 16 WR 95; *Re Etna Insurance Co Ltd* (1873) 6 IR Eq 298, CA.

14 *Bwlch-y-Plwm Lead Mining Co v Baynes* (1867) LR 2 Exch 324; *Pentelow's Case* (1869) 4 Ch App 178; *Taite's Case* (1867) LR 3 Eq 795; *Whitehouse's Case* (1867) LR 3 Eq 790; *Lawrence's Case* (1867) 2 Ch App 412; *Heymann v European Central Rly Co* (1868) LR 7 Eq 154; *Scholey v Venezuela Central Rly Co* (1868) LR 9 Eq 266n; *Pawle's Case* (1869) 4 Ch App 497; *Ashley's Case* (1870) LR 9 Eq 263; *Sharpley v Louth and East Coast Rly Co* (1876) 2 ChD 663, CA; *Cargill v Bower* (1878) 10 ChD 502; *Re London and Staffordshire Fire Insurance Co* (1883) 24 ChD 149; *Re London and Provincial Electric Lighting and Power Generating Co Ltd, ex p Hale* (1886) 55 LT 670; *Taylor v Oil and Ozokerite Co Ltd* (1913) 29 TLR 515; *First National Reinsurance Co Ltd v Greenfield* [1921] 2 KB 260; *Central Rly Co of Venezuela (Directors etc) v Kisch* (1867) LR 2 HL 99 at 125 per Lord Romilly. Cf *South London Greyhound Racecourses Ltd v Wake* [1931] 1 Ch 496 at 510 per Clauson J.

15 *Neill's Case* (1867) 15 WR 894; *Heymann v European Central Rly Co* (1868) LR 7 Eq 154 at 168 per Lord Romilly MR; *Ogilvie v Currie* (1868) 37 LJ Ch 541.

16 *Re London and Provincial Electric Lighting etc Co, ex p Hale* (1886) 55 LT 670. Cf *Whitehouse's Case* (1867) LR 3 Eq 790.

17 *Alabaster's Case* (1868) LR 7 Eq 273; *Dougan's Case* (1873) 8 Ch App 540; *Re United Ports And General Insurance Co, Wynne's Case* (1873) 8 Ch App 1002 at 1016 per Mellish LJ; *Re Monarch Insurance Co, Gorrissen's*

Case (1873) 8 Ch App 507 at 519 per Mellish LJ; *Beck's Case* (1874) 9 Ch App 392; *Baillie's Case* [1898] 1 Ch 110; *Re United Ports and General Insurance Co, Nelson's Case* [1874] WN 197.

18 See the Misrepresentation Act 1967 s 2(2); and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 834. Damages may be awarded against the company under this head as well as under s 2(1) for negligent misrepresentation (see PARA 1087) but any award under this head must be taken into account in assessing its liability under the other: s 2(3). As to how this discretion might be exercised and as to the measure of damages under s 2(2) see *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA; *Thomas Witter v TBP Industries Ltd* [1996] 2 All ER 573 at 591 per Jacob J; *Floods of Queensferry Ltd v Shand Construction Ltd* [2000] BLR 81 (on appeal in relation to liability for certain costs [2002] EWCA Civ 918, [2003] Lloyd's Rep IR 181); and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 834.

19 *Re London and Mediterranean Bank Ltd, Wright's Case* (1871) 7 Ch App 55.

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1075. Sub-underwriters.

A sub-underwriter may not obtain rescission of his contract to take shares where he is an undisclosed principal¹, although he has relied on misrepresentations, unless he establishes that the underwriter who is his agent relied on the misrepresentations; and the entry of the name of the sub-underwriter in the register of members, pursuant to an authority contained in a letter of renunciation signed by the underwriters, cannot of itself be treated as a contract entered into on the basis of the offer documents².

1 As to commissions, underwriting and brokerage generally see PARA 1151 et seq.

2 *Collins v Associated Greyhound Racecourses Ltd* [1930] 1 Ch 1, CA.

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1076. Compromise by surrender of shares.

A surrender of shares, as a compromise of proceedings commenced in good faith for rescission on the ground of misrepresentation, is valid¹.

1 *Re Life Association of England, Blake's Case* (1865) 34 Beav 639; *Fox's Case* (1868) LR 5 Eq 118; *Re London and Mediterranean Bank Ltd, Wright's Case* (1871) 7 Ch App 55.

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1077. Restraining forfeiture of shares.

After proceedings for rescission have been commenced, forfeiture of the shares for non-payment of calls will be restrained until the trial, on the claimant's giving an undertaking as to damages and paying the amount of the calls with interest thereon into court¹.

¹ *Jones v Pacaya Rubber and Produce Co Ltd* [1911] 1 KB 455, CA (following *Lamb v Sambas Rubber and Gutta Percha Co Ltd* [1908] 1 Ch 845; and *Charran Ltd v Indian Motor Taxi Cab Co* (1910) unreported, CA (cited in *Jones v Pacaya Rubber and Produce Co Ltd* at 456, 458), and disapproving *Ripley v Paper Bottle Co* (1887) 57 LJ Ch 327).

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1078. Joinder of other claims.

A person who has been induced to subscribe by misrepresentation may combine in the same proceedings his claims for rescission against the company and for damages for deceit, for negligent misrepresentation or negligent misstatement, or for statutory compensation¹ against the directors or others².

¹ See PARA 1070.

² See PARA 1081.

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C. RECTIFICATION OF THE REGISTER AND CONSEQUENT RELIEF

1079. Rectifying register on ground of misrepresentation.

A person who has been induced to take shares by misrepresentation in an offer document relating to the subscription of shares may, if he can show repudiation, and that he has not so acted after discovering the misrepresentation as to have claimed or recognised any rights or liabilities as a shareholder¹, obtain relief on an application to rectify the register of members by removing his name from it and for the return to him of what he has paid with interest².

¹ *First National Reinsurance Co Ltd v Greenfield* [1921] 2 KB 260. See also *Bwlch-y-Plwm Lead Mining Co v Baynes* (1867) LR 2 Exch 324; *Bentley & Co v Black* (1893) 9 TLR 580, CA; *Deposit Life Assurance v Ayscough* (1856) 6 E & B 761.

² See the Companies Act 2006 s 125 (general power of court to rectify register); and PARA 351. See also *Stewart's Case* (1866) 1 Ch App 574; *Wilkinson's Case* (1867) 2 Ch App 536; *Peel's Case* (1867) 2 Ch App 674;

Anderson's Case (1881) 17 ChD 373; *Re London and Staffordshire Fire Insurance Co* (1883) 24 ChD 149; *Re Christineville Rubber Estates Ltd* (1911) 81 LJ Ch 63.

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1080. Defence to proceedings for calls or specific performance.

A person who has been induced to take shares by misrepresentation in an offer document relating to the subscription of shares¹ may set up the defence of misrepresentation to proceedings² for calls on shares registered in his name³, if he has commenced proceedings for rectification of the register⁴ or given some undertaking to commence them within a reasonable time after he has discovered the misrepresentation or if the shares have been forfeited⁵. The usual defences available in proceedings for specific performance of an agreement to take shares or debentures are available⁶.

1 I.e. a person referred to in PARA 1079.

2 As to setting up misrepresentation as a defence to proceedings generally see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 785.

3 As to calls on share capital see PARA 1132 et seq.

4 I.e. under the Companies Act 2006 s 125: see PARA 351.

5 *Aaron's Reefs v Twiss* [1896] AC 273, HL.

6 See *Odessa Tramways Co v Mendel* (1878) 8 ChD 235, CA; and PARA 1312. As to specific performance generally see **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 801 et seq.

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D. CLAIM FOR DECEIT

1081. Who may be sued in claim for deceit.

Although a company is liable to a claim for deceit in respect of an act of its agent which is within the scope of his authority¹, claims for deceit in respect of misrepresentations in an offer document are generally brought against one or more of the directors or other persons responsible for such document; for the liability of the director remains. The right to rescission as against the company² may, however, be barred by the fact that the company has gone into liquidation or otherwise³.

Formerly a shareholder could not both retain his shares and bring proceedings against a company for deceit inducing him to buy from the company its shares or, by analogy, to take up shares of the company⁴. A person is, however, no longer debarred from obtaining damages or

other compensation from a company by reason only of his holding or having held shares in the company or any right to apply or subscribe for shares or to be included in the company's register of members⁵ in respect of shares⁶.

The shareholder may combine in the same proceedings a claim for damages against directors for deceit in respect of statements in an offer document with a claim against them for the statutory relief⁷ and a claim against the company for rescission⁸; and any number of shareholders may sue directors in one claim for deceit⁹.

1 See PARA 277 et seq. As to claims for deceit generally see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 789 et seq; **TORT** vol 45(2) (Reissue) PARA 391 et seq.

2 *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317, HL; *Re Hull and County Bank, Burgess's Case* (1880) 15 ChD 507; *Re Addlestone Linoleum Co* (1887) 37 ChD 191, CA (overruling *Re Government Security Fire Insurance Co, Mudford's Claim* (1880) 14 ChD 634 and *Great Australian Gold Mining Co, ex p Appleyard* (1881) 18 ChD 587). The effect of *Houldsworth v City of Glasgow Bank* has been reversed in so far as it relates to claims for damages and compensation: see the text and notes 4-6.

3 See PARA 1074.

4 *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317, HL; *Re Addlestone Linoleum Co* (1887) 37 ChD 191, CA. In principle, it was thought that such a claim was inconsistent with the contract into which the plaintiff had entered and the plaintiff had, therefore, to have severed his connection with the company by agreement or judgment for rescission before he could sue the company for misrepresentation: see *Houldsworth v City of Glasgow Bank* at 324-325 per Lord Cairns LC. This principle did not prevent proceedings being maintained for rescission in a proper case: see *Western Bank of Scotland v Addie* (1867) LR 1 Sc & Div 145 at 163-164, HL, per Lord Chelmsford.

5 As to the register of members see PARA 335 et seq.

6 See the Companies Act 2006 s 655; and PARA 323.

7 See PARA 1070. See also *Re a Company (No 00477 of 1986)* [1986] BCLC 376 (where unusually the aggrieved purchasers sought to bring what was in substance a claim for damages for deceit by way of a petition under what is now the Companies Act 2006 s 994 (petition in respect of unfair prejudice) (see PARA 466)). A statutory claim is preferable because it is for the person responsible for the offer document to prove that he was not negligent: see the Financial Services and Markets Act 2000 s 90, Sch 10; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 428.

8 *Frankenburg v Great Horseless Carriage Co* [1900] 1 QB 504, CA (where the defendants included the executors of a deceased director); and see *Greenwood v Humber & Co (Portugal) Ltd* (1898) 6 Mans 42; *Kent Coal Exploration Co v Martin* (1900) 16 TLR 486, CA. See also CPR 7.3; and **CIVIL PROCEDURE** vol 11 (2009) PARA 119. As to ordering an unsuccessful defendant to pay the costs of a successful defendant see *Bullock v London General Omnibus Co* [1907] 1 KB 264, CA; *Sanderson v Blyth Theatre Co* [1903] 2 KB 533, CA; *Rudow v Great Britain Mutual Life Assurance Society* (1881) 17 ChD 600 at 610, CA; and **CIVIL PROCEDURE** vol 11 (2009) PARA 212.

9 *Arnison v Smith* (1889) 41 ChD 98 at 102, CA, per Lindley LJ. One subscriber cannot maintain the claim on behalf of himself and the others who have been misled: see *Hallows v Fernie* (1868) 3 Ch App 467; *Croskey v Bank of Wales* (1863) 4 Giff 314. See also CPR 19.1-19.3; and **CIVIL PROCEDURE** vol 11 (2009) PARA 210 et seq.

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1082. Grounds for claim of deceit.

Where an offer document contains a false and fraudulent¹ representation² as to a matter of fact, made in order to induce a person to act thereon, and he acts thereon relying on the

representation and thereby sustains damage, he may recover damages for it from the directors or other persons who were responsible for the issue of the document³.

The false statement must be as to a matter of fact, not of law⁴, and the fact must be ascertained at the time when the statement is made, in the sense that a statement as to something that is expected to happen in the future is generally considered to be only a matter of opinion⁵.

The statement complained of must be a material representation⁶ and, if it is not obviously material, the onus of showing materiality is on the claimant⁷. The claimant must also prove that the defendant was responsible for the offer document⁸.

1 See PARA 1083.

2 As to what amounts in law to a representation see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 703 et seq.

3 *Gerhard v Bates* (1853) 2 E & B 476; *Scott v Dixon* (1859) 29 LJ Ex 62n; *Burnes v Pennell* (1849) 2 HL Cas 497; *Richardson v Silvester* (1873) LR 9 QB 34; *Cullen v Thomson's Trustees* (1862) 4 Macq 424, HL; *Peek v Gurney* (1873) LR 6 HL 377. See also *Denton v Great Northern Rly Co* (1856) 5 E & B 860; *Williams v Swansea Harbour Trustees* (1863) 14 CBNS 845; *Arnison v Smith* (1889) 41 ChD 98, CA; *Edgington v Fitzmaurice* (1885) 29 ChD 459, CA.

4 *Eaglesfield v Marquis of Londonderry* (1876) 4 ChD 693, CA.

5 *Beattie v Lord Ebury* (1872) 7 Ch App 777 at 804 per Mellish LJ; *Denton v Macneil* (1866) LR 2 Eq 352. See also the cases cited in PARA 1072 note 5.

6 *Smith v Chadwick* (1884) 9 App Cas 187, HL. As to the materiality of a representation see PARA 1073.

7 *Smith v Chadwick* (1882) 20 ChD 27 at 45, CA, per Jessel MR (affd (1884) 9 App Cas 187, HL); *Capel & Co v Sim's Ships Compositions Co Ltd* (1888) 57 LJ Ch 713 at 714.

8 *Henderson v Lacon* (1867) LR 5 Eq 249; *Ship v Crosskill* (1870) LR 10 Eq 73 at 82 per Lord Romilly MR; *Watts v Atkinson* (1892) 8 TLR 235, CA. As to the persons responsible for listing particulars see the Financial Services and Markets Act 2000 s 79(3), and the Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001, SI 2001/2956, made thereunder; and see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 391.

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1083. Fraud must be proved.

The claimant must further prove that a false representation contained in an offer document was fraudulent in the sense that it was made knowingly, or without belief in its truth, or recklessly, without caring whether it was true or false¹. The fact that a statement was made through carelessness, and without reasonable ground for believing it to be true, may be, but is not necessarily, evidence of fraud. If the false statement is made in the honest belief that it is true, it is not fraudulent, and does not give ground for a claim of deceit². Where a statement is ambiguous and capable of more than one meaning, the onus is on the claimant to show first that he has interpreted the words in the sense in which they were false, and has been deceived by them as so interpreted³, and, secondly, that this was the sense in which the defendant intended the words to be understood⁴. A true statement of fact may, by withholding other facts, be itself absolutely false⁵.

1 Different considerations apply to the statutory remedies given by the Financial Services and Markets Act 2000: see PARA 1070.

2 *Derry v Peek* (1889) 14 App Cas 337, HL. See also *Arkwright v Newbold* (1881) 17 ChD 301, CA; *Glasier v Rolls* (1889) 42 ChD 436, CA; *Angus v Clifford* [1891] 2 Ch 449, CA; *Jackson v Turquand* (1869) LR 4 HL 305; *Watts v Atkinson* (1892) 8 TLR 235, CA. The directors may be made liable for negligence in a claim by the company if they issued the offer documents without proper care, and if loss resulted, as the directors owe duties to the company: *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 at 436, CA, per Lindley MR.

3 *Smith v Chadwick* (1884) 9 App Cas 187, HL.

4 *Akerhielm v De Mare* [1959] AC 789, [1959] 3 All ER 485, PC (preferring *Derry v Peek* (1889) 14 App Cas 337, HL, *Angus v Clifford* [1891] 2 Ch 449, CA, and *Lees v Tod* (1882) 9 R 807, to *Arnison v Smith* (1889) 41 ChD 348, CA).

5 *Peek v Gurney* (1873) LR 6 HL 377; *Gluckstein v Barnes* [1900] AC 240, HL; *R v Lord Kylsant* [1932] 1 KB 442, CCA; *R v Bishirian* [1936] 1 All ER 586, CCA. Cf the cases in PARA 1073 notes 2, 6.

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1084. Inducement to subscribe.

A false statement need not be the only inducement to subscribe; it is sufficient to show that it was a material inducement¹. A claimant cannot succeed unless he was directly induced to subscribe by the false statement, even if it was made with the intention that it should be acted on².

The function of the offer document is, as a rule, exhausted when the shares are issued and a person who is only a subsequent purchaser of shares in the market is not so connected with the prospectus as to render those who have issued it liable to indemnify him against the losses which he has suffered in consequence of his purchase³; but if it contains a material false statement, and is intended to be acted on by a person other than the original allottees of the shares, that person, if deceived and injured, may maintain a claim for deceit⁴.

1 *Peek v Derry* (1887) 37 ChD 541, CA (revsd without affecting the point sub nom *Derry v Peek* (1889) 14 App Cas 337, HL); *Western Bank of Scotland v Addie* (1867) LR 1 Sc & Div 145, HL; *Re Royal British Bank, Nicol's Case* (1859) 3 De G & J 387; *Cleveland Iron Co v Stephenson* (1865) 4 F & F 428; *Clarke v Dickson* (1859) 6 CBNS 453; *Edgington v Fitzmaurice* (1885) 29 ChD 459, CA; *Moore v Burke* (1865) 4 F & F 258; *Arnison v Smith* (1889) 41 ChD 348 at 369, CA. Cf *Re London and Leeds Bank, ex p Carling* (1887) 56 LT 115.

2 *Peek v Derry* (1887) 37 ChD 541, CA (revsd sub nom *Derry v Peek* (1889) 14 App Cas 337, HL).

3 *Peek v Gurney* (1873) LR 6 HL 377 at 396-400 per Lord Chelmsford, and at 410 per Lord Cairns (overruling *Bagshaw v Seymour* (1858) 18 CB 903 and *Bedford v Bagshaw* (1859) 4 H & N 538); *Barry v Croskey* (1861) 2 John & H 1 at 23 per Page Wood V-C; *Barrett's Case* (1865) 3 De GJ & Sm 30. See further PARA 1087. This is no such limitation with respect to statutory liability under the Financial Services and Markets Act 2000 s 90, which extends to any person who has acquired securities to which the offer document applies and who has suffered loss in respect of them as a result of any untrue or misleading statement in the documents or as a result of the omission from the particulars of any matter required to be included: see PARA 1070.

4 Where the offer document is part of a scheme of fraud, continued after the issue by other devices, intended to induce the purchase of shares in the market, there is a good cause of action: *Andrews v Mockford* [1896] 1 QB 372 at 381, CA, per Smith LJ; *Peek v Gurney* (1873) LR 6 HL 377; *Barry v Croskey* (1861) 2 John & H 1; *Levy v Langridge* (1838) 4 M & W 337; *Cullen v Thomson's Trustees* (1862) 4 Macq 424 at 441, HL; *Stainbank v Fernley* (1839) 9 Sim 556.

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1085. Director's liability for acts of others.

The fact that a director has joined in an authority to brokers to obtain subscriptions does not apparently render him liable in a claim for deceit for misstatements of facts in an offer document issued by the brokers, not known of or authorised by him¹. Nor is he so liable in respect of false representations in an offer document issued by his co-director or by any other agent of the company unless he has expressly authorised or tacitly permitted its issue².

A promoter is liable in respect of a misrepresentation made with his consent or by his agent within the scope of his actual or ostensible authority³.

1 *Weir v Bell* (1878) 3 Ex D 238, CA. As to ratification see note 2. As to brokerage see PARA 1158. As to the liability of a principal for misrepresentation by his agent see **AGENCY** vol 1 (2008) PARAS 152-153.

2 *Cargill v Bower* (1878) 10 ChD 502. See also *Re Denham & Co* (1883) 25 ChD 752 at 765 per Chitty J; *Peek v Gurney* (1873) LR 6 HL 377 at 392 per Lord Chelmsford; *Glasier v Rolls* (1889) 42 ChD 436, CA; *Marnham v Weaver* (1899) 80 LT 412 at 413 per Romer J. The dicta of Kekewich J in *Hoole v Speak* [1904] 2 Ch 732 at 736, that a principal cannot ratify a tort committed by his agent, is contrary to authority: see *Hull v Pickersgill* (1819) 1 Brod & Bing 282 at 286 per Dallas CJ; *Wilson v Barker* (1833) 4 B & Ad 614; *Wilson v Tumman* (1843) 6 Man & G 236 at 242 per Tindall CJ; *Keighley, Maxsted & Co v Durant* [1901] AC 240 at 246-247, HL, per Lord Macnaghten; *Carter v St Mary Abbots, Kensington Vestry* (1900) 64 JP 548, CA.

3 *Glasier v Rolls* (1889) 42 ChD 436 at 441 per Kekewich J; *Dunnett v Mitchell* (1885) 12 R 400; *Arnison v Smith* (1889) 41 ChD 348, CA.

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1086. Proceedings and damages.

Mere delay in instituting a claim of deceit does not debar the claimant from relief, as it may in a claim for rescission; but a claim for damages for deceit is barred after six years from the time the claimant acted on the fraudulent misrepresentation or, if the existence of the fraud has been concealed, from the date when the fraud was or might with reasonable diligence have been discovered¹.

The claimant must prove actual damage to himself² and, where he has proved this in relation to shares acquired by him under a fraudulent misrepresentation by the defendant in an appropriate case, the correct measure of damages may be the difference between the contract price and the amount actually raised by the claimant on the resale of the shares³.

On the death of any person, all causes of action subsisting against or vested in him (including a right to claim for deceit but not including causes of action for defamation) survive against (or, as the case may be, for the benefit of) his estate⁴. Discharge from bankruptcy does not, however, release a bankrupt from any bankruptcy debt which he incurred in respect of, or

forbearance in respect of which was secured by means of, any fraud or fraudulent breach of trust to which he was a party⁵.

1 See the Limitation Act 1980 s 2 (time limit for actions founded on tort), s 32 (postponement of limitation period in case of fraud, concealment or mistake); and **LIMITATION PERIODS** vol 68 (2008) PARAS 979, 1220 et seq.

2 *Hyde v Bulmer* (1868) 18 LT 293.

3 *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, [1996] 4 All ER 769, HL (overruling in part *Downs v Chappell* [1996] 3 All ER 344, [1997] 1 WLR 426, CA; and doubting *Twycross v Grant* (1877) 2 CPD 469; *Waddell v Blockey* (1879) 4 QBD 678; *Peek v Derry* (1887) 37 Ch D 541; *McConnel v Wright* [1903] 1 Ch 546). In *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*, the claimant was induced by fraudulent misrepresentations to purchase shares and was locked into the transaction by those misrepresentations in circumstances which precluded the claimant from disposing of the shares immediately. In those circumstances, the court accepted that the measure of damages should be as stated in the text rather than according to the *prima facie* rule on deceit which is that the loss caused is measured by the price paid less the real value of the subject matter of the sale as at the date of the transaction or acquisition by the claimant. *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* was applied in *Parabola Investments Ltd v Browallia Cal Ltd* [2009] EWHC 901 (Comm), [2009] All ER (D) 75 (May) (claimant company was entitled to recover all losses that flowed directly from the defendants' fraudulent misrepresentations (ie as to daily profitability and account balances in relation to stockbroking activities conducted on the claimant's behalf) which consisted not only of the depletion of its trading fund and loss of profits it would otherwise have made on that fund in the period of the fraud, but also the loss of profits it had suffered up until the trial). As to the measure of damages in deceit see generally *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, [1969] 2 All ER 119, CA (the person making a misrepresentation may have to pay additional damages for consequential loss suffered by the person to whom the representation was made on account of his having entered into the contract and make reparation for all the actual damage flowing from the fraudulent inducement); and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 805 et seq.

4 See the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 814 et seq.

5 See the Insolvency Act 1986 s 281(3); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 643.

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E. NEGLIGENCE MISREPRESENTATION OR NEGLIGENCE MISSTATEMENT

1087. Damages for negligent misrepresentation or negligent misstatement.

As an alternative to a claim for deceit against the company¹, the shareholder may bring proceedings for negligent misrepresentation². The company's liability for damages will be precisely the same as if the misrepresentation had been made fraudulently, save that it will be a defence to show that it had reasonable ground for believing, and did believe up to the time the contract was made, that the facts represented were true³. Such a claim lies only against the other party to the contract⁴ (that is, for present purposes, the company and thus not against the directors responsible).

However, directors may owe a duty of care to persons who subscribe for shares in reliance on a prospectus⁵. Such a duty is not owed, however, to a shareholder or anyone else who relies on the prospectus for the purpose of deciding whether to purchase shares in the company through the stock market because the prospectus is addressed to shareholders for the particular purpose of inviting a subscription for shares and, if it is used for the different purpose of buying

shares in the stock market, there is not a sufficiently proximate relationship between the directors and the shareholder for a duty of care to arise on the part of the directors⁶.

1 See PARA 1081 et seq. The statutory compensation available under the Financial Services and Markets Act 2000 s 90 offers more generous grounds for relief: see PARA 1070.

2 See the Misrepresentation Act 1967 s 2; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 801. A claim made by an open-market purchaser of shares in a company (as opposed to an original subscriber or allottee) and based on alleged negligent misrepresentation by the company as to its assets, though necessarily conditional upon membership of the company, was not sufficiently closely related to the corporate nexus to be characteristically a member's claim and therefore such a claim did not amount to a claim 'in his character as a member' within the Insolvency Act 1986 s 74(2)(f) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 719): *Soden v British and Commonwealth Holdings plc* [1995] 1 BCLC 686; affd [1998] AC 298, [1997] 4 All ER 353, HL.

3 See the Misrepresentation Act 1967 s 2(1); and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 801. As to quantum of damages see *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297, [1991] 3 All ER 294, CA (the measure of damages for misrepresentation giving rise to an action under the Misrepresentation Act 1967 s 2(1) (see note 4) is the measure of damages for fraudulent misrepresentation); *Cemp Properties (UK) Ltd v Dentsply Research and Development Corpn (Denton, Hall & Burgin, third party)* [1991] 2 EGLR 197, CA; *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA; *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573 at 591 per Jacob J; *Floods of Queensferry Ltd v Shand Construction Ltd* [2000] BLR 81 (on appeal in relation to liability for certain costs [2002] EWCA Civ 918, [2003] Lloyd's Rep IR 181); and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 811, 834. The effect of *Royscot Trust Ltd v Rogerson* was reviewed critically in *Cheltenham BC v Laird* [2009] EWHC 1253 (QB) at [524], [2009] IRLR 621 at [524] per Hamblen J.

4 See the Misrepresentation Act 1967 s 2(1); and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 801.

5 It may be made liable under the doctrine of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL (person in a special position who takes it upon himself to give information liable if information negligently given if the necessary requirements are met as to foreseeability of damage, proximity of relationship and the reasonableness or otherwise of imposing the duty). See further *Caparo Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568, HL; *Al-Nakib Investments (Jersey) Ltd v Longcroft* [1990] 3 All ER 321, [1990] 1 WLR 1390; *Morgan Crucible Co plc v Hill Samuel & Co Ltd* [1991] Ch 295 (on appeal sub nom *Morgan Crucible Co Ltd v Hill Samuel Bank Ltd* [1991] 1 All ER 148, CA); and **NEGLIGENCE** vol 78 (2010) PARA 14. A director of a limited company may only be liable for negligent misstatement if it is shown objectively that the claimant could reasonably have relied on such an assumption of personal responsibility by the director as to create a special relationship between him and the claimant: *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 WLR 830, HL.

6 *Al-Nakib Investments (Jersey) Ltd v Longcroft* [1990] 3 All ER 321, [1990] 1 WLR 1390. See also *Possfund Custodian Trustee Ltd v Diamond (McGrigor Donald (a firm), third party)* [1996] 2 All ER 774, [1996] 1 WLR 1351 (it is arguable that persons responsible for the issue of a company's share prospectus owe a duty of care to a subsequent purchaser of the company's shares on the unlisted securities market, provided that the purchaser can establish both that he reasonably relied on the representations made in the prospectus and reasonably believed that the representor intended him to act on them); *Abbott v Strong* [1998] 2 BCLC 420 (an accountancy firm, engaged by company directors to help in the preparation of a share prospectus, does not owe a duty of care to third party shareholders for negligent misstatements which appear in the prospectus). As to the wider liability imposed under statute see the Financial Services and Markets Act 2000 s 90; and PARA 1070.

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(vi) Allotment, Issue and Payment of Shares

A. APPLICATION AND ALLOTMENT

1088. Application and allotment.

In most cases, the contract with the company is constituted by an application being made by the intending shareholder¹ to the company for an allotment² to him of so many shares³, and by an allotment being made, and notified to him. The application is an offer by him to take a certain number of shares; and the allotment by the company is an acceptance of the offer. A binding contract is constituted to take, and issue, the shares when, and not before, the acceptance is notified to the applicant⁴ or his agent for the purpose of receiving the notice⁵. Until then, the contract is not complete, even when the applicant's name is registered⁶.

Only slight evidence is required as to the service of notice⁷, and, even where there is no formal notice, the receipt of notice of allotment may be implied from the conduct of the applicant⁸.

If notice of allotment is sent by post, the acceptance is notified when the notice is posted⁹, even though it never reaches the applicant¹⁰. In some cases, as, for example, on a reconstruction or amalgamation, the offer may, in effect, come from the company, and the application then operates as an acceptance¹¹.

Either the offer or the acceptance may be oral¹². In general, before notification of the acceptance is received¹³, or if sent by post, posted¹⁴, the offer may be withdrawn, and even if in writing, it may be withdrawn orally¹⁵.

If there is unreasonable delay in accepting an application for shares, the applicant may repudiate them within a reasonable time after receiving notice of allotment¹⁶, and before a winding up commences¹⁷.

There is no contract where the offer to take shares in a company is made by a person who believes it to be a totally different company, and that belief is induced by those who represent the company¹⁸.

1 As to persons who may not become shareholders see PARA 333 et seq.

2 As to contracts to pay on allotment where the company is never registered see *Wheeler v Fradd* (1898) 14 TLR 302. Where the allotment is made but subsequently rescinded because the company cannot obtain a certificate to commence business see *Ellett v Sternberg* (1910) 27 TLR 127.

3 As to shares see PARA 1042 et seq.

4 *Re Florence Land and Public Works Co, Nicol's Case, Tufnell and Ponsonby's Case* (1885) 29 ChD 421 at 426, CA, per Chitty J; *Hebb's Case* (1867) LR 4 Eq 9. Acceptance is sufficiently communicated when a letter demanding payment for the shares is dispatched: *Forget v Cement Products Co of Canada* [1916] WN 259, PC.

5 *Harward's Case* (1871) LR 13 Eq 30; *Levita's Case* (1870) 5 Ch App 489; *Re Charles Laffitte & Co Ltd, De Rosaz's Case* (1869) 21 LT 10, CA.

6 *Gunn's Case* (1867) 3 Ch App 40; *Sahlgreen and Carrall's Case* (1868) 3 Ch App 323; *Wallis's Case* (1868) 4 Ch App 325n; *Re Peruvian Railways Co, Crawley's Case, Robinson's Case* (1869) 4 Ch App 322; *Re Land Shipping Colliery Co, ex p Harwood, Gull, Geary and Stafford* (1869) 20 LT 736; *Ward's Case* (1870) LR 10 Eq 659; *Re Joseph Horner & Sons Ltd, Plimsoll's Case* (1871) 24 LT 653.

7 *Re National Funds Assurance Co, Sparling's Case* (1877) 26 WR 41.

8 *Richards v Home Assurance Association* (1871) LR 6 CP 591; *Re Valparaiso Water Works Co, Davies' Case* (1872) 41 LJ Ch 659; *Re Hampshire Co-operative Milk Co Ltd, Purcell's Case* (1880) 29 WR 170; *Re Saloon Steam Packet Co, ex p Fletcher* (1867) 37 LJ Ch 49; *Re Peruvian Railways Co, Crawley's Case, Robinson's Case* (1869) 4 Ch App 322; *Re International Contract Co, Levita's Case* (1867) 3 Ch App 36 at 38 per Rolt LJ; *Re United Ports and General Insurance Co, Brown's Case, Tucker's Case* (1871) 41 LJ Ch 157; *Re Imperial Land Credit Corp'n Ltd, ex p Eve* (1868) 37 LJ Ch 844.

9 As to acceptance by post see **CONTRACT** vol 9(1) (Reissue) PARA 659. See also *Quenerduaine v Cole* (1883) 32 WR 185; *Household Fire and Carriage Accident Insurance Co v Grant* (1879) 4 ExD 216, CA (overruling *Re*

Constantinople and Alexandria Hotels Co, Finucane's Case (1869) 17 WR 813; *Reidpath's Case* (1870) LR 11 Eq 86; *British and American Telegraph Co Ltd v Colson* (1871) LR 6 Exch 108; *Re Cardiff and Caerphilly Iron Co Ltd, Gledhill's Case* (1861) 3 De GF & J 713; *Re Exhall Coal Mining Co Ltd, Miles' Case* (1864) 4 De GJ & Sm 471; *Re Natal Investment Co Ltd, Wilson's Case* (1869) 20 LT 962; *Re Metropolitan Fire Insurance Co, Wallace's Case* [1900] 2 Ch 671; *Re Whitley Partners Ltd, Steel's Case* (1879) 49 LJ Ch 176; *Re Scottish Petroleum Co, MacLagan's Case* (1882) 51 LJ Ch 841; *Wall's Case* (1872) LR 15 Eq 18; *Ritso's Case* (1877) 4 ChD 774, CA; *Truman's Case* [1894] 3 Ch 272; *Re General International Agency Co, Chapman's Case* (1866) LR 2 Eq 567. Cf *Re London and Northern Bank, ex p Jones* [1900] 1 Ch 220 (handing letter of allotment to postman does not constitute posting).

10 *Jackson v Turquand* (1869) LR 4 HL 305 (offer by company of available shares pro rata to members; concluded contract in respect of shares so offered accepted by shareholders, but no contract in respect of application for surplus shares where no acceptance by company notified); *Household Fire and Carriage Accident Insurance Co v Grant* (1879) 4 ExD 216, CA.

11 *Adams' Case* (1872) LR 13 Eq 474; *Re United Ports and General Insurance Co, Brown's Case, Tucker's Case* (1871) 41 LJ Ch 157. Cf *Wallace's Case* [1900] 2 Ch 671; *Re New Eberhardt Co, ex p Menzies* (1889) 43 ChD 118, CA. As to reconstruction or amalgamation of a company see PARA 1425 et seq.

12 *Re Electric Telegraph Co of Ireland, Cookney's Case* (1858) 3 De G & J 170 at 173 per Knight Bruce LJ; *Re New Theatre Co, Bloxam's Case* (1864) 33 LJ Ch 574; *Re International Contract Co, Levita's Case* (1867) 3 Ch App 36.

13 *Ritso's Case* (1877) 4 ChD 774, CA; *Re London and Northern Bank, ex p Jones* [1900] 1 Ch 220; *Wallace's Case* [1900] 2 Ch 671. Cf *Re Portuguese Consolidated Copper Mines Ltd, ex p Badman, ex p Bosanquet* (1890) 45 ChD 16, CA (where notification of an invalid allotment had been received); *Re Whitley Partners Ltd, Steel's Case* (1879) 49 LJ Ch 176. As to notice of allotment see the text and notes 5-10.

14 *Harris' Case* (1872) 7 Ch App 587; *Wall's Case* (1872) LR 15 Eq 18; *Re Natal Investment Co, Wilson's Case* (1869) 20 LT 962; *Truman's Case* [1894] 3 Ch 272.

15 *Ritso's Case* (1877) 4 ChD 774, CA.

16 *Ramsgate Victoria Hotel Co v Montefiore, Ramsgate Victoria Hotel Co v Goldsmid* (1866) LR 1 Exch 109; *Re Bowron, Baily & Co, ex p Baily* (1868) 3 Ch App 592. Cf *Pentelow's Case* (1869) 4 Ch App 178; *Peek's Case* (1869) 4 Ch App 532.

17 *Re Land Loan Mortgage and General Trust Co of South Africa, Boyle's Case* (1885) 54 LJ Ch 550.

18 *Baillie's Case* [1898] 1 Ch 110; *Cundy v Lindsay* (1878) 3 App Cas 459, HL.

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1089. Conditional offer of allotment.

In the case of a conditional offer to take shares, if the condition is a condition subsequent, there is a binding agreement to take the shares as soon as the company notifies its acceptance of the offer; but, where the condition is a condition precedent, there is no binding agreement to take the shares unless and until the condition is either fulfilled or waived¹. If an acceptance introduces a new term, it will not constitute a contract unless the new term is accepted or acquiesced in².

An allotment may be made conditionally on the happening of some event, such as the allottee indicating his acceptance of the shares and paying certain money; in such a case he does not become a member until the condition is performed, even if his name is registered³.

1 *Elkington's Case* (1867) 2 Ch App 511; *Pellatt's Case* (1867) 2 Ch App 527; *Bridger's Case* (1870) 5 Ch App 305; *Fisher's Case*, *Sherrington's Case* (1885) 31 ChD 120, CA; *Boyer Ltd v Edwardes* (1900) 17 TLR 16 (affd (1901) 18 TLR 3, CA); *Re Bultfontein Sun Diamond Mine, ex p Cox, Hughes and Norman* (1897) 75 LT 669, CA; *Shackleford's Case* (1866) 1 Ch App 567; *Roger's Case*, *Harrison's Case* (1868) 3 Ch App 633; *Wood's Case* (1873) LR 15 Eq 236.

2 *Addinell's Case* (1865) LR 1 Eq 225; *Beck's Case* (1874) 9 Ch App 392. Cf *Howard's Case* (1866) 1 Ch App 561; *Jackson v Turquand* (1869) LR 4 HL 305; *Harris' Case* (1872) 7 Ch App 587.

3 *Spitzel v Chinese Corpn Ltd* (1899) 80 LT 347. Cf *Pentelow's Case* (1869) 4 Ch App 178; and cf *Hebb's Case* (1867) LR 4 Eq 9.

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1090. Allotment and its effect.

Allotment is an appropriation to some person or corporation of a certain number of shares, but not necessarily of any specific shares¹. The legal effect of the appropriation depends on the circumstances, for it may be an offer of shares to the allottee or an acceptance of an application for shares by him²; of itself, an allotment does not necessarily create the status of membership, even when the contract to take the shares is complete³, because an allotment of shares is not a condition precedent to any person becoming a member of the company⁴.

A contract is not constituted by an allotment of shares other than those applied for, as, for example, when the shares allotted are unpaid or partly paid instead of fully paid⁵, or of larger nominal amount⁶, or fewer in number, than those applied for⁷. If, however, the allottee accepts the shares and acts as shareholder, although under a mistake as to his liability, he is bound⁸. Where an allotment has been made on a binding contract to take shares, it cannot be cancelled by the company⁹. Allotments which were invalid as ultra vires¹⁰ have, however, been rescinded, and an allotment may be rescinded which has been made, by mistake, of unpaid instead of fully paid shares¹¹, or to the wrong persons¹², or when an allottee who has been induced to subscribe for shares by misrepresentation repudiates the contract¹³ or where the allotment is made by directors in their own favour and in breach of the statutory pre-emption provisions¹⁴.

The issue and allotment of bonus shares, at least once they have been accepted by the shareholders to whom they have been allotted, involves a relationship between the company and the shareholder which is analogous to contract¹⁵. Accordingly, the common law principle of mistake is applicable to a bonus issue in the same way as to an ordinary contract and the question as to whether the issue and allotment of bonus shares is void for mistake must be decided by reference to the principles governing the effect of a common mistake on a contract¹⁶.

Damages may be recovered against a company failing to allot shares under a binding agreement in addition to the grant of an order for specific performance¹⁷.

1 In an agreement providing for a repayment within a stated period of a company 'going to allotment', it was held that 'going to allotment' takes place as soon as the directors resolve to go to allotment and take the necessary steps to make their resolution effective, whatever the results may be: *Ellett v Sternberg* (1910) 27 TLR 127.

2 See PARAS 1088-1089.

3 *Spitzel v Chinese Corpn Ltd* (1899) 80 LT 347. Cf *Re Northern Electric Wire and Cable Manufacturing Co Ltd, ex p Hall* (1890) 63 LT 369.

4 See PARA 321. See also PARAS 1045, 342.

5 *Blake v Mowatt* (1856) 21 Beav 603 (revsd on other grounds sub nom *Mowatt v Blake* (1858) 31 LTOS 387, HL); *Arnot's Case* (1887) 36 ChD 702, CA; *Re Almada and Tirito Co* (1888) 38 ChD 415, CA; *Re New Eberhardt Co, ex p Menzies* (1889) 43 ChD 118, CA; *Wynne's Case* (1873) 8 Ch App 1002; *Beck's Case* (1874) 9 Ch App 392. As to paid up capital see PARA 1048.

6 *Gustard's Case* (1869) LR 8 Eq 438. As to the nominal value of shares see PARA 1044.

7 *Re Wolverhampton, Chester and Birkenhead Junction Rly Co, ex p Roberts* (1852) 1 Drew 204; *Re Oxford and Worcester Extension and Chester Junction Rly Co, ex p Barber* (1851) 20 LJ Ch 146. It is, however, usual for the prospectus to intimate that the number of shares allotted may be less than the number applied for, and for the applicant to offer to accept the number applied for, or any smaller number that may be allotted.

8 *Dent's Case, Forbes' Case* (1873) 8 Ch App 768; *Re Railway Time Tables Publishing Co, ex p Sandys* (1889) 42 ChD 98, CA; *Re James Pilkin & Co Ltd* (1916) 85 LJ Ch 318.

9 *Adams' Case* (1872) LR 13 Eq 474; *Duff's Executors' Case* (1886) 32 ChD 301, CA; *Re Saloon Steam Packet Co, ex p Fletcher* (1867) 37 LJ Ch 49; *Re Companies Guardian Society, Lord Wallscourt's Case* (1899) 7 Mans 235. Cf *Hall's Case* (1870) 5 Ch App 707; *Re London and Provincial Consolidated Coal Co* (1877) 5 ChD 525 (where no allotment had been made).

10 *Barnett's Case* (1874) LR 18 Eq 507 (issue of shares at a discount); *Tintin Exploration Syndicate Ltd v Sandys* (1947) 177 LT 412; *Bath's Case* (1878) 8 ChD 334, CA (where, however, the allottee was held liable as a past member). Cf *Re British Provident Life and Fire Assurance Society, Coleman's Case* (1863) 1 De GJ & Sm 495. These cases must now be read in light of the statutory protection which is afforded certain persons for acts ultra vires the company or acts beyond the authority of the board of directors: see PARA 256 et seq.

11 *Hartley's Case* (1875) 10 Ch App 157.

12 *Re Hoylake Rly Co, ex p Keightley* [1874] WN 18; affd [1874] WN 47, CA.

13 *Re London and Mediterranean Bank Ltd, Wright's Case* (1871) 7 Ch App 55; *Reese River Silver Mining Co v Smith* (1869) LR 4 HL 64 at 74 per Lord Cairns. Cf *Re Life Association of England, Blake's Case* (1865) 34 Beav 639. See also PARAS 1071, 1081.

14 See *Re Thundercrest Ltd* [1995] 1 BCLC 117; and PARAS 1095, 1105.

15 *EIC Services Ltd v Phipps* [2004] EWCA Civ 1069, [2005] 1 All ER 338, [2005] 1 WLR 1377. See also *Re Cleveland Trust plc* [1991] BCLC 424, [1991] BCC 33. As to bonus shares see PARA 1053.

16 See note 15. As to the principles governing the effect of a common mistake on a contract see **CONTRACT** vol 9(1) (Reissue) PARA 703 et seq.

17 *Sri Lanka Omnibus Co Ltd v Perera* [1952] AC 76, PC. See further PARA 332.

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1091. Statutory meanings of 'allotted share capital', 'allotted' and 'allotted for cash'.

For the purposes of the Companies Acts¹, shares² in a company³ are to be taken to be 'allotted'⁴ when a person acquires the unconditional right to be included in the company's register of members⁵ in respect of the shares⁶.

For the purposes of the Companies Acts⁷, a share in a company is deemed 'paid up' (as to its nominal value⁸ or any premium on it⁹) in cash¹⁰, or 'allotted for cash', if the consideration

received for the allotment or payment up is a cash consideration¹¹. For these purposes, a 'cash consideration' means: (1) cash received by the company¹²; (2) a cheque received by the company in good faith that the directors¹³ have no reason for suspecting will not be paid¹⁴; (3) a release of a liability of the company for a liquidated sum¹⁵; (4) an undertaking to pay cash to the company at a future date¹⁶; or (5) payment by any other means giving rise to a present or future entitlement (of the company or a person acting on the company's behalf) to a payment, or credit equivalent to payment, in cash¹⁷. In relation to the allotment or payment up of shares in a company¹⁸, the payment of cash to a person other than the company, or an undertaking to pay cash to a person other than the company, counts as consideration 'other than cash'¹⁹.

References in the Companies Acts to 'allotted share capital'²⁰ are to shares of a company that have been allotted²¹; and references to 'allotted' shares, or to 'allotted' share capital, include shares taken on the formation of the company by the subscribers to the company's memorandum²².

1 As to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'share' in the Companies Acts see PARA 1042.

3 As to the meaning of 'company' under the Companies Acts see PARA 24.

4 As to the general provisions relating to allotment see PARA 1093 et seq.

5 As to the register of members see PARA 355.

6 Companies Act 2006 s 558. The provisions of Pt 17 Ch 2 (ss 549-559) have no application in relation to the taking of shares by the subscribers to the memorandum on the formation of the company: s 559. As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 321 et seq. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.

7 The provisions of the Companies Act 2006 s 583(2)-(7) (see the text and notes 8-19) have effect for the purposes of the Companies Acts: s 583(1). The Secretary of State may by regulations modify the Companies Act 2006 Pt 17 Ch 5 (ss 580-592) (see also PARA 1111 et seq): s 657(1). As to the Secretary of State see PARA 6. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 657 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 657(4), 1290. The regulations may amend or repeal any provision of Pt 17 Ch 5, or make such other provision as appears to the Secretary of State appropriate in place of any provision of Pt 17 Ch 5 (s 657(2)); and may make consequential amendments or repeals in other provisions of the Companies Act 2006, or in other enactments (s 657(3)). As to the meaning of 'enactment' see PARA 17 note 2. At the date at which this volume states the law, no such regulations had been made for these purposes.

8 As to the nominal value of shares see PARA 1044.

9 As to the meaning of 'premium' see PARA 1146.

10 For the purpose of determining whether a share is or is to be allotted for cash, or paid up in cash, 'cash' includes foreign currency: Companies Act 2006 s 583(6). See note 7. As to the meaning of 'cash' generally see PARA 564 note 6.

11 Companies Act 2006 s 583(2). See note 7.

12 Companies Act 2006 s 583(3)(a). See note 7.

13 As to the meaning of 'director' under the Companies Acts see PARA 478.

14 Companies Act 2006 s 583(3)(b). See note 7.

15 Companies Act 2006 s 583(3)(c). See note 7.

16 Companies Act 2006 s 583(3)(d). See note 7. See also *System Control plc v Munro Corporate plc* [1990] BCLC 659 (an undertaking to pay cash means an undertaking given to the company in consideration of the allotment of the shares; it does not include the assignment of an earlier debt).

17 Companies Act 2006 s 583(3)(e). The Secretary of State may by order provide that particular means of payment specified in the order are to be regarded as falling within s 583(3)(e): s 583(4). An order under s 583 is subject to negative resolution procedure (ie the statutory instrument containing the order is subject to annulment in pursuance of a resolution of either House of Parliament): ss 583(7), 1289. See note 7. As to the making of orders under the Companies Act 2006 generally see ss 1288-1292. In exercise of the powers conferred by s 583(4), the Secretary of State has made the Companies (Shares and Share Capital) Order 2009, SI 2009/388. Accordingly, the creation of an obligation on the part of a settlement bank to make a relevant payment in respect of the allotment of, or in respect of the payment up of, a share to a system-member by means of a relevant system is to be regarded as a means of payment falling within the Companies Act 2006 s 583(3)(e): see the Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 4(1), (2). For these purposes, 'relevant payment' means a payment in accordance with the rules and practices of an operator of a relevant system: art 4(4)(b). As to the meaning of 'operator' see PARA 421 note 1; definition applied by art 4(4)(a). As to the meaning of 'relevant system' see PARA 421 note 1; definition applied by art 4(4)(a). As to the meaning of 'settlement bank' see PARA 428 note 10; definition applied by art 4(4)(a). As to the meaning of 'system-member' see PARA 422 note 9; definition applied by art 4(4)(a).

18 The Companies Act 2006 s 583(5) does not apply, however, for the purposes of Pt 17 Ch 3 (ss 560-577) (allotment of equity securities: existing shareholders' right of pre-emption) (see PARA 1098 et seq): see s 583(5). See note 7.

19 Companies Act 2006 s 583(5). See note 7.

20 As to the meaning of 'share capital' see PARA 1042.

21 Companies Act 2006 s 546(1)(b).

22 Companies Act 2006 s 546(2). A company limited by shares cannot be registered on formation unless it submits a statement of capital and initial shareholdings: see s 10; and PARA 113. Amongst other things, this must state, with respect to each subscriber to the memorandum of association, the number, nominal value (of each share) and class of shares to be taken by him on formation; and the amount to be paid up and the amount (if any) to be unpaid on each share (whether on account of the nominal value of the share or by way of premium): see s 10; and PARA 113. As to the meaning of 'company limited by shares' see PARA 78. As to the meaning of 'class of shares' see PARA 1057.

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1092. Issued shares and share capital.

The term 'issue' is used in connection with shares¹. The shares which are to be taken by each subscriber to the memorandum of association² are issued when the company is registered³. As regards other shares, when a person who has agreed to take shares is entered on the register of members⁴ as a shareholder⁵, the shares have been issued to him, although he has not obtained the share certificate⁶. A resolution to allot⁷ shares is not, however, necessarily the issue of them, and the term seems to mean allotment followed by registration or possibly by some other act, distinct from allotment, whereby the title of the allottee becomes complete⁸.

The allotment creates an enforceable contract for the issue of shares⁹. The shares are issued when an application to the company has been followed by allotment and notification to the purchaser and completed by entry on the register of members¹⁰.

1 See eg the Companies Act 2006 s 769(2); and PARA 383. As to the meaning of references to 'issued' shares and capital see PARA 1045. As to the meanings of 'share' and 'share capital' see PARA 1042.

2 As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 103 et seq.

3 *Dalton Time Lock Co v Dalton* (1892) 66 LT 704, CA. See the Companies Act 2006 s 16(1), (5) (in the case of a company having a share capital, the subscribers to the memorandum become holders of the shares specified in the statement of capital and initial shareholdings); and PARA 120. As to the requirements that must be met before a company is duly formed by registration see PARA 102 et seq.

4 As to the register of members see PARA 335.

5 As to shareholders and membership of companies generally see PARA 321 et seq.

6 *Blyth's Case* (1876) 4 ChD 140, CA; *A-G v Regent's Canal and Dock Co* [1904] 1 KB 263 at 270, CA. Cf *Bush's Case* (1874) 9 Ch App 554.

7 As to the meaning of 'allot' see PARA 1091.

8 The statement in the text was approved in *National Westminster Bank plc v IRC, Barclays Bank plc v IRC* [1995] 1 AC 119 at 147, [1994] 3 All ER 1 at 26, HL, per Lord Lloyd of Berwick. See also *Clarke's Case* (1878) 8 ChD 635, CA; *Spitzel v Chinese Corpn Ltd* (1899) 80 LT 347; *Pool's Case* (1887) 35 ChD 579. It would seem that the meaning of 'issue' depends on the context of the enactment in which the word occurs: see *Re Bank of Hindustan, China and Japan, Campbell's Case, Hippisley's Case, Alison's Case* (1873) 9 Ch App 1; *A-G v Anglo-Argentine Tramways Co Ltd* [1909] 1 KB 677; *Re Perth Electric Tramways Ltd, Lyons v Tramways Syndicate Ltd and Perth Electric Tramways Ltd* [1906] 2 Ch 216; *Oswald Tillotson Ltd v IRC* [1933] 1 KB 134; *National Westminster Bank plc v IRC, Barclays Bank plc v IRC*. The term is not a technical, but a mercantile, term: *Levy v Abercorris Slate and Slab Co* (1887) 37 ChD 260 at 264 per Chitty J. See also PARA 1045.

9 *National Westminster Bank plc v IRC, Barclays Bank plc v IRC* [1995] 1 AC 119 at 126, [1994] 3 All ER 1 at 6, HL, per Lord Templeman. See also PARA 1045.

10 *National Westminster Bank plc v IRC, Barclays Bank plc v IRC* [1995] 1 AC 119, [1994] 3 All ER 1, HL. See also PARA 1045.

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B. POWERS OF ALLOTMENT

1093. Restriction on powers of private company to allot shares.

Under the Companies Act 2006, a private company that is limited by shares¹, or is limited by guarantee and having a share capital², is prohibited both from making any offer to the public³ of any securities⁴ of the company, and from allotting (or agreeing to allot) any securities of the company with a view to their being offered to the public⁵.

Any contravention, or proposed contravention, of this prohibition is enforceable by order⁶. However, a company does not contravene this restriction if it acts in good faith in pursuance of arrangements under which it is to re-register as a public company⁷ before the securities are allotted or if, as part of the terms of the offer, it undertakes to re-register as a public company within a specified period⁸, and that undertaking is complied with⁹.

1 As to the meanings of 'private company' and 'company limited by shares' see PARA 102; and as to the meaning of 'share' see PARA 1042. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'company limited by guarantee' see PARA 102; and as to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

3 As to the meaning of 'offer to the public' for these purposes see the Companies Act 2006 s 756; and PARA 1066.

4 For these purposes, 'securities' means shares or debentures: see the Companies Act 2006 s 755(5); and PARA 1066. As to the meaning of 'debenture' see PARA 1299.

5 See the Companies Act 2006 ss 755, 760; and PARA 1066.

6 See the Companies Act 2006 ss 757-759; and PARA 1066.

7 As to the meaning of 'public company' see PARA 102. As to the procedure on application to re-register a private company as a public company see PARA 168.

8 See the Companies Act 2006 s 755(4); and PARA 1066.

9 See the Companies Act 2006 s 755(3); and PARA 1066.

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1094. Power of directors to allot: private company with only one class of shares.

Where a private company¹ has only one class of shares², the directors³ may exercise any power of the company either to allot shares of that class⁴, or to grant rights to subscribe for or to convert any security into such shares⁵, except to the extent that they are prohibited from doing so by the company's articles⁶.

1 As to the meaning of 'private company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'class of shares' see PARA 1057; and as to the meaning of 'shares of one class' see PARA 1058. As to the meaning of 'share' in the Companies Acts see PARA 1042.

3 As to the meaning of 'director' under the Companies Acts see PARA 478.

4 Companies Act 2006 s 550(a). As to the meaning of 'allot' see PARA 1091. The provisions of Pt 17 Ch 2 (ss 549-559) have no application in relation to the taking of shares by the subscribers to the memorandum on the formation of the company: see s 559; and PARA 1091 note 6. As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 104 et seq. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.

5 Companies Act 2006 s 550(b). See note 4.

6 Companies Act 2006 s 550. See note 4. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

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1095. Power of directors to allot shares.

The directors¹ of a company² must not exercise any power of the company either to allot³ shares⁴ in the company⁵, or to grant rights to subscribe for, or to convert any security into,

shares in the company⁶, except in accordance with the provisions that govern private companies⁷ with only a single class of shares⁸ or in accordance with the provisions that govern authorisation by the company⁹. However, this restriction¹⁰ does not apply to¹¹: (1) the allotment of shares in pursuance of an employees' share scheme¹²; or (2) the grant of a right to subscribe for, or to convert any security into, shares so allotted¹³; or (3) the allotment of shares pursuant to a right to subscribe for, or to convert any security into, shares in the company¹⁴.

A director who knowingly contravenes, or permits or authorises a contravention of, this restriction¹⁵ commits an offence¹⁶; and a person who is guilty of such an offence is liable (on conviction on indictment) to a fine and (on summary conviction) to a fine not exceeding the statutory maximum¹⁷.

Nothing in these provisions¹⁸ affects the validity of an allotment or other transaction¹⁹.

1 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 As to the meaning of 'allot' see PARA 1091.

4 As to the meaning of 'share' in the Companies Acts see PARA 1042.

5 Companies Act 2006 s 549(1)(a). The provisions of Pt 17 Ch 2 (ss 549-559) have no application in relation to the taking of shares by the subscribers to the memorandum on the formation of the company: see s 559; and PARA 1091 note 6. As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 104 et seq. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.

6 Companies Act 2006 s 549(1)(b). See note 5.

7 As to the meaning of 'private company' see PARA 102.

8 Ie except in accordance with the Companies Act 2006 s 550 (see PARA 1094): see s 549(1). As to the meaning of 'class of shares' see PARA 1057.

9 Companies Act 2006 s 549(1). The text refers to authorisation by the company under s 551 (see PARA 1096): see s 549(1). See note 5.

10 Ie the Companies Act 2006 s 549(1) (see the text and notes 1-9): see s 549(2), (3).

11 See the Companies Act 2006 s 549(2), (3).

12 Companies Act 2006 s 549(2)(a). See note 5. As to the meaning of 'employees' share scheme' see PARA 169 note 20.

13 Companies Act 2006 s 549(2)(b). See note 5.

14 Companies Act 2006 s 549(3) (substituted by SI 2009/2561). See note 5.

15 Ie the Companies Act 2006 s 549: see s 549(4).

16 Companies Act 2006 s 549(4). See note 5.

17 Companies Act 2006 s 549(5). See note 5. As to the meaning of 'statutory maximum' see PARA 1622.

18 Ie nothing in the Companies Act 2006 s 549 (see the text and notes 1-17): see s 549(6).

19 Companies Act 2006 s 549(6). See note 5.

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1096. Authorisation granted to directors to allot shares.

The directors¹ of a company² may exercise a power of the company either to allot³ shares⁴ in the company⁵, or to grant rights to subscribe for or to convert any security into shares in the company⁶, if they are authorised to do so by the company's articles⁷ or by resolution of the company⁸. Authorisation may be given for a particular exercise of the power or for its exercise generally, and may be unconditional or subject to conditions⁹.

Authorisation must state the maximum amount of shares that may be allotted under it¹⁰, and must specify the date on which it will expire, which must be not more than five years from (in the case of authorisation contained in the company's articles at the time of its original incorporation) the date of that incorporation¹¹ or (in any other case) the date on which the resolution is passed by virtue of which the authorisation is given¹².

Authorisation may be renewed or further renewed by resolution of the company for a further period not exceeding five years¹³, and may be revoked or varied at any time by resolution of the company¹⁴. A resolution renewing authorisation must state (or restate) the maximum amount of shares that may be allotted under the authorisation (or, as the case may be, the amount remaining to be allotted under it)¹⁵ and must specify the date on which the renewed authorisation will expire¹⁶.

The directors may allot shares, or grant rights to subscribe for or to convert any security into shares, after authorisation has expired if the shares are allotted, or the rights are granted, in pursuance of an offer or agreement made by the company before the authorisation expired¹⁷, and if the authorisation allowed the company to make an offer or agreement which would or might require shares to be allotted, or rights to be granted, after the authorisation had expired¹⁸.

A resolution of a company so to give, vary, revoke or renew authorisation¹⁹ may be an ordinary resolution²⁰, even though it amends the company's articles²¹.

1 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 As to the meaning of 'allot' see PARA 1091.

4 As to the meaning of 'share' in the Companies Acts see PARA 1042.

5 Companies Act 2006 s 551(1)(a). As to the power of directors to allot shares see PARA 1095. The provisions of Pt 17 Ch 2 (ss 549-559) have no application in relation to the taking of shares by the subscribers to the memorandum on the formation of the company: see s 559; and PARA 1091 note 6. As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 104 et seq. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.

6 Companies Act 2006 s 551(1)(b). See note 5.

7 As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq.

8 Companies Act 2006 s 551(1). See note 5. As to the exercise by directors of their power to allot see PARA 547. An abuse of their powers in this respect may be the subject of a petition alleging unfairly prejudicial conduct: see PARA 466. Where a provision of the Companies Acts requires a resolution of a company, and does

not specify what kind of resolution is required, what is required is an ordinary resolution unless the company's articles require a higher majority (or unanimity): see the Companies Act 2006 s 281(3); and PARA 617. As to company resolutions generally see PARA 613 et seq.

9 Companies Act 2006 s 551(2). See note 5.

10 Companies Act 2006 s 551(3)(a). In relation to rights to subscribe for or to convert any security into shares in the company, references in s 551 to the maximum amount of shares that may be allotted under the authorisation are to the maximum amount of shares that may be allotted pursuant to the rights: s 551(6). See note 5.

11 Companies Act 2006 s 551(3)(b)(i). See note 5. A company is incorporated from the beginning of the date mentioned in the certificate of incorporation: see PARA 119.

12 Companies Act 2006 s 551(3)(b)(ii). See note 5.

13 Companies Act 2006 s 551(4)(a). See note 5.

14 Companies Act 2006 s 551(4)(b). See note 5.

15 Companies Act 2006 s 551(5)(a). See note 5.

16 Companies Act 2006 s 551(5)(b). See note 5.

17 Companies Act 2006 s 551(7)(a). See note 5.

18 Companies Act 2006 s 551(7)(b). See note 5.

19 Ie under the Companies Act 2006 s 551 (see the text and notes 1-18): see s 551(8). See note 5. As to the meaning of references to a company's constitution see PARA 227.

20 As to the meaning of 'ordinary resolution' see PARA 613.

21 Companies Act 2006 s 551(8). The provisions of Pt 3 Ch 3 (ss 29-30) (resolutions and agreements affecting a company's constitution) (see PARA 231) apply to a resolution under s 551: s 551(9). See notes 5, 8.

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1097. No allotment where issue by public company not fully subscribed.

No allotment¹ may be made of shares² of a public company³ offered for subscription⁴ unless⁵:

2011 (1) the issue is subscribed for in full⁶; or

2012 (2) the offer is made on terms that the shares subscribed for may be allotted either in any event or in the event of specified conditions being met (and those conditions are met)⁷.

If shares are so prohibited from being allotted⁸ and 40 days have elapsed after the first making of the offer, all money received from applicants for shares must be repaid to them forthwith, without interest⁹. If any of the money is not repaid within 48 days after the first making of the offer, the directors¹⁰ of the company are jointly and severally liable to repay it with interest¹¹ from the expiration of the forty-eighth day¹²; except that a director is not so liable if he proves that the default in repayment was not due to any misconduct or negligence on his part¹³.

Any condition requiring or binding an applicant for shares to waive compliance with any of the above requirements is void¹⁴.

An allotment made by a public company to an applicant in contravention of these provisions¹⁵, is voidable at the instance of the applicant within one month after the date of the allotment and not later¹⁶; and it is so voidable even if the company is in the course of being wound up¹⁷. A director of a public company who knowingly contravenes¹⁸, or permits or authorises the contravention of, any statutory provision governing allotments made by public companies when the offer is not fully subscribed¹⁹ is liable to compensate the company and the allottee respectively for any loss, damages, costs or expenses that the company or allottee may have sustained or incurred by the contravention²⁰. However, proceedings to recover any such loss, damages, costs or expenses may not be brought more than two years after the date of the allotment²¹. An applicant to whom an irregular allotment has been made may within the month so prescribed²², either: (a) commence proceedings claiming relief, namely rescission of the allotment, rectification of the register, return of the moneys paid, and an injunction to restrain the company from parting or dealing with the moneys²³; or (b) give notice of avoidance (which need not specify the ground), but the notice must be followed by prompt legal proceedings²⁴.

1 As to the meaning of 'allotment' see PARA 1091.

2 As to the meaning of 'share' see PARA 1042.

3 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 The Companies Act 2006 s 578 applies in the case of shares offered as wholly or partly payable otherwise than in cash as it applies in the case of shares offered for subscription: s 578(4). However, in that case, the references in s 578(1) to subscription must be construed accordingly; references in s 578(2), (3) (see the text and notes 8-13) to the repayment of money received from applicants for shares include either the return of any other consideration so received (including, if the case so requires, the release of the applicant from any undertaking) or (if it is not reasonably practicable to return the consideration) the payment of money equal to its value at the time it was so received; and references to interest apply accordingly: s 578(5). As to the meanings of 'cash' and consideration 'other than cash' in relation to the allotment or payment up of shares in a company see PARA 1091. As to 'subscription' see PARA 1151. As to public offers of securities generally see PARA 1066 et seq.

5 Companies Act 2006 s 578(1). See note 4.

6 Companies Act 2006 s 578(1)(a). See note 4.

7 Companies Act 2006 s 578(1)(b). See note 4.

8 Ie by virtue of the Companies Act 2006 s 578(1) (see the text and notes 1-7): see s 578(2).

9 Companies Act 2006 s 578(2). See note 4.

10 As to the meaning of 'director' under the Companies Acts see PARA 478.

11 Ie at the rate for the time being specified under the Judgments Act 1838 s 17 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1307): see the Companies Act 2006 s 578(3).

12 Companies Act 2006 s 578(3). See note 4.

13 Companies Act 2006 s 578(3). See note 4.

14 Companies Act 2006 s 578(6).

15 Ie in contravention of the Companies Act 2006 s 578 (see the text and notes 1-14): see s 579(1).

16 Companies Act 2006 s 579(1).

17 Companies Act 2006 s 579(2). As to the effect of the commencement of winding up generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 489-490.

18 He contravenes with knowledge of the facts. A director cannot, however, escape liability by being ignorant of the law: *Burton v Bevan* [1908] 2 Ch 240.

19 He any provision of the Companies Act 2006 s 578 (see the text and notes 1-14): see s 579(3).

20 Companies Act 2006 s 579(3).

21 Companies Act 2006 s 579(4).

22 He within the month prescribed by the Companies Act 2006 s 579(1): see the text and notes 15-16.

23 *Mears v Western Canada Pulp and Paper Co Ltd* [1905] 2 Ch 353, CA.

24 *Re National Motor Mail-Coach Co Ltd, Anstis's and McLean's Claims* [1908] 2 Ch 228.

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C. PRE-EMPTION RIGHTS

1098. Existing shareholders' right of pre-emption.

Subject to certain exceptions, exclusions, disapplications and other savings¹, a company² must not allot³ equity securities⁴ to a person on any terms unless⁵:

2013 (1) it has made an offer to each person who holds ordinary shares in the company to allot to him on the same or more favourable terms a proportion of those securities that is as nearly as practicable equal to the proportion in nominal value⁶ held by him of the ordinary share capital of the company⁷; and

2014 (2) the period during which any such offer may be accepted has expired or the company has received notice of the acceptance or refusal of every offer so made⁸.

Securities that a company has offered to allot to a holder of ordinary shares⁹ may be allotted to him, or anyone in whose favour he has renounced his right to their allotment, without contravening head (2) above¹⁰.

Shares that are held by the company as treasury shares are disregarded for these purposes¹¹, so that the company is not treated as a person who holds ordinary shares¹², and the shares are not treated as forming part of the ordinary share capital of the company¹³.

1 The Companies Act 2006 s 561 is subject to ss 564-566 (exceptions to pre-emption right) (see PARA 1099), ss 567-568 (exclusion of rights of pre-emption) (see PARA 1100), ss 569-573 (disapplication of pre-emption rights) (see PARA 1103) and s 576 (saving for certain older pre-emption procedures) (see PARA 1106): s 561(5). As to savings see also PARA 1107.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'allotment' and related expressions see PARA 1091.

4 For the purposes of the Companies Act 2006 Pt 17 Ch 3 (ss 560-577) (see also PARA 1098 et seq), 'equity securities' means either ordinary shares in the company or rights to subscribe for, or to convert securities into, ordinary shares in the company; and 'ordinary shares' means shares other than shares that as respects dividends and capital carry a right to participate only up to a specified amount in a distribution: s 560(1). As to

the meaning of 'share' see PARA 1042. As to distributions and dividends generally see PARA 1390 et seq. References in Pt 17 Ch 3 to the 'allotment of equity securities' include the grant of a right to subscribe for, or to convert any securities into, ordinary shares in the company, and do not include the allotment of shares pursuant to such a right: s 560(2) (substituted by SI 2009/2561). References in the Companies Act 2006 Pt 17 Ch 3 to the 'allotment of equity securities' include the sale of ordinary shares in the company that immediately before the sale were held by the company as treasury shares: s 560(3) (added by SI 2009/2561). As to treasury shares see the text and notes 12-14; and see PARA 1251. The provisions of the Companies Act 2006 Pt 17 Ch 3 have no application in relation to the taking of shares by the subscribers to the memorandum on the formation of the company: s 577. As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 104 et seq. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.

5 Companies Act 2006 s 561(1). See note 4. Any requirement or authorisation contained in the articles of a private company that is inconsistent with s 561 is treated for the purposes of s 567 (exclusion of pre-emption requirements) as a provision excluding s 561: see s 567(3); and PARA 1100. As to the meaning of references in the Companies Acts to a company's 'articles' see PARA 228 note 2. As to the meaning of 'private company' see PARA 102.

6 As to the nominal value of shares see PARA 1044.

7 Companies Act 2006 s 561(1)(a). See note 4. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. As to the communication of pre-emption offers to shareholders see PARA 1104. As to the consequences of contravention see PARA 1105.

8 Companies Act 2006 s 561(1)(b). See note 4.

9 For the purposes of the Companies Act 2006 Pt 17 Ch 3 (see also PARA 1098 et seq), in relation to an offer to allot securities required by s 561, a reference (however expressed) to the holder of shares of any description is to whoever was the holder of shares of that description at the close of business on a date to be specified in the offer: s 574(1). The specified date must fall within the period of 28 days immediately before the date of the offer: s 574(2).

10 Companies Act 2006 s 561(2). See note 4.

11 In relation to the purposes of the Companies Act 2006 s 561 (see the text and notes 1-11): see s 561(4). See note 4.

12 Companies Act 2006 s 561(4)(a). See note 4.

13 Companies Act 2006 s 561(4)(b). See note 4.

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1099. Exceptions to right of pre-emption.

The restriction imposed¹ on a company² allotting³ equity securities⁴ not to do so, unless the required offer⁵ is made to existing shareholders, does not apply⁶:

- 2015 (1) in relation to the allotment of bonus shares⁷;
- 2016 (2) to a particular allotment of equity securities if these are, or are to be, wholly or partly paid up otherwise than in cash⁸;
- 2017 (3) to the allotment of equity securities that would, apart from any renunciation or assignment of the right to their allotment, be held under or allotted or transferred pursuant to an employees' share scheme⁹.

1 In relation to the Companies Act 2006 s 561(1): see PARA 1098.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'allotment' and related expressions see PARA 1091.

4 As to the meanings of 'equity securities' and the 'allotment of equity securities' for these purposes see PARA 1098 note 4. The provisions of the Companies Act 2006 Pt 17 Ch 3 (ss 560-577) (see PARAS 1098, 1100 et seq) have no application in relation to the taking of shares by the subscribers to the memorandum on the formation of the company: see s 577; and PARA 1098 note 4. As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 103 et seq. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.

5 Is the offer required by the Companies Act 2006 s 561(1): see PARA 1098.

6 See the Companies Act 2006 ss 564, 565, 566. As to savings see PARAS 1106, 1107.

7 Companies Act 2006 s 564. As to the meaning of 'share' see PARA 1042. As to bonus shares see PARA 1053.

8 Companies Act 2006 s 565. As to the meanings of 'cash' and consideration 'other than cash' in relation to the allotment or payment up of shares in a company see PARA 1091.

9 Companies Act 2006 s 566 (substituted by SI 2009/2561). As to the meaning of 'employees' share scheme' see PARA 169 note 20. See also EC Council Directive 77/91 (OJ L26, 31.1.77, p 1) (the 'Second Company Law Directive') art 29. As to the scope of art 29 see Case C-42/95 *Siemens AG v Nold* [1996] ECR I-6017, [1997] 1 BCLC 291. As to EC Council Directive 77/91 (OJ L26, 31.01.77, p 1) of 13 December 1976 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by member states of companies, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent throughout the Community, see PARA 23.

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1100. Exclusion of rights of pre-emption.

All or any of the requirements of the statutory restrictions that are imposed¹ on a company² allotting³ equity securities⁴ not to do so, unless the required offer is made⁵ to existing shareholders, may be excluded by provision contained in the articles of a private company⁶. They may be excluded either generally in relation to the allotment by the company of equity securities⁷, or in relation to allotments of a particular description⁸.

Where, in a case in which the statutory restrictions⁹ would otherwise apply¹⁰:

2018 (1) a company's articles contain provision ('pre-emption provision') prohibiting the company from allotting ordinary shares¹¹ of a particular class¹² unless it has complied with the condition that it makes a relevant offer¹³ to each person who holds ordinary shares of that class¹⁴; and

2019 (2) in accordance with that provision, the company makes an offer to allot shares to such a holder¹⁵, and he or anyone in whose favour he has renounced his right to their allotment accepts the offer¹⁶,

the statutory requirement of an offer made to the existing shareholders¹⁷ does not apply to the allotment of those shares and the company may allot them accordingly¹⁸.

If there is a contravention of the pre-emption provision of the company's articles, the company, and every officer¹⁹ of it who knowingly authorised or permitted the contravention, are jointly

and severally liable to compensate any person to whom an offer should have been made under the provision for any loss, damage, costs or expenses which the person has sustained or incurred by reason of the contravention²⁰. However, no proceedings to recover any such loss, damage, costs or expenses may be commenced after the expiration of two years either from the delivery to the registrar of companies²¹ of the return of allotment²² or (where equity securities other than shares are granted) from the date of the grant²³.

1 Ie by the Companies Act 2006 s 561: see PARA 1098.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'allotment' and related expressions see PARA 1091.

4 As to the meanings of 'equity securities' and the 'allotment of equity securities' for these purposes see PARA 1098 note 4. The provisions of the Companies Act 2006 Pt 17 Ch 3 (ss 560-577) (see PARA 1098 et seq) have no application in relation to the taking of shares by the subscribers to the memorandum on the formation of the company: see s 577. As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 103 et seq. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.

5 Ie the offer required by the Companies Act 2006 s 561(1): see PARA 1098.

6 Companies Act 2006 s 567(1). Any requirement or authorisation contained in the articles of a private company that is inconsistent with s 561 is treated for the purposes of s 567 as a provision excluding s 561: s 567(3). However, a provision to which s 568 applies (see the text and notes 9-23) is not to be treated as inconsistent with s 561: s 567(4). As to the meaning of references in the Companies Acts to a company's 'articles' see PARA 228 note 2. As to the meaning of 'private company' see PARA 102. As to savings see PARAS 1106, 1107. In *Re Thundercrest Ltd* [1995] 1 BCLC 117, articles imported the statutory provisions except in so far as they were inconsistent but the articles failed to specify the period within which the pre-emption offer might be accepted and the statutory period (see PARA 1104) therefore applied.

7 Companies Act 2006 s 567(2)(a).

8 Companies Act 2006 s 567(2)(b).

9 Ie the Companies Act 2006 s 561(1) (see PARA 1098): see s 568(1).

10 Companies Act 2006 s 568(1).

11 As to the meaning of 'ordinary shares' for these purposes see PARA 1098 note 4. As to the meaning of 'share' see PARA 1042.

12 As to the meaning of 'class of shares' see PARA 1057.

13 Ie such an offer as is described in the Companies Act 2006 s 561(1) (see PARA 1098): see s 568(1)(a).

14 Companies Act 2006 s 568(1)(a). For the purposes of the Companies Act 2006 Pt 17 Ch 3 (see PARA 1098 et seq), in relation to an offer to allot securities required by any provision to which s 568 applies, a reference (however expressed) to the holder of shares of any description is to whoever was the holder of shares of that description at the close of business on a date to be specified in the offer: s 574(1). The specified date must fall within the period of 28 days immediately before the date of the offer: s 574(2).

15 Companies Act 2006 s 568(1)(b)(i). The provisions of s 562 (communication of pre-emption offers to shareholders) (see PARA 1104) apply in relation to offers made in pursuance of the pre-emption provision of the company's articles, but subject to s 567 (see the text and notes 1-8): see s 568(3); and PARA 1104.

16 Companies Act 2006 s 568(1)(b)(ii).

17 Ie the provisions of the Companies Act 2006 s 561 (see PARA 1098): see s 568(2).

18 Companies Act 2006 s 568(2).

19 As to the meaning of 'officer' see PARA 607.

20 Companies Act 2006 s 568(4).

21 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

22 Companies Act 2006 s 568(5)(a). As to the return of allotments etc to the registrar see PARA 1108.

23 Companies Act 2006 s 568(5)(b).

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1101. Disapplication of pre-emption rights: sale of treasury shares.

In relation to an allotment of equity securities¹ that is² a sale of ordinary shares³ in the company⁴ that immediately before the sale are held by the company as treasury shares⁵, the directors⁶ of a company may be given power by the articles⁷, or by a special resolution⁸ of the company, to allot equity securities as if the pre-emptive basis of allotment⁹ either did not apply to the allotment¹⁰, or applied to the allotment with such modifications as the directors may determine¹¹; and, where the directors make such an allotment, the general provisions relating to pre-emption rights¹² have effect accordingly¹³. Notwithstanding that any such power¹⁴ has expired, the directors may allot equity securities in pursuance of an offer or agreement previously made by the company, if the power enabled the company to make an offer or agreement which would or might require equity securities to be allotted after it expired¹⁵.

In relation to such an allotment¹⁶, the company may by special resolution resolve that the pre-emptive basis of allotment¹⁷ either does not apply to a specified allotment of equity securities¹⁸, or that the pre-emptive basis applies to the allotment with such modifications as may be specified in the resolution¹⁹; and, where such a resolution is passed, the general provisions relating to pre-emption rights²⁰ have effect accordingly²¹. Notwithstanding that any such resolution has expired, the directors may allot equity securities in pursuance of an offer or agreement previously made by the company, if the resolution enabled the company to make an offer or agreement that would or might require equity securities to be allotted after it expired²². Such a resolution²³, or a special resolution to renew such a resolution, must not be proposed unless it is recommended by the directors²⁴ and they have made a statement in compliance with the statutory requirements²⁵. Accordingly, before such a resolution is proposed, the directors must make a written statement setting out their reasons for making the recommendation²⁶, the amount to be paid to the company in respect of the equity securities to be allotted²⁷, and the directors' justification of that amount²⁸. The directors' statement must (if the resolution is proposed as a written resolution²⁹) be sent or submitted to every eligible member³⁰ at or before the time at which the proposed resolution is sent or submitted to him³¹ or (if the resolution is proposed at a general meeting³²) it must be circulated to the members entitled to notice of the meeting with that notice³³.

1 As to the meanings of 'equity securities' and the 'allotment of equity securities' for these purposes see PARA 1098 note 4. As to the meaning of 'allot' and related expressions generally see PARA 1091. The provisions of the Companies Act 2006 Pt 17 Ch 3 (ss 560-577) (see PARAS 1098 et seq, 1106 et seq) have no application in relation to the taking of shares by the subscribers to the memorandum on the formation of the company: see s 577; and PARA 1098 note 4. As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 103 et seq. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.

- 2 le by virtue of the Companies Act 2006 s 560(3) (see PARA 1098): see s 573(1) (amended by SI 2009/2651).
- 3 As to the meaning of 'ordinary shares' for these purposes see the Companies Act 2006 s 560(1); and PARA 1098 note 4. As to the meaning of 'share' see PARA 1042.
- 4 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.
- 5 See the Companies Act 2006 s 573(1) (as amended: see note 2). As to treasury shares see PARA 1251.
- 6 As to the meaning of 'director' under the Companies Acts see PARA 478.
- 7 As to the meaning of references in the Companies Acts to a company's 'articles' see PARA 228 note 2.
- 8 As to the meaning of 'special resolution' see PARA 614.
- 9 le the Companies Act 2006 s 561 (see PARA 1098): see s 573(2).
- 10 Companies Act 2006 s 573(2)(a).
- 11 Companies Act 2006 s 573(2)(b).
- 12 le the provisions of the Companies Act 2006 Pt 17 Ch 3 (see PARA 1098 et seq): see s 570(2); applied by s 573(3).
- 13 Companies Act 2006 s 570(2); applied by s 573(3). Any resolution under s 570 which disapplies pre-emption rights is subject to the disclosure requirements in s 1078: see PARAS 144, 1103.
- 14 le the power conferred by the Companies Act 2006 s 573(2): see s 570(4); applied by s 573(3).
- 15 Companies Act 2006 s 570(4); applied by s 573(3).
- 16 le an allotment to which the Companies Act 2006 s 573 applies by virtue of s 573(1): see the text and notes 12-14.
- 17 le the Companies Act 2006 s 561 (see PARA 1098): see s 573(4).
- 18 Companies Act 2006 s 573(4)(a).
- 19 Companies Act 2006 s 573(4)(b).
- 20 le the provisions of the Companies Act 2006 Pt 17 Ch 3 (see PARA 1098 et seq): see s 571(2); applied by s 573(5).
- 21 Companies Act 2006 s 571(2); applied by s 573(5). Any resolution under s 571 which disapplies pre-emption rights is subject to the disclosure requirements in s 1078: see PARAS 144, 1103.
- 22 Companies Act 2006 s 571(4); applied by s 573(5).
- 23 le a special resolution under the Companies Act 2006 s 573: see s 571(5); applied by s 573(5).
- 24 Companies Act 2006 s 571(5)(a); applied by s 573(5).
- 25 Companies Act 2006 s 571(5)(b); applied by s 573(5). The text refers to the requirement for directors to have complied with s 571(6), (7) (applied by s 573(5)) (see the text and notes 26-33): see s 571(5)(b); applied by s 573(5).
- 26 Companies Act 2006 s 571(6)(a); applied by s 573(5).
- 27 Companies Act 2006 s 571(6)(b); applied by s 573(5).
- 28 Companies Act 2006 s 571(6)(c); applied by s 573(5).
- 29 As to the meaning of 'written resolution' see PARA 623.
- 30 As to eligible members in relation to a resolution proposed as a written resolution of a private company see PARA 623. As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

31 Companies Act 2006 s 571(7)(a); applied by s 573(5).

32 As to meetings of the company see PARA 629 et seq.

33 Companies Act 2006 s 571(7)(b); applied by s 573(5). As to meetings convened by notice see PARA 632. The provisions of s 572 (liability for false statements) apply in relation to a directors' statement under s 571 that is sent, submitted or circulated under s 571(7): see s 572(1); and PARA 1103.

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1102. Disapplication of pre-emption rights: private company with only one class of share.

The directors¹ of a private company² that has only one class of shares³ may be given power by the articles⁴, or by a special resolution⁵ of the company, to allot equity securities⁶ of that class as if the pre-emptive basis of allotment⁷ either did not apply to the allotment⁸, or applied to the allotment with such modifications as the directors may determine⁹; and, where the directors make such an allotment, the general provisions relating to pre-emption rights¹⁰ have effect accordingly¹¹.

1 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'private company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24.

3 As to the meaning of 'share' in the Companies Acts see PARA 1042; as to the meaning of 'class of share' see PARA 1057; and as to the meaning of 'shares of one class' see PARA 1058.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 As to the meaning of references in the Companies Acts to a company's 'articles' see PARA 228 note 2.

5 As to the meaning of 'special resolution' see PARA 614.

6 As to the meanings of 'equity securities' and the 'allotment of equity securities' for these purposes see PARA 1098 note 4. As to the meaning of 'allot' and related expressions generally see PARA 1091. The provisions of the Companies Act 2006 Pt 17 Ch 3 (ss 560-577) (see PARAS 1098 et seq, 1106 et seq) have no application in relation to the taking of shares by the subscribers to the memorandum on the formation of the company: see s 577; and PARA 1098 note 4. As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 103 et seq. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.

7 I.e the Companies Act 2006 s 561 (see PARA 1098): see s 569(1).

8 Companies Act 2006 s 569(1)(a).

9 Companies Act 2006 s 569(1)(b).

10 I.e the provisions of the Companies Act 2006 Pt 17 Ch 3 (see PARAS 1098 et seq, 1106 et seq): see s 569(2).

11 Companies Act 2006 s 569(2).

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1103. Disapplication of pre-emption rights where directors are authorised to allot.

Where the directors¹ of a company² are generally authorised³ to allot⁴ shares⁵ etc, they may be given power by the articles⁶, or by a special resolution⁷ of the company, to allot equity securities⁸ pursuant to that authorisation as if the pre-emptive basis of allotment⁹ either did not apply to the allotment¹⁰, or applied to the allotment with such modifications as the directors may determine¹¹; and, where the directors make such an allotment, the general provisions relating to pre-emption rights¹² have effect accordingly¹³. The power so conferred¹⁴ ceases to have effect when the authorisation to which it relates either is revoked or would (if not renewed) expire¹⁵; but, if the authorisation is renewed, the power may also be renewed, for a period not longer than that for which the authorisation is renewed, by a special resolution of the company¹⁶. Notwithstanding that any such power¹⁷ has expired, the directors may allot equity securities in pursuance of an offer or agreement previously made by the company, if the power enabled the company to make an offer or agreement that would or might require equity securities to be allotted after it expired¹⁸.

Where the directors of a company are authorised¹⁹ to allot shares etc, whether generally or otherwise, the company may by special resolution resolve that the pre-emptive basis of allotment²⁰ either does not apply to a specified allotment of equity securities to be made pursuant to that authorisation²¹, or that the pre-emptive basis applies to the allotment with such modifications as may be specified in the resolution²²; and, where such a resolution is passed, the general provisions relating to pre-emption rights²³ have effect accordingly²⁴. Such a resolution²⁵ ceases to have effect when the authorisation to which it relates either is revoked or would (if not renewed) expire²⁶; but, if the authorisation is renewed, the resolution may also be renewed, for a period not longer than that for which the authorisation is renewed, by a special resolution of the company²⁷. Notwithstanding that any such resolution has expired, the directors may allot equity securities in pursuance of an offer or agreement previously made by the company, if the resolution enabled the company to make an offer or agreement that would or might require equity securities to be allotted after it expired²⁸.

Such a resolution²⁹, or a special resolution to renew such a resolution, must not be proposed unless it is recommended by the directors³⁰ and they have made a statement in compliance with the statutory requirements³¹. Accordingly, before such a resolution is proposed, the directors must make a written statement setting out their reasons for making the recommendation³², the amount to be paid to the company in respect of the equity securities to be allotted³³, and the directors' justification of that amount³⁴. The directors' statement must (if the resolution is proposed as a written resolution³⁵) be sent or submitted to every eligible member³⁶ at or before the time at which the proposed resolution is sent or submitted to him³⁷ or (if the resolution is proposed at a general meeting³⁸) it must be circulated to the members entitled to notice of the meeting with that notice³⁹. A person who knowingly or recklessly authorises or permits the inclusion of any matter that is misleading, false or deceptive in a material particular in such a statement⁴⁰ commits an offence⁴¹. A person guilty of such an offence is liable (on conviction on indictment) to imprisonment for a term not exceeding two years or a fine (or both)⁴² or (on summary conviction) to imprisonment for a term not exceeding 12 months⁴³ or to a fine not exceeding the statutory maximum⁴⁴ (or both)⁴⁵.

- 1 As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of the 'Companies Acts' see PARA 16.
- 2 As to the meaning of 'company' under the Companies Acts see PARA 24.
- 3 Ie for the purposes of the Companies Act 2006 s 551 (see PARA 1096): see s 570(1).
- 4 As to the meaning of 'allot' and related expressions see PARA 1091.
- 5 As to the meaning of 'share' in the Companies Acts see PARA 1042.
- 6 As to the meaning of references in the Companies Acts to a company's 'articles' see PARA 228 note 2.
- 7 As to the meaning of 'special resolution' see PARA 614.
- 8 As to the meanings of 'equity securities' and the 'allotment of equity securities' for these purposes see PARA 1098 note 4. The provisions of the Companies Act 2006 Pt 17 Ch 3 (ss 560-577) (see PARA 1098 et seq) have no application in relation to the taking of shares by the subscribers to the memorandum on the formation of the company: see s 577; and PARA 1098 note 4. As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 103 et seq. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.
- 9 Ie the Companies Act 2006 s 561 (see PARA 1098): see s 570(1).
- 10 Companies Act 2006 s 570(1)(a).
- 11 Companies Act 2006 s 570(1)(b).
- 12 Ie the provisions of the Companies Act 2006 Pt 17 Ch 3 (see PARA 1098 et seq): see s 570(2).
- 13 Companies Act 2006 s 570(2). Any resolution under s 570 which disapplies pre-emption rights is subject to the disclosure requirements in s 1078: see PARA 144.
- 14 Ie by the Companies Act 2006 s 570: see s 570(3).
- 15 Companies Act 2006 s 570(3).
- 16 Companies Act 2006 s 570(3).
- 17 Ie the power conferred by the Companies Act 2006 s 570: see s 570(4).
- 18 Companies Act 2006 s 570(4).
- 19 Ie for the purposes of the Companies Act 2006 s 551 (see PARA 1096): see s 571(1).
- 20 Ie the Companies Act 2006 s 561 (see PARA 1098): see s 571(1).
- 21 Companies Act 2006 s 571(1)(a).
- 22 Companies Act 2006 s 571(1)(b).
- 23 Ie the provisions of the Companies Act 2006 Pt 17 Ch 3 (see PARA 1098 et seq): see s 571(2).
- 24 Companies Act 2006 s 571(2). Any resolution under s 571 which disapplies pre-emption rights is subject to the disclosure requirements in s 1078: see PARA 144.
- 25 Ie a special resolution under the Companies Act 2006 s 571: see s 571(3).
- 26 Companies Act 2006 s 571(3).
- 27 Companies Act 2006 s 571(3).
- 28 Companies Act 2006 s 571(4).
- 29 Ie a special resolution under the Companies Act 2006 s 571: see s 571(5).

- 30 Companies Act 2006 s 571(5)(a).
- 31 Companies Act 2006 s 571(5)(b). The text refers to the requirement for directors to have complied with s 571(6), (7) (see the text and notes 32-39): see s 571(5)(b).
- 32 Companies Act 2006 s 571(6)(a).
- 33 Companies Act 2006 s 571(6)(b).
- 34 Companies Act 2006 s 571(6)(c).
- 35 As to the meaning of 'written resolution' see PARA 623.
- 36 As to eligible members in relation to a resolution proposed as a written resolution of a private company see PARA 623. As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.
- 37 Companies Act 2006 s 571(7)(a).
- 38 As to meetings of the company see PARA 629 et seq.
- 39 Companies Act 2006 s 571(7)(b). As to meetings convened by notice see PARA 632.
- 40 Is a directors' statement under the Companies Act 2006 s 571 that is sent, submitted or circulated under s 571(7) (see the text and notes 35-39): s 572(1).
- 41 Companies Act 2006 s 572(2).
- 42 Companies Act 2006 s 572(3)(a).
- 43 In relation to an offence committed after the commencement of the Companies Act 2006 s 1131 (summary proceedings) (see PARA 1625), but before a day is appointed in relation to the commencement of the Criminal Justice Act 2003 s 154(1) (general limit on magistrates' courts' power to impose imprisonment), the reference in the Companies Act 2006 s 572(3)(b) to '12 months' must be read as a reference to 'six months': see ss 572(3)(b), 1131, 1133; and PARA 1625.
- 44 As to the meaning of the 'statutory maximum' see PARA 1622.
- 45 Companies Act 2006 s 572(3)(b).

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1104. Communication of pre-emption offers to shareholders.

Offers which are subject to requirements imposed by the pre-emptive basis of allotment¹ may be made in hard copy or electronic form².

If the holder has no registered address in an EEA State³ and has not given to the company an address in an EEA State for the service of notices on him⁴, or if he is the holder of a share warrant⁵, the offer may be made by causing it, or a notice specifying where a copy of it can be obtained or inspected, to be published in the Gazette⁶.

The offer must state a period during which it may be accepted and the offer may not be withdrawn before the end of that period⁷. The period must be a period of at least 14 days beginning⁸ (in the case of an offer made in hard copy form) with the date on which the offer is sent or supplied⁹ or beginning (in the case of an offer made in electronic form) with the date on which the offer is sent¹⁰ or beginning (in the case of an offer made by publication in the Gazette) with the date of publication¹¹. The Secretary of State¹² may by regulations made by

statutory instrument¹³ reduce the period so specified¹⁴ (but not to less than 14 days)¹⁵, or increase that period¹⁶.

1 The Companies Act 2006 s 562 has effect as to the manner in which offers required by s 561 (see PARA 1098) are to be made to holders of a company's shares: s 562(1). For the purposes of Pt 17 Ch 3 (ss 560-577) (see PARAS 1098 et seq, 1105 et seq), in relation to an offer to allot securities required by s 561, a reference (however expressed) to the holder of shares of any description is to whoever was the holder of shares of that description at the close of business on a date to be specified in the offer: s 574(1). The specified date must fall within the period of 28 days immediately before the date of the offer: s 574(2). As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of 'share' in the Companies Acts see PARA 1042. As to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'allotment' and related expressions see PARA 1091.

The provisions of s 562 apply in relation to offers made in pursuance of the pre-emption provision of the company's articles, but subject to s 567: s 568(3). Accordingly, all or any of the requirements of s 562 may be excluded by provision contained in the articles of a private company: s 567(1). They may be excluded either generally in relation to the allotment by the company of equity securities, or in relation to allotments of a particular description: s 567(2). Any requirement or authorisation contained in the articles of a private company that is inconsistent with s 562 is treated for the purposes of s 567 as a provision excluding s 562: s 567(3). As to the meaning of references in the Companies Acts to a company's 'articles' see PARA 228 note 2. As to the meaning of 'private company' see PARA 102. As to the meanings of 'equity securities' and the 'allotment of equity securities' for these purposes see PARA 1098 note 4. The provisions of the Companies Act 2006 Pt 17 Ch 3 have no application in relation to the taking of shares by the subscribers to the memorandum on the formation of the company: see s 577; and PARA 1098 note 4. As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 321 et seq. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.

2 Companies Act 2006 s 562(2). See note 1. As to documents or information sent or supplied in hard copy form see PARA 678; and as to documents or information sent or supplied in electronic form see PARA 679.

3 Ie the address shown in the register of members: see PARA 335. As to the meaning of 'EEA State' see PARA 29 note 5.

4 Companies Act 2006 s 562(3)(a). See note 1.

5 Companies Act 2006 s 562(3)(b). See note 1. As to the meaning of 'share warrant' see PARA 382.

6 Companies Act 2006 s 562(3). See note 1. As to the meaning of 'Gazette' see PARA 138 note 2. As to alternatives to publication in the Gazette see PARA 138.

7 Companies Act 2006 s 562(4). See note 1.

8 Companies Act 2006 s 562(5) (amended by SI 2009/2022). See note 1.

9 Companies Act 2006 s 562(5)(a). See note 1.

10 Companies Act 2006 s 562(5)(b). See note 1.

11 Companies Act 2006 s 562(5)(c). See note 1.

12 As to the Secretary of State see PARA 6 et seq.

13 A statutory instrument containing regulations made under the Companies Act 2006 s 562(6) is subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 562(7), 1290. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. As to regulations so made see the Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009, SI 2009/2022; and see the text and note 8.

14 Ie specified in the Companies Act 2006 s 562(5) (see the text and notes 8-10): see s 562(6)(a).

15 Companies Act 2006 s 562(6)(a). See notes 1, 13.

16 Companies Act 2006 s 562(6)(b). See notes 1, 13.

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1105. Consequences of contravention.

Where there is a contravention of the provision that an allotment of equity securities¹ must be offered to existing shareholders² on a pre-emptive basis³, or of the provisions relating to the communication of such offers⁴, the company, and every officer⁵ of it who knowingly authorised or permitted the contravention, are jointly and severally liable to compensate any person to whom an offer should have been made⁶ for any loss, damage, costs or expenses which the person has sustained or incurred by reason of the contravention⁷. No proceedings to recover any such loss, damage, costs or expenses may, however, be commenced after the expiration of two years either from the delivery to the registrar of companies⁸ of the return of allotments in question⁹ or, where equity securities other than shares¹⁰ are granted, from the date of the grant¹¹.

1 As to the meanings of 'equity securities' and the 'allotment of equity securities' for these purposes see PARA 1098 note 4. As to the meaning of 'allot' and related expressions generally see PARA 1091. The provisions of the Companies Act 2006 Pt 17 Ch 3 (ss 560-577) (see PARAS 1098 et seq, 1106 et seq) have no application in relation to the taking of shares by the subscribers to the memorandum on the formation of the company: see s 577; and PARA 1098 note 4. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 321 et seq. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.

2 As to shareholders and membership of companies generally see PARA 321 et seq.

3 Ie where there is a contravention of the Companies Act 2006 s 561 (see PARA 1098): see s 563(1).

4 Ie where there is a contravention of the Companies Act 2006 s 562 (see PARA 1104): see s 563(1).

5 As to the meaning of 'officer' see PARA 607.

6 Ie in accordance with the Companies Act 2006 s 561 (see PARA 1098) and s 562 (see PARA 1104): see s 563(2).

7 Companies Act 2006 s 563(1), (2). No provision is made for improper allotments to be set aside; but see *Re Thundercrest Ltd* [1995] 1 BCLC 117 (where the court did set aside an allotment by directors in their own favour which was made in breach of the statutory requirements); and *Re Coloursource Ltd, Dalby v Bodilly* [2004] EWHC 3078 (Ch), [2005] BCC 627, [2004] All ER (D) 43 (Dec) (improper allotments made in contravention of the statutory pre-emption requirements constituted unfairly prejudicial conduct under the Companies Act 2006 s 994 (see PARA 470)). See also PARA 1090.

8 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

9 Companies Act 2006 s 563(3)(a). As to the return of allotments etc to the registrar see PARA 1108.

10 As to the meaning of 'share' see PARA 1042.

11 Companies Act 2006 s 563(3)(b).

COMPANIES ACTS/(20) SHARE CAPITAL/(vi) Allotment, Issue and Payment of Shares/C. PRE-EMPTION RIGHTS/1106. Saving for pre-emption requirements operative under the Companies Act 1985.

1106. Saving for pre-emption requirements operative under the Companies Act 1985.

In the case of a public company¹, the general provisions relating to pre-emption rights² do not apply to an allotment of equity securities³ that are subject to a pre-emption requirement in relation to which the relevant saving provision of the Companies Act 1985⁴ applied immediately before the commencement of the general provisions relating to pre-emption rights⁵.

In the case of a private company⁶, a pre-emption requirement to which the relevant saving provision of the Companies Act 1985⁷ applied immediately before the commencement of the general provisions relating to pre-emption rights⁸ has effect, so long as the company remains a private company, as if it were contained in the company's articles⁹.

A pre-emption requirement to which the relevant saving provision of the Companies Act 1985¹⁰ applied immediately before the commencement of this saving provision¹¹ must be treated for the purposes of the general provisions relating to pre-emption rights¹² as if it were contained in the company's articles¹³.

1 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie the provisions of the Companies Act 2006 Pt 17 Ch 3 (ss 560-577) (see PARAS 1098 et seq, 1107): see s 576(1).

3 As to the meanings of 'equity securities' and the 'allotment of equity securities' for these purposes see PARA 1098 note 4. As to the meaning of 'allot' and related expressions generally see PARA 1091. The provisions of the Companies Act 2006 Pt 17 Ch 3 (see PARA 1098 et seq) have no application in relation to the taking of shares by the subscribers to the memorandum on the formation of the company: see s 577; and PARA 1098 note 4. As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 321 et seq. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.

4 Ie the Companies Act 1985 s 96(1) (repealed): see s 576(1). The Companies Act 1985 s 96(1) (repealed) provided that, where a company which was re-registered or registered as a public company was (or, but for the provisions of the Companies Act 1980 and the enactments replacing it, would have been) subject at the time of re-registration or (as the case may be) registration to a pre-1982 pre-emption requirement, the general provisions relating to pre-emption rights under the Companies Act 1985 did not apply to an allotment of the equity securities which were subject to that requirement. As to re-registration as a public company see PARA 168 et seq. Pre-emption provisions were first introduced by the Companies Act 1980 ss 17-19 (repealed) and amended by the Companies Act 1981 s 119, Sch 3 para 40 (repealed).

5 Companies Act 2006 s 576(1). The provisions of Pt 17 Ch 3 were fully commenced by 1 October 2009: see the Companies Act 2006 (Commencement No 1, Transitional Provisions and Savings) Order 2006, SI 2006/3428, art 3(3); and the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3(k).

6 As to the meaning of 'private company' see PARA 102.

7 Ie the Companies Act 1985 s 96(3) (repealed): see s 576(2). The Companies Act 1985 s 96(3) (repealed) provided that a requirement imposed on a private company (having been so imposed before the relevant date in 1982) otherwise than by the company's memorandum or articles, and which, if contained in the company's memorandum or articles, would have had effect to the exclusion of the statutory provisions relating to pre-emption rights under the Companies Act 1985, had effect, so long as the company remained a private company, as if it were contained in the memorandum or articles.

8 Ie the Companies Act 2006 Pt 17 Ch 3 (see PARAS 1098 et seq, 1104 et seq): see s 576(2). The provisions of Pt 17 Ch 3 were fully commenced by 1 October 2009: see note 5.

9 Companies Act 2006 s 576(2). As to the meaning of references in the Companies Acts to a company's 'articles' see PARA 228 note 2.

10 Ie the Companies Act 1985 s 96(4) (repealed): see s 576(3). The Companies Act 1985 s 96(4) (repealed) provided that if, on the relevant date in 1982, a company, other than a public company registered as such on its original incorporation, was subject to a requirement obliging it, when proposing to allot equity securities consisting of relevant shares of any particular class, not to allot those securities unless it had made a pre-emptive offer to its shareholders imposed otherwise than by the memorandum or articles, the requirement was to be treated for the purposes of the relevant provisions as if it were contained in the memorandum or articles.

11 Ie before the commencement of the Companies Act 2006 s 576: see s 576(3). The commencement date for s 576 was 1 October 2009: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3(k).

12 Ie the provisions of the Companies Act 2006 Pt 17 Ch 3 (see PARAS 1098 et seq, 1104 et seq): see s 576(3).

13 Companies Act 2006 s 576(3).

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1107. Saving for other restrictions as to offers.

The statutory provisions relating to pre-emption rights¹ are without prejudice to any enactment² by virtue of which a company³ is prohibited (whether generally or in specified circumstances) from offering or allotting equity securities⁴ to any person⁵. Where a company cannot by virtue of such an enactment offer or allot equity securities to a holder of ordinary shares⁶ of the company, those shares are disregarded for the purposes of the provisions which require a pre-emptive basis of allotment⁷, so that the person is not treated as a person who holds ordinary shares⁸, and the shares are not treated as forming part of the ordinary share capital⁹ of the company¹⁰.

1 Ie the provisions of the Companies Act 2006 Pt 17 Ch 3 (ss 560-577) (see PARA 1098 et seq): see s 575(1).

2 As to the meaning of 'enactment' see PARA 17 note 2.

3 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 As to the meanings of 'equity securities' and the 'allotment of equity securities' for these purposes see PARA 1098 note 4. As to the meaning of 'allot' and related expressions generally see PARA 1091. The provisions of the Companies Act 2006 Pt 17 Ch 3 (see PARA 1098 et seq) have no application in relation to the taking of shares by the subscribers to the memorandum on the formation of the company: see s 577; and PARA 1098 note 4. As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 321 et seq. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.

5 Companies Act 2006 s 575(1).

6 As to the meaning of 'ordinary shares' for these purposes see PARA 1098 note 4. For the purposes of the Companies Act 2006 Pt 17 Ch 3 (see PARA 1098 et seq), in relation to an offer to allot securities required by s 561 (see PARA 1098), a reference (however expressed) to the holder of shares of any description is to whoever was the holder of shares of that description at the close of business on a date to be specified in the offer: s 574(1). The specified date must fall within the period of 28 days immediately before the date of the offer: s 574(2). As to the meaning of 'share' see PARA 1042.

7 Ie for the purposes of the Companies Act 2006 s 561 (see PARA 1098): see s 575(2).

8 Companies Act 2006 s 575(2)(a).

9 As to the meaning of 'share capital' see PARA 1042.

10 Companies Act 2006 s 575(2)(b). As to the meaning of 'company having a share capital' see PARA 1042.

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D. RETURN OF ALLOTMENTS AND REGISTRATION

1108. Return of allotments to registrar.

A company¹ must register an allotment² of shares³ as soon as practicable and in any event within two months after the date of the allotment⁴. If a company fails to comply with this requirement⁵, an offence is committed by the company and by every officer of the company who is in default⁶. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale⁷ and (for continued contravention) a daily default fine⁸ not exceeding one-tenth of level 3 on the standard scale⁹.

When a company limited by shares¹⁰, or a company limited by guarantee¹¹ and having a share capital¹², makes an allotment of its shares, it must within one month of doing so deliver to the registrar of companies¹³ for registration a return of the allotment¹⁴. The return must contain the prescribed information¹⁵, and must be accompanied by a statement of capital¹⁶. The statement of capital must state with respect to the company's share capital at the date to which the return is made up¹⁷: (1) the total number of shares of the company¹⁸; (2) the aggregate nominal value of those shares¹⁹; (3) for each class of shares²⁰, prescribed particulars of the rights attached to the shares²¹, the total number of shares of that class²², and the aggregate nominal value of shares of that class²³; and (4) the amount paid up and the amount (if any) unpaid on each share (whether on account of the nominal value of the share or by way of premium)²⁴.

Where an unlimited company²⁵ allots shares of a class with rights that are not in all respects uniform with shares previously allotted²⁶, the company must, within one month of making such an allotment, deliver to the registrar for registration a return of the allotment²⁷. The return must contain the prescribed particulars of the rights attached to the shares²⁸.

If a company makes default in complying with the provisions that require a return of the allotment to be made by a company limited by shares or a company limited by guarantee and having a share capital²⁹ or by an unlimited company³⁰, an offence is committed by every officer of the company who is in default³¹. A person guilty of such an offence is liable (on conviction on indictment) to a fine³² or (on summary conviction) to a fine not exceeding the statutory maximum³³ and (for continued contravention) a daily default fine not exceeding one-tenth of the statutory maximum³⁴.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'allotment' and related expressions see PARA 1091.

3 As to the meaning of 'share' see PARA 1042.

4 Companies Act 2006 s 554(1). This does not apply if the company has issued a share warrant in respect of the shares (see s 779; and PARA 382): s 554(2). As to the company's duties as to the issue of share certificates etc see Pt 21 (ss 768-790) (certification and transfer of securities) (see PARA 381 et seq): s 554(5).

5 le fails to comply with the Companies Act 2006 s 554: see s 554(3).

6 Companies Act 2006 s 554(3). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

7 As to the meaning of the 'standard scale' see PARA 1622.

8 As to the meaning of 'daily default fine' see PARA 1622.

9 Companies Act 2006 s 554(4).

10 As to the meaning of 'company limited by shares' see PARA 102.

11 As to the meaning of 'company limited by guarantee' see PARA 102.

12 As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

13 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

14 See the Companies Act 2006 s 555(1), (2). Such a return is to be accompanied in certain circumstances by a valuer's report made under s 593 (see PARA 1120): see s 597(2); and PARA 1124. Any return of allotment is subject to the disclosure requirements in s 1078: see PARA 144.

15 Companies Act 2006 s 555(3)(a). In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: s 1167. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6. In exercise of the powers conferred by s 555(3)(a), the Secretary of State has made the Companies (Shares and Share Capital) Order 2009, SI 2009/388. Accordingly, the information prescribed for the purposes of the Companies Act 2006 s 555(3)(a) is (Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 3(1)):

517 (1) the number of shares allotted (art 3(2)(a));

518 (2) the amount paid up and the amount (if any) unpaid on each allotted share (whether on account of the nominal value of the share or by way of premium) (art 3(2)(b)); and

519 (3) where the shares are allotted as fully or partly paid up (as to their nominal value or any premium on them) otherwise than in cash, the consideration for the allotment (art 3(2)(c)).

As to the meaning of 'allotted' shares see PARA 1045. As to the meanings of 'cash' and consideration 'other than cash' in relation to the allotment or payment up of shares in a company see PARA 1091. As to the meaning of 'premium' see PARA 1146. As to the nominal value of shares see PARA 1044. As to payment in cash for these purposes see PARA 1109. As to when shares in a company are deemed paid up generally see PARA 1091; and as to the means of payment generally see PARA 1113 et seq. As to what is an adequate statement of the consideration see *Re Frost & Co Ltd* [1899] 2 Ch 207, CA; *Re Maynards Ltd* [1898] 1 Ch 515. Cf *Re Robert Watson & Co Ltd* [1899] 2 Ch 509.

16 Companies Act 2006 s 555(3)(b). Any statement of capital accompanying a return of allotment is subject to the disclosure requirements in s 1078: see PARA 144.

17 Companies Act 2006 s 555(4).

18 Companies Act 2006 s 555(4)(a).

19 Companies Act 2006 s 555(4)(b).

20 Companies Act 2006 s 555(4)(c). As to the meaning of 'class of shares' see PARA 1057.

21 Companies Act 2006 s 555(4)(c)(i). In exercise of the powers conferred by s 555(4)(c)(i), the Secretary of State has made the Companies (Shares and Share Capital) Order 2009, SI 2009/388. Accordingly, the particulars prescribed for the purposes of the Companies Act 2006 s 555(4)(c)(i) are (Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 2(1), (2)(d)):

- 520 (1) particulars of any voting rights attached to the shares, including rights that arise only in certain circumstances (art 2(3)(a));
- 521 (2) particulars of any rights attached to the shares, as respects dividends, to participate in a distribution (art 2(3)(b));
- 522 (3) particulars of any rights attached to the shares, as respects capital, to participate in a distribution (including on winding up) (art 2(3)(c)); and
- 523 (4) whether the shares are to be redeemed or are liable to be redeemed at the option of the company or the shareholder (art 2(3)(d)).

As to rights attached to classes of shares generally see PARA 1057 et seq; as to redeemable shares see PARAS 1052, 1229 et seq; and as to distributions and dividends see PARA 1390 et seq. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

22 Companies Act 2006 s 555(4)(c)(ii).

23 Companies Act 2006 s 555(4)(c)(iii).

24 Companies Act 2006 s 555(4)(d).

25 As to the meaning of 'unlimited company' see PARA 102.

26 Companies Act 2006 s 556(1). For these purposes, shares are not to be treated as different from shares previously allotted by reason only that the former do not carry the same rights to dividends as the latter during the 12 months immediately following the former's allotment: s 556(4).

27 Companies Act 2006 s 556(2). Any return of allotment is subject to the disclosure requirements in s 1078: see PARA 144.

28 Companies Act 2006 s 556(3). In exercise of the powers conferred by s 556(3), the Secretary of State has made the Companies (Shares and Share Capital) Order 2009, SI 2009/388. Accordingly, the particulars prescribed for the purposes of the Companies Act 2006 s 556(3) are (Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 2(1), (2)(e)):

- 524 (1) particulars of any voting rights attached to the shares, including rights that arise only in certain circumstances (art 2(3)(a));
- 525 (2) particulars of any rights attached to the shares, as respects dividends, to participate in a distribution (art 2(3)(b));
- 526 (3) particulars of any rights attached to the shares, as respects capital, to participate in a distribution (including on winding up) (art 2(3)(c)); and
- 527 (4) whether the shares are to be redeemed or are liable to be redeemed at the option of the company or the shareholder (art 2(3)(d)).

29 Ie in complying with the Companies Act 2006 s 555 (see the text and notes 10-24): see s 557(1).

30 Ie in complying with the Companies Act 2006 s 556 (see the text and notes 25-28): see s 557(1).

31 Companies Act 2006 s 557(1). As to the power of the court to extend the time to make a return of the allotment see PARA 1110.

32 Companies Act 2006 s 557(2)(a).

33 As to the meaning of the 'statutory maximum' see PARA 1622.

34 Companies Act 2006 s 557(2)(b).

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1109. Payment in cash.

Any transaction in good faith between a company and a shareholder¹, which, if the company were to bring a claim against him for calls², would support a plea of payment, constitutes payment in cash for the purposes of the provisions³ requiring returns of allotments⁴. Thus the cancellation of a debt for compensation due to a director⁵ or, in a proper case, for money lent⁶, or for consideration for property purchased⁷, may constitute payment in cash; but the debt cancelled must have been a genuine debt presently due from the company⁸.

1 As to shareholders and membership of companies generally see PARA 321 et seq.

2 As to the meaning of 'call' see PARA 1132.

3 I.e. the Companies Act 2006 s 555 (see PARA 1108).

4 *Re Harmony and Montague Tin and Copper Mining Co, Spargo's Case* (1873) 8 Ch App 407; *Re Pen'Allt Silver Lead Mining Co, Fothergill's Case* (1873) 8 Ch App 270; *Re Limehouse Works Co, Coates' Case* (1873) LR 17 Eq 169 (set-off debt on sale of business to company against money due for shares); *Larocque v Beauchemin* [1897] AC 358, PC (set-off); *North Sydney Investment and Tramway Co v Higgins* [1899] AC 263, PC. As to set-off cf *Tarrant v Roberts* (1930) 47 TLR 199 (set-off amounting to repayment of excess profits duty).

5 *Re Paraguassu Steam Tramway Co, Adamson's Case* (1874) LR 18 Eq 670; *Re Regent United Service Stores, ex p Bentley* (1879) 12 ChD 850. As to a company's directors see PARA 478 et seq.

6 See *Re Metropolitan Public Carriage and Repository Co, Cleland's Case* (1872) LR 14 Eq 387, where this was queried on principle, as there may be a debt presently payable for money lent, and the cancellation of such a debt should be payment in cash: see the cases cited in PARA 1110 note 8; and *Re Barrow-in-Furness and Northern Counties' Land Investment Co* (1880) 14 ChD 400, CA.

7 *Re Barrow-in-Furness and Northern Counties' Land and Investment Co* (1880) 14 ChD 400, CA; *Re Limehouse Works Co, Coates' Case* (1873) LR 17 Eq 169; *Larocque v Beauchemin* [1897] AC 358, PC. However, distinguish *Re Pen'Allt Silver Lead Mining Co, Fraser's Case* (1873) 42 LJ Ch 358; and *Re Rosherville Hotel Co, Roberts' Case* (1890) 2 Meg 60 (where the transaction of cancellation was incomplete or no money was due). Cf *Re Newport and South Wales Shipowners' Co Ltd, Rowland's Case* (1880) 42 LT 785, CA (where shares were allotted to a nominee, but at no moment of time was there a debt on one side which could be set off against a debt on the other side).

8 *Re Johannesburg Hotel Co, ex p Zoutpansberg Prospecting Co* [1891] 1 Ch 119, CA (actual demand for present payment necessary); *Re Church and Empire Fire Insurance Co, Pagin and Gill's Case* (1877) 6 ChD 681; *Re Church and Empire Fire Insurance Fund, Andress's Case* (1878) 8 ChD 126, CA; *Re Government Security Fire Insurance Co, White's Case* (1879) 12 ChD 511, CA (company not having become liable for debt); *Re Barangah Oil Refining Co, Arnot's Case* (1887) 36 ChD 702, CA; *Re Land Development Association, Kent's Case* (1888) 39 ChD 259, CA (agreement to write off at future time when cross-debts should become payable); *Re Eddystone Marine Insurance Co* [1893] 3 Ch 9, CA (shares allotted in consideration of past services, no payment having been made; shares issued as a gift and such an allotment is ultra vires).

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1110. Power of court to extend time to make return of allotment.

In the case of default in delivering to the registrar of companies¹ within one month after an allotment² of shares³ the return for registration that is required by the relevant statutory provisions⁴, any person liable for the default may apply to the court⁵ for relief⁶; and the court, if

satisfied that the omission to deliver the document was accidental⁷ or due to inadvertence⁸, or if satisfied that it is just and equitable to grant relief⁹, may make an order extending the time for delivery of the document for such period as the court thinks proper¹⁰. The application is primarily in the interest of the company and its officers, in order to obtain relief from the penalties.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

2 As to the meaning of 'allotment' and related expressions see PARA 1091.

3 As to the meaning of 'share' see PARA 1042.

4 If when a company limited by shares, or a company limited by guarantee and having a share capital, makes an allotment of its shares and a return is required by the Companies Act 2006 s 555 (see PARA 1108) or where an unlimited company allots shares of a class with rights that are not in all respects uniform with shares previously allotted and a return is required under s 556 (see PARA 1108): see s 557(3). As to the meanings of 'company limited by guarantee', 'company limited by shares' and 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

5 As to the meaning of 'court' see PARA 212 note 1.

6 Companies Act 2006 s 557(3)(a). As to the procedure for making claims and applications to the court under companies legislation see PARA 305. The claim form must be supported by a statement, setting out the reason for the failure to deliver the required documents for registration: *Re Victoria Brick Works Co Ltd*, *Seaton's Case* (1898) 5 Mans 350.

7 'Accidental' means due to accident, and an accident is probably an unlooked-for mishap or an untoward event which was not expected or designed: see *Fenton v J Thorley & Co Ltd* [1903] AC 443, HL; and PARA 1287.

8 Companies Act 2006 s 557(3)(b)(i). See eg *Re Lucky Guss Ltd* (1898) 79 LT 722 (delay in adjudicating on the stamp duty). Inadvertence includes cases of ignorance or forgetfulness of the law: see *Re Jackson & Co Ltd* [1899] 1 Ch 348; *Re Tom-Tit Cycle Co* (1899) 43 Sol Jo 334. See also PARA 1287.

9 Companies Act 2006 s 557(3)(b)(ii). See *Spiers and Bevan's Case* [1899] 1 Ch 210.

10 Companies Act 2006 s 557(3)(b). The statutory provisions apply whether any part or the whole of the consideration was other than cash, and the court has a wide discretion: *Re Tom-Tit Cycle Co* (1899) 43 Sol Jo 334. Relief has been granted under earlier Acts, when the filed contract was insufficiently or erroneously stated (*Re Mays' Metals Separating Syndicate Ltd*, *Smithson's Case* (1898) 68 LJ Ch 46; *Re Northern Creosoting and Sleeper Co Ltd* (1898) 79 LT 407; and see also *Markham and Darter's Case* [1899] 2 Ch 480, CA); where there was no contract (*Re Jackson & Co Ltd* [1899] 1 Ch 348); and where the contract was only verbal (*Re Victoria Brick Works Co Ltd*, *Seaton's Case* (1898) 5 Mans 350). However, there is no requirement under the Companies Act 2006 for the contract to be filed: see PARA 1108. Where, in a winding up, relief is sought, the party seeking relief should give the liquidator the fullest information; otherwise he may be ordered to pay the costs of the liquidator on what is now the indemnity basis: *Re Farmer's United*, *Stephenson's Case* [1900] 2 Ch 442.

In *Re Anderson and Munro* 1924 SC 222, Ct of Sess, a company failed to file the required particulars. After the time for filing had expired the contract was reduced to writing, and the court gave leave to extend the time for filing the contract in writing.

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E. PAYMENT

(A) AMOUNT AND MEANS OF PAYMENT

(a) *In general*

1111. Prohibition on allotment of shares at a discount.

A company's¹ shares² must not be allotted³ at a discount to the nominal value⁴. If shares are allotted in contravention of this provision⁵, the allottee is liable to pay the company an amount equal to the amount of the discount, with interest at the appropriate rate⁶; and, if a company contravenes this provision, an offence is committed by the company, and by every officer of the company who is in default⁷. A person who is guilty of such an offence is liable (on conviction on indictment) to a fine or (on summary conviction) to a fine not exceeding the statutory maximum⁸.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'share' see PARA 1042.

3 As to the meaning of 'allotment' and related expressions see PARA 1091.

4 See the Companies Act 2006 s 580(1). As to the power of the Secretary of State by regulations to modify Pt 17 Ch 5 (ss 580-592) (see also PARAS 1091, 1113 et seq) see s 657; and PARA 1091 note 7. As to the Secretary of State see PARA 6. As to the making of orders under the Companies Act 2006 generally see ss 1288-1292.

It has been unlawful for a company even with the sanction of the court to allot shares at a discount since 23 June 1980, ie the date on which the Companies Act 1980 s 2 (now repealed) came into force. Previously (ie since 1 November 1929) the allotment of shares at a discount was permissible with the sanction of the court (see the Companies Act 1948 s 57 (repealed)), and the alteration in the law in 1980 contained a saving in respect of any application for such sanction which had been made to the court before 23 June 1980 and had not yet been disposed of (see the Companies Act 1980 s 21(4) (repealed)). Before 1 November 1929, apart from the statutory provision as to paying commissions for underwriting and brokerage (see PARAS 1151, 1152), a company limited by shares could not allot shares at a discount, ie allot shares at their nominal value with a liability to pay only a sum smaller than their nominal value either in money or money's worth: see *Ooregum Gold Mining Co of India v Roper* [1892] AC 125, HL; *Re Eddystone Marine Insurance Co* [1893] 3 Ch 9, CA (where shares were issued as fully paid as a free gift or bonus without any payment being received by the company; issue was ultra vires and void); *Hirsche v Sims* [1894] AC 654, PC; *Re Addlestone Linoleum Co* (1887) 37 ChD 191, CA; *Re Almada and Tiritto Co* (1888) 38 ChD 415, CA; *Re New Chile Gold Mining Co* (1888) 38 ChD 475; *Keatinge v Paringa Consolidated Mines Ltd* (1902) 18 TLR 266 (overruling *Re Plaskynaston Tube Co* (1883) 23 ChD 542 and *Re Ince Hall Rolling Mills Co* (1882) 23 ChD 545n); *Chapman v Great Central Freehold Mines Ltd* (1905) 22 TLR 90, PC; *Famatina Development Corp Ltd v Bury* [1910] AC 439, HL (where a company proposed to issue shares as fully paid in satisfaction of a bonus on debentures payable only out of profits but profits had not been earned; ultra vires); *Hong Kong and China Gas Co Ltd v Glen* [1914] 1 Ch 527 (agreement to allot one-fifth of every increase of capital as consideration for property acquired; ultra vires). A contract to issue shares at a discount was void: *Welton v Saffery* [1897] AC 299 at 321, HL, per Lord Macnaghten. As to the meaning of 'company limited by shares' see PARA 102. As to the nominal value of shares see PARA 1044.

5 Ie in contravention of the Companies Act 2006 s 580: see s 580(2).

6 Companies Act 2006 s 580(2). For the purposes of Pt 17 Ch 5 (ss 580-592), the 'appropriate rate' of interest is 5% per annum or such other rate as may be specified by order made by the Secretary of State: s 592(1). An order under s 592 is subject to negative resolution procedure (ie the statutory instrument containing the order is subject to annulment in pursuance of a resolution of either House of Parliament): ss 592(2), 1289. At the date at which this volume states the law, no such order has been made in exercise of the power conferred by s 592. As to the liability of subsequent holders of shares see PARA 1118; and as to relief from liability that may be granted by the court see PARA 1119.

7 Companies Act 2006 s 590(1). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

8 Companies Act 2006 s 590(2). As to the meaning of the 'statutory maximum' see PARA 1622.

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1112. Different amounts may be paid on shares.

A company¹, if so authorised by its articles², may:

- 2020 (1) make arrangements on the issue of shares³ for a difference between the shareholders⁴ in the amounts and times of payment of calls⁵ on their shares⁶;
- 2021 (2) accept from any member⁷ the whole or part of the amount remaining unpaid on any shares held by him, although no part of that amount has been called up⁸;
- 2022 (3) pay a dividend in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others⁹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of references to a company's 'articles' see PARA 228 note 2. In the absence of a provision in the articles, the directors' calls may not be made on some shareholders and not on others: *Galloway v Hallé Concerts Society* [1915] 2 Ch 233.

3 As to the meaning of 'share' see PARA 1042. As to the meaning of references to 'issue' in relation to shares see PARA 1045.

4 As to shareholders of a company generally see PARA 321 et seq.

5 As to the meaning of 'call' see PARA 1132.

6 Companies Act 2006 s 581(a). As to the exercise of this power see PARA 1133 et seq. As to the power of the Secretary of State by regulations to modify Pt 17 Ch 5 (ss 580-592): see s 657; and PARA 1091 note 7. As to the Secretary of State see PARA 6.

7 As to the meaning of 'member of a company' see PARA 321.

8 Companies Act 2006 s 581(b). As to the exercise of this power see PARAS 1049, 1133 et seq.

9 Companies Act 2006 s 581(c). As to dividends on shares not fully paid up see also PARA 1410. As to distributions and dividends generally see PARA 1390 et seq.

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1113. General rule as to means of payment for shares.

Shares¹ allotted² by a company³, and any premium⁴ on them, may be paid up in money or money's worth, including goodwill and know-how⁵. However, this restriction does not prevent a company from allotting bonus shares⁶ to its members⁷ or from paying up, with sums available

for the purpose⁸, any amounts for the time being unpaid on any of its shares⁹, whether on account of the nominal value of the shares¹⁰ or by way of premium¹¹.

Additional rules apply to payments involving public companies¹².

A share may be fully paid without any cash¹³ passing from the shareholder¹⁴ to the company (unless the shares are taken by a subscriber to the memorandum of association¹⁵ of a public company¹⁶ in pursuance of an undertaking of his in the memorandum, in which case those shares, and any premium¹⁷ on them, must be paid up in cash¹⁸). The circuitous process of paying up the nominal amount of the share and then taking back the money in satisfaction of the company's indebtedness for goods or other property sold to it is unnecessary. Thus shares may be lawfully issued as 'fully paid' for considerations which the company has agreed to accept as representing in money's worth the nominal value of the shares¹⁹, provided that the statutory conditions as to delivery of the prescribed particulars relating to the shares and a return of the allotment are complied with²⁰. Whilst the transaction is unimpeached, the court will not inquire into the value of the consideration²¹, and it will not rescind a transaction which is not impeached as dishonest merely because the company may have paid an extravagant price for the property²². Thus a specialty debt resulting from a call on shares may be discharged by accord and satisfaction, but the consideration must not be a mere blind or clearly colourable or illusory²³.

1 As to the meaning of 'share' see PARA 1042.

2 As to the meaning of 'allotment' and related expressions see PARA 1091.

3 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 As to the meaning of 'premium' see PARA 1146.

5 Companies Act 2006 s 582(1). The provisions of s 582 have effect subject to ss 583-592 (see also PARA 1114 et seq); s 582(3). As to the power of the Secretary of State by regulations to modify Pt 17 Ch 5 (ss 580-592) (see also PARAS 1111, 1114 et seq) see s 657; and PARA 1091 note 7. As to the Secretary of State see PARA 6.

6 As to bonus shares see PARA 1053.

7 Companies Act 2006 s 582(2)(a). As to the meaning of 'member of a company' see PARA 321.

8 See PARA 1420, citing the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 art 36 and reg 4, Sch 3 art 78, which provide that any undivided profits available for dividend may be capitalised and distributed among the shareholders. See also the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 105; and PARA 1420.

9 As to when shares in a company are deemed paid up generally see PARA 1091.

10 As to the nominal value of shares see PARA 1044.

11 Companies Act 2006 s 582(2)(b).

12 See PARA 1114 et seq.

13 As to the statutory meaning of 'cash' in relation to the allotment or payment up of shares in a company see PARA 1091.

14 As to shareholders and membership of companies generally see PARA 321 et seq.

15 As to the meaning of 'memorandum of association' see PARA 104. As to subscribers to a company's memorandum of association see PARA 104 et seq.

16 As to the meaning of 'public company' see PARA 102.

17 As to the meaning of 'premium' see PARA 1146.

18 See the Companies Act 2006 s 584; and PARA 1114.

19 *Ooregum Gold Mining Co of India v Roper* [1892] AC 125 at 136, HL, per Lord Watson; *Chapman's Case* [1895] 1 Ch 771; *Pellatt's Case* (1867) 2 Ch App 527; *Gardner v Iredale* [1912] 1 Ch 700.

20 See PARA 1108. Public companies must comply with additional statutory constraints on the acceptance of non-cash consideration: see PARA 1117 et seq.

21 *Pell's Case* (1869) 5 Ch App 11; *Re Wragg Ltd* [1897] 1 Ch 796, CA; *Chapman's Case* [1895] 1 Ch 771. It is otherwise where the consideration is illusory or capable of obvious money measure (*Chapman's Case*; *Re Wragg Ltd* at 836 per Smith LJ; *Famatina Development Corp Ltd v Bury* [1910] AC 439, HL; *Park Business Interiors Ltd v Park* [1992] BCLC 1034, Ct of Sess) or where from the terms of the contract it is obvious that the property acquired is not equivalent to the amount of capital which is treated as paid up (*Hong Kong and China Gas Co Ltd v Glen* [1914] 1 Ch 527). See also *Re Leinster Contract Corp* [1902] 1 IR 349; *Brownlie, Petitioner, Scottish Heritages Co* (1899) 6 SLT 326.

22 *Ooregum Gold Mining Co of India v Roper* [1892] AC 125 at 143, HL, per Lord Herschell; *Re Innes & Co Ltd* [1903] 2 Ch 254, CA.

23 *Re White Star Line Ltd* [1938] Ch 458, [1938] 1 All ER 607, CA. See also *Park Business Interiors Ltd v Park* [1992] BCLC 1034, Ct of Sess.

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(b) Public Company Restrictions

1114. Shares taken by subscribers of memorandum of public company.

Shares¹ taken by a subscriber to the memorandum of association² of a public company³ in pursuance of an undertaking of his in the memorandum, and any premium⁴ on the shares, must be paid up in cash⁵.

If a company contravenes this provision, an offence is committed by the company, and by every officer of the company who is in default⁶. A person who is guilty of such an offence is liable (on conviction on indictment) to a fine or (on summary conviction) to a fine not exceeding the statutory maximum⁷.

1 As to the meaning of 'share' see PARA 1042.

2 As to the meaning of 'memorandum of association' see PARA 104. As to subscribers to a company's memorandum of association see PARA 103 et seq.

3 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 As to the meaning of 'premium' see PARA 1146.

5 Companies Act 2006 s 584. As to the meaning of 'cash' in relation to the allotment or payment up of shares in a company see PARA 1091. As to the liability of subsequent holders of shares see PARA 1118; and as to relief from liability that may be granted by the court see PARA 1119. As to the power of the Secretary of State by regulations to modify Pt 17 Ch 5 (ss 580-592) (see also PARAS 1111 et seq, 1115 et seq) see s 657; and PARA 1091 note 7. As to the Secretary of State see PARA 6.

6 Companies Act 2006 s 590(1). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

7 Companies Act 2006 s 590(2). As to the meaning of the 'statutory maximum' see PARA 1622.

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1115. Restriction on payment for shares in public company by undertaking to do work etc.

A public company¹ must not accept at any time, in payment up of its shares² or any premium³ on them, an undertaking given by any person that he or another should do work or perform services for the company or any other person⁴. If a public company accepts such an undertaking in payment up of its shares or any premium on them, the holder of the shares⁵ when they or the premium are treated as paid up (in whole or in part) by the undertaking is liable⁶:

- 2023 (1) to pay the company in respect of those shares an amount equal to their nominal value⁷, together with the whole of any premium or, if the case so requires, such proportion of that amount as is treated as paid up by the undertaking⁸; and
- 2024 (2) to pay interest at the appropriate rate⁹ on the amount payable under head (1) above¹⁰.

If a company contravenes this restriction¹¹, an offence is committed by the company, and by every officer of the company who is in default¹². A person who is guilty of such an offence is liable (on conviction on indictment) to a fine or (on summary conviction) to a fine not exceeding the statutory maximum¹³.

1 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'share' see PARA 1042. As to when shares in a company are deemed paid up generally see PARA 1091.

3 As to the meaning of 'premium' see PARA 1146.

4 Companies Act 2006 s 585(1). As to the power of the Secretary of State by regulations to modify Pt 17 Ch 5 (ss 580-592) (see also PARAS 1111 et seq, 1116 et seq) see s 657; and PARA 1091 note 7. As to the Secretary of State see PARA 6.

An undertaking given by any person, in or in connection with payment for shares in a company, to do work or perform services or to do any other thing, if it is enforceable by the company apart from Pt 17 Ch 5, is so enforceable notwithstanding that there has been a contravention in relation to it of a provision of Pt 17 Ch 5 or Pt 17 Ch 6 (ss 593-609) (see PARA 1120 et seq): s 591(1). This is without prejudice to s 589 (power of court to grant relief etc in respect of liabilities) (see PARA 1119): s 591(2). See also PARA 1120.

5 For these purposes, the reference to the holder of shares includes any person who has an unconditional right either to be included in the company's register of members in respect of those shares, or to have an instrument of transfer of them executed in his favour: Companies Act 2006 s 585(3). As to the register of members see PARA 335.

6 Companies Act 2006 s 585(2). As to the liability of subsequent holders of shares see PARA 1118; and as to relief from liability that may be granted by the court see PARA 1119.

7 As to the nominal value of shares see PARA 1044.

8 Companies Act 2006 s 585(2)(a).

9 As to the meaning of 'appropriate rate' for the purposes of the Companies Act 2006 Pt 17 Ch 5 (ss 580-592) see PARA 1111 note 6.

10 Companies Act 2006 s 585(2)(b).

11 In the Companies Act 2006 s 585 (see the text and notes 1-10): see s 590(1).

12 Companies Act 2006 s 590(1). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

13 Companies Act 2006 s 590(2). As to the meaning of the 'statutory maximum' see PARA 1622.

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1116. Shares in public company to be allotted as at least one-quarter paid up.

A public company¹ must not allot² a share³ except as paid up⁴ at least as to one-quarter of its nominal value⁵ and the whole of any premium on it⁶, unless the share is allotted in pursuance of an employees' share scheme⁷. If a company allots a share in contravention of this restriction: (1) the share is to be treated as if one-quarter of its nominal value, together with the whole of any premium on it, had been received⁸; and (2) the allottee is liable to pay the company the minimum amount which should have been received in respect of the share under head (1) above (less the value of any consideration actually applied in payment up, to any extent, of the share and any premium on it), with interest at the appropriate rate⁹.

If a company contravenes this restriction¹⁰, an offence is committed by the company, and by every officer of the company who is in default¹¹. A person who is guilty of such an offence is liable (on conviction on indictment) to a fine or (on summary conviction) to a fine not exceeding the statutory maximum¹².

1 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'allotment' and related expressions see PARA 1091.

3 As to the meaning of 'share' see PARA 1042.

4 See PARA 1147.

5 As to the nominal value of shares see PARA 1044.

6 Companies Act 2006 s 586(1). As to the meaning of 'premium' see PARA 1146. As to the power of the Secretary of State by regulations to modify Pt 17 Ch 5 (ss 580-592) (see also PARAS 1111 et seq, 1117 et seq) see s 657; and PARA 1091 note 7. As to the Secretary of State see PARA 6.

7 Companies Act 2006 s 586(2). As to the meaning of 'employees' share scheme' see PARA 169 note 20.

8 Companies Act 2006 s 586(3)(a). The provisions of s 586(3) do not apply to the allotment of bonus shares unless the allottee knew or ought to have known the shares were allotted in contravention of s 586: s 586(4). As to bonus shares see PARA 1053.

9 Companies Act 2006 s 586(3)(b). See note 8. As to the meaning of 'appropriate rate' for the purposes of Pt 17 Ch 5 see PARA 1111 note 6. As to the liability of subsequent holders of shares see PARA 1118; and as to relief from liability that may be granted by the court see PARA 1119.

10 In the Companies Act 2006 s 586 (see the text and notes 1-9): see s 590(1).

11 Companies Act 2006 s 590(1). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

12 Companies Act 2006 s 590(2). As to the meaning of the 'statutory maximum' see PARA 1622.

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1117. Restriction on payment for shares in public company by long term undertaking.

A public company¹ must not allot² shares³ as fully or partly paid up⁴ (as to their nominal value⁵ or any premium⁶ on them) otherwise than in cash⁷ if the consideration for the allotment is or includes an undertaking which is to be, or may be, performed more than five years after the date of the allotment⁸. If a company allots shares in contravention of this restriction, the allottee is liable to pay the company an amount equal to the aggregate of their nominal value and the whole of any premium (or, if the case so requires, so much of that aggregate as is treated as paid up by the undertaking), with interest at the appropriate rate⁹.

Where a contract for the allotment of shares¹⁰ does not contravene the restriction¹¹, any variation of the contract that has the effect that the contract would have contravened the restriction, if the terms of the contract as varied had been its original terms, is void¹².

Where a public company allots shares for a consideration which consists of or includes¹³ an undertaking that is to be performed within five years of the allotment¹⁴, and where the undertaking is not performed within the period allowed by the contract for the allotment of the shares¹⁵, the allottee is liable to pay the company, at the end of the period so allowed, an amount equal to the aggregate of the nominal value of the shares and the whole of any premium (or, if the case so requires, so much of that aggregate as is treated as paid up by the undertaking), with interest at the appropriate rate¹⁶.

If a company contravenes this restriction¹⁷, an offence is committed by the company, and by every officer of the company who is in default¹⁸. A person who is guilty of such an offence is liable (on conviction on indictment) to a fine or (on summary conviction) to a fine not exceeding the statutory maximum¹⁹.

1 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'allotment' and related expressions see PARA 1091.

3 As to the meaning of 'share' see PARA 1042.

4 As to the meaning of 'paid up' shares see PARA 1091.

5 As to the nominal value of shares see PARA 1044.

6 As to the meaning of 'premium' see PARA 1146.

7 As to the meanings of 'cash' and consideration 'other than cash' in relation to the allotment or payment up of shares in a company see PARA 1091.

8 Companies Act 2006 s 587(1). However, an undertaking to perform services etc which is enforceable by the company apart from the provisions of Pt 17 Ch 5 (ss 580-592) (see also PARAS 1111 et seq, 1118 et seq) is enforceable notwithstanding any contravention under s 587: see PARA 1115 note 4. As to the power of the Secretary of State by regulations to modify Pt 17 Ch 5: see s 657; and PARA 1091 note 7. As to the Secretary of State see PARA 6.

9 Companies Act 2006 s 587(2). As to the meaning of 'appropriate rate' for the purposes of Pt 17 Ch 5 see PARA 1111 note 6. As to the liability of subsequent holders of shares see PARA 1118; and as to relief from liability that may be granted by the court see PARA 1119.

10 For these purposes, references to a contract for the allotment of shares include an ancillary contract relating to payment in respect of them: Companies Act 2006 s 587(5).

11 Ie the Companies Act 2006 s 587(1) (see the text and notes 1-8): see s 587(3).

12 Companies Act 2006 s 587(3). The provisions of s 587(3) apply also to the variation by a public company of the terms of a contract entered into before the company was re-registered as a public company: see s 587(3). As to re-registration as a public company see PARA 168 et seq.

13 Ie in accordance with the Companies Act 2006 s 587(1) (see the text and notes 1-8): see s 587(4)(a).

14 Companies Act 2006 s 587(4)(a).

15 Companies Act 2006 s 587(4)(b).

16 Companies Act 2006 s 587(4). The provisions of s 588 (see PARA 1118) apply in relation to a failure to carry out a term of a contract as mentioned in s 587(4) as it applies in relation to a contravention of a provision of Pt 17 Ch 5: see s 588(4); and PARA 1118.

17 Ie the Companies Act 2006 s 587 (see the text and notes 1-16): see s 590(1).

18 Companies Act 2006 s 590(1). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

19 Companies Act 2006 s 590(2). As to the meaning of the 'statutory maximum' see PARA 1622.

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(c) Liability for Contravention

1118. Liability of subsequent holders of shares allotted.

If a person becomes a holder of shares¹ in respect of which: (1) there has been a contravention of any of the statutory provisions² which govern payment for shares³; and (2) by virtue of that contravention, another is liable to pay any amount under the provision so contravened⁴, that person is also liable to pay that amount (jointly and severally with any other person so liable)⁵. However, a person who is otherwise liable in this way⁶ is exempted from that liability if either⁷: (a) he is a purchaser for value and, at the time of the purchase, he did not have actual notice of the contravention concerned⁸; or (b) he derived title to the shares (directly or indirectly) from a person who became a holder of them after the contravention and was not so liable⁹.

1 For these purposes, references to a holder, in relation to shares in a company, include any person who has an unconditional right either to be included in the company's register of members in respect of those shares or to have an instrument of transfer of the shares executed in his favour: Companies Act 2006 s 588(3). As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'share' see PARA 1042. As to the register of members see PARA 335. See *System Control plc v Munro Corporate plc* [1990] BCLC 659 (a person in whose favour renounceable letters of allotment had been renounced had an unconditional right to be included in the company's register for these purposes).

2 le a contravention of any provision of the Companies Act 2006 Pt 17 Ch 5 (ss 580-592) (see also PARAS 1111 et seq, 1119); see s 588(1)(a). As to the power of the Secretary of State by regulations to modify Pt 17 Ch 5 see s 657; and PARA 1091 note 7. As to the Secretary of State see PARA 6.

3 Companies Act 2006 s 588(1)(a). The provisions of s 588 apply in relation to a failure to carry out a term of a contract as mentioned in s 587(4) (public companies: payment by long-term undertaking) (see PARA 1117) as it applies in relation to a contravention of a provision of Pt 17 Ch 5: s 588(4).

4 Companies Act 2006 s 588(1)(b).

5 Companies Act 2006 s 588(1). As to the court's power to grant relief see PARA 1119. See also PARA 1120.

6 le under the Companies Act 2006 s 588(1) (see the text and notes 1-5): see s 588(2).

7 Companies Act 2006 s 588(2).

8 Companies Act 2006 s 588(2)(a). See *System Control plc v Munro Corporate plc* [1990] BCLC 659 (parties could not rely on this where it was clear that they had notice of the facts; it was not also necessary to show that the parties were aware of the terms of the statutory provision).

9 Companies Act 2006 s 588(2)(b). Head (b) in the text refers to a person who was not liable under s 588(1) (see the text and notes 1-5): see s 588(2)(b).

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1119. Relief in respect of certain liabilities.

A person who is subject to liability¹ to a company²: (1) in relation to payment in respect of shares³ in the company⁴; or (2) by virtue of an undertaking given to it in, or in connection with, payment for shares in the company⁵, may apply to the court⁶ to be exempted in whole or in part from the liability⁷.

If such liability arises under head (1) above, the court may exempt the applicant from the liability only if and to the extent that it appears to the court just and equitable to do so having regard to⁸:

2025 (a) whether the applicant has paid, or is liable to pay, any amount in respect of any other liability arising in relation to those shares under any of the provisions which govern payment for shares⁹ or the valuation of non-cash assets¹⁰ (where these apply), or in respect of any liability arising by virtue of any undertaking given in or in connection with payment for those shares¹¹;

2026 (b) whether any person other than the applicant has paid or is likely to pay (whether in pursuance of an order of the court or otherwise) any such amount¹²; and

- 2027 (c) whether the applicant or any other person has performed, in whole or in part, or is likely so to perform any such undertaking, or has done or is likely to do any other thing in payment or part payment for the shares¹³.

Where a liability arises under head (2) above, the court may exempt the applicant from the liability only if and to the extent that it appears to the court just and equitable to do so having regard to¹⁴ whether the applicant has paid or is liable to pay any amount in respect of liability arising¹⁵ in relation to the shares¹⁶, and whether any person other than the applicant has paid or is likely to pay, whether in pursuance of an order of the court or otherwise, any such amount¹⁷. In determining whether it should exempt the applicant in whole or in part from any liability, the court must have regard to the following overriding principles¹⁸, namely:

- 2028 (i) a company that has allotted shares should receive money or money's worth at least equal in value to the aggregate of the nominal value of those shares¹⁹ and the whole of any premium²⁰ or, if the case so requires, so much of that aggregate as is treated as paid up²¹; and
- 2029 (ii) subject to that, where a company would, if the court did not grant the exemption, have more than one remedy against a particular person, it should be for the company to decide which remedy it should remain entitled to pursue²².

If a person brings proceedings against another (the 'contributor') for a contribution in respect of liability to a company so arising²³, and it appears to the court that the contributor is liable to make such a contribution, the court may, if and to the extent that it appears to it just and equitable to do so having regard to the respective culpability (in respect of the liability to the company) of the contributor and the person bringing the proceedings²⁴, exempt the contributor in whole or in part from his liability to make such a contribution²⁵, or order the contributor to make a larger contribution than he would otherwise²⁶ be liable to make²⁷.

1 The Companies Act 2006 s 589 applies in relation to liability under s 585(2) (liability of allottee in case of breach by public company of prohibition on accepting undertaking to do work or perform services) (see PARA 1115), s 587(2), (4) (liability of allottee in case of breach by public company of prohibition on payment by long-term undertaking) (see PARA 1117), or s 588 (liability of subsequent holders of shares) (see PARA 1118), as it applies in relation to a contravention of those provisions: s 589(1). As to the power of the Secretary of State by regulations to modify Pt 17 Ch 5 (ss 580-592) (see also PARA 1111 et seq) see s 657; and PARA 1091 note 7. As to the Secretary of State see PARA 6.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'share' see PARA 1042.

4 Companies Act 2006 s 589(2)(a).

5 Companies Act 2006 s 589(2)(b).

6 As to the meaning of 'court' see PARA 212 note 1. As to the procedure that applies to applications under companies legislation generally see PARA 305.

7 Companies Act 2006 s 589(2). The burden is on the person applying for relief to satisfy the court that a case for relief exists: *Re Bradford Investments plc (No 2)* [1991] BCLC 688. Quaere whether relief is available if in fact there is no subsisting contract for the allotment of shares in the first place: see *System Control plc v Munro Corporate plc* [1990] BCLC 659.

8 Companies Act 2006 s 589(3). See also *Re Bradford Investments plc (No 2)* [1991] BCLC 688 at 693 (the matters specified were not intended to be an exhaustive statement of the matters to which the court should or may have regard). See also *Re Ossory Estates plc* [1988] BCLC 213.

9 Ie the Companies Act 2006 Pt 17 Ch 5 (see also PARA 1111 et seq): see s 589(3)(a).

- 10 le the Companies Act 2006 Pt 17 Ch 6 (ss 593-609) (see PARA 1120 et seq): see s 589(3)(a).
- 11 Companies Act 2006 s 589(3)(a).
- 12 Companies Act 2006 s 589(3)(b).
- 13 Companies Act 2006 s 589(3)(c).
- 14 Companies Act 2006 s 589(4).
- 15 le under either the Companies Act 2006 Pt 17 Ch 5 (see also PARA 1111 et seq) or under Pt 17 Ch 6 (see PARA 1120 et seq): see s 589(4)(a).
- 16 Companies Act 2006 s 589(4)(a).
- 17 Companies Act 2006 s 589(4)(b).
- 18 Companies Act 2006 s 589(5). See *Re Bradford Investments plc (No 2)* [1991] BCLC 688 at 694, where Hoffmann J thought that the designation 'overriding principle' did not oblige the court to refuse relief unless the company had received at least the nominal value of the allotted shares and any premium because, had that been the intention, the requirement would have been framed as a rule.
- 19 As to the nominal value of shares see PARA 1044.
- 20 As to the meaning of 'premium' see PARA 1146.
- 21 Companies Act 2006 s 589(5)(a). See *Re Ossory Estates plc* [1988] BCLC 213 (relief granted where the company had undoubtedly received at least money or money's worth equal in value, and probably exceeding in value, the aggregate of the nominal value of the shares and any premium). Cf *System Control plc v Munro Corporate plc* [1990] BCLC 659 (no prospect of relief being granted when absolutely no evidence that the company had received the minimum amount); *Re Bradford Investments plc (No 2)* [1991] BCLC 688 (applicants failed to discharge the burden of showing that the company had received value for its shares).
- 22 Companies Act 2006 s 589(5)(b).
- 23 le under either the Companies Act 2006 Pt 17 Ch 5 (see also PARA 1111 et seq) or under Pt 17 Ch 6 (see PARA 1120 et seq): see s 589(6).
- 24 Companies Act 2006 s 589(6).
- 25 Companies Act 2006 s 589(6)(a).
- 26 le but for the Companies Act 2006 s 589(6): see s 589(6)(b).
- 27 Companies Act 2006 s 589(6)(b).

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(B) INDEPENDENT VALUATION OF NON-CASH CONSIDERATION FOR SHARES IN PUBLIC COMPANY

(a) Non-Cash Consideration for Shares

1120. Non-cash consideration for shares to be valued before allotment.

A public company¹ must not allot² shares³ as fully or partly paid up⁴ (as to their nominal⁵ value or any premium⁶ on them) otherwise than in cash⁷ unless⁸:

- 2030 (1) the consideration for the allotment has been independently valued⁹; and
- 2031 (2) the valuer's report has been made to the company during the six months immediately preceding the allotment of the shares¹⁰; and
- 2032 (3) a copy of the report has been sent to the proposed allottee¹¹.

If a company allots shares in contravention of this restriction¹², and either the allottee has not received the valuer's report required¹³ to be sent to him¹⁴, or there has been some other contravention of the valuation requirements¹⁵ that the allottee knew or ought to have known amounted to a contravention¹⁶, the allottee is liable¹⁷ to pay the company an amount equal to the aggregate of the nominal value of the shares and the whole of any premium (or, if the case so requires, so much of that aggregate as is treated as paid up by the consideration) with interest at the appropriate rate¹⁸.

If a public company allots shares for a non-cash consideration in contravention of the above restriction¹⁹, an offence is committed by the company, and by every officer of the company who is in default²⁰. A person who is guilty of such an offence is liable (on conviction on indictment) to a fine or (on summary conviction) to a fine not exceeding the statutory maximum²¹.

1 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'allotment' and related expressions see PARA 1091.

3 As to the meaning of 'share' see PARA 1042.

4 As to the meaning of 'paid up' shares see PARA 1091.

5 As to the nominal value of shares see PARA 1044.

6 As to the meaning of 'premium' see PARA 1146.

7 As to the meanings of 'cash' and consideration 'other than cash' in relation to the allotment or payment up of shares in a company see PARA 1091. An undertaking given by any person, in or in connection with payment for shares in a company, to do work or perform services or to do any other thing, if it is enforceable by the company apart from the Companies Act 2006 Pt 17 Ch 6 (ss 593-609) (see also PARA 1120 et seq), is so enforceable notwithstanding that there has been a contravention in relation to it of a provision of Pt 17 Ch 5 (ss 580-592) (see PARA 1111 et seq) or Pt 17 Ch 6: s 608(1). This is without prejudice to s 606 (power of court to grant relief etc in respect of liabilities) (see PARA 1119): s 608(2). See also PARA 1115.

8 Companies Act 2006 s 593(1). The provisions of s 593 have effect subject to s 594 (see PARA 1121) and s 595 (see PARA 1121): s 593(4). See also s 593(2); and PARA 1121.

The Secretary of State may by regulations modify Pt 17 Ch 6 (ss 593-609) (see also PARA 1120 et seq): s 657(1). As to the Secretary of State see PARA 6. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 657 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 657(4), 1290. The regulations may amend or repeal any provision of Pt 17 Ch 6, or make such other provision as appears to the Secretary of State appropriate in place of any provision of Pt 17 Ch 6 (s 657(2)); and may make consequential amendments or repeals in other provisions of the Companies Act 2006, or in other enactments (s 657(3)). As to the meaning of 'enactment' see PARA 17 note 2. As to regulations so made under s 657 see the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941.

9 Companies Act 2006 s 593(1)(a). The independent valuation mentioned in the text must be in accordance with Pt 17 Ch 6 (see also PARA 1120 et seq): see s 593(1)(a). The provisions of ss 1150-1153 (see PARA 1122) apply to the valuation and report required by s 593: s 1149.

10 Companies Act 2006 s 593(1)(b).

11 Companies Act 2006 s 593(1)(c). See the cases cited in note 18. A copy of any report as to the value of a non-cash asset under s 593 or s 599 (see PARA 1125) is subject to the disclosure requirements in s 1078: see PARA 144.

12 Ie in contravention of the Companies Act 2006 s 593(1) (see the text and notes 1-11): see s 593(3).

13 Ie by Companies Act 2006 s 596 (see PARA 1122): see s 593(3)(a).

14 Companies Act 2006 s 593(3)(a).

15 Ie some other contravention of the requirements of the Companies Act 2006 s 593 (see the text and notes 1-11) or of s 596 (see PARA 1122): see s 593(3)(b).

16 Companies Act 2006 s 593(3)(b).

17 The effect is to create an immediate liability as if the allottee had agreed to take up the shares for cash: *Re Bradford Investments Ltd* [1991] BCLC 224 at 233 per Hoffmann J. As to the liability of subsequent holders of shares see PARA 1118; and as to relief from liability that may be granted by the court see PARA 1119.

18 Companies Act 2006 s 593(3). For the purposes of Pt 17 Ch 6, the 'appropriate rate' of interest is 5% per annum or such other rate as may be specified by order made by the Secretary of State: s 609(1). An order under s 609 is subject to negative resolution procedure (ie the statutory instrument containing the order is subject to annulment in pursuance of a resolution of either House of Parliament): ss 609(2), 1289. At the date at which this volume states the law, no such order has been made in exercise of the power conferred by s 609.

The penalties mentioned in the text can be onerous (see *Re Ossory Estates plc* [1988] BCLC 213; *Re Bradford Investments plc (No 2)* [1991] BCLC 688) but can be mitigated by the court's powers to give relief (see PARA 1119). As to the difficulties in applying s 593 in a case in which the contractual basis for payment of the consideration to the company has gone see *System Control plc v Munro Corporate plc* [1990] BCLC 659.

19 Ie in contravention of the Companies Act 2006 s 593 (see the text and notes 1-18): see s 607(1).

20 Companies Act 2006 s 607(1), (2). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

21 Companies Act 2006 s 607(3). As to the meaning of the 'statutory maximum' see PARA 1622.

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1121. Exceptions to requirement for non-cash consideration for shares to be valued before allotment.

For the purposes of the provisions which require a public company¹ not to allot² shares³ as fully or partly paid up⁴ otherwise than in cash⁵ without a valuation⁶, the application of an amount standing to the credit of any of a company's reserve accounts, or of its profit and loss account⁷, in paying up (to any extent) shares allotted to members of the company⁸ (or any premiums on shares so allotted) does not count as consideration for the allotment, and accordingly the valuation requirement⁹ does not apply in that case¹⁰.

Nor does the valuation requirement apply to the allotment of shares by a company ('company A')¹¹ in connection with an arrangement¹² providing for the allotment of shares in that company ('company A') on terms that the whole or part of the consideration for the shares allotted is to be provided either by the transfer to that company, or by the cancellation, of all or some of the shares, or of all or some of the shares of a particular class¹³, in another company ('company B')¹⁴. It is immaterial whether the arrangement provides for the issue to the allotting company

('company A') of shares, or shares of any particular class, in that other company ('company B')¹⁵. However, the valuation requirement will nevertheless apply unless under the arrangement it is open to all the holders of the shares in the other company in question ('company B') or, where the arrangement applies only to shares of a particular class, to all the holders of shares of that class, to take part in the arrangement¹⁶. In determining whether that is the case, the following are to be disregarded¹⁷:

- 2033 (1) shares held by or by a nominee of the allotting company ('company A')¹⁸;
- 2034 (2) shares held by or by a nominee of a company which is the holding company¹⁹, or a subsidiary²⁰, of the allotting company ('company A'), or a subsidiary of such a holding company²¹; and
- 2035 (3) shares held as treasury shares²² by the other company in question ('company B')²³.

The restriction on such an allotment of shares without a valuation²⁴ also does not apply to the allotment of shares by a company in connection with a proposed merger with another company²⁵, that is where one of the companies proposes to acquire all the assets and liabilities of the other in exchange for the issue of shares or other securities of that one to shareholders of the other, with or without any cash payment to shareholders²⁶.

1 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'allotment' and related expressions see PARA 1091.

3 As to the meaning of 'share' see PARA 1042.

4 As to their nominal value or any premium on them: see the Companies Act 2006 s 593(1); and PARA 1120. As to the meaning of 'paid up' shares see PARA 1091; and as to the meaning of 'premium' see PARA 1146. As to the nominal value of shares see PARA 1044.

5 As to the meanings of 'cash' and consideration 'other than cash' in relation to the allotment or payment up of shares in a company see PARA 1091. As to the enforceability of an undertaking given by any person, in or in connection with payment for shares in a company, to do work or perform services or to do any other thing, see PARA 1120 note 7.

6 As to the purposes of the Companies Act 2006 s 593 (see PARA 1120): see s 593(2).

7 As to the meaning of 'profit and loss account' see PARA 715.

8 As to the meaning of 'member of the company' see PARA 321. See also PARA 1420, citing the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 art 36 and reg 4, Sch 3 art 78, which provide that any undivided profits available for dividend may be capitalised and distributed among the shareholders. See also the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 105; and PARA 1420.

9 As to the requirement imposed by the Companies Act 2006 s 593(1) (see PARA 1120): see s 593(2).

10 Companies Act 2006 s 593(2). As to the power of the Secretary of State by regulations to modify Pt 17 Ch 6 (ss 593-609) (see also PARA 1120 et seq) see s 657; and PARA 1120 note 8. As to the Secretary of State see PARA 6.

11 For these purposes, 'company', except in reference to 'company A', includes any body corporate: Companies Act 2006 s 594(6)(a). As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5.

12 For these purposes, 'arrangement' means any agreement, scheme or arrangement, including an arrangement sanctioned in accordance with the Companies Act 2006 Pt 26 (ss 895-901) (arrangements and reconstructions) (see PARA 1425 et seq) or the Insolvency Act 1986 s 110 (liquidator in voluntary winding up accepting shares as consideration for sale of company's property) (see PARA 1438; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 963): Companies Act 2006 s 594(6)(a).

13 As to the meaning of 'class of shares' see PARA 1057.

- 14 Companies Act 2006 s 594(1), (2).
- 15 Companies Act 2006 s 594(3).
- 16 Companies Act 2006 s 594(4).
- 17 Companies Act 2006 s 594(5).
- 18 Companies Act 2006 s 594(5)(a).
- 19 As to the meaning of 'holding company' see PARA 25.
- 20 As to the meaning of 'subsidiary' see PARA 25.
- 21 Companies Act 2006 s 594(5)(b).
- 22 As to treasury shares see PARA 1251.
- 23 Companies Act 2006 s 594(5)(c).
- 24 Ie the restriction contained in the Companies Act 2006 s 593 (see PARA 1120): see s 595(1).
- 25 Companies Act 2006 s 595(1). For these purposes, 'company', in reference to the other company, includes any body corporate: s 595(3).
- 26 Companies Act 2006 s 595(2).

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1122. Making of valuation and report on non-cash consideration for shares.

The valuation and report required by the provisions which restrict a public company¹ from allotting² shares³ as fully or partly paid up⁴ otherwise than in cash⁵ without a valuation⁶ must be made by a person (the 'valuer') who is eligible for appointment as a statutory auditor⁷, and who meets the independence requirement⁸.

However, where it appears to the valuer to be reasonable for the valuation of the consideration, or part of it, to be made by (or for him to accept a valuation made by) another person who: (1) appears to him to have the requisite knowledge and experience to value the consideration or that part of it⁹; and (2) is not an officer or employee¹⁰ of the company (or of any other body corporate that is that company's subsidiary or holding company¹¹ or a subsidiary of that company's holding company) or a partner of or employed by any such officer or employee¹², he may arrange for or accept such a valuation, together with a report which will enable him to make his own report¹³. Where the consideration or part of it is valued by a person other than the valuer himself, the latter's report must state that fact¹⁴, and must also state the former's name and what knowledge and experience he has to carry out the valuation¹⁵, and describe so much of the consideration as was valued by the other person, and the method used to value it, and specify the date of that valuation¹⁶.

A person carrying out a valuation or making a report with respect to any consideration proposed to be accepted or given by a company, is entitled to require from the officers of the company such information and explanation as he thinks necessary to enable him to carry out the valuation or make the report¹⁷, and to provide any note that is required¹⁸ where such a

valuation is carried out by another person¹⁹. A person who knowingly or recklessly makes such a statement²⁰ that is misleading, false or deceptive in a material particular commits an offence²¹; and a person who is guilty of such an offence is liable (on conviction on indictment) to imprisonment for a term not exceeding two years or a fine (or both)²² and (on summary conviction) to imprisonment for a term not exceeding 12 months²³ or to a fine not exceeding the statutory maximum²⁴ (or both)²⁵.

1 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'allotment' and related expressions see PARA 1091.

3 As to the meaning of 'share' see PARA 1042.

4 As to their nominal value or any premium on them: see the Companies Act 2006 s 593; and PARA 1120. As to the meaning of 'paid up' shares see PARA 1091; and as to the meaning of 'premium' see PARA 1146. As to the nominal value of shares see PARA 1044.

5 As to the meanings of 'cash' and consideration 'other than cash' in relation to the allotment or payment up of shares in a company see PARA 1091.

6 As to the valuation and report required by the Companies Act 2006 s 593 (see PARA 1120): see s 593(1). The provisions of ss 1150-1153 (see the text and notes 7-25) apply to the valuation and report required by s 593: ss 596(1), 1149.

7 Companies Act 2006 s 1150(1)(a). As to a person's eligibility for appointment as a statutory auditor see s 1212 (see PARA 969): s 1150(1)(a).

8 Companies Act 2006 s 1150(1)(b). The text refers to the independence requirement in s 1151: s 1150(1)(b). Accordingly, a person meets the independence requirement for the purposes of s 1150 only if:

528 (1) he is not an officer or employee of the company, or a partner or employee of such a person, or a partnership of which such a person is a partner (s 1151(1)(a));

529 (2) he is not an officer or employee of an associated undertaking of the company, or a partner or employee of such a person, or a partnership of which such a person is a partner (s 1151(1)(b)); and

530 (3) there does not exist between the person or an associate of his, and the company or an associated undertaking of the company, a connection of any such description as may be specified by regulations made by the Secretary of State (s 1151(1)(c)).

An auditor of the company is not regarded as an officer or employee of the company for this purpose: s 1151(2). Regulations under s 1151 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 1151(4), 1289. As to the Secretary of State see PARA 6. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. At the date at which this volume states the law, no such regulations had been made under s 1151. For these purposes, 'associated undertaking' means a parent undertaking or subsidiary undertaking of the company, or a subsidiary undertaking of a parent undertaking of the company; and 'associate' has the meaning given by s 1152: see ss 1151(3), 1152(1). Accordingly, in relation to an individual, 'associate' means that individual's spouse or civil partner or minor child or step-child, any body corporate of which that individual is a director, and any employee or partner of that individual: s 1152(2). In relation to a body corporate, 'associate' means any body corporate of which that body is a director, any body corporate in the same group as that body, and any employee or partner of that body or of any body corporate in the same group: s 1152(3). In relation to a partnership that is a legal person under the law by which it is governed, 'associate' means any body corporate of which that partnership is a director, any employee or partner in that partnership, and any person who is an associate of a partner in that partnership: s 1152(4). In relation to a partnership that is not a legal person under the law by which it is governed, 'associate' means any person who is an associate of any of the partners: s 1152(5). For the purposes of s 1152, in relation to a limited liability partnership, for 'director' read 'member': s 1152(6). As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5. As to the meaning of 'director' see PARA 478. As to the meaning of 'officer' under the Companies Acts generally see PARA 607. As to the meanings of 'parent undertaking', 'subsidiary' and 'subsidiary undertaking' in the Companies Acts see PARA 26. As to company auditors see PARA 905 et seq. As to the meaning of 'partnership' generally see **PARTNERSHIP** vol 79 (2008) PARA 1; and as to the legal personality of a partnership or firm generally see **PARTNERSHIP** vol 79 (2008).

PARA 2. As to limited liability partnerships incorporated in the United Kingdom see **PARTNERSHIP** vol 79 (2008) PARA 234 et seq.

9 Companies Act 2006 s 1150(2)(a).

10 The references in the Companies Act 2006 s 1150(2)(b) to an officer or employee do not include an auditor: s 1150(3).

11 As to the meaning of 'holding company' see PARA 25.

12 Companies Act 2006 s 1150(2)(b).

13 Companies Act 2006 s 1150(2). The text refers to a report which will enable the valuer to make his own report under s 1150: s 1150(2).

14 Companies Act 2006 s 1150(4).

15 Companies Act 2006 s 1150(4)(a).

16 Companies Act 2006 s 1150(4)(b).

17 Companies Act 2006 s 1153(1)(a).

18 Is required by the Companies Act 2006 s 596(3) (see PARA 1123): see s 1153(1)(b).

19 Companies Act 2006 s 1153(1)(b).

20 Is a statement made (whether orally or in writing) to a person carrying out a valuation or making a report, and conveying or purporting to convey any information or explanation which that person requires, or is entitled to require, under the Companies Act 2006 s 1153(1) (see the text and notes 17-19): s 1153(3).

21 Companies Act 2006 s 1153(2).

22 Companies Act 2006 s 1153(4)(a).

23 In relation to an offence committed after the commencement of the Companies Act 2006 s 1131 (summary proceedings) (see PARA 1625), but before a day is appointed in relation to the commencement of the Criminal Justice Act 2003 s 154(1) (general limit on magistrates' courts' power to impose imprisonment), the reference in the Companies Act 2006 s 1153(4)(b) to '12 months' must be read as a reference to 'six months': see ss 1153(4)(b), 1131, 1133; and see PARA 1625.

24 As to the meaning of 'statutory maximum' see PARA 1622.

25 Companies Act 2006 s 1153(4)(b).

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1123. Contents of valuer's report on non-cash consideration for shares.

The valuer's report required by the provisions which restrict a public company¹ from allotting² shares³ as fully or partly paid up⁴ otherwise than in cash⁵ without a valuation⁶ must state⁷:

- 2036 (1) the nominal value of the shares to be wholly or partly paid for by the consideration in question⁸;
- 2037 (2) the amount of any premium payable on the shares⁹;

2038 (3) the description of the consideration and, as respects so much of the consideration as he himself has valued, a description of that part of the consideration, the method used to value it and the date of the valuation¹⁰;

2039 (4) the extent to which the nominal value of the shares and any premium are to be treated as paid up by the consideration and in cash¹¹.

The valuer's report must contain or be accompanied by a note by him¹²:

- 2040 (a) in the case of a valuation made by a person other than himself, that it appeared to himself reasonable to arrange for it to be so made or to accept a valuation so made¹³;
- 2041 (b) whoever made the valuation, that the method of valuation was reasonable in all the circumstances¹⁴;
- 2042 (c) that it appears to the valuer that there has been no material change in the value of the consideration in question since the valuation¹⁵; and
- 2043 (d) that, on the basis of the valuation, the value of the consideration, together with any cash by which the nominal value of the shares or any premium payable on them is to be paid up, is not less than so much of the aggregate of the nominal value and the whole of any such premium as is treated as paid up by the consideration and any such cash¹⁶.

Where the consideration to be valued is accepted partly in payment up of the nominal value of the shares and any premium and partly for some other consideration given by the company, the valuation provisions¹⁷ apply as if references to the consideration accepted by the company included the proportion of that consideration that is properly attributable to the payment up of that value and any premium¹⁸. In such a case, the valuer must carry out, or arrange for, such other valuations as will enable him to determine that proportion¹⁹, and his report must state what valuations have been made for this purpose²⁰ and also the reason for, and method and date of, any such valuation and any other matters which may be relevant to that determination²¹.

1 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'allotment' and related expressions see PARA 1091.

3 As to the meaning of 'share' see PARA 1042.

4 As to their nominal value or any premium on them: see the Companies Act 2006 s 593; and PARA 1120. As to the meaning of 'paid up' shares see PARA 1091; and as to the meaning of 'premium' see PARA 1146. As to the nominal value of shares see PARA 1044.

5 As to the meanings of 'cash' and consideration 'other than cash' in relation to the allotment or payment up of shares in a company see PARA 1091. As to the enforceability of an undertaking given by any person, in or in connection with payment for shares in a company, to do work or perform services or to do any other thing, see PARA 1120 note 7.

6 As to the valuer's report that is required by the Companies Act 2006 s 593 (see PARA 1120): see s 596(1); and PARA 1122. The provisions of ss 1150-1153 (see PARA 1122) apply to the valuation and report required by s 593: see ss 596(1), 1149; and PARA 1122.

7 Companies Act 2006 s 596(2). As to the power of the Secretary of State by regulations to modify Pt 17 Ch 6 (ss 593-609) (see also PARA 1120 et seq) see s 657; and PARA 1120 note 8. As to the Secretary of State see PARA 6.

8 Companies Act 2006 s 596(2)(a).

9 Companies Act 2006 s 596(2)(b).

10 Companies Act 2006 s 596(2)(c).

11 Companies Act 2006 s 596(2)(d).

- 12 Companies Act 2006 s 596(3).
- 13 Companies Act 2006 s 596(3)(a).
- 14 Companies Act 2006 s 596(3)(b).
- 15 Companies Act 2006 s 596(3)(c).
- 16 Companies Act 2006 s 596(3)(d).
- 17 Ie the Companies Act 2006 s 593 (see PARA 1120) and s 596(1)-(3) (see the text and notes 1-16): see s 596(4).
- 18 Companies Act 2006 s 596(4).
- 19 Companies Act 2006 s 596(5)(a).
- 20 Ie under the Companies Act 2006 s 596(5): see s 596(5)(a).
- 21 Companies Act 2006 s 596(5)(b).

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1124. Copy of valuer's report on non-cash consideration for shares to be delivered to registrar.

A company¹ to which a report is made² as to the value of any consideration for which, or partly for which, it proposes to allot³ shares⁴ must deliver a copy of the report to the registrar of companies⁵ for registration⁶ at the same time that the company files the return of the allotment of those shares⁷.

If default is made in complying with these requirements⁸, an offence is committed by every officer of the company who is in default⁹; and a person guilty of such an offence is liable (on conviction on indictment) to a fine¹⁰ or (on summary conviction) to a fine not exceeding the statutory maximum¹¹ and (for continued contravention) a daily default fine not exceeding one-tenth of the statutory maximum¹². However, in the case of default in delivering to the registrar any document that is so required¹³, any person liable for the default may apply to the court¹⁴ for relief¹⁵; and the court, if satisfied that the omission to deliver the document was accidental or due to inadvertence¹⁶, or if satisfied that it is just and equitable to grant relief¹⁷, may make an order extending the time for delivery of the document for such period as the court thinks proper¹⁸.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie under the Companies Act 2006 s 593 (see PARA 1120): see s 597(1).

3 As to the meaning of 'allotment' and related expressions see PARA 1091.

4 As to the meaning of 'share' see PARA 1042.

5 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

6 Companies Act 2006 s 597(1). As to the power of the Secretary of State by regulations to modify Pt 17 Ch 6 (ss 593-609) (see also PARAS 1120 et seq, 1125 et seq) see s 657; and PARA 1120 note 8. As to the Secretary of State see PARA 6.

7 Companies Act 2006 s 597(2). The text refers to the return of allotment under s 555 (see PARA 1108); see s 597(2).

8 le in complying with the Companies Act 2006 s 597(1) (see the text and notes 1-6) or with s 597(2) (see the text and note 7): see s 597(3).

9 Companies Act 2006 s 597(3). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

10 Companies Act 2006 s 597(4)(a).

11 As to the meaning of the 'statutory maximum' see PARA 1622.

12 Companies Act 2006 s 597(4)(b).

13 le as required by the Companies Act 2006 s 597 (see the text and notes 1-7): see s 597(5).

14 As to the meaning of 'court' see PARA 212 note 1.

15 Companies Act 2006 s 597(5).

16 Companies Act 2006 s 597(6)(a).

17 Companies Act 2006 s 597(6)(b).

18 Companies Act 2006 s 597(6). As to the court's power to extend time to make a return of allotment see s 557(3)(b); and PARA 1110.

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(b) Transfer of Non-Cash Asset in Initial Period

1125. Transfer to public company of non-cash asset in initial period.

A public company¹ formed as such must not enter into an agreement²:

2044 (1) with a person who is a subscriber to the company's memorandum³;

2045 (2) for the transfer by him to the company, or another, before the end of the company's initial period⁴ of one or more non-cash assets⁵;

2046 (3) under which the consideration for the transfer to be given by the company is at the time of the agreement equal in value to one-tenth or more of the company's issued share capital⁶,

unless the following conditions have been complied with⁷, namely:

- 2047 (a) the consideration to be received by the company⁸, and any consideration other than cash to be given by the company, must have been independently valued⁹;
- 2048 (b) the valuer's report must have been made to the company during the six months immediately preceding the date of the agreement¹⁰;
- 2049 (c) a copy of the report must have been sent to the other party to the proposed agreement¹¹ not later than the date on which copies have to be circulated to members¹²;
- 2050 (d) the terms of the agreement must have been approved by an ordinary resolution¹³ of the company¹⁴;
- 2051 (e) copies of the valuer's report must have been circulated to the members entitled to notice of the meeting at which the resolution is proposed¹⁵, not later than the date on which notice of the meeting is given¹⁶;
- 2052 (f) a copy of the proposed resolution must have been sent to the other party to the proposed agreement¹⁷.

These requirements¹⁸ apply also in relation to a company re-registered as a public company¹⁹ but in that case the reference²⁰ to a person who is a subscriber to the company's memorandum must be read as a reference to a person who is a member of the company on the date of re-registration²¹; and the reference²² to the date of the company being issued with a trading certificate²³ must be read as a reference to the date of re-registration²⁴.

These restrictions²⁵, however, do not apply in the case of the following agreements²⁶, namely:

- 2053 (i) where it is part of the company's ordinary business to acquire, or arrange for other persons to acquire, assets of a particular description²⁷, and the agreement is entered into by the company in the ordinary course of that business²⁸;
- 2054 (ii) an agreement entered into by the company under the supervision of the court²⁹, or of an officer authorised by the court for the purpose³⁰.

If a public company enters into an agreement in contravention of these restrictions³¹, an offence is committed by the company, and by every officer of the company who is in default³². A person who is guilty of such an offence is liable (on conviction on indictment) to a fine or (on summary conviction) to a fine not exceeding the statutory maximum³³.

1 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 598(1). As to the kinds of agreement to which the provisions of s 598 do not apply see heads (i) to (ii) in the text. As to the enforceability of an undertaking given by any person, in or in connection with payment for shares in a company, to do work or perform services or to do any other thing, see PARA 1120 note 7. As to the power of the Secretary of State by regulations to modify Pt 17 Ch 6 (ss 593-609) (see also PARAS 1120 et seq, 1127 et seq) see s 657; and PARA 1120 note 8. As to regulations so made (in relation to s 601) see the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941; and see note 16. As to the Secretary of State see PARA 6.

3 Companies Act 2006 s 598(1)(a). See also the text and notes 18-24. As to the meaning of 'memorandum of association' see PARA 104. As to subscribers of the memorandum see PARA 104.

4 For these purposes, the company's 'initial period' means the period of two years beginning with the date of the company being issued with a trading certificate under the Companies Act 2006 s 761 (see PARA 74): s 598(2). See also the text and notes 18-24.

5 Companies Act 2006 s 598(1)(b). As to the meanings of 'cash' and 'non-cash asset' for the purposes of the Companies Acts see PARA 564 note 6. A reference to the transfer or acquisition of a non-cash asset includes the creation or extinction of an estate or interest in, or a right over, any property, and the discharge of a liability of any person, other than a liability for a liquidated sum: s 1163(2). As to payments in cash see PARA 1109. See *Micro Leisure Ltd v County Properties and Developments Ltd (No 1)* 1999 SLT 1307, Ct of Sess (where the

meaning of the acquisition of a non-cash asset was considered in the context of a substantial property transaction in possible breach of what was then the Companies Act 1985 s 320 (see now the Companies Act 2006 s 190; and PARA 564)).

6 Companies Act 2006 s 598(1)(c). As to the meaning of references to 'issued share capital' in the Companies Acts see PARA 1045. As to the meanings of 'share' and 'share capital' see PARA 1042.

7 See the Companies Act 2006 s 598(1). The conditions referred to in the text are those specified in s 599 (requirement of independent valuation) (see heads (a) to (c) in the text), and s 601 (requirement of approval by members) (see heads (d) to (f) in the text): s 598(3).

8 The reference in the Companies Act 2006 s 599(1)(a) to the consideration to be received by the company is to the asset to be transferred to it or, as the case may be, to the advantage to the company of the asset's transfer to another person: s 599(2). Any reference in s 599 or in s 600 (see PARA 1127) to consideration given for the transfer of an asset includes consideration given partly for its transfer: s 600(4). In such a case, the value of any consideration partly so given is to be taken as the proportion of the consideration properly attributable to its transfer, the valuer must carry out, or arrange for, such valuations of anything else as will enable him to determine that proportion, and his report (see PARA 1127) must state what valuations have been made for that purpose and also the reason for, and method and date of, any such valuation and any other matters which may be relevant to that determination: s 600(5).

9 Companies Act 2006 s 599(1)(a). The text refers to consideration to be received by the company, and consideration other than cash to be given by the company, that is required to be independently valued in accordance with the provisions of Pt 17 Ch 6 (see also PARA 1120 et seq, 1126 et seq): see s 599(1)(a). The provisions of ss 1150-1153 (see PARA 1126) apply to the valuation and report required by s 599: s 1149. The provisions of s 599 do not affect, however, any requirement to value any consideration for purposes of s 593 (valuation of non-cash consideration for shares) (see PARA 1120): s 599(4).

10 Companies Act 2006 s 599(1)(b).

11 The reference in the Companies Act 2006 s 599(1)(c) to the other party to the proposed agreement is to the person referred to in s 598(1)(a) (see head (1) in the text): s 599(3). If he has received a copy of the report under s 601 (requirement of approval by members) (see heads (d) to (f) in the text) in his capacity as a member of the company, it is not necessary to send another copy under s 599: s 599(3). As to the meaning of 'member of the company' see PARA 321.

12 Companies Act 2006 s 599(1)(c). The text refers to the date on which copies have to be circulated to members under s 601(3) (repealed: see now the requirements set out in s 601(1)(b) (see head (e) in the text)): see s 599(1)(c). A copy of any report as to the value of a non-cash asset under s 593 (see PARA 1120) or s 599 is subject to the disclosure requirements in s 1078: see PARA 144.

13 As to the meaning of 'ordinary resolution' see PARA 613.

14 Companies Act 2006 s 601(1)(a).

15 See head (c) in the text. As to members entitled to notice of a meeting see PARA 632.

16 Companies Act 2006 s 601(1)(b) (substituted by SI 2009/1941).

17 Companies Act 2006 s 601(1)(c). The reference in s 601(1)(c) to the other party to the proposed agreement is to the person referred to in s 598(1)(a) (see head (1) in the text): s 601(2).

18 In the provisions of the Companies Act 2006 ss 598-602 (see the text and notes 1-17; and PARAS 1127, 1128): see s 603.

19 As to re-registration as a public company see PARA 168 et seq.

20 In the Companies Act 2006 s 598(1)(a) (see head (1) in the text): s 603(a).

21 Companies Act 2006 s 603(a).

22 In the Companies Act 2006 s 598(2) (see note 4): s 603(b).

23 In the Companies Act 2006 s 761 (see PARA 74): s 603(b).

24 Companies Act 2006 s 603(b).

25 In the provisions of the Companies Act 2006 s 598 (see the text and notes 1-7): see s 598(4).

- 26 Companies Act 2006 s 598(4).
- 27 Companies Act 2006 s 598(4)(a).
- 28 Companies Act 2006 s 598(4)(b).
- 29 As to the meaning of 'court' see PARA 212 note 1.
- 30 Companies Act 2006 s 598(5).
- 31 In contravention of the Companies Act 2006 s 598 (see the text and notes 1-7): see s 607(1).
- 32 Companies Act 2006 s 607(1), (2). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607. As to the liability of subsequent holders of shares see PARA 1118; and as to relief from liability that may be granted by the court see PARA 1119.
- 33 Companies Act 2006 s 607(3). As to the meaning of the 'statutory maximum' see PARA 1622.

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1126. Making of valuation and report on non-cash asset transferred in initial period.

The valuation of a non-cash asset¹ and the report required on it² when such an asset is transferred to a public company³ in its initial period⁴ must be made by a person (the 'valuer') who is eligible for appointment as a statutory auditor⁵ and who meets the independence requirement⁶.

However, where it appears to the valuer to be reasonable for the valuation of the consideration, or part of it, to be made by (or for him to accept a valuation made by) another person who: (1) appears to him to have the requisite knowledge and experience to value the consideration or that part of it⁷; and (2) is not an officer or employee⁸ of the company (or of any other body corporate⁹ that is that company's subsidiary¹⁰ or holding company¹¹ or a subsidiary of that company's holding company) or a partner of or employed by any such officer or employee¹², he may arrange for or accept such a valuation, together with a report which will enable him to make his own report¹³. Where the consideration or part of it is valued by a person other than the valuer himself, the latter's report must state that fact¹⁴, and must also state the former's name and what knowledge and experience he has to carry out the valuation¹⁵, and describe so much of the consideration as was valued by the other person, and the method used to value it, and specify the date of that valuation¹⁶.

A person carrying out a valuation or making a report with respect to any consideration proposed to be accepted or given by a company, is entitled to require from the officers of the company such information and explanation as he thinks necessary to enable him to carry out the valuation or make the report¹⁷, and to provide any note that is required¹⁸ where such a valuation is carried out by another person¹⁹. A person who knowingly or recklessly makes such a statement²⁰ that is misleading, false or deceptive in a material particular commits an offence²¹; and a person who is guilty of such an offence is liable (on conviction on indictment) to imprisonment for a term not exceeding two years or a fine (or both)²², and (on summary conviction) to imprisonment for a term not exceeding 12 months²³ or to a fine not exceeding the statutory maximum²⁴ (or both)²⁵.

- 1 As to the meaning of 'non-cash asset' for these purposes see PARA 564 note 6.
 - 2 le required by the Companies Act 2006 s 599 (see PARA 1125): see s 1150(1)(a). The provisions of ss 1150-1153 (see the text and notes 4-24) apply to the valuation and report required by s 599: ss 600(1), 1149.
 - 3 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.
 - 4 As to the meaning of a company's 'initial period' see PARA 1125 note 4.
 - 5 Companies Act 2006 s 1150(1)(a). As to a person's eligibility for appointment as a statutory auditor see s 1212 (see PARA 969): s 1150(1)(a).
 - 6 Companies Act 2006 s 1150(1)(b). The text refers to the independence requirement in s 1151: s 1150(1)(b). Accordingly, a person meets the independence requirement for the purposes of s 1150 only if:
 - 531 (1) he is not an officer or employee of the company, or a partner or employee of such a person, or a partnership of which such a person is a partner (s 1151(1)(a));
 - 532 (2) he is not an officer or employee of an associated undertaking of the company, or a partner or employee of such a person, or a partnership of which such a person is a partner (s 1151(1)(b)); and
 - 533 (3) there does not exist between the person or an associate of his, and the company or an associated undertaking of the company, a connection of any such description as may be specified by regulations made by the Secretary of State (s 1151(1)(c)).
- An auditor of the company is not regarded as an officer or employee of the company for this purpose: s 1151(2). Regulations under s 1151 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 1151(4), 1289. As to the Secretary of State see PARA 6. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. At the date at which this volume states the law, no such regulations had been made under s 1151. As to the meanings of 'associate' and 'associated undertaking' for these purposes see PARA 1122 note 8. As to the meaning of 'officer' under the Companies Acts generally see PARA 607. As to company auditors see PARA 905 et seq. As to the meaning of 'partnership' generally see **PARTNERSHIP** vol 79 (2008) PARA 1.
- 7 Companies Act 2006 s 1150(2)(a).
 - 8 The references in the Companies Act 2006 s 1150(2)(b) to an officer or employee do not include an auditor: s 1150(3).
 - 9 As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5.
 - 10 As to the meaning of 'subsidiary' in the Companies Acts see PARA 26.
 - 11 As to the meaning of 'holding company' see PARA 25.
 - 12 Companies Act 2006 s 1150(2)(b).
 - 13 Companies Act 2006 s 1150(2). The text refers to a report which will enable the valuer to make his own report under s 1150: s 1150(2).
 - 14 Companies Act 2006 s 1150(4).
 - 15 Companies Act 2006 s 1150(4)(a).
 - 16 Companies Act 2006 s 1150(4)(b).
 - 17 Companies Act 2006 s 1153(1)(a).
 - 18 le required by the Companies Act 2006 s 600(3) (see PARA 1127): see s 1153(1)(b).
 - 19 Companies Act 2006 s 1153(1)(b).
 - 20 le a statement made (whether orally or in writing) to a person carrying out a valuation or making a report, and conveying or purporting to convey any information or explanation which that person requires, or is entitled to require, under the Companies Act 2006 s 1153(1) (see the text and notes 17-19): s 1153(3).

21 Companies Act 2006 s 1153(2).

22 Companies Act 2006 s 1153(4)(a).

23 In relation to an offence committed after the commencement of the Companies Act 2006 s 1131 (summary proceedings) (see PARA 1625), but before a day is appointed in relation to the commencement of the Criminal Justice Act 2003 s 154(1) (general limit on magistrates' courts' power to impose imprisonment), the reference in the Companies Act 2006 s 1153(4)(b) to '12 months' must be read as a reference to 'six months': see ss 1153(4)(b), 1131, 1133; and see PARA 1625.

24 As to the meaning of 'statutory maximum' see PARA 1622.

25 Companies Act 2006 s 1153(4)(b).

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1127. Contents of valuer's report regarding transfer of non-cash asset.

The valuer's report that is required¹ on the valuation of a non-cash asset² when such an asset is transferred to a public company³ in its initial period⁴ must state⁵:

- 2055 (1) the consideration to be received by the company, describing the asset in question (specifying the amount to be received in cash) and the consideration to be given by the company (specifying the amount to be given in cash)⁶; and
- 2056 (2) the method and date of valuation⁷.

The valuer's report must contain or be accompanied by a note by him⁸:

- 2057 (a) in the case of a valuation made by a person other than himself, that it appeared to himself reasonable to arrange for it to be so made or to accept a valuation so made⁹;
- 2058 (b) whoever made the valuation, that the method of valuation was reasonable in all the circumstances¹⁰;
- 2059 (c) that it appears to the valuer that there has been no material change in the value of the consideration in question since the valuation¹¹; and
- 2060 (d) that, on the basis of the valuation, the value of the consideration to be received by the company is not less than the value of the consideration to be given by it¹².

¹ ie the valuer's report that is required by the Companies Act 2006 s 599 (see PARA 1125); see s 600(1); and PARA 1126.

² As to the meaning of 'non-cash asset' for these purposes see PARA 564 note 6. As to the meaning of 'cash' see PARA 564 note 6. The provisions of the Companies Act 2006 ss 1150-1153 (see PARA 1126) apply to the valuation and report required by s 599: see ss 600(1), 1149; and PARA 1126. As to the enforceability of an undertaking given by any person, in or in connection with payment for shares in a company, to do work or perform services or to do any other thing, see PARA 1120 note 7.

³ As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the application of the

Companies Act 2006 ss 598-602 (see also PARAS 1125, 1128) in relation to a company re-registered as a public company see PARA 1125. As to re-registration as a public company see PARA 168 et seq.

4 As to the meaning of a company's 'initial period' see PARA 1125 note 4.

5 Companies Act 2006 s 600(2). As to the power of the Secretary of State by regulations to modify Pt 17 Ch 6 (ss 593-609) (see also PARAS 1120 et seq, 1128 et seq) see s 657; and PARA 1120 note 8. As to the Secretary of State see PARA 6.

6 Companies Act 2006 s 600(2)(a).

7 Companies Act 2006 s 600(2)(b). Any reference in s 599 (see PARA 1125) or in s 600 to consideration given for the transfer of an asset includes consideration given partly for its transfer: s 600(4). In such a case, the value of any consideration partly so given is to be taken as the proportion of the consideration properly attributable to its transfer, the valuer must carry out, or arrange for, such valuations of anything else as will enable him to determine that proportion, and his report must state what valuations have been made for that purpose and also the reason for, and method and date of, any such valuation and any other matters which may be relevant to that determination: s 600(5).

8 Companies Act 2006 s 600(3).

9 Companies Act 2006 s 600(3)(a).

10 Companies Act 2006 s 600(3)(b).

11 Companies Act 2006 s 600(3)(c).

12 Companies Act 2006 s 600(3)(d).

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1128. Copy of resolution approving transfer of non-cash asset to be delivered to registrar.

A company¹ that has passed a resolution² with respect to the transfer of a non-cash asset³ must, within 15 days of doing so, deliver to the registrar of companies⁴ a copy of the resolution together with the valuer's report that is also required⁵.

If a company fails to comply with these requirements⁶, an offence is committed by the company and by every officer of the company who is in default⁷; and any person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale⁸ and (for continued contravention) to a daily default fine⁹ not exceeding one-tenth of level 3 on the standard scale¹⁰.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the application of the Companies Act 2006 ss 598-602 (see also PARAS 1125, 1127) in relation to a company re-registered as a public company see PARA 1125. As to re-registration as a public company see PARA 168 et seq.

2 Ie an ordinary resolution under the Companies Act 2006 s 601 (see PARA 1125): see s 602(1). As to the meaning of 'ordinary resolution' see PARA 613.

3 As to the meaning of 'non-cash asset' for these purposes see PARA 564 note 6. As to the enforceability of an undertaking given by any person, in or in connection with payment for shares in a company, to do work or perform services or to do any other thing, see PARA 1120 note 7.

4 As to the meaning of 'registrar of companies' see PARA 131 note 2.

5 Companies Act 2006 s 602(1). The text refers to the valuer's report that is required by s 601 (see PARA 1125); see s 602(1). As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to the power of the Secretary of State by regulations to modify Pt 17 Ch 6 (ss 593-609) (see also PARAS 1120 et seq, 1129 et seq) see s 657; and PARA 1120 note 8. As to the Secretary of State see PARA 6.

6 He fails to comply with the Companies Act 2006 s 602(1) (see the text and notes 1-5); see s 602(2).

7 Companies Act 2006 s 602(2). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

8 As to the meaning of the 'standard scale' see PARA 1622.

9 As to the meaning of 'daily default fine' see PARA 1622.

10 Companies Act 2006 s 602(3).

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1129. Effect of agreements contravening requirements on transfer of non-cash assets.

Where a public company¹ enters into an agreement in contravention of the restriction on agreements for the transfer of non-cash assets² in its initial period³, and either: (1) the other party to the agreement has not received the valuer's report required⁴ to be sent to him⁵; or (2) there has been some other contravention of the statutory requirements relating to non-cash consideration⁶ that the other party to the agreement knew or ought to have known amounted to a contravention⁷, the company is then entitled to recover from that person any consideration given by it under the agreement, or an amount equal to the value of the consideration at the time of the agreement⁸; and the agreement, so far as not carried out, is void⁹.

If, however, the agreement is or includes an agreement for the allotment¹⁰ of shares¹¹ in the company¹², then: (a) whether or not the agreement also contravenes the statutory provisions that require a non-cash consideration for shares to be valued before allotment takes place¹³, these provisions for recovery of the consideration given by the company¹⁴ do not apply to it in so far as it is for the allotment of shares¹⁵; and (b) the allottee is liable to pay the company an amount equal to the aggregate of the nominal value¹⁶ of the shares and the whole of any premium¹⁷ (or, if the case so requires, so much of that aggregate as is treated as paid up¹⁸ by the consideration), with interest at the appropriate rate¹⁹.

1 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'non-cash asset' for these purposes see PARA 564 note 6. As to the enforceability of an undertaking given by any person, in or in connection with payment for shares in a company, to do work or perform services or to do any other thing, see PARA 1120 note 7.

3 He is in contravention of the Companies Act 2006 s 598 (see PARA 1125); see s 604(1). As to the meaning of a company's 'initial period' for these purposes see PARA 1125 note 4.

- 4 le under the Companies Act 2006 s 599 (see PARA 1125).
- 5 Companies Act 2006 s 604(1)(a).
- 6 le contravention of the requirements of the Companies Act 2006 Pt 17 Ch 6 (ss 593-609) (see also PARAS 1120 et seq, 1130 et seq): see s 604(1)(b).
- 7 Companies Act 2006 s 604(1)(b).
- 8 Companies Act 2006 s 604(2)(a).
- 9 Companies Act 2006 s 604(2)(b). As to recovery in these circumstances see PARA 1119.
- 10 As to the meaning of 'allotment' and related expressions see PARA 1091.
- 11 As to the meaning of 'share' see PARA 1042.
- 12 Companies Act 2006 s 604(3).
- 13 le the Companies Act 2006 s 593 (see PARA 1120): see s 604(3)(a).
- 14 le the Companies Act 2006 s 604 (see PARA 1129): see s 604(3)(a).
- 15 Companies Act 2006 s 604(3)(a).
- 16 As to the nominal value of shares see PARA 1044.
- 17 As to the meaning of 'premium' see PARA 1146.
- 18 As to the meaning of 'paid up' shares see PARA 1091.
- 19 Companies Act 2006 s 604(3)(b). As to the meaning of 'appropriate rate' for the purposes of Pt 17 Ch 6 see PARA 1120 note 18. As to the liability of subsequent holders of shares see PARA 1118; and as to relief from liability that may be granted by the court see PARA 1119.

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(c) Liability for Contravention

1130. Liability of subsequent holders of shares.

If a person becomes a holder of shares¹ in respect of which: (1) there has been a contravention of any of the statutory provisions² that require non-cash consideration³ for shares to be valued independently before allotment takes place⁴; and (2) by virtue of that contravention, another is liable to pay any amount under the provision contravened⁵, that person is also liable to pay that amount (jointly and severally with any other person so liable) unless he is exempted from liability because he falls within head (i) or head (ii) below⁶.

If a company enters into an agreement in contravention of the restriction on agreements for the transfer of non-cash assets⁷ to a company in its initial period⁸, and: (a) the agreement is or includes an agreement for the allotment of shares in the company⁹; (b) a person becomes a holder of shares allotted under the agreement¹⁰; and (c) by virtue of the agreement and allotment under it, another person is liable¹¹ to pay an amount under the provisions that allow for recovery of the consideration given by the company¹², the person who becomes the holder

of the shares is also liable to pay that amount (jointly and severally with any other person so liable), unless he is exempted from liability because he falls within head (i) or head (ii) below¹³.

However, a person who is otherwise liable in this way¹⁴ is exempted from that liability if either¹⁵: (i) he is a purchaser for value and, at the time of the purchase, he did not have actual notice of the contravention concerned¹⁶; or (ii) he derived title to the shares (directly or indirectly) from a person who became a holder of them after the contravention and was not so liable¹⁷.

1 For these purposes, references to a holder, in relation to shares in a company, include any person who has an unconditional right either to be included in the company's register of members in respect of those shares or to have an instrument of transfer of the shares executed in his favour: Companies Act 2006 s 605(4). As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meaning of 'share' see PARA 1042. As to the register of members see PARA 335. See *System Control plc v Munro Corporate plc* [1990] BCLC 659 (a person in whose favour renounceable letters of allotment had been renounced had an unconditional right to be included in the company's register for these purposes).

2 Ie a contravention of the Companies Act 2006 s 593 (see PARA 1120): see s 605(1)(a).

3 As to the meanings of 'cash' and consideration 'other than cash' in relation to the allotment or payment up of shares in a company see PARA 1091. As to the meaning of 'allotment' and related expressions see PARA 1091. As to the enforceability of an undertaking given by any person, in or in connection with payment for shares in a company, to do work or perform services or to do any other thing, see PARA 1120 note 7.

4 Companies Act 2006 s 605(1)(a). As to the power of the Secretary of State by regulations to modify Pt 17 Ch 6 (ss 593-609) (see also PARAS 1120 et seq, 1131): see s 657; and PARA 1120 note 8. As to the Secretary of State see PARA 6.

5 Companies Act 2006 s 605(1)(b).

6 Companies Act 2006 s 605(1). As to the court's power to grant relief see PARA 1119.

7 As to the meaning of 'non-cash asset' for these purposes see PARA 564 note 6. See also note 3.

8 Ie in contravention of the Companies Act 2006 s 598 (see PARA 1125): see s 605(2). As to the meaning of a company's 'initial period' for these purposes see PARA 1125 note 4.

9 Companies Act 2006 s 605(2)(a).

10 Companies Act 2006 s 605(2)(b).

11 Ie under the Companies Act 2006 s 604 (see PARA 1129): see s 605(2)(c).

12 Companies Act 2006 s 605(2)(c).

13 Companies Act 2006 s 605(2). This applies whether or not the agreement also contravenes s 593 (see PARA 1120): see s 605(2). See also the text and notes 1-6.

14 Ie under the Companies Act 2006 s 605(1) (see the text and notes 1-6) or under s 605(2) (see the text and notes 7-13): see s 605(3).

15 Companies Act 2006 s 605(3).

16 Companies Act 2006 s 605(3)(a). See *System Control plc v Munro Corporate plc* [1990] BCLC 659 (parties could not rely on this where it was clear that they had notice of the facts; it was not also necessary to show that the parties were aware of the terms of the statutory provision).

17 Companies Act 2006 s 605(3)(b). Head (ii) in the text refers to a holder of shares after the contravention who was not liable under s 605(1) (see the text and notes 1-6) or under s 605(2) (see the text and notes 7-13): see s 605(3)(b).

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1131. Relief in respect of certain liabilities.

A person who is liable to a company¹: (1) under any of the provisions that require non-cash consideration for shares², or non-cash assets³ which are transferred in the initial period⁴, to be independently valued⁵, in relation to payment in respect of shares in the company⁶; or (2) by virtue of an undertaking given to it in, or in connection with, payment for any shares in the company⁷, may apply to the court⁸ to be exempted in whole or in part from the liability⁹.

If a liability arises under head (1) above, the court may exempt the applicant from the liability only if and to the extent that it appears to the court just and equitable to do so having regard to¹⁰:

- 2061 (a) whether the applicant has paid, or is liable to pay, any amount in respect of any other liability arising in relation to those shares under any of the provisions which govern payment for shares¹¹ or the valuation of non-cash assets¹² (where these apply), or in respect of any liability arising by virtue of any undertaking given in or in connection with payment for those shares¹³;
- 2062 (b) whether any person other than the applicant has paid or is likely to pay (whether in pursuance of an order of the court or otherwise) any such amount¹⁴; and
- 2063 (c) whether the applicant or any other person has performed, in whole or in part, or is likely so to perform any such undertaking, or has done or is likely to do any other thing in payment or part payment for the shares¹⁵.

Where a liability arises under head (2) above, the court may exempt the applicant from the liability only if and to the extent that it appears to the court just and equitable to do so having regard to¹⁶ whether the applicant has paid or is liable to pay any amount in respect of liability arising¹⁷ in relation to the shares¹⁸, and whether any person other than the applicant has paid or is likely to pay (whether in pursuance of an order of the court or otherwise) any such amount¹⁹. In determining whether it should exempt the applicant in whole or in part from any liability, the court must have regard to the following overriding principles²⁰, namely:

- 2064 (i) a company that has allotted shares should receive money or money's worth at least equal in value to the aggregate of the nominal value of those shares²¹ and the whole of any premium²² or, if the case so requires, so much of that aggregate as is treated as paid up²³; and
- 2065 (ii) subject to that, where such a company would, if the court did not grant the exemption, have more than one remedy against a particular person, it should be for the company to decide which remedy it should remain entitled to pursue²⁴.

If a person brings proceedings against another (the contributor²⁵) for a contribution in respect of liability to a company so arising²⁵, and it appears to the court that the contributor is liable to make such a contribution, the court may, if and to the extent that it appears to it just and equitable to do so having regard to the respective culpability (in respect of the liability to the company) of the contributor and the person bringing the proceedings²⁶, either exempt the contributor in whole or in part from his liability to make such a contribution²⁷, or order the contributor to make a larger contribution than he would otherwise²⁸ be liable to make²⁹.

Where a person is liable to a company³⁰ to pay an amount under the provisions that allow for recovery of consideration given by the company, the court may, on application, exempt him in

whole or in part from that liability if and to the extent that it appears to the court to be just and equitable to do so having regard to any benefit accruing to the company by virtue of anything done by him towards the carrying out of the agreement in question³¹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meanings of 'cash' and consideration 'other than cash' in relation to the allotment or payment up of shares in a company see PARA 1091. As to the meaning of 'share' see PARA 1042. As to the meaning of 'allotment' and related expressions see PARA 1091.

3 As to the meaning of 'non-cash asset' for these purposes see PARA 1125 note 5.

4 As to the meaning of 'initial period' for these purposes see PARA 1125 note 4.

5 I.e. a person who is liable to a company under any provision of the Companies Act 2006 Pt 17 Ch 6 (ss 593-609) (see PARA 1120 et seq): see s 606(1)(a). As to the power of the Secretary of State by regulations to modify Pt 17 Ch 6: see s 657; and PARA 1120 note 8. As to the Secretary of State see PARA 6.

6 Companies Act 2006 s 606(1)(a).

7 Companies Act 2006 s 606(1)(b). As to the enforceability of an undertaking given by any person, in or in connection with payment for shares in a company, to do work or perform services or to do any other thing, which is without prejudice to s 606, see PARA 1120 note 7.

8 As to the meaning of 'court' see PARA 212 note 1. As to the procedure that applies to applications under companies legislation generally see PARA 305.

9 Companies Act 2006 s 606(1). The burden is on the person applying for relief to satisfy the court that a case for relief exists: *Re Bradford Investments plc (No 2)* [1991] BCLC 688. Quaere whether relief is available if in fact there is no subsisting contract for the allotment of shares in the first place: see *System Control plc v Munro Corporate plc* [1990] BCLC 659.

10 Companies Act 2006 s 606(2). See also *Re Bradford Investments plc (No 2)* [1991] BCLC 688 at 693 (the matters specified were not intended to be an exhaustive statement of the matters to which the court should or may have regard). See also *Re Ossory Estates plc* [1988] BCLC 213.

11 I.e. the Companies Act 2006 Pt 17 Ch 5 (ss 580-592) (see PARA 1111 et seq): see s 606(2)(a).

12 I.e. the Companies Act 2006 Pt 17 Ch 6 (see PARA 1120 et seq): see s 606(2)(a).

13 Companies Act 2006 s 606(2)(a).

14 Companies Act 2006 s 606(2)(b).

15 Companies Act 2006 s 606(2)(c).

16 Companies Act 2006 s 606(3).

17 I.e. under either the Companies Act 2006 Pt 17 Ch 5 (see PARA 1111 et seq) or under Pt 17 Ch 6 (see PARA 1120 et seq): see s 606(3)(a).

18 Companies Act 2006 s 606(3)(a).

19 Companies Act 2006 s 606(3)(b).

20 Companies Act 2006 s 606(4). See *Re Bradford Investments plc (No 2)* [1991] BCLC 688 at 694, where Hoffmann J thought that the designation 'overriding principle' did not oblige the court to refuse relief unless the company had received at least the nominal value of the allotted shares and any premium because, had that been the intention, the requirement would have been framed as a rule.

21 As to the nominal value of shares see PARA 1044.

22 As to the meaning of 'premium' see PARA 1146.

23 Companies Act 2006 s 606(4)(a). See *Re Ossory Estates plc* [1988] BCLC 213 (relief granted where the company had undoubtedly received at least money or money's worth equal in value, and probably exceeding in value, the aggregate of the nominal value of the shares and any premium). Cf *System Control plc v Munro Corporate plc* [1990] BCLC 659 (no prospect of relief being granted when absolutely no evidence that the company had received the minimum amount); *Re Bradford Investments plc (No 2)* [1991] BCLC 688 (applicants failed to discharge the burden of showing that the company had received value for its shares).

24 Companies Act 2006 s 606(4)(b).

25 Ie under any provision of either the Companies Act 2006 Pt 17 Ch 5 (see also PARA 1111 et seq) or Pt 17 Ch 6 (see PARA 1120 et seq): see s 606(5).

26 Companies Act 2006 s 606(5).

27 Companies Act 2006 s 606(5)(a).

28 Ie but for the Companies Act 2006 s 606(5): see s 606(5)(b).

29 Companies Act 2006 s 606(5)(b).

30 Ie under the Companies Act 2006 s 604(2) (see PARA 1129): see s 606(6).

31 Companies Act 2006 s 606(6). The text refers to the agreement in question that is mentioned in s 604(2) (see PARA 1129): see s 606(6).

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F. COMPANY'S CALL ON SHARES NOT FULLY PAID-UP

1132. Meaning of 'call'.

A call is a demand for payment of the amount or part of the amount which has not been paid or satisfied on a share¹, made by the company through its governing body upon its members² prior to winding up, or by its liquidator when it is in course of winding up³. While the company is a going concern, or, in other words, prior to the time when its winding up commences⁴, the liability of a member to calls is defined by its articles of association⁵. Even though the prospectus of a company relating to the issue of certain shares states that it is not intended to call up more than a specified amount per share, the company may call up the balance⁶.

1 As to shares generally see PARA 1042. As to when shares in a company are deemed paid up see PARA 1091; and as to the means of payment generally see PARA 1113 et seq.

2 As to who qualifies as a member of a company see PARA 321.

3 As to calls in a winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 733 et seq. Only calls prior to winding up are dealt with in this title. As to calls after winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1004. A demand for payment of a sum due under terms of allotment is not a call: *Croskey v Bank of Wales* (1863) 4 Giff 314. As to the meaning of 'allotment' see PARA 1091.

4 As to the commencement of the winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 489.

5 As to a company's articles of association generally see PARA 228 et seq. As to the manner of making calls see PARA 1134. The company may, however, by special resolution alter the articles to give power to the directors to call up money unpaid on shares: *Accidental and Marine Insurance Corp'n v Davis* (1866) 15 LT 182; *Malleon v National Insurance and Guarantee Corp'n* [1894] 1 Ch 200. As to provision that is made for the

alteration of a company's articles see PARA 232 et seq. Under the model articles of association that are prescribed for the purposes of the Companies Act 2006 for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), no share is to be issued for less than the aggregate of its nominal value and any premium to be paid to the company in consideration for its issue (although this does not apply to shares taken on the formation of the company by the subscribers to the company's memorandum): see Sch 1 art 21; and PARA 1044.

6 *Alexander v Automatic Telephone Co* [1900] 2 Ch 56, CA; *Nicol's Case*, *Tufnell and Ponsonby's Case* (1885) 29 ChD 421, CA.

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1133. Provision for differences in payment of calls.

A company¹, if so authorised by its articles², may:

- 2066 (1) make arrangements on the issue of shares³ for a difference between the shareholders⁴ in the amounts and times of payment of calls⁵ on their shares⁶; and
- 2067 (2) accept from any member⁷ the whole or part of the amount remaining unpaid on any shares held by him, although no part of that amount has been called up⁸.

An exercise of the power under head (2) above will be valid even though it confers a collateral benefit on the directors⁹, but not if it is exercised solely for their benefit¹⁰. Capital¹¹ cannot be paid up in advance by setting off an existing debt¹².

To the extent to which money is paid in advance of calls, the shareholder is a creditor of the company¹³; but he is not an ordinary creditor, for he cannot demand repayment of the money so paid, and the company cannot repay it unless the articles so provide¹⁴.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of references to a company's 'articles' see PARA 228 note 2. In the absence of a provision in the articles, the directors' calls may not be made on some shareholders and not on others: *Galloway v Hallé Concerts Society* [1915] 2 Ch 233.

3 As to the meaning of 'share' see PARA 1042. As to the meaning of references to 'issue' in relation to shares see PARA 1045.

4 As to shareholders of a company generally see PARA 321 et seq.

5 As to the meaning of 'call' see PARA 1132.

6 See the Companies Act 2006 s 581(a); and PARA 1112. See also the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 55(3), which provides that, subject to the terms on which shares are allotted, the directors of a public company may, when issuing shares, provide that call notices sent to the holders of those shares may require them either to pay calls which are not the same, or to pay calls at different times (cited in PARA 1134 note 4). As to the exercise of a power to differentiate between shareholders in the making of calls see PARA 1136. As to the power of the Secretary of State by regulations to modify Pt 17 Ch 5 (ss 580-592) see s 657; and PARA 1091 note 7. As to the Secretary of State see PARA 6.

7 As to the meaning of 'member of a company' see PARA 321.

8 See the Companies Act 2006 s 581(b); and PARA 1112. See also *Hunter v Senate Support Services Ltd* [2004] EWHC 1085 (Ch), [2005] 1 BCLC 175. For the purposes of sanctioning a scheme of arrangement, shareholders with uncalled moneys paid in advance on their shares were held to be a separate class from fully paid shareholders: *Re United Provident Assurance Co Ltd* [1910] 2 Ch 477. As to the effect of such a payment in winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 836. As to paying interest out of capital on such terms see PARA 1049.

9 *Poole, Jackson and Whyte's Case* (1878) 9 ChD 322, CA (where a debt was paid off for which the directors were liable). Cf *Re South London Fish Market Co* (1888) 39 ChD 324, CA. As to a company's directors see PARA 478 et seq.

10 *Sykes' Case* (1872) LR 13 Eq 255 (where the money was used to pay the directors' fees). Cf *Re Washington Diamond Mining Co* [1893] 3 Ch 95, CA.

11 As to a company's capital generally see PARA 1045.

12 *Kent's Case* (1888) 39 ChD 259, CA. Cf *Ferrao's Case* (1874) 9 Ch App 355. See also *Re Liverpool and London Guarantee and Accident Insurance Co* (1882) 30 WR 378.

13 *Lock v Queensland Investment and Land Mortgage Co* [1896] 1 Ch 397 at 407, CA, per Kay LJ; affd [1896] AC 461, HL.

14 *Lock v Queensland Investment and Land Mortgage Co* [1896] 1 Ch 397 at 407, CA, per Kay LJ (affd [1896] AC 461, HL); *Scottish Queensland Mortgage Co Ltd, Petitioners* (1908) 46 SLR 22 (where the court sanctioned a reduction of capital which included a ratification of repayments by the company to the shareholders of calls paid in advance); *London and Northern Steamship Co Ltd v Farmer* (1914) 111 LT 204.

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1134. Manner of making calls.

Calls¹ made prior to winding up² are made, and payment of them is enforced, in pursuance of the power given by the company's articles of association³ and in the manner therein provided⁴. A power to make calls may be exercised only by a quorum of directors⁵ present at a meeting duly convened⁶, unless the articles otherwise provide⁷; but a call made at an adjourned meeting is not bad because notice of the adjourned meeting was not given to each director⁸.

A call made by a quorum may be bad if the total number of directors is less than the minimum number prescribed by the articles, but, if the direction as to the minimum number is not imperative, the call is good⁹; and a director who is one of the quorum may be estopped from denying the validity of the call¹⁰.

Where by the articles a call is to be made by the directors, it must be made by directors properly appointed, acting as a duly constituted meeting of the board¹¹; the power to make calls cannot be delegated except under an express power to delegate¹². If a call is invalid by reason of any defect in the constitution of the board meeting, it may be confirmed by a duly convened and constituted board¹³; all acts of directors are valid notwithstanding any defect that may afterwards be discovered in their appointments or qualifications¹⁴.

Any resolution must comply with the provisions of the articles and must in any case state the amount of the call and the time at which it is to be paid; otherwise the call will be invalid¹⁵.

1 As to the meaning of 'call' see PARA 1132.

2 As to the commencement of the winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 489.

3 As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

4 The Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3, provides that, subject to the articles and the terms on which shares are allotted, the directors may send a notice (a 'call notice') to a member requiring the member to pay the company a specified sum of money (a 'call') which is payable in respect of shares which that member holds at the date when the directors decide to send the call notice: art 54(1). A call notice:

534 (1) may not require a member to pay a call which exceeds the total sum unpaid on that member's shares (whether as to the share's nominal value or any amount payable to the company by way of premium) (art 54(2)(a));

535 (2) must state when and how any call to which it relates is to be paid (art 54(2)(b)); and

536 (3) may permit or require the call to be paid by instalments (art 54(2)(c)).

As to the notice of call see PARA 1137. As to the nominal value of shares see PARA 1044; and as to the meaning of 'premium' see PARA 1146. As to a company's directors see PARA 478 et seq.

A member must comply with the requirements of a call notice, but no member is obliged to pay any call before 14 days have passed since the notice was sent: art 54(3). Before the company has received any call due under a call notice, the directors may either revoke it wholly or in part, or specify a later time for payment than is specified in the notice, by a further notice in writing to the member in respect of whose shares the call is made: art 54(4). Liability to pay a call is not extinguished or transferred by transferring the shares in respect of which it is required to be paid: art 55(1). Joint holders of a share are jointly and severally liable to pay all calls in respect of that share: art 55(2). Subject to the terms on which shares are allotted, the directors may, when issuing shares, provide that call notices sent to the holders of those shares may require them either to pay calls which are not the same, or to pay calls at different times: art 55(3). A call notice need not be issued in respect of sums which are specified, in the terms on which a share is issued, as being payable to the company in respect of that share (whether in respect of nominal value or premium) on allotment, on the occurrence of a particular event, or on a date fixed by or in accordance with the terms of issue: art 56(1). But if the due date for payment of such a sum has passed and it has not been paid, the holder of the share concerned is treated in all respects as having failed to comply with a call notice in respect of that sum, and is liable to the same consequences as regards the payment of interest and forfeiture: art 56(2). As to forfeiture see PARAS 1141, 1213 et seq.

For companies still using the Companies (Tables A to F) Regulations 1985, SI 1985/805, the making of calls is regulated by Schedule, Table A arts 12-17, as follows:

537 (a) general power of directors to make calls (Table A art 12);

538 (b) when calls are deemed to be made (Table A art 13);

539 (c) liability of joint holders of a share (Table A art 14);

540 (d) interest due on any amount unpaid (Table A art 15);

541 (e) sums payable on allotment or at fixed date deemed to be calls (Table A art 16);

542 (f) differentiation in amounts and times of calls (Table A art 17).

Table A arts 12-17 are applied by Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and by Table E (an unlimited company having a share capital); but Table A arts 12-17 are disapplied by Table C art 1 in relation to companies limited by guarantee and not having a share capital. As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1045. Under an article in like terms to those of art 12, it has been held that two calls payable at different times may be made at one meeting: *Universal Corp'n Ltd v Hughes* 1909 SC 1434, Ct of Sess.

5 As to what constitutes a quorum of directors see PARA 529.

6 As to meetings of directors generally see PARA 528 et seq.

7 *Moore v Hammond* (1827) 6 B & C 456. The Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 (as to which see note 4), provides that decisions of the directors of a public company may be taken either at a directors' meeting, or in the form of a directors' written resolution: see Sch 3 art 7; and PARA 527 note 4.

8 *Wills v Murray* (1850) 4 Exch 843.

9 *Bottomley's Case* (1880) 16 ChD 681; *Re British Empire Match Co, ex p Ross* (1888) 59 LT 291; *Faure Electric Accumulator Co v Phillipart* (1888) 58 LT 525; *Thames-Haven Dock and Rly Co v Rose* (1842) 4 Man & G 552.

10 See *Faure Electric Accumulator Co v Phillipart* (1888) 58 LT 525.

11 *Howbeach Coal Co Ltd v Teague* (1860) 5 H & N 151 (and see *Re London and Southern Counties Freehold Land Co* (1885) 31 ChD 223); *Garden Gully United Quartz Mining Co v McLister* (1875) 1 App Cas 39, PC; *Tyne Mutual Steamship Insurance Association v Brown* (1896) 74 LT 283.

12 *Southampton Dock Co v Richards* (1840) 1 Man & G 448; *Howard's Case* (1866) 1 Ch App 561. The Companies (Model Articles) Regulations 2008, SI 2008/3229 (as to which see note 4), provide that, subject to the articles, the directors of a company limited by shares may delegate any of the powers which are conferred on them under the articles: see Sch 1 art 5, Sch 3 art 5; and PARA 537 note 4.

13 *Re Phosphate of Lime Co Ltd, Austin's Case* (1871) 24 LT 932.

14 See the Companies Act 2006 s 161 (cited in PARA 486), which does not cover a case where there has been a total absence of appointment or a fraudulent usurpation of authority (*Morris v Kanssen* [1946] AC 459, [1946] 1 All ER 586, HL).

15 *Johnson v Lyttle's Iron Agency* (1877) 5 ChD 687, CA; *Re Cawley & Co* (1889) 42 ChD 209, CA.

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1135. Conditions as to making calls.

Conditions precedent to the making of calls¹, such as those relating to time and amount², and all the requirements and formalities of the company's articles of association³, must be strictly complied with⁴. A call may be made, although only a part of the capital is subscribed⁵, unless by the regulations of the company⁶ the subscription of the whole of the capital is a condition precedent to the exercise of the powers of the directors⁷ generally or their power to make calls⁸.

1 As to the meaning of 'call' see PARA 1132. As to the manner of making calls see PARA 1134.

2 *Baillie v Edinburgh Oil Gas Light Co* (1835) 3 Cl & Fin 639, HL; *Stratford and Moreton Rly Co v Stratton* (1831) 2 B & Ad 518; *Welland Rly Co v Berrie* (1861) 6 H & N 416.

3 See eg the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 54 (call notices); and PARA 1134 note 4. As to a company's articles of association generally see PARA 228 et seq.

4 *Chubwa Tea Co of Assam v Barry* (1866) 15 LT 449.

5 As to the meaning of 'capital' see PARA 1042; and as to the meaning of 'subscribe' see PARA 1151 note 5.

6 *North Stafford Steel etc Co (Burslem) Ltd v Ward* (1868) LR 3 Exch 172.

7 As to a company's directors see PARA 478 et seq.

8 *Ornamental Pyrographic Woodwork Co v Brown* (1863) 2 H & C 63, overruling a dictum in *Howbeach Coal Co v Teague* (1860) 5 H & N 151. See also *Re Great Cambrian Mining and Quarrying Co, Hawkins' Case* (1856) 2 K & J 253; *Elder v New Zealand Land Improvement Co Ltd* (1874) 30 LT 285.

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1136. Discretion as to making calls.

The discretion which directors¹ possess as to making or abstaining from making calls² is not reviewed by the court in the absence of bad faith³. The power to make calls is fiduciary as regards the shareholders⁴, and, in making or abstaining from making calls, the directors must have regard to their duty to promote the success of the company, and their powers must be exercised fairly as between different shareholders, and not with a view to giving themselves an unfair advantage⁵. Unless the directors have power to do so, *prima facie* they are not entitled to make a call on some members and not on others of the same class⁶; and, even if they have that power of differentiating between members, there must be a sufficient reason for its exercise⁷. The directors are not, however, trustees for the company's creditors, either collectively or individually⁸.

1 As to a company's directors see PARA 478 et seq.

2 As to the meaning of 'call' see PARA 1132. As to the manner of making calls see PARA 1134.

3 *Odessa Tramways Co v Mendel* (1878) 8 ChD 235, CA; *Re Sankey Brook Coal Co* (1870) LR 9 Eq 721; *Re British Provident Life and Fire Assurance Society, Stanley's Case* (1864) 4 De GJ & Sm 407 at 415; *Tatham v Palace Restaurants Ltd* (1909) 53 Sol Jo 743. Cf *Bailey v Birkenhead, Lancashire and Cheshire Junction Rly Co* (1850) 12 Beav 433.

4 As to shareholders and membership of companies generally see PARA 321 et seq.

5 The Companies Act 2006, in specifying general duties that are owed by a director to the company (see PARA 532 et seq), provides that he must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, having regard (amongst other matters) to the need to act fairly as between members of the company: see s 172(1)(f); and PARA 544. See further *Gilbert's Case* (1870) 5 Ch App 559; *Alexander v Automatic Telephone Co* [1900] 2 Ch 56, CA; *Preston v Grand Collier Dock Co* (1840) 11 Sim 327.

6 As to the power to differentiate in making calls see PARA 1112.

7 *Galloway v Hallé Concerts Society* [1915] 2 Ch 233.

8 *Re Wincham Shipbuilding, Boiler and Salt Co, Poole, Jackson and Whyte's Case* (1878) 9 ChD 322 at 328, CA, per Jessel MR. Cf *Gaslight Improvement Co v Terrell* (1870) LR 10 Eq 168 at 175 per Lord Romilly MR. A director has an obligation, nevertheless, to have regard to creditors' interests: see PARA 545.

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1137. Notice of call.

The notice of call¹ must be served as directed by the articles of association²; and, if addressed to a member³ at his registered address⁴, as provided by the articles, it is good, notwithstanding his previous death, if the company has no notice of his death⁵. The call may be valid though the form of the notice is inaccurate⁶, provided that it is clear notice of the call⁷. The fact that no notice has been sent to other shareholders is immaterial⁸.

1 As to the meaning of 'call' see PARA 1132. As to the manner of making calls see PARA 1134.

2 See PARA 1134 note 4. As to a company's articles of association generally see PARA 228 et seq.

3 As to who qualifies as a member of a company see PARA 321.

4 As to the register of members see PARA 335 et seq.

5 *New Zealand Gold Extraction Co (Newbery-Vautin Process) v Peacock* [1894] 1 QB 622, CA.

6 *Shackleford, Ford & Co v Dangerfield* (1868) LR 3 CP 407 (where a company in course of changing its name used the new name).

7 *Chubwa Tea Co of Assam Ltd v Barry* (1866) 15 LT 449.

8 *Newry and Enniskillen Rly Co v Edmunds* (1848) 2 Exch 118. As to shareholders and membership of companies generally see PARA 321 et seq.

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1138. Calls on directors' shares.

A director¹ may, before a call is made², transfer his shares³ to escape liability⁴, and directors may pay the amount uncalled on their shares, and apply it in payment of a debt of the company in the ordinary course of business, even if the effect is to relieve them of their liability as guarantors of such debt⁵.

1 As to a company's directors see PARA 478 et seq.

2 As to the manner of making calls see PARA 1134. As to the meaning of 'call' see PARA 1132.

3 As to the transfer of shares see PARA 389 et seq. As to shares generally see PARA 1042.

4 *Re Cawley & Co* (1889) 42 ChD 209, CA.

5 *Poole, Jackson and Whyte's Case* (1878) 9 ChD 322, CA. As to payments in advance of calls on shares see PARA 1049. See also *Re Exchange Banking Co, Ramwell's Case* (1881) 50 LJ Ch 827. Applying the advance in payment of the directors' fees may be a preference: see *Re Washington Diamond Mining Co* [1893] 3 Ch 95, CA.

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1139. Set-off against calls.

A set-off purported to be made by a director¹ within six months of a winding-up petition² and with knowledge that the company is in a precarious condition, is a preference³. A debt presently due and owing by the company to a shareholder⁴, but not one which is payable only at a future date, may be set off against a sum due from him upon calls⁵ while the company is a going concern⁶. An agreement to set off a present liability of the company against future calls is also good⁷. A call once made may be discharged by accord and satisfaction provided the consideration is not illusory⁸; but in general a company cannot contract that payment of future calls are to be accepted in goods or other money's worth⁹.

1 As to a company's directors see PARA 478 et seq.

2 As to the commencement of the winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 489.

3 *Re Washington Diamond Mining Co* [1893] 3 Ch 95, CA. See the Insolvency Act 1986 ss 239, 240(1)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 846, 850. A director who, before winding up, gives a promissory note to secure a debt of the company cannot, after winding up, set off the amount against a call made before the winding up: *Re Norwich Equitable Fire Assurance Co, Brasnett's Case* (1884) 32 WR 1010; affd (1885) 53 LT 569, CA.

4 As to shareholders and membership of companies generally see PARA 321 et seq.

5 As to the meaning of 'call' see PARA 1132. As to the manner of making calls see PARA 1134.

6 *Habershon's Case* (1868) LR 5 Eq 286; *Holden's Case* (1869) LR 8 Eq 444; *Adamson's Case* (1874) LR 18 Eq 670. See also *Re Norwich Equitable Fire Assurance Co, Brasnets's Case* (1885) 53 LT 569, CA. Cf *Sykes' Case* (1872) LR 13 Eq 255; *Christie v Taunton, Delmard, Lane & Co, Re Taunton, Delmard, Lane & Co* [1893] 2 Ch 175 (calls set off against debenture debt); *Re County Marine Insurance Co, Rance's Case* (1870) 6 Ch App 104 at 116 per James LJ. As to set-off against calls in a winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 738.

7 *Re Jones, Lloyd & Co Ltd* (1889) 41 ChD 159.

8 *Re White Star Line Ltd* [1938] Ch 458, [1938] 1 All ER 607; *Re Wragg Ltd* [1897] 1 Ch 796.

9 *Black & Co's Case* (1872) 8 Ch App 254; *Pellatt's Case* (1867) 2 Ch App 527; *Elkington's Case* (1867) 2 Ch App 511; *Re London and Colonial Co, ex p Clark* (1869) LR 7 Eq 550. See also *Gardner v Iredale* [1912] 1 Ch 700 (where the principles laid down in *Pellatt's Case* were held not to be applicable to the case).

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1140. Interest on calls.

A company's articles of association¹ may provide for payment of interest on calls² in arrear³. Even in the absence of any provision for interest, after notice to pay on a fixed day has been given, interest may be claimed from the date fixed until payment⁴. Interest on calls in arrear may be recovered after forfeiture for non-payment of the calls⁵.

1 As to a company's articles of association generally see PARA 228 et seq.

2 As to the meaning of 'call' see PARA 1132.

3 See eg the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 art 57(1)(b) (until the call is paid, the person liable must pay the company interest on the call from the call payment date at the relevant rate); and see PARA 1213. Such provisions do not apply to calls made in a winding up: *Re Welsh Flannel and Tweed Co* (1875) LR 20 Eq 360.

4 *Re Overend, Gurney & Co, ex p Lintott* (1867) LR 4 Eq 184; *Barrow's Case* (1868) 3 Ch App 784; *Stocken's Case* (1868) 3 Ch App 412. The rate then allowed was 5% per annum. As to the payment of interest generally, in the absence of a special provision, and the power of the court to award interest in proceedings for the recovery of a debt see the Senior Courts Act 1981 s 35A; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1303 et seq.

5 *Faure Electric Accumulator Co Ltd v Phillipart* (1888) 58 LT 525. As to forfeiture see PARAS 1141, 1213 et seq.

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1141. Calls on transferred or forfeited shares.

Where shares have been transferred¹, the transferor remains liable for calls² already made³.

Where shares are forfeited for non-payment of calls⁴ and then sold and the purchaser receives a certificate showing that the shares are not fully paid⁵, but stating that the purchaser is to be deemed the holder of the 'said shares discharged from all calls due prior to the date hereof' the company may nevertheless make calls on the purchaser for the balance due on the shares, but the purchaser is not liable for interest on calls previously made⁶. On winding up, the purchaser is, however, liable for calls only in respect of the balance owing on the shares after giving credit for any sums paid on the shares by the original holder, whether as a shareholder or as being a debtor under articles which render him liable after forfeiture⁷.

1 As to the transfer of shares see PARA 389 et seq. As to shares generally see PARA 1042.

2 As to the meaning of 'call' see PARA 1132.

3 *Re National Bank of Wales, Taylor, Phillips and Rickards' Cases* [1897] 1 Ch 298 at 306, CA, per Lindley LJ. See also *North American Colonial Association of Ireland v Bentley* (1850) 19 LJB 427 (if articles provide for a company to have a lien on shares for moneys called up in respect of them and to have the power to decline to register a transfer of shares on which it has a lien, the shareholders on the register when the call is made are those who are liable to pay the call). As to a company's articles of association generally see PARA 228 et seq.

4 As to forfeiture of shares generally see PARA 1213 et seq.

5 As to when shares in a company are deemed paid up see PARA 1091.

6 *New Balkis Eersteling Ltd v Randt Gold Mining Co* [1904] AC 165, HL.

7 *Re Randt Gold Mining Co* [1904] 2 Ch 468. As to the power of forfeiture under a company's articles of association see PARA 1213 et seq.

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1142. Recovery of calls.

In proceedings for the recovery of a call¹, the company is the claimant, and calls made but not paid before winding up may be enforced by a claim brought by the liquidator in the name of the company, although he has obtained a balance order².

The money for calls, payable by a member³ to the company under its constitution⁴, is a debt due from him to the company⁵.

1 As to the meaning of 'call' see PARA 1132.

2 *Westmoreland Green and Blue Slate Co v Feilden* [1891] 3 Ch 15, CA. See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 736, 1004.

3 As to the meaning of 'member' see PARA 321.

4 As to the meaning of references to a company's constitution see PARA 227.

5 See the Companies Act 2006 s 33; and PARA 243. A call, which is a specialty debt, is not statute-barred until 12 years have expired after it became due: see *Cork and Bandon Rly Co v Goode* (1853) 13 CB 826; the Limitation Act 1980 s 8; and **LIMITATION PERIODS** vol 68 (2008) PARA 976. As to satisfaction of the debt see PARA 1139.

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1143. Liability of joint holders of shares.

Where there is no special provision as to several liability¹, two or more holders of the same share are only jointly liable².

1 Cf the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 art 55(2) (cited in PARA 1134 note 4).

2 *Re Maria Anna and Steinbank Coal and Coke Co, Maxwell's Case, Hill's Case* (1875) LR 20 Eq 585.

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1144. Effect of bankruptcy in respect of shares not fully paid up.

Calls¹ which are unpaid at the date of the bankruptcy of a shareholder², and the estimated value of his liability in respect of any future calls, are provable in the bankruptcy³. If the dividend received is less than 100 pence in the pound on the amount of the proof, payment of the dividend does not make the shares fully paid, so as to enable the bankrupt's estate to rank as a fully paid shareholder in the distribution of surplus assets of the company⁴. Where shares

have been forfeited⁵ and reissued, and the person against whom the forfeiture was exercised has become bankrupt, the company may prove in his bankruptcy only to the extent of its actual loss, that is, the difference between the amount payable by the original holder in respect of the shares, including interest on calls, and the net amount received by the company in respect of the reissued shares⁶. Where any part of the property of a bankrupt consists of shares or stock constituting overseas property, his trustee in bankruptcy may disclaim them⁷.

1 As to the meaning of 'call' see PARA 1132.

2 As to shareholders and membership of companies generally see PARA 321 et seq.

3 *Re Mercantile Mutual Marine Insurance Association* (1883) 25 ChD 415; *Re McMahon, Fuller v McMahon* [1900] 1 Ch 173; *Re Rowe, ex p West Coast Gold Fields Ltd* [1904] 2 KB 489 (where the company had a security by lien on the shares). Where a member who held both partly paid up and fully paid up shares became bankrupt and the company, after proving in respect of amounts due on the partly paid up shares, altered its articles of association so as to give it a lien on fully paid up shares, the company was not allowed to amend its proof or to substitute a fresh proof so as to set up its lien on the fully paid up shares: *Re Rowe, ex p West Coast Gold Fields Ltd*. As to when shares in a company are deemed paid up see PARA 1091. As to a company's articles of association generally see PARA 228 et seq; and as to provision that is made for the alteration of a company's articles see PARA 232 et seq. As to the right of proof against the estate of a bankrupt contributory in a winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 709. As to a bankrupt's right to vote see PARA 652. As to disclaimer of a contract to take shares by a trustee in bankruptcy and proof thereon see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 472 et seq.

4 *Re West Coast Gold Fields Ltd, Rowe's Trustee's Claim* [1905] 1 Ch 597; affd [1906] 1 Ch 1, CA.

5 As to forfeiture of shares generally see PARA 1213 et seq.

6 *Re Bolton, ex p North British Artificial Silk Ltd* [1930] 2 Ch 48.

7 See the Insolvency Act 1986 s 315(1); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 472. As to the effect of disclaimer and rights of proof against the bankrupt's estate see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 709.

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1145. Effect of shareholder's death on liability in respect of shares not fully paid up.

The estate of a deceased shareholder is liable for the payment of calls on shares¹ standing in his name, whether the calls are made before or after his death, and his legal personal representatives are liable only in their representative character². Personal representatives who distribute the estate amongst the beneficiaries without providing for the liability attaching to the estate in respect of shares not fully paid up, forming part of the estate, breach their duty to preserve, protect and administer the assets of the deceased³, and are personally liable to pay calls on the shares up to the amount of the assets distributed⁴. If there is no legal personal representative, the court grants administration to the company's nominee as a creditor of the deceased person's estate⁵. If legal personal representatives unequivocally request that the shares should be transferred into their own names, they become personally liable, although on the register they are designated executors⁶.

1 As to the meaning of 'call' see PARA 1132. As to shares generally see PARA 1042.

2 *Houldsworth v Evans* (1868) LR 3 HL 263 at 283 per Lord Chelmsford; *Baird's Case* (1870) 5 Ch App 725; *New Zealand Gold Extraction Co (Newbery-Vautin Process) v Peacock* [1894] 1 QB 622, CA. It has been held in Ireland that an executor de son tort who takes the dividends on shares cannot be sued for calls de bonis propriis: *Blackstaff Flax Spinning and Weaving Co v Cameron* [1899] 1 IR 252.

3 As to breaches of this duty see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 792.

4 *Taylor v Taylor* (1870) LR 10 Eq 477.

5 *Tomlinson v Gilby* (1885) 54 LJP 80.

6 *Buchan's Case* (1879) 4 App Cas 549, HL.

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G. ISSUE OF SHARES AT A PREMIUM

1146. Share premium account and its application.

There are no statutory or other restrictions on the issue of shares¹ at a 'premium' (that is, at more than their nominal value)²; indeed, if the directors³ can obtain a premium on the issue, it is their duty to do so⁴.

Subject to relief from the statutory provisions governing such an issue⁵ that is available in cases of merger⁶ or group reconstruction⁷, and subject to retrospective relief⁸ and the powers of the Secretary of State⁹ to make further provision in this regard¹⁰, where a company issues shares at a premium (whether for cash or otherwise¹¹), a sum equal to the aggregate amount or value¹² of the premiums on those shares must be transferred to an account, called the 'share premium account'¹³; and the provisions of the Companies Act 2006 relating to the reduction of a company's share capital¹⁴ apply, except as mentioned below, as if the share premium account were part of its paid up share capital¹⁵. Thus, if the assets of the share premium account are to be distributed among shareholders, the transaction is to be regarded as if the company were reducing its paid up share capital and the money distributed is capital and not income in the hands of the payee¹⁶.

Notwithstanding the above, where, on issuing shares, a company has transferred a sum to the share premium account, it may use that sum to write off¹⁷:

- 2068 (1) the expenses of the issue of those shares¹⁸; and
- 2069 (2) any commission paid on the issue of those shares¹⁹.

The company may use the share premium account also to pay up new shares to be allotted²⁰ to members²¹ as fully paid bonus shares²².

If a limited company²³ redeems any redeemable shares²⁴ which were issued at a premium, any premium payable on their redemption may be paid out of the proceeds of a fresh issue of shares made for the purpose of the redemption, up to an amount equal to²⁵:

- 2070 (a) the aggregate of the premiums received by the company on the issue of the shares redeemed²⁶; or
- 2071 (b) the current amount of the company's share premium account, including any sum transferred to that account in respect of premiums on the new shares²⁷,

whichever is the less²⁸; and, in that case, the amount of the company's share premium account must be reduced by a sum corresponding, or by sums in the aggregate corresponding, to the amount of any payment made by virtue of this provision out of the proceeds of the issue of the new shares²⁹.

Where a private company³⁰ exercises its power to redeem or purchase its own shares out of capital and the permissible capital payment is greater than the nominal amount of the shares purchased or redeemed, the share premium account may be reduced by a sum not exceeding the amount by which the permissible capital payment exceeds the nominal amount of the shares³¹.

1 As to the meaning of 'share' see PARA 1042. As to the meaning of references to 'issue' and related expressions in relation to shares see PARA 1045.

2 See also note 12. As to the nominal value of shares see PARA 1044.

3 As to a company's directors see PARA 478 et seq.

4 See *Lowry (Inspector of Taxes) v Consolidated African Selection Trust Ltd* [1940] AC 648 at 679, [1940] 2 All ER 545 at 565, HL, per Lord Wright.

5 In subject to relief from the Companies Act 2006 s 610: see s 610(5).

6 In subject to the Companies Act 2006 s 612 (see PARA 1148): see s 610(5).

7 In subject to the Companies Act 2006 s 611 (see PARA 1147): see s 610(5).

8 In under the Companies Consolidation (Consequential Provisions) Act 1985 s 12 (see PARA 1150).

9 As to the Secretary of State see PARA 6.

10 In subject to the Companies Act 2006 s 614: see s 610(5). The Secretary of State may by regulations make such provision as he thinks appropriate for relieving companies from the requirements of s 610 in relation to premiums other than cash premiums, or for restricting or otherwise modifying any relief from those requirements provided by Pt 17 Ch 7 (ss 610-616) (see also PARA 1147 et seq): s 614(1). As to the meaning of 'cash' see PARA 564 note 6. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. Regulations under s 614 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 614(2), 1290. At the date at which this volume states the law, no such regulations had been made under s 614. Such regulations may relate also to the Companies Consolidation (Consequential Provisions) Act 1985 s 12: see PARA 1150 note 4. For these purposes, 'company', except in reference to the issuing company (see note 13), includes any body corporate: Companies Act 2006 s 616(1). As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5; and as to the meaning of 'company' under the Companies Acts generally see PARA 24. As to the meaning of the 'Companies Acts' see PARA 16.

The Secretary of State may by regulations modify the Companies Act 2006 Pt 17 Ch 7: s 657(1). Regulations under s 657 are subject to affirmative resolution procedure: s 657(4). The regulations may amend or repeal any provision of Pt 17 Ch 7, or make such other provision as appears to the Secretary of State appropriate in place of any provision of Pt 17 Ch 7 (s 657(2)); and may make consequential amendments or repeals in other provisions of the Companies Act 2006, or in other enactments (s 657(3)). As to the meaning of 'enactment' see PARA 17 note 2. At the date at which this volume states the law, no such regulations had been made for these purposes.

11 As to the meanings of 'cash' and consideration 'other than cash' in relation to the allotment or payment up of shares in a company see PARA 1091.

12 Shares issued for a consideration other than cash are issued at a premium if the value of the assets in consideration of which they are issued is more than the nominal value of the shares: see *Henry Head & Co Ltd v Ropner Holdings Ltd* [1952] Ch 124 at 128, [1951] 2 All ER 994 at 997 per Harman J (where a holding company, formed for the purpose of amalgamating two existing companies, acquired assets of a greater value than the nominal value of the shares issued by it in exchange for the existing shares of the amalgamated companies; it was required to transfer the excess value of the assets acquired to its share premium account); *Shearer (Inspector of Taxes) v Bercaim Ltd* [1980] 3 All ER 295.

13 Companies Act 2006 s 610(1). For the purposes of Pt 17 Ch 7, the 'issuing company' means the company issuing shares as mentioned in s 610(1): ss 610(6), 616(1).

14 I.e. the Companies Act 2006 Pt 17 Ch 10 (ss 641-653) (see PARA 1173 et seq). As to the meaning of 'share capital' see PARA 1045.

15 Companies Act 2006 s 610(4). As to when shares in a company are deemed paid up see PARA 1091; and as to the means of payment generally see PARA 1113 et seq. Before the coming into operation of the Companies Act 1948 (now repealed) any such premiums could also be distributed by way of dividend: *Drown v Gaumont-British Picture Corp'n Ltd* [1937] Ch 402, [1937] 2 All ER 609.

16 *Re Duff's Settlement, National Provincial Bank Ltd v Gregson* [1951] Ch 923, [1951] 2 All ER 534, CA. See further **SETTLEMENTS** vol 42 (Reissue) PARA 950 et seq. But see *Quayle Munro Ltd, Petitioners* [1994] 1 BCLC 410, Ct of Sess (funds which were released from the share premium account following its cancellation in accordance with the statutory procedures and transferred to special reserve were available to be distributed as profits distributable by way of dividend). The procedure for reduction of the share premium account is the same as that for reduction of capital (as to which see PARA 1173 et seq).

17 Companies Act 2006 s 610(2).

18 Companies Act 2006 s 610(2)(a).

19 Companies Act 2006 s 610(2)(b). As to commission see PARA 1151 et seq.

20 As to the meaning of 'allotment' and related expressions see PARA 1091.

21 As to the meaning of 'member' see PARA 321.

22 Companies Act 2006 s 610(3). As to bonus shares see PARA 1053.

23 As to the meaning of 'limited company' see PARA 102.

24 As to redeemable shares see PARA 1229 et seq.

25 See the Companies Act 2006 s 687(4); and PARA 1231.

26 See the Companies Act 2006 s 687(4)(a); and PARA 1231.

27 See the Companies Act 2006 s 687(4)(b); and PARA 1231.

28 See the Companies Act 2006 s 687(4); and PARA 1231.

29 See the Companies Act 2006 s 687(5); and PARA 1231.

30 As to the meaning of 'private company' see PARA 102.

31 See the Companies Act 2006 s 734(3); and PARA 1245.

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1147. Relief in respect of group reconstructions.

Where the issuing company¹:

2072 (1) is a wholly-owned subsidiary² of another company³ (the 'holding company')⁴; and

2073 (2) allots⁵ shares⁶, either to the holding company⁷ or to another wholly-owned subsidiary of the holding company, in consideration for the transfer to the issuing

company⁸ of non-cash assets⁹ of a company (the 'transferor company') that is a member of the group of companies which comprises the holding company and all its wholly-owned subsidiaries¹⁰, and

where the shares in the issuing company allotted in consideration for the transfer are issued at a premium¹¹, the issuing company is not required¹² to transfer any amount in excess of the minimum premium value to the share premium account¹³.

For these purposes, the 'minimum premium value' means the amount, if any, by which the base value of the consideration for the shares allotted exceeds the aggregate nominal value of the shares¹⁴; and the 'base value of the consideration for the shares allotted' is the amount by which the base value of the assets transferred exceeds the base value of any liabilities of the transferor company assumed by the issuing company as part of the consideration for the assets transferred¹⁵. The 'base value of the assets transferred' is to be taken as:

- 2074 (a) the cost of those assets to the transferor company¹⁶; or
- 2075 (b) (if less) the amount at which those assets are stated in the transferor company's accounting records immediately before the transfer¹⁷.

The 'base value of the liabilities' is to be taken as the amount at which they are stated in the transferor company's accounting records immediately before the transfer¹⁸.

1 As to the meaning of references to the 'issuing company' see PARA 1146 note 13.

2 As to the meaning of 'wholly-owned subsidiary' see PARA 25.

3 As to the meaning of 'company' for these purposes, except in reference to the issuing company, see PARA 1146 note 10. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 Companies Act 2006 s 611(1)(a). As to the meaning of 'holding company' generally see PARA 25. As to the power of the Secretary of State by regulations to modify Pt 17 Ch 7 (ss 610-616) (see also PARA 1146 et seq) see s 657; and PARA 1146 note 10. As to the Secretary of State see PARA 6.

5 As to the meaning of 'allotment' and related expressions see PARA 1091; and see note 7.

6 As to the meaning of 'share' see PARA 1042.

7 References in the Companies Act 2006 Pt 17 Ch 7 (see also PARA 1146 et seq), however expressed, to the acquisition by a company of shares in another company, and the issue or allotment of shares to (or the transfer of shares to or by) a company, include (respectively) the acquisition of shares by, and the issue or allotment or transfer of shares to or by, a nominee of that company; and the reference in s 611 to the 'transferor company' (see the text and note 10) should be read accordingly: s 616(2).

8 References in the Companies Act 2006 Pt 17 Ch 7 (see also PARA 1146 et seq) to the transfer of shares in a company include the transfer of a right to be included in the company's register of members in respect of those shares: s 616(3). As to the register of members see PARA 335 et seq.

9 As to the meaning of 'non-cash asset' for these purposes see PARA 1125 note 5.

10 Companies Act 2006 s 611(1)(b). See note 7.

11 As to the meaning of 'issued at a premium' see PARA 1146.

12 Ie by the Companies Act 2006 s 610 (see PARA 1146): see s 611(2).

13 Companies Act 2006 s 611(2). As to the meaning of 'share premium account' see PARA 1146. The provisions of s 612 (see PARA 1148) (merger relief) do not apply where a case falls within s 611: see s 612(4); and PARA 1148. Relief may be reflected in the company's balance sheet see PARA 1149. As to retrospective relief see PARA 1150.

- 14 Companies Act 2006 s 611(3). As to the nominal value of shares see PARA 1044.
- 15 Companies Act 2006 s 611(4).
- 16 Companies Act 2006 s 611(5)(a)(i).
- 17 Companies Act 2006 s 611(5)(a)(ii).
- 18 Companies Act 2006 s 611(5)(b).

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1148. Merger relief.

Except where relief is given in respect of group reconstruction¹, relief from the requirement to transfer amounts to a share premium account² is available where the issuing company³ has secured at least a 90 per cent equity holding in another company⁴ in pursuance of an arrangement⁵ providing for the allotment of equity shares⁶ in the issuing company on terms that the consideration for the shares allotted is to be provided by the issue or transfer to the issuing company⁷ of equity shares in the other company⁸, or by the cancellation of any such shares not held by the issuing company⁹.

If the equity shares in the issuing company allotted in pursuance of the arrangement in consideration for the acquisition¹⁰ or cancellation of equity shares in the other company are issued at a premium¹¹, the obligation to maintain a share premium account¹² does not apply to the premiums on those shares¹³. Where the arrangement also provides for the allotment of any shares in the issuing company on terms that the consideration for those shares is to be provided either by the issue or transfer to the issuing company of non-equity shares in the other company¹⁴, or by the cancellation of any such shares in that company not held by the issuing company¹⁵, such relief extends to any shares in the issuing company allotted on those terms in pursuance of the arrangement¹⁶.

The issuing company ('company A') is to be regarded for these purposes as having secured at least a 90 per cent equity holding in another company ('company B'), in pursuance of an arrangement providing for the allotment of equity shares¹⁷, if, in consequence of an acquisition or cancellation of equity shares in company B (in pursuance of such an arrangement), Company A holds equity shares in company B of an aggregate amount equal to 90 per cent or more of the nominal value of that company's equity share capital¹⁸; but where the equity share capital of company B is divided into different classes of shares, company A is not regarded as having secured at least a 90 per cent equity holding in company B unless the issuing company has secured at least a 90 per cent holding¹⁹ in relation to each of those classes of shares taken separately²⁰. Shares that are held by a company that is company A's holding company²¹ or subsidiary²², or by a subsidiary of company A's holding company, or by its or their nominees, are to be treated for these purposes as held by company A²³.

1 The relief in a case falling within the Companies Act 2006 s 611 (group reconstruction relief) (see PARA 1147): s 612(4). As to the power of the Secretary of State by regulations to modify Pt 17 Ch 7 (ss 610-616) (see also PARA 1146 et seq): see s 657; and PARA 1146 note 10. As to the Secretary of State see PARA 6.

Provisions relating to merger relief and relief in respect of group reconstruction were originally enacted by the Companies Act 1981 in order to relieve companies of the consequences of the decisions in *Henry Head & Co Ltd v Ropner Holdings Ltd* [1952] Ch 124, [1951] 2 All ER 994 and *Shearer (Inspector of Taxes) v Bercain Ltd* [1980] 3 All ER 295 (both cited in PARA 1146 note 12).

2 le from the provisions of the Companies Act 2006 s 610 (see PARA 1146). As to the meaning of 'share premium account' see PARA 1146.

3 As to the meaning of references to the 'issuing company' see PARA 1146 note 13.

4 As to determining what constitutes a 90 % equity holding in another company for these purposes see the text and notes 17-23. As to the meaning of 'company' for these purposes, except in reference to the issuing company, see PARA 1146 note 10. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

5 For these purposes, 'arrangement' means any agreement, scheme or arrangement, including an arrangement sanctioned in accordance with the Companies Act 2006 Pt 26 (ss 895-901) (arrangements and reconstructions) (see PARA 1425 et seq) or the Insolvency Act 1986 s 110 (liquidator in voluntary winding up accepting shares as consideration for sale of company's property) (see PARA 1438; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 963): Companies Act 2006 s 616(1).

6 For these purposes, 'equity shares' means shares comprised in the company's equity share capital; and 'non-equity shares' means shares (of any class) that are not so comprised: Companies Act 2006 s 616(1). As to the meaning of 'equity share capital' under the Companies Acts see PARA 1047. As to the meaning of 'class of shares' see PARA 1057. As to the meaning of references to the allotment of shares to a company for these purposes see PARA 1147 note 7.

7 As to the meaning of references to the issue of shares to, or the transfer of shares to or by, a company for these purposes see PARA 1147 note 7.

8 Companies Act 2006 s 612(1)(a).

9 Companies Act 2006 s 612(1)(b).

10 As to the meaning of references to the acquisition by a company of shares in another company for these purposes see PARA 1147 note 7.

11 As to the meaning of 'issued at a premium' see PARA 1146.

12 le under the provisions of the Companies Act 2006 s 610 (see PARA 1146): see s 612(2).

13 Companies Act 2006 s 612(2). Relief may be reflected in the company's balance sheet see PARA 1149. As to retrospective relief see PARA 1150.

14 Companies Act 2006 s 612(3)(a).

15 Companies Act 2006 s 612(3)(b).

16 Companies Act 2006 s 612(3).

17 le in pursuance of such an arrangement as is mentioned in the Companies Act 2006 s 612(1) (see the text and notes 1-9): see s 613(1).

18 Companies Act 2006 s 613(1), (2). For this purpose, it is immaterial whether any of those shares were acquired in pursuance of the arrangement; and shares in company B held by the company as treasury shares are excluded in determining the nominal value of company B's share capital: s 613(3). As to treasury shares see PARA 1251. As to the nominal value of shares see PARA 1044.

19 le in accordance with the requirements of the Companies Act 2006 s 612(1), (2) (see the text and notes 1-13): see s 613(4).

20 Companies Act 2006 s 613(4).

21 As to the meaning of 'holding company' see PARA 25.

22 As to the meaning of 'subsidiary' see PARA 25.

23 Companies Act 2006 s 613(5).

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1149. Relief may be reflected in company's balance sheet.

An amount corresponding to the amount representing the premiums¹, or part of the premiums, on shares² issued³ by a company⁴ which, by virtue of any of the provisions that offer relief from the obligation to maintain a share premium account⁵, is not included in the company's share premium account may also be disregarded in determining the amount at which any shares or other consideration provided for the shares issued is to be included in the company's balance sheet⁶.

1 As to the meaning of 'premium' in relation to shares see PARA 1146.

2 As to the meaning of 'share' see PARA 1055.

3 As to the meaning of references to the issue of shares for these purposes see PARA 1147 note 7.

4 As to the meaning of references to the 'issuing company' see PARA 1146 note 13. As to the meaning of 'company' for these purposes, except in reference to the issuing company, see PARA 1146 note 10. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

5 Ie by virtue of any relief under the Companies Act 2006 Pt 17 Ch 7 (ss 610-616) (see also PARA 1146 et seq); see s 615. As to the meaning of 'share premium account' see PARA 1146. As to retrospective relief see PARA 1150.

6 Companies Act 2006 s 615. As to the power of the Secretary of State by regulations to modify Pt 17 Ch 7 (see also PARA 1146 et seq) see s 657; and PARA 1146 note 10. As to the Secretary of State see PARA 6.

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1150. Retrospective relief for sums not transferred to premium share account.

Where a company¹ has issued² shares³ before 4 February 1981⁴, and where the issuing company⁵ has issued at a premium⁶ shares which were allotted in pursuance of any arrangement⁷ providing for the allotment of shares⁸ in the issuing company on terms that the consideration for the shares allotted was to be provided by the issue or transfer⁹ to the issuing company of shares in another company or by the cancellation of any shares in that other company not held by the issuing company¹⁰, the other company in question must either have been at the time of the arrangement a subsidiary¹¹ of the issuing company or of any company which was then the issuing company's holding company¹² or have become such a subsidiary on the acquisition or cancellation of its shares¹³ in pursuance of the arrangement¹⁴.

Any part of the premiums on the shares so issued which was not transferred to the company's share premium account¹⁵ in accordance with the relevant provisions of the Companies Act 1948¹⁶ must be treated as if those provisions had never applied to those premiums (and may accordingly be disregarded in determining the sum to be included in the company's share premium account)¹⁷.

- 1 For these purposes, 'company', except in reference to the issuing company, includes any body corporate: Companies Consolidation (Consequential Provisions) Act 1985 s 12(5). As to the meaning of references to the 'issuing company' see note 5. As to the meaning of 'body corporate' see PARA 1 note 5.
- 2 As to the meaning of references to the issue of shares for these purposes see PARA 1147 note 7; definition applied by the Companies Consolidation (Consequential Provisions) Act 1985 s 12(5); Interpretation Act 1978 s 17(2)(b).
- 3 As to the meaning of 'share' see PARA 1042.
- 4 See the Companies Consolidation (Consequential Provisions) Act 1985 s 12(1). The date mentioned in the text was the date of the publication of the Bill which became the Companies Act 1981, which contained in s 39 (repealed) the precursor of these provisions. The Companies Consolidation (Consequential Provisions) Act 1985 s 12 is deemed to be included in the Companies Act 2006 Pt 17 Ch 7 (ss 610-616) (see PARA 1146 et seq) for the purposes of the Secretary of State's power under s 614 (see PARA 1146) to make regulations in respect of relief from the requirements of s 610 (see PARA 1146); Companies Consolidation (Consequential Provisions) Act 1985 s 12(6); Interpretation Act 1978 s 17(2)(b). As to the Secretary of State see PARA 6 et seq.
- 5 In the company issuing shares as referred to in the Companies Act 2006 s 610(1) (see PARA 1146): see the Companies Consolidation (Consequential Provisions) Act 1985 s 12(2); Interpretation Act 1978 s 17(2)(b).
- 6 As to the meaning of 'issued at a premium' see PARA 1146.
- 7 As to the meaning of 'arrangement' see PARA 1148 note 5; definition applied by the Companies Consolidation (Consequential Provisions) Act 1985 s 12(5); Interpretation Act 1978 s 17(2)(b).
- 8 As to the meaning of references to the allotment of shares to a company for these purposes see PARA 1147 note 7; definition applied by the Companies Consolidation (Consequential Provisions) Act 1985 s 12(5); Interpretation Act 1978 s 17(2)(b).
- 9 As to the meaning of references to the transfer of shares to or by a company for these purposes see PARA 1147 note 7; definition applied by the Companies Consolidation (Consequential Provisions) Act 1985 s 12(5); Interpretation Act 1978 s 17(2)(b).
- 10 See the Companies Consolidation (Consequential Provisions) Act 1985 s 12(2); Interpretation Act 1978 s 17(2)(b).
- 11 As to the meaning of 'subsidiary' see PARA 25.
- 12 As to the meaning of 'holding company' see PARA 25.
- 13 As to the meaning of references to the acquisition by a company of shares in another company for these purposes see PARA 1147 note 7; definition applied by the Companies Consolidation (Consequential Provisions) Act 1985 s 12(5); Interpretation Act 1978 s 17(2)(b).
- 14 Companies Consolidation (Consequential Provisions) Act 1985 s 12(3).
- 15 As to the meaning of 'share premium account' see PARA 1146.
- 16 In accordance with the Companies Act 1948 s 56 (repealed): see the Companies Consolidation (Consequential Provisions) Act 1985 s 12(4).
- 17 Companies Consolidation (Consequential Provisions) Act 1985 s 12(4).

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H. COMMISSIONS, UNDERWRITING AND BROKERAGE

1151. General prohibition on commissions etc.

Except as otherwise permitted¹, a company² must not apply any of its shares or capital³ money, either directly or indirectly, in payment of any commission, discount⁴ or allowance to any person in consideration of his either: (1) subscribing⁵ or agreeing to subscribe (whether absolutely or conditionally) for shares in the company⁶; or (2) procuring or agreeing to procure subscriptions (whether absolute or conditional) for shares in the company⁷. It is immaterial how the shares or money are so applied, whether by being added to the purchase money of any property acquired by the company or to the contract price of work to be executed for the company, or whether the money is paid out of the nominal purchase money or contract price, or otherwise⁸.

This restriction⁹ does not, however, affect the power of a company to pay such brokerage as has previously been lawful¹⁰.

1 Ie except as permitted by the Companies Act 2006 s 553 (see PARA 1152): see s 552(1).

The Secretary of State may by regulations modify ss 552, 553: s 657(1). Regulations under s 657 are subject to (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 657(4), 1290. The regulations may amend or repeal any provision of ss 552, 553, or make such other provision as appears to the Secretary of State appropriate in place of any provision of ss 552, 553 (s 657(2)); and may make consequential amendments or repeals in other provisions of the Companies Act 2006, or in other enactments (s 657(3)). As to the meaning of 'enactment' see PARA 17 note 2. At the date at which this volume states the law, no such regulations had been made for these purposes.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meanings of 'share' and 'capital' see PARA 1042. The provisions of the Companies Act 2006 Pt 17 Ch 2 (ss 549-559) have no application in relation to the taking of shares by the subscribers to the memorandum on the formation of the company: see s 559; and PARA 1091 note 6. As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 104 et seq. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.

4 Shares may not be allotted at a discount: see PARA 1111.

5 'Subscribing' probably means entering into an agreement to take shares by means of a formal application or otherwise, under which there is a liability to pay: see *Arnison v Smith* (1889) 41 ChD 348 at 357 per Kekewich J.

6 Companies Act 2006 s 552(1)(a); and see *Banking Service Corpn Ltd v Toronto Finance Corpn Ltd* [1928] AC 333, PC.

7 Companies Act 2006 s 552(1)(b); and see *Banking Service Corpn Ltd v Toronto Finance Corpn Ltd* [1928] AC 333, PC.

8 Companies Act 2006 s 552(2).

9 Ie the Companies Act 2006 s 552: see s 552(3).

10 Companies Act 2006 s 552(3). As to brokerage see PARA 1158.

1152. Permitted commissions etc.

Notwithstanding the general prohibition on the payment of commissions etc¹, it is lawful for a company² to pay a commission to a person in consideration of his subscribing³ or agreeing to subscribe (whether absolutely or conditionally) for shares⁴ in the company, or procuring or agreeing to procure subscriptions (whether absolute or conditional) for shares in the company, if the following conditions are satisfied⁵, namely that⁶:

- 2076 (1) the payment of the commission is authorised by the company's articles⁷; and:
- 2077 (2) the commission paid or agreed to be paid does not exceed 10 per cent of the price at which the shares are issued, or the amount or rate authorised by the articles, whichever is the less⁸.

A vendor to, or promoter of, or other person who receives payment in money or shares from, a company may apply any part of the money or shares so received in payment of any commission the payment of which directly by the company would be permitted by these provisions⁹.

1 Notwithstanding the general prohibition in the Companies Act 2006 s 552 (see PARA 1151).

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the meaning of 'subscribing' see PARA 1151 note 5.

4 As to the meaning of 'share' see PARA 1042. The provisions of the Companies Act 2006 Pt 17 Ch 2 (ss 549-559) have no application in relation to the taking of shares by the subscribers to the memorandum on the formation of the company: see s 559; and PARA 1091 note 6. As to the meaning of 'memorandum of association' see PARA 104. As to the memorandum of association of a company limited by shares see PARA 78; and as to subscribers to a company's memorandum of association see PARA 104 et seq. As to the requirements that must be met before a company is duly formed see PARA 102 et seq.

5 Companies Act 2006 s 553(1). The Secretary of State may by regulations modify ss 552, 553: see s 657; and PARA 1151 note 1.

6 Companies Act 2006 s 553(2).

7 Companies Act 2006 s 553(2)(a); and see *Re Bolivia Republic Exploration Syndicate Ltd* [1914] 1 Ch 139. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. Under the Companies (Model Articles) Regulations 2008, SI 2008/3229, the company may pay any person a commission in consideration for that person either subscribing (or agreeing to subscribe) for shares, or procuring (or agreeing to procure) subscriptions for shares: Sch 3 art 44(1). Any such commission may be paid in cash (or in fully paid or partly paid shares or other securities) or partly in one way and partly in the other, and in respect of a conditional or an absolute subscription: Sch 3 art 44(2). Under the Companies (Tables A to F) Regulations 1985, SI 1985/805, the company may exercise the powers of paying commissions conferred by the Companies Acts; and, subject to the provisions of those Acts, any such commission may be satisfied by the payment of cash or by the allotment of fully or partly paid shares or partly in one way and partly in the other: Schedule, Table A art 4. Table A art 4 is applied by Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and by Table E (an unlimited company having a share capital) but Table A art 4 is disapplied by Table C art 1 (regulations for the management of a company limited by guarantee and not having a share

capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

As to the liability of auditors in respect of an improper payment of commission see *Re Bolivia Republic Exploration Syndicate Ltd*. A company cannot lawfully pay commission to a director for placing shares unless the director has thereby performed such special services as are authorised by the articles to be the subject of remuneration: *Ural Caspian Oil Corp Ltd v Hume-Schweder* (1913) Times, 31 July.

8 Companies Act 2006 s 553(2)(b). Before the enactment of the Companies Act 1900 s 8(1) (repealed), it was doubtful whether payment of underwriting commission was legal: see *Hilder v Dexter* [1902] AC 474 at 478, HL, per Lord Davey; and PARA 55 note 5. As to the common law meaning of 'underwriting' see PARA 1156. As to payment of brokerage before the enactment of the Companies Act 1900 (repealed) see *Hilder v Dexter* at 478-479, HL, per Lord Davey; and PARA 64 note 4. As to brokerage see PARA 1158.

9 Companies Act 2006 s 553(3). As to promoters generally see PARA 49 et seq.

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1153. Option to take shares at par.

In consideration of a person's taking or procuring subscriptions¹ for shares², the company may give him an option to take further shares within a limited period at par³ without complying with the statutory provisions as to commissions and discounts⁴, as such an option does not amount to an application of shares or capital money⁵ within those provisions⁶.

1 As to the meaning of 'subscribing' see PARA 1151 note 5.

2 As to shares generally see PARA 1042 et seq.

3 I.e. the nominal value: see PARA 1044.

4 See PARAS 1151, 1152.

5 As to capital generally see PARA 1042.

6 *Hilder v Dexter* [1902] AC 474, HL (overruling on this point *Burrows v Matabele Gold Reefs and Estates Co Ltd* [1901] 2 Ch 23, CA).

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1154. Reconstruction.

On a sale of a company's undertaking to persons who agree to form a new company for the repurchase of the undertaking in consideration of shares¹ to be allotted² to the members³ of the selling company, any additional consideration paid by the new company apart from that for the shares is a commission or discount and is accordingly illegal unless the statutory conditions as to commissions⁴ are complied with⁵.

- 1 As to shares generally see PARA 1042 et seq.
- 2 As to the meaning of 'allotment' and related expressions see PARA 1091.
- 3 As to membership of a company see PARA 321 et seq.
- 4 See PARAS 1151, 1152.
- 5 *Booth v New Afrikander Gold Mining Co Ltd* [1903] 1 Ch 295, CA. This was a decision on the Companies Act 1900 s 8 (now repealed), under which payment of a commission was authorised only upon an offer of shares to the public. The provisions of s 8 (repealed) were, however, extended to authorise payment of commission on shares not offered to the public by the Companies Act 1907 s 8(2) (now repealed). See also *Barrow v Paringa Mines (1909) Ltd* [1909] 2 Ch 658.

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1155. Commission to allot at discount.

Transactions amounting to the illegal allotment¹ of shares² at a discount³ under colour of compliance with the statutory requirements as to commissions⁴ are not allowed⁵.

- 1 As to the meaning of 'allotment' and related expressions see PARA 1091.
- 2 As to shares generally see PARA 1042 et seq.
- 3 As to the allotment of shares at a discount see PARA 1111.
- 4 See PARAS 1151, 1152.
- 5 *Keatinge v Paringa Consolidated Mines Ltd* (1902) 18 TLR 266.

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1156. Underwriting agreements.

'Underwriting' is taken to mean agreeing to take the number of shares specified in an underwriting letter or agreement to the extent that the public or other persons do not subscribe for them before a fixed date¹.

The construction of each underwriting agreement depends upon its individual terms and differs widely in different cases². The underwriting agreement is usually signed on the terms of draft offer documents, and it is the practice to provide that the contract to underwrite will hold good notwithstanding variations between the draft offer documents and the offer documents as finally published. An alteration in the terms of the offer documents which substantially alters the risk is not such a variation³. Generally, the letter is not in itself a contract, but a mere offer⁴, which, like other offers, requires acceptance before a contract comes into existence⁵; but the offer, if accepted within a reasonable time, need not be accepted before the result of the proposed issue of shares is known⁶. There may be acceptance without writing⁷, and notice of

acceptance may be inferred⁸, or the writer of the letter may be estopped from setting up want of acceptance⁹. An underwriting letter authorising some other person to apply for shares, for a valuable consideration, if the offer is accepted by him, constitutes an authority coupled with an interest and is irrevocable¹⁰. If the underwriting agreement requires the writer to subscribe if and when called upon, the request for him to subscribe is a condition precedent to his liability¹¹. The contract is not personal¹², and the legal personal representatives¹³ of the underwriter may be sued on it¹⁴.

1 *Re Licensed Victuallers' Mutual Trading Association, ex p Audain* (1889) 42 ChD 1 at 7, CA, per Lindley LJ; *Re London-Paris Financial Mining Corp Ltd* (1897) 13 TLR 569, CA. In carrying out underwriting obligations, an underwriter does not act as a financial adviser to the company whose shares are being underwritten: *Eagle Trust plc v SBC Securities Ltd (No 2)* [1996] 1 BCLC 121, [1995] BCC 231.

2 *Re Consort Deep Level Gold Mines, ex p Stark* [1897] 1 Ch 575 at 593, CA, per Lindley LJ.

3 *Warner International and Overseas Engineering Co Ltd v Kilburn, Brown & Co* (1914) 84 LJB 365, CA. However, see *Re Greater Britain Insurance Corp Ltd, ex p Brockdorff* (1920) 124 LT 194, CA.

4 As eg in *Re Consort Deep Level Gold Mines Ltd, ex p Stark* [1897] 1 Ch 575, CA.

5 See **CONTRACT** vol 9(1) (Reissue) PARA 631 et seq.

6 *Re Hemp, Yarn and Cordage Co, Hindley's Case* [1896] 2 Ch 121 at 135, CA, per Kay LJ; *Re Consort Deep Level Gold Mines Ltd, ex p Stark* [1897] 1 Ch 575 at 592, CA, per Lindley LJ.

7 *North Charterland Exploration Co Ltd v Riordan* (1897) 13 TLR 281, CA. As to the withdrawal of an offer to take shares before acceptance see PARA 1088; and see **CONTRACT** vol 9(1) (Reissue) PARA 644.

8 *Re Bultfontein Sun Diamond Mine Ltd* (1897) 75 LT 669, CA; *Premier Briquette Co v Gray* 1922 SC 329, Ct of Sess. However, see *Re Consort Deep Level Gold Mines Ltd, ex p Stark* [1897] 1 Ch 575 at 593, CA, per Lindley LJ.

9 *Re Henry Bentley & Co and Yorkshire Breweries Ltd, ex p Harrison* (1893) 69 LT 204, CA; *Re Consort Deep Level Gold Mines Ltd, ex p Stark* [1897] 1 Ch 575 at 592, CA, per Lindley LJ.

10 *Re Hannan's Empress Gold Mining and Development Co, Carmichael's Case* [1896] 2 Ch 643, CA. Cf *Re Henry Bentley & Co and Yorkshire Breweries Ltd, ex p Harrison* (1893) 69 LT 204, CA (explained in *Re Consort Deep Level Gold Mines Ltd, ex p Stark* [1897] 1 Ch 575, CA).

11 *Re Harvey's Oyster Co, Ormerod's Case* [1894] 2 Ch 474; *Re Bultfontein Sun Diamond Mine Ltd* (1897) 75 LT 669, CA; *Brussels Palace of Varieties Ltd v Prockter* (1893) 10 TLR 72, CA. A condition precedent to the writer's liability requiring a specified number of shares to be irrevocably applied for by the public is not fulfilled by the allotment of that number to another underwriter: *Boyer Ltd v Edwardes* (1901) 18 TLR 3, CA. The liability of an underwriter under an agreement providing for liability diminishing in accordance with the amount of public subscription for shares may be reduced by 'firm' agreements by other underwriters to take shares: see *Sydney Harbour Collieries Ltd v Earl Grey* (1898) 14 TLR 373, HL.

12 *Re Worthington, ex p Pathé Frères* [1914] 2 KB 299, CA.

13 As to the meaning of 'personal representative' see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 4.

14 *Warner Engineering Co Ltd v Brennan* (1913) 30 TLR 191.

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1157. Sub-underwriting.

It is common for underwriters¹ to enter into contracts with sub-underwriters, under which the latter agree to sub-underwrite a part of the shares² for which the underwriters have subscribed and they sign a sub-underwriting letter³. A sub-underwriting letter authorising an underwriter to apply for shares, for a valuable consideration, if the offer is accepted by him, constitutes, as in the case of an underwriting letter, an authority coupled with an interest, and is irrevocable⁴.

There is no duty on the part of an underwriter to find satisfactory sub-underwriters⁵.

1 As to underwriting generally see PARA 1156.

2 As to shares generally see PARA 1042 et seq.

3 As to underwriting letters generally see PARA 1156.

4 *Re Olympic Fire and General Reinsurance Co Ltd* [1920] 2 Ch 341, CA. It has been held in Scotland that, where the sub-underwriter signs an application form, he cannot repudiate his agreement, after receiving notice of allotment, on the ground that the underwriter did not communicate to him any acceptance of the offer contained in the sub-underwriting letter: *Premier Briquette Co v Gray* 1922 SC 329, Ct of Sess. As to the right of a sub-underwriter to obtain rescission of his contract to take shares see PARA 1075.

5 *Eagle Trust plc v SBC Securities Ltd (No 2)* [1996] 1 BCLC 121, [1995] BCC 231 (a financial adviser may properly, in appropriate circumstances, rely on the consent to a director's involvement in an underwriting transaction given by the company's chief executive who was acting in the course of his apparent authority).

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1158. Brokerage.

A company may pay to brokers a reasonable sum by way of brokerage for placing shares¹. 'Brokers' includes stockbrokers, bankers and the like who exhibit offer documents and send them to their customers, and by whose mediation the customers are induced to subscribe. It does not include anyone who does not carry on a business of this character².

1 See the Companies Act 2006 s 552(3) (cited in PARA 1151), which saves the power of companies to pay such brokerage as was lawful before the enactment of the Companies Act 2006.

2 *Metropolitan Coal Consumers' Association v Scrimgeour* [1895] 2 QB 604, CA (where the articles of association expressly authorised the payment of all brokerages payable in respect of the placing of any shares, and the commission paid to the stockbrokers for placing the shares was only 2.5% on their nominal amount). In this instance, the memorandum of association also expressly authorised the payment of brokerages, but the authority (if necessary at all) is none the better for being in the memorandum: *Metropolitan Coal Consumers' Association v Scrimgeour* at 607 per Lindley LJ. Only ordinary brokerage in the regular way of business can be paid: *Metropolitan Coal Consumers' Association v Scrimgeour* at 610 per Rigby LJ. Cf *Andreae v Zinc Mines of Great Britain Ltd* [1918] 2 KB 454.

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(vii) Alteration of Share Capital

A. IN GENERAL

1159. The power to alter share capital.

A limited company¹ having a share capital² may not alter its share capital except in the following ways³. The company may:

- 2078 (1) increase its share capital by allotting new shares in accordance with Part 17⁴ of the Companies Act 2006⁵ or reduce its share capital in accordance with the relevant provisions⁶ of that Part⁷;
- 2079 (2) sub-divide or consolidate⁸ all or any of its share capital⁹ or reconvert¹⁰ stock into shares¹¹;
- 2080 (3) redenominate all or any of its shares¹² and may reduce its share capital¹³ in connection with such a redenomination¹⁴.
- 2081 Nothing in the above provisions, however, affects:
- 2082 (a) the power of a company to purchase its own shares, or to redeem shares, in accordance with Part 18 of the 2006 Act¹⁵;
- 2083 (b) the power of a company to purchase its own shares in pursuance of an order of the court under certain specified statutory provisions¹⁶;
- 2084 (c) the forfeiture of shares, or the acceptance of shares surrendered in lieu, in pursuance of the company's articles¹⁷, for failure to pay any sum payable in respect of the shares;
- 2085 (d) the cancellation of shares under the statutory duty to do so in certain circumstances¹⁸;
- 2086 (e) the power of a company to enter into a compromise or arrangement in accordance with Part 26 of the 2006 Act¹⁹ or to do anything required to comply with an order of the court on an application under that Part²⁰.

1 As to the meaning of 'limited company' under the Companies Acts see PARA 102.

2 As to the meaning of 'company having a share capital' see PARA 1042.

3 Companies Act 2006 s 617(1).

4 In accordance with the Companies Act 2006 Pt 17 (ss 540-657): see PARA 1042 et seq. See also PARA 1160.

5 Companies Act 2006 s 617(2)(a).

6 In accordance with the Companies Act 2006 Pt 17 Ch 10 (ss 641-653): see PARA 1173 et seq.

7 Companies Act 2006 s 617(2)(b).

8 In accordance with the Companies Act 2006 s 618: see PARA 1161.

9 Companies Act 2006 s 617(3)(a).

10 In accordance with the Companies Act 2006 s 620: see PARA 1164.

11 Companies Act 2006 s 617(3)(b).

12 In accordance with the Companies Act 2006 s 622: see PARA 1167.

13 In accordance with the Companies Act 2006 s 626: see PARA 1170.

14 Companies Act 2006 s 617(4).

15 In accordance with the Companies Act 2006 Pt 18 (ss 658-737): see PARA 1197 et seq.

16 le in pursuance of an order of the court under (1) the Companies Act 2006 s 98 (application to court to cancel resolution for re-registration as a private company: see PARA 174); (2) s 721(6) (powers of court on objection to redemption or purchase of shares out of capital: see PARA 1249); (3) s 759 (remedial order in case of breach of prohibition of public offers by private company: see PARA 1066); or (4) Pt 30 (ss 994-999) (protection of members against unfair prejudice: see PARA 466).

17 As to the meaning of 'articles' see PARA 228 note 2. As to forfeiture see PARAS 1141, 1213 et seq. As to surrender see PARAS 1220, 1221.

18 le under the Companies Act 2006 s 662 (duty to cancel shares held by or for a public company): see PARA 1200.

19 le in accordance with the Companies Act 2006 Pt 26 (ss 895-901): see PARA 1425 et seq.

20 Companies Act 2006 s 617(5).

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B. INCREASE OF CAPITAL

1160. Power to increase capital: power to allot shares.

A limited company¹ having a share capital² may increase its share capital by allotting new shares in accordance with Part 17³ of the Companies Act 2006⁴.

On any such increase, there is no reason why the increased capital need be expressed in the same currency as the existing capital, or why the increased capital should be all in the same specific currency⁵. The increased capital may consist of preference shares⁶, provided that this is not inconsistent with rights given by the articles of association⁷.

1 As to the meaning of 'limited company' under the Companies Acts see PARA 102.

2 As to the meaning of 'company having a share capital' see PARA 1042.

3 le in accordance with the Companies Act 2006 Pt 17 (ss 540-657): see PARA 1042 et seq.

4 Companies Act 2006 s 617(1), (2)(a). See also PARA 1159. Formerly, a company was required to state in the memorandum of association the amount of its authorised share capital divided into shares of a fixed nominal value, this amount operating as a limit on the number of shares which could be issued, subject to the power of the company to increase this figure by way of a resolution under the Companies Act 1985 s 121 (repealed) (see now the Companies Act 2006 ss 617, 618): see PARA 1046. The Companies Act 2006 contains no such requirement, although a company may choose in its articles to limit the power of the directors to allot additional shares: see s 550 (cited in PARA 1094), s 551 (cited in PARA 1096).

The Companies (Model Articles) Regulations 2008, SI 2008/3229, prescribe no specific procedure with regard to an increase of capital; but the members of a company may restrict the exercise of that power by making provision to that effect in the company's articles. As to the power to issue different classes of share see Sch 1 para 22, Sch 3 para 43; and PARA 1057 et seq. As to a company's articles of association generally see PARA 228 et seq. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. If the company is governed by the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A, the increase is made by an ordinary resolution prescribing the amount of increase, and the shares into which it is divided: Schedule, Table A art 32(a). As to ordinary resolutions see PARA 613. In the case of an unlimited company having a share capital which is governed by Schedule, Table E, the increase is made by special resolution: Schedule, Table E art 4(a). As to the meaning of 'unlimited company' see PARA 102.

Before the Companies Act 1929 there was no statutory provision as to the mode in which an increase of capital was to be effected, and in the case of companies governed by the Companies Act 1862 Sch 1, Table A (repealed) which provided that the directors could effect an increase with the sanction of an extraordinary resolution of the company, it was held that, if the capital was increased without first obtaining the sanction, the irregularity was cured by the passing of subsequent resolutions: see *Sewell's Case* (1868) 3 Ch App 131; *Re London and New York Investment Corp* [1895] 2 Ch 860. Under the Companies Act 1862, it was held that a company could delegate the power of increasing its capital to its directors: see *Mosely v Koffyfontein Mines Ltd* [1910] 2 Ch 382; *re*sd on another point sub nom *Koffyfontein Mines Ltd v Mosely* [1911] AC 409, HL.

5 *Re Scandinavian Bank Group plc* [1988] Ch 87, [1987] 2 All ER 70.

6 As to the meaning of 'preference shares' see PARA 1059 note 4.

7 *Andrews v Gas Meter Co* [1897] 1 Ch 361, CA. As to classes of shares and class rights see PARA 1057 et seq; and as to objections to a variation of class rights in the case of a company having a share capital see the Companies Act 2006 s 633; and PARA 1061.

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C. CONSOLIDATION OF CAPITAL AND SUB-DIVISION OF SHARES

1161. Power to consolidate share capital.

A limited company¹ having a share capital² may consolidate all or any of its share capital in accordance with the following provisions³. The company may consolidate and divide all or any of its share capital into shares⁴ of a larger nominal amount than its existing shares⁵. In any such consolidation or division of shares, the proportion between the amount paid and the amount, if any, unpaid on each resulting share must be the same as it was in the case of the share from which that share is derived⁶.

A company may exercise the powers conferred by these provisions only if its members⁷ have passed a resolution authorising it to do so⁸; and the company's articles⁹ may exclude or restrict the exercise of any power so conferred¹⁰.

If a company exercises the statutory power to consolidate its share capital¹¹ it must within one month after doing so give notice to the registrar¹², specifying the shares affected¹³. The notice must be accompanied by a statement of capital¹⁴ which must state, with respect to the company's share capital immediately following the exercise of the power¹⁵:

- 2087 (1) the total number of shares of the company¹⁶;
- 2088 (2) the aggregate nominal value of those shares¹⁷;
- 2089 (3) for each class of shares, prescribed particulars¹⁸ of the rights attached to the shares¹⁹, the total number of shares of that class²⁰ and the aggregate nominal value of shares of that class²¹; and
- 2090 (4) the amount paid up and the amount, if any, unpaid on each share, whether on account of the nominal value of the share or by way of premium²².

If default is made in complying with these provisions, an offence is committed by the company, and by every officer²³ of the company who is in default²⁴. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale²⁵ and (for continued contravention) a daily default fine²⁶ not exceeding one-tenth of level 3 on the standard scale²⁷.

1 As to the meaning of 'limited company' under the Companies Acts see PARA 102; and as to the meaning of 'company' under the Companies Acts see PARA 24.

2 As to the meaning of 'company having a share capital' see PARA 1042.

3 Companies Act 2006 s 617(1), (3)(a). See also PARA 1159.

4 As to the meaning of 'share' see PARA 1042.

5 Companies Act 2006 s 618(1)(b). As to classes of shares and class rights see PARA 1057 et seq; and as to objections to a variation of class rights in the case of a company having a share capital see the Companies Act 2006 s 633; and PARA 1061.

6 Companies Act 2006 s 618(2).

7 As to who qualifies as a member of a company see PARA 321.

8 Companies Act 2006 s 618(3). Such a resolution may authorise a company (1) to exercise more than one of the powers conferred by s 618 (see the text and notes 1-8; and PARA 1162); (2) to exercise a power on more than one occasion; (3) to exercise a power at a specified time or in specified circumstances: s 618(4). Where a provision of the Companies Acts requires a resolution of a company, and does not specify what kind of resolution is required, what is required is an ordinary resolution unless the company's articles require a higher majority (or unanimity): see the Companies Act 2006 s 281(3); and PARA 617. As to company resolutions generally see PARA 613 et seq.

9 As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102.

10 Companies Act 2006 s 618(5). Under the Companies (Model Articles) Regulations 2008, SI 2008/3229, where there has been a consolidation or division of shares by a public company, and as a result, members are entitled to fractions of shares, the directors may (1) sell the shares representing the fractions to any person including the company for the best price reasonably obtainable; (2) in the case of a certificated share, authorise any person to execute an instrument of transfer of the shares to the purchaser or a person nominated by the purchaser; and (3) distribute the net proceeds of sale in due proportion among the holders of the shares: see Sch 3 art 69(1), (2). Where any holder's entitlement to a portion of the proceeds of sale amounts to less than a minimum figure determined by the directors, that member's portion may be distributed to an organisation which is a charity for the purposes of the law of England and Wales, Scotland or Northern Ireland: Sch 3 art 69(3). The person to whom the shares are transferred is not obliged to ensure that any purchase money is received by the person entitled to the relevant fractions (Sch 3 art 69(4)); and the transferee's title to the shares is not affected by any irregularity in or invalidity of the process leading to their sale (Sch 3 art 69(5)). As to the meaning of 'director' under the Companies Acts see PARA 478.

The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides that a company may consolidate and divide all or any of its share capital into shares of larger amount than its existing shares by ordinary resolution: see Schedule, Table A art 32(b) (disapplied by Schedule, Table E art 1 in relation to an unlimited company having a share capital). Whenever as a result of a consolidation of shares any members would become entitled to fractions of a share, the directors may, on behalf of those members, sell the shares representing the fractions for the best price reasonably obtainable to any person (including, subject to the provisions of the Companies Act 2006, the company) and distribute the net proceeds of sale in due proportion among those members, and the directors may authorise some person to execute an instrument of transfer of the shares to, or in accordance with the directions of, the purchaser. The transferee is not be bound to see to the application of the purchase money nor is his title to the shares affected by any irregularity in or invalidity of the proceedings in reference to the sale: Schedule, Table A art 33.

11 Ie the power conferred by the Companies Act 2006 s 618: see the text and notes 1-10.

12 As to the meaning of 'registrar' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

13 Companies Act 2006 s 619(1). The repeal of the Companies Act 1985 s 122(1)(a), (2) (notice to registrar of consolidation and division of shares) does not affect the operation of that provision in relation to a consolidation and division of shares effected before 1 October 2009: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, 2008/2860, Sch 2 para 59.

See also the Companies Act 2006 s 689 (notice on redemption of shares); and PARA 1233.

14 Companies Act 2006 s 619(2). Any statement of capital is subject to the disclosure requirements in s 1078: see PARA 144.

15 Companies Act 2006 s 619(3).

16 Companies Act 2006 s 619(3)(a).

17 Companies Act 2006 s 619(3)(b).

18 In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the Secretary of State see PARA 6. As to the particulars prescribed for these purposes see note 19.

19 Companies Act 2006 s 619(3)(c)(i). The particulars prescribed for these purposes are (1) particulars of any voting rights attached to the shares, including rights that arise only in certain circumstances; (2) particulars of any rights attached to the shares, as respects dividends, to participate in a distribution; (3) particulars of any rights attached to the shares, as respects capital, to participate in a distribution (including on winding up); and (4) whether the shares are to be redeemed or are liable to be redeemed at the option of the company or the shareholder: Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 2(2)(f), (3).

20 Companies Act 2006 s 619(3)(c)(ii).

21 Companies Act 2006 s 619(3)(c)(iii).

22 Companies Act 2006 s 619(3)(d).

23 As to the meaning of 'officer' under the Companies Acts see PARA 607.

24 Companies Act 2006 s 619(4). As to the meaning of 'officer in default' see PARA 315.

25 As to the meaning of 'standard scale' see PARA 1622.

26 As to the meaning of 'daily default fine' see PARA 1622.

27 Companies Act 2006 s 619(5).

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1162. Power to sub-divide share capital.

A limited company¹ having a share capital² may sub-divide all or any of its share capital in accordance with the following provisions³. The company may sub-divide its shares⁴, or any of them, into shares of a smaller nominal amount than its existing shares⁵. In any such sub-division of shares, the proportion between the amount paid and the amount, if any, unpaid on each resulting share must be the same as it was in the case of the share from which that share is derived⁶.

A company may exercise the powers conferred by these provisions only if its members⁷ have passed a resolution authorising it to do so⁸; and the company's articles⁹ may exclude or restrict the exercise of any power so conferred¹⁰.

If a company exercises the statutory power to sub-divide its shares¹¹ it must within one month after doing so give notice to the registrar¹², specifying the shares affected¹³. The notice must be accompanied by a statement of capital¹⁴ which must state, with respect to the company's share capital immediately following the exercise of the power¹⁵:

- 2091 (1) the total number of shares of the company¹⁶;
- 2092 (2) the aggregate nominal value of those shares¹⁷;
- 2093 (3) for each class of shares, prescribed particulars¹⁸ of the rights attached to the shares¹⁹, the total number of shares of that class²⁰ and the aggregate nominal value of shares of that class²¹; and
- 2094 (4) the amount paid up and the amount, if any, unpaid on each share, whether on account of the nominal value of the share or by way of premium²².

If default is made in complying with these provisions, an offence is committed by the company, and by every officer of the company who is in default²³. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale²⁴ and (for continued contravention) a daily default fine²⁵ not exceeding one-tenth of level 3 on the standard scale²⁶.

1 As to the meaning of 'limited company' under the Companies Acts see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24.

2 As to the meaning of 'company having a share capital' see PARA 1042.

3 Companies Act 2006 s 617(1), (3)(a). See also PARA 1159.

4 As to the meaning of 'share' see PARA 1042.

5 Companies Act 2006 s 618(1)(a). As to classes of shares and class rights see PARA 1057 et seq; and as to objections to a variation of class rights in the case of a company having a share capital see the Companies Act 2006 s 633; and PARA 1061.

6 Companies Act 2006 s 618(2).

7 As to who qualifies as a member of a company see PARA 321.

8 Companies Act 2006 s 618(3). Such a resolution may authorise a company (1) to exercise more than one of the powers conferred by s 618 (see the text and notes 1-8; and PARA 1161); (2) to exercise a power on more than one occasion; (3) to exercise a power at a specified time or in specified circumstances: s 618(4). Where a provision of the Companies Acts requires a resolution of a company, and does not specify what kind of resolution is required, what is required is an ordinary resolution unless the company's articles require a higher majority (or unanimity): see the Companies Act 2006 s 281(3); and PARA 617. As to company resolutions generally see PARA 613 et seq.

9 As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102.

10 Companies Act 2006 s 618(5).

The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides that a company may, subject to the provisions of the Companies Acts, sub-divide its shares, or any of them, into shares of smaller amount by ordinary resolution and the resolution may determine that, as between the shares resulting from the sub-division, any of them may have any preference or advantage as compared with the others: see Schedule, Table A art 32(c) (disapplied by Schedule, Table E art 1 in relation to an unlimited company having a share

capital). Where the company purports to sub-divide without having the power, a transfer of sub-divided shares, if they can be identified, is effectual to pass the original shares: *Re Financial Corp'n, Feiling's and Rimington's Case, King's Case, Holmes's, Pritchard's, and Adams's Cases* (1867) 2 Ch App 714.

11 le the power conferred by the Companies Act 2006 s 618: see the text and notes 1-10.

12 As to the meaning of 'registrar' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

13 Companies Act 2006 s 619(1). The repeal of the Companies Act 1985 s 122(1)(d), (2) (notice to registrar of sub-division of shares) does not affect the operation of that provision in relation to a sub-division of shares effected before 1 October 2009: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, 2008/2860, Sch 2 para 59.

See also the Companies Act 2006 s 689 (notice on redemption of shares); and PARA 1233.

14 Companies Act 2006 s 619(2). Any statement of capital is subject to the disclosure requirements in s 1078: see PARA 144.

15 Companies Act 2006 s 619(3).

16 Companies Act 2006 s 619(3)(a).

17 Companies Act 2006 s 619(3)(b).

18 In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the Secretary of State see PARA 6. As to the particulars prescribed for these purposes see note 19.

19 Companies Act 2006 s 619(3)(c)(i). The particulars prescribed for these purposes are: (1) particulars of any voting rights attached to the shares, including rights that arise only in certain circumstances; (2) particulars of any rights attached to the shares, as respects dividends, to participate in a distribution; (3) particulars of any rights attached to the shares, as respects capital, to participate in a distribution (including on winding up); and (4) whether the shares are to be redeemed or are liable to be redeemed at the option of the company or the shareholder: Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 2(2)(f), (3).

20 Companies Act 2006 s 619(3)(c)(ii).

21 Companies Act 2006 s 619(3)(c)(iii).

22 Companies Act 2006 s 619(3)(d).

23 Companies Act 2006 s 619(4). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

24 As to the meaning of 'standard scale' see PARA 1622.

25 As to the meaning of 'daily default fine' see PARA 1622.

26 Companies Act 2006 s 619(5).

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D. CONVERSION OF STOCK INTO SHARES; RECONVERSION

1163. Stock: in general.

Stock is the aggregate of fully paid¹ shares² legally consolidated, portions of which aggregate may be transferred or split up into fractions of any amount, without regard to the original

nominal³ amount of the shares⁴. Where the amount of stock standing in the name of the holder on 15 February 1971 was not a whole number of pounds, so much of the amount as was in shillings or pence was then treated as the corresponding amount⁵ in decimal currency⁶.

Warrants to bearer may be issued in respect of stock⁷.

1 As to the meaning of 'fully paid' see PARAS 1048.

2 As to the meaning of 'share' see PARA 1055.

3 As to the meaning of 'nominal' see PARA 1044.

4 *Morrice v Aylmer* (1875) LR 7 HL 717 at 724 per Lord Hatherley.

5 ie the corresponding amount calculated in accordance with the Decimal Currency Act 1969 Sch 1.

6 Decimal Currency Act 1969 ss 8(3), 16(1).

7 *Pilkington v United Railways of the Havana and Regla Warehouses Ltd* [1930] 2 Ch 108. For the provisions as to share warrants which apply equally to stock warrants see further PARA 382.

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1164. Power of conversion and reconversion.

A limited company¹ having a share capital² may reconvert³ stock⁴ into shares⁵ in accordance with the following provisions⁶. A limited company that has converted paid-up shares⁷ into stock before the repeal by the Companies Act 2006⁸ of the power to do so⁹ may reconvert that stock into paid-up shares of any nominal value¹⁰. A company may, however, exercise the power so conferred only if its members¹¹ have passed an ordinary resolution¹² authorising it to do so¹³. Such a resolution may authorise a company to exercise the power so conferred¹⁴: (1) on more than one occasion¹⁵; (2) at a specified time or in specified circumstances¹⁶.

1 As to the meaning of 'limited company' under the Companies Acts see PARA 102.

2 As to the meaning of 'company having a share capital' see PARA 1042.

3 There is no longer a power to convert shares into stock, only a power to convert stock into shares: see the text and notes 7-10; and PARA 1042.

4 As to the meaning of 'stock' see PARA 1163.

5 As to the meaning of 'share' see PARA 1042.

6 Companies Act 2006 s 617(1), (3)(b). See also PARA 1159.

7 As to the meaning of 'paid-up' in relation to shares see PARA 1048.

8 See the Companies Act 2006 Sch 16.

9 As to the previous power to convert shares into stock see the Companies Act 1985 s 121(c) (repealed). In practice that power had ceased to be exercised before 1 October 2009 (the date when the repeal of s 121 by the Companies Act 2006 Sch 16 came into force).

10 Companies Act 2006 s 620(1). As to classes of shares and class rights see PARA 1057 et seq; and as to objections to a variation of class rights in the case of a company having a share capital see the Companies Act 2006 s 633; and PARA 1061.

11 As to who qualifies as a member of a company see PARA 321.

12 As to the meaning of 'ordinary resolution' see PARA 613.

13 Companies Act 2006 s 620(2).

14 Companies Act 2006 s 620(3).

15 Companies Act 2006 s 620(3)(a).

16 Companies Act 2006 s 620(3)(b).

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1165. Notice to registrar of reconversion of stock into shares.

If a company¹ exercises a statutory power to reconvert² stock³ into shares⁴ it must within one month after doing so give notice to the registrar⁵, specifying the stock affected⁶. The notice must be accompanied by a statement of capital⁷ which must state with respect to the company's share capital immediately following the exercise of the power⁸:

- 2095 (1) the total number of shares of the company⁹;
- 2096 (2) the aggregate nominal value of those shares¹⁰;
- 2097 (3) for each class of shares¹¹, prescribed particulars¹² of the rights attached to the shares¹³, the total number of shares of that class¹⁴, and the aggregate nominal value of shares of that class¹⁵; and
- 2098 (4) the amount paid up and the amount, if any, unpaid on each share, whether on account of the nominal value of the share or by way of premium¹⁶.

If default is made in complying with these provisions, an offence is committed by the company, and by every officer of the company who is in default¹⁷.

1 As to the meaning of 'company' under the Companies Acts see PARA 24.

2 I.e the power conferred by the Companies Act 2006 s 620: see PARA 1164. There is no longer a power to convert shares into stock, only a power to convert stock into shares: see PARA 1164 text and notes 8-9; and PARA 1042.

3 As to the meaning of 'stock' see PARA 1163.

4 As to the meaning of 'share' see PARA 1042.

5 As to the meaning of 'registrar' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

6 Companies Act 2006 s 621(1). The repeal of the Companies Act 1985 s 122(1)(c), (2) (notice to registrar of reconversion of stock into shares) does not affect the operation of that provision in relation to a reconversion effected before 1 October 2009: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, 2008/2860, Sch 2 para 60.

See also the Companies Act 2006 s 689 (notice on redemption of shares); and PARA 1233.

7 Companies Act 2006 s 621(2). Any statement of capital is subject to the disclosure requirements in s 1078: see PARA 144.

8 Companies Act 2006 s 621(3).

9 Companies Act 2006 s 621(3)(a).

10 Companies Act 2006 s 621(3)(b).

11 As to the meaning of 'class of shares' see PARA 1057.

12 In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the Secretary of State see PARA 6. As to the particulars prescribed for these purposes see note 13.

13 Companies Act 2006 s 621(3)(c)(i). The particulars prescribed for these purposes are (1) particulars of any voting rights attached to the shares, including rights that arise only in certain circumstances; (2) particulars of any rights attached to the shares, as respects dividends, to participate in a distribution; (3) particulars of any rights attached to the shares, as respects capital, to participate in a distribution (including on winding up); and (4) whether the shares are to be redeemed or are liable to be redeemed at the option of the company or the shareholder: Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 2(2)(g), (3).

14 Companies Act 2006 s 621(3)(c)(ii).

15 Companies Act 2006 s 621(3)(c)(iii).

16 Companies Act 2006 s 621(3)(d).

17 Companies Act 2006 s 621(4). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607. A person guilty of an offence under s 621 is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 621(5). As to the meanings of 'standard scale' and 'daily default fine' see PARA 1622.

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1166. Effect of conversion.

The normal provision contained in articles¹ in relation to stock² is that the holders of stock are to have, according to the amount of the stock held by them, the same rights, privileges and advantages as regards dividends, voting at meetings and other matters as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company and in the assets on winding up) is conferred by an amount of stock which would not, if existing in shares, have conferred that privilege or advantage.

If the company³ has converted any of its shares⁴ into stock⁵, and given notice of the conversion to the registrar⁶, the register of members⁷ must show the amount and class of stock held by each member instead of the amount of shares and the particulars relating to shares specified⁸ by the Companies Act 2006⁹.

1 As to the articles of association of a company see PARA 228 et seq.

2 As to the meaning of 'stock' see PARA 1163.

3 As to the meaning of 'company' under the Companies Acts see PARA 24.

4 As to the meaning of 'share' see PARA 1042.

5 There is no longer a statutory power to convert shares into stock. As to the previous power to do so, which had ceased to be used in practice before its repeal, see the Companies Act 1985 s 122(1)(c) (repealed by the Companies Act 2006 Sch 16).

6 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to the former duty to give notice to the registrar of the conversion of shares into stock see the Companies Act 1985 s 122(2) (repealed by the Companies Act 2006 Sch 16).

7 As to the register of members see PARA 335 et seq. As to membership of a company see PARA 321 et seq.

8 I.e. the particulars specified by the Companies Act 2006 s 113(1)-(3): see PARA 335.

9 Companies Act 2006 s 113(4). As to the removal of entries relating to former members see s 121; and PARA 335; and as to the time limit for claims arising from an entry in the register see s 128; and PARA 335.

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E. REDENOMINATION OF SHARE CAPITAL

1167. Redenomination and calculation of new nominal values.

A limited company¹ having a share capital² may redenominate all or any of its shares³ in accordance with the following provisions⁴. Such a company may by resolution⁵ redenominate⁶ its share capital or any class of its share capital⁷; and the resolution may specify conditions which must be met before the redenomination takes effect⁸.

Redenomination in accordance with a resolution under these provisions takes effect on the day on which the resolution is passed, or on such later day as may be determined in accordance with the resolution⁹. A resolution under these provisions lapses if the redenomination for which it provides has not taken effect at the end of the period of 28 days beginning on the date on which it is passed¹⁰.

A company's articles¹¹ may, however, prohibit or restrict the exercise of the power conferred by the provisions set out above¹².

The Secretary of State¹³ may by regulations¹⁴ modify the statutory provisions¹⁵ relating to redenomination¹⁶.

1 As to the meaning of 'limited company' under the Companies Acts see PARA 102.

2 As to the meaning of 'company having a share capital' see PARA 1042.

3 As to the meaning of 'share' see PARA 1042.

4 Companies Act 2006 s 617(1), (4). See also PARA 1159.

5 The Companies Act 2006 Pt 3 Ch 3 (ss 29, 30) (resolutions affecting a company's constitution: see PARA 231) applies to such a resolution: s 622(8). Where a provision of the Companies Acts requires a resolution of a company, and does not specify what kind of resolution is required, what is required is an ordinary resolution unless the company's articles require a higher majority (or unanimity): see the Companies Act 2006 s 281(3); and PARA 617. As to company resolutions generally see PARA 613 et seq.

6 'Redenominate' means convert shares from having a fixed nominal value in one currency to having a fixed nominal value in another currency: Companies Act 2006 s 622(1). The conversion must be made at an appropriate spot rate of exchange specified in the resolution: s 622(2). The rate must be either (1) a rate prevailing on a day specified in the resolution; or (2) a rate determined by taking the average of rates prevailing on each consecutive day of a period specified in the resolution; and the day or period specified for the purposes of head (1) or head (2) above must be within the period of 28 days ending on the day before the resolution is passed: s 622(3).

For each class of share the new nominal value of each share is calculated as follows: s 623. Step one is to take the aggregate of the old nominal values of all the shares of that class; step two is to translate that amount into the new currency at the rate of exchange specified in the resolution; and step three is to divide that amount by the number of shares in the class: s 623.

7 Companies Act 2006 s 622(1).

8 Companies Act 2006 s 622(4).

9 Companies Act 2006 s 622(5).

10 Companies Act 2006 s 622(6).

11 As to the articles of association of a company see PARA 228 et seq.

12 Companies Act 2006 s 622(7).

13 As to the Secretary of State see PARA 6.

14 Such regulations are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see the Companies Act 2006 ss 657(4), 1290.

15 Ie the Companies Act 2006 ss 622-628 (see the text and notes 1-12; and PARAS 1168-1171).

16 Companies Act 2006 s 657(1). The regulations may (1) amend or repeal any of ss 622-628; or (2) make such other provision as appears to the Secretary of State appropriate in place of any of those provisions: s 657(2). Regulations under s 657 may make consequential amendments or repeals in other provisions of the Companies Act 2006, or in other enactments: s 657(3). At the date at which this volume states the law, no such regulations had been made for these purposes.

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1168. Effect of redenomination.

The redenomination¹ of shares² does not affect any rights or obligations of members³ under the company's constitution⁴, or any restrictions affecting members under the company's constitution. In particular, it does not affect entitlement to dividends, including entitlement to dividends in a particular currency, voting rights or any liability in respect of amounts unpaid on shares⁵. Subject to that, references to the old nominal value of the shares in any agreement or statement, or in any deed, instrument or document, are to be read after the resolution⁶ takes effect as references to the new nominal value of the shares, unless the context otherwise requires⁷.

1 As to the meaning of 'redenominate' see PARA 1167 note 6.

2 As to the meaning of 'share' see PARA 1042.

3 As to who qualifies as a member of a company see PARA 321.

4 For this purpose the company's constitution includes the terms on which any shares of the company are allotted or held: Companies Act 2006 s 624(2). As to the meaning of references to a company's constitution see generally PARA 227.

5 Companies Act 2006 s 624(1).

6 As to the resolution for redenomination see PARA 1167.

7 Companies Act 2006 s 624(3).

As to the Secretary of State's power to modify s 624 by regulations see s 657; and PARA 1167 text and notes 13-16. At the date at which this volume states the law, no such regulations had been made for these purposes.

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1169. Notice to registrar of redenomination.

If a limited company¹ having a share capital² redenominates³ any of its share capital, it must within one month after doing so give notice to the registrar⁴, specifying the shares⁵ redenominated⁶. The notice must state the date on which the resolution⁷ was passed⁸. It must be accompanied by a statement of capital⁹ which must state with respect to the company's share capital as redenominated by the resolution¹⁰:

- 2099 (1) the total number of shares of the company¹¹;
- 2100 (2) the aggregate nominal value of those shares¹²;
- 2101 (3) for each class of shares¹³, prescribed particulars¹⁴ of the rights attached to the shares¹⁵, the total number of shares of that class¹⁶, and the aggregate nominal value of shares of that class¹⁷; and
- 2102 (4) the amount paid up and the amount, if any, unpaid on each share, whether on account of the nominal value of the share or by way of premium¹⁸.

If default is made in complying with these provisions, an offence is committed by the company, and by every officer of the company who is in default¹⁹.

1 As to the meaning of 'limited company' under the Companies Acts see PARA 24.

2 As to the meaning of 'company having a share capital' see PARA 1042.

3 As to the meaning of 'redenominate' see PARA 1167 note 6.

4 As to the meaning of 'registrar' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

5 As to the meaning of 'share' see PARA 1042.

6 Companies Act 2006 s 625(1).

7 As to the resolution for redenomination see PARA 1167.

8 Companies Act 2006 s 625(2)(a).

9 Companies Act 2006 s 625(2)(b). Any statement of capital is subject to the disclosure requirements in s 1078: see PARA 144.

10 Companies Act 2006 s 625(3).

11 Companies Act 2006 s 625(3)(a).

12 Companies Act 2006 s 625(3)(b).

13 As to the meaning of 'class of shares' see PARA 1057.

14 In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the Secretary of State see PARA 6. As to the particulars prescribed for these purposes see note 15.

15 Companies Act 2006 s 625(3)(c)(i). The particulars prescribed for these purposes are (1) particulars of any voting rights attached to the shares, including rights that arise only in certain circumstances; (2) particulars of any rights attached to the shares, as respects dividends, to participate in a distribution; (3) particulars of any rights attached to the shares, as respects capital, to participate in a distribution (including on winding up); and (4) whether the shares are to be redeemed or are liable to be redeemed at the option of the company or the shareholder: Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 2(2)(h), (3).

16 Companies Act 2006 s 625(3)(c)(ii).

17 Companies Act 2006 s 625(3)(c)(iii).

18 Companies Act 2006 s 625(3)(d).

19 Companies Act 2006 s 625(4). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607. A person guilty of an offence under s 625 is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 625(5). As to the meanings of 'standard scale' and 'daily default fine' see PARA 1622.

As to the Secretary of State's power to modify s 625 by regulations see s 657; and PARA 1167 text and notes 13-16. At the date at which this volume states the law, no such regulations had been made for these purposes.

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1170. Reduction of capital in connection with redenomination.

A limited company¹ that passes a resolution² redenominating³ some or all of its shares⁴ may, for the purpose of adjusting the nominal values of the redenominated shares to obtain values that are, in the opinion of the company, more suitable, reduce its share capital under these provisions⁵. Such a reduction of capital requires a special resolution⁶ of the company⁷, which must be passed within three months of the resolution effecting the redenomination⁸.

The amount by which a company's share capital is reduced under these provisions must not exceed 10 per cent of the nominal value of the company's allotted share capital⁹ immediately after the reduction¹⁰.

A reduction of capital under these provisions does not extinguish or reduce any liability in respect of share capital not paid up¹¹.

1 As to the meaning of 'limited company' under the Companies Acts see PARA 24.

2 As to the resolution for redenomination see PARA 1167.

3 As to the meaning of 'redenominate' see PARA 1167 note 6.

4 As to the meaning of 'share' see PARA 1042.

5 Companies Act 2006 s 626(1). Nothing in Pt 17 Ch 10 (ss 641-653) (see PARA 1173 et seq) applies to a reduction of capital under s 626: s 626(6).

6 As to the meaning of 'special resolution' see PARA 614.

7 Companies Act 2006 s 626(2).

8 Companies Act 2006 s 626(3).

9 As to the meaning of 'allotted share capital' see PARA 1091.

10 Companies Act 2006 s 626(4).

11 Companies Act 2006 s 626(5).

As to the Secretary of State's power to modify s 626 by regulations see s 657; and PARA 1167 text and notes 13-16. At the date at which this volume states the law, no such regulations had been made for these purposes.

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1171. Notice to registrar of reduction of capital in connection with redenomination.

A company¹ that passes a resolution for the reduction of capital in connection with redenomination² must within 15 days after the resolution is passed give notice to the registrar³ stating the date of that resolution, and the date of the resolution⁴ for redenomination in connection with which it was passed⁵. The notice must be accompanied by a statement of capital⁶ which must state with respect to the company's share capital as reduced by the resolution⁷:

2103 (1) the total number of shares of the company⁸;

2104 (2) the aggregate nominal value of those shares⁹;

2105 (3) for each class of shares¹⁰, prescribed particulars¹¹ of the rights attached to the shares¹², the total number of shares of that class¹³, and the aggregate nominal value of shares of that class¹⁴; and

2106 (4) the amount paid up and the amount, if any, unpaid on each share, whether on account of the nominal value of the share or by way of premium¹⁵.

The registrar must register the notice and the statement on receipt¹⁶; and the reduction of capital is not effective until those documents are registered¹⁷.

The company must also deliver to the registrar, within 15 days after the resolution¹⁸ is passed, a statement by the directors¹⁹ confirming that the reduction in share capital does not exceed²⁰ 10 per cent of nominal value of allotted shares²¹ immediately after reduction²².

If default is made in complying with these provisions, an offence is committed by the company, and by every officer of the company who is in default²³.

1 As to the meaning of 'company' under the Companies Acts see PARA 24.

2 I.e. a resolution under the Companies Act 2006 s 626: see PARA 1170. As to the meaning of 'redenominate' see PARA 1167 note 6.

- 3 As to the meaning of 'registrar' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.
 - 4 Ie the resolution under the Companies Act 2006 s 622: see PARA 1167.
 - 5 Companies Act 2006 s 627(1). This is in addition to the copies of the resolutions themselves that are required to be delivered to the registrar under Pt 3 Ch 3 (ss 29, 30) (see PARA 231): s 627(1).
 - 6 Companies Act 2006 s 627(2). Any statement of capital is subject to the disclosure requirements in s 1078: see PARA 144.
 - 7 Companies Act 2006 s 627(3).
 - 8 Companies Act 2006 s 627(3)(a).
 - 9 Companies Act 2006 s 627(3)(b).
 - 10 As to the meaning of 'class of shares' see PARA 1057.
 - 11 In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the Secretary of State see PARA 6. As to the particulars prescribed for these purposes see note 12.
 - 12 Companies Act 2006 s 627(3)(c)(i). The particulars prescribed for these purposes are (1) particulars of any voting rights attached to the shares, including rights that arise only in certain circumstances; (2) particulars of any rights attached to the shares, as respects dividends, to participate in a distribution; (3) particulars of any rights attached to the shares, as respects capital, to participate in a distribution (including on winding up); and (4) whether the shares are to be redeemed or are liable to be redeemed at the option of the company or the shareholder: Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 2(2)(i), (3).
 - 13 Companies Act 2006 s 627(3)(c)(ii).
 - 14 Companies Act 2006 s 627(3)(c)(iii).
 - 15 Companies Act 2006 s 627(3)(d).
 - 16 Companies Act 2006 s 627(4).
 - 17 Companies Act 2006 s 627(5).
 - 18 Ie the resolution for reduction in connection with redenomination under the Companies Act 2006 s 626: see PARA 1170.
 - 19 As to the meaning of 'director' under the Companies Acts see PARA 478.
 - 20 Ie that the reduction in share capital is in accordance with the Companies Act 2006 s 626(4) (reduction of capital not to exceed 10% of nominal value of allotted shares immediately after reduction: see PARA 1170): s 627(6).
 - 21 As to the meaning of 'allotted shares' see PARA 1091.
 - 22 See the Companies Act 2006 s 627(6).
 - 23 Companies Act 2006 s 627(7). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607. A person guilty of an offence under s 627 is liable on conviction on indictment to a fine, and on summary conviction to a fine not exceeding the statutory maximum: s 627(8). As to the meaning of 'statutory maximum' see PARA 1622.
- As to the Secretary of State's power to modify s 627 by regulations see s 657; and PARA 1167 text and notes 13-16. At the date at which this volume states the law, no such regulations had been made for these purposes.

COMPANIES ACTS/(20) SHARE CAPITAL/(vii) Alteration of Share Capital/E. REDENOMINATION OF SHARE CAPITAL/1172. Redenomination reserve.

1172. Redenomination reserve.

The amount by which a company's¹ share capital is reduced in connection with redenomination² must be transferred to a reserve, called the 'redenomination reserve'³.

The redenomination reserve may be applied by the company in paying up shares⁴ to be allotted to members⁵ as fully paid bonus shares⁶. Subject to that, the provisions of the Companies Acts relating to the reduction of a company's share capital⁷ apply as if the redenomination reserve were paid-up share capital of the company⁸.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie reduced under the Companies Act 2006 s 626 (reduction of capital in connection with redenomination): see PARA 1170.

3 Companies Act 2006 s 628(1).

4 As to the meaning of 'share' see PARA 1042.

5 As to who qualifies as a member of a company see PARA 321.

6 Companies Act 2006 s 628(2). As to bonus shares see PARA 1053.

7 Ie the provisions of the Companies Act 2006 Pt 17 Ch 10 (ss 641-653) (see PARA 1173 et seq).

8 Companies Act 2006 s 628(3).

As to the Secretary of State's power to modify s 628 by regulations see s 657; and PARA 1167 text and notes 13-16. At the date at which this volume states the law, no such regulations had been made for these purposes.

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(viii) Reduction of Share Capital

A. IN GENERAL

1173. Circumstances in which a company may reduce share capital.

A private company¹ limited by shares² may reduce its share capital³ by special resolution⁴ supported by a solvency statement⁵; but it may not do so if as a result of the reduction there would no longer be any member of the company⁶ holding shares⁷ other than redeemable shares⁸.

In any case, the reduction by a limited company of its share capital requires a special resolution⁹ confirmed by the court¹⁰ in accordance with¹¹ the statutory provisions¹².

The statutory provisions that govern such a reduction¹³ have effect¹⁴ subject to any provision of the company's articles¹⁵ restricting or prohibiting the reduction of the company's share capital¹⁶, and subject to the proviso regarding the holding of shares other than redeemable shares¹⁷. The

Secretary of State¹⁸ may by regulations¹⁹ modify the statutory provisions²⁰ relating to reduction of capital²¹.

The provisions of the Companies Act 2006 relating to the reduction of a company's share capital²² apply²³ as if the share premium account²⁴ were part of its paid up share capital²⁵, as if the redenomination reserve²⁶ were paid up share capital²⁷, and as if the capital redemption reserve²⁸ were paid up share capital of the company²⁹.

1 As to the meaning of 'private company' under the Companies Acts see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'company limited by shares' see PARA 102.

3 In accordance with the Companies Act 2006 Pt 17 Ch 10 (ss 641-653) (see also PARA 1174 et seq). As to the meaning of 'share capital' see PARA 1042. Nothing in Pt 17 Ch 10 applies to a reduction of capital in accordance with s 626 (see PARA 1170); s 626(6). The directors of the company: (1) may take any steps necessary to enable the company to comply with s 662 (see PARA 1200), and may do so without complying with the provisions of Pt 17 Ch 10 (s 662(4)); and (2) may take any steps required to enable the company to cancel its shares under s 629 (see PARA 1253) without complying with the provisions of Pt 17 Ch 10 (s 629(5)). As to the meaning of 'director' under the Companies Acts see PARA 478.

Where shares in a limited company are redeemed, the redeemed shares are cancelled and the amount of the company's issued share capital is diminished accordingly by the nominal value of the shares redeemed: see the Companies Act 2006 s 688; and PARA 1232. A reduction of capital will normally amount to a disposal of an interest in the shares affected for the purpose of capital gains tax: see the Taxation of Chargeable Gains Act 1992 ss 122, 126-129; and **CAPITAL GAINS TAXATION** vol 5(1) (2004 Reissue) PARAS 295, 323.

Capital may also be reduced in effect by the exercise by a private company of its power to purchase or redeem its shares out of capital (see PARA 1244) but this scheme is subject to stringent statutory controls and provision is made for objections by members and creditors to the court (see PARA 1249).

4 As to the meaning of 'special resolution' see PARA 614. As to when the resolution has effect see PARA 1179. A special resolution under the Companies Act 2006 s 641 may not provide for a reduction of share capital to take effect later than the date on which the resolution has effect in accordance with Pt 17 Ch 10: s 641(5).

5 Companies Act 2006 s 641(1)(a). As to reduction of capital supported by a solvency statement see PARAS 1178-1179.

6 As to the meaning of 'member of the company' see PARA 321.

7 As to the meaning of 'share' see PARA 1042.

8 Companies Act 2006 s 641(2). As to the meaning of 'redeemable shares' see PARA 1229.

9 As to when the resolution has effect see PARA 1193. See also the Companies Act 2006 s 641(5) (cited in note 4).

10 As to the meaning of 'court' see PARA 212 note 1.

11 In accordance with the Companies Act 2006 ss 645-651 (see PARA 1180 et seq): see s 641(1)(b).

12 See the Companies Act 2006 s 641(1)(b). Many reductions of capital occur within a scheme of arrangement under Pt 26 (ss 895-901) where the court is called upon to sanction both the scheme and the reduction of capital: see PARA 1425 et seq.

13 In the Companies Act 2006 Pt 17 Ch 10 (see also PARA 1174 et seq): see s 641(6).

14 In with the exception of the Companies Act 2006 s 641(5) (cited in note 4): see s 641(6).

15 As to the meaning of 'articles' see PARA 228 note 2.

16 Companies Act 2006 s 641(6). See further PARA 1187.

17 In subject to the Companies Act 2006 s 641(2): see the text and notes 6-8.

18 As to the Secretary of State see PARA 6.

19 Such regulations are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see the Companies Act 2006 ss 657(4), 1290.

20 Ie the Companies Act 2006 Pt 17 Ch 10 (see also PARA 1174 et seq): see s 657(1).

21 Companies Act 2006 s 657(1). The regulations may: (1) amend or repeal any provision of Pt 17 Ch 10; or (2) make such other provision as appears to the Secretary of State appropriate in place of any of those provisions: s 657(2). Regulations under s 657 may make consequential amendments or repeals in other provisions of the Companies Act 2006, or in other enactments: s 657(3). At the date at which this volume states the law, no such regulations had been made for these purposes.

22 Ie the Companies Act 2006 Pt 17 Ch 10 (see also PARA 1174 et seq).

23 See the Companies Act 2006 s 610(4) (cited in PARA 1146), s 628(3) (cited in PARA 1172), s 733(6) (cited in PARA 1236).

24 As to the meaning of 'share premium account' see PARA 1146.

25 See the Companies Act 2006 s 610(4); and PARA 1146. See also *Re Tip-Europe Ltd* [1988] BCLC 231; *Re Ratners Group plc* [1988] BCLC 685; *Re Thorn EMI plc* [1989] BCLC 612; *Quayle Munro Ltd, Petitioners* [1994] 1 BCLC 410, Ct of Sess.

26 As to the meaning of 'redenomination reserve' see PARA 1172.

27 See the Companies Act 2006 s 628(3); and PARA 1172.

28 As to the meaning of 'capital redemption reserve' see PARA 1236.

29 See the Companies Act 2006 s 733(6); and PARA 1236.

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1174. Forms of reduction.

Subject to confirmation by the court¹ or, in the case of a private company², to a supporting solvency statement³, and subject also to any provision of the company's articles⁴ restricting or prohibiting the reduction of the company's share capital⁵, a company may reduce its share capital⁶ in any way⁷. In particular, a company may⁸: (1) extinguish or reduce the liability on any of its shares⁹ in respect of share capital not paid up¹⁰; or (2) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital that is lost or unrepresented by available assets, or repay any paid-up share capital in excess of the company's wants¹¹.

1 Ie subject to the Companies Act 2006 s 641(1)(b): see PARA 1173. As to the meaning of 'court' see PARA 212 note 1.

A transaction which upon examination can be seen to involve a return of capital (other than one properly sanctioned by the court), in whatever form, under whatever label, and whether directly or indirectly, to a member is void: *British and Commonwealth Holdings plc v Barclays Bank plc* [1996] 1 All ER 381, [1996] 1 WLR 1, CA; *Aveling Barford Ltd v Perion Ltd* [1989] BCLC 626.

2 As to the meaning of 'private company' under the Companies Acts see PARA 102.

3 Ie subject to the Companies Act 2006 s 641(1)(a), (2): see PARA 1173.

4 As to the meaning of 'articles' see PARA 228 note 2; and as to the meaning of 'company' under the Companies Acts see PARA 24.

5 See the Companies Act 2006 s 641(6). As to a company's capital generally see PARA 1042.

6 Ie under the Companies Act 2006 s 641: see the text and notes 1-5, 7-11.

7 Companies Act 2006 s 641(3). A company cannot bind itself not to exercise its statutory power to reduce its capital: see *Russell v Northern Bank Development Corpn Ltd* [1992] 3 All ER 161, [1992] 1 WLR 588, HL.

The resolution to reduce capital can refer to the share capital as it will be when the court's confirmation is sought and not as it stands at the date of the resolution: *Re Tip-Europe Ltd* [1988] BCLC 231 (resolution for a reduction of share premium account made conditional on allotment of shares at a premium; court may confirm reduction provided that the condition is fulfilled by the time the court confirms the reduction). Cf *Re Transfesa Terminals Ltd* (1987) 3 BCC 647, distinguished in *Re Tip-Europe Ltd* [1988] BCLC 231. A company may reduce its stock: see *Re Allsopp & Sons Ltd* (1903) 51 WR 644, CA.

8 Companies Act 2006 s 641(4).

9 As to the meaning of 'share' see PARA 1042.

10 Companies Act 2006 s 641(4)(a). In *Re Doloswella Rubber and Tea Estates Ltd, and Reduced* [1917] 1 Ch 213, the court confirmed a reduction under which partly paid shares were sub-divided and the amount paid appropriated to some of the shares resulting, so making them fully paid, while the remainder of the shares which were wholly unpaid were surrendered for reissue. In that case the decision in *Re Walker Steam Trawl Fishing Co Ltd, Petitioners* 1908 SC 123, Ct of Sess (where the Scottish court refused to confirm a similar reduction) was not referred to.

Issued capital may be reduced, whether fully paid or not: *Re Anglo-French Exploration Co* [1902] 2 Ch 845 at 852 per Buckley J; *Re Ormiston Coal Co* 1949 SC 516. Prior authorisation under the articles of association is no longer required: see PARA 1187. As to the meaning of 'issued', in relation to share capital, see PARA 1045.

11 Companies Act 2006 s 641(4)(b). For a case where there was a simultaneous reduction of capital and capitalisation of reserves so as to leave the shares after both operations had been concluded as still paid up in full see *Doloi Tea Co Ltd, Petitioners* 1961 SLT 168, Ct of Sess.

As to the Secretary of State's power to modify s 641 by regulations see s 657; and PARA 1173 text and notes 24-27. At the date at which this volume states the law, no such regulations had been made for these purposes.

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1175. Reduction when company is winding up.

The power of a limited company¹ to reduce capital² continues even after it has gone into liquidation³. If the reduction is part of a compromise or arrangement⁴, the requirements of the Companies Act 2006 as regards reduction of capital must still be complied with⁵.

1 As to limited companies see PARA 102.

2 As to the power to reduce capital see PARA 1173.

3 *Re Cooper, Cooper and Johnson Ltd* [1902] WN 199; *Re Stephen Walters & Sons Ltd* [1926] WN 236.

4 Ie under the Companies Act 2006 Pt 26 (ss 895-901): see PARA 1425 et seq. As to the meaning of 'arrangement' for these purposes see PARA 1425.

5 *Re Cooper, Cooper and Johnson Ltd* [1902] WN 199. See further PARA 1432.

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1176. Reserve or returned capital.

Capital¹ which cannot be called up² except in the event of, and for the purpose of, winding up³ may be cancelled with the confirmation of the court⁴.

Capital issued by a company registered under the Companies Act 1844⁵ on the terms that it should be returned to the shareholders, and which had been so returned, was cancelled with the confirmation of the court, where the company had subsequently been registered with limited liability and had under its articles power to reduce capital⁶.

1 As to a company's capital generally see PARA 1042.

2 As to the meaning of 'called up share capital' see PARA 1045.

3 Ie 'reserve' capital, to be distinguished from reserves created out of profits.

4 *Re Midland Railway Carriage and Wagon Co* (1907) 23 TLR 661.

5 7 & 8 Vict c 110 (repealed).

6 *Re Midland Railway Carriage and Wagon Co* (1907) 23 TLR 661. Companies which under their deeds of settlement had power to reduce capital lost that power by registering as limited companies under the Companies Act 1862 (repealed): *Droitwich Patent Salt Co Ltd v Curzon* (1867) LR 3 Exch 35.

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1177. Unlimited companies.

There is nothing to prevent an unlimited company¹, whenever registered², from providing by its articles³ for a return of capital to its members⁴.

1 As to the meaning of 'unlimited company' under the Companies Acts see PARA 102.

2 As to registration and re-registration under the Companies Act 2006 see PARA 102 et seq.

3 As to a company's articles of association see PARA 228 et seq.

4 *Re Borough Commercial and Building Society* [1893] 2 Ch 242 at 252. As to membership of a company see PARA 321 et seq.

The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. If an unlimited company is governed by Table E of those legacy articles, it may alter the capital clause in its articles by a special resolution reducing its share capital in any way: see the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table E art 4(e). As to alterations in a company's articles of association see PARA 232; and as to special resolutions see PARA 614.

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B. PRIVATE COMPANIES: REDUCTION BY SOLVENCY STATEMENT

1178. Reduction of capital supported by solvency statement.

A resolution for reducing the share capital of a private company¹ limited by shares² is supported by a solvency statement if the directors³ of the company make a statement of the solvency of the company⁴ (a 'solvency statement') not more than 15 days before the date on which the resolution is passed, and the resolution and solvency statement are registered⁵.

A solvency statement is a statement that each of the directors⁶:

- 2107 (1) has formed the opinion, as regards the company's situation at the date of the statement, that there is no ground on which the company could then be found to be unable to pay (or otherwise discharge) its debts⁷; and
- 2108 (2) has also formed the opinion, if it is intended to commence the winding up of the company within 12 months of that date, that the company will be able to pay, or otherwise discharge, its debts in full within 12 months of the commencement of the winding up⁸, or in any other case, that the company will be able to pay, or otherwise discharge, its debts as they fall due during the year immediately following that date⁹.

In forming those opinions, the directors must take into account all of the company's liabilities, including any contingent or prospective liabilities¹⁰. The solvency statement must be in the prescribed form¹¹ and must state the date on which it is made, and the name of each director of the company¹².

If the directors make a solvency statement without having reasonable grounds for the opinions expressed in it, and the statement is delivered to the registrar, an offence is committed by every director who is in default¹³.

Where the resolution is proposed as a written resolution, a copy of the solvency statement must be sent or submitted to every eligible member¹⁴ at or before the time at which the proposed resolution is sent or submitted to him¹⁵; and where the resolution is proposed at a general meeting, a copy of the solvency statement must be made available for inspection by members of the company throughout that meeting¹⁶. The validity of a resolution is not, however, affected by a failure to comply¹⁷ with these requirements¹⁸.

The above provisions have effect subject to any provision of the company's articles¹⁹ restricting or prohibiting the reduction of the company's share capital²⁰, and subject to the proviso that a company may not reduce its capital if as a result of the reduction there would no longer be any member of the company holding shares other than redeemable shares²¹.

1 As to the meaning of 'private company' under the Companies Acts see PARA 102.

2 I.e. the resolution required by the Companies Act 2006 s 641(1)(a) (see PARA 1173). As to the meaning of 'limited by shares' under the Companies Acts see PARA 102.

3 As to the meaning of 'director' under the Companies Acts see PARA 478.

- 4 le in accordance with the Companies Act 2006 s 643: see the text and notes 6-13.
 - 5 Companies Act 2006 s 642(1). Registration must take place in accordance with s 644 (see PARA 1179): s 642(1).
 - 6 Companies Act 2006 s 643(1).
 - 7 Companies Act 2006 s 643(1)(a).
 - 8 Companies Act 2006 s 643(1)(b)(i).
 - 9 Companies Act 2006 s 643(1)(b)(ii).
 - 10 Companies Act 2006 s 643(2).
 - 11 In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the Secretary of State see PARA 6. A solvency statement under the Companies Act 2006 s 643 must (1) be in writing; (2) indicate that it is a solvency statement for the purposes of s 642; and (3) be signed by each of the directors: Companies (Reduction of Share Capital) Order 2008, SI 2008/1915, art 2.
 - 12 Companies Act 2006 s 643(3).
 - 13 Companies Act 2006 s 643(4). A person guilty of an offence under s 643(4) is liable on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or to both, or on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both: s 643(5)(a), (b)(i). As to the meaning of 'statutory maximum' see PARA 1622.
 - 14 As to who qualifies as a member of a company see PARA 321.
 - 15 Companies Act 2006 s 642(2). As to written resolutions see PARA 623.
 - 16 Companies Act 2006 s 642(3). As to resolutions and meetings of members see PARA 629 et seq.
 - 17 le a failure to comply with the Companies Act 2006 s 642(2), (3): see the text and notes 14-16.
 - 18 Companies Act 2006 s 642(4).
- As to the Secretary of State's power to modify ss 642, 643 by regulations see s 657; and PARA 1173 text and notes 24-27. At the date at which this volume states the law, no such regulations had been made for these purposes.
- 19 As to the meaning of 'articles' see PARA 228 note 2.
 - 20 See the Companies Act 2006 s 641(6); and PARA 1173.
 - 21 See the Companies Act 2006 s 641(2); and PARA 1173. As to the meaning of 'redeemable shares' see PARA 1229.

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1179. Registration of resolution and supporting documents.

Within 15 days after the resolution for reducing share capital¹ is passed the company² must deliver to the registrar³ a copy of the solvency statement⁴ and a statement of capital⁵. The statement of capital must state with respect to the company's share capital as reduced by the resolution⁶:

- 2109 (1) the total number of shares⁷ of the company⁸;
- 2110 (2) the aggregate nominal value of those shares⁹;
- 2111 (3) for each class of shares¹⁰, prescribed particulars¹¹ of the rights attached to the shares¹², the total number of shares of that class¹³, and the aggregate nominal value of shares of that class¹⁴; and
- 2112 (4) the amount paid up and the amount, if any, unpaid on each share, whether on account of the nominal value of the share or by way of premium¹⁵.

The registrar must register the documents so delivered to him¹⁶ on receipt¹⁷; and the resolution does not take effect until those documents are registered¹⁸.

The company must also deliver to the registrar, within 15 days after the resolution is passed, a statement by the directors¹⁹ confirming that the solvency statement was made not more than 15 days before the date on which the resolution was passed, and was duly provided²⁰ to members²¹.

The validity of a resolution is not, however, affected by a failure to deliver the documents required to be delivered to the registrar²² within the specified time²³, or by a failure to comply with the duty²⁴ to deliver the directors' statement²⁵.

If the company delivers to the registrar a solvency statement that was not duly provided to members²⁶, an offence is committed by every officer of the company who is in default²⁷; and if default is made in complying with the above provisions, an offence is committed by the company, and by every officer of the company who is in default²⁸.

1 As to the special resolution for reducing share capital see PARA 1173.

2 As to the meaning of 'company' under the Companies Acts see para 24.

3 As to the meaning of 'registrar' see para 131 note 2. As to the delivery of documents to the registrar see para 141; and as to the requirements generally for the proper delivery of documents to the registrar see para 142.

4 As to the solvency statement see para 1178.

5 Companies Act 2006 s 644(1). This is in addition to the copy of the resolution itself that is required to be delivered to the registrar under Pt 3 Ch 3 (ss 29, 30) (see para 231): s 644(1). Any statement of capital is subject to the disclosure requirements in s 1078: see para 144.

6 Companies Act 2006 s 644(2).

7 As to the meaning of 'share' see para 1042.

8 Companies Act 2006 s 644(2)(a).

9 Companies Act 2006 s 644(2)(b). As the nominal value of shares see para 1042.

10 As to the meaning of 'class of shares' see para 1057.

11 In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the Secretary of State see para 6. As to the particulars prescribed for these purposes see note 12.

12 Companies Act 2006 s 644(2)(c)(i). The particulars prescribed for these purposes are (1) particulars of any voting rights attached to the shares, including rights that arise only in certain circumstances; (2) particulars of any rights attached to the shares, as respects dividends, to participate in a distribution; (3) particulars of any rights attached to the shares, as respects capital, to participate in a distribution (including on winding up); and (4) whether the shares are to be redeemed or are liable to be redeemed at the option of the company or the shareholder: Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 2(2)(j), (3).

13 Companies Act 2006 s 644(2)(c)(ii).

- 14 Companies Act 2006 s 644(2)(c)(iii).
- 15 Companies Act 2006 s 644(2)(d).
- 16 Ie the documents delivered under the Companies Act 2006 s 644(1): see the text and notes 1-5.
- 17 Companies Act 2006 s 644(3).
- 18 Companies Act 2006 s 644(4).
- 19 As to the meaning of 'director' under the Companies Acts see para 478.
- 20 Ie provided in accordance with the Companies Act 2006 s 642(2) or (3): see para 1178.
- 21 Companies Act 2006 s 644(5). As to who qualifies as a member of a company see para 321.
- 22 Ie required to be delivered under the Companies Act 2006 s 644(1): see the text and notes 1-5.
- 23 Ie within the time specified in the Companies Act 2006 s 644(1): see the text and notes 1-5.
- 24 Ie a failure to comply with the Companies Act 2006 s 644(5): see the text and notes 19-21.
- 25 Companies Act 2006 s 644(6).
- 26 See note 20.
- 27 Companies Act 2006 s 644(7). As to the meaning of 'officer in default' see para 315; and as to the meaning of 'officer' under the Companies Acts generally see para 607. A person guilty of an offence under s 644(7) or (8) is liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum: s 644(9). As to the meaning of 'statutory maximum' see para 1622.
- 28 Companies Act 2006 s 644(8). As to the penalty for such an offence see note 28.
- As to the Secretary of State's power to modify s 644 by regulations see s 657; and PARA 1173 text and notes 24-27. At the date at which this volume states the law, no such regulations had been made for these purposes.

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C. ALL CASES: REDUCTION BY COURT ORDER

(A) IN GENERAL

1180. Procedure.

Where a limited company having a share capital¹ has passed a special resolution for reducing share capital², it may apply to the court³ for an order confirming the reduction⁴. This procedure applies equally to the reduction of the share premium account⁵, the reduction of the capital redemption reserve⁶ and the reduction of the redenomination reserve⁷.

In the case of an application to confirm a reduction in capital, if any shares were issued otherwise than for cash⁸, then for any shares so issued on or after 1 January 1901, it is sufficient to set out in the application the extent to which the shares are, or are treated as being, paid up⁹.

¹ As to the meaning of 'company limited by shares' see PARA 102. As to the meaning of 'share capital' see PARA 1042.

2 It has passed a resolution in accordance with the Companies Act 2006 s 641(1)(b) (see PARA 1173).

3 As to the meaning of 'court' see PARA 212 note 1.

4 Companies Act 2006 s 645(1). As to applications made under the Companies Act 2006 see generally PARA 305.

The provisions of s 645(1) have effect subject to any provision of the company's articles restricting or prohibiting the reduction of the company's share capital: see s 641(6); and PARA 1173. As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to the Secretary of State's power to modify s 645 by regulations see s 657; and PARA 1173 text and notes 24-27. At the date at which this volume states the law, no such regulations had been made for these purposes.

5 See the Companies Act 2006 s 610(4); and PARA 1146. As to the meaning of 'share premium account' see PARA 1146.

6 See the Companies Act 2006 s 733(6); and PARA 1236. As to the meaning of 'capital redemption reserve' see PARA 1236.

7 See the Companies Act 2006 s 628(3); and PARA 1172. As to the meaning of 'redenomination reserve' see PARA 1172.

8 As to the meanings of 'cash' and consideration 'other than cash' in relation to the allotment or payment up of shares in a company see PARA 1091.

9 *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 27(a). For any shares so issued between 1 September 1867 and 31 December 1900, the application must also show that the requirement as to the filing of the relevant contract with the registrar of joint stock companies in the Companies Act 1867 s 25 (repealed) was complied with: *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 27(b).

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(B) ROLE OF THE COURT

1181. Confirmation by the court.

In the case of a reduction of capital which must be confirmed by the court¹, the court has a discretion whether to do so². Where the reduction does not involve the diminution of liability on any shares or the return of paid up capital to any shareholder, the only question for the court is whether the proposed reduction is fair and equitable as between the different classes of shareholders³. The fairness of a proposed reduction is a matter to be decided by the court on the evidence before it⁴.

Speaking generally, a reduction of capital need not be spread equally or rateably over all the shares of the company⁵. If there is nothing unfair or inequitable in the transaction, the shares of one or more shareholders may be extinguished without affecting other shares of the same or a different class⁶, although a reduction which does not provide for uniform treatment of shareholders whose rights are similar is narrowly scrutinised⁷.

The court can confirm a reduction even if there is a factual error in the resolution for reducing capital, provided that it is so insignificant that no one could be thought to be prejudiced by its correction⁸.

The court may also confirm a reduction even if the voting powers of the members or their priorities are affected by it, or the scheme involves the extinction of liability in respect of arrears of preference dividends⁹.

1 See the Companies Act 2006 s 641(1)(b); and PARA 1173.

2 *British and American Trustee and Finance Corp v Couper* [1894] AC 399, HL; *Re Thomas de la Rue & Co Ltd and Reduced* [1911] 2 Ch 361. See generally the cases cited in note 3. As to the position of creditors see PARAS 1183, 1188 et seq. The court will also provide for the costs of a dissentient shareholder in a proper case, and as far as possible encourages helpful criticism by such a shareholder: *Re Thomas de la Rue & Co Ltd and Reduced*.

3 See the cases cited in note 2.

4 *Poole v National Bank of China Ltd* [1907] AC 229 at 239, HL, per Lord Macnaghten. See also *British and American Trustee and Finance Corp v Couper* [1894] AC 399, HL; *Re Floating Dock Co of St Thomas Ltd* [1895] 1 Ch 691; *Re Thomas de la Rue & Co Ltd and Reduced* [1911] 2 Ch 361; *Carruth v Imperial Chemical Industries Ltd* [1937] AC 707, [1937] 2 All ER 422, HL; *Prudential Assurance Co Ltd v Chatterley-Whitfield Collieries Ltd* [1949] AC 512, [1949] 1 All ER 1094, HL; *Wilsons and Clyde Coal Co Ltd v Scottish Insurance Corp Ltd* 1948 SC 360, Ct of Sess (affd sub nom *Scottish Insurance Corp Ltd v Wilsons & Clyde Coal Co Ltd* [1949] AC 462, [1949] 1 All ER 1068, HL); *Ex p Westburn Sugar Refineries Ltd* [1951] AC 625, [1951] 1 All ER 881, HL; *Re Saltean Estate Co Ltd* [1968] 3 All ER 829, [1968] 1 WLR 1844; *Re William Jones & Sons Ltd* [1969] 1 All ER 913, [1969] 1 WLR 146; *House of Fraser plc v ACGE Investments Ltd* [1987] AC 387, [1987] 2 WLR 1083, HL; *Re Northern Engineering Industries plc* [1994] 2 BCLC 704, CA. Earlier cases had also considered whether confirmation should be refused out of regard to the interest of those members of the public who may be induced to take shares (see *Poole v National Bank of China Ltd* at 239 per Lord Macnaghten; *Caldwell & Co Ltd v Caldwell* 1916 SC 120 at 121, HL, per Lord Parker of Waddington; *Ex p Westburn Sugar Refineries Ltd* at 630 and 884 per Lord Normand) but the court seems to give little weight to such considerations now (see *Re Grosvenor Press plc* [1985] 1 WLR 980, [1985] BCLC 286 (in the absence of special circumstances, creditors and future shareholders adequately protected by statutory safeguards)).

5 *Re Quebrada Railway, Land and Copper Co* (1889) 40 ChD 363; *Re American Pastoral Co* (1890) 62 LT 625; *Re Gatling Gun Ltd* (1890) 43 ChD 628; *Re Agricultural Hotel Co* [1891] 1 Ch 396; *Re Dido Pier Co* [1891] 2 Ch 354; *Re Pinkney & Sons Steamship Co* [1892] 3 Ch 125; *Re Newbery-Vautin (Patents) Gold Extraction Co Ltd* [1892] 3 Ch 127n; *Re Floating Dock Co of St Thomas Ltd* [1895] 1 Ch 691; *Re London and New York Investment Corp* [1895] 2 Ch 860; *Re Hyderabad (Deccan) Co Ltd* (1896) 75 LT 23. A rateable reduction may work injustice: see *Re Credit Assurance and Guarantee Corp Ltd* [1902] 2 Ch 601, CA.

6 *British and American Trustee and Finance Corp v Couper* [1894] AC 399 at 406, HL, per Lord Herschell LC, and at 415, 417 per Lord Macnaghten; *Re National Dwellings Society Ltd* (1898) 78 LT 144; *Bannatyne v Direct Spanish Telegraph Co* (1886) 34 ChD 287, CA; *Re Direct Spanish Telegraph Co* (1886) 34 ChD 307; *Re Thomas de la Rue & Co Ltd and Reduced* [1911] 2 Ch 361; *Re Showell's Brewery Co Ltd and Reduced* (1914) 30 TLR 428; cf *Re Australian Estates and Mortgage Co Ltd* [1910] 1 Ch 414; *Re Hoare & Co Ltd and Reduced* [1910] WN 87.

The decision that the power to confirm a reduction of capital affecting only some of the shares is legal (*Re Gatling Gun Ltd* (1890) 43 ChD 628) has been approved by the House of Lords (*British and American Trustee and Finance Corp v Couper* [1894] AC 399, where the reduction involved the cancellation of the shares of all the American shareholders, who were to take over the American investments of the company in consideration for which the company, which would then consist only of English shareholders, was to retain the English assets). More recently in *Re Robert Stephen Holdings Ltd* [1968] 1 All ER 195n, [1968] 1 WLR 522, it was stated that the better practice in such cases where one part of a class is to be treated differently from another part of the same class (unless all the shareholders consent) is to proceed by way of a compromise or arrangement under what is now the Companies Act 2006 Pt 26 (ss 895-901) (see PARA 1425 et seq), as this affords better protection to a non-assenting minority. In that case the court did confirm the reduction despite its affecting shareholders of the same class in different ways but no shareholder appeared to oppose the confirmation.

As to a reduction which amounts to a variation of class rights see PARA 1186.

7 *Poole v National Bank of China Ltd* [1907] AC 229, HL. See also the cases cited in note 5.

8 *Re Willaire Systems plc* [1987] BCLC 67, CA. See also *Re European Home Products plc* [1988] BCLC 690 (where a more significant error occurred in the circulars sent to the shareholders setting out the proposed reduction but the court reluctantly confirmed the reduction as creditors were not affected and no shareholder regarded the mistake as being of such importance as to seek the court's refusal).

9 *Re James Colmer Ltd* [1897] 1 Ch 524; *Re Allsopp & Sons Ltd* (1903) 51 WR 644, CA; *Re National Dwellings Society Ltd* (1898) 78 LT 144; *Re Oban and Aultmore-Glenlivet Distilleries Ltd* (1903) 5 F 1140; and see *Re*

Continental Union Gas Co Ltd (1891) 7 TLR 476; *Re Hoare & Co Ltd and Reduced* [1910] WN 87 (where a scheme under what is now the Companies Act 2006 Pt 26 was at the same time approved).

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1182. Reduction where shares of different classes.

In the case of a reduction of capital lost or unrepresented by available assets¹, the reduction should prima facie, as between preference shares having a priority as to return of capital in winding up, and shares deferred in this respect, be effected at the expense of the latter². A reduction is not, however, necessarily made on this basis where the preference shareholders under a power in the articles consent, as part of the scheme, to a modification of their rights as to capital³. All-round reductions are also confirmed where the preference shares confer only a priority as to dividends⁴.

The fact that losses are, in case of winding up, to be borne by members in proportion to the amount paid up on their shares does not require the court to apply the same principle on a reduction as between shares of the same class with different amounts paid up on them⁵.

Where surplus capital is being returned, the repayment should prima facie, as between preference shares having a priority as to the return of capital in winding up, and shares deferred in this respect, be effected at the expense of the former⁶.

1 Capital properly expended in preliminary expenses is not such capital: *Re Abstainers and General Insurance Co* [1891] 2 Ch 124.

2 *Re Floating Dock Co of St Thomas Ltd* [1895] 1 Ch 691; *Re Agricultural Hotel Co* [1891] 1 Ch 396; *Re London and New York Investment Corp* [1895] 2 Ch 860.

3 *Re Welsbach Incandescent Gas Light Co Ltd* [1904] 1 Ch 87, CA.

4 *Bannatyne v Direct Spanish Telegraph Co* (1886) 34 ChD 287, CA; *Re Barrow Haematite Steel Co* (1888) 39 ChD 582; *Re Mackenzie & Co Ltd* [1916] 2 Ch 450. See also *Re Quebrada Railway, Land and Copper Co* (1889) 40 ChD 363; *Re Union Plate Glass Co* (1889) 42 ChD 513.

5 *Re Credit Assurance and Guarantee Corp Ltd* [1902] 2 Ch 601, CA.

6 *Re Chatterley-Whitfield Collieries Ltd* [1948] 2 All ER 593, CA (affd sub nom *Prudential Assurance Co Ltd v Chatterley-Whitfield Collieries Ltd* [1949] AC 512, [1949] 1 All ER 1094, HL); *Wilsons and Clyde Coal Co Ltd v Scottish Insurance Corp Ltd* 1948 SC 360, Ct of Sess (affd sub nom *Scottish Insurance Corp Ltd v Wilsons & Clyde Coal Co Ltd* [1949] AC 462, [1949] 1 All ER 1068, HL); *Re Fowlers Vacola Manufacturing Co Ltd* [1966] VR 97; *Re Saltdean Estate Co Ltd* [1968] 3 All ER 829, [1968] 1 WLR 1844; *House of Fraser plc v ACGE Investments Ltd* [1987] AC 387, [1987] 2 WLR 1083, HL; *Re Hunting plc* [2004] EWHC 2591 (Ch), [2005] 2 BCLC 211. See also PARAS 1185-1186.

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1183. Proving loss of capital.

Where the sole reason for reduction is the fact that capital is lost or unrepresented by available assets, the court requires evidence of such loss¹ and that it is permanent². If, however, there are other valid reasons for reduction, it is immaterial that the reduction is not exactly commensurate with the loss or deficiency of assets, a reduction beyond the loss by the company being within the general words of the Companies Act 2006³.

1 If reliance is placed upon a valuation to prove the value of a particular asset, the court will as a general rule require an affidavit by the valuer to the effect that the value shown by his valuation (which should be exhibited) is in his opinion fair and proper: *Practice Direction* [1947] WN 116. See also note 3.

2 *Re Jupiter House Investments (Cambridge) Ltd* [1985] BCLC 222, [1985] 1 WLR 975 (reduction sanctioned even though no permanent loss shown, on faith of undertaking to place any moneys recovered to capital reserve). Cf *Re Grosvenor Press plc* [1985] 1 WLR 980, [1985] BCLC 286 (reduction similarly sanctioned on undertaking limited to protection of existing creditors).

3 *Poole v National Bank of China Ltd* [1907] AC 229, HL. As to applying reserve funds in or towards wiping out losses of capital cf *Re Hoare & Co Ltd and Reduced* [1904] 2 Ch 208, CA; *Re Rowland and Marwood's Steamship Co Ltd and Reduced* (1906) 51 Sol Jo 131; and see *Re Barrow Haematite Steel Co* [1901] 2 Ch 746, CA (commented upon in *Poole v National Bank of China Ltd* at 238). If the amount of capital to be written off as lost is more than the amount of proved loss, the court may, and probably will, direct an inquiry as to creditors. It has been held that it is unnecessary to prove that capital has been lost, or is unrepresented by available assets: *Re Louisiana and Southern States Real Estate and Mortgage Co* [1909] 2 Ch 552. The real effect of *Poole v National Bank of China Ltd* is probably that the courts need not be so strict as formerly in requiring evidence that the capital is lost or unrepresented by available assets. See *Caldwell v Caldwell & Co (Papermakers) Ltd* [1916] WN 70 at 70, HL, per Lord Parker of Waddington (where the reduction of capital was based on the ground that capital had been lost or was unrepresented by available assets, it was, though not necessary, at any rate wise and prudent to insist on some evidence of the fact). The approach in *Caldwell v Caldwell & Co (Papermakers) Ltd* has become the modern practice.

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1184. Reductions which the court will not confirm.

The court has refused to confirm a reduction by the surrender of paid up deferred shares the holders of which were to receive a larger amount in paid up ordinary shares, by which amount the capital was to be increased¹; and a reduction scheme to wipe out the deficiency caused by an illegal allotment of shares at a discount². The court may well refuse to confirm any reduction where the resolution for reducing the share capital is not for any discernible purpose but is simply an act in a vacuum³.

1 *Re Development Co of Central and West Africa* [1902] 1 Ch 547.

2 *Re New Chile Gold Mining Co* (1888) 38 ChD 475.

3 See *Re Ratners Group plc* [1988] BCLC 685; *Re Thorn EMI plc* [1989] BCLC 612.

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COMPANIES ACTS/(20) SHARE CAPITAL/(viii) Reduction of Share Capital/C. ALL CASES:
REDUCTION BY COURT ORDER/(B) Role of the Court/1185. Return of capital.

1185. Return of capital.

Where the reduction involves the diminution of liability on any shares or the return of paid up capital, the court must see that the interests of creditors are safeguarded, but, subject to this, the questions for consideration are the same as if there were no such diminution or return¹. The fact that the reduction may have an ulterior motive is irrelevant², unless it is simply a device to avoid the payment of tax³.

The court has sanctioned: a return of capital in excess of the needs of the company even though a part of the portion returned was to be borrowed immediately by the company from the shareholders on the security of debentures⁴; a return of capital to be satisfied by the issue of debenture stock⁵; and a return made upon the footing that it may be called up again⁶. The actual return of the excess capital should not be made until after the order confirming the reduction and approving the minute has been made⁷. If the capital is not returned, the right of the shareholders to claim it will be barred after 12 years from the date of the notice of the order confirming the reduction⁸. It is not necessary that on a return of capital the shareholders should receive cash⁹.

1 *Ex p Westburn Sugar Refineries Ltd* [1951] AC 625, [1951] 1 All ER 881, HL (where a transfer of a company's assets, in consideration of reduction of capital, to a holding company whose shares were held by the same shareholders, was held to be permissible although the value of assets exceeded the amount of reduction). See further PARA 1181.

2 *Ex p Westburn Sugar Refineries Ltd* [1951] AC 625, [1951] 1 All ER 881, HL.

3 *Re A and D Fraser Ltd* 1951 SC 394. Cf *Re David Bell Ltd* 1954 SC 33, Ct of Sess (no objection that company could pay dividend equal to proposed return of capital).

4 *Re Nixon's Navigation Co* [1897] 1 Ch 872; *Re Lamson Store Service Co Ltd* [1897] 1 Ch 875n.

5 *Re Thomas de la Rue & Co Ltd and Reduced* [1911] 2 Ch 361 (scheme sanctioned on the condition that the debenture stock should be redeemed within 40 years).

6 *Re Fore-Street Warehouse Co Ltd* (1888) 59 LT 214; *Re Watson, Walker and Quickfall Ltd* [1898] WN 69; *Re Brown, Sons & Co* 1931 SC 701; *Re Stevenson, Anderson & Co Ltd* 1951 SC 346.

7 *Re Lees Brook Spinning Co* [1906] 2 Ch 394; *Re Anglo-Italian Bank Ltd and Reduced* (1906) 51 Sol Jo 48; *General Industrials Development Syndicate Ltd* [1907] WN 23 (not following *Re Calgary and Edmonton Land Co* [1906] 1 Ch 141).

8 See the Limitation Act 1980 s 8(1); and **LIMITATION PERIODS** vol 68 (2008) PARA 975 et seq. See also *Re Artisans' Land and Mortgage Corpn* [1904] 1 Ch 796 at 802 per Byrne J; *Re Phoebe Gold Mining Co* [1900] WN 182.

9 *Ex p Westburn Sugar Refineries Ltd* [1951] AC 625, [1951] 1 All ER 881, HL; *Re Thomas de la Rue & Co Ltd and Reduced* [1911] 2 Ch 361. In that case there need not be an exact correlation between the capital reduced and the value of the assets transferred but, if what is offered to the shareholder is illusory, the court will refuse to confirm the reduction.

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REDUCTION BY COURT ORDER/(B) Role of the Court/1186. Reduction and variation of class rights.

1186. Reduction and variation of class rights.

The cancellation of a particular class of shares and the return of the capital paid up thereon does not require the separate consent of the holders of the shares of that class unless it involves a variation of the rights attaching to those shares; and such cancellation and return of capital while the company is a going concern does not constitute a variation of the rights attached to the shares if the return of capital is made strictly in accordance with those rights on a winding up¹. Shareholders may be protected against the risk of reduction in this way without their consent by a provision in the articles of association².

If a scheme of reduction does vary or abrogate class rights, despite the generality of the court's power to confirm³ (and some suggestions to the contrary in older cases⁴), it is unlikely that the court would now confirm a reduction without the appropriate class consent having been obtained⁵.

1 *Re Northern Engineering Industries plc* [1994] 2 BCLC 704 at 706, CA, per Millett LJ; *Re Chatterley-Whitfield Collieries Ltd* [1948] 2 All ER 593 (affd sub nom *Prudential Assurance Co Ltd v Chatterley-Whitfield Collieries Ltd* [1949] AC 512, [1949] 1 All ER 1094, HL); *Re Saltdean Estate Co Ltd* [1968] 3 All ER 829, [1968] 1 WLR 1844; *House of Fraser plc v ACGE Investments Ltd* [1987] AC 387, [1987] 2 WLR 1083, HL. This is so even if the preference shareholders also have further rights of participation as regards dividend: *Re Saltdean Estate Co Ltd*. It is not clear whether preference shares which are participating as to surplus on a winding up could be dealt with in this way although *Re William Jones & Sons Ltd* [1969] 1 All ER 913, [1969] 1 WLR 146 suggests that they can. In that instance, however, the preference shareholders raised no objection to being paid off, probably because they were to be paid off in full, although the shares stood at less than par. Moreover, there was no present prospect of the company being wound up so any enjoyment of surplus on a winding up would not occur for many years.

2 See *Re Northern Engineering Industries plc* [1994] 2 BCLC 704, CA (articles provided that the rights attached to the preference shares were deemed to be varied by a reduction of the capital paid up on the shares). Such a protective provision encompasses both piecemeal reduction of capital and repayment of an entire class on a reduction to zero: *Re Northern Engineering Industries plc*. A provision of the company's articles may restrict or prohibit the reduction of the company's share capital under the Companies Act 2006: see s 641(6); and PARA 1173.

3 See PARA 1181; and the cases there cited.

4 See eg *Re William Jones & Sons Ltd* [1969] 1 All ER 913, [1969] 1 WLR 146.

5 *Re Northern Engineering Industries plc* [1994] 2 BCLC 704 at 713, CA, per Millett LJ. In such a case shareholders voting at the class meeting must have regard to the interests of the class: *Re Holders Investment Trust Ltd* [1971] 2 All ER 289, [1971] 1 WLR 583.

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1187. Power to reduce may be restricted or prohibited in articles.

The Companies Act 2006¹ does not retain the requirement for prior authorisation of a reduction in capital to be given by a company's articles of association² which was contained in the Companies Act 1985³. If it wishes, however, a company may restrict or prohibit the reduction of its share capital by making provision to this effect in its articles; and the relevant statutory provisions⁴ have effect⁵ subject to any such provision⁶.

1 le the Companies Act 2006 s 641: see PARAS 1173-1174.

2 As to a company's articles of association see PARA 228 et seq.

3 See the Companies Act 1985 s 135(1) (repealed); and see eg *Re MB Group plc* [1989] BCLC 672 (articles authorised reduction provided that it did not have the effect of reducing the share capital below the authorised minimum for public companies; provision not infringed by reduction below minimum for an instant of time followed by an increase of capital above minimum) (see also PARA 1194); *Re Dexine Patent Packing and Rubber Co* (1903) 88 LT 791 (authority to reduce capital given by the memorandum of association did not suffice). The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. If the company is governed by Table A of those legacy articles, Schedule, Table A art 34 (disapplied by Schedule, Table E art 1 in relation to an unlimited company having a share capital) authorises the company by special resolution to reduce its capital. The company may by ordinary resolution cancel shares which, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person and diminish the amount of its share capital by the amount of the shares so cancelled: Schedule, Table A art 32(d) (also so disapplied). As to the reduction of capital by unlimited companies see PARA 1177.

The Companies Act 1862 (repealed) did not expressly provide for any reduction of capital, but Sch 1, Table A arts 17-22 enabled the directors of companies regulated by the Table to forfeit shares on non-payment of calls. This forfeiture worked a reduction of capital not provided for in the body of that Act, but, as it had legislative sanction, it was undoubtedly legal, and similar provisions in the articles of association of companies which had not adopted Table A were also lawful and effective: *Trevor v Whitworth* (1887) 12 App Cas 409 at 417, HL, per Lord Herschell; *Lock v Queensland Investment and Land Mortgage Co* [1896] AC 461, HL. As to forfeiture see PARA 1213 et seq.

4 le the Companies Act 2006 Pt 17 Ch 10 (ss 641-653): see PARA 1173 et seq, 1188 et seq.

5 le with the exception of the Companies Act 2006 s 641(5), cited in PARA 1173 note 17: s 641(6).

6 See the Companies Act 2006 s 641(6); and PARA 1173.

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(C) CONSENT OF CREDITORS TO REDUCTION

1188. Where creditors may object.

If the proposed reduction of capital¹ involves either diminution of liability in respect of unpaid share capital² or the payment to a shareholder³ of any paid-up share capital⁴, and in any other case⁵ if the court⁶ so directs⁷, every creditor of the company⁸ who⁹: (1) at the date fixed by the court is entitled to any debt or claim that, if that date were the commencement of the winding up of the company would be admissible in proof against the company¹⁰; and (2) can show that there is a real likelihood that the reduction would result in the company being unable to discharge his debt or claim when it fell due¹¹, is entitled to object to the reduction of capital¹².

The above provisions have effect subject to any provision of the company's articles¹³ restricting or prohibiting the reduction of the company's share capital¹⁴.

1 See PARA 1173 et seq.

2 Companies Act 2006 s 645(2)(a). As to a company's capital generally see PARA 1042.

As to the Secretary of State's power to modify s 645 by regulations see s 657; and PARA 1173 text and notes 24-27. At the date at which this volume states the law, no such regulations had been made for these purposes.

- 3 As to shareholders and membership of companies generally see PARA 321 et seq.
- 4 Companies Act 2006 s 645(2)(b). See note 2. As to the meaning of 'paid up' in relation to shares see PARA 1091. Cancelling paid up shares on the terms of the amount of paid up capital being paid out of a sinking fund created for the purpose out of profits under special provisions in the articles is not payment of any paid up share capital: see *Re Dido Pier Co* [1891] 2 Ch 354.
- 5 The court will so direct only where a strong case is made out: *Re Meux's Brewery Co Ltd* [1919] 1 Ch 28.
- 6 As to the meaning of 'court' see PARA 212 note 1.
- 7 Companies Act 2006 s 645(2), (4). See note 2.
- 8 As to the meaning of 'company' under the Companies Acts see PARA 24.
- 9 Companies Act 2006 s 646(1).
As to the Secretary of State's power to modify s 646 by regulations see s 657; and PARA 1173 text and notes 24-27. As to regulations so made see the Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009, SI 2009/2022.
- 10 Companies Act 2006 s 646(1)(a) (renumbered by SI 2009/2022). See note 9.
- 11 Companies Act 2006 s 646(1)(b) (added by SI 2009/2022). See note 9.
- 12 Companies Act 2006 s 646(1). See note 9. See also *Re Eastern and Australian Steamship Co Ltd and Reduced* (1893) 68 LT 321. As to creditors entitled to prove in winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 749 et seq. As to the treatment of creditors generally see PARA 1189.
- 13 As to the meaning of 'articles' see PARA 228 note 2.
- 14 See the Companies Act 2006 s 641(6); and PARA 1173.

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1189. Settling list of creditors.

If there are creditors entitled to object to a reduction of share capital¹, the court² must settle a list of those creditors³. The court may, however, if having regard to any special circumstances⁴ of the case it thinks proper to do so, direct that the statutory provisions relating to the creditors' right to object and the settling of a list of creditors⁵ are not to apply as regards any class or classes of creditors⁶. It is common practice for the company to offer certain undertakings⁷ to secure the consent of creditors, thereby obviating the necessity of settling a list.

For the purpose of settling a list of creditors the court must ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims⁸ and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction of capital⁹. If a creditor entered on the list whose debt or claim is not discharged or has not determined does not consent to the reduction, the court may, if it thinks fit, dispense with the consent of that creditor on the company securing payment¹⁰ of his debt or claim¹¹.

1 le if there are creditors who fall within the Companies Act 2006 s 646(1) (see PARA 1188). As to the meaning of 'share capital' see PARA 1042.

2 As to the meaning of 'court' see PARA 212 note 1.

3 Companies Act 2006 s 646(2).

4 The special circumstances must be such that the court is satisfied that the creditors will not be adversely affected by the proposed reduction: *Re Lucania Temperance Billiard Halls (London) Ltd* [1966] Ch 98, [1965] 3 All ER 879; *Anderson Brown & Co Ltd, Petitioners* 1965 SLT 99, Ct of Sess. In considering whether to dispense with the list of creditors, the court will consider whether a company holds sufficient cash and gilt-edged securities to cover all provable liabilities with a reasonable margin of safety as well as the amount which it is proposed to be returned to the shareholders, although its consideration is not limited to cash and gilt-edged securities; it may also take into account sums due to a company by its sundry debtors provided that such sums have been written down so as to exclude bad debts: *Re House of Fraser plc* [1987] BCLC 293, Ct of Sess; *Anderson Brown & Co Ltd, Petitioners* 1965 SC 81, Ct of Sess; *Re Lucania Temperance Billiard Halls (London) Ltd* [1966] Ch 98, [1965] 3 All ER 879. See also *Re Unifruitco Steamship Co* 1930 SC 1104, Ct of Sess; *Re Cadzow Coal Co Ltd* 1931 SC 272, Ct of Sess.

5 le the Companies Act 2006 s 646: see the text and notes 1-3, 8-11; and PARA 1188.

6 Companies Act 2006 s 645(3). See also s 645(2), cited in PARA 1188.

7 See *Re Antwerp Waterworks Co Ltd* [1931] WN 186 (court dispensed with an inquiry on the undertaking of the company to keep on deposit a sum considerably in excess of the liabilities as proved in evidence); *Quayle Munro Ltd, Petitioners* [1994] 1 BCLC 410, Ct of Sess (court dispensed with an inquiry on the giving of undertakings as to the manner in which the special reserve created on a reduction of the share premium account would be utilised). Before 1929 the court did not possess this power and it was held that the list had to be settled even if there was evidence that there were no creditors: see *Re Lamson Store Service Co Ltd, Re National Reversionary Investment Co Ltd* [1895] 2 Ch 726.

8 Companies Act 2006 s 646(3)(a).

9 Companies Act 2006 s 646(3)(b).

10 For this purpose, the debt or claim must be secured by appropriating (as the court may direct) the following amount: (1) if the company admits the full amount of the debt or claim or, though not admitting it, is willing to provide for it, the full amount of the debt or claim; (2) if the company does not admit, and is not willing to provide for, the full amount of the debt or claim, or if the amount is contingent or not ascertained, an amount fixed by the court after the like inquiry and adjudication as if the company were being wound up by the court: Companies Act 2006 s 646(5).

11 Companies Act 2006 s 646(4).

As to the Secretary of State's power to modify s 646 by regulations see s 657; and PARA 1173 text and notes 24-27. At the date at which this volume states the law, no such regulations had been made for these purposes.

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1190. Liability to creditor omitted from list of creditors.

Where, in the case of a reduction of capital confirmed by the court¹, a creditor entitled to object to the reduction of share capital² is by reason of his ignorance of the proceedings for reduction of share capital, or of their nature and effect with respect to his debt or claim, not entered on the list of creditors³, and after the reduction of capital the company is unable to pay the amount of his debt or claim⁴, the following provisions apply⁵. Every person who was a member⁶ of the company⁷ at the date on which the resolution for reducing capital took effect⁸ is liable to contribute for the payment of the debt or claim an amount not exceeding that which he would

have been liable to contribute if the company had commenced to be wound up on the day before that date⁹.

If the company is wound up, the court on the application of the creditor in question, and proof of ignorance as mentioned above, may if it thinks fit settle accordingly a list of persons liable to contribute under these provisions, and may make and enforce calls and orders on them as if they were ordinary contributories in a winding up¹⁰.

1 As to the court order confirming such a reduction see PARA 1192. As to the meaning of 'court' see PARA 212 note 1.

2 As to when creditors are entitled to object see PARA 1188.

3 As to the list of creditors see PARA 1189.

4 The reference in the text to a company being unable to pay the amount of a debt or claim has the same meaning as in the Insolvency Act 1986 s 123 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) PARA 446) or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 103): Companies Act 2006 s 653(4).

5 Companies Act 2006 s 653(1).

6 As to who qualifies as a member of a company see PARA 321.

7 As to the meaning of 'company' under the Companies Acts see PARA 24.

8 ie under the Companies Act 2006 s 649(3): see PARA 1193.

9 Companies Act 2006 s 653(2).

10 Companies Act 2006 s 653(3).

As to the Secretary of State's power to modify s 653 by regulations see s 657; and PARA 1173 text and notes 24-27. At the date at which this volume states the law, no such regulations had been made for these purposes.

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1191. Offences in connection with list of creditors.

If an officer¹ of the company² intentionally or recklessly conceals the name of a creditor entitled to object to the reduction of capital³, or misrepresents the nature or amount of the debt or claim of a creditor, he commits an offence⁴. He also commits an offence if he is knowingly concerned in any such concealment or misrepresentation⁵.

1 As to the meaning of 'officer' see PARA 607.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 As to when creditors are entitled to object see PARA 1188.

4 Companies Act 2006 s 647(1)(a). A person guilty of an offence under s 647 is liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum: s 647(2). As to the meaning of 'statutory maximum' see PARA 1622.

5 Companies Act 2006 s 647(1)(b). As to the penalty for this offence see note 4.

As to the Secretary of State's power to modify s 647 by regulations see s 657; and PARA 1173 text and notes 24-27. At the date at which this volume states the law, no such regulations had been made for these purposes.

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(D) ORDER CONFIRMING REDUCTION

1192. Order confirming reduction.

The court¹ may make an order confirming the reduction of capital² on such terms and conditions as it thinks fit³. The court may, if for any special reason it thinks proper to do so, make an order directing that the company⁴ must, during such period, commencing on or at any time after the date of the order, as is specified in the order, add to its name as its last words the words 'and reduced'; and if such an order is made, those words are, until the end of the period specified in the order, deemed to be part of the company's name⁵. Where the court confirms the reduction, it may also order the company to publish, as the court directs, the reasons for reduction of capital, or such other information in regard to it as the court thinks expedient with a view to giving proper information to the public, and, if the court thinks fit, the causes that led to the reduction⁶.

The court must not, however, confirm the reduction unless it is satisfied, with respect to every creditor of the company who is entitled to object to the reduction of capital⁷ that either his consent to the reduction has been obtained⁸ or his debt or claim has been discharged, or has determined or has been secured⁹. If there are no creditors entitled to object, the court may make an order without regard to creditors, unless they can show a strong case¹⁰.

An application to the court to confirm the reduction does not amount to ordinary adversarial litigation, since the court has to be satisfied that it is right to sanction the reduction even if the application is unopposed¹¹.

1 As to the meaning of 'court' see PARA 212 note 1.

2 As to an application made to the court for confirmation of the reduction see PARA 1180 et seq.

3 Companies Act 2006 s 648(1). See also *Re Jupiter House Investments (Cambridge) Ltd* [1985] BCLC 222, [1985] 1 WLR 975; *Re Grosvenor Press plc* [1985] BCLC 286, [1985] 1 WLR 980 (possibility of capital being recovered; undertakings to protect creditors); *Re Ransomes plc* [1999] 2 BCLC 591, CA (although the respondent had changed its plans, the court did not impose any conditions because the alterations had not increased the risk of prejudice to the preference shareholders). Either in exercise of the power mentioned in the text, or of its inherent jurisdiction, the court may correct immaterial errors in the resolution for the reduction of capital: *Re Willaire Systems plc* [1987] BCLC 67, CA; *Re European Home Products plc* [1988] BCLC 690. See also PARA 1181 text and note 7. As to the resolution which is required to effect a reduction in capital see PARA 1173.

4 As to the meaning of 'company' under the Companies Acts see PARA 24.

5 Companies Act 2006 s 648(3). In practice the court rarely makes such a direction. As to the company name generally see PARA 200 et seq.

6 Companies Act 2006 s 648(4). See eg *Re Llynvi, Tondy and Ogmre Coal and Iron Co* (1877) 37 LT 373 (company not required to publish reasons); *Re Truman, Hanbury, Buxton & Co Ltd* [1910] 2 Ch 498 (company required to publish reasons).

As to the Secretary of State's power to modify the Companies Act 2006 s 648 by regulations see s 657; and PARA 1173 text and notes 24-27. At the date at which this volume states the law, no such regulations had been made for these purposes.

7 As to when creditors are entitled to object see PARA 1188.

8 Companies Act 2006 s 648(2)(a).

9 Companies Act 2006 s 648(2)(b).

10 Thus in *Re Meux's Brewery Co Ltd* [1919] 1 Ch 28, debenture holders unsuccessfully objected that the proposed reduction would be prejudicial to their security by enabling the company to pay dividends out of profits instead of such profits being applied in making good the lost capital. No evidence was adduced, however, to show what part of the lost capital was attributable to circulating capital.

11 *Re Ransomes plc* [1999] 2 BCLC 591, CA (since many applications are unopposed and the court hears only from the applicant company, it is undesirable to dilute in any way the applicant's duty of full and frank disclosure to the court).

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1193. Registration of order and statement of capital.

The registrar¹, on production of an order of the court² confirming the reduction of a company's³ share capital⁴ and the delivery of a copy of the order and of a statement of capital approved by the court⁵, must register the order and statement⁶. The statement of capital must state with respect to the company's share capital as altered by the order⁷:

2113 (1) the total number of shares⁸ of the company⁹;

2114 (2) the aggregate nominal value of those shares¹⁰;

2115 (3) for each class of shares¹¹, prescribed particulars¹² of the rights attached to the shares¹³, the total number of shares of that class¹⁴, and the aggregate nominal value of shares of that class¹⁵; and

2116 (4) the amount paid up and the amount, if any, unpaid on each share, whether on account of the nominal value of the share or by way of premium¹⁶.

The resolution for reducing share capital¹⁷, as confirmed by the court's order, takes effect, in the case of a reduction of share capital that forms part of a compromise or arrangement¹⁸ sanctioned by the court under Part 26 of the Companies Act 2006¹⁹, on delivery of the order and statement of capital to the registrar, or, if the court so orders, on the registration of the order and statement of capital²⁰. In any other case the resolution takes effect on the registration of the order and statement of capital²¹.

Notice of the registration of the order and statement of capital must be published in such manner as the court may direct²²; and the registrar must certify²³ the registration of the order and statement of capital²⁴.

1 As to the meaning of 'registrar' see PARA 131 note 2.

2 As to the meaning of 'court' see PARA 212 note 1.

3 As to the meaning of 'company' under the Companies Acts see PARA 24.

4 As to the making of such an order see PARA 1192.

5 Embodying the statement in the confirmatory order is a sufficient approval: *Re Sharp, Stewart & Co* (1867) LR 5 Eq 155 at 159 per Page Wood V-C. Any statement of capital is subject to the disclosure requirements in s 1078: see PARA 144.

6 Companies Act 2006 s 649(1). This is subject to s 650 (public company reducing capital below authorised minimum: see PARA 1194): s 649(1).

7 Companies Act 2006 s 649(2).

8 As to the meaning of 'share' see PARA 1042.

9 Companies Act 2006 s 649(2)(a).

10 Companies Act 2006 s 649(2)(b).

11 As to the meaning of 'class of shares' see PARA 1057.

12 In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the Secretary of State see PARA 6. As to the particulars prescribed for these purposes see note 13.

13 Companies Act 2006 s 649(2)(c)(i). The particulars prescribed for these purposes are (1) particulars of any voting rights attached to the shares, including rights that arise only in certain circumstances; (2) particulars of any rights attached to the shares, as respects dividends, to participate in a distribution; (3) particulars of any rights attached to the shares, as respects capital, to participate in a distribution (including on winding up); and (4) whether the shares are to be redeemed or are liable to be redeemed at the option of the company or the shareholder: Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 2(2)(k), (3).

14 Companies Act 2006 s 649(2)(c)(ii).

15 Companies Act 2006 s 649(2)(c)(iii).

16 Companies Act 2006 s 649(2)(d).

17 Is the resolution required by the Companies Act 2006 s 641(1) (see PARA 1173).

18 As to the meaning of 'arrangement' for these purposes see PARA 1425.

19 Is under the Companies Act 2006 Pt 26 (ss 895-901): see PARA 1425 et seq.

20 Companies Act 2006 s 649(3)(a).

21 Companies Act 2006 s 649(3)(b). See *Re Castiglione, Erskine & Co Ltd* [1958] 2 All ER 455, [1958] 1 WLR 688.

22 Companies Act 2006 s 649(4).

23 The certificate must be signed by the registrar or authenticated by the registrar's official seal, and is conclusive evidence that the requirements of the Companies Act 2006 with respect to the reduction of share capital have been complied with, and that the company's share capital is as stated in the statement of capital: s 649(6). As to the registrar's official seal see PARA 131.

It has been held that where the resolution for the reduction of capital has not been properly passed, the defect is cured by the certificate: see *Ladies' Dress Association Ltd v Pulbrook* [1900] 2 QB 376, CA; *Re Walker and Smith Ltd* (1903) 72 LJ Ch 572.

24 Companies Act 2006 s 649(5).

As to the Secretary of State's power to modify s 649 by regulations see s 657; and PARA 1173 text and notes 24-27. At the date at which this volume states the law, no such regulations had been made for these purposes.

COMPANIES ACTS/(20) SHARE CAPITAL/(viii) Reduction of Share Capital/C. ALL CASES:
REDUCTION BY COURT ORDER/(D) Order confirming Reduction/1194. Public company reducing capital below authorised minimum.

1194. Public company reducing capital below authorised minimum.

Where the court¹ makes an order confirming a reduction of a public company's capital² that has the effect of bringing the nominal value of its allotted share capital³ below the authorised minimum⁴, the registrar⁵ must not register the order⁶ unless either the court so directs, or the company is first re-registered as a private company⁷. An expedited procedure for re-registration is provided for⁸ in these circumstances⁹.

The court may authorise the company to be re-registered as a private company without its having passed the special resolution normally required¹⁰; and if it does so, the court must specify in the order the changes to the company's name¹¹ and articles¹² to be made in connection with the re-registration¹³. The company may then be re-registered as a private company if an application to that effect is delivered to the registrar together with a copy of the court's order and notice of the company's name, and a copy of the company's articles, as altered by the court's order¹⁴. On receipt of such an application the registrar must issue a certificate of incorporation altered to meet the circumstances of the case¹⁵. The certificate must state that it is issued on re-registration and the date on which it is issued¹⁶. On the issue of the certificate, the company by virtue of the issue of the certificate becomes a private company, and the changes in the company's name and articles take effect¹⁷.

1 As to the meaning of 'court' see PARA 212 note 1.

2 See PARA 1180 et seq. As to the meaning of 'public company' see PARA 102. As to a company's capital generally see PARA 1042.

3 As to the meaning of 'allotted share capital' see PARA 1045.

4 Companies Act 2006 s 650(1). As to the meaning of 'authorised minimum' see PARA 75. As to the application of the authorised minimum requirement for these purposes, where (taking account of the reduction of the company's share capital) the company has or will have shares denominated in more than one currency, see the Companies (Authorised Minimum) Regulations 2009, SI 2009/2425, regs 3, 4, 7. See also the Companies (Authorised Minimum) Regulations 2008, SI 2008/729, regs 3, 4, 7 (referring to the Companies Act 1985 s 139 (repealed)).

5 As to the meaning of 'registrar' under the Companies Acts see PARA 131 note 2.

6 As to registration of the order see PARA 1193.

7 Companies Act 2006 s 650(2). As to the meaning of 'private company' see PARA 102.

8 Ie by the Companies Act 2006 s 651: see the text and notes 10-17.

As to the assumptions about a company's capital and the authorised minimum requirement that the registrar is entitled to make where the court has not directed that an order confirming a reduction of share capital be registered see the Companies (Authorised Minimum) Regulations 2008, SI 2009/2425, regs 5, 7. See also the Companies (Authorised Minimum) Regulations 2008, SI 2008/729, regs 5, 7 (referring to a like situation under the Companies Act 1985 s 138 (repealed)).

9 Companies Act 2006 s 650(3).

10 Companies Act 2006 s 651(1). The reference in the text to the special resolution normally required is to the special resolution required by s 97: see PARA 173. As to the meaning of 'special resolution' see PARA 614.

11 As to company names see generally PARA 196 et seq.

12 As to the meaning of 'articles' see PARA 228 note 2.

13 Companies Act 2006 s 651(2).

14 Companies Act 2006 s 651(3). As to fees payable under s 651 see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(c).

15 Companies Act 2006 s 651(4).

16 Companies Act 2006 s 651(5). The certificate is conclusive evidence that the requirements of the Companies Act 2006 as to re-registration have been complied with: s 651(7).

17 Companies Act 2006 s 651(6).

As to the Secretary of State's power to modify ss 650, 651 by regulations see s 657; and PARA 1173 text and notes 24-27. At the date at which this volume states the law, no such regulations had been made for these purposes.

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1195. Liability of members following reduction of capital.

Where a company's share capital¹ is reduced², a member³ of the company, past or present, is not liable in respect of any share⁴ to any call⁵ or contribution exceeding in amount the difference, if any, between the nominal amount of the share as notified to the registrar⁶ in the statement of capital delivered for registration of the reduction⁷, and the amount paid on the share or the reduced amount, if any, which is deemed to have been paid on it, as the case may be⁸. This is, however, subject to any statutory liability⁹ to a creditor omitted from the list of creditors¹⁰.

Nothing in the above provisions affects the rights of the contributories among themselves¹¹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of 'share capital' see PARA 1042.

2 As to the reduction of share capital see PARA 1173 et seq.

3 As to who qualifies as a member of a company see PARA 321.

4 As to the meaning of 'share' see PARA 1055.

5 As to calls on capital see PARA 1132 et seq.

6 As to the meaning of 'registrar' see PARA 131 note 2.

7 Ie the statement of capital delivered under the Companies Act 2006 s 644 (see PARA 1179) or s 649 (see PARA 1193).

8 Companies Act 2006 s 652(1).

9 Ie subject to the Companies Act 2006 s 653: see PARA 1190.

10 Companies Act 2006 s 652(1).

11 Companies Act 2006 s 652(3).

As to the Secretary of State's power to modify s 652 by regulations see s 657; and PARA 1173 text and notes 24-27. At the date at which this volume states the law, no such regulations had been made for these purposes.

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1196. Treatment of reserve arising from reduction of capital.

A reserve arising from the reduction of a company's¹ share capital is not distributable, subject to any provision made by order under these provisions². The Secretary of State³ may by order⁴ specify cases in which the above prohibition does not apply, and the reserve is to be treated for the purposes of the statutory provisions relating to distributions⁵ as a realised profit⁶.

The Companies (Reduction of Share Capital) Order 2008⁷ provides that the above prohibition⁸ does not apply if an unlimited company⁹ reduces its share capital¹⁰, or if a private company limited by shares¹¹ reduces its share capital and the reduction is supported by a solvency statement¹² but has not been the subject of an application to the court for an order confirming it¹³. In either case, a reserve arising from the reduction is to be treated¹⁴ as a realised profit¹⁵. Further, if a limited company¹⁶ having a share capital¹⁷ reduces its share capital and the reduction is confirmed by order of the court¹⁸, the above prohibition does not apply, and a reserve arising from the reduction is to be treated¹⁹ as a realised profit unless the court orders²⁰ otherwise²¹. These provisions are without prejudice to any contrary provision of an order of, or undertaking given to, the court, the resolution for, or any other resolution relevant to, the reduction of share capital, or the company's memorandum²² or articles of association²³.

1 As to the meaning of 'company' under the Companies Acts see PARA 24.

2 Companies Act 2006 s 654(1).

3 As to the Secretary of State see PARA 6.

4 An order under the Companies Act 2006 s 654 is subject to affirmative resolution procedure (ie the order must not be made unless a draft of the statutory instrument containing it has been laid before Parliament and approved by a resolution of each House of Parliament): ss 654(3), 1290.

5 Ie for the purposes of the Companies Act 2006 Pt 23 (ss 829-853): see PARA 1389 et seq.

6 Companies Act 2006 s 654(2). As to the meaning of 'realised profit' for the purposes of Pt 23 see PARA 1390 note 5.

7 Ie the Companies (Reduction of Share Capital) Order 2008, SI 2008/1915, which came into force on 1 October 2008 (see art 1(1)).

8 Ie the prohibition in the Companies Act 2006 s 654(1): see the text and notes 1-2.

9 As to the meaning of 'unlimited company' under the Companies Acts see PARA 102.

10 Companies (Reduction of Share Capital) Order 2008, SI 2008/1915, art 3(1)(a).

11 As to the meanings of 'private company' and 'limited by shares' under the Companies Acts see PARA 102.

12 As to the reduction of capital supported by a solvency statement see PARA 1178.

13 Companies (Reduction of Share Capital) Order 2008, SI 2008/1915, art 3(2)(a).

14 See note 5.

15 Companies (Reduction of Share Capital) Order 2008, SI 2008/1915, art 3(1)(b), (2)(b).

- 16 As to the meaning of 'limited company' under the Companies Acts see PARA 102.
- 17 As to the meaning of 'company having a share capital' see PARA 1042.
- 18 As to the meaning of 'court' see PARA 212 note 1.
- 19 See note 5.
- 20 Ie under the Companies Act 2006 s 648(1); see PARA 1192.
- 21 Companies (Reduction of Share Capital) Order 2008, SI 2008/1915, art 3(3).
- 22 As to the meaning of 'memorandum of association' see PARA 104.
- 23 Companies (Reduction of Share Capital) Order 2008, SI 2008/1915, art 3(4). As to a company's articles of association see PARA 228 et seq.

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(21) ACQUISITION BY LIMITED COMPANY OF ITS OWN SHARES

(i) Rules regarding Company acquiring own Shares

A. GENERAL RULE

1197. General rule against limited company acquiring its own shares.

A limited company¹ must not acquire its own shares, whether by purchase, subscription or otherwise, except in accordance with Part 18² of the Companies Act 2006³. If a company purports to act in contravention of this prohibition, an offence is committed by the company, and by every officer of the company who is in default⁴, and the purported acquisition is void⁵.

1 As to the meaning of 'limited company' see PARA 102.

2 Ie the Companies Act 2006 Pt 18 (ss 658-737) (see PARA 1197 et seq). As to exceptions to the general rule see PARA 1198.

3 Companies Act 2006 s 658(1). This provision gives statutory force to *Trevor v Whitworth* (1887) 12 App Cas 409, HL (see also PARA 1222); *Kirby v Wilkins* [1929] 2 Ch 444; *Vision Express (UK) Ltd v Wilson* [1995] 2 BCLC 419. The Companies Act 2006 s 658 does not prohibit a company from acquiring the shares of another company (the 'acquired company') in circumstances where the sole asset of the acquired company is shares in the acquiring company: *Acatos & Hutcheson plc v Watson* [1995] 1 BCLC 218 (in view of the potential for abuse, the court will look carefully, however, at the transaction to ensure that the directors have fulfilled their fiduciary duties to safeguard the interests of shareholders and creditors alike). See also *British and Commonwealth Holdings plc v Barclays Bank plc* [1996] 1 All ER 381, [1996] 1 WLR 1, CA.

4 As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

5 Companies Act 2006 s 658(2). A person guilty of an offence under s 658 is liable: (1) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both; and (2) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum, or both: s 658(3). As to the statutory maximum see PARA 1622. In relation to an offence committed before the coming into force of the Criminal Justice Act 2003 s 154(1) (not yet in force), the maximum term of imprisonment on summary conviction is six months: see the Companies Act 2006 s 1131.

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1198. Exceptions to general rule.

A limited company¹ may acquire any of its own fully paid² shares otherwise than for valuable consideration³. The general rule against the acquisition of a limited company's own shares⁴ does not prohibit:

- 2117 (1) the acquisition of shares in a reduction of capital duly made⁵;
- 2118 (2) the purchase of shares in pursuance of an order of the court⁶;
- 2119 (3) the forfeiture of shares, or the acceptance of shares surrendered in lieu, in pursuance of the company's articles⁷, for failure to pay any sum payable in respect of the shares⁸.

1 As to the meaning of 'limited company' see PARA 102.

2 As to the meaning of 'fully paid' see PARA 1048.

3 Companies Act 2006 s 659(1). Where shares are acquired under s 659 a statement must be included in the directors' report required under s 415 (see PARA 816 et seq): see the Small Companies and Groups (Accounts and Directors' Reports) Regulations 2008, SI 2008/409, Sch 5 para 6(1)(a); and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 para 8(a).

4 Ie the Companies Act 2006 s 658 (see PARA 1197).

5 Companies Act 2006 s 659(2)(a). As to the reduction of a company's share capital see PARA 1173 et seq.

6 Companies Act 2006 s 659(2)(b). This exception applies to an order of the court under: (1) s 98 (application to court to cancel resolution for re-registration as a private company: see PARA 174); (2) s 721(6) (powers of court on objection to redemption or purchase of shares out of capital: see PARA 1250); (3) s 759 (remedial order in case of breach of prohibition of public offers by private company: see PARA 1066); or (4) Pt 30 (ss 994-999) (protection of members against unfair prejudice) (see PARA 466 et seq): s 659(2)(b)(i)-(iv).

7 As to the meaning of 'articles' see PARA 228 note 2. See further the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 arts 57-62; and PARA 1213.

8 Companies Act 2006 s 659(2)(c). As to forfeiture see PARAS 1141, 1213 et seq. As to surrender see PARAS 1220, 1221.

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B. SHARES HELD BY COMPANY'S NOMINEE

1199. Shares held by company's nominee.

Where shares in a limited company¹: (1) are taken by a subscriber to the memorandum² as nominee of the company³; (2) are issued to a nominee of the company⁴; or (3) are acquired by a nominee of the company, partly paid up⁵, from a third person⁶ then, for all purposes, the shares are to be treated as held by the nominee on his own account⁷, and the company is to be regarded as having no beneficial interest in them⁸.

The provision set out above does not apply to shares acquired otherwise than by subscription by a nominee of a public company⁹, where a person acquires shares in the company with financial assistance given to him, directly or indirectly, by the company for the purpose of or in connection with the acquisition, and the company has a beneficial interest in the shares¹⁰. Nor does it apply to shares acquired by a nominee of the company when the company has no beneficial interest in the shares¹¹.

Where shares in a limited company satisfy the conditions in heads (1) to (3) above, if the nominee, having been called on to pay any amount for the purposes of paying up, or paying any premium on, the shares, fails to pay that amount within 21 days from being called on to do so, then: (a) in the case of shares that he agreed to take as subscriber to the memorandum, the other subscribers to the memorandum; and (b) in any other case, the directors of the company when the shares were issued to or acquired by him, are jointly and severally liable with him to pay that amount¹². If in proceedings for the recovery of the amount it appears to the court that the subscriber or director has acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be relieved from liability, the court may relieve him, either wholly or in part, from his liability on such terms as the court thinks fit¹³. If a subscriber to a company's memorandum or a director of a company has reason to apprehend that a claim will or might be made for the recovery of any such amount from him, he may apply to the court for relief, and the court has the same power to relieve him as it would have had in proceedings for recovery of that amount¹⁴.

1 As to the meaning of 'limited company' see PARA 102.

2 As to subscribers to the memorandum see PARA 321 et seq.

3 Companies Act 2006 s 660(1)(a).

4 Companies Act 2006 s 660(1)(b).

5 As to the meaning of 'partly paid up' see PARA 1048.

6 Companies Act 2006 s 660(1)(c).

7 Companies Act 2006 s 660(2)(a).

8 Companies Act 2006 s 660(2)(b).

9 As to the meaning of 'public company' see PARA 102.

10 Companies Act 2006 s 660(3)(a).

11 Companies Act 2006 s 660(3)(b).

12 Companies Act 2006 s 661(1), (2). The provisions of s 661 do not apply to shares acquired by a nominee of the company when the company has no beneficial interest in the shares: s 661(5).

13 Companies Act 2006 s 661(3). See note 12. Cf s 1157 (if, in proceedings for negligence, default, breach of duty or breach of trust, it appears to the court hearing the case that the officer or person is or may be liable, but that he acted honestly and reasonably etc) (see PARA 600).

14 Companies Act 2006 s 661(4). See note 12.

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C. SHARES HELD BY OR FOR PUBLIC COMPANY

1200. Treatment of shares held by or for public company.

The following provisions apply in the case of a public company¹:

- 2120 (1) where shares² in the company are forfeited³, or surrendered to the company in lieu of forfeiture⁴, in pursuance of the articles⁵, for failure to pay any sum payable in respect of the shares⁶;
- 2121 (2) where shares in the company are surrendered to the company in pursuance the Building Societies Act 1986⁷;
- 2122 (3) where shares in the company are acquired by it⁸ and the company has a beneficial interest in the shares⁹;
- 2123 (4) where a nominee of the company acquires shares in the company from a third party without financial assistance being given directly or indirectly by the company and the company has a beneficial interest in the shares¹⁰; or
- 2124 (5) where a person acquires shares in the company, with financial assistance given to him, directly or indirectly, by the company for the purpose of or in connection with the acquisition¹¹, and the company has a beneficial interest in the shares¹².

Unless the shares or any interest of the company in them are previously disposed of, the company must, no later than the relevant period from their forfeiture, surrender or acquisition¹³, cancel the shares and diminish the amount of the company's share capital¹⁴ by the nominal¹⁵ value of the shares cancelled¹⁶. The company must also, where the effect is that the nominal value of the company's allotted¹⁷ share capital is brought below the authorised minimum¹⁸, apply for re-registration as a private company¹⁹, stating the effect of the cancellation²⁰. The directors of the company may take any steps necessary to enable the company to comply with this section, and may do so without complying with the normal statutory requirements²¹ relating to the reduction of capital²².

Neither the company nor, in a case within head (4) or head (5) above, the nominee or other shareholder may exercise any voting rights in respect of the shares²³. Any purported exercise of those rights is void²⁴.

1 Companies Act 2006 s 662(1). As to the meaning of 'public company' see PARA 102; as to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. Where shares in a company are acquired under s 662(1) a statement must be included in the directors' report required under s 415 (see PARA 816 et seq): see the Small Companies and Groups (Accounts and Directors' Reports) Regulations 2008, SI 2008/409, Sch 5 para 6(1)(c); and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 para 8(b).

2 As to the meaning of 'share' see PARA 1042.

3 As to forfeiture see PARA 1213 et seq.

4 As to surrender see PARAS 1220, 1221.

5 As to the meaning of 'articles' see PARA 228 note 2. See further the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 arts 57-62; and PARA 1213.

6 Companies Act 2006 s 662(1)(a).

7 Companies Act 2006 s 662(1)(b). Such surrender is made under the Building Societies Act 1986 s 102C(1)(b) where, in relation to a person who has made a statutory declaration to a building society purporting to comply with the relevant statutory requirements, it is shown that at the time the declaration is made he is not a trustee account holder in relation to the account in question: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1941.

8 le otherwise than in accordance with the Companies Act 2006 Pt 18 (ss 658-737) or Pt 30 (ss 994-999) (protection of members against unfair prejudice: see PARA 466 et seq).

9 Companies Act 2006 s 662(1)(c). In determining for the purposes of Pt 18 Ch 1 (ss 658-676) whether a company has a beneficial interest in shares, there is to be disregarded any such interest as is mentioned in s 672 (residual interest under pension scheme or employees' share scheme), s 673 (employer's charges and other rights of recovery), or s 674 (rights as personal representative or trustee) (see PARA 1201): s 671.

10 Companies Act 2006 s 662(1)(d). See note 9.

11 As to financial assistance allowing a company to purchase its own shares see PARA 1222 et seq.

12 Companies Act 2006 s 662(1)(e). See note 9.

13 le no later than:

543 (1) in a case within head (1) or head (2) in the text, three years from the date of the forfeiture or surrender (Companies Act 2006 s 662(3)(a));

544 (2) in a case within head (3) or head (4) in the text, three years from the date of the acquisition (s 662(3)(b));

545 (3) in a case within head (5) in the text, one year from the date of the acquisition (s 662(3)(c)).

14 As to the meaning of 'share capital' see PARA 1042.

15 As to the meaning of 'nominal' value see PARA 1044.

16 Companies Act 2006 s 662(2)(a).

17 As to the meaning of 'allotment' see PARA 1091.

18 As to the meaning of 'authorised minimum' see PARA 75.

19 As to re-registration as a private company under the Companies Act 2006 generally see PARA 173 et seq. See also s 664 (re-registration as private company in consequence of cancellation); and PARA 1203.

20 Companies Act 2006 s 662(2)(b). As to the application of the authorised minimum requirement for these purposes, where (taking account of the diminution of the company's share capital) the company has or will have shares denominated in more than one currency, see the Companies (Authorised Minimum) Regulations 2009, SI 2009/2425, regs 3, 4, 7. See also the Companies (Authorised Minimum) Regulations 2008, SI 2008/729, regs 3, 4, 7 (referring to the Companies Act 1985 s 146(2)(b) (repealed)).

21 le the provisions of the Companies Act 2006 Pt 17 Ch 10 (ss 641-653) (see PARA 1173 et seq).

22 Companies Act 2006 s 662(4).

23 Companies Act 2006 s 662(5).

24 Companies Act 2006 s 662(6).

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1201. Interests to be disregarded: whether company has beneficial interest.

In determining whether a company¹ has a beneficial interest in shares², there are three special cases which fall for consideration³:

- 2125 (1) a company's residual interests⁴ under pension⁵ and employees' share schemes⁶;
- 2126 (2) employer's charges and other rights of recovery⁷; and
- 2127 (3) a trustee's right to expenses, remuneration and indemnity⁸.

Where shares in a company are held on trust for the purposes of a pension scheme or an employees' share scheme, there is to be disregarded any residual interest of the company which has not vested in possession⁹. For these purposes, a 'residual interest' means a right¹⁰ of the company to receive any of the trust property in the event of¹¹:

- 2128 (a) all the liabilities¹² arising under the scheme having been satisfied or provided for¹³; or
- 2129 (b) the company ceasing to participate in the scheme¹⁴; or
- 2130 (c) the trust property at any time exceeding what is necessary for satisfying the liabilities arising or expected to arise under the scheme¹⁵.

A residual interest vests in possession¹⁶, in a case within head (a) above, on the occurrence of the event there mentioned, whether or not the amount of the property receivable pursuant to the right is ascertained¹⁷; and, in a case within head (b) or head (c) above, when the company becomes entitled to require the trustee to transfer to it any of the property receivable pursuant to that right¹⁸.

Where, by virtue of the legislation set out above, shares are exempt from the provisions relating to shares held by a company's nominee¹⁹ at the time they are taken, issued or acquired but the residual interest in question vests in possession before they are disposed of or fully paid up, those provisions apply to the shares as if they had been taken, issued or acquired on the date on which that interest vests in possession²⁰.

Where, by virtue of the legislation set out above, shares are exempt from the provisions relating to shares held by or for a public company²¹ at the time they are acquired but the residual interest in question vests in possession before they are disposed of, those provisions apply to the shares as if they had been acquired on the date on which the interest vests in possession²².

Where the shares are held on trust for the purposes of a pension scheme there must be disregarded²³:

- 2131 (i) any charge or lien on, or set-off against, any benefit or other right or interest under the scheme for the purpose of enabling the employer or former employer of a member of the scheme to obtain the discharge of a monetary obligation due to him from the member²⁴;
- 2132 (ii) any right to receive from the trustee of the scheme, or as trustee of the scheme to retain, an amount that can be recovered or retained under the Pension Schemes Act 1993²⁵ or otherwise, as reimbursement or partial reimbursement for any contributions equivalent premium paid in connection with the scheme under Part 3 of that Act²⁶.

Where the shares are held on trust for the purposes of an employees' share scheme, there is to be disregarded any charge or lien on, or set-off against, any benefit or other right or interest under the scheme for the purpose of enabling the employer or former employer of a member of the scheme to obtain the discharge of a monetary obligation due to him from the member²⁷.

Where the company is a personal representative or trustee, there is to be disregarded any rights that the company has in that capacity including, in particular, any right to recover its expenses or be remunerated out of the estate or trust property, and any right to be indemnified out of that property for any liability incurred by reason of any act or omission of the company in the performance of its duties as personal representative or trustee²⁸.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie in determining for the purposes of the Companies Act 2006 Pt 18 Ch 1 (ss 658-676) (see PARAS 1197 et seq, 1202 et seq) whether a company has a beneficial interest in shares: see s 671. As to the meaning of 'share' see PARA 1042.

3 See the Companies Act 2006 s 671.

4 As to the meaning of 'residual interest' see the text and notes 10-15.

5 For the purposes of the Companies Act 2006 Pt 18 Ch 1 (ss 658-676), 'pension scheme' means a scheme for the provision of benefits consisting of or including relevant benefits for or in respect of employees or former employees: s 675(1). 'Relevant benefits' means any pension, lump sum, gratuity or other like benefit given or to be given on retirement or on death or in anticipation of retirement or, in connection with past service, after retirement or death: s 675(2).

6 See the Companies Act 2006 ss 671, 672; and the text and notes 9-22. As to the meaning of 'employees' share scheme' see PARA 169 note 20. For the purposes of Pt 18 Ch 1 (ss 658-676) references to 'employer' and 'employee', in the context of a pension scheme or employees' share scheme, is to be read as if a director of a company were employed by it: s 676.

7 See the Companies Act 2006 ss 671, 673; and the text and notes 23-27.

8 See the Companies Act 2006 ss 671, 674; and the text to note 28.

9 Companies Act 2006 s 672(1). The text refers to interests which are to be disregarded in determining for the purposes of Pt 18 Ch 1 (ss 658-676) (see PARAS 1197 et seq, 1202 et seq) whether a company has a beneficial interest in shares: see s 671; and note 2.

10 For these purposes, references to a right include a right dependent on the exercise of a discretion vested by the scheme in the trustee or another person: Companies Act 2006 s 672(3)(a).

11 Companies Act 2006 s 672(2).

12 For these purposes, references to liabilities arising under a scheme include liabilities that have resulted or may result from the exercise of any such discretion: Companies Act 2006 s 672(3)(b).

13 Companies Act 2006 s 672(2)(a).

14 Companies Act 2006 s 672(2)(b).

15 Companies Act 2006 s 672(2)(c).

16 Companies Act 2006 s 672(4).

17 Companies Act 2006 s 672(4)(a).

18 Companies Act 2006 s 672(4)(b).

19 Ie the Companies Act 2006 s 660 or s 661 (see PARA 1199).

20 Companies Act 2006 s 672(5).

21 le the Companies Act 2006 ss 662-668 (see PARAS 1200, 1202-1204).

22 Companies Act 2006 s 672(6).

23 Companies Act 2006 s 673(1). The text refers to interests which are to be disregarded in determining for the purposes of Pt 18 Ch 1 (ss 658-676) (see PARAS 1197 et seq, 1202 et seq) whether a company has a beneficial interest in shares: see s 671; and note 2.

24 Companies Act 2006 s 673(1)(a).

25 le under the Pension Schemes Act 1993 s 61 (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 924).

26 Companies Act 2006 s 673(1)(b)(i). As to the Pension Schemes Act 1993 Pt 3 (ss 7-68) see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 877 et seq. In relation to Northern Ireland see the Pension Schemes (Northern Ireland) Act 1993 s 57 in connection with the scheme under Pt 3 of that Act: see the Companies Act 2006 s 673(1)(b)(ii).

27 Companies Act 2006 s 673(2). The text refers to interests which are to be disregarded in determining for the purposes of Pt 18 Ch 1 (ss 658-676) (see PARAS 1197 et seq, 1202 et seq) whether a company has a beneficial interest in shares: see s 671; and note 2.

28 Companies Act 2006 s 674. The text refers to interests which are to be disregarded in determining for the purposes of Pt 18 Ch 1 (ss 658-676) (see PARAS 1197 et seq, 1202 et seq) whether a company has a beneficial interest in shares: see s 671; and note 2. As to the meaning of 'personal representative' see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 4.

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1202. Notice of cancellation of shares.

Where a company¹ cancels shares², it must within one month after the shares are cancelled give notice to the registrar³, specifying the shares cancelled⁴. The notice must be accompanied by a statement of capital⁵, which must state with respect to the company's share capital immediately following the cancellation⁶:

2133 (1) the total number of shares of the company⁷;

2134 (2) the aggregate nominal value of those shares⁸,

2135 (3) for each class of shares, prescribed particulars of the rights attached to the shares⁹, the total number of shares of that class, and the aggregate nominal value of shares of that class¹⁰; and

2136 (4) the amount paid up and the amount (if any) unpaid on each share, whether on account of the nominal value of the share or by way of premium¹¹.

If default is made in complying with these requirements, an offence is committed by the company, and by every officer of the company who is in default¹².

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 le in order to comply with the Companies Act 2006 s 662 (see PARA 1200). As to the meaning of 'share' see PARA 1042.

- 3 As to the meaning of 'registrar' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.
- 4 Companies Act 2006 s 663(1).
- 5 Companies Act 2006 s 663(2).
- 6 Companies Act 2006 s 663(3).
- 7 Companies Act 2006 s 663(3)(a).
- 8 Companies Act 2006 s 663(3)(b). As to the meaning of 'nominal' value see PARA 1044.
- 9 The prescribed particulars are: (1) particulars of any voting rights attached to the shares, including rights that arise only in certain circumstances; (2) particulars of any rights attached to the shares, as respects dividends, to participate in a distribution; (3) particulars of any rights attached to the shares, as respects capital, to participate in a distribution (including on winding up); and (4) whether the shares are to be redeemed or are liable to be redeemed at the option of the company or the shareholder: Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 2(1), (2)(i), (3).
- 10 Companies Act 2006 s 663(3)(c). As to classes of shares generally see PARA 1057 et seq.
- 11 Companies Act 2006 s 663(3)(d).
- 12 Companies Act 2006 s 663(4). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607. A person guilty of an offence under s 663 is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 663(5). As to the standard scale see PARA 1622.

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1203. Re-registration in consequence of cancellation.

Where a public company¹ is obliged² to re-register as a private company³, the directors may resolve that the company should be so re-registered⁴. The resolution may make such changes in the company's name, and in the company's articles, as are necessary in connection with its becoming a private company⁵.

The application for re-registration must contain a statement of the company's proposed name on re-registration⁶. The application must be accompanied by a copy of the resolution⁷, a copy of the company's articles as amended by the resolution, and a statement of compliance⁸, which must state that the statutory requirements⁹ as to re-registration as a private company have been complied with¹⁰. The registrar¹¹ may accept the statement of compliance as sufficient evidence that the company is entitled to be re-registered as a private company¹².

If the registrar is satisfied that the company is entitled to be re-registered as a private company, the company must be re-registered accordingly¹³. The registrar must issue a certificate of incorporation¹⁴, altered to meet the circumstances of the case¹⁵, which must state that it is issued on re-registration and the date on which it is issued¹⁶. On the issue of the certificate the company by virtue of the issue of the certificate becomes a private company, and the changes in the company's name and articles take effect¹⁷. The certificate is conclusive evidence that the requirements of the Companies Act 2006 as to re-registration have been complied with¹⁸.

If a public company that is required¹⁹ to apply to be re-registered as a private company fails to do so before the end of the specified period²⁰, the statutory prohibition of public offers by private companies²¹ applies to it as if it were a private company²². Subject to that, the company continues to be treated as a public company until it is so re-registered²³.

Where, after shares in a private company:

- 2137 (1) are forfeited in pursuance of the company's articles or are surrendered to the company in lieu of forfeiture²⁴;
- 2138 (2) are acquired by the company²⁵, the company having a beneficial interest in the shares²⁶;
- 2139 (3) are acquired by a nominee of the company from a third party without financial assistance being given directly or indirectly by the company, the company having a beneficial interest in the shares²⁷; or
- 2140 (4) are acquired by a person with financial assistance given to him, directly or indirectly, by the company for the purpose of or in connection with the acquisition, the company having a beneficial interest in the shares²⁸,

the company is re-registered as a public company²⁹, then the provisions set out above³⁰ apply to the company as if it had been a public company at the time of the forfeiture, surrender or acquisition, subject to certain modifications³¹.

1 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie in order to comply with the Companies Act 2006 s 662 (see PARA 1200).

3 As to the meaning of 'private company' see PARA 102.

4 Companies Act 2006 s 664(1). Pt 3 Ch 3 (ss 29-30) (resolutions affecting a company's constitution) (see PARA 231) applies to any such resolution: s 664(1).

5 Companies Act 2006 s 664(2). As to the meaning of 'articles' see PARA 228 note 2.

6 Companies Act 2006 s 664(3).

7 Ie unless a copy has already been forwarded under Pt 3 Ch 3 (see PARA 231).

8 Companies Act 2006 s 664(4).

9 Ie the requirements of the Companies Act 2006 s 664.

10 Companies Act 2006 s 664(5).

11 As to the meaning of 'registrar' see PARA 131 note 2.

12 Companies Act 2006 s 664(6).

13 Companies Act 2006 s 665(1). As to fees payable under s 655 see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(d).

14 As to the certificate of incorporation see PARA 119.

15 Companies Act 2006 s 665(2).

16 Companies Act 2006 s 665(3).

17 Companies Act 2006 s 665(4).

18 Companies Act 2006 s 665(5).

- 19 Ie required by the Companies Act 2006 s 662 (see PARA 1200).
- 20 As to the specified period see the Companies Act 2006 s 662(3) (see PARA 1200 note 12).
- 21 Ie the Companies Act 2006 Pt 20 Ch 1 (ss 755-760) (see PARA 1066).
- 22 Companies Act 2006 s 666(1).
- 23 Companies Act 2006 s 666(2).
- 24 Companies Act 2006 s 668(1)(a). As to forfeiture see PARA 1213 et seq. As to surrender see PARAS 1220, 1221.
- 25 Ie otherwise than by any of the methods permitted by Pt 18 (ss 658-737) (see PARA 1198 et seq) or Pt 30 (ss 994-999) (protection of members against unfair prejudice) (see PARA 466 et seq).
- 26 Companies Act 2006 s 668(1)(b). In determining for the purposes of Pt 18 Ch 1 (ss 658-676) whether a company has a beneficial interest in shares, there is to be disregarded any such interest as is mentioned in s 672 (residual interest under pension scheme or employees' share scheme), s 673 (employer's charges and other rights of recovery), or s 674 (rights as personal representative or trustee) (see PARA 1201): s 671.
- 27 Companies Act 2006 s 668(1)(c). See note 26.
- 28 Companies Act 2006 s 668(1)(d). See note 26.
- 29 Companies Act 2006 s 668(1).
- 30 Ie the Companies Act 2006 ss 662-667 (see the text and notes 1-23; and PARA 1204).
- 31 Companies Act 2006 s 668(2). The modification is that the period specified in s 662(3)(a), (b) or (c) (period for complying with obligations under s 662) (see PARA 1200 note 12) runs from the date of the re-registration of the company as a public company: s 668(3).

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1204. Offence in case of failure to cancel shares or re-register.

Where a public company¹, when required to do so², fails to cancel any shares, or fails to make an application for re-registration as a private company³, within the specified time⁴, an offence is committed by the company, and by every officer of the company who is in default⁵.

1 As to the meaning of 'public company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie required by the Companies Act 2006 s 662 (see PARA 1200).

3 Ie under the Companies Act 2006 s 664 (see PARA 1203).

4 Companies Act 2006 s 667(1). As to the specified time see the Companies Act 2006 s 662(3) (see PARA 1200 note 12).

5 Companies Act 2006 s 667(2). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607. A person guilty of an offence under s 667 is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 667(3). As to the standard scale see PARA 1622.

As to provisions which enable the courts, in proceedings for an offence under s 667, to make a determination in certain circumstances about the exchange rates to be applied in working out whether a public company satisfies the authorised minimum requirement, see the Companies (Authorised Minimum) Regulations 2009, SI 2009/2425, regs 6, 7.

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1205. Transfer to reserve on acquisition of shares by public company or nominee.

Where: (1) a public company¹, or a nominee of a public company, acquires shares in the company; and (2) those shares are shown in a balance sheet of the company as an asset, an amount equal to the value of the shares must be transferred out of profits available for dividend to a reserve fund and is not then available for distribution². This applies to an interest in shares as it applies to shares³.

1 As to the meaning of 'public company' see PARA 102.

2 Companies Act 2006 s 669(1). As to dividends see PARA 1408 et seq.

3 Companies Act 2006 s 669(2). As it so applies the reference to the value of the shares is to be read as a reference to the value to the company of its interest in the shares: s 669(2).

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D. COMPANY'S LIEN ON SHARES

1206. Company's lien on shares.

Where there is an agreement to this effect, or the articles of association so provide¹, a company may have a lien on a member's shares for money owing² by him to the company. Where fully paid shares³ are, under the original articles, exempt from lien, the articles may be altered⁴ so as to subject the existing fully paid shares to the lien with respect to existing debts⁵; but, if the company has already proved in the bankruptcy of the shareholder, it will not be allowed to set up a lien acquired subsequent to the bankruptcy⁶.

1 See *Re Kingstown Yacht Club* (1888) 21 LR Ir 199; *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, CA (where a lien was held good against executors). Where no express lien is conferred, but shares may be forfeited if money due in respect of them is not paid, the company has no lien: *Re Dunlop, Dunlop v Dunlop* (1882) 21 ChD 583, CA; *Re Kingstown Yacht Club*.

The Companies Act 1862 Sch 1, Table A (repealed) (see PARA 18) did not give any express lien on shares, but art 10 (repealed) empowered the company to decline to register a transfer of shares to a person 'indebted to them', and 'indebted' meant on any account whatever, and either solely or jointly with other persons: *Ex p Stringer* (1882) 9 QBD 436; *Re Bentham Mills Spinning Co* (1879) 11 ChD 900, CA. Such a power does not

create a lien and does not enable the company to obtain priority over an equitable charge created by the shareholder over his shares: *Bank of NT Butterfield & Son Ltd v Golinsky* [1926] AC 733, PC. Articles of association usually give a much more extensive lien actively enforceable by sale of the shares; such a power of sale does not of itself authorise the company to sell the shares otherwise than in accordance with articles conferring a right of pre-emption on the other shareholders: *Champagne Perrier-Jouet SA v HH Finch Ltd* [1982] 3 All ER 713, [1982] 1 WLR 1359.

The model articles of association contained in the Companies (Model Articles) Regulations 2008, SI 2008/3229, expressly provide for the company to have a paramount lien on every share which is partly paid. Accordingly, the company has a lien (the 'company's lien') over every share which is partly paid for any part of that share's nominal value, and any premium at which it was issued, which has not been paid to the company, and which is payable immediately or at some time in the future, whether or not a call notice has been sent in respect of it: reg 4, Sch 3 art 52(1). The company's lien over a share takes priority over any third party's interest in that share, and extends to any dividend or other money payable by the company in respect of that share and (if the lien is enforced and the share is sold by the company) the proceeds of sale of that share: Sch 3 art 52(2). The directors may at any time decide that a share which is or would otherwise be subject to the company's lien shall not be subject to it, either wholly or in part: Sch 3 art 52(3). The Companies (Tables A to F) Regulations 1985, SI 1985/805, make similar provision. Accordingly, the company has a first and paramount lien on every share (not being a fully paid share) for all moneys (whether presently payable or not) payable at a fixed time or called in respect of that share; the directors may at any time declare any share to be wholly or in part exempt from these provisions; and the company's lien on a share extends to any amount payable in respect of it: reg 2, Schedule, Table A art 8. Enforcement of the company's lien is subject to the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 53 and the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A arts 9-11, respectively. (See also PARA 1210).

As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but arts 8-11 are applied by Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital) but are disapplied by Table C art 1 (regulations for the management of a company limited by guarantee and not having a share capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

2 The lien extends to moneys paid as directors' fees under a mistake of fact: *Re Bodega Co Ltd* [1904] 1 Ch 276.

3 As to the meaning of 'paid up' shares see PARA 1091.

4 As to the power to alter a company's articles of association see PARA 232.

5 *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, CA. Cf *Liquidator of W and A McArthur Ltd v Gulf Line Ltd* 1909 SC 732, Ct of Sess. If such a provision empowers the company to forfeit shares which are subject to a lien for all debts for non-payment of these debts (which ex hypothesi are not in respect of calls), it is void: see PARA 1214 text and note 6.

6 *Re Rowe, ex p West Coast Gold Fields Ltd* [1904] 2 KB 489. As to proof of debts in bankruptcy generally see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 490 et seq.

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1207. Extent of lien.

The lien extends to any moneys receivable by the shareholder in respect of the shares in a winding up¹. The lien is a security within the meaning of an article which forbids the making of loans to shareholders without sufficient security².

If articles of association³ give a company a paramount lien on shares held by a group of people in respect of all moneys owing to the company by any of the holders, alone or jointly with any other persons, the company is entitled to a lien on shares held by trustees in respect of debts due to the company by a firm, of which one of such trustees is a member, paramount to the claims of the beneficiaries⁴.

The company has no lien for debts due from beneficiaries who are not registered holders of shares⁵, and cannot alter its register of shareholders by substituting their names for those of the trustees⁶.

1 *Re General Exchange Bank, Re Lewis* (1871) 6 Ch App 818. A lien on the proceeds of sale of shares is a lien on the shares: *Deering and McQuestron v Hibernian Joint-Stock Banking Co* (1868) 16 WR 578. As to lien generally see **LIEN**.

2 *Re National Bank of Wales Ltd* [1899] 2 Ch 629 at 649 per Wright J; affd on this point [1899] 2 Ch 629 at 675, CA, per Lindley MR.

3 As to a company's articles of association generally see PARA 228. See also PARA 1206 note 1.

4 *New London and Brazilian Bank v Brocklebank* (1882) 21 ChD 302, CA.

5 *Re Perkins, ex p Mexican Santa Barbara Mining Co* (1890) 24 QBD 613, CA; *Paul's Trustee v Thomas Justice & Sons Ltd* 1912 SC 1303, Ct of Sess (where the articles gave the lien against 'the holder'); *Mathieson v Gronow* (1929) 141 LT 553; *Re Collie, ex p Manchester and County Bank* (1876) 3 ChD 481, CA.

6 *Re Ystalyfera Gas Co* [1887] WN 30.

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1208. Priority of lien.

Where the company has by its articles¹ a paramount lien on every share for all debts due from the holder to the company, it has no priority in respect of moneys which become due from the shareholder to the company after the company has received notice of a charge given to another person². The lien continues to exist, however, although the shareholder has given the company unmatured bills for his debt; and it prevails over a charge given after the giving of the bills but before maturity³.

1 As to the meaning of 'articles' see PARA 288 note 2.

2 *Bradford Banking Co Ltd v Briggs, Son & Co Ltd* (1886) 12 App Cas 29, HL (overruling on this point *Miles v New Zealand Alford Estate Co* (1886) 32 ChD 266, CA); *Rearden v Provincial Bank of Ireland* [1896] 1 IR 532; *Mackereth v Wigan Coal and Iron Co Ltd* [1916] 2 Ch 293.

3 *Re London, Birmingham and South Staffordshire Banking Co Ltd* (1865) 34 Beav 332.

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1209. Loss or discharge of lien.

The company's lien is lost if it registers a transfer of the shares which are subject to the lien¹; but a dividend declared after the execution but before registration of a transfer may be retained under the lien². When a transfer is executed for value of certain shares forming part of a larger number on which the company has a lien and the company declines to register the transfer, the lien must, as between the transferor and transferee, be satisfied out of the remaining shares, if sufficient³.

A lien on shares may be discharged by a new arrangement between the company and the shareholder, the terms of which are incompatible with retention of the lien, or which show an intention to waive it⁴.

On payment of the debt in respect of which there is a lien, the debtor may require the company to assign the lien to his nominee⁵.

1 *Higgs v Assam Tea Co* (1869) LR 4 Exch 387; *Re Northern Assam Tea Co, ex p Universal Life Assurance Co* (1870) LR 10 Eq 458. As to transfers see PARA 389 et seq. As to lien generally see **LIEN**.

2 *Re M'Murdo, Penfold v M'Murdo* (1892) 8 TLR 507.

3 *Gray v Stone and Funnell* (1893) 69 LT 282.

4 *Bank of Africa v Salisbury Gold Mining Co* [1892] AC 281, PC; *Hunter v Stewart* (1861) 4 De GF & J 168.

5 *Everitt v Automatic Weighing Machine Co* [1892] 3 Ch 506.

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1210. Provision made in articles for enforcement of company's lien.

The model articles of association¹ provide for a company's lien over partly paid shares and for the enforcement of that lien². Accordingly³, if a lien enforcement notice has been given in respect of a share, and the person to whom the notice was given has failed to comply with it, the company may sell that share in such manner as the directors decide⁴. A lien enforcement notice: (1) may only be given in respect of a share which is subject to the company's lien, in respect of which a sum is payable and the due date for payment of that sum has passed⁵; (2) must specify the share concerned⁶; (3) must require payment of the sum payable within 14 days of the notice⁷; (4) must be addressed either to the holder of the share or to a person entitled to it by reason of the holder's death, bankruptcy or otherwise⁸; and (5) must state the company's intention to sell the share if the notice is not complied with⁹.

Where shares are sold in this way¹⁰, the directors may authorise any person to execute an instrument of transfer of the shares to the purchaser or a person nominated by the purchaser,

and the transferee is not bound to see to the application of the consideration, and the transferee's title is not affected by any irregularity in or invalidity of the process leading to the sale¹¹.

The net proceeds of any such sale (after payment of the costs of sale and any other costs of enforcing the lien) must be applied, first, in payment of so much of the sum for which the lien exists as was payable at the date of the lien enforcement notice and, second, to the person entitled to the shares at the date of the sale, but only after the certificate for the shares sold has been surrendered to the company for cancellation or a suitable indemnity has been given for any lost certificates, and subject to a lien equivalent to the company's lien over the shares before the sale for any money payable in respect of the shares after the date of the lien enforcement notice¹².

A statutory declaration by a director or the company secretary that the declarant is a director or the company secretary and that a share has been sold to satisfy the company's lien on a specified date is conclusive evidence of the facts stated in it as against all persons claiming to be entitled to the share and, subject to compliance with any other formalities of transfer required by the articles or by law, constitutes a good title to the share¹³.

1 As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 228 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, be used by companies after the commencement of the Companies Act 2006: see PARA 230. As to the meanings of 'company limited by guarantee', 'company limited by shares', 'private company' and 'public company' see PARA 102.

2 The model articles of association contained in the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 8, and in the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 art 52, expressly provide for the company to have a paramount lien on every share which is partly paid; and enforcement of the company's lien is subject to the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A arts 9-11, and the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 53, respectively. For these purposes, only the provisions contained in Sch 3 art 53 are set out (see the text and notes 3-13) but the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A provides regulations for the management of a company limited by shares but arts 8-11 are applied by Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital) but are disapplied by Table C art 1 (regulations for the management of a company limited by guarantee and not having a share capital). As to the meaning of 'unlimited company' see PARA 102. As to the meanings of 'company having a share capital' and 'share capital' see PARA 1042.

3 Ie and subject to the provisions of the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 53: see Sch 3 art 53(1).

4 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 53(1).

5 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 53(2)(a).

6 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 53(2)(b).

7 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 53(2)(c).

8 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 53(2)(d).

9 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 53(2)(e).

10 Ie under the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 53: see Sch 3 art 53(3).

11 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 53(3).

- 12 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 53(4).
 13 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 53(5).

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1211. Charges of public companies on own shares.

A lien or other charge¹ of a public company² on its own shares³ (whether taken expressly or otherwise) except a charge permitted by any of the following provisions, is void⁴.

In the case of any description of company⁵, a charge on its own shares is permitted if the shares are not fully paid up and the charge is for an amount payable in respect of the shares⁶. In the case of a company whose ordinary business includes the lending of money⁷, or consists of the provision of credit or the bailment of goods under a hire purchase agreement⁸, or both⁹, a charge of the company on its own shares is permitted, whether the shares are fully paid or not, if it arises in connection with a transaction entered into by the company in the ordinary course of that business¹⁰. In the case of a company that has been re-registered as a public company¹¹, a charge on its own shares is permitted if the charge was in existence immediately before the company's application for re-registration¹².

1 As to the borrowing or securing of money generally see PARA 1256 et seq. As to a company's lien on shares generally see PARA 1206.

2 As to the meaning of 'public company' see PARA 102.

3 As to shares generally see PARA 1055.

4 Companies Act 2006 s 670(1). As to shares of an old public company held by or charged to itself see the Companies Consolidation (Consequential Provisions) Act 1985 s 6(3); and PARA 188. As to the meaning of 'old public company' see PARA 183.

5 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

6 Companies Act 2006 s 670(2). As to the meaning of 'paid up', in relation to shares, see PARA 1091. Where charges are so permitted under s 670(2) or s 670(4) (see the text and notes 11-12) a statement must be included in the directors' report required under s 415 (see PARA 816 et seq): see the Small Companies and Groups (Accounts and Directors' Reports) Regulations 2008, SI 2008/409, Sch 5 para 6(1)(c); and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 7 para 8(c).

7 Companies Act 2006 s 670(3)(a). As to the meaning of 'business' generally see PARA 1 note 1.

8 'Hire-purchase agreement' has the same meaning as in the Consumer Credit Act 1974 (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 95); Companies Act 2006 s 1173(1).

9 Companies Act 2006 s 670(3)(b).

10 Companies Act 2006 s 670(3).

11 As to re-registration as a public company see PARA 168 et seq.

12 Companies Act 2006 s 670(4). See also note 6.

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E. MORTGAGES OF SHARES

1212. Security given on shares by way of mortgage.

A valid security may be given on shares either by a legal¹ or an equitable² mortgage³. Where notice to the company is required, it must be given to the proper officers when conducting the business of the company⁴.

1 See eg *Deverges v Sandeman, Clark & Co* [1902] 1 Ch 579, CA. On repayment of the loan in full, the mortgagee will become a trustee of the shares and may not use the votes attached to them contrary to the interests of the mortgagor: *McGrattan v McGrattan* [1985] NI 28.

2 See eg *Harrold v Plenty* [1901] 2 Ch 314. Cf *Hunter v Hunter* [1936] AC 222, HL.

3 As to the manner of effecting mortgages of stocks and shares, and as to the priority between equitable mortgages and the effect of notice to the company, see **MORTGAGE** vol 77 (2010) PARAS 237, 273 et seq. As to the right of an equitable claimant to stocks and shares to protect his claim by serving a stop notice see PARA 344.

4 See **CHOSES IN ACTION** vol 13 (2009) PARA 56.

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F. FORFEITURE AND SURRENDER OF SHARES

1213. Power given by articles.

Forfeiture of shares¹ may cause in effect a reduction of the capital of the company²; but the operation has statutory authority³, and does not require the confirmation by the court that is required in most other cases of reduction⁴. Under model articles of association⁵, directors⁶ may issue a notice of intended forfeiture to any person who is liable to pay a call⁷ and who fails to do so by the call payment date and, until the call is paid, that person must pay the company interest on the call from the call payment date at the relevant rate⁸. If a notice of intended forfeiture is not complied with before the date by which payment of the call is required in the notice of intended forfeiture, the directors may decide that any share in respect of which it was given is forfeited, and the forfeiture is to include all dividends or other moneys payable in respect of the forfeited shares and not paid before the forfeiture⁹. Subject to the articles, the forfeiture of a share extinguishes all interests in that share, and all claims and demands against the company in respect of it, and all other rights and liabilities incidental to the share as between the person whose share it was prior to the forfeiture and the company¹⁰. A statutory declaration by a director or the company secretary that the declarant is a director or the company secretary and that a share has been forfeited on a specified date is conclusive

evidence of the facts stated in it as against all persons claiming to be entitled to the share and, subject to compliance with any other formalities of transfer required by the articles or by law, constitutes a good title to the share¹¹.

Such provisions may be inserted in articles of association other than those based on the model articles¹², and the power may be given or extended by altering the articles¹³.

1 As to shares generally see PARA 1055.

2 As to the reduction of a company's capital generally see PARA 1173 et seq.

3 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 Pt 4 (arts 54-62); the text and notes 7-12; and PARA 1134 note 4. Similar provision is made in the default articles that were prescribed for the purposes of the Companies Act 1985 ('legacy articles') (ie the Companies (Tables A to F) Regulations 1985, SI 1985/805) which have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. These latter provisions are not set out in this paragraph but see the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A arts 18-22, which apply to companies limited by shares, and are applied by Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and Table E (an unlimited company having a share capital) but are disapplied by Table C art 1 (regulations for the management of a company limited by guarantee and not having a share capital).

4 See PARA 1173 et seq.

5 As to articles of association generally see PARA 228 et seq.

6 As to a company's directors see PARA 478 et seq.

7 As to the meaning of 'call' see PARA 1132.

8 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 arts 57, 58.

9 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 59.

10 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 60(1). Any share which is forfeited in accordance with the articles is deemed to have been forfeited when the directors decide that it is forfeited, is deemed to be the property of the company, and may be sold, re-allotted or otherwise disposed of as the directors think fit: Sch 3 art 60(2). If a person's shares have been forfeited, the company must send that person notice that forfeiture has occurred and record it in the register of members, that person ceases to be a member in respect of those shares, that person must surrender the certificate for the shares forfeited to the company for cancellation, that person remains liable to the company for all sums payable by that person under the articles at the date of forfeiture in respect of those shares, including any interest (whether accrued before or after the date of forfeiture), and the directors may waive payment of such sums wholly or in part or enforce payment without any allowance for the value of the shares at the time of forfeiture or for any consideration received on their disposal: Sch 3 art 60(3). At any time before the company disposes of a forfeited share, the directors may decide to cancel the forfeiture on payment of all calls and interest due in respect of it and on such other terms as they think fit: Sch 3 art 60(4).

11 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 61(2). If a forfeited share is to be disposed of by being transferred, the company may receive the consideration for the transfer and the directors may authorise any person to execute the instrument of transfer: Sch 3 art 61(1). A person to whom a forfeited share is transferred is not bound to see to the application of the consideration (if any) nor is that person's title to the share affected by any irregularity in or invalidity of the process leading to the forfeiture or transfer of the share: Sch 3 art 61(3). If the company sells a forfeited share, the person who held it prior to its forfeiture is entitled to receive from the company the proceeds of such sale, net of any commission, and excluding any amount which was, or would have become, payable, and had not, when that share was forfeited, been paid by that person in respect of that share, but no interest is payable to such a person in respect of such proceeds and the company is not required to account for any money earned on them: Sch 3 art 61(4).

12 *Trevor v Whitworth* (1887) 12 App Cas 409, HL; *Bellerby v Rowland and Marwood's Steamship Co Ltd* [1902] 2 Ch 14, CA.

13 *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, CA. As to alterations in a company's articles of association see PARA 232.

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1214. Extent of power.

The power to forfeit shares¹ is confined to the case where calls² on those shares are not paid³. Thus a power which in terms purports to empower the company⁴ to forfeit shares in order to enforce a lien for debts due from a member⁵ otherwise than in respect of calls is void⁶. If the ground of forfeiture is contrary to the policy of the law, the power is invalid; for example a purported power to forfeit the shares of a member who commences litigation against the company is void, although the article⁷ containing it also provides that the market value of the forfeited shares is to be paid to the shareholder⁸.

1 See PARA 1213. As to shares generally see PARA 1055.

2 As to the meaning of 'call' see PARA 1132.

3 *Hopkinson v Mortimer, Harley & Co Ltd* [1917] 1 Ch 646; *Re Dronfield Silkstone Coal Co* (1880) 17 ChD 76, CA; *Trevor v Whitworth* (1887) 12 App Cas 409, HL; *Clarke and Chapman v Hart* (1858) 6 HL Cas 633; *Re National Patent Steam Fuel Co, Barton's Case* (1859) 4 De G & J 46, CA. See also *Evans v Smallcombe* (1868) LR 3 HL 249; *Re Agriculturists' Insurance Co, Brotherhood's Case* (1862) 31 Beav 365 (affd 31 LJ Ch 861); *Lord Belhaven's Case* (1865) 3 De GJ & Sm 41; *Dixon v Evans* (1872) LR 5 HL 606; *Spackman v Evans* (1868) LR 3 HL 171; *Stanhope's Case* (1866) 1 Ch App 161; *Stewart's Case* (1866) 1 Ch App 511; *Houldsworth v Evans* (1868) LR 3 HL 263; *Re Midland Railway Carriage and Wagon Co* (1907) 23 TLR 661.

4 As to the meaning of 'company' generally see PARA 1.

5 As to who qualifies as a member of a company see PARA 321.

6 *Hopkinson v Mortimer, Harley & Co Ltd* [1917] 1 Ch 646. This decision proceeded on the basis that such a forfeiture involved a reduction of capital, and to the extent to which the power of forfeiture could be invoked to give effect to the company's lien for the debts, was a clog on the equity of redemption. See also *Re Bolton, ex p North British Artificial Silk Ltd* [1930] 2 Ch 48 at 56-57 per Luxmoore J (where a power such as this was included, in addition to a power to forfeit for non-payment of calls, and it was held that the forfeiture was good as it was effected under the second of such powers).

7 As to articles of association generally see PARA 228 et seq.

8 *Hope v International Financial Society* (1876) 4 ChD 327, CA.

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1215. Exercise of power of forfeiture.

A purported forfeiture of shares¹ is invalid if it is not made for the company's benefit². When by a provision of the articles³ the company may forfeit on default in payment of calls⁴, the shareholder⁵ in default cannot insist on the provision being acted upon, even if he has received a notice that it would be⁶.

Directors⁷ elected in a voluntary winding up⁸ may be authorised to exercise the forfeiture clauses in the articles⁹. The power to forfeit is not lost by the uncalled capital being charged in favour of debenture holders¹⁰. A valid forfeiture holds good against the liquidator¹¹.

1 As to the power given to forfeit shares see PARAS 1213-1214.

2 *Harris v North Devon Rly Co* (1855) 20 Beav 384. Forfeiture is void when made to relieve a shareholder from liability: see *Re London and County Assurance Co, ex p Jones* (1858) 27 LJ Ch 666; *Re Esparto Trading Co* (1879) 12 ChD 191; *European Assurance Society, Manisty's Case* (1873) 17 Sol Jo 745; *Stanhope's Case* (1866) 1 Ch App 161 at 169 per Lord Cranworth LC. It has been held that forfeiture following a complaint that the contract to take the shares was induced by misrepresentation, but not followed by rectification of the register, did not relieve the shareholder from unpaid calls: *Gowers' Case* (1868) LR 6 Eq 77. As to restraining forfeiture for non-payment of calls after proceedings for rescission have been commenced see PARA 1077. See also *Hunter v Senate Support Services* [2004] EWHC 1085 (Ch), [2005] 1 BCLC 175 (directors' decision to forfeit claimant's shares for non-payment of a call was not made for any improper purpose; however, where the directors, in making that decision, failed to take into account a material consideration, the appropriate legal consequence is voidability).

3 As to articles of association generally see PARA 228 et seq.

4 As to the meaning of 'call' see PARA 1132. See eg the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 arts 57, 58; and PARA 1213.

5 As to shareholders and membership of companies generally see PARA 321 et seq.

6 *Bigg's Case* (1865) LR 1 Eq 309. Cf *Harris v North Devon Rly Co* (1855) 20 Beav 384 (enforcement of contract to forfeit on terms).

7 As to the meaning of 'director' see PARA 478.

8 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 71 et seq.

9 *Ladd's Case* [1893] 3 Ch 450.

10 *Re Agency Land and Finance Co of Australia, Bosanquet v Agency Land and Finance Co of Australia* (1903) 20 TLR 41. As to the meaning of 'debenture' see PARA 1299.

11 *Dawes's Case* (1868) LR 6 Eq 232. Cf *Srimati Premila Devi v People's Bank of Northern India Ltd* [1938] 4 All ER 337, PC.

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1216. Observance of conditions as to forfeiture.

In the forfeiture of shares¹, technicalities must be strictly observed². Accordingly, as against the company the shareholder may resist forfeiture on the ground that the conditions precedent to forfeiture have not been strictly complied with³; but if, as a director, he has been party to any informalities in connection with the forfeiture, he is estopped from relying on them⁴. A shareholder may rely on a forfeiture as against the company, although some formalities have not been complied with⁵. Laches on the part of the shareholder may bar the right to relief, even when the forfeiture is irregular⁶, but not when it is wholly void⁷. Where the articles provide that notice of forfeiture is to be given to the shareholder, a forfeiture, when once complete, is not made invalid by the fact that no notice is sent⁸. Articles may provide that, if there has been

irregularity in the forfeiture, the remedy of the member after the shares are disposed of is to be in damages only⁹.

- 1 As to the power given to forfeit shares, and the exercise of this power, see PARAS 1213-1215.
- 2 *Srimati Premila Devi v Peoples Bank of Northern India Ltd* [1938] 4 All ER 337, PC.
- 3 *Johnson v Lyttle's Iron Agency* (1877) 5 ChD 687, CA (time from which interest is demanded); *Stubbs v Lister* (1841) 1 Y & C Ch Cas 81 (undervalue when forfeiture was empowered to satisfy a lien); *Garden Gully United Quartz Mining Co v McLister* (1875) 1 App Cas 39, PC; *Bottomley's Case* (1880) 16 ChD 681 (invalid call); *Van Diemen's Land Co v Cockerell* (1857) 1 CBNS 732, Ex Ch; *Re New Chile Gold Mining Co* (1890) 45 ChD 598; *Watson v Eales* (1857) 23 Beav 294 (absence of, and irregularities in, or as regards service of, any notice required). See also *Goulton v London Architectural Brick and Tile Co* [1877] WN 141. Cf *Graham v Van Diemen's Land Co* (1856) 1 H & N 541, Ex Ch (notices to a bankrupt shareholder); *Kelk's Case, Pahlen's Case* (1869) LR 9 Eq 107; *Sparks v Liverpool Waterworks Co* (1807) 13 Ves 428 (absence of giving or receiving notice). See also *Parkstone Ltd v Gulf Guarantee Bank plc* [1990] BCLC 850, [1990] BCC 534 (notice posted to member whose registered address was outside the United Kingdom was effective and consistent with the articles; personal service was not required). As to tenders to prevent forfeiture see *Re New Quebrada Co, Clarke's Case* (1873) 27 LT 843; *Sweny v Smith* (1869) LR 7 Eq 324 (where the proceedings were on behalf of the claimant and all other shareholders). Where the power to forfeit is only the alternative to recovering calls by initiating proceedings, it cannot be exercised after the proceedings have begun: *Giles v Hutt* (1848) 3 Exch 18. As to the recovery of calls through proceedings see PARA 1142. As to shareholders and membership of companies generally see PARA 321 et seq. As to the meaning of 'United Kingdom' see PARA 1 note 5. As to the meaning of 'company' see PARA 24.
- 4 *Jones v North Vancouver Land and Improvement Co* [1910] AC 317, PC. As to the meaning of 'director' see PARA 478.
- 5 *Knight's Case* (1867) 2 Ch App 321 (non-entry of resolution in books); *Re Phosphate of Lime Co, Austin's Case* (1871) 24 LT 932 (absence or insufficiency of notice); *Lyster's Case* (1867) LR 4 Eq 233; *Re Asiatic Banking Corp, ex p Collum* (1869) LR 9 Eq 236; *Re Home Counties and General Life Assurance Co, Woollaston's Case* (1859) 4 De G & J 437; *Moore v Rawlins* (1859) 6 CBNS 289; *Re State Fire Insurance Co, Webster's Case* (1862) 32 LJ Ch 135 (non-rectification of the register); *King's Case* (1867) 2 Ch App 714 (after illegal conversion of shares). A prospective resolution for forfeiture if a notice is not complied with may be good: *Re Home Counties and General Life Assurance Co, Woollaston's Case*; *Painter v Ford* [1866] WN 77; *Knight's Case* (1867) 2 Ch App 321.
- 6 *Rule v Jewell* (1881) 18 ChD 660; *Prendergast v Turton* (1841) 1 Y & C Ch Cas 98. Cf *Garden Gully United Quartz Mining Co v McLister* (1875) 1 App Cas 39, PC. Acquiescence by the company in an invalid forfeiture arranged between the directors and the shareholder may relieve the shareholder from liability: see *Spackman v Evans* (1868) LR 3 HL 171; *Re Agriculturists' Cattle Insurance Co, Brotherhood's Case* (1862) 31 Beav 365.
- 7 *Bellerby v Rowland and Marwood's Steamship Co Ltd* [1902] 2 Ch 14, CA.
- 8 *Knight's Case* (1867) 2 Ch App 321; *Re Home Counties and General Life Assurance Co, Woollaston's Case* (1859) 4 De G & J 437; *Re State Fire Insurance Co, Webster's Case* (1862) 32 LJ Ch 135; *Kelk's Case, Pahlen's Case* (1869) LR 9 Eq 107 at 117 per James V-C. As to articles of association generally see PARA 228 et seq.
- 9 *Re New Chile Gold Mining Co* (1890) 45 ChD 598. As to who qualifies as a member of a company see PARA 321.

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1217. Liability for calls.

Articles may provide that the forfeiture of shares is not to bar the company's right to recover calls then owing¹, in which case calls made before, but payable after, a forfeiture may be

recovered²; but the company cannot prove in the bankruptcy of a person whose shares have been forfeited and reissued for more than the difference between the amount unpaid at the date of forfeiture and the amount received from subsequent holders of the shares³. The validity of a forfeiture cannot be disputed in the bankruptcy, but must be tried in a separate proceeding⁴. Forfeiture does not exempt the holder of shares from liability as a past member⁵.

Where the due payment of calls has been guaranteed, the company, by forfeiting the shares for non-payment, releases the surety from his liability under the guarantee⁶.

1 *Stocken's Case* (1868) 3 Ch App 412. As to articles of association generally see PARA 228 et seq. As to shares generally see PARA 1055. As to the meaning of 'company' see PARA 24. As to the meaning of 'call' see PARA 1132. As to interest on calls see *Stocken's Case*; *Ladies' Dress Association v Pulbrook* [1900] 2 QB 376, CA. Without express provision, there would probably be no liability for calls: *Stocken's Case* at 415 per Lord Cairns LJ. As to the liability of the purchaser of forfeited shares see PARA 1219.

2 *Faure Electric Accumulator Co v Phillipart* (1888) 58 LT 525; *Re China Steamship and Labuan Coal Co, Dawes' Case* (1869) 38 LJ Ch 512.

3 *Re Bolton, ex p North British Artificial Silk Ltd* [1930] 2 Ch 48. Formerly, interest was not recoverable unless expressly provided for: *Stocken's Case* (1868) 3 Ch App 412; *Faure Electric Accumulator Co v Phillipart* (1888) 58 LT 525. As to the power of the court to award interest in proceedings for the recovery of a debt see the Senior Courts Act 1981 s 35A; and **DAMAGES** vol 12(1) (Reissue) PARA 848; **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1307.

4 *Re Andrew, ex p Rippon* (1869) 4 Ch App 639. See also *Sweny v Smith* (1869) LR 7 Eq 324.

5 *Bridger's Case and Neill's Case* (1869) 4 Ch App 266; *Creyke's Case* (1869) 5 Ch App 63. As to who qualifies as a member of a company see PARA 321.

6 *Re Darwen and Pearce* [1927] 1 Ch 176.

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1218. Reinstatement.

Where, as is usual, the articles¹ empower directors² to annul the forfeiture of shares³, the company⁴ cannot reinstate the former holder with the liabilities of a shareholder⁵ unless he consents⁶.

1 As to articles of association generally see PARA 228 et seq. See also note 3.

2 As to a company's directors see PARA 478 et seq.

3 Under the model articles of association, at any time before the company disposes of a forfeited share, the directors may decide to cancel the forfeiture on payment of all calls and interest due in respect of it and on such other terms as they think fit: see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 art 60(4); and PARA 1213. As to the power given to forfeit shares, and the exercise of this power generally, see PARAS 1213-1215.

4 As to the meaning of 'company' see PARA 24.

5 As to shareholders and membership of companies generally see PARA 321 et seq.

6 *Larkworthy's Case* [1903] 1 Ch 711.

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1219. Re-allotting forfeited shares.

Where shares have been forfeited by the company¹, on re-allotting them² it may give credit for money already received in respect of them. As re-allotment is not an issue of shares³, this is not contrary to the principle that shares cannot be issued at a discount⁴. Where credit for the amount already paid is given, the new allottee becomes liable for the balance remaining unpaid on the shares⁵.

1 As to the procedure on forfeiture under the model articles of association see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 art 61; and PARA 1213. As to the power given to forfeit shares, and the exercise of this power generally, see PARAS 1213-1215.

2 As to the meaning of 'allotment' see PARA 1091.

3 As to the meaning of 'issue' in relation to shares see PARA 1045.

4 *Morrison v Trustees, Executors, and Securities Insurance Corpn* (1898) 68 LJ Ch 11, CA; *Re Exchange Banking Co Ltd, Ramwell's Case* (1881) 50 LJ Ch 827. Forfeited shares have been treated as 'unissued' on a reduction of capital, where sums had already been received in respect of the shares: *Re Oceana Development Co Ltd* (1912) 56 Sol Jo 537; *Re Victoria (Malaya) Rubber Estates Ltd* (1914) 58 Sol Jo 706.

5 *New Balkis Eersteling Ltd v Randt Gold Mining Co* [1904] AC 165 at 168, HL, per Lord Davey. See also PARA 1141. The new allottee is not entitled to vote whilst calls are payable by the original holder of the shares, when the articles provide that no member is to have a vote so long as any calls payable are unpaid: *Randt Gold Mining Co v Wainwright* [1901] 1 Ch 184. As to the meaning of 'call' see PARA 1132. As to articles of association generally see PARA 228 et seq. As to who qualifies as a member of a company see PARA 321.

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1220. Surrender in case of company limited by shares.

There are only minimal references to the surrender of shares¹ in the Companies Act 2006². However, under model articles of association³, a member may surrender any share in respect of which the directors may issue a notice of intended forfeiture, or any share which the directors may forfeit, or any share which has been forfeited⁴. The directors may accept the surrender of any such share⁵. The effect of surrender on a share is the same as the effect of forfeiture on that share⁶; and a share which has been surrendered may be dealt with in the same way as a share which has been forfeited⁷.

Where the company is limited by shares⁸, such a power does not justify them either in accepting a surrender for any valuable consideration paid by the company out of its assets, as the transaction is a purchase by the company of its own shares⁹, or in repaying to the member the amount paid on his shares¹⁰. Where a surrender of shares, whether fully paid up or not¹¹,

amounts to a reduction of capital¹², it cannot be effected other than in accordance with the statutory procedures that govern reduction¹³, except as a short cut to forfeiture where forfeiture would be justified¹⁴ under the articles for failure to pay any sum payable in respect of the shares; and, perhaps, by way of compromise either of a genuine dispute as to whether the shares have been legally issued¹⁵, or of a genuine claim for rectification of the register for misrepresentation¹⁶.

It has been held that a surrender of fully paid shares in return for other shares of the same nominal amount does not amount to a reduction of capital and may be validly effected¹⁷.

A transfer of shares to a nominee on behalf of the company is not a surrender, though the practical effect may be similar. Where some consideration moves from the company, such a transfer is invalid¹⁸; but, where no consideration moves from the company, it is valid¹⁹ and may be made direct to the company itself.

1 As to shares generally see PARA 1055.

2 See eg the Companies Act 2006 s 617 (see PARA 1159), s 659 (see PARA 1198), s 662 (see PARA 1200) and s 668 (see PARA 1203).

3 As to articles of association generally see PARA 228 et seq.

4 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 art 62(1). As to forfeiture see PARA 1213 et seq.

5 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 62(2).

6 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 62(3).

7 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 3 art 62(4).

8 As to the meaning of 'company limited by shares' see PARA 102.

9 This is prohibited by the Companies Act 2006 s 658 (see PARA 1197). See also *Trevor v Whitworth* (1887) 12 App Cas 409 at 438, HL, per Lord Macnaghten; *Kirby v Wilkins* [1929] 2 Ch 444.

10 *Re Companies Guardian Society, Lord Wallscourt's Case* (1899) 7 Mans 235; *Re Walker and Hacking Ltd* (1887) 57 LT 763.

11 As to the meaning of 'fully paid' see PARA 1048.

12 *Hope v International Financial Society* (1876) 4 ChD 327, CA; *Bellerby v Rowland and Marwood's Steamship Co Ltd* [1902] 2 Ch 14 at 32, CA, per Cozens-Hardy LJ (every surrender involves reduction of capital), explained and modified in *Rowell v John Rowell & Sons Ltd* [1912] 2 Ch 609 at 620 per Warrington J. See also *Hopkinson v Mortimer, Harley & Co Ltd* [1917] 1 Ch 646 at 653-655 per Eve J. As to the reduction of a company's capital generally see PARA 1173 et seq.

13 Ie in accordance with the Companies Act 2006 Pt 17 Ch 10 (ss 641-653): see PARA 1173 et seq.

14 Ie under the Companies Act 2006 s 659 (see PARA 1198). See *Bellerby v Rowland and Marwood's Steamship Co Ltd* [1902] 2 Ch 14, CA. As to the powers of forfeiture see PARA 1213 et seq.

15 *Bath's Case* (1878) 8 ChD 334, CA. See also *Mother Lode Consolidated Gold Mines Ltd v Hill* (1903) 19 TLR 341.

16 *Re Life Association of England Ltd, Blake's Case* (1865) 34 Beav 639; *Fox's Case* (1868) LR 5 Eq 118; *Wright's Case* (1871) 7 Ch App 55; *Anderson's Case* (1881) 17 ChD 373 (approved in *Re Scottish Petroleum Co* (1883) 23 ChD 413, CA). See also *Re MacDonald, Sons & Co* [1894] 1 Ch 89, CA. Cases depending on whether the articles purported to give power to accept surrenders, such as *Marshall v Glamorgan Iron and Coal Co* (1869) LR 7 Eq 129; *Snell's Case* (1869) 5 Ch App 22; *Hall's Case* (1870) 5 Ch App 707; *Re London and Provincial Consolidated Coal Co* (1877) 5 ChD 525, cannot be supported in the face of *Trevor v Whitworth* (1887) 12 App Cas 409, HL, and *Bellerby v Rowland and Marwood's Steamship Co Ltd* [1902] 2 Ch 14, CA. (See PARA 1197). As to rectification of the register of members see PARA 356 et seq. As to the register of members see PARA 335 et seq.

17 *Rowell v John Rowell & Sons Ltd* [1912] 2 Ch 609. Cf *Re St James' Court Estate Ltd* [1944] Ch 6 (where Simonds J refused to sanction a scheme for the surrender of preference shares in exchange for redeemable preference shares until a proper resolution for reduction and increase of capital had been passed). Cf also *Re Ellenroad Ring Mill Ltd* (1942) 86 Sol Jo 235.

18 *Addison's Case* (1870) 5 Ch App 294; *Cree v Somervail* (1879) 4 App Cas 648, HL. It is otherwise where it is part of a purchase of its own shares permitted by the Companies Act 2006 Pt 18 Ch 4 (ss 690-708): see PARA 1234 et seq.

19 See the Companies Act 2006 s 659(1); and PARA 1198. Under the law prior to the Companies Act 1980 s 35(2) (now repealed), the transfer had to be to a nominee: see *Kirby v Wilkins* [1929] 2 Ch 444 (the nominee had to vote as the company from time to time directed: see at 453-454 per Romer J); *Re Castiglione's Will Trusts*, *Hunter v MacKenzie* [1958] Ch 549, [1958] 1 All ER 480 (company to whom shares bequeathed entitled to direct transfer to nominees for itself).

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1221. Surrender in case of unlimited company.

An unlimited company¹ which has power to do so under its articles² may accept a surrender of shares³ on the terms of the member⁴ receiving back the amount paid up on them⁵.

1 As to the meaning of 'unlimited company' see PARA 102.

2 As to articles of association generally see PARA 228 et seq.

3 As to shares generally see PARA 1055.

4 As to who qualifies as a member of a company see PARA 321.

5 *Re Borough Commercial and Building Society* [1893] 2 Ch 242.

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(ii) Financial Assistance for Purchase of own Shares

1222. Limits on company's power to deal with its assets.

A company incorporated under the Companies Acts¹ has not, as corporations at common law² have, the power to do with its property all such acts as an ordinary person may do³. Thus a company cannot otherwise than under the statutory provisions⁴ make use of its assets to purchase or traffic in its own shares⁵, and, subject to certain exceptions, a public company (or a subsidiary of that company) may not provide financial assistance⁶ directly or indirectly for the purpose of the acquisition of its own shares⁷, and a private or public company may not give financial assistance, and a public company cannot give financial assistance directly or indirectly

for the purpose of the acquisition of shares in its private holding company or the shares of its public holding company⁸.

Among the forms which financial assistance might take is the purchase of an asset at an overvalue; there can be no doubt but that this can constitute prohibited assistance⁹. The payment of a debt owed by the company itself cannot be financial assistance¹⁰. However, the payment off of a parent company's debt by a subsidiary will constitute such assistance¹¹, as will the payment by the subsidiary of a target company of professional fees incurred by a purchaser of shares in the target company¹². The payment of a dividend is not, however, financial assistance¹³. Where an agreement between the parties is capable of being performed in alternative ways, one lawful and one in breach of the provisions relating to financial assistance, it is to be presumed that the parties intend to carry out the agreement in a lawful and not in an unlawful manner¹⁴.

1 As to the meaning of 'Companies Acts' see PARA 16. As to the effect of incorporation under the Companies Acts see PARA 120.

2 As to companies and corporations see PARA 2.

3 See PARA 125.

4 Ie under the provisions of the Companies Act 2006 Pt 18 Ch 4 (ss 690-708) (see PARA 1234 et seq).

5 *Trevor v Whitworth* (1887) 12 App Cas 409, HL. (See PARA 1197). As to the meaning of 'share' see PARA 1055.

6 As to the meaning of 'financial assistance' see PARA 1223. The statutory prohibition was enacted as a result of the previously common practice of purchasing the shares of a company having a substantial cash balance or easily realisable assets and so arranging matters that the purchase money was lent by the company to the purchaser: see *Re VGM Holdings Ltd* [1942] Ch 235 at 239, [1942] 1 All ER 224 at 225-226, CA, per Lord Greene MR. [Regardless of the forms of financial assistance caught], the general mischief . . . remains the same, namely that the resources of the target company and its subsidiaries should not be used directly or indirectly to assist the purchaser financially to make the acquisition. This may prejudice the interests of the creditors of the target or its group, and the interests of any shareholders who do not accept the offer to acquire their shares or to whom the offer is not made: see *Chaston v SWP Group Ltd* [2002] EWCA Civ 1999 at [31], [2003] 1 BCLC 675 at [31] per Arden LJ.

In cases where the application of the financial assistance provisions is doubtful, it is important to remember their central purpose, to examine the commercial realities of the transaction and to bear in mind that the statute is a penal statute: *Anglo Petroleum Ltd v TFB (Mortgages) Ltd* [2007] EWCA Civ 456, [2008] 1 BCLC 185 (the commercial reality was that the defendants were seeking to avoid their liabilities to the claimant, for what was in essence a straightforward commercial loan, by a strained reading of the statute; but none of the arrangements at issue was unlawful). See also note 7.

7 Because the financial assistance must be for the purpose of the acquisition, the policy of the statute extends beyond mere assistance given to enable the price for shares to be paid and requires that the objective of the payment is to further the acquisition: *Chaston v SWP Group plc* [2003] EWCA Civ 1999, [2003] 1 BCLC 675 (financial assistance given when subsidiary paid due diligence expenses incurred by prospective purchaser of parent company shares). The assistance does not have to be given to the purchaser if the purpose of the assistance remains the acquisition of the shares nor does the company giving the assistance have to suffer detriment: *Chaston v SWP Group plc*. The commercial realities of the transaction must be examined: *Charterhouse Investment Trust Ltd v Tempest Diesels Ltd* [1986] BCLC 1. See also *Dymnt v Boyden* [2004] EWHC 350 (Ch), [2004] All ER (D) 463 (Feb) (affd [2004] EWCA Civ 1586, [2005] 1 WLR 792) (company entered into a lease which could be said to have been 'in connection with' the acquisition of the shares, but it could not fairly be said to have been 'for the purpose' of that acquisition).

8 See PARA 1224 et seq. As to the meaning of 'holding company' see PARA 25. The prohibition applies only to subsidiaries registered under the Companies Acts and therefore a foreign subsidiary of an English parent company can give financial assistance for the acquisition of the latter's shares: *Arab Bank plc v Merchantile Holdings Ltd* [1994] Ch 71, [1994] 2 All ER 74. Any other interpretation would give the statute an extra-territorial effect contrary to the general principles of private international law: *Arab Bank plc v Merchantile Holdings Ltd*. The giving of financial assistance by a subsidiary is not *ipso facto* financial assistance by the parent company but it may involve unlawful conduct by the parent company either by procuring a breach of the prohibition or by constituting indirect financial assistance: *Arab Bank plc v Merchantile Holdings Ltd*. See also *AMG Global Nominees (Private) Ltd v Africa Resources Ltd* [2008] EWCA Civ 1262, [2009] 1 BCLC 281 (the fact

that a parent company authorised its subsidiary to provide financial assistance when it could have exercised its control over the subsidiary to acquire for itself the asset of the subsidiary used to provide the financial assistance did not involve either an asset leaving the parent or an assumption of liability by the parent).

9 See *Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] Ch 250, [1979] 1 All ER 118, CA (where a conspiracy to effect a breach of these provisions was alleged; it was held that the company was not a party to such conspiracy, so as to be debarred from suing; the guilty knowledge of its directors would not be imputed to the company).

10 *Spink (Bournemouth) Ltd v Spink* [1936] Ch 544, [1936] 1 All ER 597; *Burton v Palmer* [1980] 2 NSWLR 878, NSW CA. The criticism in the latter case of *Armour Hick Northern Ltd v Armour Trust Ltd* [1980] 3 All ER 833 at 837-838, sub nom *Armour Hick Northern Ltd v Whitehouse* [1980] 1 WLR 1520 at 1525-1526 per Mahoney JA is based upon an incomplete newspaper report. It does not in any way conflict with the principle stated in the text.

11 *Armour Hick Northern Ltd v Armour Trust Ltd* [1980] 3 All ER 833 (sub nom *Armour Hick Northern Ltd v Whitehouse* [1980] 1 WLR 1520).

12 *Chaston v SWP Group plc* [2003] EWCA Civ 1999, [2003] 1 BCLC 675, [2003] BCC 140 (target company paid purchaser's accountants' costs incurred in connection with a potential acquisition).

13 *Re Wellington Publishing Co Ltd* [1973] 1 NZLR 133.

14 *Parlett v Guppys (Bridport) Ltd* [1996] 2 BCLC 34, CA (an agreement whereby four private companies together assumed liability for making future payments of salary, bonus and pension, subject to there being sufficient profits, to a shareholder in return for that shareholder transferring shares in one of those companies did not have to be performed in breach of the statutory prohibition); *Neilson v Stewart* [1991] BCC 713, HL (preferred construction of document reasonably susceptible of two meanings was one which did not render the agreement in breach of the financial assistance provisions). See also *Brady v Brady* [1989] AC 755, [1988] 2 All ER 617, HL. This is only possible where there is no need for any departure from the agreed terms: *Brady v Brady*; and see *Plaut v Steiner* (1988) 5 BCC 352 (agreement did not permit of any performance which would be lawful and could not be enforced).

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1223. Meaning of 'financial assistance'.

In general, a company may not provide financial assistance for the acquisition of its own shares¹. For the purposes of the Companies Act 2006 provisions which govern such assistance², 'financial assistance'³ means:

- 2141 (1) financial assistance given by way of gift⁴;
- 2142 (2) financial assistance given by way of guarantee, security or indemnity (other than an indemnity in respect of the indemnifier's own neglect or default), or by way of release or waiver⁵;
- 2143 (3) financial assistance given: (a) by way of a loan or any other agreement under which any of the obligations of the person giving the assistance are to be fulfilled at a time when in accordance with the agreement any obligation of another party to the agreement remains unfulfilled; or (b) by way of the novation of, or the assignment of rights arising under, a loan or such other agreement⁶; or
- 2144 (4) any other financial assistance given by a company where the net assets⁷ of the company are reduced to a material extent by the giving of the assistance, or the company has no net assets⁸.

1 The text refers to a company that falls within the prohibitions set out in the Companies Act 2006 ss 678(1), (3), 679(1), (3): see PARAS 1224, 1225. See also *Arab Bank plc v Merchantile Holdings Ltd* [1994] Ch 71, [1994] 1 BCLC 330 at 335-337 per Millett J (applied in *AMG Global Nominees (Private) Ltd v Africa Resources Ltd* [2008] EWHC 221 (Ch), [2008] 1 BCLC 447); and PARA 1222 note 8.

2 Ie for the purposes of the Companies Act 2006 Pt 18 Ch 2 (ss 677-683) (see PARAS 1222, 1224 et seq). The prohibition on the giving of financial assistance by a private company for the acquisition of shares in itself, which was set out in the Companies Act 1985 ss 151-153 (repealed) (see now the Companies Act 2006 Pt 18 Ch 2), has been abolished; and such companies do not fall within Pt 18 Ch 2 unless they are subsidiaries of a public company giving financial assistance for the acquisition of shares in that public company. As to transitional provisions that apply in relation to financial assistance given on or after 1 October 2008, following the repeal of the Companies Act 1985 ss 151-153 (prohibition of financial assistance for acquisition of shares) (see now the Companies Act 2006 Pt 18 Ch 2), see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, art 9, Sch 4 para 51. The repeal of the Companies Act 1985 ss 151-153 does not cause anything that would have been unlawful by reason of any rule of law if that rule had not ceased to have effect (or been modified) as a consequence of the enactment of any provision contained in the Companies Act 1985 ss 151-153 (or as a consequence of the enactment of any former statutory provision substantially similar in effect to any such provision) to be rendered unlawful by reason of any rule of law that had so ceased to have effect or been modified: see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, Sch 4 para 52.

3 The phrase 'financial assistance' has to be interpreted in the light of the language of ordinary commerce: *Charterhouse Investment Trust Ltd v Tempest Diesels Ltd* [1986] BCLC 1 at 10 et seq per Hoffmann J (the surrender of tax losses by the company whose shares were being acquired to its holding company not shown to amount to company giving financial assistance for the purchase of its own shares). What matters is the commercial reality of the transaction and its substance: *MT Realisations Ltd (in liquidation) v Digital Equipment Co Ltd* [2003] EWCA Civ 494, [2003] 2 BCLC 117; *Charterhouse Investment Trust Ltd v Tempest Diesels Ltd*. See also *Chaston v SWP Group plc* [2003] EWCA Civ 1999, [2003] 1 BCLC 675, [2003] BCC 140 (rather than defining the phrase 'financial assistance', the statutory provision simply identifies forms of assistance which are to be treated as financial assistance). As a penal provision what is now the Companies Act 2006 s 677 should not be strained to cover transactions not fairly within it: *Charterhouse Investment Trust Ltd v Tempest Diesels Ltd*; *British and Commonwealth Holdings plc v Barclays Bank plc* [1996] 1 BCLC 1 at 25 per Harman J (affd [1996] 1 All ER 381, [1996] 1 WLR 1, CA). It is immaterial that the giving of the assistance (eg by means of a debenture) might otherwise be ultra vires the company (and hence void) in any event: *Heald v O'Connor* [1971] 2 All ER 1105, [1971] 1 WLR 497; *Selangor United Rubber Estates Ltd v Cradock (a bankrupt) (No 3)* [1968] 2 All ER 1073 at 1152-1154, [1968] 1 WLR 1555 at 1656-1659 per Ungood-Thomas J; *Dressy Frocks Pty Ltd v Bock* (1951) 51 SRNSW 390, NSW FC; *Shearer Transport Co Pty Ltd v McGrath* [1956] VLR 316; *EH Dey Pty Ltd v Dey* [1966] VR 464 (not following *Victor Battery Co Ltd v Curry's Ltd* [1946] Ch 242, [1946] 1 All ER 519). See also *Dyment v Boyden* [2004] EWCA Civ 1586, [2005] 1 WLR 792, [2005] 1 BCLC 163 (although entering into an onerous lease was in connection with the acquisition of shares, it was not 'financial assistance . . . for the purpose' of the acquisition as required by the statutory provision and therefore the lease was not open to challenge on grounds of illegality); *Re Hill & Tyler Ltd (in administration)*, *Harlow v Loveday* [2004] EWHC 1261 (Ch), [2005] 1 BCLC 41 (a charge given by a company to secure funding obtained by it for the purposes of loaning it to a purchaser to pay for its shares constituted financial assistance falling within what is now the Companies Act 2006 s 677); *Corporate Development Partners LLC v E-Relationship Marketing Ltd* [2007] EWHC 436 (Ch), [2007] All ER (D) 162 (Mar) (even giving a broad interpretation to 'financial assistance', it was unsound to describe the defendant's commitment to pay a transaction fee to the claimant as amounting to relevant 'financial assistance . . . for the purpose' of the transaction); *Anglo Petroleum Ltd v TFB (Mortgages) Ltd* [2007] EWCA Civ 456, [2008] 1 BCLC 185 (even if the use of the funds had involved a breach of what is now the Companies Act 2006 s 677, the judge was right to hold that the credit agreement, the security agreement and the guarantee at issue were not illegal).

4 Companies Act 2006 s 677(1)(a).

5 Companies Act 2006 s 677(1)(b). Each of the terms so used (guarantee, security, indemnity, release, waiver) can properly be described as a legal term of art: *British and Commonwealth Holdings plc v Barclays Bank plc* [1996] 1 BCLC 1 at 25 per Harman J (affd [1996] 1 All ER 381, [1996] 1 WLR 1, CA) ('indemnity' meaning a contract by one party to keep the other harmless from loss; on the facts no indemnity in this sense and therefore no financial assistance).

6 Companies Act 2006 s 677(1)(c). As to the general provisions regarding a company making loans to directors see PARA 568 et seq.

7 'Net assets' here means the aggregate amount of the company's assets less the aggregate amount of its liabilities: s 677(2). For this purpose, a company's liabilities include: (1) where the company draws up Companies Act individual accounts, any provision of a kind specified for the purposes of s 677(2) by regulations under s 396 (see PARA 728); and (2) where the company draws up IAS individual accounts, any provision made in those accounts: s 677(3). The specified provisions for the purposes of head (2) are provisions for liabilities

under the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 12, Sch 7 Pt 1 para 2 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 12, Sch 9 Pt 1 para 2: see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 7 Pt 2 para 3; and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 9 Pt 2 para 3.

8 Companies Act 2006 s 677(1)(d). See *Parlett v Guppys (Bridport) Ltd* [1996] 2 BCLC 34, CA; *MT Realisations Ltd (in liquidation) v Digital Equipment Co Ltd* [2003] EWCA Civ 494, [2003] 2 BCLC 117; *Chaston v SWP Group plc* [2003] EWCA Civ 1999, [2003] 1 BCLC 675, [2003] BCC 140.

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1224. Assistance for acquisition of shares in public company.

Where a person is acquiring or proposing to acquire shares¹ in a public company², it is not lawful for that company, or a company that is a subsidiary³ of that company, to give financial assistance⁴ directly or indirectly for the purpose of the acquisition⁵ before or at the same time as the acquisition takes place⁶. This does not, however, prohibit a company from giving financial assistance for the acquisition of shares in it or its holding company⁷ if: (1) the company's principal purpose in giving the assistance is not to give it for the purpose of any such acquisition; or (2) the giving of the assistance for that purpose is only an incidental part of some larger purpose of the company, and the assistance is given in good faith in the interests of the company⁸.

Where a person has acquired shares in a company, and a liability has been incurred⁹ (by that or another person) for the purpose of the acquisition, it is not lawful for that company, or a company that is a subsidiary of that company, to give financial assistance directly or indirectly for the purpose of reducing or discharging the liability if, at the time the assistance is given, the company in which the shares were acquired is a public company¹⁰. However, this does not prohibit a company from giving financial assistance if: (a) the company's principal purpose in giving the assistance is not to reduce or discharge any liability incurred by a person for the purpose of the acquisition of shares in the company or its holding company; or (b) the reduction or discharge of any such liability is only an incidental part of some larger purpose of the company, and the assistance is given in good faith in the interests of the company¹¹.

1 As to the meaning of 'share' see PARA 1055.

2 As to the meaning of 'public company' see PARA 102.

3 As to the meaning of 'subsidiary' see PARA 25.

4 As to the meaning of 'financial assistance' see PARA 1223. The company is held to be a person for whose benefit the illegality had been created so that it could eg recover damages it suffered as a result of giving financial assistance: *Wallersteiner v Moir* [1974] 3 All ER 217, [1974] 1 WLR 991, CA (not following dictum of Harman LJ in *Essex Aero Ltd v Cross* [1961] CA Transcript 388; *Victor Battery Co Ltd v Curry's Ltd* [1946] Ch 242, [1946] 1 All ER 519); *Belmont Finance Corp Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, CA (where the company recovered the entire loss sustained through the purchase of the shares which it bought solely to facilitate the transaction). In addition there might be a claim based on breach of fiduciary duty owed to the company eg by directors or by a constructive trustee for it: *Selangor United Rubber Estates Ltd v Craddock (a bankrupt)* (No 3) [1968] 2 All ER 1073, [1968] 1 WLR 1555. See also *Re In a Flap Envelope Co Ltd, Willmott v Jenkin* [2003] EWHC 3047 (Ch), [2004] 1 BCLC 64; *Chaston v SWP Group plc* [2003] EWCA Civ 1999, [2003] 1 BCLC 675; *Anglo Petroleum Ltd v TFB (Mortgages) Ltd* [2007] EWCA Civ 456, [2008] 1 BCLC 185. Illegality of this nature is readily severable in a contract containing other valid provisions: *Herbert Spink (Bournemouth) Ltd v Spink* [1936] Ch 544, [1936] 1 All ER 597; *South Western Mineral Water Co Ltd v Ashmore* [1967] 2 All ER 953,

[1967] 1 WLR 1110; *Carney v Herbert* [1985] AC 301, [1985] 1 All ER 438, PC; *Neilson v Stewart* [1991] BCC 713, HL.

5 See *Chaston v SWP Group plc* [2003] EWCA Civ 1999, [2003] 1 BCLC 675; *Dymont v Boyden* [2004] EWHC 350 (Ch), [2004] All ER (D) 463 (Feb) (affd [2004] EWCA Civ 1586, [2005] 1 WLR 792); and PARA 1222 note 7.

6 Companies Act 2006 s 678(1). The provisions of s 678 have effect subject to ss 681 and 682 (unconditional and conditional exceptions to prohibition) (see PARAS 1227, 1228).

As to transitional provisions that apply in relation to financial assistance given on or after 1 October 2008, following the repeal of the Companies Act 1985 ss 151-153 (prohibition of financial assistance for acquisition of shares) (see now the Companies Act 2006 Pt 18 Ch 2 (ss 677-683); and PARAS 1223, 1225 et seq), see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, art 9, Sch 4 paras 51, 52; and PARA 1223 note 2.

7 As to the meaning of 'holding company' see PARA 25.

8 Companies Act 2006 s 678(2). See note 6. See also PARA 1225. In construing the word 'purpose' in this context, the court will bear in mind the mischief against which the statutory provisions are aimed and will distinguish between a purpose and the reason why a purpose is formed: *Brady v Brady* [1989] AC 755 at 779, [1988] 2 All ER 617 at 633, HL, per Lord Oliver Of Aylmerton. Where reliance is placed on the fact that the company's principal purpose in giving the assistance is not to give it for the purpose of any such acquisition or, as the case may be, is not to reduce or discharge any liability incurred by a person for the purpose of the acquisition of shares in the company or its holding company, this envisages a principal and, by implication, a subsidiary purpose for the assistance; for example, the assistance may be given principally to acquire from the purchaser of shares in the company an asset which the company requires for its business: *Brady v Brady* at 778 and 632 per Lord Oliver Of Aylmerton. Where reliance is placed on the fact that the financial assistance is but an incidental part of some larger purpose of the company, it is necessary to find some larger overall corporate purpose of the company in which the giving of the financial assistance or the resultant reduction or discharge of liability is merely incidental: *Brady v Brady* at 779 and 633 per Lord Oliver Of Aylmerton. The existence of reasons such as the commercial advantages flowing from the transaction do not amount to a larger purpose of which the assistance can properly be considered to be an incident: *Brady v Brady* at 779 and 633 per Lord Oliver Of Aylmerton. In *Brady v Brady*, the purpose of the financial assistance was to assist in the financing of the acquisition of shares, although the reason for the financial assistance was to facilitate the break up of a business; that reason did not amount to the larger purpose required by the statute. See also *Plaut v Steiner* (1988) 5 BCC 352.

The words 'in good faith in the interests of the company' form a single composite expression and postulate a requirement that those responsible for procuring the company to provide the assistance act in the genuine belief that it is being done in the company's interest: *Brady v Brady* at 777, at 632 per Lord Oliver Of Aylmerton. The time at which this is to be considered is the time at which the assistance is given: *Brady v Brady*. If the company was insolvent at that time, the assistance could not be given in good faith in the interests of the company (*Plaut v Steiner*); nor would it be so given where the company giving the assistance had no interest in the transaction (*Plaut v Steiner*). See also *Chaston v SWP Group plc* [2003] EWCA Civ 1999, [2003] 1 BCLC 675, [2003] BCC 140.

9 For the purposes of the Companies Act 2006 Pt 18 Ch 2 (ss 677-683), a reference to a person incurring a liability includes his changing his financial position by making an agreement or arrangement (whether enforceable or unenforceable, and whether made on his own account or with any other person) or by any other means; and a reference to a company giving financial assistance for the purposes of reducing or discharging a liability incurred by a person for the purpose of the acquisition of shares includes its giving such assistance for the purpose of wholly or partly restoring his financial position to what it was before the acquisition took place: s 683(2).

10 Companies Act 2006 s 678(3). See notes 6, 8, 9.

11 Companies Act 2006 s 678(4). See notes 6, 8, 9.

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1225. Assistance by public company for acquisition of shares in its private holding company.

Where a person is acquiring or proposing to acquire shares¹ in a private company², it is not lawful for a public company³ that is a subsidiary⁴ of that company to give financial assistance⁵ directly or indirectly for the purpose of the acquisition⁶ before or at the same time as the acquisition takes place⁷. However, this does not prohibit a company from giving financial assistance for the acquisition of shares in its holding company⁸ if: (1) the company's principal purpose in giving the assistance is not to give it for the purpose of any such acquisition; or (2) the giving of the assistance for that purpose is only an incidental part of some larger purpose of the company, and the assistance is given in good faith in the interests of the company⁹.

Where a person has acquired shares in a private company, and a liability has been incurred (by that or another person) for the purpose of the acquisition, it is not lawful for a public company that is a subsidiary of that company to give financial assistance directly or indirectly for the purpose of reducing or discharging the liability¹⁰. However, this does not prohibit a company from giving financial assistance if: (a) the company's principal purpose in giving the assistance is not to reduce or discharge any liability incurred by a person for the purpose of the acquisition of shares in its holding company; or (b) the reduction or discharge of any such liability is only an incidental part of some larger purpose of the company, and the assistance is given in good faith in the interests of the company¹¹.

1 As to the meaning of 'share' see PARA 1055.

2 As to the meaning of 'private company' see PARA 102.

3 As to the meaning of 'public company' see PARA 102.

4 As to the meaning of 'subsidiary' see PARA 25.

5 As to the meaning of 'financial assistance' see PARA 1223. See also PARA 1224 note 4.

6 See PARA 1224 note 5.

7 Companies Act 2006 s 679(1). The provisions of s 679 have effect subject to ss 681 and 682 (unconditional and conditional exceptions to prohibition) (see PARAS 1227, 1228).

As to transitional provisions that apply in relation to financial assistance given on or after 1 October 2008, following the repeal of the Companies Act 1985 ss 151-153 (prohibition of financial assistance for acquisition of shares) (see now the Companies Act 2006 Pt 18 Ch 2 (ss 677-683); and PARAS 1223 et seq), see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, art 9, Sch 4 paras 51, 52; and PARA 1223 note 2.

8 As to the meaning of 'holding company' see PARA 25.

9 Companies Act 2006 s 679(2). See note 6. See also PARA 1224 note 8.

10 Companies Act 2006 s 679(3). See note 6. See also PARA 1224 notes 8, 9.

11 Companies Act 2006 s 679(4). See note 6. See also PARA 1224 notes 8, 9.

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1226. Prohibited financial assistance is an offence.

If a company¹ contravenes the prohibition against providing financial assistance² an offence is committed by the company, and by every officer of the company who is in default³. A person guilty of such an offence is liable (on conviction on indictment) to imprisonment for a term not exceeding two years or a fine, or both, and (on summary conviction) to imprisonment for a term not exceeding 12 months⁴ or to a fine not exceeding the statutory maximum⁵, or both⁶.

1 ie a company that falls within the prohibitions set out in the Companies Act 2006 ss 678(1), (3), 679(1), (3); see PARAS 1224, 1225. See also PARA 1222 note 8. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 ie under the Companies Act 2006 s 678(1) or (3) (see PARA 1224) or s 679(1) or (3) (see PARA 1225).

3 Companies Act 2006 s 680(1). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

As to transitional provisions that apply in relation to financial assistance given on or after 1 October 2008, following the repeal of the Companies Act 1985 ss 151-153 (prohibition of financial assistance for acquisition of shares) (see now the Companies Act 2006 Pt 18 Ch 2 (ss 677-683); and PARAS 1223 et seq), see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, art 9, Sch 4 paras 51, 52; and PARA 1223 note 2.

4 In relation to an offence committed before the coming into force of the Criminal Justice Act 2003 s 154(1) (not yet in force), the maximum term of imprisonment on summary conviction is six months: see the Companies Act 2006 s 1131.

5 As to the statutory maximum see PARA 1622.

6 Companies Act 2006 s 680(2). See note 3.

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1227. Unconditional exceptions from prohibition.

The prohibitions against providing financial assistance¹ for the acquisition of shares² in a public company³ or a private company⁴ do not prohibit any of the following transactions⁵:

- 2145 (1) a distribution⁶ of the company's assets by way of dividend lawfully made⁷, or distribution in the course of a company's winding up⁸;
- 2146 (2) an allotment of bonus shares⁹;
- 2147 (3) a reduction of capital¹⁰;
- 2148 (4) a redemption or purchase of shares made in accordance with the statutory provisions¹¹;
- 2149 (5) anything done in pursuance of an order of the court under the provisions¹² dealing with compromises or arrangements with members or creditors¹³;
- 2150 (6) anything done under an arrangement made in pursuance of the statutory provisions¹⁴ enabling liquidators in winding up to accept shares as consideration for the sale of property¹⁵;
- 2151 (7) anything done under an arrangement¹⁶ made between a company and its creditors which is binding on the creditors by virtue of the statutory provisions relating to such arrangements when made by a company about to be or in the course of being wound up¹⁷.

1 As to the meaning of 'financial assistance' see PARA 1223.

2 As to the meaning of 'share' see PARA 1055.

3 le under the Companies Act 2006 s 678 (see PARA 1224). As to the meaning of 'public company' see PARA 102.

4 le under the Companies Act 2006 s 679 (see PARA 1225). As to the meaning of 'private company' see PARA 102.

5 Companies Act 2006 s 681(1).

As to transitional provisions that apply in relation to financial assistance given on or after 1 October 2008, following the repeal of the Companies Act 1985 ss 151-153 (prohibition of financial assistance for acquisition of shares) (see now the Companies Act 2006 Pt 18 Ch 2 (ss 677-683); and PARA 1223 et seq), see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, art 9, Sch 4 paras 51, 52; and PARA 1223 note 2.

6 'Distribution' has the same meaning as in the Companies Act 2006 Pt 23 (ss 829-853) (see s 829; and PARA 1389).

7 See PARA 1389 et seq.

8 Companies Act 2006 s 681(2)(a). See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 831 et seq.

9 Companies Act 2006 s 681(2)(b). As to bonus shares see PARA 1053.

10 Companies Act 2006 s 681(2)(c). As to the reduction of capital see Pt 17 Ch 10 (ss 641-653) (see PARA 1173 et seq).

11 Companies Act 2006 s 681(2)(d). A redemption of shares is made under the Companies Act 2006 Pt 18 Ch 3 (ss 684-689) (see PARAS 1229-1233) or a purchase of shares under Pt 18 Ch 4 (ss 690-708) (see PARA 1234 et seq).

12 le under the Companies Act 2006 Pt 26 (ss 895-901) (see PARA 1425 et seq).

13 Companies Act 2006 s 681(2)(e). As to membership of a company see PARA 321 et seq. As to the meaning of 'arrangement' see PARA 1148 note 5.

14 le under the Insolvency Act 1986 s 110 (see PARA 1438).

15 Companies Act 2006 s 681(2)(f).

16 le under the Insolvency Act 1986 Pt 1 (ss 1-7) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 71 et seq).

17 Companies Act 2006 s 681(2)(g).

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1228. Conditional exceptions from prohibition.

The prohibitions against providing financial assistance¹ for the acquisition of shares² in a public company³ or a private company⁴ do not prohibit any of the following transactions if the company giving the assistance is a private company, or if the company giving the assistance is a public company and the company has net assets⁵ that are not reduced by the giving of the assistance, or, to the extent that those assets are so reduced, the assistance is provided out of distributable profits⁶. The transactions are:

- 2152 (1) where the lending of money is part of the ordinary business of the company, the lending of money in the ordinary course of the company's business⁷;
- 2153 (2) the provision by the company, in good faith in the interests of the company or its holding company⁸, of financial assistance for the purposes of an employees' share scheme⁹;
- 2154 (3) the provision of financial assistance by the company for the purposes of or in connection with anything done by the company (or another company in the same group¹⁰) for the purpose of enabling or facilitating transactions in shares in the first-mentioned company or its holding company between, and involving the acquisition of beneficial ownership of those shares by, bona fide employees or former employees of that company (or another company in the same group), or spouses or civil partners, widows, widowers or surviving civil partners, or minor children or step-children of any such employees or former employees¹¹;
- 2155 (4) the making by the company of loans to persons (other than directors) employed in good faith by the company with a view to enabling those persons to acquire fully paid shares in the company or its holding company to be held by them by way of beneficial ownership¹².

1 As to the meaning of 'financial assistance' see PARA 1223.

2 As to the meaning of 'share' see PARA 1055.

3 Ie under the Companies Act 2006 s 678 (see PARA 1224). As to the meaning of 'public company' see PARA 102.

4 Ie under the Companies Act 2006 s 679 (see PARA 1225). As to the meaning of 'private company' see PARA 102.

5 The references in the Companies Act 2006 s 682 to 'net assets' are to the amount by which the aggregate of the company's assets exceeds the aggregate of its liabilities: s 682(3). For this purpose: (1) the amount of both assets and liabilities are to be taken to be as stated in the company's accounting records immediately before the financial assistance is given; and (2) 'liabilities' includes any amount retained as reasonably necessary for the purpose of providing for a liability the nature of which is clearly defined and that is either likely to be incurred or certain to be incurred but uncertain as to amount or as to the date on which it will arise: s 682(4).

6 Companies Act 2006 s 682(1). See also s 840(4), (5); and PARA 1399. 'Distributable profits', in relation to the giving of any financial assistance: (1) means those profits out of which the company could lawfully make a distribution equal in value to that assistance; and (2) includes, in a case where the financial assistance consists of or includes, or is treated as arising in consequence of, the sale, transfer or other disposition of a non-cash asset, any profit that, if the company were to make a distribution of that character would be available for that purpose (see s 846; and PARA 1404): s 683(1).

As to transitional provisions that apply in relation to financial assistance given on or after 1 October 2008, following the repeal of the Companies Act 1985 ss 151-153 (prohibition of financial assistance for acquisition of shares) (see now the Companies Act 2006 Pt 18 Ch 2 (ss 677-683); and PARA 1223 et seq), see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, art 9, Sch 4 paras 51, 52; and PARA 1223 note 2.

7 Companies Act 2006 s 682(2)(a).

8 As to the meaning of 'holding company' see PARA 25.

9 Companies Act 2006 s 682(2)(b). As to the meaning of 'employees' share scheme' see PARA 169 note 20.

10 A company is in the same group as another company if it is a holding company or subsidiary of that company or a subsidiary of a holding company of that company: Companies Act 2006 s 682(5). As to the meaning of 'subsidiary' see PARA 26.

11 Companies Act 2006 s 682(2)(c).

12 Companies Act 2006 s 682(2)(d).

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(iii) Redemption or Purchase in general

A. REDEEMABLE SHARES

1229. Power to issue redeemable shares.

A limited company¹ having a share capital² may issue shares³ that are to be redeemed or are liable to be redeemed at the option of the company or the shareholder⁴ ('redeemable shares'), subject to the following provisions⁵:

- 2156 (1) the articles of a private limited company⁶ may exclude or restrict the issue of redeemable shares⁷;
- 2157 (2) a public limited company⁸ may only issue redeemable shares if it is authorised to do so by its articles⁹;
- 2158 (3) no redeemable shares may be issued at a time when there are no issued shares of the company that are not redeemable¹⁰.

Redeemable shares in a limited company may not be redeemed unless they are fully paid¹¹. The terms of redemption of shares in a limited company may provide that the amount payable on redemption may, by agreement between the company and the holder of the shares, be paid on a date later than the redemption date¹². Unless this is the case, the shares must be paid for on redemption¹³.

1 As to the meaning of 'limited company' see PARA 102.

2 As to the meaning of 'share capital' see PARA 1045.

3 As to the meaning of 'issue' in relation to shares see PARA 1045. As to the meaning of 'share' see PARA 1055.

4 As to shareholders and membership of companies generally see PARA 321 et seq.

5 Companies Act 2006 s 684(1). In *Re RW Peak (King's Lynn) Ltd* [1998] 1 BCLC 193, it was held that non-compliance with the statutory requirements will not be treated as a mere procedural irregularity capable of being waived or dispensed with or validated by unanimous agreement of all members entitled to vote at meetings of the company. However, whether strict adherence with the formalities for calling meetings and passing resolutions could be waived by all the relevant shareholders entitled to vote acting informally but unanimously depends on whether the particular requirement sought to be waived was intended merely to protect the current shareholders or to confer protection on a wider class of persons (in particular the company's creditors) in which case compliance could not be waived even if the members acted unanimously: see *Kinlan v Crimmin* [2006] EWHC 779 (Ch), [2007] 2 BCLC 67; *Dashfield v Davidson* [2008] EWHC 486 (Ch), [2009] 1 BCLC 220. See also *Re SH & Co (Realisations) 1990 Ltd* [1993] BCLC 1309 at 1316 per Mummery J (where the court considered the statutory scheme relating to the giving of financial assistance by a company for the purchase of its own shares which is very similar to the scheme governing redemption and purchase of shares); *Precision Dippings Ltd v Precision Dippings Marketing Ltd* [1986] Ch 447 at 456-457, [1985] 3 WLR 812 at 816-817, CA, per Dillon LJ (failure to comply with the statutory procedures governing auditors' reports when the company proposed to make a distribution on the basis of qualified accounts). An error which is so insignificant that no one could be thought to be prejudiced by its correction will not, however, invalidate the whole scheme: *Re Willaire Systems plc* [1987] BCLC 67, CA (special resolution for a reduction of capital contained minor inaccuracies). As to meetings of members see PARA 629 et seq.

6 As to articles of association generally see PARA 228 et seq. As to the meaning of 'private limited company' see PARA 102.

7 Companies Act 2006 s 684(2). Under model articles, the company may issue shares which are to be redeemed, or are liable to be redeemed at the option of the company or the holder, and the directors may determine the terms, conditions and manner of redemption of any such shares: see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 art 22(2); and PARA 1057. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 3 makes similar provision except that redemption must be made on such terms and in such manner as may be provided by the articles: see PARA 1057.

8 As to the meaning of 'public limited company' see PARA 102.

9 Companies Act 2006 s 684(3). See eg the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3 art 43(2); and PARA 1057.

10 Companies Act 2006 s 684(4).

11 Companies Act 2006 s 686(1). As to the meaning of 'fully paid' shares see PARA 1045.

12 Companies Act 2006 s 686(2). Previously-deferred payment is not allowed: see *Kinlan v Crimmin* [2006] EWHC 779 (Ch), [2007] 2 BCLC 67 (transaction void).

13 Companies Act 2006 s 686(3).

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1230. Terms and manner of redemption

The directors¹ of a limited company² may determine the terms, conditions and manner of redemption of shares³ if they are authorised to do so by the company's articles⁴, or by a resolution⁵ of the company⁶. Where the directors are so authorised to determine the terms, conditions and manner of redemption of shares, they must do so before the shares are allotted⁷, and any obligation of the company to state in a statement of capital⁸ the rights attached to the shares extends to the terms, conditions and manner of redemption⁹. Where the directors are not so authorised, the terms, conditions and manner of redemption of any redeemable shares must be stated in the company's articles¹⁰.

1 As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'limited company' see PARA 102.

3 See PARA 1229. As to the meaning of 'share' see PARA 1055.

4 See eg the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 art 22(2) (private company limited by shares); reg 4, Sch 3 art 43(2) (public company) (cited in PARA 1057); and the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A art 3. As to articles of association generally see PARA 228 et seq.

5 The resolution may be an ordinary resolution, even though it amends the company's articles: Companies Act 2006 s 685(2). As to ordinary resolutions see PARA 613.

6 Companies Act 2006 s 685(1). As to a failure to redeem see PARA 1242.

7 As to the meaning of 'allotment' see PARA 1091.

8 As to the statement of capital see PARA 113.

9 Companies Act 2006 s 685(3).

10 Companies Act 2006 s 685(4).

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1231. Financing etc of redemption.

A private limited company¹ may redeem redeemable shares² out of capital³. Subject to that, redeemable shares in a limited company⁴ may only be redeemed out of distributable profits⁵ of the company⁶, or the proceeds of a fresh issue of shares made for the purposes of the redemption⁷.

Any premium payable on redemption of shares in a limited company must be paid out of distributable profits of the company⁸. However, if the redeemable shares were issued at a premium⁹, any premium payable on their redemption may be paid out of the proceeds of a fresh issue of shares made for the purposes of the redemption, up to an amount equal to: (1) the aggregate of the premiums received by the company on the issue of the shares redeemed; or (2) the current amount of the company's share premium account (including any sum transferred to that account in respect of premiums on the new shares), whichever is the less¹⁰. The amount of the company's share premium account is reduced by a sum corresponding, or by sums in the aggregate corresponding, to the amount of any such payment made¹¹.

1 As to the meaning of 'private limited company' see PARA 102.

2 As to the meaning of 'redeemable' shares see PARA 1229.

3 Companies Act 2006 s 687(1). Share may be redeemed out of capital in accordance with Pt 18 Ch 5 (ss 709-723) (see PARA 1244 et seq). The provisions of s 687 are subject to s 735(4) (terms of redemption enforceable in a winding up) (see PARA 1242).

4 As to the meaning of 'limited company' see PARA 102.

5 In the Companies Act 2006 Pt 18 (ss 658-737) (except in Ch 2 (ss 677-683) (financial assistance): see s 683; and PARA 1228), 'distributable profits', in relation to the making of any payment by a company, means profits out of which the company could lawfully make a distribution (within the meaning given by s 830 (see PARA 1389)) equal in value to the payment: s 736.

6 Companies Act 2006 s 687(2)(a). See note 3.

7 Companies Act 2006 s 687(2)(b). See note 3.

8 Companies Act 2006 s 687(3), which is expressed to be subject to s 687(4) (see the text to notes 9, 10). See note 3.

9 As to the meaning of 'issued at a premium' see PARA 1146.

10 Companies Act 2006 s 687(4). See note 3.

11 Companies Act 2006 s 687(5). See note 3.

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1232. Redeemed shares treated as cancelled.

Where shares¹ in a limited company² are redeemed³, the shares are treated as cancelled, and the amount of the company's issued share capital⁴ is diminished accordingly by the nominal value of the shares redeemed⁵.

- 1 As to the meaning of 'share' see PARA 1055.
- 2 As to the meaning of 'limited company' see PARA 102.
- 3 See PARA 1229.
- 4 As to the meaning of 'issued share capital' see PARA 1045.
- 5 Companies Act 2006 s 688.

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1233. Notice to registrar of redemption.

If a limited company¹ redeems any redeemable shares² it must within one month after doing so give notice to the registrar³, specifying the shares redeemed⁴. The notice must be accompanied by a statement of capital⁵ which must state with respect to the company's share capital⁶ immediately following the redemption⁷:

- 2159 (1) the total number of shares of the company⁸;
- 2160 (2) the aggregate nominal value of those shares⁹;
- 2161 (3) for each class of shares: (a) prescribed particulars of the rights attached to the shares¹⁰; (b) the total number of shares of that class; and (c) the aggregate nominal value of shares of that class¹¹; and
- 2162 (4) the amount paid up and the amount (if any) unpaid on each share, whether on account of the nominal value of the share or by way of premium¹².

If default is made in complying with this requirement, an offence is committed by the company, and by every officer of the company who is in default¹³.

- 1 As to the meaning of 'limited company' see PARA 102.
- 2 As to the meaning of 'redeemable' shares see PARA 1229.
- 3 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements for the proper delivery of documents to the registrar see PARA 142.

4 Companies Act 2006 s 689(1).

5 Companies Act 2006 s 689(2). As to the statement of capital see PARA 113.

6 As to the meaning of 'share capital' see PARA 1045.

7 Companies Act 2006 s 689(3).

8 Companies Act 2006 s 689(3)(a).

9 Companies Act 2006 s 689(3)(b).

10 The prescribed particulars are: (1) particulars of any voting rights attached to the shares, including rights that arise only in certain circumstances; (2) particulars of any rights attached to the shares, as respects dividends, to participate in a distribution; (3) particulars of any rights attached to the shares, as respects capital, to participate in a distribution (including on winding up); and (4) whether the shares are to be redeemed or are liable to be redeemed at the option of the company or the shareholder: Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 2(1), (2)(m), (3).

11 Companies Act 2006 s 689(3)(c).

12 Companies Act 2006 s 689(3)(d).

13 Companies Act 2006 s 689(4). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607. A person guilty of an offence under s 689 is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 689(5). As to the standard scale see PARA 1622

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B. PURCHASE OF OWN SHARES

(A) IN GENERAL

1234. Power of company to purchase own shares.

A limited company¹ having a share capital² may purchase its own shares, including any redeemable shares³, subject to the statutory provisions governing such purchases⁴ and to any restriction or prohibition in the company's articles⁵.

A limited company may not purchase its own shares if as a result of the purchase there would no longer be any issued shares of the company other than redeemable shares or shares held as treasury shares⁶.

A limited company may not purchase its own shares unless they are fully paid⁷. Where a limited company purchases its own shares, the shares must be paid for on purchase⁸.

1 As to the meaning of 'limited company' see PARA 102.

2 As to the meaning of 'share capital' see PARA 1045.

3 As to the meaning of 'redeemable' shares see PARA 1229. As to the meaning of 'share' see PARA 1055.

4 le the provisions of the Companies Act 2006 Pt 18 Ch 4 (ss 690-708). See also as to treasury shares s 724 (see PARA 1251).

5 Companies Act 2006 s 690(1). See also *Kinlan v Crimmin* [2006] EWHC 779 (Ch), [2007] 2 BCLC 67. As to articles of association generally see PARA 228 et seq. See eg the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule, Table A art 35. Table A provides regulations for the management of a company limited by shares but art 35 is applied by Table D Pt III (regulations for the management of a company limited by guarantee and having a share capital), and disapplied by Table C art 1 (regulations for the management of a company limited by guarantee and not having a share capital) and Table E (an unlimited company having a share capital). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'private company' and 'unlimited company' see PARA 102. As to the meaning of 'company having a share capital' see PARA 1042.

6 Companies Act 2006 s 690(2). As to treasury shares see PARA 1251 et seq.

7 Companies Act 2006 s 691(1).

8 Companies Act 2006 s 691(2). See *Re BDG Roof-Bond Ltd v Douglas* [2000] 1 BCLC 401 at 412-413 per Park J (as to what constitutes payment); and *Peña v Dale* [2003] EWHC 1065 (Ch), [2004] 2 BCLC 508 (whole of the purchase money must be paid on completion). Cf on redemption (see PARA 1229).

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1235. Financing of purchase of own shares.

A private limited company¹ may purchase its own shares² out of capital³. Subject to that, a limited company may only purchase its own shares out of distributable profits⁴ of the company, or the proceeds of a fresh issue of shares made for the purpose of financing the purchase⁵, and any premium payable on the purchase by a limited company of its own shares must be paid out of distributable profits of the company⁶. However, if the shares to be purchased were issued at a premium, any premium payable on their purchase by the company may be paid out of the proceeds of a fresh issue of shares made for the purpose of financing the purchase, up to an amount equal to: (1) the aggregate of the premiums received by the company on the issue of the shares purchased; or (2) the current amount of the company's share premium account (including any sum transferred to that account in respect of premiums on the new shares), whichever is the less⁷. The amount of the company's share premium account⁸ is reduced by a sum corresponding, or by sums in the aggregate corresponding, to the amount of any payment made⁹.

1 As to the meaning of 'private limited company' see PARA 102.

2 As to the meaning of 'share' see PARA 1055.

3 Companies Act 2006 s 692(1). Such a purchase must be in accordance with Pt 18 Ch 5 (ss 709-723) (see PARA 1244 et seq). The provisions of s 692 have effect subject to s 735(4) (terms of purchase enforceable in a winding up) (see PARA 1242).

4 As to the meaning of 'distributable profits' see PARA 1231 note 5.

5 Companies Act 2006 s 692(2)(a). See note 3.

6 Companies Act 2006 s 692(2)(b), which is expressed to be subject to s 692(3). See note 3.

7 Companies Act 2006 s 692(3). See note 3.

- 8 As to the share premium account see PARA 1146.
 9 Companies Act 2006 s 692(4). See note 3.

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1236. Transfers to capital redemption reserve.

In the following circumstances a company must transfer amounts to a reserve, called the 'capital redemption reserve'¹.

- 2163 (1) Where² shares³ of a limited company⁴ are redeemed⁵ or purchased wholly out of the company's profits⁶, the amount by which the company's issued share capital⁷ is diminished on the cancellation of shares redeemed⁸, or on the cancellation of shares purchased⁹, must be transferred to the capital redemption reserve¹⁰.
- 2164 (2) If (a) the shares are redeemed or purchased wholly or partly out of the proceeds of a fresh issue; and (b) the aggregate amount of the proceeds is less than the aggregate nominal value of the shares redeemed or purchased, the amount of the difference must be transferred to the capital redemption reserve¹¹.
- 2165 (3) The amount by which a company's share capital is diminished on the cancellation of shares held as treasury shares¹² must be transferred to the capital redemption reserve¹³.

The company may use the capital redemption reserve to pay up new shares to be allotted to members as fully paid bonus shares¹⁴. Subject to that, the provisions of the Companies Acts relating to the reduction of a company's share capital¹⁵ apply as if the capital redemption reserve were part of its paid up share capital¹⁶.

- 1 Companies Act 2006 s 733(1).
 2 I.e. under the Companies Act 2006 Pt 18 (ss 658-737) (see PARA 1198 et seq).
 3 As to the meaning of 'share' see PARA 1055.
 4 As to the meaning of 'limited company' see PARA 102.
 5 See PARA 1229.
 6 See PARA 1235.
 7 As to the meaning of 'issued share capital' see PARA 1045.
 8 I.e. in accordance with the Companies Act 2006 s 688(b) (see PARA 1232).
 9 I.e. in accordance with the Companies Act 2006 s 706(b)(ii) (see PARA 1239).
 10 Companies Act 2006 s 733(2).
 11 Companies Act 2006 s 733(3). This does not apply in the case of a private company if, in addition to the proceeds of the fresh issue, the company applies a payment out of capital under Pt 18 Ch 5 (709-723) (see PARA 1244 et seq) in making the redemption or purchase: s 733(3).

12 le in accordance with the Companies Act 2006 s 729(4) (see PARA 1253).

13 Companies Act 2006 s 733(4).

14 Companies Act 2006 s 733(5). As to shareholders and membership of companies generally see PARA 321 et seq. As to bonus shares see PARA 1053.

15 le the Companies Act 2006 Pt 17 Ch 10 (ss 641-653) (see PARA 1173 et seq). As to the meaning of 'Companies Acts' see PARA 16.

16 Companies Act 2006 s 733(6). Under the Companies (Model Articles) Regulations 2008, SI 2008/3229, subject to the articles, the directors may, if they are so authorised by an ordinary resolution: (1) decide to capitalise any profits of the company (whether or not they are available for distribution) which are not required for paying a preferential dividend, or any sum standing to the credit of the company's share premium account or capital redemption reserve; and (2) appropriate any sum which they so decide to capitalise (a 'capitalised sum') to the persons who would have been entitled to it if it were distributed by way of dividend (the 'persons entitled') and in the same proportions: see reg 2, Sch 1 art 36, reg 4, Sch 3 art 78; and PARA 1420.

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1237. Authority for off-market purchase.

A limited company¹ may only purchase its own shares² by an off-market purchase, in pursuance of a contract approved in advance³, or by a market purchase⁴. A purchase is 'off-market' if the shares either are purchased otherwise than on a recognised investment exchange⁵, or are purchased on a recognised investment exchange but are not subject to a marketing arrangement on the exchange⁶.

A company may only make an off-market purchase of its own shares in pursuance of a contract approved prior to the purchase in accordance with the following provisions⁷. Either: (1) the terms of the contract must be authorised by a special resolution⁸ of the company before the contract is entered into; or (2) the contract must provide that no shares may be purchased in pursuance of the contract until its terms have been authorised by a special resolution of the company⁹. The contract may be a contract, entered into by the company and relating to shares in the company, that does not amount to a contract to purchase the shares but under which the company may, subject to any conditions, become entitled or obliged to purchase the shares¹⁰. The authority conferred by such a resolution may be varied¹¹, revoked or from time to time renewed by a special resolution of the company¹². In the case of a public company¹³ a resolution conferring, varying or renewing authority must specify a date on which the authority is to expire, which must not be later than five years after the date on which the resolution is passed¹⁴.

An agreement by a company to release its rights under an approved contract¹⁵ is void unless the terms of the release agreement are approved in advance¹⁶.

The rights of a company under a contract giving authority for off-market purchase¹⁷ are not capable of being assigned¹⁸.

A payment made by a company in consideration of: (a) acquiring any right with respect to the off-market purchase of its own shares in pursuance of a contingent purchase contract¹⁹; (b) the variation of any such contract; or (c) the release of any of the company's obligations with respect to the purchase of any of its own shares under such a contract, must be made out of the company's distributable profits²⁰. If this requirement is not met in relation to a contract,

then, in a case within head (a), no purchase by the company of its own shares in pursuance of that contract may be made, in a case within head (b), no such purchase following the variation may be made, and, in a case within head (c), the purported release is void²¹.

1 As to the meaning of 'limited company' see PARA 102.

2 As to the meaning of 'share' see PARA 1055.

3 In accordance with the Companies Act 2006 s 694 (see the text and notes 7-14).

4 Companies Act 2006 s 693(1). A market purchase is authorised in accordance with s 701 (see PARA 1238). A purchase is a 'market purchase' if it is made on a recognised investment exchange and is not an off-market purchase by virtue of s 693(2)(b) (see the text to note 6): s 693(4). In s 693, 'recognised investment exchange' means a recognised investment exchange (within the meaning of the Financial Services and Markets Act 2000 Pt 18 (ss 285-313) other than an overseas exchange (within the meaning of that Part) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 684): Companies Act 2006 s 693(5).

5 Companies Act 2006 s 693(2)(a).

6 Companies Act 2006 s 693(2)(b). For this purpose, a company's shares are subject to a marketing arrangement on a recognised investment exchange if: (1) they are listed under the Financial Services and Markets Act 2000 Pt 6 (ss 72-103) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385 et seq); or (2) the company has been afforded facilities for dealings in the shares to take place on the exchange (a) without prior permission for individual transactions from the authority governing that investment exchange; and (b) without limit as to the time during which those facilities are to be available: Companies Act 2006 s 693(3).

7 Companies Act 2006 s 694(1).

8 As to special resolutions see PARA 614.

9 Companies Act 2006 s 694(2). See *Kinlan v Crimmin* [2006] EWHC 779 (Ch), [2007] 2 BCLC 67 (special resolution valid despite procedural defects); *Dashfield v Davidson* [2008] EWHC 486 (Ch), [2009] 1 BCLC 220 (technical failure to resolve to approve contract cured by informal unanimous assent).

10 Companies Act 2006 s 694(3).

11 A company may only agree to a variation of a contract authorised under the Companies Act 2006 s 694 if the variation is approved in advance in accordance with the following provisions: s 697(1). The terms of the variation must be authorised by a special resolution of the company before it is agreed to: s 697(2). That authority may be varied, revoked or from time to time renewed by a special resolution of the company: s 697(3). In the case of a public company a resolution conferring, varying or renewing authority must specify a date on which the authority is to expire, which must not be later than five years after the date on which the resolution is passed: s 697(4) (amended by SI 2009/2022). A resolution conferring, varying, revoking or renewing authority under the Companies Act 2006 s 697 is subject to s 698 (exercise of voting rights), and s 699 (disclosure of details of variation): s 697(5).

In relation to a resolution to confer, vary, revoke or renew authority for the purposes of s 697, where the resolution is proposed as a written resolution, a member who holds shares to which the resolution relates is not an eligible member: s 698(1), (2). Where the resolution is proposed at a meeting of the company, it is not effective if: (1) any member of the company holding shares to which the resolution relates exercises the voting rights carried by any of those shares in voting on the resolution; and (2) the resolution would not have been passed if he had not done so: s 698(3). For this purpose: (a) a member who holds shares to which the resolution relates is regarded as exercising the voting rights carried by those shares not only if he votes in respect of them on a poll on the question whether the resolution is to be passed, but also if he votes on the resolution otherwise than on a poll; (b) any member of the company may demand a poll on that question; (c) a vote and a demand for a poll by a person as proxy for a member are the same respectively as a vote and a demand by the member: s 698(4). See *Kinlan v Crimmin* [2006] EWHC 779 (Ch), [2007] 2 BCLC 67 (waiver of requirement by unanimous assent).

In relation to a resolution under s 697, a copy of the proposed variation (if it is in writing) or a written memorandum giving details of the proposed variation (if it is not) must be made available to members: (i) in the case of a written resolution, by being sent or submitted to every eligible member at or before the time at which the proposed resolution is sent or submitted to him; (ii) in the case of a resolution at a meeting, by being made available for inspection by members of the company both at the company's registered office for not less than 15 days ending with the date of the meeting, and at the meeting itself: s 699(1), (2). As to the registered office see PARA 129. There must also be made available in the same way a copy of the original contract or, as the case may be, a memorandum of its terms, together with any variations previously made: s 699(3). A memorandum

of the proposed variation so made available must include the names of the members holding shares to which the variation relates: s 699(4). A copy of the proposed variation so made available must have annexed to it a written memorandum specifying such of those names as do not appear in the variation itself: s 699(5). The resolution is not validly passed if the requirements of s 699 are not complied with: s 699(6).

12 Companies Act 2006 s 694(4). A resolution conferring, varying, revoking or renewing authority under s 694 is subject to s 695 (exercise of voting rights) and s 696 (disclosure of details of contract): s 694(6). Where a resolution to confer, vary, revoke or renew authority for the purposes of s 694 is proposed as a written resolution, a member who holds shares to which the resolution relates is not an eligible member: s 695(1), (2). Where the resolution is proposed at a meeting of the company, it is not effective if: (1) any member of the company holding shares to which the resolution relates exercises the voting rights carried by any of those shares in voting on the resolution; and (2) the resolution would not have been passed if he had not done so: s 695(3). For this purpose: (a) a member who holds shares to which the resolution relates is regarded as exercising the voting rights carried by those shares not only if he votes in respect of them on a poll on the question whether the resolution is to be passed, but also if he votes on the resolution otherwise than on a poll; (b) any member of the company may demand a poll on that question; (c) a vote and a demand for a poll by a person as proxy for a member are the same respectively as a vote and a demand by the member: s 695(4).

In relation to a resolution to confer, vary, revoke or renew authority for the purposes of s 694, a copy of the contract (if it is in writing) or a memorandum setting out its terms (if it is not) must be made available to members: (i) in the case of a written resolution, by being sent or submitted to every eligible member at or before the time at which the proposed resolution is sent or submitted to him; (ii) in the case of a resolution at a meeting, by being made available for inspection by members of the company both at the company's registered office for not less than 15 days ending with the date of the meeting, and at the meeting itself: s 696(1), (2). A memorandum of contract terms so made available must include the names of the members holding shares to which the contract relates: s 696(3). A copy of the contract so made available must have annexed to it a written memorandum specifying such of those names as do not appear in the contract itself: s 696(4). The resolution is not validly passed if the requirements of s 696 are not complied with: s 696(5).

13 As to the meaning of 'public company' see PARA 102.

14 Companies Act 2006 s 694(5) (amended by SI 2009/2022).

15 Ie approved under the Companies Act 2006 s 694 (see the text and notes 7-14).

16 Companies Act 2006 s 700(1). The terms of the proposed agreement must be authorised by a special resolution of the company before the agreement is entered into: s 700(2). That authority may be varied, revoked or from time to time renewed by a special resolution of the company: s 700(3). In the case of a public company, a resolution conferring, varying or renewing authority must specify a date on which the authority is to expire, which must not be later than five years after the date on which the resolution is passed: s 700(4) (amended by SI 2009/2022). The provisions of the Companies Act 2006 s 698 (exercise of voting rights), and s 699 (disclosure of details of variation) (see note 11), apply to a resolution authorising a proposed release agreement as they apply to a resolution authorising a proposed variation: s 700(5).

17 Ie a contract authorised under the Companies Act 2006 s 694 (see the text and notes 7-14).

18 Companies Act 2006 s 704(a).

19 Ie a contract authorised under the Companies Act 2006 s 694 (see the text and notes 7-14).

20 Companies Act 2006 s 705(1). As to the meaning of 'distributable profits' see PARA 1231 note 5.

21 Companies Act 2006 s 705(2).

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1238. Authority for market purchase.

A limited company¹ may only purchase its own shares² by an off-market purchase³ or by an authorised⁴ market purchase⁵. A company may only make a market purchase of its own shares if the purchase has first been authorised by a resolution of the company⁶. That authority may be general or limited to the purchase of shares of a particular class or description, and may be unconditional or subject to conditions⁷. The authority must specify the maximum number of shares authorised to be acquired, and determine both the maximum and minimum prices that may be paid for the shares⁸.

The authority may be varied, revoked or from time to time renewed by a resolution of the company⁹. A resolution conferring, varying or renewing authority must specify a date on which it is to expire, which must not be later than five years after the date on which the resolution is passed¹⁰. A company may make a purchase of its own shares after the expiry of the time limit specified if: (1) the contract of purchase was concluded before the authority expired; and (2) the terms of the authority permitted the company to make a contract of purchase that would or might be executed wholly or partly after its expiration¹¹.

A resolution to confer or vary authority may determine either or both the maximum and minimum price for purchase by specifying a particular sum, or providing a basis or formula for calculating the amount of the price, but without reference to any person's discretion or opinion¹².

The rights of a company under a contract giving authority for market purchase¹³ are not capable of being assigned¹⁴.

1 As to the meaning of 'limited company' see PARA 102.

2 As to the meaning of 'share' see PARA 1055.

3 I.e. in pursuance of a contract approved in advance in accordance with the Companies Act 2006 s 694 (see PARA 1237).

4 I.e. authorised in accordance with the Companies Act 2006 s 701 (see the text and notes 6-12).

5 Companies Act 2006 s 693(1). As to the meaning of 'market purchase' see PARA 1237 note 4.

6 Companies Act 2006 s 701(1). Where a provision of the Companies Acts requires a resolution of a company, and does not specify what kind of resolution is required, what is required is an ordinary resolution unless the company's articles require a higher majority (or unanimity): see the Companies Act 2006 s 281(3); and PARA 617. As to company resolutions generally see PARA 613 et seq. The provisions of Pt 3 Ch 3 (ss 29-30) (resolutions affecting a company's constitution) (see PARA 231) apply to a resolution under s 701: s 701(8).

7 Companies Act 2006 s 701(2).

8 Companies Act 2006 s 701(3).

9 Companies Act 2006 s 701(4).

10 Companies Act 2006 s 701(5) (amended by SI 2009/2022).

11 Companies Act 2006 s 701(6).

12 Companies Act 2006 s 701(7).

13 I.e. under the Companies Act 2006 s 701 (see the text and notes 6-12).

14 Companies Act 2006 s 704(b).

Redemption or Purchase in general/B. PURCHASE OF OWN SHARES/(A) In general/1239.
Treatment of shares purchased.

1239. Treatment of shares purchased.

Where a limited company¹ makes a purchase of its own shares², then, if the statutory requirements as to treasury shares are satisfied³, the shares may be held and dealt with as treasury shares⁴. Otherwise, the shares are treated as cancelled, and the amount of the company's issued share capital⁵ is diminished accordingly by the nominal value of the shares cancelled⁶.

If on the purchase by a company of any of its own shares⁷ the shares are not treasury shares⁸ and the shares are consequently treated as cancelled, or the shares are treasury shares but are cancelled forthwith⁹, the company must give notice of cancellation to the registrar, within the period of 28 days beginning with the date on which the shares are delivered to it, specifying the shares cancelled¹⁰. The notice must be accompanied by a statement of capital¹¹ which must state with respect to the company's share capital immediately following the cancellation:

- 2166 (1) the total number of shares of the company¹²;
- 2167 (2) the aggregate nominal value of those shares¹³;
- 2168 (3) for each class of shares: (a) prescribed particulars of the rights attached to the shares¹⁴; (b) the total number of shares of that class; and (c) the aggregate nominal value of shares of that class¹⁵; and
- 2169 (4) the amount paid up and the amount, if any, unpaid on each share (whether on account of the nominal value of the share or by way of premium)¹⁶.

If default is made in complying with this requirement, an offence is committed by the company, and by every officer of the company who is in default¹⁷.

1 As to the meaning of 'limited company' see PARA 102.

2 Ie in accordance with the Companies Act 2006 Pt 18 Ch 4 (ss 690-708) (see PARA 1234 et seq). As to the meaning of 'share' see PARA 1055.

3 Ie if the Companies Act 2006 s 724 applies (see PARA 1251). As to the meaning of 'treasury share' see PARA 1251.

4 Companies Act 2006 s 706(a). Treasury shares are dealt with in accordance with Pt 18 Ch 6 (ss 724-732) (see PARA 1251 et seq).

5 As to the meaning of 'issued share capital' see PARA 1045.

6 Companies Act 2006 s 706(b).

7 Ie in accordance with the Companies Act 2006 Pt 18 (ss 658-737) (see PARA 1197 et seq).

8 Ie the Companies Act 2006 s 724 does not apply (see PARA 1251).

9 Ie under the Companies Act 2006 s 729 (see PARA 1253).

10 Companies Act 2006 s 708(1).

11 Companies Act 2006 s 708(2). As to the statement of capital see PARA 113.

12 Companies Act 2006 s 708(3)(a).

13 Companies Act 2006 s 708(3)(b). As to the nominal value of shares see PARA 1042.

14 The prescribed particulars are: (1) particulars of any voting rights attached to the shares, including rights that arise only in certain circumstances; (2) particulars of any rights attached to the shares, as respects dividends, to participate in a distribution; (3) particulars of any rights attached to the shares, as respects capital, to participate in a distribution (including on winding up); and (4) whether the shares are to be redeemed or are liable to be redeemed at the option of the company or the shareholder: Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 2(1), (2)(n), (3).

15 Companies Act 2006 s 708(3)(c).

16 Companies Act 2006 s 708(3)(d).

17 Companies Act 2006 s 708(4). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607. A person guilty of an offence under s 708 is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 708(5).

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1240. Contracts to be available for inspection.

Where a company¹ has entered into an authorised contract for off-market purchase², or market purchase³ of its own shares⁴, the company must keep available for inspection a copy of the contract or, if the contract is not in writing, a written memorandum setting out its terms⁵. The copy or memorandum must be kept available for inspection from the conclusion of the contract until the end of the period of ten years beginning with: (1) the date on which the purchase of all the shares in pursuance of the contract is completed; or (2) the date on which the contract otherwise determines⁶. The copy or memorandum must be kept available for inspection at the company's registered office⁷, or at the company's alternative inspection location⁸. The company must give notice to the registrar of companies⁹ of the place at which the copy or memorandum is kept available for inspection, and of any change in that place, unless it has at all times been kept at the company's registered office¹⁰. Every copy or memorandum required to be kept must be kept open to inspection without charge by any member of the company¹¹, and in the case of a public company¹², by any other person¹³.

If default is made in complying with the inspection requirements¹⁴, or if default is made for 14 days in giving notice to the registrar¹⁵ of the place of inspection, or an inspection¹⁶ is refused, an offence is committed by the company, and by every officer of the company who is in default¹⁷.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 I.e. a contract authorised under the Companies Act 2006 s 694 (see PARA 1237).

3 I.e. a contract authorised under the Companies Act 2006 s 701 (see PARA 1238).

4 As to the meaning of 'share' see PARA 1055.

5 Companies Act 2006 s 702(1), (2). The provisions of s 702 apply to a variation of a contract as they apply to the original contract: s 702(7).

6 Companies Act 2006 s 702(3).

7 As to the registered office see PARA 129.

8 Companies Act 2006 ss 702(4), 1136(2); Companies (Company Records) Regulations 2008, SI 2008/3006, reg 3. As to inspection of company records see PARA 676.

9 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

10 Companies Act 2006 s 702(5).

11 As to shareholders and membership of companies generally see PARA 321 et seq.

12 As to the meaning of 'public company' see PARA 102.

13 Companies Act 2006 s 702(6).

14 Ie the Companies Act 2006 s 702(2), (3) or (4) (see the text and notes 1-8).

15 Ie under the Companies Act 2006 s 702(5) (see the text to notes 9-10).

16 Ie an inspection required under the Companies Act 2006 s 702(6) (see the text to notes 11-13).

17 Companies Act 2006 s 703(1). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607. A person guilty of an offence under s 703 is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 703(2). In the case of refusal of an inspection required under s 702(6) (see the text to notes 11-13) the court may by order compel an immediate inspection: s 703(3).

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1241. Return to registrar of purchase of own shares.

Where a company¹ purchases its own shares², it must deliver a return to the registrar³ within the period of 28 days beginning with the date on which the shares are delivered to it⁴. The return must distinguish: (1) treasury shares⁵ and shares which are not treasury shares; and (2) treasury shares that are cancelled forthwith⁶ and treasury shares that are not so cancelled⁷. The return must state, with respect to shares of each class purchased, the number and nominal value of the shares, and the date on which they were delivered to the company⁸. In the case of a public company⁹ the return must also state the aggregate amount paid by the company for the shares, and the maximum and minimum prices paid in respect of shares of each class purchased¹⁰. Particulars of shares delivered to the company on different dates and under different contracts may be included in a single return¹¹.

If default is made in complying with these requirements, an offence is committed by every officer of the company who is in default¹².

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie in accordance with the Companies Act 2006 Pt 18 Ch 4 (ss 690-708) (see PARA 1234 et seq). As to the meaning of 'share' see PARA 1055.

3 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

- 4 Companies Act 2006 s 707(1).
- 5 le shares in relation to which the Companies Act 2006 s 724 applies (see PARA 1251).
- 6 le under the Companies Act 2006 s 729 (see PARA 1253).
- 7 Companies Act 2006 s 707(2).
- 8 Companies Act 2006 s 707(3).
- 9 As to the meaning of 'public company' see PARA 102.
- 10 Companies Act 2006 s 707(4). See note 11.
- 11 Companies Act 2006 s 707(5). In such a case the amount required to be stated under s 707(4) is the aggregate amount paid by the company for all the shares to which the return relates: s 707(5).
- 12 Companies Act 2006 s 707(6). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607. A person guilty of an offence under s 707 is liable: (1) on conviction on indictment, to a fine; (2) on summary conviction to a fine not exceeding the statutory maximum and, for continued contravention, a daily default fine not exceeding one-tenth of the statutory maximum: s 707(7). As to the statutory maximum see PARA 1622.

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1242. Effect of company's failure to redeem or purchase.

Where a company¹ issues shares² on terms that they are or are liable to be redeemed³, or agrees to purchase any of its shares⁴, the company is not liable in damages in respect of any failure on its part to redeem or purchase any of the shares⁵. This is without prejudice to any right of the holder of the shares other than his right to sue the company for damages in respect of its failure⁶. The court may not grant an order for specific performance of the terms of redemption or purchase if the company shows that it is unable to meet the costs of redeeming or purchasing the shares in question out of distributable profits⁷.

If the company is wound up and at the commencement of the winding up any of the shares have not been redeemed or purchased, the terms of redemption or purchase may be enforced against the company⁸. When shares are redeemed or purchased in this way, they are treated as cancelled⁹. However, this does not apply if: (1) the terms provided for the redemption or purchase to take place at a date later than that of the commencement of the winding up; or (2) during the period beginning with the date on which the redemption or purchase was to have taken place, and ending with the commencement of the winding up, the company could not at any time have lawfully made a distribution equal in value to the price at which the shares were to have been redeemed or purchased¹⁰.

There must be paid in priority to any amount that the company is liable¹¹ to pay in respect of any shares: (a) all other debts and liabilities of the company (other than any due to members in their character as such¹²); and (b) if other shares carry rights, whether as to capital or as to income, that are preferred to the rights as to capital attaching to the first-mentioned shares, any amount due in satisfaction of those preferred rights¹³. Subject to that, any such amount must be paid in priority to any amounts due to members in satisfaction of their rights, whether as to capital or income, as members¹⁴.

- 1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.
- 2 As to the meaning of 'share' see PARA 1055.
- 3 See PARA 1229.
- 4 Companies Act 2006 s 735(1).
- 5 Companies Act 2006 s 735(2).
- 6 Companies Act 2006 s 735(2).
- 7 Companies Act 2006 s 735(3). See generally **SPECIFIC PERFORMANCE**.
- 8 Companies Act 2006 s 735(4).
- 9 Companies Act 2006 s 735(4).
- 10 Companies Act 2006 s 735(5).
- 11 Ie under the Companies Act 2006 s 735(4) (see the text to notes 8-9).
- 12 As to shareholders and membership of companies generally see PARA 321 et seq. As to debts due to members in their character as such see *Soden v British and Commonwealth Holdings plc* [1995] 1 BCLC 686 (affd [1998] AC 298, [1997] 4 All ER 353, HL).
- 13 Companies Act 2006 s 735(6).
- 14 Companies Act 2006 s 735(6).

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1243. General power to make further provision by regulations.

The Secretary of State¹ may by regulations modify the provisions² governing the acquisition by a limited company³ of its own shares⁴. The regulations may amend or repeal any of the statutory provisions, or make such other provision as appears to the Secretary of State appropriate in place of any of the statutory provisions⁵. The regulations may make consequential amendments or repeals in other provisions of the Companies Act 2006, or in other enactments⁶.

- 1 As to the Secretary of State see PARA 6.
- 2 Ie the Companies Act 2006 Pt 18 (ss 658-737) (see PARA 1234 et seq).
- 3 As to the meaning of 'limited company' see PARA 102.
- 4 Companies Act 2006 s 737(1). Regulations made under s 737 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 737(4), 1290. In exercise of the power conferred by s 737(4), the Secretary of State has made the Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009, SI 2009/2022.
- 5 Companies Act 2006 s 737(2).

6 Companies Act 2006 s 737(3).

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(B) REDEMPTION OR PURCHASE BY PRIVATE COMPANY OUT OF CAPITAL

1244. Power of private companies to redeem or purchase own shares out of capital.

A private limited company¹ may in accordance with the statutory provisions², but subject to any restriction or prohibition in the company's articles³, make a payment in respect of the redemption or purchase of its own shares⁴ otherwise than out of distributable profits or the proceeds of a fresh issue of shares⁵.

1 As to the meaning of 'private limited company' see PARA 102.

2 In accordance with the Companies Act 2006 Pt 18 Ch 5 (ss 709-723).

3 As to the meaning of 'articles' see PARA 228 note 2.

4 As to the meaning of 'share' see PARA 1055.

5 Companies Act 2006 s 709(1). References in the rest of Pt 18 Ch 5 (see PARA 1244 et seq) to payment out of capital are to any payment so made, whether or not it would be otherwise be regarded as a payment out of capital: s 709(2).

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1245. Financing redemption or purchase of own shares out of capital.

The 'permissible capital payment' is the payment that may¹ be made by a company² out of capital³ in respect of the redemption or purchase of its own shares⁴ as, after applying for that purpose any available profits⁵ of the company, and the proceeds of any fresh issue of shares made for the purposes of the redemption or purchase, is required to meet the price of redemption or purchase⁶.

Where a payment out of capital is made⁷ for the redemption or purchase of its own shares by private company⁸, if the permissible capital payment is less than the nominal amount of the shares redeemed or purchased, the amount of the difference must be transferred to the company's capital redemption reserve⁹. If the permissible capital payment is greater than the nominal amount of the shares redeemed or purchased: (1) the amount of any capital redemption reserve, share premium account or fully paid share capital of the company; and (2)

any amount representing unrealised profits of the company for the time being standing to the credit of any revaluation reserve maintained by the company, may be reduced by a sum not exceeding (or by sums not in total exceeding) the amount by which the permissible capital payment exceeds the nominal amount of the shares¹⁰.

1 In accordance with the Companies Act 2006 Pt 18 Ch 5 (ss 709-723).

2 In a private company that falls within the Companies Act 2006 s 709 (see PARA 1244). As to the meaning of 'private company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 See PARA 1244 note 5.

4 As to the meaning of 'share' see PARA 1055.

5 For the purposes of the Companies Act 2006 Pt 18 Ch 5, the available profits of the company, in relation to the redemption or purchase of any shares, are the profits of the company that are available for distribution (within the meaning of Pt 23 (ss 829-853) (see PARA 1389)): s 711(1). But the question whether a company has any profits so available, and the amount of any such profits, is to be determined in accordance with s 712 instead of in accordance with ss 836-842 in Pt 23 (see PARA 1395-1400): s 711(2).

The available profits of the company are determined as follows: s 712(1). First, determine the profits of the company by reference to the following items as stated in the relevant accounts: (1) profits, losses, assets and liabilities; (2) provisions of the following kinds: (a) where the relevant accounts are Companies Act accounts, provisions of a kind specified for the purposes of s 712(2) by regulations under s 396 (see PARA 728); (b) where the relevant accounts are IAS accounts (see PARA 859), provisions of any kind; (3) share capital and reserves (including undistributable reserves): s 712(2). Second, reduce the amount so determined by the amount of any distribution lawfully made by the company, and any other relevant payment lawfully made by the company out of distributable profits, after the date of the relevant accounts and before the end of the relevant period: s 712(3). For this purpose, 'other relevant payment lawfully made' includes: (i) financial assistance lawfully given out of distributable profits in accordance with Pt 18 Ch 2 (ss 677-683) (see PARA 1223 et seq); (ii) payments lawfully made out of distributable profits in respect of the purchase by the company of any shares in the company; and (iii) payments of any description specified in s 705 (payments other than purchase price to be made out of distributable profits) (see PARA 1235) lawfully made by the company: s 712(4). The resulting figure is the amount of available profits: s 712(5). The 'relevant accounts' are any accounts that are prepared as at a date within the relevant period, and are such as to enable a reasonable judgment to be made as to the amounts of the items mentioned in s 712(2): s 712(6). 'Relevant period' means the period of three months ending with the date on which the directors' statement is made in accordance with s 714 (see PARA 1246): s 712(7).

As to the definition of 'provisions' for the purposes of head (2)(a) see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 12, Sch 7 Pt 2 para 4; and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 12, Sch 9 Pt 2 para 4.

6 Companies Act 2006 s 710(1), (2).

7 In accordance with the Companies Act 2006 Pt 18 Ch 5.

8 Companies Act 2006 s 734(1). See note 10.

9 Companies Act 2006 s 734(2). As to transfers to a company's capital redemption reserve see PARA 1236. See note 10.

10 Companies Act 2006 s 734(3). Where the proceeds of a fresh issue are applied by the company in making a redemption or purchase of its own shares in addition to a payment out of capital under Pt 18 Ch 5, the references in s 734(2) and (3) to the permissible capital payment are to be read as referring to the aggregate of that payment and those proceeds: s 734(4).

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1246. Conditions for payment out of capital.

A payment out of capital by a private company¹ for the redemption or purchase of its own shares² is not lawful unless the statutory requirements governing the directors' statement and auditor's report³, approval by special resolution⁴, public notice of proposed payment⁵ and the directors' statement and auditor's report to be available for inspection⁶ are met⁷. This is subject to any order of the court⁸ extending the period for compliance on the application by persons objecting to payment⁹.

The company's directors must make a statement specifying the amount of the permissible capital payment for the shares in question¹⁰. It must state that, having made full inquiry into the affairs and prospects of the company, the directors have formed the opinion: (1) as regards its initial situation immediately following the date on which the payment out of capital is proposed to be made, that there will be no grounds on which the company could then be found unable to pay its debts¹¹; and (2) as regards its prospects for the year immediately following that date, that having regard to their intentions with respect to the management of the company's business during that year, and the amount and character of the financial resources that will in their view be available to the company during that year, the company will be able to continue to carry on business as a going concern, and will accordingly be able to pay its debts as they fall due, throughout that year¹².

The directors' statement must be in the prescribed form and must contain such information with respect to the nature of the company's business as may be prescribed¹³. It must in addition have annexed to it a report addressed to the directors by the company's auditor¹⁴ stating that: (a) he has inquired into the company's state of affairs; (b) the amount specified in the statement as the permissible capital payment for the shares in question is in his view properly determined¹⁵; and (c) he is not aware of anything to indicate that the opinion expressed by the directors in their statement as to any of the matters mentioned in heads (1) and (2) above is unreasonable in all the circumstances¹⁶.

If the directors make a statement without having reasonable grounds for the opinion expressed in it, an offence is committed by every director who is in default¹⁷.

1 As to the meaning of 'private company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 I.e. a payment permitted by the Companies Act 2006 s 709 (see PARA 1244). As to the meaning of 'share' see PARA 1055.

3 I.e. the provisions of the Companies Act 2006 s 714 (see the text and notes 10-16).

4 I.e. the provisions of the Companies Act 2006 s 716 (see PARA 1247).

5 I.e. the provisions of the Companies Act 2006 s 719 (see PARA 1248).

6 I.e. the provisions of the Companies Act 2006 s 720 (see PARA 1248).

7 Companies Act 2006 s 713(1).

8 I.e. under the Companies Act 2006 s 721 (see PARA 1249). As to the meaning of 'court' see PARA 212 note 1.

9 Companies Act 2006 s 713(2).

10 Companies Act 2006 s 714(1), (2). As to the permissible capital payment see PARA 1245.

11 Companies Act 2006 s 714(3)(a). In forming their opinion for the purposes of s 714(3)(a), the directors must take into account all of the company's liabilities, including any contingent or prospective liabilities: s 714(4). As to the meaning of 'director' see PARA 478.

12 Companies Act 2006 s 714(3)(b).

13 Companies Act 2006 s 714(5). The directors' statement required by s 714 must: (1) be in writing; (2) indicate that it is a directors' statement made under that provision; and (3) be signed by each of the company's directors: Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 5(1). The statement must state: (a) whether the company's business includes that of a banking company; and (b) whether its business includes that of an insurance company: art 5(2).

14 As to auditors see PARA 905 et seq.

15 In accordance with the Companies Act 2006 ss 710-712 (see PARA 1245).

16 Companies Act 2006 s 714(6).

17 Companies Act 2006 s 715(1). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607. A person guilty of an offence under s 715 is liable: (1) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both; (2) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum, or both: s 715(2). As to the statutory maximum see PARA 1622. In relation to an offence committed before the coming into force of the Criminal Justice Act 2003 s 154(1) (not yet in force), the maximum term of imprisonment on summary conviction is six months: see the Companies Act 2006 s 1131.

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1247. Procedure for special resolution sanctioning payment out of capital.

The payment out of capital for the redemption or purchase of a company's own shares¹ must be approved by a special resolution of the company². The resolution must be passed on, or within the week immediately following, the date on which the directors make the statement³ specifying the amount of the permissible capital payment for the shares in question⁴.

Where the special resolution⁵ is proposed as a written resolution⁶, a member who holds shares to which the resolution relates is not an eligible member⁷. Where the resolution is proposed at a meeting of the company, it is not effective if any member of the company holding shares to which the resolution relates exercises the voting rights carried by any of those shares in voting on the resolution, and the resolution would not have been passed if he had not done so⁸.

A copy of the directors' statement and auditor's report⁹ must be made available to members: (1) in the case of a written resolution, by being sent or submitted to every eligible member at or before the time at which the proposed resolution is sent or submitted to him; and (2) in the case of a resolution at a meeting, by being made available for inspection by members of the company at the meeting¹⁰. The resolution is ineffective if this requirement is not complied with¹¹.

The payment out of capital must be made no earlier than five weeks after the date on which the resolution¹² is passed, and no more than seven weeks after that date¹³.

1 See PARAS 1244-1250. As to the meaning of 'share' see PARA 1055.

2 Companies Act 2006 s 716(1). As to the meaning of 'special resolution' see PARA 614. A resolution under s 716 is subject to s 717 (exercise of voting rights) (see the text and notes 5-8), and s 718 (disclosure of directors' statement and auditors' report) (see the text and notes 9-11): s 716(3).

- 3 le the statement required by the Companies Act 2006 s 714 (see PARA 1246).
- 4 Companies Act 2006 s 716(2).
- 5 le the resolution under the Companies Act 2006 s 716 (see the text and notes 1-4).
- 6 As to written resolutions see PARA 623.
- 7 Companies Act 2006 s 717(1), (2).
- 8 Companies Act 2006 s 717(3). For this purpose: (1) a member who holds shares to which the resolution relates is regarded as exercising the voting rights carried by those shares not only if he votes in respect of them on a poll on the question whether the resolution is to be passed, but also if he votes on the resolution otherwise than on a poll; (2) any member of the company may demand a poll on that question; (3) a vote and a demand for a poll by a person as proxy for a member are the same respectively as a vote and a demand by the member: s 717(4).
- 9 le the reports required under the Companies Act 2006 s 714 (see PARA 1246).
- 10 Companies Act 2006 s 718(1), (2).
- 11 Companies Act 2006 s 718(3).
- 12 le the resolution under the Companies Act 2006 s 716 (see the text and notes 1-4).
- 13 Companies Act 2006 s 723(1). This is subject to any exercise of the court's powers under s 721(5) (power to alter or extend time where resolution confirmed after objection) (see PARA 1249): s 723(2).

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1248. Publicity for proposed payment out of capital.

Within the week immediately following the date of the resolution sanctioning payment out of capital for the redemption or purchase of a company's own shares¹, the company must cause to be published in the Gazette² a notice: (1) stating that the company has approved a payment out of capital for the purpose of acquiring its own shares by redemption or purchase³ or both, as the case may be; (2) specifying the amount of the permissible capital payment⁴ for the shares in question, and the date of the resolution⁵; (3) stating where the directors' statement and auditor's report⁶ are available for inspection; and (4) stating that any creditor of the company may at any time within the five weeks immediately following the date of the resolution apply to the court⁷ for an order preventing the payment⁸.

Within the week immediately following the date of the resolution the company must also either cause a notice to the same effect as that required by heads (1) to (4) above to be published in an appropriate national newspaper⁹, or give notice in writing to that effect to each of its creditors¹⁰.

Not later than the day on which the company first publishes or gives the notice as required, the company must deliver to the registrar¹¹ a copy of the directors' statement and auditor's report¹².

The directors' statement and auditor's report must be kept available for inspection throughout the period beginning with the day on which the company first publishes or gives the required notice, and ending five weeks after the date of the resolution for payment out of capital¹³. They must be kept available for inspection at the company's registered office¹⁴, or at the company's

alternative inspection location¹⁵. The company must give notice to the registrar of the place at which the statement and report are kept available for inspection, and of any change in that place, unless they have at all times been kept at the company's registered office¹⁶. They must be open to the inspection of any member or creditor of the company without charge¹⁷. If default is made for 14 days in complying with the requirement to give notice to the registrar, or an inspection is refused, an offence is committed by the company, and by every officer of the company who is in default¹⁸.

1 le under the Companies Act 2006 s 716 (see PARA 1247).

2 As to the meaning of 'Gazette' see PARA 138 note 2.

3 See PARAS 1244-1250.

4 See PARA 1245.

5 See PARA 1247.

6 le required by the Companies Act 2006 s 714 (see PARA 1246).

7 le under the Companies Act 2006 s 721 (see PARAS 1249-1250). As to the meaning of 'court' see PARA 212 note 1.

8 Companies Act 2006 s 719(1).

9 'Appropriate national newspaper' means a newspaper circulating throughout the part of the United Kingdom in which the company is registered: Companies Act 2006 s 719(3). As to the meaning of 'United Kingdom' see PARA 1 note 5.

10 Companies Act 2006 s 719(2).

11 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

12 Companies Act 2006 s 719(4). The statement and report mentioned in the text are those required by s 714 (see PARA 1246).

13 Companies Act 2006 s 720(1).

14 As to the registered office see PARA 129.

15 Companies Act 2006 ss 720(2), 1136(2); Companies (Company Records) Regulations 2008, SI 2008/3006, reg 3. As to inspection of company records see PARA 676.

16 Companies Act 2006 s 720(3).

17 Companies Act 2006 s 720(4).

18 Companies Act 2006 s 720(5). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607. A person guilty of an offence under s 720 is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 720(6). As to the standard scale see PARA 1622. In the case of a refusal of an inspection required by s 720(4) (see the text to note 17), the court may by order compel an immediate inspection: s 720(7).

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Purchase by Private Company out of Capital/1249. Objections to payment by company's members or creditors.

1249. Objections to payment by company's members or creditors.

Where a private company¹ passes a special resolution approving a payment out of capital for the redemption or purchase of any of its shares², any member of the company³ (other than one who consented to or voted in favour of the resolution), and any creditor of the company, may apply to the court⁴ for the cancellation of the resolution⁵. The application must be made within five weeks after the passing of the resolution⁶. It may be made on behalf of the persons entitled to make it by such one or more of their number as they may appoint in writing for the purpose⁷.

On making an application to the court to cancel a resolution, the applicants, or the person making the application on their behalf, must immediately give notice to the registrar⁸. In addition, on being served with notice of any such application, the company must immediately give notice to the registrar⁹. Within 15 days of the making of the court's order on the application, or such longer period as the court may at any time direct, the company must deliver to the registrar a copy of the order¹⁰. If a company fails to comply with these obligations, an offence is committed by the company, and by every officer of the company who is in default¹¹.

1 As to the meaning of 'private company' see PARA 102.

2 See PARA 1247. As to the meaning of 'share' see PARA 1055.

3 As to shareholders and membership of companies generally see PARA 321 et seq.

4 As to the meaning of 'court' see PARA 212 note 1.

5 Companies Act 2006 s 721(1).

6 Companies Act 2006 s 721(2)(a).

7 Companies Act 2006 s 721(2)(b).

8 Companies Act 2006 s 722(1). This is without prejudice to any provision of rules of court as to service of notice of the application: s 722(1). As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

9 Companies Act 2006 s 722(2).

10 Companies Act 2006 s 722(3).

11 Companies Act 2006 s 722(4). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607. A person guilty of an offence under s 722 is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 722(5). As to the standard scale see PARA 1622.

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1250. Powers of court on application.

On an application to the court to cancel a resolution approving a payment out of capital¹, the court may if it thinks fit adjourn the proceedings in order that an arrangement may be made to the satisfaction of the court for the purchase of the interests of dissentient members², or for the protection of dissentient creditors³. The court may also give such directions and make such orders as it thinks expedient for facilitating or carrying into effect any such arrangement⁴. Subject to that, the court must make an order either cancelling or confirming the resolution, and may do so on such terms and conditions as it thinks fit⁵. If the court confirms the resolution, it may by order alter or extend any date or period of time specified in the resolution, or in any statutory provision⁶ applying to the redemption or purchase to which the resolution relates⁷. The court's order may, if the court thinks fit: (1) provide for the purchase by the company of the shares of any of its members and for the reduction accordingly of the company's capital; and (2) make any alteration in the company's articles⁸ that may be required in consequence of that provision⁹. The court's order may, if the court thinks fit, require the company not to make any, or any specified, amendments of its articles without the leave of the court¹⁰.

1 See PARA 1249. As to the meaning of 'court' see PARA 212 note 1.

2 As to shareholders and membership of companies generally see PARA 321 et seq.

3 Companies Act 2006 s 721(3)(a).

4 Companies Act 2006 s 721(3)(b).

5 Companies Act 2006 s 721(4).

6 In any of the Companies Act 2006 Pt 18 Ch 5 (ss 709-723) (see PARA 1244 et seq).

7 Companies Act 2006 s 721(5).

8 As to the meaning of 'articles' see PARA 228 note 2.

9 Companies Act 2006 s 721(6).

10 Companies Act 2006 s 721(7).

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(C) TREASURY SHARES

1251. Treasury shares.

Where a limited company¹ makes a purchase of its own shares², the purchase is made out of distributable profits³, and the shares are qualifying shares⁴, then the company may hold the shares (or any of them), or deal with any of them, at any time, as treasury shares⁵. Where shares are held by the company, the company must be entered in its register of members⁶ as the member holding the shares⁷.

In the Companies Acts⁸ references to a company holding shares as treasury shares are to the company holding shares that: (1) were (or are treated as having been) purchased by it in the circumstances set out above; and (2) have been held by the company continuously since they were so purchased (or treated as purchased)⁹.

Where shares are held by a company as treasury shares, the company must not exercise any right in respect of the treasury shares, and any purported exercise of such a right is void¹⁰. This applies, in particular, to any right to attend or vote at meetings¹¹.

No dividend may be paid, and no other distribution, whether in cash or otherwise, of the company's assets (including any distribution of assets to members on a winding up) may be made to the company, in respect of the treasury shares¹².

Nothing in the provisions set out above¹³ prevents: (a) an allotment of shares as fully paid bonus shares in respect of the treasury shares; or (b) the payment of any amount payable on the redemption of the treasury shares (if they are redeemable shares)¹⁴.

1 As to the meaning of 'limited company' see PARA 102. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 In accordance with the Companies Act 2006 Pt 18 Ch 4 (ss 690-708) (see PARA 1234 et seq). As to the meaning of 'share' see PARA 1055.

3 As to the meaning of 'distributable profits' see PARA 1231 note 5.

4 Companies Act 2006 s 724(1). For this purpose, 'qualifying shares' means shares that: (1) are included in the official list in accordance with the provisions of the Financial Services and Markets Act 2000 Pt 6 (ss 72-103) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385 et seq); (2) are traded on the market known as the Alternative Investment Market established under the rules of London Stock Exchange plc (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 75); (3) are officially listed in an EEA state; or (4) are traded on a regulated market: Companies Act 2006 s 724(2). In head (1), 'official list' has the meaning given in the Financial Services and Markets Act 2000 s 103(1) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 387); Companies Act 2006 s 724(2). As to the meaning of 'EEA State' see PARA 29 note 5.

5 Companies Act 2006 s 724(3). The company must act in accordance with s 727 or s 729 (see PARAS 1252-1253); s 724(3). Where a limited company makes a purchase of its own shares in accordance with Pt 18 Ch 4, then: (1) if s 724 applies, the shares may be held and dealt with in accordance with Pt 18 Ch 6 (ss 724-732) (see PARA 1251 et seq); (2) if s 724 does not apply, the shares are treated as cancelled, and the amount of the company's issued share capital is diminished accordingly by the nominal value of the shares cancelled: see s 706; and PARA 1239.

6 As to the register of members see PARA 335 et seq.

7 Companies Act 2006 s 724(4).

8 As to the meaning of 'Companies Acts' see PARA 16.

9 Companies Act 2006 s 724(5).

10 Companies Act 2006 s 726(1), (2).

11 Companies Act 2006 s 726(2). As to meetings of members see PARA 629 et seq.

12 Companies Act 2006 s 726(3).

13 In nothing in the Companies Act 2006 s 726 (see the text and notes 10-12): s 726(4).

14 Companies Act 2006 s 726(4). As to the meaning of 'redeemable shares' see PARA 1229. As to bonus shares see PARA 1053. Shares allotted as fully paid bonus shares in respect of the treasury shares are treated as if purchased by the company, at the time they were allotted, in circumstances in which s 724(1) (see the text and notes 1-4) applied: s 726(5). As to the meaning of 'fully paid' see PARA 1048.

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1252. Disclosure by company of disposal of treasury shares.

Where shares¹ are held as treasury shares², the company³ may at any time: (1) sell the shares, or any of them, for a cash consideration⁴; or (2) transfer the shares, or any of them, for the purposes of or pursuant to an employees' share scheme⁵.

If the company receives a notice⁶, in connection with a takeover offer that does not relate to shares of different classes, that a person desires to acquire shares held by the company as treasury shares⁷, the company must not sell or transfer the shares to which the notice relates except to that person⁸.

Where shares held by a company as treasury shares are sold, or are transferred for the purposes of an employees' share scheme, the company must deliver a return to the registrar⁹ not later than 28 days after the shares are disposed of¹⁰. The return must state, with respect to shares of each class disposed of, the number and nominal value of the shares and the date on which they were disposed of¹¹. Particulars of shares disposed of on different dates may be included in a single return¹². If default is made in complying with this requirement an offence is committed by every officer of the company who is in default¹³.

1 As to the meaning of 'share' see PARA 1055.

2 See PARA 1251.

3 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 Companies Act 2006 s 727(1)(a). 'Cash consideration' means: (1) cash received by the company; (2) a cheque received by the company in good faith that the directors have no reason for suspecting will not be paid; (3) a release of a liability of the company for a liquidated sum; (4) an undertaking to pay cash to the company on or before a date not more than 90 days after the date on which the company agrees to sell the shares; or (5) payment by any other means giving rise to a present or future entitlement (of the company or a person acting on the company's behalf) to a payment, or credit equivalent to payment, in cash: s 727(2). For this purpose, 'cash' includes foreign currency: s 727(2). As to the meaning of 'director' see PARA 478. The Secretary of State may by order provide that particular means of payment specified in the order are to be regarded as falling within head (5): s 727(3). An order under s 727 is subject to negative resolution procedure (ie the statutory instrument containing the order is subject to annulment in pursuance of a resolution of either House of Parliament): ss 727(5), 1289. The creation of an obligation on the part of a settlement bank to make a relevant payment in respect of the transfer by a company to a system-member, by means of a relevant system, of a share held by the company as a treasury share is to be regarded as a means of payment falling within head (5): Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 4(3). The expressions 'relevant system', 'settlement bank' and 'system-member' have the meanings given in the Uncertificated Securities Regulations 2001, SI 2001/3755; and 'relevant payment' means a payment in accordance with the rules and practices of an operator of a relevant system: Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 4(4). See PARA 420 et seq.

Shares that are held by the company as treasury shares are disregarded for the purposes of the Companies Act 2006 s 561 (see PARA 1098), which prohibits an allotment of equity securities to a person unless certain conditions are met, subject to certain exemptions, exclusions and other qualifications: see s 561; and PARA 1098 et seq.

5 Companies Act 2006 s 727(1)(b). As to the meaning of 'employees' share scheme' see PARA 169 note 20.

6 Ie a notice under the Companies Act 2006 s 979 (takeover offers: right of offeror to buy out minority shareholders) (see PARA 1515).

7 See PARA 1251.

8 Companies Act 2006 s 727(4).

9 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

10 Companies Act 2006 s 728(1).

11 Companies Act 2006 s 728(2).

12 Companies Act 2006 s 728(3).

13 Companies Act 2006 s 728(4). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607. A person guilty of an offence under s 728 is liable: (1) on conviction on indictment, to a fine; (2) on summary conviction, to a fine not exceeding the statutory maximum and, for continued contravention, a daily default fine not exceeding one-tenth of the statutory maximum: s 728(5). As to the statutory maximum see PARA 1622.

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1253. Disclosure by company of cancellation of treasury shares.

Where shares¹ are held as treasury shares², the company³ may at any time cancel any or all of the shares⁴. If shares held as treasury shares cease to be qualifying shares⁵, the company must forthwith cancel the shares⁶. If a company cancels shares held as treasury shares, the amount of the company's share capital is reduced accordingly by the nominal amount of the shares cancelled⁷. The directors⁸ may take any steps required to enable the company to cancel its shares without complying with the provisions⁹ relating to the reduction of share capital¹⁰.

Where shares held by a company as treasury shares are cancelled, the company must deliver a return to the registrar¹¹ not later than 28 days after the shares are cancelled¹². The return must state, with respect to shares of each class cancelled, the number and nominal value of the shares and the date on which they were cancelled¹³. Particulars of shares cancelled on different dates may be included in a single return¹⁴. The notice must be accompanied by a statement of capital¹⁵ which must state with respect to the company's share capital immediately following the cancellation: (1) the total number of shares of the company; (2) the aggregate nominal value of those shares; (3) for each class of shares (a) prescribed particulars of the rights attached to the shares¹⁶; (b) the total number of shares of that class; and (c) the aggregate nominal value of shares of that class; and (4) the amount paid up and the amount, if any, unpaid on each share (whether on account of the nominal value of the share or by way of premium)¹⁷.

If default is made in complying with this requirement, an offence is committed by the company and by every officer of the company who is in default¹⁸.

1 As to the meaning of 'share' see PARA 1055.

2 See PARA 1251.

3 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 Companies Act 2006 s 729(1).

5 See PARA 1251 note 4. For this purpose shares are not to be regarded as ceasing to be qualifying shares by virtue only of: (1) the suspension of their listing in accordance with the applicable rules in the EEA state in which the shares are officially listed; or (2) the suspension of their trading in accordance with (a) in the case of shares traded on the market known as the Alternative Investment Market, the rules of London Stock Exchange

plc (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 75); and (b) in any other case, the rules of the regulated market on which they are traded: Companies Act 2006 s 729(3).

6 Companies Act 2006 s 729(2).

7 Companies Act 2006 s 729(4).

8 As to the meaning of 'director' see PARA 478.

9 le the provisions of the Companies Act 2006 Pt 17 Ch 10 (ss 641-653) (see PARA 1173 et seq).

10 Companies Act 2006 s 729(5).

11 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

12 Companies Act 2006 s 730(1). This does not apply to shares that are cancelled forthwith on their acquisition by the company (see s 708; and PARA 1239): s 730(1).

13 Companies Act 2006 s 730(2).

14 Companies Act 2006 s 730(3).

15 Companies Act 2006 s 730(4).

16 The prescribed particulars are: (1) particulars of any voting rights attached to the shares, including rights that arise only in certain circumstances; (2) particulars of any rights attached to the shares, as respects dividends, to participate in a distribution; (3) particulars of any rights attached to the shares, as respects capital, to participate in a distribution (including on winding up); and (4) whether the shares are to be redeemed or are liable to be redeemed at the option of the company or the shareholder: Companies (Shares and Share Capital) Order 2009, SI 2009/388, art 2(1), (2)(o), (3).

17 Companies Act 2006 s 730(5).

18 Companies Act 2006 s 730(6). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607. A person guilty of an offence under s 730 is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 730(7). As to the standard scale see PARA 1622.

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1254. Treatment of proceeds from sale of treasury shares.

Where shares¹ held as treasury shares² are sold, the proceeds of sale must be dealt with as follows³. If the proceeds of sale are equal to or less than the purchase price paid by the company⁴ for the shares, the proceeds are treated for the purposes of distributions⁵ as a realised profit of the company⁶. If the proceeds of sale exceed the purchase price paid by the company: (1) an amount equal to the purchase price paid is treated as a realised profit of the company⁷; and (2) the excess must be transferred to the company's share premium account⁸.

1 As to the meaning of 'share' see PARA 1055.

2 See PARA 1251.

3 Companies Act 2006 s 731(1).

4 For these purposes: (1) the purchase price paid by the company must be determined by the application of a weighted average price method (see PARA 721); and (2) if the shares were allotted to the company as fully paid bonus shares (see PARA 1251), the purchase price paid for them is treated as nil: Companies Act 2006 s 731(4).

5 le for the purposes of the Companies Act 2006 Pt 23 (ss 829-853) (see PARA 1389 et seq).

6 Companies Act 2006 s 731(2).

7 See note 4.

8 Companies Act 2006 s 731(3). As to the share premium account see PARA 1146.

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1255. Offences in relation to treasury shares.

If a company¹ contravenes any of the statutory provisions relating to treasury shares², an offence is committed by the company and by every officer of the company who is in default³. A person guilty of such an offence is liable (on conviction on indictment) to a fine and (on summary conviction) to a fine not exceeding the statutory maximum⁴.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 le any of the provisions of the Companies Act 2006 Pt 18 Ch 6 (ss 724-732) (see PARA 1251 et seq) (except s 730 (notice of cancellation) (see PARA 1253)).

3 Companies Act 2006 s 732(1). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

4 Companies Act 2006 s 732(2). As to the meaning of the 'statutory maximum' see PARA 1622.

A person's liability under s 732 in respect of a failure to comply with s 725(3) (duty to dispose of excess shares) (repealed) is not affected where the period mentioned in that provision expired before 1 October 2009: see the Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009, SI 2009/2022, reg 5(3). Otherwise, any outstanding obligation to dispose of or cancel excess shares arising under the Companies Act 2006 s 725(3) (duty to dispose of excess shares) (repealed) ceases to exist on 1 October 2009, whether or not the period mentioned in that provision has expired: see the Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009, SI 2009/2022, reg 5(2).

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(22) BORROWING AND SECURING MONEY

(i) Power to Borrow

1256. Company's capacity to borrow.

A company regulated by the Companies Act 2006¹ has unrestricted capacity, unless its objects specifically are restricted by the articles of association². This is a change from the situation that pertained under the Companies Act 1985 and its predecessor legislation³, according to which a company was obliged to state its objects in the memorandum of association⁴. Formerly, a trading or commercial company had an implied power to borrow to a reasonable amount for the purposes of its business, and to mortgage or charge all or any part of its property to secure the money so borrowed, even where no express power to borrow or mortgage was given to it, provided that such borrowing or giving of security was not expressly prohibited⁵. No power of borrowing was implied when the company was not a trading or commercial undertaking⁶; and, in such a case, a company might borrow only if authorised to do so by its constitution. In view of these limitations, it was almost invariable practice to give an express power to borrow in the company's constitution.

Under the Companies Act 2006, the company's articles may impose a limit on borrowing⁷, although subsequently a company may amend its articles of association by special resolution⁸ so as to extend or remove any limit on borrowing⁹.

Where a company's constitution expressly limits the capacity of the company to borrow, any borrowing beyond that limit is, strictly speaking, ultra vires and, at common law, void¹⁰. However, no intending lender will be concerned with any question of capacity because the Companies Act 2006 provides that the validity of an act done by a company may not be called into question on the ground of lack of capacity by reason of anything in the company's constitution¹¹.

1 As to companies regulated by the Companies Act 2006 see PARA 24 et seq. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 See the Companies Act 2006 s 31(1); and PARA 240. As to articles of association generally see PARA 228 et seq. As to a company's capacity generally see PARA 252 et seq.

3 As to which see PARA 16 et seq.

4 See PARA 240; and see *Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653.

5 *Re Badger, Mansell v Viscount Cobham* [1905] 1 Ch 568 at 574 per Buckley J; *Re Hamilton's Windsor Ironworks Co, ex p Pitman and Edwards* (1879) 12 ChD 707. See also *Bank of Australasia v Breillat* (1847) 6 Moo PCC 152 (banking company); *Australian Auxiliary Steam Clipper Co v Mounsey* (1858) 4 K & J 733 (shipping company); *Bryon v Metropolitan Saloon Omnibus Co Ltd* (1858) 3 De G & J 123 (omnibus company); *Re Patent File Co, ex p Birmingham Banking Co* (1870) 6 Ch App 83 at 87 per James LJ, and at 88 per Mellish LJ (file-making company); *Re International Life Assurance Society, Gibbs and West's Case* (1870) LR 10 Eq 312 (insurance company); *General Auction Estate and Monetary Co v Smith* [1891] 3 Ch 432 (auction company whose objects included discounting approved commercial bills).

6 *Re Badger, Mansell v Viscount Cobham* [1905] 1 Ch 568.

7 Where directors may borrow any sum not exceeding two-thirds of the uncalled capital of the company, they may borrow up to two-thirds of the nominal capital not called up, whether issued or unissued: *English Channel Steamship Co v Rolt* (1881) 17 ChD 715. Unless the directors' borrowing powers given by the constitution are exclusive, the company may delegate its borrowing powers to an agent by executing a power of attorney: *Mercantile Bank of India Ltd v Chartered Bank of India, Australia and China and Strauss & Co Ltd* [1937] 1 All ER 231. As to the meaning of 'called up share capital' see PARA 1048; and as to the meaning of 'issued' in relation to shares see PARA 1045. As to the meaning of 'nominal capital' see PARA 1044. As to companies and agency see PARA 269 et seq.

8 As to the amendment of articles of association see PARA 232 et seq. As to special resolutions see PARA 614. Certain conditions must be met for amendment to take place if the articles in question are 'entrenched' provisions (see PARA 233), although it would be unusual in practice to entrench any limit on a company's capacity to borrow. See also *Irvine v Union Bank of Australia* (1877) 2 App Cas 366, PC (limitation on the powers

of borrowing in the articles merely a limitation of directors' authority; acts in excess of that authority may be ratified by the company and rendered binding); *Grant v United Kingdom Switchback Railways Co* (1888) 40 ChD 135, CA). Cf *Re Olderfleet Shipbuilding and Engineering Co Ltd* [1922] 1 IR 26.

9 See eg *Re Bansa Woollen Mills Co Ltd* (1887) 21 LR Ir 181 (articles limited power to borrow).

10 *Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653. See also *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246, [1985] 3 All ER 52, CA (execution of a guarantee and debenture was within the company's corporate capacity and, thus, not ultra vires). As to the meaning of 'ultra vires' see PARA 259.

11 See the Companies Act 2006 s 39(1); and PARA 265. The protection thus afforded does not affect any right of a member of the company to bring proceedings to restrain the doing of an action that is beyond the powers of the directors: see s 40(4); and PARA 263.

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1257. Borrowing when directors' powers limited.

A company's articles of association may limit the directors' authority to borrow¹; and a member of the company² may bring proceedings to restrain the doing of an action (for example, borrowing) that is beyond the powers of the directors³, although no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company⁴.

However, in favour of a person dealing with a company in good faith, the power of the board of directors to bind the company, or to authorise others to do so, is deemed to be free of any limitation under the company's constitution⁵. Furthermore, a person dealing with a company is not bound to inquire as to any limitation on the powers of the directors to bind the company or authorise others to do so, is presumed to have acted in good faith unless the contrary is proved, and is not regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution⁶.

If the company enters into a transaction which, although within its powers, is in excess⁷ of or an abuse of the directors' powers, the transaction may be set aside⁸, or ratified by the company⁹, an ordinary resolution being sufficient for that purpose¹⁰. Ratification of the transaction also may be inferred¹¹. This protection does not, however, affect any liability incurred by the directors, or any other person, by reason of the directors' exceeding their powers¹². A company may ratify conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company, if the decision to ratify such conduct is made by resolution of the members of the company¹³.

The power to borrow must be exercised in good faith for the benefit of the company, and not for purposes other than those for which it has been conferred¹⁴.

Where one company lends money to another, and one person is a director of both companies, the knowledge acquired by him as officer of one company is not imputed to the other company, unless he has some duty to communicate his knowledge to the company sought to be affected by the notice and some duty imposed on him by that company to receive it; and if the officer in common has been guilty of fraudulent conduct, or even irregularity, the court will not draw the inference that he has fulfilled his duties¹⁵.

1 See PARA 1256. As to a company's articles of association generally see PARA 228 et seq. As to a company's capacity generally see PARA 252 et seq.

- 2 As to who qualifies as a member of a company see PARA 321.
- 3 See the Companies Act 2006 s 40(4); and PARA 263. As to directors and their powers see PARA 478 et seq.
- 4 See the Companies Act 2006 s 40(4); and PARA 263.
- 5 See the Companies Act 2006 s 40(1), (6); and PARA 263. See also PARA 267. As to the meaning of references in the Companies Acts to a company's constitution see PARA 227; and as to the meaning of the 'Companies Acts' see PARA 16. For these purposes, the references to limitations on the directors' powers under the company's constitution include limitations deriving: (1) from a resolution of the company in general meeting or a meeting of any class of shareholders (see s 40(3)(a); and PARA 263); or (2) from any agreement between the members of the company or of any class of shareholders (see s 40(3)(b); and PARA 263). As to resolutions of the company generally see PARA 629 et seq. As to shareholders generally see PARA 321 et seq. As to classes of shares and the rights attached to classes of shares generally see PARA 1057 et seq.
- 6 See the Companies Act 2006 s 40(2); and PARA 263. However, the statutory protections thereby afforded do not absolve a person dealing with a company from any duty to inquire whether the persons acting for the company were authorised by the board to enter into the transaction when the circumstances were such as to put that person on inquiry: see PARA 263 note 7.
- 7 Eg if a company's articles prohibit the directors from borrowing more than a specified amount except with the sanction of the shareholders. Cf the provision made by model articles cited in PARA 541 note 3. As to a company's powers and capacity under its regulations generally see PARA 256 et seq.
- 8 *Rolled Steel Products (Holdings) Ltd v British Steel Corpn* [1986] Ch 246, [1985] 3 All ER 52, CA.
- 9 *Irvine v Union Bank of Australia* (1877) 2 App Cas 366, PC. Cf *Grant v United Kingdom Switchback Rlys Co* (1888) 40 ChD 135, CA.
- 10 As to ordinary resolutions see PARA 613.
- 11 See *Re Magdalena Steam Navigation Co* (1860) Johns 690 (continued use for benefit of company of money raised; shareholders bound by acquiescence).
- 12 See the Companies Act 2006 s 40(5); and PARA 263. As to a director's powers see also note 14. The statutory provision made by ss 39, 40 (see PARAS 263-265) does not affect a third party's liability under a constructive trust, if the facts give rise to one: see *International Sales and Agencies Ltd v Marcus* [1982] 3 All ER 551, [1982] 2 CMLR 46; Case C-104/96 *Coöperatieve Rabobank Vecht en Plassengebied BA v Minderhoud* [1998] 1 WLR 1025, [1997] ECR I-7211, ECJ; and see **TRUSTS** vol 48 (2007 Reissue) PARA 698 et seq. As to directors' liability see PARA 585 et seq.
- 13 See the Companies Act 2006 s 239; and PARA 593. By virtue of s 239(3), (4), such ratification is valid only if certain conditions are met in relation to who may vote on the resolution and who may constitute an effective majority on such a vote: see PARA 593.
- 14 *Re London and County Assurance Co, Wood's Claim, Brown's Claim* (1861) 30 LJ Ch 373. A director is under a statutory duty to act in accordance with the company's constitution and to only exercise powers for the purposes for which they are conferred (see s 171; and PARA 540 et seq); to act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole (see s 172; and PARA 544); and to exercise reasonable care, skill and diligence (see s 174; and PARA 548). As to directors' liabilities that arise under these duties see PARA 559.
- 15 *Re Hampshire Land Co* [1896] 2 Ch 743; *Re David Payne & Co Ltd, Young v David Payne & Co Ltd* [1904] 2 Ch 608, CA; *JC Houghton & Co v Nothard, Lowe and Wills Ltd* [1928] AC 1, HL. See also *Re Marseilles Extension Rly Co, ex p Crédit Foncier and Mobilier of England* (1871) 7 Ch App 161. As to the limits of the application of the principle in *Re Hampshire Land Co* see *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] UKHL 39, [2009] 3 WLR 455; and PARA 127 note 9.

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1258. Security given by directors.

In the absence of limitations in the company's constitution¹, a company's directors² may borrow to such an amount and upon such terms and security and for such purposes for the benefit of the company as they think fit; they may issue bonds or debentures³ to secure sums borrowed; and they may borrow on other securities⁴.

Directors may exercise the power to mortgage for such purposes as to secure a past debt, if the mortgage is not given in such circumstances as to make it a preference⁵; to secure sums owing on a bill of exchange given by directors to secure a debt of the company⁶; or to indemnify directors against loss on guarantees given by them to the company's creditors⁷. They may issue debentures in satisfaction of the debts of an insolvent business which the company has taken over and against which it has agreed to indemnify the vendor of the business⁸, and may give the vendor of a solvent business preference over unsecured creditors in respect of a part of the purchase price⁹. Even if proceedings to enforce a series of debentures have begun, they may issue further debentures of the series, provided that a receiver has not been appointed¹⁰.

1 As to which see PARA 1256. As to the meaning of references in the Companies Acts to a company's constitution see PARA 227. As to a company's capacity generally see PARA 252 et seq.

2 As to a company's directors see PARA 478 et seq.

3 As to the meaning of 'debenture' see PARA 1299.

4 *Commercial Bank of Canada v Great Western Rly Co of Canada* (1865) 3 Moo PCCNS 295, PC. As to perpetual debenture stock see PARA 1305.

5 *Shears v Jacob* (1866) LR 1 CP 513; *Re Inns of Court Hotel Co* (1868) LR 6 Eq 82; *Re Patent File Co, ex p Birmingham Banking Co* (1870) 6 Ch App 83; *Davies v R Bolton & Co Ltd* [1894] 3 Ch 678. See also **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 843 et seq.

6 *Scott v Colburn* (1858) 26 Beav 276. As to bills of exchange generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1400 et seq.

7 *Re Pyle Works (No 2)* [1891] 1 Ch 173.

8 *Seligman v Prince & Co* [1895] 2 Ch 617, CA.

9 *Salomon v A Salomon & Co Ltd* [1897] AC 22, HL.

10 *Re Hubbard & Co Ltd, Hubbard v Hubbard & Co Ltd* (1898) 68 LJ Ch 54.

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1259. Loan by directors or promoters.

A director of a company¹ may, unless prohibited by the company's constitution², lend money to the company, provided that, in so doing, he is acting for its benefit, even though the loan is made on the security of a debenture³ issued at a discount⁴.

A trader, when selling his solvent business to a company, even though it consists only of himself and members of his family, may as a general rule lawfully take debentures charged upon all the company's assets in satisfaction of the whole or part of his purchase money⁵.

- 1 As to a company's directors see PARA 478 et seq.
- 2 As to the meaning of references in the Companies Acts to a company's constitution see PARA 227.
- 3 As to the meaning of 'debenture' see PARA 1299.
- 4 *Re Compagnie Générale de Bellegarde, Campbell's Case* (1876) 4 ChD 470.
- 5 *Salomon v A Salomon & Co Ltd* [1897] AC 22, HL. As to the effect of selling an insolvent business for debentures see *Re Slobodinsky, ex p Moore* [1903] 2 KB 517; and PARA 320.

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1260. Borrowing by two companies jointly.

Where two or more companies join in giving one debenture¹ to secure a joint loan, and thereby purport to charge their several undertakings and assets with payment of the amount advanced, but only under a general power to borrow in the company's constitution², the charge is ultra vires³ so far as it purports to make one company's assets a security for money lent to the other company or companies; but the charge is good as to each company's assets to the extent of the money actually received by that company⁴.

- 1 As to the meaning of 'debenture' see PARA 1299.
- 2 As to which see PARA 1256. As to the meaning of references in the Companies Acts to a company's constitution see PARA 227.
- 3 As to the meaning of 'ultra vires' see PARA 259.
- 4 *Re Johnston Foreign Patents Co* [1904] 2 Ch 234, CA.

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1261. Examples of borrowing.

An overdraft at a company's bank is a loan¹. A sale in good faith of part of its equipment by a company which has exhausted its borrowing powers, accompanied by an agreement on its part to hire the equipment from the purchaser at a rent which will repay the purchase money and interest and enable the company at the end of the term to repurchase the equipment for a nominal consideration, is not a borrowing². A sale of goods in good faith with a proviso that the purchaser may call on the vendor to repurchase them at a profit to the purchaser at the end of four years is not a borrowing; but it is a borrowing where there is not only a sale but also a collateral document providing for the redemption by the vendor of the goods comprised in the sale³.

1 *Cunliffe, Brooks & Co v Blackburn and District Benefit Building Society* (1884) 9 App Cas 857, HL (affg *Blackburn Building Society v Cunliffe, Brooks & Co* (1882) 22 ChD 61, CA); *Chambers v Manchester and Milford Rly Co* (1864) 5 B & S 588; *Looker v Wrigley* (1882) 9 QBD 397; *Blackburn and District Benefit Building Society v Cunliffe, Brooks & Co* (1885) 29 ChD 902, CA (overruling *Re Cefn Cilcen Mining Co* (1868) LR 7 Eq 88; *Waterlow v Sharp* (1869) LR 8 Eq 501).

2 *Yorkshire Railway Wagon Co v Maclure* (1882) 21 ChD 309, CA. Cf *Manchester, Sheffield, and Lincolnshire Rly Co v North Central Wagon Co* (1888) 13 App Cas 554, HL. As to the distinction between a loan and a sale accompanied by an agreement for rehire cf **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1692 et seq.

3 *Coveney v Persse Ltd* [1910] 1 IR 194, CA.

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1262. Condition precedent to borrowing.

Where the power of a company's directors to borrow¹ is limited to a power to borrow upon the security of debentures² only after a certain proportion of the share capital³ has been subscribed, any debentures issued before such subscription will be invalid⁴.

Although as a general principle any condition precedent to the exercise of a power to borrow or mortgage should be performed, yet, where the condition is a matter pertaining to the internal management of the company, its non-performance does not invalidate a loan by a person acting in good faith without notice, nor any security given in respect of the loan by the company⁵. Statutory protection is also afforded to a person dealing with a company in good faith, in respect of the power of the board of directors to bind the company, or to authorise others to do so, which is deemed to be free of any limitation under the company's constitution⁶.

If the lender is a director, he may be taken to have notice of non-compliance with internal regulations⁷; but a security transferred to him by a person who had no notice will be valid in his hands⁸.

1 As to the power to borrow see PARA 1256 et seq. As to a company's directors see PARA 478 et seq.

2 As to the meaning of 'debenture' see PARA 1299.

3 As to the meaning of 'share capital' see PARA 1042.

4 *West Cornwall Rly Co v Mowatt* (1848) 17 LJ Ch 366. Where the borrowing powers of a company are to arise only upon completion of a portion of its works, the company may before completion, in consideration of a present advance, validly agree to issue debentures to secure the same when it is completed: *Re Bagnalstown and Wexford Rly Co* (1870) IR 4 Eq 505, CA.

5 *Royal British Bank v Turquand* (1856) 6 E & B 327, Ex Ch; *Agar v Athenaeum Life Assurance Society* (1858) 3 CBNS 725; *Fountaine v Carmarthen Rly Co* (1868) LR 5 Eq 316; *Re General Provident Assurance Co, ex p National Bank* (1872) LR 14 Eq 507; *Landowners' West of England and South Wales Land Drainage and Inclosure Co v Ashford* (1880) 16 ChD 411; *Biggerstaff v Rowatt's Wharf Ltd* [1896] 2 Ch 93, CA (powers of managing director relied on); *Re Hampshire Land Co* [1896] 2 Ch 743 (where the power to borrow and issue debentures required the consent of a general meeting of the company, which had not been given); *County of Gloucester Bank v Rudry Merthyr Steam and House Coal Colliery Co* [1895] 1 Ch 629, CA; *Cox v Dublin City Distillery (No 2)* [1915] 1 IR 345, CA; *Re Fireproof Doors Ltd, Umney v Fireproof Doors Ltd* [1916] 2 Ch 142 (debentures issued at a meeting of directors where there was an insufficient quorum); *Davies v R Bolton & Co* [1894] 3 Ch 678 (where the issue of debentures had not been duly authorised by the directors). In *Davies v R Bolton & Co*, the articles provided that any debentures bearing the company's common seal issued for valuable consideration should be binding on the company, notwithstanding any irregularity touching the directors' authority to issue them. See

also *Re Bank of Syria, Owen and Ashworth's Claim, Whitworth's Claim* [1900] 2 Ch 272; on appeal [1901] 1 Ch 115, CA. As to the rule in *Royal British Bank v Turquand* and subsequent decisions see PARA 267 et seq. See also *Mercantile Bank of India Ltd v Chartered Bank of India, Australia and China and Strauss & Co Ltd* [1937] 1 All ER 231.

A person dealing with a company in good faith will now rely in most instances on the Companies Act 2006 s 40 (see PARA 263), although the precise relationship between this provision and the rule in *Royal British Bank v Turquand* has not yet been determined (see PARA 263 note 3).

6 See the Companies Act 2006 s 40(1), (6); and PARA 263. As to the meaning of references in the Companies Acts to a company's constitution see PARA 227.

7 *Re Patent Ivory Manufacturing Co, Howard v Patent Ivory Manufacturing Co* (1888) 38 ChD 156 at 170 per Kay J; *Re General Provident Assurance Co Ltd* (1869) 38 LJ Ch 320 at 321 (loan by solicitor of the company). The employment of a director as agent by his wife to apply for debentures on her behalf does not fix her with notice of what he knows or should know as director: *Re Fireproof Doors Ltd, Umney v Fireproof Doors Ltd* [1916] 2 Ch 142. The statutory protection afforded to a person dealing with a company in good faith (see the Companies Act 2006 s 40; and see the text and note 6) is subject to s 41 (see PARA 264) where the transaction in question involves a director or a person who is connected with a director: see s 40(6); and PARA 263.

8 *Re Bank of Syria, Owen and Ashworth's Claim, Whitworth's Claim* [1900] 2 Ch 272.

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1263. Public company trading certificate: when borrowing powers commence.

A company¹ that is a public company² must not exercise any borrowing powers³ unless the registrar of companies⁴ has issued it with a certificate (a 'trading certificate') indicating that he is satisfied that the nominal value⁵ of the company's allotted share capital⁶ is not less than the authorised minimum⁷. Such a certificate is conclusive evidence that the company is entitled to exercise borrowing powers⁸.

If a company exercises borrowing powers in contravention of the prohibition on doing so without a trading certificate⁹, any such contravention does not affect the validity of a transaction entered into by the company¹⁰. However, if a company: (1) enters into a transaction in contravention of that prohibition¹¹; and (2) fails to comply with its obligations in connection with the transaction within 21 days from being called on to do so¹², the directors of the company¹³ are jointly and severally liable to indemnify any other party to the transaction in respect of any loss or damage suffered by him by reason of the company's failure to comply with its obligations¹⁴.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 I.e. a company that is registered as a public company on its original incorporation: see the Companies Act 2006 s 761(1); and PARA 74. As to incorporation by registration under the Companies Act 2006 see PARA 111 et seq. As to the meaning of 'public company' see PARA 102. See also PARAS 72, 73.

3 As to a company's borrowing powers see PARA 1256 et seq.

4 As to the meaning of 'registrar of companies' see PARA 131 note 2.

5 As to the nominal value of shares see PARA 1042.

6 As to the meaning of 'allotted share capital' see PARA 1045.

7 See the Companies Act 2006 s 761(1)-(3); and PARA 74. As to the meaning of 'authorised minimum' see PARA 75.

8 See the Companies Act 2006 s 761(4); and PARA 74.

9 In contravention of the Companies Act 2006 s 761: see s 767(3); and PARA 74.

10 See the Companies Act 2006 s 767(3); and PARA 76. However, an offence is committed by the company and by every officer of the company who is in default: see s 767(1); and PARA 74. As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

11 See the Companies Act 2006 s 767(3)(a); and PARA 76. Head (1) in the text refers to a transaction entered into in contravention of s 761 (see PARA 74): see s 767(3)(a); and PARA 76.

12 See the Companies Act 2006 s 767(3)(b); and PARA 76.

13 As to the meaning of 'director' see PARA 478.

14 See the Companies Act 2006 s 767(3); and PARA 76. The directors who are so liable are those who were directors at the time the company entered into the transaction: see s 767(4); and PARA 76.

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1264. Assignee's position.

Where a security is transferable at law and is legally transferred, an irregularity in the issue cannot be set up against an assignee for value in good faith without notice, even where the original holder had notice of it¹; but the equitable assignee of a security takes it subject to any equities affecting the person to whom it was originally issued, even though the assignment is taken for value and without notice of the circumstances giving rise to such equities², unless the terms of issue otherwise provide³. If a debenture defectively created is issued to a person who has no notice of the defect⁴, so that the company cannot rely on the defect, and is then assigned to a person who has notice of the defect, the assignee has a good title to the debenture⁵.

1 *Webb v Herne Bay Comrs* (1870) LR 5 QB 642; *Re Romford Canal Co, Carew's Claim* (1883) 24 ChD 85 at 89 per Kay J. A person acting de facto as a director of the company apparently cannot, however, be an assignee for value in good faith without notice of the irregularity, for he should know the true position: see *Morris v Kanssen* [1946] AC 459, [1946] 1 All ER 586, HL. See also *Re Hercules Insurance Co, Brunton's Claim* (1874) LR 19 Eq 302; *Re Renshaw & Co Ltd* [1908] WN 210; *Re Hansard Publishing Union Ltd* (1892) 8 TLR 280, CA.

2 *Athenaeum Life Assurance Society v Pooley* (1858) 3 De G & J 294; *Re Natal Investment Co, Financial Corpn Claim* (1868) 3 Ch App 355; *Christie v Taunton, Delmard, Lane & Co, Re Taunton, Delmard, Lane & Co* [1893] 2 Ch 175. As to debentures and freedom from equities see PARA 1325.

3 *Re Blakely Ordnance Co, ex p New Zealand Banking Corpn* (1867) 3 Ch App 154; *Higgs v Assam Tea Co Ltd* (1869) LR 4 Exch 387; *Re Imperial Land Co of Marseilles, ex p Colborne and Strawbridge* (1870) LR 11 Eq 478.

4 This must include all persons entitled to rely upon the Companies Act 2006 ss 39, 40: see PARAS 256, 265.

5 *Re Bank of Syria, Owen and Ashworth's Claim, Whitworth's Claim* [1901] 1 Ch 115, CA.

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1265. Charge on uncalled capital.

The property of a company does not include the liability of its members to contribute to its funds¹; but a mortgage of uncalled capital² may be made³ where, by the company's constitution⁴, whether original or as amended⁵, there is express power to mortgage uncalled capital, or where there is a power to mortgage 'the company's properties and rights'⁶, or 'property and assets whether existing or future'⁷, or 'to receive money on loan . . . upon any security of the company or upon the security of any property of the company'⁸, or to borrow money on the security of 'all or any of the real and personal assets . . . of the company'⁹, or to borrow 'in such other manner as the company may determine', when the preceding specific powers cover everything it could charge except uncalled capital¹⁰. A charge on uncalled capital is not authorised by a power to charge the company's 'funds or property'¹¹, or to charge its 'works, hereditaments, plant, property and effects'¹² or its 'property'¹³; but such a power authorises a charge on calls already made or determined upon¹⁴.

Where a company, with power to charge its uncalled capital, issues debentures¹⁵ charging only its undertaking and its present and after-acquired property, the charge does not include uncalled capital¹⁶; nor does a charge on 'all the lands, tenements and estates of the company and all their undertaking'¹⁷, or on 'their undertaking and property and receipts and revenues'¹⁸, or on 'their real and personal estate'¹⁹.

If a resolution has been passed under the Companies Act 2006 (or under the enactments which it replaces²⁰) prohibiting any portion of the uncalled capital being called up except in the event and for the purpose of the company being wound up²¹, directors cannot mortgage that uncalled capital, even if the constitution empowers them to mortgage uncalled capital²².

Where a temporary loan is made by a bank to a company on the security of its uncalled capital, a charge made by a resolution of the board, that is, by parol, is good, subject to the statutory provisions²³ as to registration²⁴.

A company limited by guarantee²⁵ cannot charge the amounts which the members have undertaken to contribute in the event of a winding up²⁶.

1 *Re Russian Spratts Patent Ltd, Johnson v Russian Spratts Patent Ltd* [1898] 2 Ch 149, CA; *Re Andrew Handyside & Co Ltd* (1911) 131 LT Jo 125. As to who qualifies as a member of a company see PARA 321.

2 As to the meaning of 'uncalled share capital' see PARA 1048.

3 Such charges require registration: see PARA 1279.

4 As to the meaning of references in the Companies Acts to a company's constitution see PARA 227; and as to the meaning of the 'Companies Acts' see PARA 16.

5 *Newton v Anglo-Australian Investment Co's Debenture-holders* [1895] AC 244 at 248, PC; *Jackson v Rainford Coal Co* [1896] 2 Ch 340. As to provision that is made for the alteration of a company's articles of association see PARA 232 et seq.

6 *Re Patent Ivory Manufacturing Co, Howard v Patent Ivory Manufacturing Co* (1888) 38 ChD 156.

7 *South Australian Barytes Ltd v Wood* (1976) 12 SASR 527, Aust SC (the charge validly included premiums payable on the shares).

8 *Newton v Anglo-Australian Investment Co's Debenture-holders* [1895] AC 244, PC.

9 *Re Pyle Works (No 2)* [1891] 1 Ch 173. See also *Page v International Agency and Industrial Trust Ltd* (1893) 62 LJ Ch 610.

- 10 *Jackson v Rainford Coal Co* [1896] 2 Ch 340.
- 11 *Re British Provident Life and Fire Assurance Society, Stanley's Case* (1864) 4 De GJ & Sm 407; *Bower v Foreign and Colonial Gas Co* [1877] WN 222.
- 12 *Re Sankey Brook Coal Co (No 2)* (1870) LR 10 Eq 381, doubting *Re Colonial and General Gas Co, Lishman's Claim* (1870) 19 WR 344.
- 13 *Bank of South Australia v Abrahams* (1875) LR 6 PC 265.
- 14 *Re Sankey Brook Coal Co* (1870) LR 9 Eq 721; *Re International Life Assurance Society, Gibbs and West's Case* (1870) LR 10 Eq 312; *Re Humber Ironworks Co, ex p Warrant Finance Co* (1868) 16 WR 474 (on appeal 16 WR 667).
- 15 As to the meaning of 'debenture' see PARA 1299.
- 16 *Re Andrew Handyside & Co Ltd* (1911) 131 LT Jo 125; *Re Russian Spratts Patent Ltd, Johnson v Russian Spratts Patent Ltd* [1898] 2 Ch 149, CA (approving *Re Streatham and General Estates Co* [1897] 1 Ch 15).
- 17 *King v Marshall* (1864) 33 Beav 565.
- 18 *Re Marine Mansions Co* (1867) LR 4 Eq 601.
- 19 *Re Colonial Trusts Corp'n, ex p Bradshaw* (1879) 15 ChD 465.
- 20 As to resolutions generally see PARA 617 et seq. As to the statutory framework created by the Companies Act 2006, and as to Acts which were superseded by the Companies Act 2006, and as to the continuity which was maintained in the law, see PARA 9 et seq.
- 21 As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.
- 22 *Re Mayfair Property Co, Barlett v Mayfair Property Co* [1898] 2 Ch 28, CA; *Re Pyle Works* (1890) 44 ChD 534 at 587, CA, per Lindley LJ. Cf *Newton v Anglo-Australian Investment Co's Debenture-holders* [1895] AC 244, PC.
- 23 As to which see PARA 1277 et seq.
- 24 *Re Tilbury Portland Cement Co Ltd* (1893) 62 LJ Ch 814.
- 25 As to the meaning of 'company limited by guarantee' see PARA 102.
- 26 *Re Irish Club Co Ltd* [1906] WN 127; but see *Lloyds Bank Ltd v Morrison & Son Ltd* 1927 SC 571 (where a distinction was drawn between the guarantee by members, which was available only in winding up, and a guarantee, to which both members and non-members might contribute, in respect of liabilities of the company in organising an exhibition, and the benefit of the last-mentioned guarantee was held to be assignable).

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1266. Enforcing mortgage of uncalled capital.

A mortgage of uncalled capital¹ may be enforced while the company is a going concern by appointing a receiver², and either ordering the company's directors³ to make calls and pay the proceeds over to the receiver or ordering the receiver to make the calls⁴. Such a charge may also be enforced after the company goes into liquidation⁵; but generally speaking only the liquidator may make and enforce the calls although, on an adequate indemnity being given, a receiver so appointed may obtain leave to use the liquidator's name in proceedings to enforce the calls⁶.

The fact that uncalled capital has been charged does not prevent the company from forfeiting shares⁷.

1 As to the meaning of 'uncalled share capital' see PARA 1048.

2 In *South Australian Barytes Ltd v Wood* (1976) 12 SASR 527, Aust SC, it was held that the deed of charge validly delegated to a receiver and manager the directors' powers to make calls, the court intimating that such a delegation could in any event easily be implied. However, in that case this power was of only limited use, as it did not extend to instalments of the premium payable on the shares.

3 As to a company's directors see PARA 478 et seq.

4 *Re Phoenix Bessemer Steel Co* (1875) 44 LJ Ch 683. See also *English Channel Steamship Co v Rolt* (1881) 44 LT 135; *Re Pyle Works* (1890) 44 ChD 534, CA. As to the powers of a receiver see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 396.

5 *Re Pyle Works* (1890) 44 ChD 534, CA; *Re Queensland Mercantile and Agency Co Ltd, ex p Australasian Investment Co, ex p Union Bank of Australia* [1891] 1 Ch 536 (affd [1892] 1 Ch 219, CA); *Newton v Anglo-Australian Investment Co's Debenture-holders* [1895] AC 244, PC. A nominee of the debenture holders will not be authorised to collect calls made by the liquidator: *Re Westminster Syndicate Ltd* (1908) 99 LT 924. An assignee of such a charge (invalid as to part) who takes with notice of the winding up, is in no better position than his assignor: *Re Gwelo Matabeleland Exploration and Development Co, Williamson's Claim* [1901] 1 IR 38.

6 *Fowler v Broad's Patent Night Light Co* [1893] 1 Ch 724; *Harrison v St Etienne Brewery Co* (1893) 37 Sol Jo 562.

7 *Re Agency, Land and Finance Co of Australia Ltd* (1903) 20 TLR 41. As to forfeiture of shares generally see PARA 1721 et seq.

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1267. Charge on after-acquired property.

A charge on future or after-acquired property, when sufficiently defined (that is, capable of identification when it is sought to enforce the security) is good¹; and directors may effectually charge a company's future or after-acquired property².

1 *Tailby v Official Receiver* (1888) 13 App Cas 523 at 530, HL, per Lord Herschell. See also **CHOSSES IN ACTION** vol 13 (2009) PARAS 5 et seq, 30.

2 *Bloomer v Union Coal and Iron Co* (1873) LR 16 Eq 383; *Anderson v Butler's Wharf Co Ltd* (1879) 48 LJ Ch 824; *Re Marine Mansions Co* (1867) LR 4 Eq 601; *Re Panama, New Zealand, and Australian Royal Mail Co* (1870) 5 Ch App 318; *Re General South American Co* (1876) 2 ChD 337, CA; *Re Anglo-American Leather Cloth Co Ltd* (1880) 43 LT 43, CA (mortgage of business premises and the effects there included stock-in-trade for the time being, but not book debts); *Agnew v IRC* [2001] UKPC 28, [2001] 2 AC 710, [2001] 2 BCLC 188. In *Re Florence Land and Public Works Co, ex p Moor* (1878) 10 ChD 530, CA, a question was raised whether the Supreme Court of Judicature Act 1875 s 10 (repealed) affected the power of companies to charge their after-acquired property as against their other creditors, but in *Re Dublin Drapery Co, ex p Cox* (1884) 13 LR Ir 174, it was held that the corresponding Supreme Court of Judicature (Ireland) Act 1877 s 28(1) did not affect it.

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1268. Charge on books, registers etc.

As against the liquidator¹, a company cannot make a valid charge on any books or documents which it is bound by statute to keep, such as registers of members and mortgages, minute books and share certificate books, or books which are required by the liquidator for the performance of his duties, such as letter books, cash books, bank books and ledgers².

1 As to liquidators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 555.

2 *Engel v South Metropolitan Brewing and Bottling Co* [1892] 1 Ch 442; *Re Capital Fire Insurance Association* (1883) 24 ChD 408, CA; *Re Clyne Tin Plate Co* (1882) 47 LT 439; *Re Anglo-Maltese Hydraulic Dock Co Ltd* (1885) 54 LJ Ch 730.

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(ii) Floating Charges

1269. Meanings of 'fixed charge' and 'floating charge'.

The terms 'floating charge' and 'floating security' mean a charge or security which is not to be put into immediate operation, but is to float over a company's assets so that the company is allowed to carry on its business¹. While a specific (or 'fixed') charge is one which without more fastens on ascertained and definite property or property capable of being ascertained and defined, a floating charge moves with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp².

The essence of a floating charge is that it is a charge, not on any particular asset, but on a fluctuating body of assets which remain under the management and control of the chargor; and the chargor has the ability to dispose of and deal with the charged asset and, if necessary, to remove it from the security without first requiring the permission or consent of the chargee³; the essence of a fixed charge is that the charge is on a particular asset or class of assets which the chargor cannot deal with free from the charge without the consent of the chargee⁴.

Deciding whether a charge is fixed or floating involves: (1) construing the instrument of charge to establish the intention of the parties with regard to their mutual rights and obligations in respect of the charged assets; and (2) characterising the charge thereby construed as a matter of law⁵. It is clear that any label that might be attached to a charge in a particular instrument does not prevent the court from declaring it to be otherwise⁶.

Accordingly, the language used in a debenture⁷ is not conclusive; while a creditor can state that a charge in a debenture is fixed, whether the clause in question imposes a fixed or a floating charge depends on the legal characteristics of the charge⁸. Mortgage debentures usually contain a charge upon the undertaking of the company and all its property⁹, real or personal, whether present or future, and may or may not give a charge upon uncalled capital¹⁰. The conditions usually provide that the charge so given shall be a floating charge or security. Where a series of debentures or debenture stock¹¹ is secured by a trust deed¹², then, in addition

to specific property of the company being assigned by it to the trustees to secure the debentures or stock, a floating charge is generally given upon all the other property of the company, present or future, and its undertaking, and in some cases its uncalled capital.

A general charge may be construed as a floating security even though the instrument does not expressly so describe it. Thus a charge on the undertaking of a company constitutes a floating charge on all its property¹³, and debentures given to bind a company and all its estate, property and effects¹⁴, or its real and personal estate¹⁵, constitute a floating security.

A floating charge may extend to part only of the company's assets¹⁶, the profits of certain schemes for developing land¹⁷, or the furniture and effects 'which now are or which may from time to time be placed upon or used in or about' specified premises¹⁸. It may also arise from a contract of sale of goods on credit terms reserving the equitable ownership in the goods to the vendor¹⁹ or from a contractual lien on sub-freights²⁰.

1 *Illingworth v Houldsworth* [1904] AC 355 at 357, HL, per Lord Halsbury LC; affmg on another point sub nom *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284, CA. In the Court of Appeal, Romer LJ at 295 gave the most often cited description of a floating charge as being a charge which has the following characteristics: (1) it is a charge on a class of assets of a company present and future; (2) that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3) by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets. It has been stated judicially since that the characteristics listed at head (1) and head (2) above, although typical of a floating charge, are not distinctive of it and it is the characteristic listed at head (3) above that is the hallmark: see *Agnew v IRC* [2001] UKPC 28 at [13], [2001] 2 AC 710 at [13], [2001] 2 BCLC 188 at [13] per Lord Millett; and *In re Spectrum Plus Ltd (in liquidation)* [2005] UKHL 41 at [106]-[107], [2005] 2 AC 680 at [106]-[107], sub nom *Re Spectrum Plus Ltd, National Westminster Bank plc v Spectrum Plus Ltd* [2005] 4 All ER 209 at [106]-[107] per Lord Scott of Foscote (who went on to say that he was inclined to think that the characteristic listed at head (3) above qualifies a charge as a floating charge so that it cannot be a fixed charge whatever its other characteristics).

A floating charge was formerly unknown to the law of Scotland, and such a charge given by a company registered in Scotland over assets in England was void: see *Carse v Coppen* 1951 SC 233. The law of Scotland was changed to enable companies to give security by way of floating charge in 1961; and the definition of 'floating charge' that is used for the purposes of the Insolvency Act 1986 means a charge which, as created, was a floating charge and includes a Scottish floating charge: see s 251; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 212. Otherwise, the expression 'floating charge' is taken to be self-explanatory; it bears the meaning attributed to it by judicial decision: see *In re Spectrum Plus Ltd (in liquidation)* at [98] per Lord Scott of Foscote.

2 *Illingworth v Houldsworth* [1904] AC 355 at 358, HL, per Lord Macnaghten.

3 *Re Cosslett (Contractors) Ltd* [1998] Ch 495 at 510, [1997] 4 All ER 115 at 127, CA, per Millett LJ; *Agnew v IRC* [2001] UKPC 28 at [26], [2001] 2 AC 710 at [26], [2001] 2 BCLC 188 at [26] per Lord Millett; *Arthur D Little Ltd (in administration) v Ableco Finance LLC* [2002] EWHC 701 (Ch) at [40], [2003] Ch 217 at [40], [2002] 2 BCLC 799 at [40] per Roger Kaye QC; *In re Spectrum Plus Ltd (in liquidation)* [2005] UKHL 41 at [107], [2005] 2 AC 680 at [107], sub nom *Re Spectrum Plus Ltd, National Westminster Bank plc v Spectrum Plus Ltd* [2005] 4 All ER 209 at [107] per Lord Scott of Foscote; *Re Beam Tube Products Ltd, Fanshaw v Amav Industries Ltd* [2006] EWHC 486 (Ch), [2007] 2 BCLC 732; *Russell-Cooke Trust Co v Elliott* [2007] EWHC 1443 (Ch), [2007] 2 BCLC 637. See also *Re Brightlife Ltd* [1987] Ch 200, [1986] 3 All ER 673 (book debts constituted a floating charge as the debtor company retained freedom to collect in the debts and to use them in the ordinary course of business); *Re Armagh Shoes Ltd* [1984] BCLC 405; *Royal Trust Bank v National Westminster Bank plc* [1996] 2 BCLC 699, CA; *Re Westmaze Ltd (in administrative receivership)* [1999] BCC 441; *Re Double S Printers Ltd (in liquidation)* [1999] 1 BCLC 220 (charge was floating as chargee had no control over debts or proceeds); *Re Hamlet International plc (in administration), Trident International Ltd v Barlow* [1999] 2 BCLC 506, CA (a legal possessory lien conferred by a contract coupled with a right to sell the goods subject to the lien is not a floating charge); *Agnew v IRC* (company's freedom to deal with chargee's assets for its own benefit without the consent of the chargee was a floating charge); *Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council* [2001] UKHL 58, [2002] 1 AC 336, [2002] 1 All ER 292 (a contractual right to sell an asset belonging to a company and appropriate the proceeds of sale to payment of a debt owing was characterised as a floating charge since the property to which it attached consisted of a fluctuating body of assets, including temporary works and materials which might be consumed or removed from the site in the ordinary course of the company's business). Cf *Arthur D Little Ltd v Ableco Finance LLC* (class of asset, being simply the company's shareholding in its subsidiary, characterised as fixed). As to book debts see further note 6; and PARA 1270. As to the effect of a floating charge see PARA 1271.

4 *Re Cosslett (Contractors) Ltd* [1998] Ch 495 at 510, [1997] 4 All ER 115 at 127, CA, per Millett LJ; *Agnew v IRC* [2001] UKPC 28 at [26], [2001] 2 AC 710 at [26], [2001] 2 BCLC 188 at [26] per Lord Millett; *Arthur D Little Ltd (in administration) v Ableco Finance LLC* [2002] EWHC 701 (Ch) at [40], [2003] Ch 217 at [40], [2002] 2 BCLC 799 at [40] per Roger Kaye QC. See also *Re TXU Europe Group plc (in administration)* [2003] EWHC 3105 (Ch), [2004] 1 BCLC 519. Cf *Queen's Moat Houses plc v Capita IRG Trustees Ltd* [2004] EWHC 868 (Ch), [2005] 2 BCLC 199 (there was a critical difference between a corporate chargor's right to deal with and dispose of property free from a charge without reference to the chargee and a chargor's right to require the chargee to release property from the charge, in that the former right was consistent only with the existence of a floating charge and was inconsistent with the existence of a fixed charge whereas there was no inconsistency between the existence of a fixed charge and a contractual right on the part of the chargor to require the chargee to release property from the charge).

5 *Agnew v IRC* [2001] UKPC 28 at [32], [2001] 2 AC 710 at [32], [2001] 2 BCLC 188 at [32] per Lord Millett; *Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend CBC* [2001] UKHL 58 at [42], [2002] 1 AC 336 at [42], [2002] 1 All ER 292 at [42] per Lord Hoffmann, and at [53] per Lord Scott of Foscote; *Arthur D Little Ltd (in administration) v Ableco Finance LLC* [2002] EWHC 701 (Ch) at [39]-[40], [2003] Ch 217 at [39]-[40], [2002] 2 BCLC 799 at [39]-[40] per Roger Kaye QC; *Re Spectrum Plus Ltd, National Westminster Bank plc v Spectrum Plus Ltd* [2004] EWHC 9 (Ch) at [35]-[40], [2004] 1 All ER 981 at [35]-[40] per Morritt V-C. See also *Agnew v IRC* at [33]-[34] per Lord Millett, where it is stated that *Re New Bullas Trading Ltd* [1994] 1 BCLC 485, CA, cannot be supported in so far as it decides that the character of a charge depends on the intention of the parties as ascertained from the terms of the debenture and, legal impossibility apart, there were no considerations which prevented them from making whatever contract they chose; and see PARA 1270 note 5.

The issue as to characterisation of a charge is important because statute has given priority to preferential creditors over debenture holders so far as payment of debts out of assets subject to a floating charge is concerned: see PARA 1271.

6 See *Re Keenan Bros Ltd* [1986] BCLC 242, Ir SC; and *In re Spectrum Plus Ltd (in liquidation)* [2005] UKHL 41, [2005] 2 AC 680, sub nom *Re Spectrum Plus Ltd, National Westminster Bank plc v Spectrum Plus Ltd* [2005] 4 All ER 209 (charges labelled fixed declared to be floating). See also *Re Beam Tube Products Ltd, Fanshaw v Amav Industries Ltd* [2006] EWHC 486 (Ch), [2007] 2 BCLC 732; *Ashborder BV v Green Gas Power Ltd* [2004] EWHC 1517 (Ch), [2005] 1 BCLC 623. More unusually, a charge labelled as a floating charge may be declared to be, in substance, fixed: see *Russell-Cooke Trust Co v Elliott* [2007] EWHC 1443 (Ch), [2007] 2 BCLC 637 (the general principle remained the same, ie that the nature of the agreement rather than the labels assigned by the parties fell to be considered).

A specific charge over book debts, present and future, granted under a debenture that requires the proceeds of the book debts to be paid into a company's account without any restriction on how the company may use those proceeds creates a floating charge rather than a fixed charge over the book debts: *In re Spectrum Plus Ltd (in liquidation)* (overruling *Re Siebe Gorman & Co Ltd* [1979] 2 Lloyd's Rep 142; and *Re New Bullas Trading Ltd* [1994] 1 BCLC 485, CA). See further PARA 1270.

7 As to the meaning of 'debenture' see PARA 1299.

8 See *Re ASRS Establishment Ltd (in administrative receivership and liquidation)* [2000] 2 BCLC 631, CA (charge on escrow account fell within designation of fixed charge but was actually floating as chargor was free to use proceeds in the ordinary course of business); *Chalk v Kahn* [2000] 2 BCLC 361 (charge was described as fixed but was actually floating as chargor was required to collect and pay proceeds into bank account over which the chargee had no control). See also the cases cited in note 6.

9 'Property' or 'assets' includes goodwill: *Re Leas Hotel Co* [1902] 1 Ch 332.

10 As to charges on uncalled capital see PARA 1265.

11 As to the meaning of 'debenture stock' see PARA 1309.

12 As to trust deeds securing payment of money owing on debentures see PARA 1302.

13 *Re Panama, New Zealand and Australian Royal Mail Co* (1870) 5 Ch App 318; *Marshall v Rogers & Co* (1898) 14 TLR 217. Cf *Re New Clydach Sheet and Bar Iron Co* (1868) LR 6 Eq 514. See also *National Provincial and Union Bank of England Ltd v Charnley* [1924] 1 KB 431, CA. A floating charge over land contained in a debenture constitutes an interest in land: *Driver v Broad* [1893] 1 QB 744, CA; *Re Dawson, Pattison v Bathurst* [1915] 1 Ch 626, CA.

14 *Re Florence Land and Public Works Co, ex p Moor* (1878) 10 ChD 530, CA.

15 *Re Colonial Trusts Corpn, ex p Bradshaw* (1879) 15 ChD 465.

16 *Re Yorkshire Woolcombers' Association Ltd* [1903] 2 Ch 284, CA; affd sub nom *Illingworth v Houldsworth* [1904] AC 355, HL. Such a charge may include all present and future book debts together with the securities for them: see *Re Yorkshire Woolcombers' Association Ltd*; and PARA 1270.

17 *Hoare v British Columbia Development Association* (1912) 107 LT 602.

18 *National Provincial Bank of England Ltd v United Electric Theatres Ltd* [1916] 1 Ch 132.

19 *Re Bond Worth Ltd* [1980] Ch 228, [1979] 3 All ER 919. Cf *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25, [1979] 3 All ER 961, CA (where the product is used in a manufacturing process in accordance with the intentions of the parties and becomes part of a new product, it ceases to exist, and the retention of title clause no longer operates. If the cost is intended to be charged on the new product, or its proceeds of sale, this is a charge created by the company requiring registration under what is now the Companies Act 2006 s 860 et seq (see PARA 1279)); *Re Peachdart Ltd* [1984] Ch 131, [1983] 3 All ER 204; *Clough Mill Ltd v Martin* [1984] 3 All ER 982, [1985] 1 WLR 111. As to retention of title clauses see further PARA 1285.

20 *Annangel Glory Cia Naviera SA v M Golodetz Ltd* [1988] 1 Lloyd's Rep 45. See also *Re Welsh Irish Ferries Ltd, The Uglund Trailer* [1986] Ch 471, 1985] 2 Lloyd's Rep 372, [1985] BCLC 327 (a lien on sub-freights is an equitable charge on the company's book debts); *Agnew v IRC* [2001] UKPC 28 at [39], [2001] 2 AC 710 at [39], [2001] 2 BCLC 188 at [39] per Lord Millett (the better view is that a lien on sub-freights is not a charge at all).

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1270. Charges on book debts.

A charge on book debts¹ may be a fixed or floating charge²; the categorisation will depend upon the legal characteristics of the charge and not on the intention or language of the parties³. The company's freedom to deal with the charged assets without the consent of the charge holder is characteristic of a floating charge⁴.

Accordingly, a restriction on disposal which permits a company to extinguish book debts and to use the proceeds freely for its own benefit is inconsistent with the nature of a fixed charge because it enables a debt to be withdrawn from the security by the chargor's act⁵. Similarly, a charge over book debts, present and future, where the chargor: (1) cannot dispose of or charge the uncollected book debts but can deal with its debtors and collect the debts; and (2) is obliged to place the payments made to it by its debtors in a designated account with the chargee bank, but without any restriction on how the company may use those proceeds (barring the normal overdraft limit placed on the account), creates a floating charge rather than a fixed charge over the book debts⁶.

A debenture that requires book debts to be paid into a company's account with the chargee bank and prevents any dealing with the book debts without the prior consent in writing of the bank does not infringe the competition rules in the EC Treaty⁷.

1 According to usage, book debts are sums due to a company arising from the normal course of its business. The greater part of most entrepreneurial companies' assets would consist of raw materials, work in progress, stock-in-trade and trade debts; these were circulating assets, replaced in the normal course of business and constantly changing, and were not amenable to being the subject of traditional forms of security, before equity intervened: see *In re Spectrum Plus Ltd (in liquidation)* [2005] UKHL 41 at [95], [2005] 2 AC 680 at [95], sub nom *Re Spectrum Plus Ltd, National Westminster Bank plc v Spectrum Plus Ltd* [2005] 4 All ER 209 at [95] per Lord Scott of Foscote.

2 As to the meanings of 'fixed charge' and floating charge' see PARA 1269.

3 As to whether a charge is to be characterised as fixed or floating see PARA 1269.

4 See the cases cited in PARA 1269 notes 1-3.

5 *Agnew v IRC* [2001] UKPC 28, [2001] 2 AC 710, [2001] 2 BCLC 188 (prohibition on factoring or alienation of the book debts was insufficient to convert a floating charge into a fixed charge while the company was free to deal with the debts without the chargee's consent). The decision in *Re New Bullas Trading Ltd* [1994] 1 BCLC 485, CA, where purportedly there were two charges, one fixed and one floating, must be considered to be wrongly decided: *Agnew v IRC* at [50] per Lord Millett (the only relevant assets were uncollected book debts which were at the free disposal of the company and therefore inconsistent with the nature of a fixed charge).

6 *In re Spectrum Plus Ltd (in liquidation)* [2005] UKHL 41, [2005] 2 AC 680, sub nom *Re Spectrum Plus Ltd, National Westminster Bank plc v Spectrum Plus Ltd* [2005] 4 All ER 209 (overruling *Re Siebe Gorman & Co Ltd* [1979] 2 Lloyd's Rep 142). It is, however, quite clear that a fixed charge on book debts, present and future, is conceptually possible, so long as the particular form of debenture, properly construed, provides for a charge over specific, ascertainable book debts as and when they accrue to the chargor company: see *In re Spectrum Plus Ltd (in liquidation)* at [102]-[103] per Lord Scott of Foscote, and at [136] per Lord Walker of Gestingthorpe; and *Siebe Gorman & Co Ltd v Barclays Bank Ltd* (which part of the judgment was not overruled by the House of Lords in *In re Spectrum Plus Ltd (in liquidation)*). If the terms of the debenture were such as to require the trader to segregate its book debts and to pay all that are collected into the bank and to prohibit the trader from drawing on the account (so that the account is blocked), a charge on debts, described as a fixed or specific charge, would indeed take effect as such over present or future book debts: see *Re Keenan Bros Ltd* [1986] BCLC 242, Ir SC, followed in *William Gaskell Group Ltd v Highley (Nos 1, 2, 3)* [1994] 1 BCLC 197. In those circumstances, the chargee would be in control, prior to crystallisation, and the trader would be unable to trade in the ordinary way without the chargee's positive concurrence: see *In re Spectrum Plus Ltd (in liquidation)* at [140] per Lord Walker of Gestingthorpe. It is not enough to provide in the debenture for an account to be blocked, if it was not in fact operated as a blocked account, but it is not inconsistent with the fixed nature of a charge on book debts for the holder of the charge to appoint the company its agent to collect the debts for its account and on its behalf: *Agnew v IRC* [2001] UKPC 28 at [48], [2001] 2 AC 710 at [48], [2001] 2 BCLC 188 at [48] per Lord Millett. See also *Re CCG International Enterprises Ltd* [1993] BCLC 1428 (debenture created fixed charge over the proceeds of insurance policies); *Re Beam Tube Products Ltd, Fanshaw v Amav Industries Ltd* [2006] EWHC 486 (Ch), [2007] 2 BCLC 732 (security created by debenture did not provide for blocked account; its scheme was that the proceeds of all book and other debts should be subject to a floating charge). As to the meaning of 'debenture' see PARA 1299.

7 *Oakdale (Richmond) Ltd v National Westminster Bank plc* [1997] 3 CMLR 815, [1997] 1 BCLC 63 (the debenture's restrictions were necessary to make the fixed charge over book debts effective and to protect the bank's position). As to the competition rules that exist within the framework of the EC Treaty (ie the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see **COMPETITION** vol 18 (2009) PARA 24 et seq.

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1271. Effect of floating charge.

A floating security being only a charge on the assets for the time being¹, the company may in the ordinary course of its business², unless it is otherwise agreed and until the security becomes fixed, sell³, let, mortgage⁴, or otherwise deal with⁵ any of its assets, just as if the floating charge had not been created⁶. It follows that, if the company enters into a specifically enforceable agreement to sell land, the subsequent crystallisation of the charge will not afford a defence to a claim by the purchaser for specific performance of that agreement⁷. Where a company has created a floating charge on its undertaking and assets and has reserved power to mortgage its property, it cannot in general create another general floating charge over all the assets to rank in priority to, or *pari passu* with, the first floating charge⁸; but, where the company has reserved power to charge specified assets, it may create a floating charge on those assets in priority to the general floating charge⁹.

Each asset within the scope of the floating charge must be regarded as equitably assigned to the debenture holder by way of charge as soon as it comes into the ownership of the company,

so that, if such asset is a debt, no right of set-off of any subsequently acquired debt could defeat the debenture holder's interest¹⁰. However, where necessary, property subject to a floating charge must be used to fund the general expenses of winding up in priority to the floating charge holder and is subject to any preferential creditors to be paid out of that property¹¹. In relation to a charge which is a floating charge on its creation and which is created after 15 September 2003¹², realisations from such a charge are a prescribed part of the company's net property that must be made available for the satisfaction of unsecured debts¹³.

Even before a floating security becomes fixed or 'crystallised', the debenture holders are entitled to an injunction to restrain the company from parting with its assets otherwise than in the ordinary course of its business, as, for example, when, with a view to its ceasing to be going concern, it agrees to sell all its property¹⁴. Where a floating charge is held over the company's assets and undertakings and void dispositions of the company's property are made¹⁵, that property remains subject to the charge¹⁶.

The administrator of a company¹⁷ may dispose of or take action relating to property which is subject to a floating charge as if it were not subject to the charge¹⁸.

1 As to the meaning of 'floating security' see PARA 1269.

2 As to what acts or payments are considered to come within the ordinary course of business see *Willmott v London Celluloid Co* (1886) 34 ChD 147, CA; *Re Hubbard & Co Ltd, Hubbard v Hubbard & Co Ltd* (1898) 68 LJ Ch 54; *Re HH Vivian & Co Ltd, Metropolitan Bank of England and Wales Ltd v HH Vivian & Co Ltd* [1900] 2 Ch 654; *Cox Moore v Peruvian Corp'n Ltd* [1908] 1 Ch 604; *Hamer v London, City and Midland Bank Ltd* (1918) 87 LJKB 973. Cf *Re Borax Co, Foster v Borax Co* [1901] 1 Ch 326, CA; *Re Old Bushmills Distillery Co, ex p Brett* [1897] 1 IR 488, CA; *Wallace v Evershed* [1899] 1 Ch 891; *Cox v Dublin Distillery Co* [1906] 1 IR 446. There may be a right of set-off while the charge floats: *Edward Nelson & Co Ltd v Faber & Co* [1903] 2 KB 367. The rights of a contractor under a hire purchase agreement entered into prior to the creation of a floating charge take priority over the charge: *Re Samuel Allen & Sons Ltd* [1907] 1 Ch 575; *Re Morrison, Jones and Taylor Ltd* [1914] 1 Ch 50, CA. A purchaser to whom the property has passed under the Sale of Goods Act 1979 is entitled to goods purchased as against a receiver subsequently appointed, even though the purchaser has not taken the goods from the company's premises: see *Hamer v London, City and Midland Bank Ltd*.

3 *Re HH Vivian & Co Ltd, Metropolitan Bank of England and Wales Ltd v HH Vivian & Co Ltd* [1900] 2 Ch 654. A purchaser from a company of land subject to a charge expressed to be a floating security until default in payment is entitled to evidence that there has been no default: *Re Horne and Hellard* (1885) 29 ChD 736.

4 *Re Florence Land and Public Works Co, ex p Moor* (1878) 10 ChD 530, CA; *Re Hamilton's Windsor Ironworks Co* (1879) 12 ChD 707; *Ward v Royal Exchange Shipping Co, ex p Harrison* (1887) 58 LT 174; *Re Hubbard & Co Ltd, Hubbard v Hubbard & Co Ltd* (1898) 68 LJ Ch 54. The priority of a specific mortgage of a chose (or thing) in action over a floating charge on it is not displaced by notice by the receiver for the debenture holders of his appointment: *Re Ind, Coope & Co Ltd* [1911] 2 Ch 223.

5 See *George Barker (Transport) Ltd v Eynon* [1974] 1 All ER 900, [1974] 1 WLR 462, CA (creation of inchoate contractual right which crystallised after security became fixed).

6 *Robson v Smith* [1895] 2 Ch 118 at 124 per Romer J; *Biggerstaff v Rowatt's Wharf Ltd* [1896] 2 Ch 93 at 103, CA, per Lopes LJ. This is so even if the charge is described as a first charge: *Wheatley v Silkstone and Haigh Moor Coal Co* (1885) 29 ChD 715; *Cox Moore v Peruvian Corp'n Ltd* [1908] 1 Ch 604. An express power to carry on business until default does not give creditors who have supplied goods any priority: *Re Anglo-American Leather Cloth Co Ltd* (1880) 43 LT 43, CA.

7 *Freevale Ltd v Metrostore (Holdings) Ltd* [1984] Ch 199, [1984] 1 All ER 495 (specific performance against company after appointment of receiver of contract made in ordinary course of business before appointment). As to when a floating charge crystallises see PARA 1273.

8 *Smith v English and Scottish Mercantile Investment Trust Ltd* (1896) 40 Sol Jo 717; *Re Benjamin Cope & Sons Ltd* [1914] 1 Ch 800 (explained and approved in *Re Automatic Bottle Makers* [1926] Ch 412, CA).

9 *Re Automatic Bottle Makers* [1926] Ch 412, CA.

10 *NW Robbie & Co Ltd v Witney Warehouse Co Ltd* [1963] 3 All ER 613, [1963] 1 WLR 1324, CA (debt sought to be set off assigned to party fixed with knowledge of appointment of receiver); *Lynch v Ardmore Studios (Ireland) Ltd* [1966] IR 133 (similar principle). Cf *Rother Iron Works Ltd v Canterbury Precision Engineers*

Ltd [1974] QB 1, [1973] 1 All ER 394, CA (debt owed by company before appointment of receiver set off against subsequent debt). Similarly, the debenture holder is entitled to the moneys due in respect of the debt, even if actually received by the company after crystallisation without regard to the Insolvency Act 1986 s 127 (avoidance of dispositions of property after commencement of winding up: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 700): *Re Margart Pty Ltd, Hamilton v Westpac Banking Corp* [1985] BCLC 314, NSW SC.

11 See the Insolvency Act 1986 s 176ZA (added by the Companies Act 2006 s 1282). This provision reverses the effect of the decision in *Buchler v Talbot* [2004] UKHL 9, [2004] 2 AC 298, [2004] 1 All ER 1289 (assets comprised in the floating charge belong to the charge holder to the extent of the security and, if administered by a receiver, the expenses of the receivership are borne by those assets but the proceeds of the assets comprised in a floating charge are not available to meet the expenses of a winding up which must be borne by the company's free assets), which overruled *Re Barleycorn Enterprises Ltd, Mathias and Davies (a firm) v Down* [1970] Ch 465, [1970] 2 All ER 155, CA (distinguished in *Re MC Bacon Ltd* [1991] Ch 127, [1990] BCLC 607). See also PARA 1334; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 810. As to preferential debts and claims see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 763 et seq.

12 Ie the date on which the Insolvency Act 1986 s 176A had effect: see the Enterprise Act 2002 (Commencement No 4 and Transitional Provisions and Savings) Order 2003, SI 2003/2093, art 2(1), Sch 1; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 773.

13 See the Insolvency Act 1986 s 176A(2), (6), (9); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 773.

14 *Hubbuck v Helms* (1887) 56 LJ Ch 536. However, see *Re HH Vivian & Co Ltd, Metropolitan Bank of England and Wales Ltd v HH Vivian & Co Ltd* [1900] 2 Ch 654 (sale of a branch business); *Re Borax Co, Foster v Borax Co* [1901] 1 Ch 326, CA (where nearly the whole assets were sold, but the company continued business as the holders of shares).

15 Ie void under the Insolvency Act 1986 s 127 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 700).

16 *Merton v Hammond Suddards* [1996] 2 BCLC 470.

17 As to administrators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 158 et seq.

18 See the Insolvency Act 1986 s 8, Sch B1 para 70(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 357. Where property is disposed of in reliance on Sch B1 para 70(1), the holder of the floating charge will have the same priority in respect of acquired property (ie property of the company which directly or indirectly represents the property disposed of) as he had in respect of the property disposed of: see Sch B1 para 70(2), (3); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 357.

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1272. Restrictions on operation of floating charge.

It is usual to qualify the operation of a floating security¹ by providing that the company shall not create a mortgage or charge on all or any of the assets, ranking in priority to or *pari passu* with the charge given by the debentures². The mere existence of such a restriction in a debenture containing a specific charge on certain assets does not enable a floating charge on the remaining assets to be implied³.

Such a restriction does not prevent a solicitor from acquiring a lien having priority over the floating charge⁴; or a mortgagee of an insurance policy, without notice of such provision, from acquiring priority by giving notice to the insurance company⁵; or a person without notice from acquiring a charge on specific property in priority to the debentures⁶. This restriction does not prevent a vendor who leaves the purchase price of property acquired from him by the company

on mortgage from obtaining priority for that mortgage⁷, or a lender who provides the purchase price of property acquired by the company in consideration of a first mortgage from obtaining priority for that mortgage⁸.

Similarly, where a specific mortgagee, being a bank, knows that debentures have been issued, and even holds some of the same series as security for an account of another company, the bank is not affected with notice of the restriction⁹ and the registration of particulars of debentures pursuant to the Companies Act 2006, or earlier Acts¹⁰, although it amounts to constructive notice of the debentures, does not amount to constructive notice of the restriction, at any rate where particulars of the restriction are not also registered¹¹.

Where such a restriction exists, and a company transfers goods to creditors at a fair price to find money to carry on the company's business, then, even though the creditors are not dealers in such goods, the transaction will be held to be a sale and not an infringement of the restriction, provided that the transfer is an out and out sale¹².

1 As to the meaning of 'floating security' see PARA 1269.

2 See PARA 1271.

3 *Grigson v Taplin & Co* (1915) 85 LJ Ch 75.

4 *Brunton v Electrical Engineering Corpn* [1892] 1 Ch 434.

5 *English and Scottish Mercantile Investment Co v Brunton* [1892] 2 QB 700, CA.

6 *Re Castell and Brown Ltd, Roper v Castell and Brown Ltd* [1898] 1 Ch 315. Cf *Re Woodroffes (Musical Instruments) Ltd* [1986] Ch 366, [1985] 2 All ER 908 (express postponement of second charge).

7 *Wilson v Kelland* [1910] 2 Ch 306.

8 *Re Connolly Bros Ltd (No 2), Wood v Connolly Bros Ltd* [1912] 2 Ch 25, CA. See also *Security Trust Co v Royal Bank of Canada* [1976] AC 503, [1976] 1 All ER 381, PC.

9 *Re Valletort Sanitary Steam Laundry Co Ltd, Ward v Valletort Sanitary Steam Laundry Co Ltd* [1903] 2 Ch 654.

10 As to registration see PARA 1279.

11 *Re Standard Rotary Machine Co Ltd* (1906) 95 LT 829 at 834; *Wilson v Kelland* [1910] 2 Ch 306; *G and T Earle Ltd v Hemsworth RDC* (1928) 44 TLR 605 (affd 44 TLR 758, CA). In the case of a land charge for securing money created by a company before 1 January 1970 or so created at any time as a floating charge, registration under the Companies (Consolidation) Act 1908 s 93 (repealed), the Companies Act 1929 s 79 (repealed), the Companies Act 1948 s 95 (repealed) or the Companies Act 1985 ss 395-398 (repealed) and the Companies Act 2006 Pt 25 (ss 860-894) (see PARA 1277 et seq) and regulations made under s 1052 (overseas companies) (see PARA 1833) was or is sufficient in place of registration under the Land Charges Act 1972, and had or has effect as if the land charge had been registered under the Land Charges Act 1972: s 3(7), (8) (amended by the Companies Consolidation (Consequential Provisions) Act 1985 s 30, Sch 2; the Companies Act 1989 s 107, Sch 16 para 1(3); and SI 2009/1941); and see *Property Discount Corpn v Lyon Group Ltd* [1981] 1 All ER 379, [1981] 1 WLR 300, CA. The registration of any instrument or matter in any register kept under the Land Charges Act 1972 or any local land charges register is deemed to constitute actual notice of such instrument or matter, and of the fact of such registration, to all persons and for all purposes connected with the land affected: see the Law of Property Act 1925 s 198(1); and **EQUITY** vol 16(2) (Reissue) PARA 577. It appears that these provisions do not alter the effect of the cases cited above.

12 *Re Old Bushmills Distillery Co, ex p Brett* [1897] 1 IR 488, CA.

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1273. When floating charge becomes fixed: crystallisation.

If the company ceases its business¹ (but not if it ceases to be a going concern, in so far as there is any difference)² or if it is wound up, or if a receiver is appointed, the security ceases to be a floating security and becomes a fixed charge³, and the company cannot thereafter deal with any part of the property so charged except subject to the charge⁴. It does not, however, automatically crystallise on the crystallisation of a subsequent floating charge⁵.

Where the security merely provides that the company is at liberty to deal with the property charged until the happening of a specified event, the security continues to be a floating one after the happening of that event until a receiver is appointed or until the company goes into liquidation⁶. The mere application for a receiver to be appointed is not sufficient to affect the company's power of disposition⁷. The parties to a charge may make provision for the floating charge to become fixed or to 'crystallise' on the happening of a defined event⁸.

1 *Governments Stock and other Securities Investment Co v Manila Rly Co* [1897] AC 81 at 86, HL, per Lord MacNaghten; *Hubbuck v Helms* (1887) 56 LJ Ch 536; *Robson v Smith* [1895] 2 Ch 118; *Re Victoria Steamboats Ltd*, *Smith v Wilkinson* [1897] 1 Ch 158; *Davey & Co v Williamson & Sons Ltd* [1898] 2 QB 194; *Re Yorkshire Woolcombers' Association Ltd* [1903] 2 Ch 284, CA (affd on another point sub nom *Illingworth v Holdsworth* [1904] AC 355, HL); *Edward Nelson & Co v Faber & Co* [1903] 2 KB 367; *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979, CA; *Re Crompton & Co Ltd* [1914] 1 Ch 954; *Re Woodroffes (Musical Instruments) Ltd* [1986] Ch 366, [1985] 2 All ER 908; *National Westminster Bank plc v Jones* [2001] EWCA Civ 1541, [2002] 1 BCLC 55.

2 *Re Woodroffes (Musical Instruments) Ltd* [1986] Ch 366, [1985] 2 All ER 908.

3 The priority accorded to the charge is determined by the fact that it is a floating charge for the purposes of the Insolvency Act 1986 (see s 251; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 862), meaning a charge which as created was a floating charge (ie even if it becomes a fixed charge upon crystallisation).

4 *Governments Stock and other Securities Investment Co v Manila Rly Co* [1897] AC 81, HL; *Re Panama, New Zealand and Australian Royal Mail Co* (1870) 5 Ch App 318; *Hodson v Tea Co* (1880) 14 ChD 859; *Wallace v Universal Automatic Machines Co* [1894] 2 Ch 547, CA; *Re Horne and Hellard* (1885) 29 ChD 736 (where the charge was to be a floating charge until default). As to the appointment of a receiver by the court where the security is in jeopardy see PARA 1362. Notice of the appointment should be given to the persons carrying on the company's business: see *Re Arauco Co Ltd* (1898) 79 LT 336.

5 *Re Woodroffes (Musical Instruments) Ltd* [1986] Ch 366, [1985] 2 All ER 908 (decided under the Companies Act 1948 (repealed)).

6 *Governments Stock and other Securities Investment Co v Manila Rly Co* [1897] AC 81, HL; *Biggerstaff v Rowatt's Wharf Ltd* [1896] 2 Ch 93, CA; *Edward Nelson & Co v Faber & Co* [1903] 2 KB 367; *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979, CA.

7 *Re Hubbard & Co Ltd*, *Hubbard v Hubbard & Co Ltd* (1898) 68 LJ Ch 54.

8 *Re Brightlife Ltd* [1987] Ch 200, [1986] 3 All ER 673, following *Re Manurewa Transport Ltd* [1971] NZLR 909.

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1274. Effect of floating charge becoming fixed.

When a floating security¹ upon all the property or assets of the company becomes fixed, it constitutes a charge upon all the property or assets then belonging to the company. It has priority over any subsequent equitable charges² and over unsecured creditors³. Where necessary, property subject to a floating charge must be used to fund the general expenses of winding up in priority to the floating charge holder and is subject to any preferential creditors to be paid out of that property⁴. In relation to a charge which is a floating charge on its creation and which is created after 15 September 2003⁵, realisations from such a charge are a prescribed part of the company's net property that must be made available for the satisfaction of unsecured debts⁶.

A floating charge on all the undertaking and property of a company including uncalled capital constitutes a charge on money recovered by a liquidator in misfeasance proceedings⁷ as well as on calls got in by him⁸.

1 As to the meaning of 'floating security' see PARA 1269.

2 See PARA 1273.

3 *Re Marine Mansions Co* (1867) LR 4 Eq 601; *Panama, New Zealand and Australian Royal Mail Co* (1870) 5 Ch App 318; *Re Anglo-American Leather Cloth Co Ltd* (1880) 43 LT 43, CA; *Re General South American Co* (1876) 2 ChD 337, CA.

4 See the Insolvency Act 1986 s 176ZA; and PARA 1271 note 11. As to preferential debts and claims see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 763 et seq.

5 The date on which the Insolvency Act 1986 s 176A had effect: see the Enterprise Act 2002 (Commencement No 4 and Transitional Provisions and Savings) Order 2003, SI 2003/2093, art 2(1), Sch 1; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 773.

6 See the Insolvency Act 1986 s 176A(2), (6), (9); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 773.

7 As to such proceedings see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688 et seq.

8 *Re Anglo-Austrian Printing and Publishing Union, Brabourne v Anglo-Austrian Printing and Publishing Union* [1895] 2 Ch 891; *Re Regent's Canal Ironworks Co, ex p Grissell* (1875) 3 ChD 411, CA. Contrast recoveries under the Insolvency Act 1986 s 214 (wrongful trading: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 914), s 238 (transactions at an undervalue: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 843 et seq), s 239 (preferences: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 846 et seq). See *Lewis v IRC* [2001] 3 All ER 499, sub nom *Re Floor Fourteen Ltd, Lewis v IRC* [2001] 2 BCLC 392, CA; *Re Oasis Merchandising Services, Ward v Aitkin* [1998] Ch 170, [1997] 1 All ER 1009, CA; *Re MC Bacon Ltd (No 2)* [1991] Ch 127, [1990] BCLC 607; *Re Yagerphone Ltd* [1935] Ch 392.

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1275. Effect of attachment of debts.

Where, after a judgment creditor has obtained and served on a company a third party debt order attaching debts due from the company to the judgment debtor¹, the company borrows money on the security of a debenture comprising all its assets, and execution is then levied to enforce the attachment on its goods, the title of a receiver subsequently appointed under the debenture prevails². Where judgment is obtained against a company and the judgment creditor serves a third party debt order on a person owing the company a debt which is at the time subject to a floating charge in a debenture, the title of the debenture holder prevails over that

of the creditor, even though his receiver is appointed after the service of the order³, and the receiver's title prevails even if the third party debt order is made absolute before he is appointed⁴, unless the money has been actually paid over under the order⁵; and, even if debentures are irregularly issued, the rights of the holder, if he had no notice of the irregularity, prevail over those of an execution creditor⁶. The court will not, however, restrain an execution from proceeding or refuse to make a third party debt order unless the debenture holder takes some step to turn his security from a floating into a fixed charge⁷.

1 As to third party debt orders (formerly 'garnishee orders') see CPR Pt 72; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1411-1430.

2 *Geisse v Taylor* [1905] 2 KB 658.

3 *Norton v Yates* [1906] 1 KB 112; *Re Combined Weighing and Advertising Machine Co* (1889) 43 ChD 99, CA. Cf *Robson v Smith* [1895] 2 Ch 118; *Re Watt, ex p Joselyne* (1878) 8 ChD 327 at 330, CA, per James LJ.

4 *Cairney v Back* [1906] 2 KB 746 (where the money claimed was paid into court).

5 *Robson v Smith* [1895] 2 Ch 118, as explained in *Norton v Yates* [1906] 1 KB 112 at 123 per Warrington J.

6 *Duck v Tower Galvanizing Co* [1901] 2 KB 314.

7 *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979, CA (explaining *Re Standard Manufacturing Co* [1891] 1 Ch 627, CA; *Re Opera Ltd* [1891] 3 Ch 260, CA; *Davey & Co v Williamson & Sons* [1898] 2 QB 194; *Re London Pressed Hinge Co Ltd* [1905] 1 Ch 576 (on the grounds that in all those cases either the charge had crystallised or steps had been taken with that object); and overruling dicta in *Cairney v Back* [1906] 2 KB 746). See also *Simultaneous Colour Printing Syndicate v Foweraker* [1901] 1 KB 771; *Taunton v Sheriff of Warwickshire* [1895] 2 Ch 319, CA. A receiver seeking to oust the execution creditor must prove the validity of his appointment: *Kasofsky v Kreegers* [1937] 4 All ER 374. See **CIVIL PROCEDURE** vol 12 (2009) PARA 1597.

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1276. Effect of execution or distress.

Where, after giving a floating charge on all its property, a company has its goods seized under a writ of fieri facias¹ and, either with or without an arrangement with the execution creditor, pays to the sheriff daily a sum out of its daily takings to avoid a sale and to enable the business to go on, a receiver subsequently appointed on behalf of debenture holders is not entitled to the moneys so received even where they remain in the sheriff's hands².

1 As to writs of fieri facias see **CIVIL PROCEDURE** vol 12 (2009) PARAS 1266, 1273 et seq.

2 *Robinson v Burnell's Vienna Bakery Co* [1904] 2 KB 624; *Heaton and Dugard Ltd v Cutting Bros Ltd* [1925] 1 KB 655.

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(iii) Registration of Company Charges

A. REQUIREMENT TO REGISTER

1277. Requirement to register charges created by company.

A company¹ that creates a charge² that is required to be registered³ must deliver the prescribed particulars⁴ of the charge, together with the instrument (if any) by which the charge is created or evidenced, to the registrar of companies⁵ for registration before the end of the period allowed for registration⁶. The registration of such a charge may instead be effected on the application of any person interested in it⁷; and where registration is effected on the application of some person other than the company, that person is entitled to recover from the company the amount of any fees properly paid by him to the registrar on registration⁸.

If a company fails to comply with this requirement to register a charge⁹, an offence is committed by the company, and by any officer of the company who is in default¹⁰; a person guilty of such an offence is liable (on conviction on indictment) to a fine or (on summary conviction) to a fine not exceeding the statutory maximum¹¹.

Where any commission, allowance or discount has been paid or made either directly or indirectly by a company to a person in consideration of his subscribing or agreeing to subscribe (whether absolutely or conditionally) for debentures in a company¹², or in consideration of his procuring or agreeing to procure subscriptions (whether absolute or conditional) for such debentures¹³, the particulars that are required to be sent for registration¹⁴ must include particulars as to the amount (or rate per centage) of the commission, discount or allowance so paid or made¹⁵. However, a failure to comply with this requirement¹⁶ does not affect the validity of the debentures issued¹⁷.

1 In the Companies Act 2006 Pt 25 Ch 1 (ss 860-877) (Company Charges: Companies registered in England and Wales or in Northern Ireland), 'company' means a company registered in England and Wales or in Northern Ireland: s 861(5). As to the meanings of 'England' and 'Wales' see PARA 1 note 5. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to company registration under the Companies Act 2006 see PARA 111 et seq. As to company charges relating to companies registered in Scotland see Pt 25 Ch 2 (ss 878-892); and see PARAS 1282, 1283. As to the registration of charges by overseas companies see the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, SI 2009/1917; and PARAS 1825, 1833.

The Secretary of State may by regulations under the Companies Act 2006 s 894 amend Pt 25 (ss 860-894) by altering, adding or repealing provisions, and make consequential amendments or repeals in the Companies Act 2006 or any other enactment (whether passed or made before or after the Companies Act 2006): s 894(1). As to the meaning of 'enactment' see PARA 17 note 2. As to the Secretary of State see PARA 6. Regulations under s 894 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): see ss 894(2), 1290. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. At the date at which this volume states the law, no such regulations had been made under s 894.

2 In the Companies Act 2006 Pt 25 Ch 1, 'charge' includes mortgage: s 861(5). As to when a charge is created see PARA 1278.

3 I.e. a charge to which the Companies Act 2006 s 860 applies (as to which see PARA 1279): see s 860(1). As to charges on existing property see PARA 1280; and as to charges in other jurisdictions see PARAS 1282, 1283.

4 In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. In exercise of the powers conferred by s 860, the Secretary of State has made the Companies (Particulars of Company Charges) Regulations 2008, SI 2008/2996. Accordingly, the prescribed particulars for the purposes of the Companies Act 2006 s 860(1) are:

2170 (1) the date of the creation of the charge (Companies (Particulars of Company Charges) Regulations 2008, SI 2008/2996, reg 2(a));

- 2171 (2) a description of the instrument (if any) creating or evidencing the charge (reg 2(b));
- 2172 (3) the amount secured by the charge (reg 2(c));
- 2173 (4) the name and address of the person entitled to the charge (reg 2(d)); and
- 2174 (5) short particulars of the property charged (reg 2(e)).

5 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

6 Companies Act 2006 s 860(1). As to the period allowed for registration see PARA 1286. As to the consequences of a failure to register charges created by a company see PARA 1294. The contents of any instrument creating or evidencing a charge and delivered to the registrar under s 860 must not be made available by the registrar of companies for public inspection: see s 1087(1)(h); and PARA 150.

7 Companies Act 2006 s 860(2).

8 Companies Act 2006 s 860(3). As to the fees payable for registration of a charge under Pt 25 Ch 1 see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(g).

9 If it fails to comply with the Companies Act 2006 s 860(1) (see the text and notes 1-6): see s 860(4). However, s 860(4) does not apply if registration of the charge has been effected on the application of some other person (see the text and notes 7-8): s 860(6).

10 Companies Act 2006 s 860(4). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

11 Companies Act 2006 s 860(5). As to the meaning of the 'statutory maximum' see PARA 1622.

12 Companies Act 2006 s 864(1)(a). As to the meaning of 'debenture' see PARA 1299. As to the registration requirements of a series of debentures see PARA 1281.

13 Companies Act 2006 s 864(1)(b).

14 If it under the Companies Act 2006 s 860 (see the text and notes 1-6): see s 864(1).

15 Companies Act 2006 s 864(1). The deposit of debentures as security for a debt of the company is not, for the purposes of s 864, treated as the issue of debentures at a discount: s 864(2).

16 If it with the Companies Act 2006 s 864 (see the text and notes 12-15): see s 864(3).

17 Companies Act 2006 s 864(3).

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1278. When a charge is created.

A charge¹ is created when it is executed². However, where, under an agreement to issue debentures³, a company⁴ has sealed some debentures, but has not registered them within 21 days, it may cancel them and issue to the lender other debentures, which are valid, if registered within 21 days⁵ after they were sealed⁶.

1 As to the meaning of 'charge' for the purposes of registration see PARA 1277 note 2.

2 *Re Spiral Globe Ltd (No 2)*, *Watson v Spiral Globe Ltd* [1902] 2 Ch 209; *Re New London and Suburban Omnibus Co*, *Appleyard v New London and Suburban Omnibus Co* [1908] 1 Ch 621; *Esberger & Son Ltd v Capital and Counties Bank* [1913] 2 Ch 366; *Re Columbian Fireproofing Co* [1910] 2 Ch 120, CA; *Re Olderfleet Shipbuilding and Engineering Co Ltd* [1922] 1 IR 26; *Transport and General Credit Corp v Morgan* [1939] Ch 531, [1939] 2 All ER 17.

3 As to the meaning of 'debentures' see PARA 1299.

4 As to the meaning of 'company' for the purposes of registration see PARA 1277 note 1.

5 See PARA 1281.

6 *Re N Defries & Co Ltd*, *Bowen v N Defries & Co Ltd* [1904] 1 Ch 37.

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1279. Charges required to be registered.

Every charge¹ falling under the following heads, created² by a company³, is required to be registered⁴ with the registrar of companies⁵:

- 546 (1) a charge on land or any interest in land⁶, other than a charge for any rent or other periodical sum issuing out of the land⁷;
- 547 (2) a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale⁸;
- 548 (3) a charge for the purpose of securing any issue of debentures⁹;
- 549 (4) a charge on uncalled share capital of the company¹⁰;
- 550 (5) a charge on calls made but not paid¹¹;
- 551 (6) a charge on book debts of the company¹²;
- 552 (7) a floating charge¹³ on the undertaking¹⁴ or property¹⁵ of the company¹⁶;
- 553 (8) a charge on a ship or aircraft, or any share in a ship¹⁷;
- 554 (9) a charge on goodwill or any intellectual property¹⁸.

1 For these purposes, 'charge' includes mortgage (see PARA 1277 note 2), but does not include a charging order imposed under the Charging Orders Act 1979 s 1 (see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 636): *Re Overseas Aviation Engineering (GB) Ltd* [1963] Ch 24, [1962] 3 All ER 12, CA. The provisions relating to registration of charges cannot be evaded by making what is in fact a mortgage or charge in form an absolute assignment: *Re Kent and Sussex Sawmills Ltd* [1947] Ch 177, [1946] 2 All ER 638. Cf *Lloyds and Scottish Finance Ltd v Prentice* (1977) 121 Sol Jo 847, CA; affd sub nom *Lloyds and Scottish Finance Ltd v Cyril Lord Carpets Sales Ltd* (1979) [1992] BCLC 609, HL (assignment construed as absolute). As to the registration of charges by overseas companies see the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, SI 2009/1917; and PARAS 1825, 1833. As to charges on existing property see PARA 1280; and as to charges in other jurisdictions see PARAS 1282, 1283.

2 Whether the parties have created a charge is a matter of construction. A charge such as an unpaid vendor's lien which arises by operation of law is not 'created' within the meaning of these provisions: *London and Cheshire Insurance Co Ltd v Laplagrene Property Co Ltd* [1971] Ch 499, [1971] 1 All ER 766. As to the time of creation see PARA 1278. In the case of the usual arrangement of a conveyance of property where part of the consideration is left outstanding on mortgage, the charge is created after the conveyance and accordingly falls within these provisions: *Capital Finance Co Ltd v Stokes* [1969] 1 Ch 261, [1968] 3 All ER 625, CA.

3 As to the meaning of 'company' for the purposes of registration see PARA 1277 note 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 le under the Companies Act 2006 s 860: see PARA 1277. As to the requirement to register charges created by a company see PARA 1277.

5 See the Companies Act 2006 s 860(7). The provisions of s 860 (see PARA 1277) apply to the charges listed in heads (1) to (9) in the text: see s 860(7). As to the fees payable for registration of a charge under Pt 25 Ch 1 (ss 860-877) see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(g). As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the power of the Secretary of State by regulations to amend the Companies Act 2006 Pt 25 (ss 860-894) see s 894; and PARA 1277 note 1.

6 The holding of debentures entitling the holder to a charge on land is not, for the purposes of the Companies Act 2006 s 860(7)(a), an interest in the land: s 861(1). As to the meaning of 'debentures' see PARA 1299. It is immaterial for the purposes of Pt 25 Ch 1 (ss 860-877) (Company Charges: Companies registered in England and Wales or in Northern Ireland) where land subject to a charge is situated: s 861(2).

7 Companies Act 2006 s 860(7)(a). This does not include an unpaid vendor's lien arising by operation of law: *London and Cheshire Insurance Co Ltd v Laplagrene Property Co Ltd* [1971] Ch 499, [1971] 1 All ER 766. See also *Re Wallis & Simmonds (Builders) Ltd* [1974] 1 All ER 561, [1974] 1 WLR 391 (deposit of title deeds to secure debt owed by third party created equitable charge void against liquidator of depositor company for want of registration). A contract to create, in a particular event, a legal charge is not registrable as it does not create a present equitable right to a security, but is merely an agreement that in some future circumstance a security will be created: *Williams v Burlington Investments Ltd* (1977) 121 Sol Jo 424, HL; *Re Gregory Love & Co* [1916] 1 Ch 203. Cf *Re Jackson and Bassford Ltd* [1906] 2 Ch 467 (agreement creating present security interest registrable). The exception of a charge for rent or a periodical sum issuing out of land was introduced by the Companies Act 1948; and by s 458(1) (repealed) the equivalent provisions of earlier Companies Acts were to be deemed never to have applied to such a charge.

In the case of a land charge for securing money created by a company before 1 January 1970 or so created at any time as a floating charge, registration under the Companies (Consolidation) Act 1908 s 93 (repealed), the Companies Act 1929 s 79 (repealed), the Companies Act 1948 s 95 (repealed) or the Companies Act 1985 ss 395-398 (repealed) and the Companies Act 2006 Pt 25 (ss 860-894) (see PARA 1277 et seq) and regulations made under s 1052 (overseas companies) (see PARA 1833) was or is sufficient in place of registration under the Land Charges Act 1972, and had or has effect as if the land charge had been registered under the Land Charges Act 1972: s 3(7), (8) (amended by the Companies Consolidation (Consequential Provisions) Act 1985 s 30, Sch 2; the Companies Act 1989 s 107, Sch 16 para 1(3); and SI 2009/1941). All other charges require registration under both Acts. As to compensation for loss due to undisclosed land charges see the Law of Property Act 1969 s 25; and **LAND CHARGES** vol 26 (2004 Reissue) PARA 617. For a discussion of the relationship between registration of a charge under these provisions and the Land Charges Act 1972 where the registration of an equitable charge was not effected in the name of the owner of the underlying legal estate see *Property Discount Corpn Ltd v Lyon Group Ltd* [1981] 1 All ER 379, [1981] 1 WLR 300, CA.

8 Companies Act 2006 s 860(7)(b). It is not sufficient that the instrument, if executed by an individual, would require registration as a bill of sale if it does not also create a charge: *Stoneleigh Finance Ltd v Phillips* [1965] 2 QB 537, [1965] 1 All ER 513, CA (sale of property which did not leave vendor's possession). As to the requirement for every security bill of sale to be registered under the Bills of Sale Act 1878 see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1754 et seq.

9 Companies Act 2006 s 860(7)(c). As to the issue and reissue of debentures see PARA 1312 et seq.

10 Companies Act 2006 s 860(7)(d). As to the meaning of 'uncalled share capital' see PARA 1048 note 11. As to the meaning of 'share capital' see PARA 1045. As to the meanings of 'company having a share capital' and 'share' see PARA 1042. As to how, and the extent to which, uncalled capital may be incumbered see PARAS 1265-1266.

11 Companies Act 2006 s 860(7)(e). As to calls on share capital see PARA 1132 et seq.

12 Companies Act 2006 s 860(7)(f). The deposit by way of security of a negotiable instrument given to secure the payment of book debts is not, for the purposes of s 860(7)(f), a charge on those book debts: s 861(3). As to charges on book debts see PARA 1270. There must be a book debt in existence and included in the contract at the date the charge is created: *Paul & Frank Ltd v Discount Bank (Overseas) Ltd and Board of Trade* [1967] Ch 348, [1966] 2 All ER 922. As to what constitutes a charge on book debts see *Ladenburg & Co v Goodwin, Ferreira & Co Ltd and Garnett* [1912] 3 KB 275; *Saunderson & Co v Clark* (1913) 29 TLR 579; *Re Law, Car and General Insurance Corpn Ltd* (1911) 55 Sol Jo 407 (affd [1911] WN 101, CA); *Re David Allester Ltd* [1922] 2 Ch 211; *Re George Inglefield Ltd* [1933] Ch 1, CA; *Ashby, Warner & Co Ltd v Simmons* [1936] 2 All ER 697, CA; *Re Kent and Sussex Sawmills Ltd* [1947] Ch 177, [1946] 2 All ER 638; *Re Brush Aggregates Ltd* [1983] BCLC 320; *Re Charge Card Services Ltd* [1987] Ch 150, [1986] 3 All ER 289 (affd on other grounds [1989] Ch 497, [1988] 3 All ER 702, CA); *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150, [1987] BCLC 522 (retention of title clause). Cf *Shipley v Marshall* (1863) 14 CBNS 566; applied in *Independent Automatic Sales Ltd v Knowles and Foster* [1962] 3 All ER 27, [1962] 1 WLR 974 (where it was held

that a deposit of hire purchase agreements with a finance company to secure a loan was registrable as constituting a charge on book debts).

A company may charge a deposit which it has with a bank: *Re Bank of Credit and Commerce International (No 8)* [1998] AC 214, [1997] 4 All ER 568, HL. Cf *Re Charge Card Services Ltd* [1989] Ch 497, [1988] 3 All ER 702, CA; *Tam Wing Chuen v Bank of Credit and Commerce International Hong Kong Ltd (in liquidation)* [1996] 2 BCLC 69, PC. However, a balance at a bank is not normally a book debt: *Re Brightlife Ltd* [1987] Ch 200, [1986] 3 All ER 673; *Northern Bank Ltd v Ross* [1991] BCLC 504, NI CA. It is possible also to create a charge over a sum of money held by a person once it has been paid to him, without necessarily also creating a charge over the debt or other right in respect of which it may come to be paid: *Re SSSL Realisations (2002) Ltd (in liq)*, *Re Save Group plc (in liq)* [2004] EWHC 1760 (Ch) at [49]-[55], [2005] 1 BCLC 1 at [49]-[55] per Lloyd J (affd [2006] EWCA Civ 7, [2006] Ch 610, [2007] 1 BCLC 29).

The existence of a power of sale does not make a lien into an equitable charge requiring registration: *Re Hamlet International plc (in administration)*, *Trident International Ltd v Barlow* [1999] 2 BCLC 506, CA (a legal possessory lien over customers' stock in a warehouse coupled with a right to sell the goods and to use the proceeds to discharge the outstanding debts due to the warehouse company from those customers was not registrable). As to contractual liens on sub-freights see *Re Welsh Irish Ferries Ltd* [1986] Ch 471, [1985] 3 WLR 610 (contractual lien on sub-freights held to constitute a charge on book debts and hence registrable); *Annangel Glory Cia Naviera SA v M Golodetz Ltd* [1988] 1 Lloyd's Rep 45 (contract lien on sub-freights held to constitute a floating charge and hence registrable); and **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 306. But see also *Agnew v IRC* [2001] UKPC 28 at [39], [2001] 2 AC 710 at [39], [2001] 2 BCLC 188 at [39] per Lord Millett (the better view is that a lien on sub-freights is not a charge at all).

As to whether an assignment by a leasing company of rents due from a consumer to a financial services company providing credit to the consumer constitutes a charge on the leasing company's book debts see *Orion Finance Ltd v Crown Financial Management (No 2)* [1996] 2 BCLC 382, CA; and *Orion Finance Ltd v Crown Financial Management Ltd* [1996] 2 BCLC 78, CA (no single objective test to determine whether a transaction is one of sale and repurchase or one of security). Where an agreement provided that assignments of debts were to be absolute, the fact that the parties did not operate the transactions in accordance with the terms of the agreement did not make them into charges on book debts: *Lloyds and Scottish Finance Ltd v Cyril Lord Carpets Sales Ltd* (1979) [1992] BCLC 609, HL; *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207, [1985] 1 All ER 155. An escrow agreement whereby an account was opened and the moneys paid into it were to be impressed with a trust was held not to be registrable: *Lovell Construction Ltd v Independent Estates plc (in liquidation)* [1994] 1 BCLC 31 (the account created by the escrow agreement was only machinery for effecting payment).

13 As to the meaning of 'floating charge' see PARA 1269.

14 As to what is the 'undertaking' of a company see PARA 1265.

15 As to what is a company's 'property' generally see PARA 1265.

16 Companies Act 2006 s 860(7)(g).

17 Companies Act 2006 s 860(7)(h).

18 Companies Act 2006 s 860(7)(i). For these purposes, 'intellectual property' means any patent, trade mark, registered design, copyright or design right, and any licence under or in respect of any such right: s 861(4).

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1280. Registration of charges existing on property acquired.

Where a company¹ acquires property which is subject to a charge² of a kind which would, if it had been created by the company after the acquisition of the property, have been required to be registered³, the company must deliver the prescribed particulars⁴ of the charge, together with a certified copy⁵ of the instrument (if any) by which the charge was created or is

evidenced, to the registrar of companies⁶ for registration⁷. This requirement⁸ must be complied with before the end of the period allowed for registration⁹.

If a company fails to comply with this requirement¹⁰, an offence is committed by the company, and by any officer of the company who is in default¹¹; a person guilty of such an offence is liable (on conviction on indictment) to a fine or (on summary conviction) to a fine not exceeding the statutory maximum¹².

1 As to the meaning of 'company' for the purposes of registration see PARA 1277 note 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'charge' for the purposes of registration see PARA 1277 note 2.

3 Companies Act 2006 s 862(1). The text refers to charges required to be registered under Pt 25 Ch 1 (ss 860-877) (Company Charges: Companies registered in England and Wales or in Northern Ireland) (see PARA 1277): see s 862(1). Before the enactment of the Companies Act 1929 (now repealed) only charges created by a company had to be registered. As to the consequences of a failure to register charges created by a company see PARA 1294. As to the power of the Secretary of State by regulations to amend the Companies Act 2006 Pt 25 (ss 860-894) see s 894; and PARA 1277 note 1.

4 In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. In exercise of the powers conferred by s 860, the Secretary of State has made the Companies (Particulars of Company Charges) Regulations 2008, SI 2008/2996. Accordingly, the prescribed particulars for the purposes of the Companies Act 2006 s 862(2) are:

2175 (1) the date of the creation of the charge (Companies (Particulars of Company Charges) Regulations 2008, SI 2008/2996, regs 2(a), 4(a));

2176 (2) a description of the instrument (if any) creating or evidencing the charge (regs 2(b), 4(a));

2177 (3) the amount secured by the charge (regs 2(c), 4(a));

2178 (4) the name and address of the person entitled to the charge (regs 2(d), 4(a));

2179 (5) short particulars of the property charged (regs 2(e), 4(a)); and

2180 (6) the date of the acquisition of the property which is subject to the charge (reg 4(b)).

5 For these purposes, a certificate or verification, as the case may be, that a copy of an instrument by which a charge is created or evidenced is a correct copy must be given by the company which has created the charge, or, where that person is different, by the person who delivered or sent the copy to the registrar: Companies (Forms) Regulations 1985, SI 1985/854, reg 7(1); Interpretation Act 1978 s 17(2)(b). Such a certificate must be signed by or on behalf of the person giving it; and where that person is a body corporate, the person signing the certificate on behalf of the body must be an officer of it: Companies (Forms) Regulations 1985, SI 1985/854, reg 7(3) (amended by SI 1986/2097); Interpretation Act 1978 s 17(2)(b).

6 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

7 Companies Act 2006 s 862(2). As to the fees payable for registration of a charge under Pt 25 Ch 1 see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(g).

8 In the Companies Act 2006 s 862(2) (see the text and notes 1-7): see s 862(3).

9 Companies Act 2006 s 862(3). As to the period allowed for registration see PARA 1286.

10 In complying with the Companies Act 2006 s 862: see s 862(4).

11 Companies Act 2006 s 862(4). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

12 Companies Act 2006 s 862(5). As to the meaning of the 'statutory maximum' see PARA 1622.

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1281. Registration of a series of debentures.

Where a series of debentures¹ containing (or giving by reference to another instrument) any charge² to the benefit of which the debenture holders of that series are entitled *pari passu* is created by a company³, then it is sufficient⁴ if there are delivered to the registrar of companies⁵ before the end of the period allowed for registration⁶, the following required particulars⁷:

- 555 (1) the total amount secured by the whole series⁸; and
- 556 (2) the dates of the resolutions authorising the issue of the series and the date of the covering deed, if any, by which the security is created or defined⁹; and
- 557 (3) a general description of the property charged¹⁰; and
- 558 (4) the names of the trustees, if any, for the debenture holders¹¹,

together with the deed containing the charge (or, if there is no such deed, one of the debentures of the series)¹². Particulars of the date and amount of each issue of debentures of such a series¹³ must be sent to the registrar for entry in the register of charges¹⁴; but any failure to comply with this requirement¹⁵ does not affect the validity of the debentures issued¹⁶.

The registration of such a series of debentures may instead be effected on the application of any person interested in it¹⁷; and where registration is effected on the application of some person other than the company, that person is entitled to recover from the company the amount of any fees properly paid by him to the registrar on registration¹⁸.

If a company fails to comply with the requirement to register¹⁹, an offence is committed by the company, and by any officer of the company who is in default²⁰; a person guilty of such an offence is liable (on conviction on indictment) to a fine or (on summary conviction) to a fine not exceeding the statutory maximum²¹.

1 As to the meaning of 'debentures' see PARA 1299.

2 As to the meaning of 'charge' for the purposes of registration see PARA 1277 note 2.

3 As to the meaning of 'company' for the purposes of registration see PARA 1277 note 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

4 Ie for the purposes of the Companies Act 2006 s 860(1) (see PARA 1277): see s 863(1).

5 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

6 As to the period allowed for registration see PARA 1286.

7 See the Companies Act 2006 s 863(1), (2).

8 Companies Act 2006 s 863(2)(a).

9 Companies Act 2006 s 863(2)(b). As to the issue and reissue of debentures see PARA 1312 et seq.

10 Companies Act 2006 s 863(2)(c).

11 Companies Act 2006 s 863(2)(d).

12 Companies Act 2006 s 863(1). See also *Re Spiral Globe Ltd (No 2)*, *Watson v Spiral Globe Ltd* [1902] 2 Ch 209; *Re Harrogate Estates Ltd* [1903] 1 Ch 498; *Cunard Steamship Co Ltd v Hopwood* [1908] 2 Ch 564. As to obtaining relief in the event of a failure to comply with the registration requirement see PARA 1287.

The series of debentures includes all those which, whenever issued, are entitled to the *pari passu* charge. Cf *Re Yolland, Husson and Birkett Ltd*, *Leicester v Yolland, Husson and Birkett Ltd* [1908] 1 Ch 152, CA. The registration of the particulars mentioned in the text protects the debentures of the series issued not more than 21 days before registration and all other debentures of the series subsequently issued: *Re Harrogate Estates Ltd*. The sealing of debentures is not an issue (*Re N Defries & Co Ltd*, *Bowen v N Defries & Co Ltd* [1904] 1 Ch 37); but a contract to issue is an issue (*Re Perth Electric Tramways Ltd*, *Lyons v Tramways Syndicate Ltd and Perth Electric Tramways Ltd* [1906] 2 Ch 216). The delivery of particulars of a series of debentures is a sufficient registration of particulars of an agreement to issue debentures of that series: *Re Fireproof Doors Ltd*, *Umney v Fireproof Doors Ltd* [1916] 2 Ch 142.

13 *Ie* of the kind mentioned in the Companies Act 2006 s 863(1) (see the text and notes 1-12): see s 863(3).

14 Companies Act 2006 s 863(3). As to the duty of the registrar to keep a register of charges see PARA 1289.

15 *Ie* any failure to comply with the Companies Act 2006 s 863(3) (see the text and notes 13-14): see s 863(4).

16 Companies Act 2006 s 863(4).

17 Companies Act 2006 s 860(2); applied by s 863(5).

18 Companies Act 2006 s 860(3); applied by s 863(5). As to the fees payable for registration of a charge under Pt 25 Ch 1 (ss 860-877) see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(g).

19 *Ie* fails to comply with the Companies Act 2006 s 860(1) (see PARA 1277): see s 860(4); applied by s 863(5). However, s 860(4) (as so applied) does not apply if registration of the series of debentures has been effected on the application of some other person (see the text and notes 7-8): s 860(6); applied by s 863(5).

20 Companies Act 2006 s 860(4); applied by s 863(5). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

21 Companies Act 2006 s 860(5); applied by s 863(5). As to the meaning of the 'statutory maximum' see PARA 1622.

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1282. Charge on foreign property outside the United Kingdom.

Where a charge¹ is created in the United Kingdom² but comprises property outside the United Kingdom, the instrument creating or purporting to create the charge may be sent for registration in the usual way³, even if further proceedings may be necessary to make the charge valid or effectual according to the law of the country in which the property is situated⁴.

Where a charge is created outside the United Kingdom comprising property situated outside the United Kingdom, the delivery to the registrar of companies⁵ of a verified copy of the instrument by which the charge is created or evidenced has the same effect for these purposes⁶ as the delivery of the instrument itself⁷.

- 1 As to the meaning of 'charge' for the purposes of registration see PARA 1277 note 2.
- 2 As to the meaning of 'United Kingdom' see PARA 1 note 5.
- 3 le under the Companies Act 2006 s 860 (see PARA 1277): see s 866(2).
- 4 Companies Act 2006 s 866(2). As to the consequences of a failure to register charges created by a company see PARA 1294. As to the power of the Secretary of State by regulations to amend the Companies Act 2006 Pt 25 (ss 860-894) see s 894; and PARA 1277 note 1. As to the fees payable for registration of a charge under Pt 25 Ch 1 (ss 860-877) see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(g).
The provisions of Pt 25 Ch 1 (ss 860-877) are akin to those contained in Pt 25 Ch 2 (ss 878-892), which exist for the purpose of securing the registration in Scotland of charges created by companies registered there; and express provision is made by s 884, for charges created in the United Kingdom but comprising property outside the United Kingdom, corresponding to the provision made in relation to the rest of the United Kingdom by s 866(2). An English court has jurisdiction to deal with the consequences of non-registration in Scotland since Pt 25 Ch 2 is part of the law of England as well as part of the law of Scotland and Pt 25 Chs 1, 2 are part of the law of both jurisdictions and are a complementary whole prescribing who is to register what and where: *Arthur D Little Ltd (in administration) v Ableco Finance LLC* [2002] EWHC 701 (Ch), [2003] Ch 217, [2002] 2 BCLC 799 (decided under the Companies Act 1985).
- 5 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.
- 6 le for the purposes of the Companies Act 2006 Pt 25 Ch 1 (Company Charges: Companies registered in England and Wales or in Northern Ireland) (see PARA 1277 et seq): see s 866(1).
- 7 Companies Act 2006 s 866(1).

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1283. Charge on property in another United Kingdom jurisdiction.

Where a charge¹ comprises property situated in a part of the United Kingdom² other than the part in which the company is registered³, and where registration in that other part is necessary to make the charge valid or effectual under the law of that part of the United Kingdom⁴, the delivery to the registrar of companies⁵ of a verified copy of the instrument by which the charge is created or evidenced, together with a certificate stating that the charge was presented for registration in that other part of the United Kingdom on the date on which it was so presented has, for the purposes of the registration of charges relating to companies registered in England and Wales⁶ or in Northern Ireland⁷, the same effect as the delivery of the instrument itself⁸.

- 1 As to the meaning of 'charge' for the purposes of registration see PARA 1277 note 2.
- 2 As to the meaning of 'United Kingdom' see PARA 1 note 5.
- 3 Companies Act 2006 s 867(1)(a). References in the Companies Acts to registration in a particular part of the United Kingdom are to registration by the registrar of companies for that part of the United Kingdom: see s 1060(4); and PARA 131 note 2. As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the meaning of 'company' for the purposes of registration see PARA 1277 note 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to company registration under the Companies Act 2006 see PARA 111 et seq.
As to the power of the Secretary of State by regulations to amend the Companies Act 2006 Pt 25 (ss 860-894) see s 894; and PARA 1277 note 1.

4 Companies Act 2006 s 867(1)(b).

5 As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

6 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

7 le for the purposes of the Companies Act 2006 Pt 25 Ch 1 (ss 860-877) (Company Charges: Companies registered in England and Wales or in Northern Ireland) (see PARA 1277 et seq): see s 867(2).

8 Companies Act 2006 s 867(2).

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1284. Sale of property subject to charge.

Where property subject to a mortgage is sold and the proceeds are invested in other property which is conveyed to the company, and then mortgaged by the company to the mortgagee, the latter mortgage requires registration¹; but the registration of a trust deed securing debenture stock² containing specific equitable charges on property is sufficient to cover subsequent legal mortgages of that property to complete the security, and also mortgages of further property substituted under the powers of the deed for property comprised in the original charge³.

1 *Cornbrook Brewery Co Ltd v Law Debenture Corp Ltd* [1904] 1 Ch 103, CA; *Capital Finance Co Ltd v Stokes* [1969] 1 Ch 261, [1963] 3 All ER 625, CA. In *Bristol United Breweries Ltd v Abbot* [1908] 1 Ch 279, it was held that, where there was a direct conveyance to the mortgagee, the conveyance need not be registered, because it was not a mortgage or charge created by the company. Such a transaction should now be carried out in such a way as to vest the legal estate in fee simple in the company and a term of years in the mortgagee. Such a conveyance would require to be registered under the Companies Act 2006 s 862: see PARA 1280.

2 As to the meaning of 'debenture stock' see PARA 1309. As to the meaning of 'stock' generally see PARA 1163.

3 *Cunard Steamship Co Ltd v Hopwood* [1908] 2 Ch 564 (a case under the Companies Act 1900 s 14(4) (now repealed)). See also PARAS 1280, 1281.

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1285. Retention of title clauses.

An ordinary retention of title clause in a contract by a vendor of goods sold to a company and to which the Sale of Goods Act 1979 applies¹, so drawn as to ensure that title in the goods does not pass to the company until payment, or until the goods are sold to a third party, does not require registration under the Companies Act 2006². Just as the company never itself obtains title to the goods, so it cannot create any effective charge over such goods in favour of the vendor³. Such a reservation of title will thus be fully effective and enforceable at the

appropriate time, for example on the liquidation of the company or against a receiver, in respect of so much of the goods as are then still remaining in the company's hands⁴.

In cases where the goods supplied by a vendor to a company are simply resold by the company without alteration, the contract may by appropriate wording provide that the company is also to be regarded as standing in a fiduciary position to the vendor in relation to any goods sold, who may then be entitled to trace his goods into the proceeds of sale⁵.

Difficulties arise, however, where the company employs the goods sold to it in a manufacturing process. If the finished product incorporates no other material, there is no reason why the vendor's title should not remain⁶. If the goods are incorporated with others in such a manner that it is possible to separate them out again, then the vendor's title to any such goods still in the hands of the company remains⁷. If, however, the goods sold have for practical purposes lost their identity by being utilised in a non-reversible manufacturing process⁸, then, since the vendor never had any title to the whole of the finished product, a retention of title clause by itself will not furnish him with any rights against the manufactured product or its proceeds of sale⁹. Any provision granting any such rights will amount to a floating charge created by the company and will be accordingly void as against a liquidator or any creditor of the company for non-registration¹⁰.

Any provisions, other than a simple retention of title clause, may be held to create a charge granted by the company if, on their true construction, that appears to be their intended effect¹¹.

1 Ie under the Sale of Goods Act 1979 s 19(1) (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 137).

3 Ie under the Companies Act 2006 s 860 (see PARA 1277).

3 *Clough Mill Ltd v Martin* [1984] 3 All ER 982, [1985] 1 WLR 111, CA.

4 *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552, [1976] 1 WLR 676, CA; *Re Peachdart Ltd* [1984] Ch 131, [1983] 3 All ER 204; *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 2 All ER 152, [1984] 1 WLR 485; *Clough Mill Ltd v Martin* [1984] 3 All ER 982, [1985] 1 WLR 111, CA; *John Snow & Co Ltd v DBG Woodcroft & Co Ltd* [1985] BCLC 54.

5 *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552, [1976] 1 WLR 676, CA. Cf *Re Andrabell Ltd (in liquidation)*, *Airborne Accessories Ltd v Goodman* [1984] 3 All ER 407, [1984] BCLC 522 (where the terms of the contract made it impossible to imply a fiduciary relationship); and *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150 (clause providing for all claims with respect to the sales by the company to sub-purchasers to be passed on to the vendor pending payment in full of the company's obligations to the vendor constituted a charge on book debts by the company void for want of registration). See also *Compaq Computer Ltd v Abercorn Group Ltd (t/a Osiris)* [1993] BCLC 602.

6 *Clough Mill Ltd v Martin* [1984] 3 All ER 982 at 994, [1985] 1 WLR 111 at 125, CA, per Sir John Donaldson MR.

7 *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 2 All ER 152, [1984] 1 WLR 485.

8 Eg resin utilised in the production of chip-board as in *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25, [1979] 3 All ER 961, CA.

9 *Clough Mill Ltd v Martin* [1984] 3 All ER 982, [1985] 1 WLR 111, CA. See also *Modelboard Ltd v Outer Box Ltd (in liquidation)* [1993] BCLC 623 (arrangement between the parties created a defeasible interest in the product of the goods and the proceeds from sale; this constituted an interest by way of charge which was voidable for non-registration).

10 See PARA 1294. See also *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25, [1979] 3 All ER 961, CA; *Re Bond Worth Ltd* [1980] Ch 228, [1979] 3 All ER 919; *Re Peachdart Ltd* [1984] Ch 131, [1983] 3 All ER 204; *Specialist Plant Services Ltd v Braithwaite Ltd* [1987] BCLC 1, CA. See also *Modelboard Ltd v Outer Box Ltd (in liquidation)* [1993] BCLC 623.

11 *Re Bond Worth Ltd* [1980] Ch 228, [1979] 3 All ER 919 (clause seeking to retain 'equitable and beneficial ownership' of (ie not the legal title to) the raw fibre sold, its proceeds of sale, and the products into which any

part of the fibre might become a constituent or into which it might be converted or the proceeds of sale of any such product, held to create a floating equitable charge requiring registration for its effectiveness). See also *Compaq Computer Ltd v Abercorn Group Ltd (t/a Osiris)* [1993] BCLC 602.

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B. PERIOD ALLOWED FOR REGISTRATION OF A CHARGE CREATED BY A COMPANY

1286. Period allowed for registration with the registrar.

The period allowed for registration of a charge¹ created by a company² is 21 days beginning with the day after the day on which the charge is created³ or (if the charge is created outside the United Kingdom⁴) 21 days beginning with the day after the day on which the instrument by which the charge is created or evidenced (or a copy of it) could, in due course of post (and if despatched with due diligence) have been received in the United Kingdom⁵.

The period allowed for registration of a charge to which property acquired by a company is subject⁶ is 21 days beginning with the day after the day on which the acquisition is completed⁷ or (if the property is situated and the charge was created outside the United Kingdom) 21 days beginning with the day after the day on which the instrument by which the charge is created or evidenced (or a copy of it) could, in due course of post (and if despatched with due diligence) have been received in the United Kingdom⁸.

The period allowed for registration of particulars of a series of debentures⁹ is (if there is a deed containing the charge¹⁰), 21 days beginning with the day after the day on which that deed is executed¹¹ or (if there is no such deed) 21 days beginning with the day after the day on which the first debenture of the series is executed¹².

The registrar of companies¹³ has no power to extend this time¹⁴.

1 As to the meaning of 'charge' for the purposes of registration see PARA 1277 note 2.

2 I.e. under the Companies Act 2006 s 860 (see PARA 1277). This period may be extended by order of the court in accordance with s 873: see PARA 1287. As to the meaning of 'company' for the purposes of registration see PARA 1277 note 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

As to the power of the Secretary of State by regulations to amend the Companies Act 2006 Pt 25 (ss 860-894) see s 894; and PARA 1277 note 1.

3 Companies Act 2006 s 870(1)(a). As to when a charge is created see PARA 1278.

4 As to the meaning of 'United Kingdom' see PARA 1 note 5.

5 Companies Act 2006 s 870(1)(b).

6 I.e. under the Companies Act 2006 s 862 (see PARA 1280).

7 Companies Act 2006 s 870(2)(a).

8 Companies Act 2006 s 870(2)(b).

9 le as a result of the Companies Act 2006 s 863 (see PARA 1281): see s 870(3). As to the meaning of 'debentures' see PARA 1299.

10 le a deed containing the charge mentioned in the Companies Act 2006 s 863(1) (see PARA 1281): see s 870(3)(a).

11 Companies Act 2006 s 870(3)(a).

12 Companies Act 2006 s 870(3)(b).

13 As to the registrar of companies see PARA 131.

14 It was formerly the practice of the registrar of companies to allow an extension of time for the lodging of a properly completed form if an improperly completed form had been lodged within the 21-day period. This procedure has been held to be without statutory authority and erroneous: *R v Registrar of Companies, ex p Central Bank of India* [1986] QB 1114, [1986] 1 All ER 105, CA, where a quashing order (formerly known as an order of certiorari) had been granted by the court below to quash the registrar's decision to register the charge outside the 21-day period reckoned from the date of its creation. This decision was reversed on appeal, but the criticism of the practice was upheld.

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1287. Order by court for extension of time or rectification of register.

If the court¹ is satisfied:

- 559 (1) that the failure to register a charge² before the end of the period allowed for registration³, or the omission or mis-statement of any particular with respect to any such charge or in a memorandum of satisfaction⁴, was accidental⁵, or due to inadvertence⁶ or to some other sufficient cause⁷, or is not of a nature to prejudice the position of creditors⁸ or shareholders⁹ of the company¹⁰; or
- 560 (2) that on other grounds it is just and equitable to grant relief¹¹,

the court may, on the application¹² of the company or of a person interested (and on such terms and conditions as seem to the court just and expedient) order that the period allowed for registration is to be extended¹³, or, as the case may be, that the omission or misstatement is to be rectified¹⁴.

The statutory jurisdiction to order rectification under these provisions is limited and wholly inconsistent with any suggestion that the court has any inherent power of rectification¹⁵. The court also lacks jurisdiction under these provisions to order the deletion of the whole of a registration¹⁶ or to grant interim relief¹⁷.

It is only in exceptional circumstances that such an extension will be granted after the company has gone into liquidation¹⁸; but it is such an exceptional case if the only creditor who could be affected thereby does not oppose¹⁹.

1 As to the meaning of 'court' see PARA 212 note 1.

2 As to the meaning of 'charge' for the purposes of registration see PARA 1277 note 2. As to registration of a charge see PARA 1277. As to charges on foreign property see PARAS 1282-1283. As to charges existing on property acquired see PARA 1280.

3 As to the period allowed for registration see PARA 1286.

4 The references to 'any particular with respect to any . . . charge' and to 'a memorandum of satisfaction' are references to the particulars that the registrar of companies is required to enter on the register of charges under the Companies Act 2006 s 869 (see PARA 1289), and to the memorandum of satisfaction that the registrar may enter on the register of charges under s 872 (see PARA 1293): *igroup Ltd v Ocwen (an unlimited company)* [2003] EWHC 2431 (Ch), [2003] 4 All ER 1063, [2004] 1 WLR 451.

5 An accident is a mishap or untoward event not expected or designed: *Fenton v Thorley & Co Ltd* [1903] AC 443, HL.

6 'Inadvertence' includes ignorance of the provisions requiring registration (*Re Mendip Press* (1901) 18 TLR 38; *Re Jackson & Co Ltd* [1899] 1 Ch 348; *Re Heathstar Properties Ltd (No 2)* [1966] 1 All ER 1000 at 1005, [1966] 1 WLR 993 at 999 per Plowman J; cf *Re E and F Beattie Ltd* (1901) 45 Sol Jo 671), or a case where the company secretary and the chargee each thinks that the other has registered (*Re Kris Cruisers Ltd* [1949] Ch 138, [1948] 2 All ER 1105). See also *Confiance Ltd v Timespan Images Ltd* [2005] EWHC 1557 (Ch), [2005] 2 BCLC 693 (cited in note 11).

7 'Some other sufficient cause' covers difficulties arising through the property charged being situated abroad (*Re Tingri Tea Co Ltd* [1901] WN 165; but as to property situated abroad see PARAS 1282), and, in the case of debentures, delay at the Stamp Office (*Re Bootle Cold Storage and Ice Co* [1901] WN 54; and see *Re S Abrahams & Sons* [1902] 1 Ch 695).

8 As to the meaning of 'creditor' see PARA 1427.

9 As to shareholders generally see PARA 321.

10 Companies Act 2006 s 873(1)(a). As to the meaning of 'company' for the purposes of registration see PARA 1277 note 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

As to the power of the Secretary of State by regulations to amend the Companies Act 2006 Pt 25 (ss 860-894) see s 894; and PARA 1277 note 1.

11 Companies Act 2006 s 873(1)(b). See *Confiance Ltd v Timespan Images Ltd* [2005] EWHC 1557 (Ch), [2005] 2 BCLC 693 (although the causes set out for non-registration of the debenture satisfied the statutory requirement that there was inadvertence, no identifiable prejudice could have been caused to any relevant party by late registration; it was just and equitable to grant relief).

12 As to the procedure see PARA 1288.

13 An order extending time for registration of a charge is beyond recall once registration has been effected in reliance upon it: *Re Top Marques Car Rental Ltd* [2006] EWHC 109 (Ch), (2006) Times, 10 February.

14 Companies Act 2006 s 873(2). The power of rectification so granted to the court does not extend to the particulars entered in an application for registration: *igroup Ltd v Ocwen (an unlimited company)* [2003] EWHC 2431 (Ch), [2003] 4 All ER 1063, [2004] 1 WLR 451. The jurisdiction to grant relief conferred by corresponding provisions in earlier Companies Acts in relation to instruments requiring registration under those Acts is preserved by the Interpretation Act 1978 s 16(1), Sch 2 para 3: *Re Lush & Co Ltd* (1913) 108 LT 450. As to the court's power to deal with costs see the Senior Courts Act 1981 s 51; and **CIVIL PROCEDURE** vol 11 (2009) PARA 747.

15 *Exeter Trust Ltd v Screenways Ltd* [1991] BCLC 888, CA; *igroup Ltd v Ocwen* [2003] EWHC 2431 (Ch), [2003] 4 All ER 1063, [2004] 1 WLR 451.

16 *Re CL Nye Ltd* [1971] Ch 442, [1970] 3 All ER 1061, CA.

17 *Re Heathstar Properties Ltd* [1966] 1 All ER 628, [1966] 1 WLR 993.

18 See PARA 1288.

19 *Re RM Arnold & Co Ltd* [1984] BCLC 535. Cf *Re John Bateson & Co Ltd* [1985] BCLC 259 (where there were no exceptional circumstances).

COMPANIES ACTS/(22) BORROWING AND SECURING MONEY/(iii) Registration of Company Charges/B. PERIOD ALLOWED FOR REGISTRATION OF A CHARGE CREATED BY A COMPANY/1288. Procedure on application for rectification.

1288. Procedure on application for rectification.

An application for the period for registration of a charge¹ to be extended or for an omission or misstatement with respect to any such charge to be rectified², is made by the issue of a claim form³, which should be supported by a statement proving the facts relied on as founding the court's jurisdiction to grant relief⁴. It is usually specified in the statement that no petition to wind up the company has been presented, no notice convening a meeting for voluntary liquidation has been served, and no judgment against the company has been recovered which is unsatisfied⁵. On an application for extension of time for registration, the court will not as a rule decide the question whether a charge requires registration⁶.

There is usually inserted in an order granting an extension of time for registration⁷ a proviso that the order is to be without prejudice to any rights acquired prior to actual registration against the persons entitled to the mortgage or charge⁸. The usual form of proviso will not protect ordinary unsecured creditors unless, before actual registration, either they have acquired rights against or affecting the property charged by the debentures⁹ or a winding up has commenced¹⁰; and no express words for their protection will in ordinary cases be inserted¹¹. Where a liquidation is found to be imminent, the decision whether to extend time is a matter of discretion, the overriding question being whether it is just and equitable to grant an extension¹². It is the settled practice of the court not to make an order¹³ extending time for registration on an application made after the commencement of the winding up¹⁴. Where an administration order¹⁵ does not include as one of its purposes the survival of the company, or survival proves incapable of achievement, the court will not normally extend time for registration since liquidation is inevitable¹⁶.

1 As to the meaning of 'charge' for the purposes of registration see PARA 1277 note 2.

2 I.e. under the Companies Act 2006 s 873 (see PARA 1287).

3 As to the procedural rules that apply to proceedings under companies legislation generally see PARA 305.

4 *Re Kris Cruisers Ltd* [1949] Ch 138, [1948] 2 All ER 1105. If issues of fact arise, cross-examination on the statements may be allowed: *Re Heathstar Properties Ltd* [1966] 1 All ER 628, [1966] 1 WLR 993. For a case where there was a long delay see *Re Telomatic Ltd* [1994] 1 BCLC 90.

5 *Re Bootle Cold Storage and Ice Co* [1901] WN 54; *Re Tingri Tea Co Ltd* [1901] WN 165. These statements are, it appears, unnecessary since the purpose of the discretion given to the court as regards granting registration out of time is to protect secured creditors, not unsecured creditors of the company: see *Re MIG Trust Ltd* [1933] Ch 542 at 571, CA, per Romer LJ.

6 *Re Cunard Steamship Co Ltd* [1908] WN 160; *Re Heathstar Properties Ltd (No 2)* [1966] 1 All ER 1000, [1966] 1 WLR 993 at 999 per Plowman J.

7 I.e. under the Companies Act 2006 s 873 (see PARA 1287).

8 *Re Joplin Brewery Co Ltd* [1902] 1 Ch 79; *Re IC Johnson & Co Ltd* [1902] 2 Ch 101, CA, where the form of proviso settled by the Court of Appeal was as follows: 'Provided always that this order is to be without prejudice to any right which may have been or may be acquired against the holders of the said debentures prior to the time when such debentures shall be actually registered'. The order in that case referred to some only of a series of debentures, the remainder having been registered in due time. As to the meaning of 'debentures' see PARA 1299. As to series of debentures see PARA 1281. See also *Re Kris Cruisers Ltd* [1949] Ch 138, [1948] 2 All ER 1105; *Crew v Cummings* (1888) 21 QBD 420, CA; *Re Parsons, ex p Furber* [1893] 2 QB 122, CA; *Re RM Arnold & Co Ltd* [1984] BCLC 535 (where the addition of this proviso would have rendered the order pointless); *Barclays Bank plc v Stuart Landon Ltd* [2001] EWCA Civ 140, [2001] 2 BCLC 316 (order permitting registration out of time of bank's charge made with proviso). Cf **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1779. Where liquidation is contemplated, the order should give an opportunity to the liquidator when appointed to apply for

the discharge of the order; and for a form see *Re LH Charles & Co Ltd* [1935] WN 15. A liquidator's application for discharge of the order will be by way of a complete rehearing in which the court is not limited to the evidence before the registrar or the grounds on which he based his decision: *Re Braemar Investments Ltd* [1989] Ch 54, [1988] BCLC 556.

9 *Re Ehrmann Bros Ltd* [1906] 2 Ch 697, CA; *Re MIG Trust Ltd* [1933] Ch 542, CA.

10 *Re Ehrmann Bros Ltd* [1906] 2 Ch 697, CA; *Re Anglo-Oriental Carpet Manufacturing Co* [1903] 1 Ch 914.

11 *Re Cardiff Workmen's Cottage Co Ltd* [1906] 2 Ch 627. See also *Re MIG Trust Ltd* [1933] Ch 542, CA.

12 *Re Braemar Investments Ltd* [1989] Ch 54, [1988] BCLC 556; *Re Resinoid and Mica Products Ltd* [1983] Ch 132n, [1982] 3 All ER 677n, CA; *Re Ashpurton Estates Ltd* [1983] Ch 110, sub nom *Victoria Housing Estates Ltd v Ashpurton Estates Ltd* [1982] 3 All ER 665, CA.

13 *Re* under the Companies Act 2006 s 873 (see PARA 1287).

14 *Barclays Bank plc v Stuart Landon Ltd* [2001] EWCA Civ 140 at [13], [2001] 2 BCLC 316 at [13] per Chadwick LJ. See also *Re S Abrahams & Sons* [1902] 1 Ch 695 (where the order was refused after the winding up had commenced on the ground that with the protecting proviso it could have no beneficial effect); *Re Resinoid and Mica Products Ltd* [1983] Ch 132n, [1982] 3 All ER 677n, CA; *Re John Bateson & Co Ltd* [1985] BCLC 259. Cf *Re Spiral Globe Ltd* [1902] 1 Ch 396; and *Re RM Arnold & Co Ltd* [1984] BCLC 535 (where the proviso was not added for the converse reason); and see *Re Ehrmann Bros Ltd* [1906] 2 Ch 697, CA; *Re LH Charles & Co Ltd* [1935] WN 15 (a case where notices convening a meeting to consider a resolution for voluntary winding up had been sent out, and a provision was added to the order entitling the liquidator, if appointed, to apply to the court to challenge the order). In exceptional circumstances, however, an order may be made even after liquidation has commenced: *Re RM Arnold & Co Ltd* (where the only other person interested in the subject matter of the charge did not object).

15 *Re* under the Insolvency Act 1986 s 8: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1192 et seq.

16 *Re Barrow Borough Transport Ltd* [1990] Ch 227, [1989] BCLC 653. Where an administration order had been made (see note 15), an application for the extension of time for registration of a charge under what is now the Companies Act 2006 s 873 (see PARA 1287) does not require the permission of the court as such an application could not be described as 'legal proceedings [. . .] against the company or property of the company' within what is now the Insolvency Act 1986 s 8, Sch B1 para 43(6) (see PARA 1360): see *Re Barrow Borough Transport Ltd*.

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C. REGISTRATION PROCEDURE

1289. Register of charges kept by the registrar.

With respect to each company¹, the registrar of companies² must keep a register of all the charges³ requiring registration under the Companies Act 2006⁴.

He must enter in the register, in the case of a charge to the benefit of which the holders of a series of debentures⁵ are entitled, the particulars required⁶ to be delivered by the company⁷; and, in the case of any other charge, the following particulars⁸:

- 561 (1) if it is a charge created by the company⁹, the date of its creation and, if it is a charge which was existing on property acquired by the company¹⁰, the date of the acquisition of the property¹¹; and
- 562 (2) the amount secured by the charge¹²; and
- 563 (3) short particulars of the property charged¹³; and

564 (4) the persons entitled to the charge¹⁴.

The register so kept by the registrar¹⁵ must be open to inspection by any person¹⁶.

1 As to the meaning of 'company' for the purposes of registration see PARA 1277 note 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'registrar of companies' see PARA 131 note 2.

3 As to the meaning of 'charge' for the purposes of registration see PARA 1277 note 2.

4 Companies Act 2006 s 869(1). The text refers to charges requiring registration under Pt 25 Ch 1 (ss 860-877) (Company Charges: Companies registered in England and Wales or in Northern Ireland) (see PARA 1277 et seq): see s 869(1). The Secretary of State has power to make provision for a special register: see s 893; and PARA 1298. As to the fees payable for registration of a charge under Pt 25 Ch 1 see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(g). As to the registration of charges by overseas companies see the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, SI 2009/1917; and PARAS 1825, 1833.

As to the power of the Secretary of State by regulations to amend the Companies Act 2006 Pt 25 (ss 860-894) see s 894; and PARA 1277 note 1.

5 As to the meaning of 'debenture' see PARA 1299.

6 I.e. the required particulars specified in the Companies Act 2006 s 863(2) (see PARA 1281): see s 869(2).

7 Companies Act 2006 s 869(2).

8 Companies Act 2006 s 869(4).

9 As to the registration of charges created by a company see PARA 1277.

10 As to the registration of charges existing on property acquired see PARA 1280.

11 Companies Act 2006 s 869(4)(a).

12 Companies Act 2006 s 869(4)(b).

13 Companies Act 2006 s 869(4)(c).

14 Companies Act 2006 s 869(4)(d).

15 I.e. in pursuance of the Companies Act 2006 s 869: see s 869(7).

16 Companies Act 2006 s 869(7). As to inspection generally see PARA 149.

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1290. Certificate of registration given by the registrar.

The registrar of companies¹ must give a certificate of the registration of any charge² registered with him³, stating the amount secured by the charge⁴. The certificate must be signed by the registrar or authenticated by the registrar's official seal⁵; and such a certificate is conclusive evidence that the requirements of the Companies Act 2006 as to registration⁶ have been satisfied⁷; and the court will refuse to go into the question whether the requirements as to registration have been complied with⁸.

Thus it is immaterial, after the certificate has been obtained, that the date of the resolution creating stock is omitted from the particulars filed on registration⁹; and, if the certificate sufficiently identifies the instrument of charge, it is conclusive evidence of the effective registration of the charge in respect of all the property comprised in it, even though the registered particulars of the property charged omit some of such properties¹⁰.

It is equally immaterial that the order for extension of time for registration, if made properly at the time of making, is subsequently set aside. If registration has been effected in the meantime in reliance upon the original order, it remains valid¹¹.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2.

2 As to the meaning of 'charge' for the purposes of registration see PARA 1277 note 2.

3 In any charge registered in pursuance of the Companies Act 2006 Pt 25 Ch 1 (ss 860-877) (Company Charges: Companies registered in England and Wales or in Northern Ireland) (see PARA 1277 et seq): see s 869(5). As to the register of charges see PARA 1289.

As to the power of the Secretary of State by regulations to amend the Companies Act 2006 Pt 25 (ss 860-894) see s 894; and PARA 1277 note 1.

4 Companies Act 2006 s 869(5). As to the endorsement of this certificate on debentures see PARA 1291.

5 Companies Act 2006 s 869(6)(a). As to the registrar's official seal see PARA 131.

6 In the requirements of the Companies Act 2006 Pt 25 Ch 1 (see PARA 1277 et seq): see s 869(6)(b).

7 Companies Act 2006 s 869(6)(b). The circumstances in which it is issued does not affect the conclusive nature of the certificate: *Re Top Marques Car Rental Ltd* [2006] EWHC 109 (Ch), (2006) Times, 10 February (from the time the certificate was issued, albeit contrary to the implied direction of the court, the claimant's charge had been properly registered). See also *Re CL Nye Ltd* [1971] Ch 442 at 468-469, [1970] 3 All ER 1061 at 1069, CA, per Harman LJ (date of creation of charge misstated in application which was not made within 21 days; registration nevertheless valid); cf PARA 1279.

8 *Re Yolland, Husson and Birkett Ltd, Leicester v Yolland, Husson and Birkett Ltd* [1908] 1 Ch 152, CA; *R v Registrar of Companies, ex p Central Bank of India* [1986] QB 1114, [1986] 1 All ER 105, CA (where it was held that judicial review of the registrar's issue of the certificate was not available, save possibly in cases of fraud or where the application was made by the Attorney General, as the Companies Act is not expressed to bind the Crown).

9 *Cunard Steamship Co Ltd v Hopwood* [1908] 2 Ch 564 at 578 per Swinfen Eady J.

10 *National Provincial and Union Bank of England v Charnley* [1924] 1 KB 431 (applied in *Re Mechanisations (Eaglescliffe) Ltd* [1966] Ch 20, [1964] 3 All ER 840; *Re Eric Holmes (Property) Ltd* [1965] Ch 1052, [1965] 2 All ER 333 (cf PARA 1279); *NV Slavenburg's Bank v Intercontinental Natural Resources Ltd* [1980] 1 All ER 955, [1980] 1 WLR 1076).

11 *Wilde v Australian Trade Equipment Co Pty* (1980) 145 CLR 590, Aust HC; *Exeter Trust Ltd v Screenways Ltd* [1991] BCLC 888, CA.

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1291. Indorsement of registration certificate on debentures.

The company¹ must cause a copy of every certificate of registration² to be endorsed on every debenture³ or certificate of debenture stock⁴ which is issued by the company, and the payment

of which is secured by the charge⁵ so registered⁶, not being a debenture or certificate of debenture stock issued by it before the charge was created⁷.

If a person knowingly and wilfully authorises or permits the delivery of a debenture or certificate of debenture stock which⁸ is required to have endorsed on it a copy of a certificate of registration, without the copy being so endorsed upon it, he commits an offence⁹; and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale¹⁰.

1 As to the meaning of 'company' for the purposes of registration see PARA 1277 note 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Ie given under the Companies Act 2006 s 869 (see PARA 1290); see s 865(1).

3 As to the meaning of 'debenture' see PARA 1299.

4 As to the meaning of 'debenture stock' see PARA 1309. As to the meaning of 'stock' generally see PARA 1163.

5 As to the meaning of 'charge' for the purposes of registration see PARA 1277 note 2.

6 Companies Act 2006 s 865(1).

As to the power of the Secretary of State by regulations to amend the Companies Act 2006 Pt 25 (ss 860-894) see s 894; and PARA 1277 note 1.

7 Companies Act 2006 s 865(2).

8 Ie under the Companies Act 2006 s 865: see s 865(3).

9 Companies Act 2006 s 865(3).

10 Companies Act 2006 s 865(4). As to the meaning of the 'standard scale' see PARA 1622.

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1292. Registration of enforcement of security.

If a person obtains an order for the appointment of a receiver or manager¹ of a company's property², or appoints such a receiver or manager under powers contained in an instrument, he must within seven days of the order or of the appointment under those powers, give notice of the fact to the registrar of companies³.

Where a person appointed receiver or manager of a company's property under powers contained in an instrument ceases to act as such receiver or manager, he must, on so ceasing, give the registrar notice to that effect⁴.

The registrar must enter a fact of which he is given notice in this way⁵ in the register of charges⁶.

A person who makes default in complying with these requirements⁷ commits an offence⁸; and a person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale⁹ and (for continued contravention) a daily default fine¹⁰ not exceeding one-tenth of level 3 on the standard scale¹¹.

- 1 As to the construction of references to receivers and managers see PARA 1336.
- 2 As to the meaning of 'company' for the purposes of registration see PARA 1277 note 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.
- 3 Companies Act 2006 s 871(1). As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.
As to the power of the Secretary of State by regulations to amend the Companies Act 2006 Pt 25 (ss 860-894) see s 894; and PARA 1277 note 1.
- 4 Companies Act 2006 s 871(2).
- 5 Ie under the Companies Act 2006 s 871: see s 871(3).
- 6 Companies Act 2006 s 871(3). As to the register of charges see PARA 1289.
- 7 Ie in complying with the Companies Act 2006 s 871: see s 871(4).
- 8 Companies Act 2006 s 871(4).
- 9 As to the meaning of 'standard scale' see PARA 1622.
- 10 As to the meaning of 'daily default fine' see PARA 1622.
- 11 Companies Act 2006 s 871(5).

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1293. Memorandum of satisfaction or release.

If a statement is delivered to the registrar of companies¹ verifying, with respect to a registered charge²: (1) that the debt for which the charge was given has been paid or satisfied in whole or in part³; or (2) that part of the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking⁴, the registrar may enter on the register a memorandum of satisfaction in whole or in part, or of the fact that part of the property or undertaking has been released from the charge or has ceased to form part of the company's property or undertaking, as the case may be⁵; and, where the registrar enters a memorandum of satisfaction in whole, he must, if required, send the company a copy of it⁶.

1 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

2 Companies Act 2006 s 872(1). As to the meaning of 'charge' for the purposes of registration see PARA 1277 note 2. As to charges registered in pursuance of the Companies Act 2006 Pt 25 Ch 1 (ss 860-877) (Company Charges: Companies registered in England and Wales or in Northern Ireland) see PARA 1277 et seq. As to the register of charges see PARA 1289.

As to the power of the Secretary of State by regulations to amend the Companies Act 2006 Pt 25 (ss 860-894) see s 894; and PARA 1277 note 1.

3 Companies Act 2006 s 872(1)(a).

4 Companies Act 2006 s 872(1)(b).

5 Companies Act 2006 s 872(2). As to cancelling and correcting a memorandum of satisfaction see PARA 1287.

6 Companies Act 2006 s 872(3).

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D. CONSEQUENCES OF FAILURE TO MEET REGISTRATION REQUIREMENTS

1294. Avoidance of charges where registration requirements not met.

If a company¹ creates a charge² which must be registered under the Companies Act 2006³, the charge is void (so far as any security on the company's property or undertaking is conferred by such a charge⁴) against⁵: (1) a liquidator of the company⁶; (2) an administrator of the company⁷; and (3) a creditor of the company⁸, unless the registration requirements⁹ are complied with¹⁰. It is not actual registration, but delivery of the particulars to the registrar for registration, that preserves the validity of the charge¹¹.

This provision¹² is without prejudice to any contract or obligation for repayment of the money secured by the charge¹³; and when a charge becomes void in this way¹⁴, the money secured by it immediately becomes payable¹⁵.

1 I.e. a company registered in England and Wales or in Northern Ireland. As to the meaning of 'company' for the purposes of registration see PARA 1277 note 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meanings of 'England' and 'Wales' see PARA 1 note 5. As to company registration under the Companies Act 2006 see PARA 111 et seq.

2 As to the meaning of 'charge' for the purposes of registration see PARA 1277 note 2. As to when a charge is created see PARA 1278; and as to charges on foreign property see PARA 1282.

3 I.e. a charge to which the Companies Act 2006 s 860 (see PARA 1277) applies: s 874(1). As to the registration of company charges relating to companies registered in Scotland see Pt 25 Ch 2 (ss 878-892); and see PARAS 1282, 1283. As to the register of charges see PARA 1289. As to the penalty for failure to comply with these provisions see PARA 1277; as to obtaining relief in the event of a failure so to comply see PARA 1287; and as to how far registration is constructive notice see PARA 1272.

4 Where the debentures which had not been registered pursuant to the statutory provisions were secured by a charge on some of the property of the company contained in a trust deed which did not require registration, it was held that the debenture holders were entitled to share as beneficiaries to the extent of the charge contained in the trust deed: *Dublin City Distillery v Doherty* [1914] AC 823, HL.

5 Companies Act 2006 s 874(1). The provisions of s 874(1) are subject to Pt 25 Ch 1 (ss 860-877) (see PARA 1277 et seq); s 874(2). As to the power of the Secretary of State by regulations to amend Pt 25 (ss 860-894) see s 894; and PARA 1277 note 1.

6 Companies Act 2006 s 874(1)(a). See note 5. As to liquidators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 555. As to provisional liquidators see *Re Namco UK Ltd* [2003] EWHC 989 (Ch) at [13], [2003] 2 BCLC 78 at [13] per Blackburne J. The company itself, as distinct from its liquidator, cannot have a cause of action arising out of non-registration: *Independent Automatic Sales Ltd v Knowles and Foster* [1962] 3 All ER 27, [1962] 1 WLR 974. On an equitable charge being avoided as against the liquidator, everything ancillary to it is also made void: *Re Molton Finance Ltd* [1968] Ch 325, [1967] 3 All ER 843, CA. See also *Orion Finance Ltd v Crown Financial Management (No 2)* [1996] 2 BCLC 382, CA.

7 Companies Act 2006 s 874(1)(b). See note 5. As to administrators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 158 et seq. An unregistered floating charge on a company's property was void against the company in administration (ie void against the company when acting by its administrator) because, on a true construction, the Companies Act 1985 s 395(1) (repealed) (see now the Companies Act 2006 s 874(1)), as applied to administrators, was intended to operate in relation to a company in administration precisely as that provision operated in respect of liquidators in relation to a company in liquidation, to protect the interests of the company in administration, so that property which was the subject of a registrable but unregistered charge might be available to the administrator as if no such charge existed: *Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council* [2001] UKHL 58, [2002] 1 AC 336, [2002] 1 All ER 292 (administrator had been entitled to bring an action for conversion of the company's property and might properly rely on the statute to defeat a claim based on the charge). Where a security is rendered void by the statutory provision (ie by what is now the Companies Act 2006 s 874), it is no part of equity to provide, via equitable set-off, an alternative security: *Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend CBC* at [36] per Lord Hoffmann, and at [78] per Lord Scott of Foscote.

8 Companies Act 2006 s 874(1)(c). See note 5. See *Re Toomer, ex p Blaiberg* (1883) 23 ChD 254, CA; *Re Monolithic Building Co, Tacon v Monolithic Building Co* [1915] 1 Ch 643, CA (where, in respect of mortgage debentures duly issued to a company director and registered, the director was given priority over a prior mortgage which had not been registered but of the existence of which he had full knowledge); *Re Eric Holmes (Property) Ltd* [1965] Ch 1052, [1965] 2 All ER 333 (where the fact that the date was wrongly stated in the charges and the fact that they were submitted for registration more than 21 days after their creation would not, since they were in fact registered, by themselves have been fatal to their validity as against the liquidator); *Re CL Nye Ltd* [1971] Ch 442, [1970] 3 All ER 1061, CA (similar facts, and similar result; as there was no evidence that any other person had given credit to the company between the dates when the charge should have been, and when it was actually, registered, the maxim that nobody could take advantage of his own wrong did not apply); *Wilde v Australian Trade Equipment Co Pty* (1980) 145 CLR 590, Aust HC (order for extension of time made on same day that a petition for winding up was presented; registration duly effected; winding-up order and order setting aside order for extension of time made subsequently; held that registration so effected continued valid). See also PARAS 1290, 1319.

9 Ie the Companies Act 2006 s 860 (see PARA 1277): s 874(1).

10 Companies Act 2006 s 874(1). See note 5. See *Grove v Advantage Healthcare (T10) Ltd* [2000] 1 BCLC 661 (a company's registered number could not fairly be described as 'a particular of the charge' to be registered and, accordingly, the failure to provide the correct registered number did not constitute a failure to comply with what is now the Companies Act 2006 s 874) (case decided under the Companies Act 1985 s 395 (repealed)). The court's jurisdiction under what is now the Companies Act 2006 s 873 to rectify the register of charges (see PARA 1287) does not extend to the particulars provided by or on behalf of an applicant for registration: *igroup Ltd v Ocwen* [2003] EWHC 2431 (Ch), [2003] 4 All ER 1063, [2004] 1 WLR 451. As to inconsistency between particulars inserted in the form and the terms of the instrument creating the charge see PARA 1290.

11 *NV Slavenburg's Bank v Intercontinental Natural Resources Ltd* [1980] 1 All ER 955, [1980] 1 WLR 1076. See also PARA 1833.

12 Ie the Companies Act 2006 s 874(1) (see the text and notes 1-10): see s 874(3).

13 Companies Act 2006 s 874(3).

14 Ie under the Companies Act 2006 s 874(1) (see the text and notes 1-10): see s 874(3).

15 Companies Act 2006 s 874(3).

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E. COMPANY'S RECORDS AND REGISTERS OF CHARGES; INSPECTION

1295. Companies' duty to keep copies of instruments creating charges.

A company¹ must keep available for inspection² a copy of every instrument creating a charge³ requiring registration under the Companies Act 2006⁴; in the case of a series of uniform debentures⁵, a copy of one debenture of the series is sufficient⁶.

1 As to the meaning of 'company' for the purposes of registration see PARA 1277 note 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to which see PARA 1297.

3 As to the meaning of 'charge' for the purposes of registration see PARA 1277 note 2. As to when a charge is created see PARA 1278; and as to charges on foreign property see PARA 1282.

4 Companies Act 2006 s 875(1). See PARA 1295. The text refers to charges requiring registration under Pt 25 Ch 1 (ss 860-877) (see PARA 1277 et seq): see s 875(1). As to the registration of company charges relating to companies registered in Scotland see Pt 25 Ch 2 (ss 878-892); and see PARAS 1282, 1283. As to the register of charges see PARA 1289. As to the power of the Secretary of State by regulations to amend Pt 25 (ss 860-894) see s 894; and PARA 1277 note 1.

5 As to the meaning of 'debenture' see PARA 1299.

6 Companies Act 2006 s 875(2).

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1296. Company's register of charges.

Every limited company¹ must keep available for inspection² a register of charges³, and enter in it⁴: (1) all charges specifically affecting property of the company⁵; and (2) all floating charges⁶ on the whole or part of the company's undertaking⁷, the entry giving in each case a short description of the property charged, the amount of the charge and, except in the case of securities to bearer⁸, the names of the persons entitled to it⁹. The property charged, not the instrument, is required to be registered¹⁰.

The omission to enter a charge in the register does not invalidate the charge¹¹, even where it is given to a director¹² or other officer of the company¹³ or to a shareholder¹⁴. If an officer of the company knowingly and wilfully authorises or permits the omission of any such entry¹⁵, he commits an offence¹⁶; and a person guilty of such an offence is liable (on conviction on indictment) to a fine or (on summary conviction) to a fine not exceeding the statutory maximum¹⁷. The company's bankers are not officers¹⁸; but the solicitor acting in the transaction is an officer¹⁹. Where directors instruct the secretary²⁰ to register a charge and he omits to do so, they are not knowingly and wilfully authorising or permitting the omission²¹.

1 As to the meaning of 'limited company' PARA 102. As to the meaning of 'company' for the purposes of registration see PARA 1277 note 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to which see PARA 1297.

3 As to the meaning of 'charge' for the purposes of registration see PARA 1277 note 2. As to the register of charges see PARA 1289; and see PARA 1298. As to charges on foreign property see PARA 1282.

4 Companies Act 2006 s 876(1).

5 Companies Act 2006 s 876(1)(a).

6 As to the meaning of 'floating charge' see PARA 1269.

7 Companies Act 2006 s 876(1)(b).

8 As to debentures payable to bearer see PARA 1304 note 2.

9 Companies Act 2006 s 876(2).

As to the provisions applicable where the entries are not recorded in legible form in the register of debenture holders see PARA 1324.

10 *Re South Durham Iron Co, Smith's Case* (1879) 11 ChD 579 at 585, CA, per Jessel MR (mortgage by deposit). Copies of the instruments creating the charge must be open to inspection: see PARA 1297.

11 Cf the Companies Act 2006 s 874(1); and PARA 1294.

12 As to a company's directors see PARA 478 et seq.

13 *Re Globe New Patent Iron and Steel Co* (1879) 48 LJ Ch 295; *Wright v Horton* (1887) 12 App Cas 371, HL (where Lord Halsbury LC relied to some extent on the fact that only creditors and members of the company could inspect the register; but the register is now open to public inspection (see PARA 1297)). As to the meaning of 'officer' see PARA 607. Cf PARA 1372.

14 *Re General South American Co* (1876) 2 ChD 337, CA.

15 Is an entry required to be made in pursuance of the Companies Act 2006 s 876: see s 876(3).

16 Companies Act 2006 s 876(3).

17 Companies Act 2006 s 876(4). As to the meaning of the 'statutory maximum' see PARA 1622.

18 *Re General Provident Assurance Co, ex p National Bank* (1872) LR 14 Eq 507. This case and those cited in notes 13, 14 were decided on the construction of the words of the Companies Act 1862 s 43 (now repealed) (see now the Companies Act 2006 s 876). Before the decision in *Wright v Horton* (1887) 12 App Cas 371, HL (cited in note 13) it was not clear whether a further penalty was or was not impliedly imposed upon a director, manager or other officer knowingly and wilfully authorising or permitting the omission, so as to make any charge in his favour invalid against the liquidator in a winding up. For a general discussion of the decisions before *Wright v Horton* see *Re General Provident Assurance Co, ex p National Bank*.

19 *Re Patent Bread Machinery Co, ex p Valpy and Chaplin* (1872) 7 Ch App 289; *Re Hackney Borough Newspaper Co* (1876) 3 ChD 669 at 671 per Jessel MR. Cf *Re International Pulp and Paper Co, Knowles' Mortgage* (1877) 6 ChD 556 at 560 per Jessel MR; *Re Dublin Drapery Co, ex p Cox* (1884) 13 LR Ir 174.

20 As to the company secretary see PARA 601 et seq.

21 *Re Hackney Borough Newspaper Co* (1876) 3 ChD 669.

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1297. Inspection of instruments creating charge and company's register of charges.

Copies of every instrument creating any charge¹ that requires registration under the Companies Act 2006², and a company's register of charges³, that are kept available for inspection, must be kept available for inspection either at the company's registered office⁴, or at a place specified in regulations⁵. The company must give notice to the registrar of companies⁶ of the place at which the documents and register are kept available for inspection⁷,

and of any change in that place⁸, unless they have at all times been kept at the company's registered office⁹. The documents and register must be open to the inspection of any creditor¹⁰ or member of the company¹¹ without charge¹², and to the inspection of any other person on payment of such fee as may be prescribed¹³.

If default is made for 14 days in complying with the giving of notice to the registrar of the place where inspection may be made¹⁴, or if an inspection¹⁵ is refused, an offence is committed by the company, and by every officer of the company who is in default¹⁶. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹⁷ and (for continued contravention) a daily default fine¹⁸ not exceeding one-tenth of level 3 on the standard scale¹⁹. In the case of a required inspection of the documents or the register²⁰ being refused, the court²¹ may by order compel an immediate inspection²².

1 As to the meaning of 'charge' for the purposes of registration see PARA 1277 note 2. As to charges on foreign property see PARA 1282.

2 Ie the documents required to be kept available for inspection under the Companies Act 2006 s 875 (see PARA 1295): see s 877(1)(a).

3 Ie a company's register of charges kept in pursuance of the Companies Act 2006 s 876 (see PARA 1296): see s 877(1)(b). As to the meaning of 'company' for the purposes of registration see PARA 1277 note 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the registration of company charges relating to companies registered in Scotland see Pt 25 Ch 2 (ss 878-892); and see PARAS 1282, 1283. As to the register of charges see PARA 1289; and see PARA 1298. As to the penalty for failure to comply with these provisions see PARA 1277; as to obtaining relief in the event of a failure so to comply see PARA 1287; and as to how far registration is constructive notice see PARA 1272. As to the power of the Secretary of State by regulations to amend Pt 25 (ss 860-894) see s 894; and PARA 1277 note 1.

4 Companies Act 2006 s 877(2)(a). As to a company's registered office see PARA 129.

5 Companies Act 2006 s 877(2)(b). The text refers to a place specified in regulations made under s 1136 (see PARA 676): see s 877(2)(b).

6 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

7 Companies Act 2006 s 877(3)(a).

8 Companies Act 2006 s 877(3)(b).

9 Companies Act 2006 s 877(3).

10 As to the meaning of 'creditor' see PARA 1427.

11 As to the meaning of 'member of the company' see PARA 321.

12 Companies Act 2006 s 877(4)(a). The right to inspect includes a right to take copies (*Nelson v Anglo-American Land Mortgage Agency Co* [1897] 1 Ch 130 at 134 per Stirling J), and the right of the shareholder to appoint a solicitor, accountant or other competent person to inspect (*Re Credit Co* (1879) 11 ChD 256; *Bevan v Webb* [1901] 2 Ch 59 at 75, CA, per Collins LJ; *Norey v Keep* [1909] 1 Ch 561; *Dodd v Amalgamated Marine Workers' Union* [1924] 1 Ch 116, CA; *Re Balaghât Gold Mining Co* [1901] 2 KB 665, CA).

13 Companies Act 2006 s 877(4)(b). See note 12. In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: s 1167. In exercise of the powers conferred by s 877(4)(b), the Secretary of State has made the Companies (Fees for Inspection of Company Records) Regulations 2008, SI 2008/3007. Accordingly, for the purpose of the Companies Act 2006 s 877(4)(b), the fee prescribed is £3.50 for each hour or part thereof during which the right of inspection is exercised: Companies (Fees for Inspection of Company Records) Regulations 2008, SI 2008/3007, reg 2.

14 Ie in complying with the Companies Act 2006 s 877(3) (see the text and notes 6-9): see s 877(5).

15 Ie an inspection required under the Companies Act 2006 s 877(4) (see the text and notes 10-13): see s 877(5).

16 Companies Act 2006 s 877(5). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' under the Companies Acts generally see PARA 607.

17 As to the meaning of 'standard scale' see PARA 1622.

18 As to the meaning of 'daily default fine' see PARA 1622.

19 Companies Act 2006 s 877(6).

20 Is an inspection required under the Companies Act 2006 s 877(4) (see the text and notes 10-13): see s 877(7).

21 As to the meaning of 'court' see PARA 212 note 1.

22 Companies Act 2006 s 877(7). See also PARA 349 note 30. As to the procedure for making claims and applications to the court under companies legislation see PARA 305. The power to order inspection ceases when the company goes into liquidation; and in that case the only right of inspection which a creditor or contributory has is in conformity with an order of the winding-up court under the Insolvency Act 1986: see s 155; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 569; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1086. See also *Somerset v Land Securities Co* [1897] WN 29.

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F. PROVISION FOR SPECIAL REGISTER

1298. Power to make provision for effect of registration in special register.

The Secretary of State¹ may by order² make provision for facilitating the making of information-sharing arrangements³ between the person responsible for maintaining a special register⁴ (the 'responsible person') and the registrar of companies that meet the requirement⁵ of ensuring that persons inspecting the register of charges⁶:

565 (1) are made aware, in a manner appropriate to the inspection, of the existence of charges in the special register which are treated in accordance with provision so made⁷; and

566 (2) are able to obtain information from the special register about any such charge⁸.

If the Secretary of State is satisfied that appropriate information-sharing arrangements have been made, he may by order provide that⁹:

567 (a) the registrar is authorised not to register a charge of a specified description¹⁰ under the Companies Act 2006¹¹;

568 (b) a charge of a specified description that is registered in the special register within a specified period is to be treated as if it had been registered (and certified by the registrar as registered) in accordance with the statutory requirements¹²; and

569 (c) the other statutory provisions¹³ apply to a charge so treated with specified modifications¹⁴.

Such an order¹⁵ may:

- 570 (i) modify any enactment¹⁶ or rule of law which would otherwise restrict or prevent the responsible person from entering into or giving effect to information-sharing arrangements¹⁷;
- 571 (ii) authorise the responsible person to require information to be provided to him for the purposes of the arrangements¹⁸;
- 572 (iii) make provision about the charging by the responsible person of fees in connection with the arrangements and the destination of such fees (including provision modifying any enactment which would otherwise apply in relation to fees payable to the responsible person)¹⁹, and about the making of payments under the arrangements by the registrar to the responsible person²⁰;
- 573 (iv) require the registrar to make copies of the arrangements available to the public (in hard copy or electronic form)²¹.

1 As to the Secretary of State see PARA 6.

2 As to the making of orders under the Companies Act 2006 generally see ss 1288-1292. An order under s 893 is subject to negative resolution procedure (ie the statutory instrument containing the order is subject to annulment in pursuance of a resolution of either House of Parliament): see ss 893(9), 1289. At the date at which this volume states the law, no such order has been made in exercise of the power conferred by s 893.

As to the power of the Secretary of State by regulations to amend Pt 25 (ss 860-894) see s 894; and PARA 1277 note 1.

3 For these purposes, 'information-sharing arrangements' are arrangements to share and make use of information held by the registrar of companies or by the responsible person (see the text and note 5): see the Companies Act 2006 s 893(2). As to the meaning of 'registrar of companies' see PARA 131 note 2.

4 For these purposes, a 'special register' means a register, other than the register of charges kept under the Companies Act 2006 Pt 25, in which a charge to which Pt 25 Ch 1 (ss 860-877) (see PARA 1277 et seq) or Pt 25 Ch 2 (ss 878-892) (registration of company charges relating to companies registered in Scotland) applies is required or authorised to be registered: s 893(1). As to the meaning of 'charge' for the purposes of registration see PARA 1277 note 2. As to the register of charges see PARA 1289. As to charges on foreign property see PARA 1282.

5 Companies Act 2006 s 893(2).

6 Companies Act 2006 s 893(4). Provision may be made under s 893 relating to registers maintained under the law of a country or territory outside the United Kingdom: s 893(8). As to the meaning of 'United Kingdom' see PARA 1 note 5. As to inspection of the register of charges see PARA 1297.

7 Companies Act 2006 s 893(4)(a).

8 Companies Act 2006 s 893(4)(b).

9 Companies Act 2006 s 893(3).

10 For these purposes, 'specified' means specified in an order under the Companies Act 2006 s 893: s 893(6). A description of charge may be specified, in particular, by reference to one or more of the following (s 893(7)):

2181 (1) the type of company by which it is created (s 893(7)(a));

2182 (2) the form of charge which it is (s 893(7)(b));

2183 (3) the description of assets over which it is granted (s 893(7)(c));

2184 (4) the length of the period between the date of its registration in the special register and the date of its creation (s 893(7)(d)).

As to the meaning of 'company' for the purposes of registration see PARA 1277 note 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

11 Companies Act 2006 s 893(3)(a). The text refers to the registration of a charge under Pt 25 Ch 1 (see PARA 1277 et seq) or Pt 25 Ch 2 (ss 878-892) (registration of company charges relating to companies registered in Scotland): see s 893(3)(a).

12 Companies Act 2006 s 893(3)(b). The text refers to registration of a charge in accordance with the requirements of Pt 25 Ch 1 (see PARA 1277 et seq) or, as the case may be, Pt 25 Ch 2 (ss 878-892) (registration of company charges relating to companies registered in Scotland): see s 893(3)(b).

13 I.e. the other provisions of Pt 25 Ch 1 (see PARA 1277 et seq) or, as the case may be, Pt 25 Ch 2 (ss 878-892) (registration of company charges relating to companies registered in Scotland): see s 893(3)(c).

14 Companies Act 2006 s 893(3)(c).

15 I.e. an order under the Companies Act 2006 s 893: see s 893(5).

16 As to the meaning of 'enactment' see PARA 17 note 2.

17 Companies Act 2006 s 893(5)(a).

18 Companies Act 2006 s 893(5)(b).

19 Companies Act 2006 s 893(5)(c)(i).

20 Companies Act 2006 s 893(5)(c)(ii).

21 Companies Act 2006 s 893(5)(d). As to references to documents or information sent or supplied in hard copy form under the Companies Acts see PARA 678 note 4; and as to documents or information sent or supplied in electronic form see PARA 679 note 3.

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(iv) Debentures and Debenture Stock

A. DESCRIPTION AND CONTENTS OF INSTRUMENTS OF SECURITY

1299. Meaning of 'debenture'.

No very precise definition of 'debenture'¹ can be found², but various forms of instruments are called debentures³. In the Companies Acts⁴, 'debenture' includes debenture stock, bonds and any other securities of a company⁵, whether or not constituting a charge on the assets of the company⁶.

A debenture is a document which either creates or acknowledges a debt⁷. The debt secured may be all moneys due from the company on any account whatsoever, and is then known as an 'all moneys debenture'. Even so, it does not cover moneys due on unsecured loan stock issued to a third party and subsequently acquired by the debenture holder⁸. A document may be a debenture even though, under its terms, the debt is to be repaid out of only a part of the profits⁹. The term 'debenture' is usually associated with a company of some kind, and most debentures are securities given by companies. Nevertheless debentures are often granted by clubs¹⁰ and occasionally by individuals.

The instrument need not describe itself as a debenture even to bring it within the exception from the application of the Bills of Sale Acts 1878 and 1882¹¹ which exists in favour of debentures of an incorporated company¹², and the use or non-use of the word is not

conclusive¹³; but, even though no security other than a promise to pay is given by the instrument, if it is described as a debenture on the face of it, it is a debenture for stamping purposes¹⁴.

1 A debenture has been described as a certificate or voucher certifying that a sum of money is owing to the person designated in it (said to derive from the Latin *debentur* which was used as the first word of a certificate recording a debt): Oxford English Dictionary (2nd Edn) vol IV p 311.

2 *British India Steam Navigation Co v IRC* (1881) 7 QBD 165 at 168-169 per Grove J, and at 172 per Lindley J; *Knightsbridge Estates Trust Ltd v Byrne* [1940] AC 613 at 621, [1940] 2 All ER 401 at 405-406, HL, per Viscount Maugham, and at 627 and 410 per Lord Romer.

3 *British India Steam Navigation Co v IRC* (1881) 7 QBD 165. A document may be a debenture even if it is also accurately describable by another description: see *Pearl Assurance Co Ltd v West Midlands Gas Board* [1950] 2 All ER 844 at 847 per Wynn-Parry J. Trust deeds securing debentures are themselves debentures within the meaning of the Bills of Sale Act (1878) Amendment Act 1882 s 17 (see the text and note 12) and as such do not require registration as bills of sale: see *Richards v Kidderminster Overseers*, *Richards v Kidderminster Corpn* [1896] 2 Ch 212; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1684. As to trust deeds securing payment of money owing on debentures see PARA 1302. As to the words which will pass debentures in a will see PARA 1308.

4 As to the meaning of the 'Companies Acts' see PARA 16.

5 As to the meaning of 'company' under the Companies Acts see PARA 24.

6 Companies Act 2006 s 738.

7 *Levy v Abercorris Slate and Slab Co* (1887) 37 ChD 260 at 264n; *Edmonds v Blaina Furnaces Co* (1887) 36 ChD 215. Cf *Topham v Greenside Glazed Fire-brick Co* (1887) 37 ChD 281 at 290, 292 per North J. See also *R v Findlater* [1939] 1 KB 594, [1939] 1 All ER 82, CCA (where a certificate undertaking to pay insurance for return of capital was held to be a debenture).

8 *Re Quest Cae Ltd* [1985] BCLC 266.

9 *Lemon v Austin Friars Investment Trust Ltd* [1926] Ch 1, CA ('income stock certificates'; characteristics of a debenture discussed).

10 See **CLUBS** vol 13 (2009) PARA 251.

11 As to the Acts which may be cited as the Bills of Sale Acts 1878 and 1882 see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1400 et seq.

12 See the Bills of Sale Act (1878) Amendment Act 1882 s 17; *Levy v Abercorris Slate and Slab Co* (1887) 37 ChD 260; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1684.

13 *British India Steam Navigation Co v IRC* (1881) 7 QBD 165 at 172 per Lindley J; *Speyer Bros v IRC* [1908] AC 92 at 95, HL, per Lord Loreburn LC; *Lemon v Austin Friars Investment Trust Ltd* [1926] Ch 1, CA.

14 *Speyer Bros v IRC* [1908] AC 92, HL; *Re Fireproof Doors Ltd, Umney v Fireproof Doors Ltd* [1916] 2 Ch 142 at 150 per Astbury J.

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1300. Form of debenture.

Although this is not strictly necessary¹, a debenture is generally issued under the company's seal²; but it is doubtful whether the statutory right of a mortgagee to sell where the mortgage is

by deed³ applies to a series of debentures of a company⁴. As a rule, a debenture contains a covenant to pay, generally at some named place, such as the company's office⁵, accompanied by some charge or security, in which case the instrument is usually called a 'mortgage debenture'⁶. Debentures sometimes contain a fixed charge, and usually contain a charge by way of floating security⁷ on the company's property and undertaking, including, as a rule, its uncalled capital⁸. A debenture is usually one of a series of documents all of which rank *pari passu* in point of priority, but it may, and often does, consist of one document only⁹.

1 *British India Steam Navigation Co v IRC* (1881) 7 QBD 165.

2 A company may have a common seal, but need not have one: see the Companies Act 2006 s 45; and PARA 283.

3 See the Law of Property Act 1925 s 101; and **MORTGAGE** vol 77 (2010) PARA 443.

4 *Blaker v Herts and Essex Waterworks Co* (1889) 41 ChD 399.

5 *Edmonds v Blaina Furnaces Co* (1887) 36 ChD 215 at 219 per Chitty J. Default in payment at the place named must be proved before any proceedings may be commenced to enforce the security: see *Thorn v City Rice Mills* (1889) 40 ChD 357; *Re Escalera Silver Lead Mining Co Ltd* (1908) 25 TLR 87. However, see also *Re Harris Calculating Machine Co, Sumner v Harris Calculating Machine Co* [1914] 1 Ch 920 (where the interest, unlike the principal, was not payable at a specified place).

6 *British India Steam Navigation Co v IRC* (1881) 7 QBD 165 at 172 per Lindley J. A debenture need not, however, embody a charge: cf *Pearl Assurance Co Ltd v West Midlands Gas Board* [1950] 2 All ER 844 (a decision on the definition of 'securities' in the Gas Act 1948 s 74(1) (now repealed)). A covenant binding the company's estate, property and effects to repay a sum mentioned in the bond has been held to constitute a charge: see *Re Florence Land and Public Works Co, ex p Moor* (1878) 10 ChD 530, CA. See also *Re Colonial Trusts Corpn, ex p Bradshaw* (1879) 15 ChD 465. As to the effect on foreign property of a charge given in England as against unsecured creditors abroad see PARA 1366.

7 As to the meaning of 'floating security' see PARA 1269.

8 As to the meaning of 'uncalled share capital' see PARA 1048.

9 See *Robson v Smith* [1895] 2 Ch 118.

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1301. Unsecured notes.

Sometimes a debenture contains no charge over the company's property whatsoever, in which case it is known as a 'naked debenture'¹, or unsecured note. Where such notes are secured by a trust deed, in the sense that the company covenants to pay the money due under them to trustees, they are sometimes called 'unsecured loan stock'. Notwithstanding the absence of any charge, an unsecured note is properly speaking a debenture², and is chargeable with the same stamp duty³.

However, since no charge is created, such notes do not require registration under the Companies Act 2006⁴. Equally, the holders of such notes are entitled to no priority over other creditors of the company in the payment of the money due on them and may have their claims expressly postponed by the terms of issue to other classes of creditors such as trade creditors⁵.

1 The word 'debenture', which by itself popularly implies the existence of some security (see *Knightsbridge Estates Trust Ltd v Byrne* [1940] AC 613 at 625, [1940] 2 All ER 401 at 407-408, HL, per Viscount Maugham), should not be used alone.

2 See PARA 1299 note 3.

3 *British India Steam Navigation Co v IRC* (1881) 7 QBD 165.

4 As to registration with the registrar of companies see PARA 1279.

5 Such subordination agreements do not offend the principle that in a winding up all debts (other than preferential debts) fall to be paid *pari passu* (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 812, 1009): *Re Maxwell Communications Corp plc (No 2)* [1994] 1 All ER 737, [1993] 1 WLR 1402; *Re SSSL Realisations (2002) Ltd (in liq)*, *Re Save Group plc (in liq)* [2006] EWCA Civ 7, [2006] Ch 610, [2007] 1 BCLC 29.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(22) BORROWING AND SECURING MONEY/(iv) Debentures and Debenture Stock/A. DESCRIPTION AND CONTENTS OF INSTRUMENTS OF SECURITY/1302. Trust deed securing payment of money owing on debentures.

1302. Trust deed securing payment of money owing on debentures.

Often a trust deed is executed by which property belonging to the company is specifically mortgaged to trustees for the debenture¹ holders further to secure the payment of the money owing on the debentures. Trustees of such a trust deed are in much the same position as any other trustees². Where the structure of a trust deed requires the bondholders, on the occurrence of a materially prejudicial event of default, to make a written request to do so, the trustee comes under a mandatory obligation, owed to the bondholders, to give the company notice of acceleration for repayment of the capital, and the trustee cannot reasonably insist on an indemnity to cover the risk of giving an invalid notice unless the risk is more than merely foreseeable³.

1 As to the meaning of 'debenture' see PARA 1299.

2 *Re Magadi Soda Co Ltd* (1925) 94 LJ Ch 217 at 219. See generally **TRUSTS** vol 48 (2007 Reissue) PARA 601 et seq. But see also *Law Debenture Trust Corp plc v Concord Trust* [2007] EWHC 1380 (Ch) at [49]-[50], [2007] All ER (D) 149 (Jun) at [49]-[50] per Lewison J (trust deed and related documents at issue were designed as a package and had to be construed as a whole; legal structure created by the deed and documents is partly that of a relationship between borrower and creditor, partly that between mortgagor and mortgagee and partly that between trustee and beneficiary, relationships which do not always sit happily together).

3 *Concord Trust v Law Debenture Trust Corp plc* [2005] UKHL 27, [2006] 1 BCLC 616, [2005] 1 WLR 1591. See also PARA 1306 note 5.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(22) BORROWING AND SECURING MONEY/(iv) Debentures and Debenture Stock/A. DESCRIPTION AND CONTENTS OF INSTRUMENTS OF SECURITY/1303. Right of holder to copy of trust deed securing debentures.

1303. Right of holder to copy of trust deed securing debentures.

Any holder of debentures¹ of a company² is entitled, on request and on payment of such fee as may be prescribed³, to be provided with a copy of any trust deed for securing the debentures⁴.

If default is made in complying with this requirement⁵, an offence is committed by every officer of the company who is in default⁶. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale⁷ and (for continued contravention) a daily default fine⁸ not exceeding one-tenth of level 3 on the standard scale⁹. In the case of any such default, the court¹⁰ may direct that the copy required be sent to the person requiring it¹¹.

1 As to the meaning of 'debenture' see PARA 1299.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. As to the Secretary of State see PARA 6. In exercise of the powers conferred by s 749(1), the Secretary of State has made the Companies (Fees for Inspection and Copying of Company Records) (No 2) Regulations 2007, SI 2007/3535. Accordingly, the fee prescribed for the purpose of the Companies Act 2006 s 749(1) is 10 pence per 500 words or part thereof copied, and the reasonable costs incurred by the company in delivering the copy of the debenture trust deed or part thereof to the person entitled to be provided with it: Companies (Fees for Inspection and Copying of Company Records) (No 2) Regulations 2007, SI 2007/3535, reg 4. As to trust deeds securing payment of money owing on debentures see PARA 1302.

4 Companies Act 2006 s 749(1). As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

5 In complying with the Companies Act 2006 s 749(1) (see the text and notes 1-4): see s 749(2).

6 Companies Act 2006 s 749(1). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' under the Companies Acts generally see PARA 607.

7 As to the meaning of 'standard scale' see PARA 1622.

8 As to the meaning of 'daily default fine' see PARA 1622.

9 Companies Act 2006 s 749(3).

10 As to the meaning of 'court' see PARA 212 note 1.

11 Companies Act 2006 s 749(4). See also PARA 499 note 47.

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1304. Bearer and registered debentures.

Debentures¹ may be:

- 574 (1) made payable to bearer², in which case interest coupons are attached and the principal and interest are payable respectively upon presentation and delivery of the debenture and coupons; or
- 575 (2) registered debentures³, in which case the principal and interest are payable only to the registered holders, unless they are issued with coupons payable to

bearer, in which case the interest is payable on presentation and delivery of the coupons.

A bearer debenture is recognised as a negotiable instrument⁴. Where money is payable on 'presentation' of a debenture or coupon, it must be delivered in order to obtain payment⁵.

Where the bearers of some of the debentures cannot be found, it may be necessary for the company or the trustees to apply to the court for directions. The Attorney General should be made a party to the proceedings by which the application is made⁶.

1 As to the meaning of 'debenture' see PARA 1299.

2 Formerly, bearer debentures were rarely issued, as the ad valorem duty payable on them was larger than the duty upon registered debentures: see *Bechuanaland Exploration Co v London Trading Bank Ltd* [1898] 2 QB 658. Certain debentures to bearer issued in Scotland are made valid and binding according to their terms by the Companies Act 2006 s 742. As to special restrictions on the issue of bearer securities and requirements as to the deposit of certificates of title see PARA 381.

3 As to registration under the Companies Act 2006 see PARA 1295 et seq.

4 See PARA 412. As to negotiable instruments generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1400 et seq.

5 Cf *Bartlett v Holmes* (1853) 13 CB 630.

6 *Re Chillagoe Rly and Mines Ltd Trust Deed* (1930) 46 TLR 242.

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1305. Perpetual debentures.

A condition contained in debentures¹, or in a deed for securing debentures², is not invalid by reason only that the debentures are made either:

- 576 (1) irredeemable³; or
- 577 (2) redeemable⁴ only on the happening of a contingency (however remote) or on the expiration of a period (however long)⁵,

any rule of equity to the contrary notwithstanding⁶.

This provision applies to debentures whenever issued, and to deeds whenever executed⁷.

1 As to the meaning of 'debenture' see PARA 1299.

2 As to trust deeds securing payment of money owing on debentures see PARA 1302.

3 Companies Act 2006 s 739(1)(a). As to the meaning of 'irredeemable' see *Re Joseph Stocks & Co Ltd* (1909) [1912] 2 Ch 134n at 140n per Eve J.

4 As to the meaning of 'redeemable' see *Re Joseph Stocks & Co Ltd* (1909) [1912] 2 Ch 134n at 140n per Eve J. As to the modification of rights of redeemable debenture holders by making their debentures irredeemable see PARA 1328.

5 Companies Act 2006 s 739(1)(b). In view of the statutory definition of 'debenture' (see PARA 1299), a mortgage of freehold land may be a 'debenture' within the meaning of s 739: *Knightsbridge Estates Trust Ltd v Byrne* [1940] AC 613, [1940] 2 All ER 401, HL.

6 Companies Act 2006 s 739(1).

7 Companies Act 2006 s 739(2).

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1306. Indorsed debenture conditions.

It is usual to set out most of the provisions relating to debentures¹ in conditions indorsed on them. Such provisions generally state that the debenture is one of a series of a certain limited number, or for securing a total sum of limited amount, each for a like amount of principal; that all the debentures of the series rank *pari passu* as a first or other charge; and that such charge (except as regards the property, if any, specifically mortgaged) is to be a floating security², but so that the company is not to create any charge ranking in priority to, or *pari passu* with, the debentures of the series. The conditions also generally provide for registration of the debentures and of transfers of them at the company's office, the non-recognition of equities³, transfers, payment of interest⁴ by warrant, requirements to be observed in the case of joint holders, acceleration of payment of principal in certain specified events⁵, the service of notices, and the time and mode of repayment of the principal money secured. A power to appoint a person as receiver or as receiver and manager is usually given, and his powers are defined, and provision is made as to the disposal of money which comes into his hands⁶. Power is also usually given to a specified majority of debenture holders of a series to modify the rights of all the holders of the series⁷. In such cases, provisions are usually made for the convening and holding of meetings of debenture holders⁸.

If there is a trust deed, some reference to it in the debentures is advisable, and many of the provisions usually contained in the debenture conditions are then inserted in the trust deed⁹.

1 As to the meaning of 'debenture' see PARA 1299.

2 As to the meaning of 'floating security' see PARA 1269.

3 See PARA 1325.

4 Where interest is payable out of net earnings, a company is not entitled to set aside a sum representing profits before ascertaining the amount available for the payment of interest: see *Heslop v Paraguay Central Rly Co Ltd* (1910) 54 Sol Jo 234. Acceptance of a cheque for interest and failure to present it does not release the security: *Re J Defries & Sons Ltd* [1909] 2 Ch 423.

5 Eg on falling into arrear with interest, winding up, seizure in execution or under a distress (*Central Printing Works Ltd v Walker and Nicholson* (1907) 24 TLR 88), or receiving notice of an intention to pay off (*First National Bank of Chicago v Orinoco Shipping and Trading Co Ltd* (1904) 21 TLR 39).

As to the obligations of a trustee under a trust deed to serve notice of acceleration see *Concord Trust v Law Debenture Trust Corp plc* [2005] UKHL 27, [2006] 1 BCLC 616, [2005] 1 WLR 1591 (cited also in PARA 1302). The terms of the debenture and related documents are typically complex and the courts approach their construction as in the manner of construing any commercial document: *Re Golden Key Ltd (in receivership)* [2009] EWCA Civ 636, [2009] All ER (D) 18 (Jul). Unless the contrary appears, the courts have to assume that parties to a commercial document intend to produce a commercial result and thus, the court takes into account

the commerciality of rival constructions, if that commerciality can be identified: see *Re Golden Key Ltd (in receivership)* at [41] per Arden LJ, adopting the approach on the question of interpretation taken in *Re Whistlejacket Capital Ltd (in receivership)* [2008] EWCA Civ 575, [2008] 2 BCLC 683. In *Re Golden Key Ltd (in receivership)*, the court held that it would be anomalous on wording of the documentation in that case (documentation which supported a 'pay as you go' construction) if commercial paper due and payable should be deferred to some later date of redemption; receivers ordered to redeem commercial paper matured on or before the date when insolvency intervened, which insolvency accelerated all non-matured claims to a set date. Cf *Re Whistlejacket Capital Ltd (in receivership)* (wording unclear, but court would interpret it in the light of normal practice of receivers with respect to realising assets, holding reserves and retentions and making payments; mindful of the need on insolvency to pay each class of creditor pro rata and pari passu, a receiver may need to withhold sums in hand from distribution to those whose debts are due in order to meet the pari passu obligation in relation to debts falling due in the future).

6 As to the power given in debentures to appoint a receiver or manager on the occurrence of specified events see PARA 1340; and as to his powers of disposal in such circumstances, which depend upon the wording of the debenture, see note 5. As to the construction of references to receivers and managers for these purposes see PARA 1336.

7 See PARA 1328.

8 See PARA 1329.

9 As to trust deeds securing payment of money owing on debentures see PARA 1302.

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1307. Special clauses in debentures.

Debentures¹ and trust deeds² often provide for redemption of debentures by drawings³ and for the formation of a sinking fund, which is to be applicable to the redemption of the debentures either as they are drawn for redemption or pari passu in proportion to the amounts secured by them.

Occasionally, provisions are made to enable debentures originally payable to bearer to become registered debentures, or vice versa, with rights varied in consequence of the change⁴.

Special provisions are required where more than one series of debentures are issued and the company is only in a position to give to the holders of the later series a second security on its assets.

1 As to the meaning of 'debenture' see PARA 1299.

2 As to trust deeds securing payment of money owing on debentures see PARA 1302.

3 See PARA 1331. As to issues of construction governing redemption and payment obligations written into debentures see PARA 1306 note 5.

4 As to debentures payable to bearer and registered debentures see PARA 1304.

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1308. Charging orders.

Debentures¹ may be made the subject of a charging order², as they are cited in the inclusive definition of 'stock' given in the Charging Orders Act 1979³.

1 As to the meaning of 'debenture' see PARA 1299.

2 See the provisions of the Charging Orders Act 1979; and CPR Pt 73 (see **CIVIL PROCEDURE** vol 12 (2009) PARA 1471 et seq), the first section of which (ie CPR 73.2-73.10: see **CIVIL PROCEDURE** vol 12 (2009) PARA 1472 et seq) applies to an application by a judgment creditor for a charging order under the Charging Orders Act 1979.

3 See the Charging Orders Act 1979 s 6(1); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1468. Formerly, the power to make a charging order was restricted to 'stocks and shares' where 'stock' bore its usual meaning of consolidated shares: *Sellar v Charles Bright & Co Ltd* [1904] 2 KB 446, CA. However, it was held that debentures may pass in a gift by will of 'all my stocks and shares': see *Re Purnchard's Will Trusts, Public Trustee v Pelly* [1948] Ch 312, [1948] 1 All ER 790; and **WILLS** vol 50 (2005 Reissue) PARA 586.

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1309. Debenture stock.

Debenture stock¹ is generally constituted and secured by a trust deed containing a charge upon the property of the company². A stock certificate is issued to each allottee or transferee of stock stating (inter alia), in the case of registered stock³, that the person named in it is the registered proprietor or, in the case of bearer stock⁴, that the bearer is the proprietor of the amount of stock mentioned in it, and having printed on it the conditions on which the stock is issued and held⁵.

Where a debenture stock deed does not contain any direct covenant with the stockholder to pay him interest, a stockholder whose interest is in arrear is not entitled to present a winding-up petition against the company as a creditor⁶.

If an agent of a company hands to a lender a fully paid certificate of debenture stock on the security of which he borrows more than he was authorised and appropriates the excess, a lender without notice may prove for the whole sum⁷.

1 As to the meaning of 'debenture' see PARA 1299. As to the meaning of 'stock' generally see PARA 1163.

2 As to trust deeds securing payment of money owing on debentures see PARA 1302.

3 As to registered debentures see PARA 1304.

4 As to debentures payable to bearer see PARA 1304.

5 See *Re Melbourne Brewery and Distillery* [1901] 1 Ch 453 (where it was held that slight breaches of the covenants in the trust deed would not entitle the stockholder to present a petition).

6 *Re Dunderland Iron Ore Co Ltd* [1909] 1 Ch 446.

7 *Robinson v Montgomeryshire Brewery Co* [1896] 2 Ch 841.

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1310. Interest on securities.

Where, as is usual in a debenture or debenture trust deed¹, the company agrees or covenants to pay the principal sum and interest at an agreed rate, and property of the company is charged with those payments, the charge is a security both for the principal and for interest at the agreed rate until payment, and on realisation of the security the debenture holder is entitled to interest at the agreed rate, notwithstanding that the company may be wound up or that he may have recovered judgment against the company².

Even if the debenture does not so provide, the principal money, if not paid on the appointed day, will continue to carry interest at the agreed rate³.

Interest payable on debentures, although payable half-yearly, accrues from day to day⁴.

A debenture holder who, in payment of interest, accepts cheques which by arrangement are not presented, is not thereby prevented from claiming to be a secured creditor in respect of that interest⁵. If in a claim by debenture holders the amount of the principal only is certified, in the belief that the security is insufficient, and payment is made on this footing, this does not prevent the full interest being payable if the security proves sufficient⁶.

1 See PARA 1299 et seq.

2 *Economic Life Assurance Society v Usborne* [1902] AC 147, HL; *Re European Central Rly Co, ex p Oriental Financial Corpn* (1876) 4 ChD 33, CA. As to interest on judgment debts see **CIVIL PROCEDURE** vol 12 (2009) PARA 1149. As to interest on debts proved in a winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 795.

3 *Price v Great Western Rly Co* (1847) 16 M & W 244.

4 *Re Rogers' Trusts* (1860) 1 Drew & Sm 338.

5 *Re J Defries & Sons Ltd, Eichholz v J Defries & Sons Ltd* [1909] 2 Ch 423.

6 *Re Calgary and Medicine Hat Land Co Ltd, Pigeon v Calgary and Medicine Hat Land Co Ltd* [1908] 2 Ch 652, CA.

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1311. Liability of trustees of debentures.

Any provision contained in a trust deed for securing an issue of debentures¹, or in any contract with the holders of debentures secured by a trust deed², is void in so far as it would have the effect of exempting a trustee of the deed from, or indemnifying him against, liability for breach

of trust where he fails to show the degree of care and diligence required of him as trustee, having regard to the provisions of the trust deed conferring on him any powers, authorities or discretions³. However, these provisions as to avoidance of liability do not invalidate⁴:

- 578 (1) a release otherwise validly given in respect of anything done or omitted to be done by a trustee before the giving of the release⁵; or
- 579 (2) any provision enabling such a release to be given: (a) on being agreed to by a majority of not less than 75 per cent in value of the debenture holders present and voting in person (or, where proxies are permitted, by proxy at a meeting summoned for the purpose)⁶; and (b) either with respect to specific acts or omissions or on the trustee dying or ceasing to act⁷.

Nor do the provisions as to avoidance of liability operate:

- 580 (i) to invalidate any provision in force on the relevant date⁸ so long as any person then entitled to the benefit of the provision, or afterwards given the benefit of the provision⁹, remains a trustee of the deed in question¹⁰; or
- 581 (ii) to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force¹¹.

While any trustee of a trust deed remains entitled to the benefit of a provision that has been saved thus¹², the benefit of that provision may be given either to all trustees of the deed, present and future, or to any named trustees or proposed trustees of it, by a resolution¹³ passed by a majority of not less than 75 per cent in value of the debenture holders present in person (or, where proxies are permitted, by proxy at a meeting summoned for the purpose)¹⁴.

Provisions are usually inserted in a trust deed for the remuneration of trustees, and for this remuneration to be a first charge on the proceeds of sale¹⁵. Without such a special provision, the remuneration is not payable in priority to the debenture holders out of the fund realised by the sale of the assets charged¹⁶. The question whether the trustees are entitled to remuneration after the appointment of a receiver is one of construction of the trust deed¹⁷.

The solicitor who acts for the trustees has a lien on the trust deed and other documents in his possession as solicitor for the trustees for costs incurred in connection with the trust both before and after the execution of the trust deed¹⁸, unless he has agreed to look for payment of the costs to a third party, for example the company¹⁹.

1 Companies Act 2006 s 750(1)(a). As to the meaning of 'debenture' see PARA 1299. As to trust deeds securing payment of money owing on debentures see PARA 1302. The provisions of s 750 are subject to the savings contained in s 751 (see the text and notes 8-14): see s 750(3). Notwithstanding ss 750, 751, a trustee of a trust deed for securing an issue of debentures is not chargeable with a breach of trust by reason only of the fact that he has assented to an amendment of the trust deed only for the following purposes, namely for the purposes of (Uncertificated Securities Regulations 2001, SI 2001/3755, reg 40(2) (amended by SI 2009/1889)):

- 2185 (1) allowing the holding of debentures in uncertificated form (Uncertificated Securities Regulations 2001, SI 2001/3755, reg 40(2)(a));
- 2186 (2) allowing the exercise of rights attaching to the debentures by means of a relevant system (reg 40(2)(b)); or
- 2187 (3) allowing the transfer of title to the debentures by means of a relevant system (reg 40(2)(c)),

provided that he has given or caused to be given notice of the amendment in accordance with the trust deed not less than 30 days prior to its becoming effective to all persons registered as holding the debentures on a date not more than 21 days before the dispatch of the notice (reg 40(2)). As to the meaning of 'uncertificated'

for these purposes see PARA 421 note 8; and as to the meaning of 'relevant system' see PARA 421 note 5. As to trustees and personal representatives and uncertificated securities see PARA 343.

2 Companies Act 2006 s 750(1)(b). See note 1.

3 Companies Act 2006 s 750(1). See note 1.

4 Companies Act 2006 s 750(2). See note 1.

5 Companies Act 2006 s 750(2)(a). See note 1.

6 Companies Act 2006 s 750(2)(b)(i). See note 1. As to meetings of members see PARA 629 et seq; and as to voting at meetings see PARA 653 et seq. As to voting by proxy see PARA 662 et seq.

7 Companies Act 2006 s 750(2)(b)(ii). See note 1.

8 The relevant date for this purpose is 1 July 1948 (ie the date on which the Companies Act 1948 came into force incorporating changes made by the Companies Act 1947, including provisions corresponding to the Companies Act 1985 s 192) in a case where s 192 of the 1985 Act applied immediately before 6 April 2008 (ie immediately before the commencement of the Companies Act 2006 s 751: see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, art 3(1)(g)): see the Companies Act 2006 s 751(2). As to the statutory framework created by the Companies Act 2006, and as to Acts that were superseded by the Companies Act 2006, and as to the continuity which was maintained in the law, see PARA 9 et seq.

9 Ie under the Companies Act 2006 s 751(3) (see the text and notes 12-14): see s 751(1)(a).

10 Companies Act 2006 s 751(1)(a).

11 Companies Act 2006 s 751(1)(b).

12 Ie a provision saved by the Companies Act 2006 s 751(1) (see the text and notes 8-11): see s 751(3).

13 As to resolutions see PARA 612 et seq.

14 Companies Act 2006 s 751(3). A meeting for that purpose must be summoned in accordance with the provisions of the deed or, if the deed makes no provision for summoning meetings, in a manner approved by the court: s 751(4). As to the meaning of 'court' see PARA 212 note 1.

15 *Re Piccadilly Hotel Ltd, Paul v Piccadilly Hotel Ltd* [1911] 2 Ch 534.

16 *Re Accles Ltd, Hodgson v Accles Ltd* (1902) 51 WR 57.

17 *Re Piccadilly Hotel Ltd, Paul v Piccadilly Hotel Ltd* [1911] 2 Ch 534; *Re Anglo-Canadian Lands (1912) Ltd* [1918] 2 Ch 287; *Re British Consolidated Oil Corpn Ltd* [1919] 2 Ch 81 (where the trustees were held to be entitled to remuneration after the appointment of a receiver); *Re Locke and Smith Ltd* [1914] 1 Ch 687, CA (where the trustee was held not so entitled). In *Re Locke and Smith Ltd*, Eve J proceeded on the basis that the trustee in question had rendered no substantial services, but see the criticism in *Re British Consolidated Oil Corpn Ltd* at 90 per Peterson J. It is now usual to provide for the remuneration to be payable notwithstanding the appointment of a receiver.

18 *Re Dee Estates Ltd* [1911] 2 Ch 85.

19 *Re Mason and Taylor* (1878) 10 ChD 729.

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B. ISSUE AND REISSUE OF DEBENTURES

1312. Enforcement of contract to subscribe for debentures.

A contract with a company¹ to take up and pay for debentures² of the company may be enforced by an order for specific performance³. However, where debentures have been issued payable by instalments and have been forfeited, the company cannot enforce payment⁴.

No claim may be brought on an agreement to purchase debentures containing a charge on land, unless the agreement is in writing, incorporating all the expressly agreed terms of the agreement in one document or, where agreements are exchanged, in each signed by or on behalf of each party to the agreement⁵.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'debenture' see PARA 1299.

3 Companies Act 2006 s 740. The remedy of specific performance first conferred by the Companies Act 1907 (repealed) was not available in the case of a contract entered into prior to that Act: *Re Smelting Corp'n Ltd* [1915] 1 Ch 472. As to specific performance see **SPECIFIC PERFORMANCE**.

4 *Kuala Pahi Rubber Estates Ltd v Mowbray* (1914) 111 LT 1072, CA.

5 *Driver v Broad* [1893] 1 QB 744, CA (decided under that part of the Statute of Frauds (1677) s 4 which was replaced by the Law of Property Act 1925 s 40, itself now repealed and replaced by the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (see **SALE OF LAND** vol 42 (Reissue) PARA 29; and see also **MORTGAGE** vol 77 (2010) PARA 118)).

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1313. Lender's position.

Where a company borrows money and agrees to give a debenture¹ to secure the amount when called upon, the agreement is valid as an equitable security², subject to any statutory requirements as to registration³ and to the law as to preference⁴.

A floating charge contained in a debenture may in certain circumstances be invalid⁵.

Under an agreement to issue debentures of a certain series to a creditor, he will be entitled to rank *pari passu* with the holders of the series even though no debentures are issued to him⁶.

Where directors of a company deposit incomplete mortgage bonds by way of security in pursuance of written agreements, a valid charge is created, independently of the bonds, upon the property which the bonds purport to charge⁷, and an agreement to issue a debenture may be implied from an irregularly issued debenture⁸.

1 As to the meaning of 'debenture' see PARA 1299.

2 *Re Queensland Land and Coal Co, Davis v Martin* [1894] 3 Ch 181; *Pegge v Neath and District Tramways Co Ltd* [1898] 1 Ch 183; *Simultaneous Colour Printing Syndicate v Foweraker* [1901] 1 KB 771; *Ross v Army and Navy Hotel Co* (1886) 34 ChD 43, CA. An agreement by a company to assign a debenture in another company by way of security to a bank in place of a security released under the agreement does not itself constitute the company a trustee of the debenture if obtained after the first-named company goes into liquidation: see *Bank of Scotland v Macleod* [1914] AC 311, HL. In *Dublin City Distillery Ltd v Doherty* [1914] AC 823, HL, it was held that holders of debentures issued after the enactment of the Companies Act 1900 (repealed), and therefore

requiring registration, but secured by a trust deed executed before that Act and therefore not requiring registration, were entitled as beneficiaries under the trust deed to a lien on the debentures for the amount of their advances to the extent of the property comprised in the deed. As to trust deeds securing payment of money owing on debentures see PARA 1302.

3 As to which see PARA 1277 et seq.

4 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 843 et seq.

5 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 861 et seq.

6 *Re Queensland Land and Coal Co, Davis v Martin* [1894] 3 Ch 181; *Pegge v Neath and District Tramways Co Ltd* [1898] 1 Ch 183. Where a person subscribed for debentures on the terms of a prospectus which stated that the debentures were first mortgage debentures and were to be secured upon the entire property of the company, it was held that he was entitled to a charge on it *pari passu* with the other debenture holders, even though no debentures were issued and the company had gone into liquidation: *Re New Durham Salt Co, Stevenson's Case* (1890) 2 Meg 360. Nevertheless, if the statement as to charge had been omitted from the prospectus, he would have had no charge: *Re New Durham Salt Co, Quin's Case* (1890) 2 Meg 360. As to the effect of scheduling creditors to a company's purchase agreement under which creditors are to have debentures see *Re Harden Star etc Co Ltd, Morris v Harden Star etc Co Ltd* (1903) 47 Sol Jo 368.

7 *Re Strand Music Hall Co* (1865) 3 De GJ & Sm 147.

8 *Re Fireproof Doors Ltd, Umney v Fireproof Doors Ltd* [1916] 2 Ch 142.

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1314. Issue of debentures.

An issue of debentures¹ or debenture stock² will not be valid until all conditions precedent to the exercise of the power to issue them have been performed³, unless any such condition relates to acts of internal management, in which case its non-observance does not necessarily invalidate the issue⁴. Statutory protection is also afforded to a person dealing with a company in good faith, in respect of the power of the board of directors to bind the company, or to authorise others to do so, which is deemed to be free of any limitation under the company's constitution⁵.

An issue of debentures or debenture stock is made on such terms and for such amount and for such purposes as the company thinks fit, subject to any restrictions or prohibitions contained in its constitution. Sealing debentures without delivery is not sufficient to constitute issuing them⁶; but sealing and delivering undated debentures is an issue, even though the names of the holders are omitted⁷.

The issue of a claim by debenture holders does not of itself prevent the company from issuing unissued debentures of the series in respect of some of which the proceedings are taken⁸.

1 As to the meaning of 'debenture' see PARA 1299.

2 As to the meaning of 'debenture stock' see PARA 1309.

3 See PARA 1262; and see the text and note 5.

4 As to the issue of debenture certificates see PARA 418.

5 See the Companies Act 2006 s 40(1), (6); and PARA 263. As to the meaning of references in the Companies Acts to a company's constitution see PARA 227.

6 *Mowatt v Castle Steel and Iron Works Co* (1886) 34 ChD 58, CA.

7 *Re Perth Electric Tramways Ltd, Lyons v Tramways Syndicate Ltd and Perth Electric Tramways Ltd* [1906] 2 Ch 216. Cf *A-G v Liverpool Corpn* [1902] 1 KB 411. An allotment of debentures and entry in the register of debentures without the issue of certificates is a sufficient issue to constitute the allottee a debenture holder so as to enable him to vote under the modification of rights clause: *Dey v Rubber and Mercantile Corpn Ltd* [1923] 2 Ch 528. As to the registration of an allotment of debentures see PARA 1315.

8 *Re Hubbard & Co Ltd* (1898) 68 LJ Ch 54.

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1315. Registration of allotment of debentures.

A company¹ must register an allotment of debentures² as soon as practicable and in any event within two months after the date of the allotment³. If a company fails to comply with this requirement⁴, an offence is committed by the company, and by every officer of the company who is in default⁵. A person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale⁶ and (for continued contravention) a daily default fine⁷ not exceeding one-tenth of level 3 on the standard scale⁸.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'debenture' see PARA 1299. As to the registration procedure see PARA 1289 et seq.

3 Companies Act 2006 s 741(1). For the duties of the company as to the issue of the debentures, or certificates of debenture stock, see Pt 21 (ss 768-790) (certification and transfer of securities) (see PARA 381 et seq); s 741(4). As to the meaning of 'debenture stock' see PARA 1309. As to the meaning of 'stock' generally see PARA 1163. As to offences see also PARA 1323.

4 If it fails to comply with the Companies Act 2006 s 741: see s 741(2).

5 Companies Act 2006 s 741(2). As to the meaning of 'officer in default' see PARA 315; and as to the meaning of 'officer' under the Companies Acts generally see PARA 607.

6 As to the meaning of the 'standard scale' see PARA 1622.

7 As to the meaning of 'daily default fine' see PARA 1622.

8 Companies Act 2006 s 741(3).

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1316. Offers of debentures for subscription or sale.

Offers of debentures¹ for subscription or sale are governed by the same statutory provisions as apply to offers of securities generally².

Prima facie, the terms of offer documents inviting subscriptions for debentures cannot be considered for the purpose of adding to or explaining the terms or conditions contained in the debenture itself³, and a transferee cannot rely on the offer documents for this purpose, even where the agreement for allotment expressly refers to the terms of the offer documents⁴. Nevertheless, in the case of an original allottee, the agreement for allotment may incorporate the terms of the offer documents as an additional or collateral contract⁵.

Debenture offer documents generally state that application for debentures must be accompanied by a remittance, and that, if any instalment payable in respect of the debentures is not punctually paid, the payments already made may be forfeited. Where debentures or debenture stock are allotted upon the terms that they be paid for by instalments, it is usual to issue provisional bearer scrip certificates to the subscribers, to be exchanged for definitive debentures or for stock certificates when all the instalments are paid, and to indorse upon the scrip certificates the payments of the several instalments. When the instalments are paid, the bearer of the certificate is entitled to have the debentures or stock certificate issued to him⁶. If the instalments are not fully paid before the company goes into liquidation, a holder may safely refuse to pay any further instalments without prejudicing his position as a secured creditor for previous instalments, even if the certificate provides that failure to pay any instalment when due will empower the company to forfeit previous instalments⁷; but it appears that, in the event of the security being enforced, such a holder would not be entitled to share in the distribution of the fund realised until after he has paid up in full the instalments still owing⁸.

1 As to the meaning of 'debenture' see PARA 1299.

2 See PARA 1066 et seq.

3 *Re Chicago and North West Granaries Co Ltd* [1898] 1 Ch 263.

4 *Re Tewkesbury Gas Co, Tysoe v Tewkesbury Gas Co* [1911] 2 Ch 279; affd [1912] 1 Ch 1, CA. See also *British Equitable Assurance Co v Baily* [1906] AC 35, HL.

5 *Jacobs v Batavia and General Plantations Trust Ltd* [1924] 1 Ch 287; affd [1924] 2 Ch 329, CA (distinguishing and explaining the cases referred to in note 3).

6 As to the issue of certificates see further PARA 418.

7 *Re Consolidated Land Co, Ellerby's Claim* (1872) 20 WR 855.

8 In *Re Smelting Corp'n* [1915] 1 Ch 472, holders of partly paid debentures were held to be entitled to share in proportion to the amounts which they had paid up. This decision was based on the ground that the debentures had been issued prior to the enactment of the Companies Act 1907 s 16 (now repealed) (see now the Companies Act 2006 s 740; and PARA 1312), before which specific performance of a contract to take debentures could not be enforced, so that the unpaid instalments did not constitute a debt due to the company. It appears from the reasoning in that case that in the case of a debenture issued since the enactment of the Companies Act 1907 (repealed) a contrary principle would apply. Cf *Re Rhodesia Goldfields Ltd* [1910] 1 Ch 239 (where a debenture holder was indebted to the company in respect of profits received as a director and the rule in *Cherry v Boulton* (1839) 4 My & Cr 442 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 559) was held to apply).

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1317. Issue of debentures at a discount.

A company which has power to borrow on debentures¹ may issue them at a discount². Thus, where a director takes some of the debentures at the rate of discount allowed to other persons, he is not liable to account for the discount³. A company cannot, however, issue debentures at a discount upon the terms that they shall be exchangeable, at the holder's option, for paid up shares in the company⁴ of the same amount as the face value of the debentures, where such an issue is a means of allotting shares at a discount⁵.

1 As to the meaning of 'debenture' see PARA 1299.

2 *Re Compagnie Générale de Bellegarde, Campbell's Case* (1876) 4 ChD 470; *Re Anglo-Danubian Steam Navigation and Colliery Co* (1875) LR 20 Eq 339. Cf *Re Regent's Canal Ironworks Co* (1876) 3 ChD 43, CA.

3 *Campbell's Case* (1876) 4 ChD 470.

4 As to shares in a company generally see PARA 1042 et seq; and as to when shares in a company are deemed paid up see PARA 1091.

5 *Mosely v Koffyfontein Mines Ltd* [1904] 2 Ch 108, CA. See further *Famatina Development Corpn Ltd v Bury* [1910] AC 439, HL. As to the statutory prohibition on the allotment of shares at a discount see PARA 1111.

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1318. Reissue of debentures.

Where a company¹ has redeemed debentures² previously issued, then unless: (1) provision to the contrary (whether express or implied) is contained in the company's articles³ or in any contract made by the company⁴; or (2) the company has, by passing a resolution⁵ to that effect or by some other act, manifested its intention that the debentures are to be cancelled⁶, the company may reissue the debentures, either by reissuing the same debentures or by issuing new debentures in their place⁷. On a reissue of redeemed debentures, the person entitled to the debentures has (and is deemed always to have had) the same priorities as if the debentures had never been redeemed⁸.

The reissue of a debenture or the issue of another debenture in its place in this way⁹ is treated as the issue of a new debenture for the purposes of stamp duty¹⁰; but it is not to be so treated for the purposes of any provision limiting the amount or number of debentures to be issued¹¹. A person lending money on the security of a debenture reissued in this way which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp duty or any penalty in respect of it, unless he had notice (or, but for his negligence, might have discovered) that the debenture was not duly stamped¹²; but in that case the company is liable to pay the proper stamp duty and penalty¹³.

Where any debentures which were redeemed before 1 November 1929¹⁴ have been reissued after that date and before 1 July 1948¹⁵ or are or have been reissued after that latter date, the reissue of the debentures does not prejudice, and is deemed never to have prejudiced, any right or priority which any person would have had under or by virtue of any mortgage or charge created before that date if the corresponding provisions in the Companies (Consolidation) Act 1908¹⁶, as originally enacted, had been enacted¹⁷ in the Companies Act 1948 and the Companies Act 2006, instead of the corresponding provisions in those Acts¹⁸.

Under the usual modification power in a debenture trust deed the deed may be altered so as to give a right to reissue debentures¹⁹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'debenture' see PARA 1299. Where a company has deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures are not treated as redeemed by reason only of the company's account having ceased to be in debit while the debentures remained so deposited: Companies Act 2006 s 753.

3 As to the meaning of references to a company's 'articles' see PARA 228 note 2.

4 Companies Act 2006 s 752(1)(a).

5 As to resolutions generally see PARA 617 et seq.

6 Companies Act 2006 s 752(1)(b).

7 Companies Act 2006 s 752(1). The provisions contained in s 752(1) are deemed always to have had effect: s 752(1). The new debentures must contain the same terms as the originals with the same date for redemption: *Re Antofagasta (Chile) and Bolivia Rly Co Ltd's Trust Deed, Antofagasta (Chile) and Bolivia Rly Co Ltd's Trust Deed v Schroeder* [1939] Ch 732, [1939] 2 All ER 461.

8 Companies Act 2006 s 752(2).

9 Ie under the Companies Act 2006 s 752 (see the text and notes 1-8): see s 752(3).

10 Companies Act 2006 s 752(3).

11 Companies Act 2006 s 752(3).

12 Companies Act 2006 s 752(4).

13 Companies Act 2006 s 752(4).

14 Ie the commencement date of the Companies Act 1928 (repealed): see the Companies Consolidation (Consequential Provisions) Act 1985 s 13.

15 Ie the commencement date of the Companies Act 1948 (repealed): see the Companies Consolidation (Consequential Provisions) Act 1985 s 13.

16 Ie the Companies (Consolidation) Act 1908 s 104 (repealed), which provided that, upon the reissue of redeemed debentures, the person entitled to the debentures would have the same rights and priorities as if the debentures had not previously been issued: see the Companies Consolidation (Consequential Provisions) Act 1985 s 13.

17 The Companies (Consolidation) Act 1908 s 104 (repealed) was amended by the Companies Act 1928 s 45 (repealed), with a saving in relation to debentures redeemed before 1 November 1929 and reissued thereafter.

18 See the Companies Consolidation (Consequential Provisions) Act 1985 s 13; Interpretation Act 1978 s 17(2)(b). The corresponding provisions are the Companies Act 1948 s 90 (repealed) and the Companies Act 1985 s 194 (see now the Companies Act 2006 s 752; and the text and notes 1-12): see the Companies Consolidation (Consequential Provisions) Act 1985 s 13; Interpretation Act 1978 s 17(2)(b).

19 *Re Kent Collieries Ltd, Day v Kent Collieries Ltd* (1907) 23 TLR 559, CA. As to the power of modification see PARA 1328; and as to the registration of reissued debentures see PARA 1278. As to trust deeds securing payment of money owing on debentures see PARA 1302.

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1319. Priority.

Subject to the necessity of registration¹, the ordinary rules regulating the priority of mortgages apply to debentures², including the ordinary equitable rules relating to marshalling and subrogation³.

If two successive securities are created by a company, both of which purport to give a first floating charge⁴, the security which is prior in date will take priority over that which is later in date, whether or not the holders of the later security have notice of the earlier one⁵. If a series of first debentures is not secured by legal mortgage and a series of second debentures is secured by a legal mortgage of specific property, the first series giving only a floating charge, then, as to the specific property, the second debentures rank in priority to the first debentures, unless the specific charge is made subject to the prior floating charge⁶.

1 As to which see PARA 1277 et seq.

2 As to the meaning of 'debenture' see PARA 1299. As to priority of mortgages generally see **MORTGAGE** vol 77 (2010) PARA 258 et seq.

3 *PX Nuclear Cameron v AMF International* (1982) 16 NIJB. As to the general principle of marshalling see **EQUITY** vol 16(2) (Reissue) PARAS 758-763; and as to the doctrine of subrogation see **EQUITY** vol 16(2) (Reissue) PARAS 770-776.

4 As to the meaning of 'floating charge' see PARA 1269.

5 *Smith v English and Scottish Mercantile Investment Trust Ltd* (1896) 40 Sol Jo 717; *Re Benjamin Cope & Sons Ltd* [1914] 1 Ch 800. However, distinguish *Re Automatic Bottle Makers* [1926] Ch 412, CA (where the trust deed creating the first floating charge reserved to the company power to mortgage certain specific assets and it was held that the power might be exercised by the creation of a floating charge over those assets with priority over the first charge). As to the payment of preferential debts on assets subject to a floating charge generally see PARA 1334.

6 *Re Robert Stephenson & Co Ltd* [1913] 2 Ch 201, CA; *Re Camden Brewery Ltd* (1911) 106 LT 598n, CA. As to the power of a company to charge specifically property subject to a floating charge, the restrictions which may be imposed on that power, and the effect of those restrictions see PARA 1269 et seq.

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1320. Priorities of debenture holders.

Where debentures¹ contain a charge upon property, but nothing is stated as to their being a series or ranking *pari passu* in point of charge, they rank in priority in order of time of issue², even when all are issued on the same day³. As a general rule, however, debentures provide that all the debentures constituting the series are to rank *pari passu* as a charge upon the property charged. If so, on a division of the proceeds of realisation between the various debenture holders, some of whom have been paid interest up to the date of the crystallisation of the charge, those who have not been paid interest are not entitled to be paid arrears of interest before the proceeds are distributed; but the amount due to each holder for capital and interest must be ascertained and the proceeds divided *pari passu* according to the amounts so due to each⁴.

When part of a series of first debentures remains unissued, and then there is another series of debentures expressed to be subject to the previous series, any of the first debentures issued after the second series ranks in priority to the second series⁵. A holder of second debentures ranking after an issue of first debentures may not set off the debt due on his second debentures against a debt due from him to the company⁶.

1 As to the meaning of 'debenture' see PARA 1299.

2 *James v Boythorpe Colliery Co* (1890) 2 Meg 55. As to the payment of preferential debts on assets subject to a floating charge generally see PARA 1334.

3 *Gartside v Silkstone and Dodworth Coal and Iron Co* (1882) 21 ChD 762; *Re Patent Ivory Manufacturing Co, Howard v Patent Ivory Manufacturing Co* (1888) 38 ChD 156 at 171 per Kay J.

4 *Re Midland Express Ltd, Pearson v Midland Express Ltd* [1914] 1 Ch 41, CA.

5 *Lister v Henry Lister & Son Ltd* (1893) 62 LJ Ch 568.

6 *H Wilkins & Elkington Ltd v Milton* (1916) 32 TLR 618.

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C. REGISTER OF DEBENTURE HOLDERS

1321. Where register of debentures may be kept.

Any register of debenture¹ holders of a company² that is kept by the company³ must be kept available for inspection⁴ either: (1) at the company's registered office⁵; or (2) at a place specified in regulations⁶ made for the purposes of specifying where certain company records are to so kept⁷.

A company must give notice to the registrar of companies⁸ of the place where any such register is kept available for inspection, and of any change in that place⁹. If a company makes default for 14 days in complying with the requirement to give such notice¹⁰, an offence is committed by the company, and by every officer of the company who is in default¹¹; and a person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale¹² and (for continued contravention) to a daily default fine¹³ not exceeding one-tenth of level 3 on the standard scale¹⁴. However, no such notice is required if the register has, at all times since it came into existence, been kept available for inspection at the company's registered office¹⁵.

1 As to the meaning of 'debenture' see PARA 1299.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 As to the registration of an allotment of debentures see PARA 1315. References in the Companies Act 2006 s 743 to a register of debenture holders include a duplicate of a register of debenture holders that is kept outside the United Kingdom, or a duplicate of any part of such a register: s 743(6). As to the meaning of 'United Kingdom' see PARA 1 note 5. As to inspection etc of the register of debentures see PARA 1322.

4 Companies Act 2006 s 743(1).

- 5 Companies Act 2006 s 743(1)(a). As to a company's registered office see PARA 129.
- 6 The regulations made under the Companies Act 2006 s 1136 (see PARA 676): see s 743(1)(b).
- 7 Companies Act 2006 s 743(1)(b). As to the form of company records, their inspection and the duty to take precautions against their falsification see PARA 674 et seq. As to records of uncertificated securities see PARA 420 et seq.
- 8 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.
- 9 Companies Act 2006 s 743(2).
- 10 The in complying with the Companies Act 2006 s 743(2) (see the text and notes 8-9): see s 743(4).
- 11 Companies Act 2006 s 743(4). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' under the Companies Acts generally see PARA 607.
- 12 As to the meaning of 'standard scale' see PARA 1622.
- 13 As to the meaning of 'daily default fine' see PARA 1622.
- 14 Companies Act 2006 s 743(5).
- 15 Companies Act 2006 s 743(3).

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1322. Inspection of register of debentures.

Every register of debenture¹ holders of a company² must, except when duly closed³, be open to the inspection⁴: (1) of the registered holder of any such debentures, or any holder of shares⁵ in the company, without charge⁶; and (2) of any other person on payment of such fee as may be prescribed⁷.

Any person may require a copy of the register, or any part of it, on payment of such fee as may be prescribed⁸.

A person seeking to exercise either the right of inspection or the right to require a copy that is so conferred⁹ must make a request to the company to that effect¹⁰; and such a request must contain the following information¹¹:

- 582 (a) in the case of an individual, his name and address¹²;
- 583 (b) in the case of an organisation, the name and address of an individual responsible for making the request on behalf of the organisation¹³;
- 584 (c) the purpose for which the information is to be used¹⁴; and
- 585 (d) whether the information will be disclosed to any other person¹⁵, and if so: (i) where that person is an individual, his name and address¹⁶; (ii) where that person is an organisation, the name and address of an individual responsible for receiving the information on its behalf¹⁷; and (iii) the purpose for which the information is to be used by that person¹⁸.

Where a company receives such a request¹⁹, it must within five working days either comply with the request²⁰, or apply to the court²¹. If the company applies to the court, it must notify the person making the request²². If, on such an application, the court is satisfied that the inspection or copy is not sought for a proper purpose²³: (A) it must direct the company not to comply with the request²⁴; and (B) it may further order that the company's costs on the application be paid in whole or in part by the person who made the request, even if he is not a party to the application²⁵. If the court makes such a direction and it appears to the court that the company is or may be subject to other requests made for a similar purpose (whether made by the same person or different persons), it may direct that the company is not to comply with any such request²⁶. The order must contain such provision as appears to the court appropriate to identify the requests to which it applies²⁷. If, on such an application²⁸, the court does not direct the company not to comply with the request, the company must comply with the request immediately upon the court giving its decision or, as the case may be, upon the proceedings being discontinued²⁹.

If an inspection required under the right to inspect the register³⁰ is refused or default is made in providing a copy so required³¹, otherwise than in accordance with an order of the court, an offence is committed by the company, and by every officer of the company who is in default³²; and a person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale³³ and (for continued contravention) to a daily default fine³⁴ not exceeding one-tenth of level 3 on the standard scale³⁵. In the case of any such refusal or default the court may by order compel an immediate inspection or, as the case may be, direct that the copy required be sent to the person requesting it³⁶.

It is an offence for a person knowingly or recklessly to make, in a request to inspect the register or to require a copy to be provided³⁷, a statement that is misleading, false or deceptive in a material particular³⁸; and it is an offence for a person in possession of information obtained by exercise of either the right of inspection or the right to require a copy³⁹ to do anything that results in the information being disclosed to another person⁴⁰, or to fail to do anything with the result that the information is disclosed to another person⁴¹, knowing, or having reason to suspect, that person may use the information for a purpose that is not a proper purpose⁴². A person guilty of such an offence is liable (on conviction on indictment) to imprisonment for a term not exceeding two years or a fine (or both)⁴³; and (on summary conviction) to imprisonment for a term not exceeding 12 months⁴⁴ or to a fine not exceeding the statutory maximum (or both)⁴⁵.

The right of inspection ceases when the company is being wound up⁴⁶.

1 As to the meaning of 'debenture' see PARA 1299.

2 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. References in the Companies Act 2006 s 744 to a register of debenture holders include a duplicate of a register of debenture holders that is kept outside the United Kingdom, or a duplicate of any part of such a register: s 744(6). As to the meaning of 'United Kingdom' see PARA 1 note 5. As to the location of the register of debentures see PARA 1321.

3 For these purposes, a register is 'duly closed' if it is closed in accordance with provision contained in the articles or in the debentures, or (in the case of debenture stock) in the stock certificates, or in the trust deed or other document securing the debentures or debenture stock: Companies Act 2006 s 744(5). The total period for which a register is closed in any year must not exceed 30 days: s 744(5). As to the meaning of references to a company's 'articles' see PARA 228 note 2. As to the meaning of 'debenture stock' see PARA 1309. As to trust deeds securing payment of money owing on debentures see PARA 1302. See also *Lemon v Austin Friars Investment Trust Ltd* [1926] Ch 1, CA. As to the right to appoint an agent to inspect see the cases cited in PARA 1297.

4 Companies Act 2006 s 744(1). As to the inspection of company records generally see PARA 676.

5 As to the meaning of 'share' see PARA 1042.

6 Companies Act 2006 s 744(1)(a). As to shareholders and membership of companies generally see PARA 321 et seq.

7 Companies Act 2006 s 744(1)(b). In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the Secretary of State see PARA 6. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. In exercise of the powers conferred by s 744(1)(b), the Secretary of State has made the Companies (Fees for Inspection and Copying of Company Records) (No 2) Regulations 2007, SI 2007/3535. Accordingly, for the purpose of the Companies Act 2006 s 744(1)(b), the fee prescribed is £3.50 for each hour or part thereof during which the right of inspection is exercised: Companies (Fees for Inspection and Copying of Company Records) (No 2) Regulations 2007, SI 2007/3535, reg 2.

The object of giving non-members a right of inspection is to enable them to ascertain what assets they may rely on: *Oakes v Turquand and Harding*, *Peek v Turquand and Harding*, *Re Overend, Gurney & Co* (1867) LR 2 HL 325 at 366 per Lord Cranworth. Cf the provision under the Companies Clauses Consolidation Act 1845 (see PARA 1700).

8 Companies Act 2006 s 744(2). In exercise of the powers conferred by s 744(2), the Secretary of State has made the Companies (Fees for Inspection and Copying of Company Records) (No 2) Regulations 2007, SI 2007/3535. Accordingly, the fee prescribed for the purpose of the Companies Act 2006 s 744(2) is: (1) the amount per number of entries copied by the company, as follows (Companies (Fees for Inspection and Copying of Company Records) (No 2) Regulations 2007, SI 2007/3535, reg 3(1)(a)): (a) £1 for each of the first five entries (reg 3(1)(a), (2)(a)); (b) £30 for the next 95 entries or part thereof (reg 3(1)(a), (2)(b)); (c) £30 for the next 900 entries or part thereof (reg 3(1)(a), (2)(c)); (d) £30 for the next 99,000 entries or part thereof (reg 3(1)(a), (2)(d)); and (e) £30 for the remainder of the entries in the register or part thereof (reg 3(1)(a), (2)(e)); and (2) the reasonable costs incurred by the company in delivering the copy of the entries to the person entitled to be provided with that copy (reg 3(1)(b)).

9 I.e either of the rights conferred by the Companies Act 2006 s 744 (see the text and notes 1-8): see s 744(3).

10 Companies Act 2006 s 744(3). As to the provision made for the sending or supplying of documents or information to or from a company (the 'company communications provisions') see PARA 678 et seq.

11 Companies Act 2006 s 744(4).

12 Companies Act 2006 s 744(4)(a). Any obligation under the Companies Acts to give a person's address is, unless otherwise expressly provided, to give a service address for that person: Companies Act 2006 s 1142. As to service of documents on a company generally see PARA 671.

13 Companies Act 2006 s 744(4)(b).

14 Companies Act 2006 s 744(4)(c).

15 Companies Act 2006 s 744(4)(d).

16 Companies Act 2006 s 744(4)(d)(i).

17 Companies Act 2006 s 744(4)(d)(ii).

18 Companies Act 2006 s 744(4)(d)(iii).

19 I.e a request under the Companies Act 2006 s 744 (see the text and notes 1-18): see s 745(1).

20 Companies Act 2006 s 745(1)(a).

21 Companies Act 2006 s 745(1)(b). As to the meaning of 'court' see PARA 212 note 1. As to the procedure that applies to proceedings under companies legislation generally see PARA 305.

22 Companies Act 2006 s 745(2).

23 Companies Act 2006 s 745(3).

24 Companies Act 2006 s 745(3)(a).

25 Companies Act 2006 s 745(3)(b).

26 Companies Act 2006 s 745(4).

- 27 Companies Act 2006 s 745(4).
- 28 Is an application under the Companies Act 2006 s 745 (see the text and notes 19-27): see s 745(5).
- 29 Companies Act 2006 s 745(5).
- 30 Is an inspection required under the Companies Act 2006 s 744 (see the text and notes 1-18): see s 746(1).
- 31 Is a copy required under the Companies Act 2006 s 744 (see the text and notes 1-18): see s 746(1).
- 32 Companies Act 2006 s 746(1). As to the meaning of 'officer who is in default' see PARA 315. As to the meaning of 'officer' under the Companies Acts generally see PARA 607.
- 33 As to the meaning of 'standard scale' see PARA 1622.
- 34 As to the meaning of 'daily default fine' see PARA 1622.
- 35 Companies Act 2006 s 746(2).
- 36 Companies Act 2006 s 746(3). See also PARA 349 note 30.
- 37 Is in a request under the Companies Act 2006 s 744 (see the text and notes 1-18): see s 747(1).
- 38 Companies Act 2006 s 747(1).
- 39 Is either of the rights conferred by the Companies Act 2006 s 744 (see the text and notes 1-18): see s 747(2).
- 40 Companies Act 2006 s 747(2)(a).
- 41 Companies Act 2006 s 747(2)(b).
- 42 Companies Act 2006 s 747(2).
- 43 Companies Act 2006 s 747(3)(a).
- 44 In relation to an offence committed after the commencement of the Companies Act 2006 s 1131 (summary proceedings) (see PARA 1625), but before a day is appointed in relation to the commencement of the Criminal Justice Act 2003 s 154(1) (general limit on magistrates' courts' power to impose imprisonment), the reference in the Companies Act 2006 s 747(3)(b) to '12 months' must be read as a reference to 'six months': see ss 747(3)(b), 1131, 1133; and see PARA 1625.
- 45 Companies Act 2006 s 747(3)(b).
- 46 *Re Kent Coalfields Syndicate* [1898] 1 QB 754, CA; *Re Yorkshire Fibre Co* (1870) LR 9 Eq 650. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq. See also *Re Joint-Stock Discount Co, Buchanan's Case* (1866) 15 LT 261; *Bevan v Webb* [1901] 2 Ch 59, CA; *Norey v Keep* [1909] 1 Ch 561.

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1323. Liability incurred by company in relation to registration of debentures.

Liability incurred by a company¹ either: (1) from the making or deletion of an entry in the register of debenture holders²; or (2) from a failure to make or delete any such entry³, is not enforceable more than ten years after the date on which the entry was made or deleted or, as

the case may be, the failure first occurred⁴; and this is without prejudice to any lesser period of limitation⁵.

1 See the Companies Act 2006 s 748(1). As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 Companies Act 2006 s 748(1)(a). As to the meaning of 'debenture' see PARA 1299. As to the registration of an allotment of debentures see PARA 1315. As to the location of the register of debentures see PARA 1321; and as to inspection etc of the register of debentures see PARA 1322.

3 Companies Act 2006 s 748(1)(b).

4 Companies Act 2006 s 748(1). The provision made by s 748 applies to causes of action arising on or after 6 April 2008: see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, art 9, Sch 4 para 23(1). The time limit for causes of action arising before that date is either ten years from 6 April 2008, or 20 years (as provided by the Companies Act 1985 s 191(7) (repealed)) from when the cause of action arose, whichever expires first: see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, Sch 4 para 23(2). This is without prejudice to any lesser period of limitation: Sch 4 para 23(3).

5 Companies Act 2006 s 748(2). See note 4.

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1324. Register of debenture holders kept otherwise than in legible form.

Where any register of holders of debentures of a company is kept by a company by recording the matters in question otherwise than in a legible form¹, a company registered in England and Wales² may not perform the duty to allow inspection³ of such a register in Scotland and a company registered in Scotland may not perform such duty in England and Wales⁴. Nor may a company perform the duty so to allow inspection of a register in England and Wales, in the case of a company registered in England and Wales, or in Scotland, in the case of a company registered in Scotland, elsewhere than at⁵:

- 586 (1) the registered office of the company⁶;
- 587 (2) any other office of the company at which the work of ensuring that the register is duly made up is done⁷; or
- 588 (3) if the company arranges with some other person for the carrying out of the work referred to in head (2) above to be undertaken on behalf of the company by that other person, the office of that other person at which the work is done⁸.

The normal statutory requirements relating to registers of debenture holders⁹ and annual returns¹⁰ do not apply to such a register in so far as they relate to any of the following matters¹¹:

- 589 (a) the place where the register is permitted to be kept¹²;
- 590 (b) the giving of notice to the registrar of companies¹³ of the place where the register is kept, or of any change in that place¹⁴; and
- 591 (c) the inclusion in the annual return of a statement¹⁵ of the address of the place where the register is kept¹⁶.

Where the place for inspection of such a register is in England and Wales or Scotland, the company must send to the registrar of companies notice in the prescribed form¹⁷ of the place for inspection of that register and of any change in that place¹⁸. The company is not, however, obliged to give such notice¹⁹:

- 592 (i) where a company changes from keeping the register in a legible form to keeping it otherwise than in a legible form and the place for inspection of the register immediately following the change is the same as the place where the register was kept in a legible form immediately prior to the change²⁰; or
- 593 (ii) where, since the register first came into existence, it has been kept by recording the matters in question otherwise than in legible form, and the place for inspection has been the registered office of the company²¹.

Where the place for inspection of a register is situated in England and Wales, in the case of a company registered in England and Wales, or in Scotland, in the case of a company registered in Scotland, elsewhere than at its registered office, the company must include in its annual return a statement of the address of that place²².

Where a register of holders of debentures is kept by recording the matters in question otherwise than in legible form, any reference to such register in any provision of the Companies Act 2006 or the Uncertificated Securities Regulations 2001²³ relating to the place where a duplicate²⁴ of such register, another register or duplicate of another register is required to be kept, is to be construed as a reference to the place for inspection of the first-mentioned register²⁵.

- 1 As to the provisions relating to the register of debenture holders kept in legible form see PARA 1321.
- 2 As to the right of inspection of the register see PARA 1322.
- 3 As to company registration under the Companies Act 2006 see PARA 111 et seq. As to the meanings of 'England' and 'Wales' see PARA 1 note 5.
- 4 Companies (Registers and other Records) Regulations 1985, SI 1985/724, reg 4(1), (2).
- 5 Companies (Registers and other Records) Regulations 1985, SI 1985/724, reg 4(3).
- 6 Companies (Registers and other Records) Regulations 1985, SI 1985/724, reg 4(3)(a). As to a company's registered office see PARA 129.
- 7 Companies (Registers and other Records) Regulations 1985, SI 1985/724, reg 4(3)(b).
- 8 Companies (Registers and other Records) Regulations 1985, SI 1985/724, reg 4(3)(c).
- 9 Ie the Companies Act 2006 s 743 (see PARA 1321).
- 10 Ie the Companies Act 2006 ss 854-859 (see PARA 1421 et seq).
- 11 Companies (Registers and other Records) Regulations 1985, SI 1985/724, reg 4(4)); Interpretation Act 1978 s 17(2)(b).
- 12 Companies (Registers and other Records) Regulations 1985, SI 1985/724, reg 4(4)(a). See PARA 1321.
- 13 As to the registrar of companies see PARA 131. As to the delivery of documents to the registrar see PARA 141; and as to the requirements for the proper delivery of documents to the registrar see PARA 142.
- 14 Companies (Registers and other Records) Regulations 1985, SI 1985/724, reg 4(4)(b). See PARA 1321.
- 15 See PARA 1422.
- 16 Companies (Registers and other Records) Regulations 1985, SI 1985/724, reg 4(4)(c).

- 17 For the prescribed form of notice see the Companies (Registers and other Records) Regulations 1985, SI 1985/724, reg 5(1), Sch 2 Form 190a.
- 18 Companies (Registers and other Records) Regulations 1985, SI 1985/724, reg 5(1).
- 19 Companies (Registers and other Records) Regulations 1985, SI 1985/724, reg 5(2).
- 20 Companies (Registers and other Records) Regulations 1985, SI 1985/724, reg 5(2)(a).
- 21 Companies (Registers and other Records) Regulations 1985, SI 1985/724, reg 5(2)(b).
- 22 Companies (Registers and other Records) Regulations 1985, SI 1985/724, reg 5(3). As to the failure to comply with reg 5(3) see reg 5(4).
- 23 Ie the Uncertificated Securities Regulations 2001, SI 2001/3755 (see PARA 425 et seq).
- 24 See eg the Companies Act 2006 s 743; and PARA 1321.
- 25 Companies (Registers and other Records) Regulations 1985, SI 1985/724, reg 6(1) (amended by SI 2001/3755); Interpretation Act 1978 s 17(2)(b).

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D EQUITIES AFFECTING DEBENTURES

1325. Freedom from equities.

Debenture conditions are usually so framed as to give the registered holder for the time being the absolute right to receive the money secured by the debentures, and similar conditions are used in the case of debenture stock¹. The usual conditions in the case of debentures make the principal money and interest payable to the registered holder without regard to any equities subsisting between the company and the original or any intermediate holder. Such a provision is binding upon the company². The conditions also usually provide that the registered holder's receipt shall be a good discharge for the money secured, and that the company shall not be bound to inquire into his title or to take notice of any trust affecting that money, or be affected by notice, express or implied, of the right or claim of any other person to that money or instrument³.

In the absence of any special conditions, the assignee of a debenture takes it subject to any equities subsisting between the company and the original holder, even though the assignment was for value and the assignee had no notice of the circumstances giving rise to such equities⁴. The company may, however, be estopped from setting up such equities against the assignee either by the form of the debenture itself⁵, or by registering the transferee as the holder⁶, by accepting notice of assignment, even though it does not register the transfer⁷, by informing the transferee that registration is unnecessary⁸, by previous contract⁹, or by a judgment previously recovered against the company for interest on the debentures¹⁰.

1 As to bearer debentures being negotiable see PARA 412. As to the meaning of 'debenture' see PARA 1299; and as to the meaning of 'debenture stock' see PARA 1309.

2 *Re Goy & Co Ltd, Farmer v Goy & Co Ltd* [1900] 2 Ch 149; *Robinson v Montgomeryshire Brewery Co* [1896] 2 Ch 841; *Hilger Analytical Ltd v Rank Precision Industries Ltd* [1984] BCLC 301. See also the cases cited in PARA 413 note 4.

3 *Re Blakely Ordnance Co, ex p New Zealand Banking Corpn* (1867) 3 Ch App 154.

4 *Athenaeum Life Assurance Society v Pooley* (1858) 3 De G & J 294; *Re China Steamship Co, ex p Mackenzie* (1869) LR 7 Eq 240; *Re Natal Investment Co, Financial Corpn Claim* (1868) 3 Ch App 355; *Christie v Taunton, Delmard, Lane & Co, Re Taunton, Delmard, Lane & Co* [1893] 2 Ch 175. It is otherwise if a document, which is called a debenture, is a negotiable instrument: *Re General Estates Co, ex p City Bank* (1868) 3 Ch App 758; *Re Imperial Land Co of Marseilles, ex p Colborne and Strawbridge* (1870) LR 11 Eq 478. See also PARA 412 note 3.

5 *Higgs v Assam Tea Co* (1869) LR 4 Exch 387; *Re General Estates Co, ex p City Bank* (1868) 3 Ch App 758; *Re Agra and Masterman's Bank, ex p Asiatic Banking Corpn* (1867) 2 Ch App 391; *Hilger Analytical Ltd v Rank Precision Industries Ltd* [1984] BCLC 301.

6 *Higgs v Assam Tea Co* (1869) LR 4 Exch 387; *Re Northern Assam Tea Co, ex p Universal Life Assurance Co* (1870) LR 10 Eq 458. See also *Re South Essex Estuary Co, Carey's Claim* [1873] WN 17.

7 *Re Hercules Insurance Co, Brunton's Claim* (1874) LR 19 Eq 302; *Christie v Taunton, Delmard, Lane & Co, Re Taunton, Delmard, Lane & Co* [1893] 2 Ch 175.

8 *Re Colonial and General Gas Co, Lishman's Claim* (1870) 23 LT 40.

9 *Higgs v Assam Tea Co* (1869) LR 4 Exch 387; *Dickson v Swansea Vale Rly Co* (1868) LR 4 QB 44.

10 *Re South Essex Gas-Light and Coke Co, Hulett's Case* (1862) 2 John & H 306; *Re South Essex Estuary Co, ex p Chorley* (1870) LR 11 Eq 157. As to irregularities in issue see PARA 1264.

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1326. Clogging the equity of redemption.

Debentures¹ and other mortgages or charges issued by a company are not excepted from the rule against clogging the equity of redemption². Thus, in the case of a loan to a company on the security of a mortgage of debenture stock³, an option given to the lender to purchase the stock within a certain period at a discount is a clog on the equity of redemption and void⁴. A term in a debenture providing for payment of a bonus out of the net profit of the company for an unlimited period until the amount specified has been discharged constitutes a clog on the equity⁵; but a term in a debenture giving the holder a right in a winding up to share in surplus assets is not a clog on the equity⁶. A debenture may be made irredeemable⁷.

1 As to the meaning of 'debenture' see PARA 1299.

2 *Jarrah Timber and Wood Paving Corpn Ltd v Samuel* [1903] 2 Ch 1 at 11, CA, per Romer LJ (affd sub nom *Samuel v Jarrah Timber and Wood Paving Corpn Ltd* [1904] AC 323, HL). See also *Noakes & Co Ltd v Rice* [1902] AC 24, HL; *Browne v Ryan* [1901] 2 IR 653, CA; *Bradley v Carritt* [1903] AC 253, HL; *Knightsbridge Estates Trust Ltd v Byrne* [1940] AC 613, [1940] 2 All ER 401, HL. Cf *De Beers Consolidated Mines Ltd v British South Africa Co* [1912] AC 52, HL; *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, HL (in both of these cases it was held that the stipulation claimed to be a clog on the equity formed part of a collateral contract, in the first-named case independent of the mortgage, in the second-named case as a condition of the company obtaining the loan). As to restrictions on the right to redeem see further **MORTGAGE** vol 77 (2010) PARA 317 et seq.

3 As to the meaning of 'debenture stock' see PARA 1309. As to the meaning of 'stock' generally see PARA 1163.

4 *Jarrah Timber and Wood Paving Corpn Ltd v Samuel* [1903] 2 Ch 1, CA; affd sub nom *Samuel v Jarrah Timber and Wood Paving Corpn Ltd* [1904] AC 323, HL.

5 *Re Rainbow Syndicate Ltd, Owen v Rainbow Syndicate Ltd* [1916] WN 178.

6 *Re Cuban Land Co Ltd* [1921] 2 Ch 147.

7 See PARA 1305.

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1327. Set-off.

A debenture¹ holder cannot set off a debt due from him to the company against the amount due from the company to him on his debentures. Before winding up², a company may set off a call made on a member³ against money owing to him on registered debentures, even though prior to the date of the call he has equitably mortgaged his debentures, provided that no notice of the mortgage has been given to the company before the calls were made⁴.

1 As to the meaning of 'debenture' see PARA 1299.

2 *Re Brown and Gregory Ltd* [1904] 1 Ch 627. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

3 As to calls made on shares see PARA 1132 et seq.

4 *Christie v Taunton, Delmard, Lane & Co, Re Taunton, Delmard, Lane & Co* [1893] 2 Ch 175.

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E. MODIFICATION OF RIGHTS; MEETINGS

1328. Modification clause.

It is common to insert in debenture trust deeds, and in the conditions indorsed on debentures, provisions for calling meetings of the debenture holders and enabling a specified majority to bind the whole body of holders to a modification, compromise or release of their rights against the company or the security.

Under a power to sanction any modification or compromise of the debenture holders' rights a mortgage may be given priority over the debentures¹, or the date of payment may be postponed², or redeemable debentures may be converted into irredeemable debentures³, or the company may be permitted to redeem debentures below par at a price which is in excess of the stock exchange quotation⁴. In such cases the court will not imply a condition that the power should be exercised only in the event of some serious occasion arising⁵. The power does not, however, allow the majority of the debenture holders to authorise a sale of the company's assets and the appropriation of the proceeds of sale in redeeming debentures by the purchase at the lowest price tendered after an invitation to the debenture holders⁶; nor does it authorise the debenture holders to delegate to a committee the power of further modifying the scheme

for modification to which they have agreed⁷. The extinction of rights against the company, as by accepting shares in a new company in exchange for the debentures, is neither a 'modification' nor a 'compromise' of rights⁸ unless there is some dispute or difficulty in enforcing those rights⁹.

Under a power to sanction any compromise or arrangement which the court would have jurisdiction to sanction¹⁰, guarantors of debentures may be released from their guarantee, interest may be increased, new trustees of the debenture trust deed may be appointed, and payments to a sinking fund established by the debenture trust deed may be discontinued¹¹, or debenture holders may be bound to accept preference shares in a new company, to which the assets charged by the debentures are sold, in lieu of their debentures¹². Where, however, there is no express power to compromise, a mere power given to the majority to bind all the debenture holders as if they had consented does not enable the majority to bind the whole body to an arrangement whereby the rights declared by the trust deed are altered¹³.

1 *Follit v Eddystone Granite Quarries* [1892] 3 Ch 75. Cf *Re Dominion of Canada Freehold Estate and Timber Co Ltd* (1886) 55 LT 347.

2 *Finlay v Mexican Investment Corp* [1897] 1 QB 517. See also *Walker v Elmore's German and Austro-Hungarian Metal Co Ltd* (1901) 85 LT 767, CA.

3 *Northern Assurance Co Ltd v Farnham United Breweries Ltd* [1912] 2 Ch 125; *Re Joseph Stocks & Co Ltd* (1909) [1912] 2 Ch 134n.

4 *Meade-King v Usher's Wiltshire Brewery Ltd* (1928) 44 TLR 298.

5 *Northern Assurance Co Ltd v Farnham United Breweries Ltd* [1912] 2 Ch 125. As to the possible requirement for a meeting to be held see PARA 1329.

6 *Re New York Taxicab Co Ltd, Sequin v New York Taxicab Co Ltd* [1913] 1 Ch 1.

7 *British America Nickel Corp v M J O'Brien Ltd* [1927] AC 369, PC.

8 *Mercantile Investment and General Trust Co v International Co of Mexico* (1891) cited at [1893] 1 Ch 484n, CA. Cf *Re Labuan and Borneo Ltd* (1901) 18 TLR 216. Such a transaction may be effected under a power to sanction a scheme for reconstruction or amalgamation: see *Re WH Hutchinson & Sons Ltd* (1915) 31 TLR 324.

9 *Sneath v Valley Gold Ltd* [1893] 1 Ch 477, CA; *Mercantile Investment and General Trust Co v River Plate Trust, Loan and Agency Co* [1894] 1 Ch 578. See also *Wright v Revelstoke* (1914) Times, 7 February.

10 In accordance with the Companies Act 2006 Pt 26 (ss 895-901) (arrangements and reconstructions) (see PARA 1426 et seq).

11 *Shaw v Royce Ltd* [1911] 1 Ch 138.

12 *Re Labuan and Borneo Ltd* (1901) 18 TLR 216.

13 *Hay v Swedish and Norwegian Rly Co* (1889) 5 TLR 460, CA.

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1329. Meetings of debenture holders.

In connection with the modification of rights clause¹, it is usual to provide in the case of debentures, where the issue is small, that the power may be exercised by writing under the hand of the holders of a specified nominal amount of the debentures; but, where the power is

contained in a debenture trust deed, provisions are usually inserted for the power to be exercised by a resolution passed at a meeting of the debenture holders². These provisions are also usually inserted in debentures where the issue is large and is not secured by a trust deed. For purposes of voting at such meetings, persons entitled to an immediate issue of debentures, but to whom certificates have not been issued, are entitled to vote³. A debenture holder may vote at a meeting as his interest directs, although, in so voting, he must act in good faith with reference to the interests of the debenture holders as a class; and a majority of debenture holders will not be allowed to oppress a minority⁴.

1 See PARA 1328.

2 The court will compel a company to hold a meeting of debenture holders pursuant to the provisions relating thereto: *Newhouse v Northern Light, Power and Coal Co Ltd* (1915) 139 LT Jo 540. As to trust deeds securing payment of money owing on debentures see PARA 1302.

3 *Dey v Rubber and Mercantile Corpn Ltd* [1923] 2 Ch 528.

4 *Goodfellow v Nelson Line (Liverpool) Ltd* [1912] 2 Ch 324; *British America Nickel Corpn v MJ O'Brien Ltd* [1927] AC 369, PC.

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1330. Arrangements and compromises.

The rights of holders of debentures¹ or debenture stock² may be modified by a scheme sanctioned under the statutory provisions relating to arrangements and reconstruction³. Where a claim is brought to administer the trusts of a deed securing debentures or debenture stock, the court may also approve a compromise and bind absent debenture holders, if satisfied that the compromise is for their benefit and that it is expedient to exercise the power⁴; but they are not bound if the order has been obtained by fraud or non-disclosure of material facts.

1 As to the meaning of 'debenture' see PARA 1299.

2 As to the meaning of 'debenture stock' see PARA 1309. As to the meaning of 'stock' generally see PARA 1163.

3 See the Companies Act 2006 Pt 26 (ss 895-901) (arrangements and reconstructions); and PARA 1425 et seq.

4 See CPR 19.7; and **CIVIL PROCEDURE** vol 11 (2009) PARA 230.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(22) BORROWING AND SECURING MONEY/(iv) Debentures and Debenture Stock/F. REDEMPTION OF DEBENTURES/1331. Time for redemption.

F REDEMPTION OF DEBENTURES

1331. Time for redemption.

Debentures¹ of a company become redeemable at the time or on the happening of any of the events specified in the debentures or debenture conditions, or in the trust deed securing the debentures²; and the happening of any one or more of such events entitles the company to make immediate repayment and call for a reconveyance of the property charged³. It is also very common in debentures and other similar instruments that are to be repaid on a fixed date to provide that that date will be accelerated in certain events, for example, if a petition is presented for the winding up by the court of the issuer⁴.

Provision is sometimes made for redemption by means of a sinking fund, and for the debentures to be redeemed by drawings⁵. An option is often given to the company at any time after a specified date to redeem at a premium. Unless otherwise agreed, debentures are not redeemable before the date or event specified in them⁶. Where debentures are to be redeemed on or after a specified date, the company may, but is not liable to, redeem them on that date, but it must redeem them on demand after that date⁷. The word 'redeemable', as used in debentures, implies an option and not an obligation to redeem⁸.

1 As to the meaning of 'debenture' see PARA 1299.

2 As to trust deeds securing payment of money owing on debentures see PARA 1302.

3 *Re Simmer and Jack East Ltd* (1913) 108 LT 488 (explaining *Re General Motor Car Co Ltd* (1912) 56 Sol Jo 573, as having decided merely that trustees of a trust deed are not bound to reconvey unless all the debenture holders secured by the trust deed have been satisfied). As to perpetual debenture see PARA 1305.

4 *Re Golden Key Ltd (in receivership)* [2009] EWCA Civ 636 at [30], [2009] All ER (D) 18 (Jul) at [30] per Arden LJ. See also PARA 1306 note 5.

5 If the debentures to be paid off are to be determined by ballot but provide for their repayment on and after a fixed date, the debentures become repayable after that date, even though no ballot is held: *Re Tewkesbury Gas Co*, *Tysoe v Tewkesbury Gas Co* [1911] 2 Ch 279; affd [1912] 1 Ch 1, CA.

6 *Hooper v Western Counties and South Wales Telephone Co Ltd* (1892) 68 LT 78.

7 *Re Tewkesbury Gas Co*, *Tysoe v Tewkesbury Gas Co* [1912] 1 Ch 1, CA.

8 *Re Chicago and North West Granaries Co Ltd*, *Morrison v Chicago and North West Granaries Co Ltd* [1898] 1 Ch 263. See also *Re Joseph Stocks & Co Ltd* (1909) [1912] 2 Ch 134n; *Edinburgh Corp v British Linen Bank* [1913] AC 133, HL.

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1332. Place of redemption; winding up.

If debentures¹ are made payable at a particular place, they must be presented for payment at that place before there can be default in payment². Where no place is fixed, the ordinary rule that a debtor must seek out his creditor applies³.

The principal money becomes due at the commencement of a winding up, even if the stipulated time for payment has not arrived⁴.

Debentures may be issued which are irredeemable or redeemable only on a contingency⁵.

- 1 As to the meaning of 'debenture' see PARA 1299.
- 2 *Thorn v City Rice Mills* (1889) 40 ChD 357. Cf *Re Harris Calculating Machine Co Ltd* [1914] 1 Ch 920 (where the principal only, and not the interest, was made payable at a fixed place and it was held that default in payment of the principal had taken place because the company had not paid the interest after demand).
- 3 *Fowler v Midland Electric Corp'n for Power Distribution Ltd* [1917] 1 Ch 656, CA.
- 4 *Hodson v Tea Co* (1880) 14 ChD 859; *Wallace v Universal Automatic Machines Co* [1894] 2 Ch 547, CA. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.
- 5 See PARA 1305. As to clogging the equity see PARA 1326. As to the use of the word 'redeemable' in debentures see PARA 1331.

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(v) Remedies for enforcing Securities

A. REMEDIES UNDER THE SECURITY

(A) IN GENERAL

1333. Debenture holder's remedies.

If the debenture¹ gives no charge² on the company's assets³, the debenture holder, being an unsecured creditor⁴, has only the rights against the company which any unsecured creditor has against an individual debtor, and also the right to present or support a petition for its winding up⁵. As a general rule, however, the holder of a debenture or debenture stock⁶ of a company has a charge or, where the debenture stock is secured by a trust deed⁷, the trustees usually have a legal mortgage on specific assets of the company, and, if so, he or they may enforce the usual remedies of a legal or equitable mortgagee against the company in the same manner as if it were an individual⁸. One of these rights is to have a sale of the property charged, either under the power given by the charge or by statute⁹, or with the assistance of the court. If the company goes into liquidation, the rights of a secured creditor under his security are not prejudiced, and the liquidator cannot obtain an injunction to restrain a sale by the secured creditor except on the usual terms of paying the amount due, or, if it is not agreed, paying the amount claimed, into court¹⁰. Where necessary, a debenture secured by a floating charge must be used to fund the general expenses of winding up in priority to the floating charge holder and is subject to any preferential creditors¹¹. In relation to a charge which is a floating charge on its creation and which is created after 15 September 2003¹², realisations from such a charge are a prescribed part of the company's net property that must be made available for the satisfaction of unsecured debts¹³.

The right of the debenture holder to exercise the remedies otherwise open to him is subject to certain statutory restrictions¹⁴.

- 1 As to the meaning of 'debenture' see PARAS 1299.
- 2 As to the meaning of 'charge' for the purposes of registration see PARA 1277 note 2.

- 3 As to the meaning of 'company' for the purposes of registration see PARA 1277 note 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.
- 4 As to the meaning of 'creditor' see PARA 1427.
- 5 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 450, 454.
- 6 As to the meaning of 'debenture stock' see PARA 1309. As to the meaning of 'stock' generally see PARA 1163.
- 7 As to trust deeds securing payment of money owing on debentures see PARA 1302.
- 8 See PARA 1360.
- 9 See the Law of Property Act 1925 s 101(1)(i); and **MORTGAGE** vol 77 (2010) PARA 443. But see also PARA 1300.
- 10 See *Re Poole Firebrick and Blue Clay Co* (1873) LR 17 Eq 268; *Walker v Banagher Distillery Co* (1875) 1 QBD 129.
- 11 See the Insolvency Act 1986 s 176ZA; and PARA 1271 note 11. As to preferential debts and claims see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 763 et seq.
- 12 As to the date on which the Insolvency Act 1986 s 176A had effect: see the Enterprise Act 2002 (Commencement No 4 and Transitional Provisions and Savings) Order 2003, SI 2003/2093, art 2(1), Sch 1; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 773.
- 13 See the Insolvency Act 1986 s 176A(2), (6), (9); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 773.
- 14 See PARA 1335. As to the position where a petition has been presented for an administration order see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 149; and as to the powers of an administrator with regard to a company's property see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 163-164.

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1334. Payment of preferential debts on assets subject to floating charge.

Where debentures¹ of a company² are secured by a charge³ which, as created, was a floating charge⁴, then, if possession is taken⁵, by or on behalf of the holders of any of the debentures, of any property⁶ comprised in or subject to the charge, and the company is not, at that time, in course of being wound up⁷, the company's preferential debts⁸ must be paid out of assets coming to the hands of the person taking possession in priority to any claims for principal or interest in respect of the debentures⁹.

Where a receiver is appointed on behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge¹⁰, then, if the company is not at the time in course of being wound up, its preferential debts¹¹ must be paid out of the assets coming to the hands of the receiver in priority to any claims for principal or interest in respect of the debentures¹².

Payments so made¹³ must be recouped, as far as may be, out of the assets of the company available for payment of general creditors¹⁴.

Where the charge, as created, was partly specific and partly floating, the priority of such preferential payments applies only to the assets secured by the floating charge¹⁵.

A receiver and manager is liable in damages to the preferential creditors if he exhausts the assets in carrying on the company's business on behalf of the debenture holders by paying ordinary debts without first paying the preferential debts¹⁶; or if, having collected assets, he hands them over to the company with the knowledge that it will transfer them to the debenture holder in satisfaction of his claim without any provision being made for payment of the preferential debts¹⁷. A claim in tort by a preferential creditor for damages for failing to pay his debt out of available assets is not barred by lapse of time if the receiver had sufficient assets to pay the debt at any time within six years¹⁸ before the bringing of the claim¹⁹.

1 As to the meaning of 'debenture' see PARAS 1299.

2 If a company registered in England and Wales or in Northern Ireland: see the Companies Act 2006 s 754(1). As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16. As to the meanings of 'England' and 'Wales' see PARA 1 note 5. As to company registration under the Companies Act 2006 see PARA 111 et seq.

3 As to the meaning of 'charge' for the purposes of registration see PARA 1277 note 2.

4 See the Companies Act 2006 s 754(1). As to the meaning of 'floating charge' see PARA 1269.

5 See *Re Oval 1742 Ltd (in creditors voluntary liquidation), Customs and Excise Comrs v Royal Bank of Scotland* [2007] EWCA Civ 1262, [2008] 1 BCLC 204 (bank took possession of money subject to a floating charge for these purposes).

6 As to the meaning of 'property' see PARA 1337 note 4.

7 A company is not in the course of being wound up until a winding-up order has been made: *Re Christonette International Ltd* [1982] 3 All ER 225, [1982] 1 WLR 1245. If the company is in winding up, a similar obligation to pay the company's preferential debts (if need be) out of the proceeds of a floating charge applies: see the Insolvency Act 1986 s 175(2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 763. As to the priority given to preferential debts in winding up over the claims of debenture holders under a floating charge see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 771-772. See also note 8.

8 For these purposes, 'preferential debts' means the categories of debts listed in the Insolvency Act 1986 s 386(1), Sch 6 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 763 et seq); and, for the purposes of Sch 6, the 'relevant date' is the date of possession being taken as mentioned in the Companies Act 2006 s 754(2): see s 754(3). However, preferential debts have been significantly reduced by the Enterprise Act 2002 s 251 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 763).

9 Companies Act 2006 s 754(2). Where a company, immediately before it has ceased to trade, had transferred and sold book debts to subsidiaries and then sold the subsidiaries to a third party on the basis that some of the consideration and the proceeds of the book debts would be transferred to the bank in return for it releasing its floating charge on the book debts (ie in return for not enforcing its security), the deferred and non-deferred consideration paid before the company's liquidation fell within the Companies Act 1985 s 196 (see now the Companies Act 2006 s 754) (ie because the bank had effectively realised its security) but so much of the deferred consideration as was paid after the liquidation fell within the Insolvency Act 1986 s 175 (which provides that, in a winding up, the company's preferential debts must be paid in priority to all other debts: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 763): *Re Oval 1742 Ltd (in creditors voluntary liquidation), Customs and Excise Comrs v Royal Bank of Scotland* [2007] EWCA Civ 1262, [2008] 1 BCLC 204.

10 See the Insolvency Act 1986 s 40(1). Subject to the specified exceptions given in ss 72B-72GA (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 382), the holder of a qualifying floating charge in respect of a company's property may not appoint an administrative receiver of the company; this prohibition applies to a floating charge created on or after 15 September 2003, and applies in spite of any provision of an agreement or instrument which purports to empower a person to appoint an administrative receiver (by whatever name): see s 72A; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 382. See also PARA 1338.

11 If preferential debts within the meaning given to that expression by the Insolvency Act 1986 s 386 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 763 et seq): see s 40(2). For the purposes of Sch 6, and in relation to a company in receivership (where s 40 applies), the 'relevant date' is the date of the appointment of the receiver by debenture holders: see s 387(1), (4)(a).

12 Insolvency Act 1986 s 40(2). For these purposes, 'the debentures' is a reference to 'any debentures of the company secured by a charge which, as created, was a floating charge' in s 40(1) (see the text and note 10) and not merely to debentures under which a receiver has been appointed: *Re H & K (Medway) Ltd, Mackay v IRC* [1997] 2 All ER 321, [1997] 1 WLR 1422. As to the form of order appointing a receiver so far as it relates to preferential creditors see PARA 1385.

13 The payment in respect of preferential debts under either the Companies Act 2006 s 754 (see the text and notes 1-9) or the Insolvency Act 1986 s 40 (see the text and notes 10-12): see the Companies Act 2006 s 754(4) and the Insolvency Act 1986 s 40(3).

14 Companies Act 2006 s 754(4); Insolvency Act 1986 s 40(3).

15 *Re Lewis Merthyr Consolidated Collieries Ltd* [1929] 1 Ch 498, CA; *Re GL Saunders Ltd* [1986] 1 WLR 215, [1986] BCLC 40 (where a surplus arising from the sale of assets subject to a fixed charge was ordered to be paid to the company); *Re Griffin Hotel Co Ltd, Joshua Tetley & Son Ltd v Griffin Hotel Co Ltd* [1941] Ch 129, [1940] 4 All ER 324 (followed in *Herde v Mahabirsingh* [1992] 1 WLR 869, PC). Where an effect of a deed of priority is to make a fixed charge subject to a floating charge, the fixed charge holder's claims are postponed until the debt secured by the floating charge has been satisfied; and the floating charge in turn is subject to the prior claims of the preferential creditors: *Re Portbase Clothing Ltd* [1993] Ch 388, [1993] 3 All ER 829. As to the meaning of 'specific (or fixed) charges' see PARA 1269.

16 *Woods v Winkill* [1913] 2 Ch 303; *Westminster Corpn v Haste* [1950] Ch 442, [1950] 2 All ER 65. If the receiver has disregarded the priority through misrepresentation by the debenture holders' agent, the illegality of which he was unaware is no bar to his enforcement of an indemnity given by the agent: *Westminster City Council v Treby* [1936] 2 All ER 21.

17 *IRC v Goldblatt* [1972] Ch 498, [1972] 2 All ER 202.

18 See the Limitation Act 1980 s 2; and **LIMITATION PERIODS** vol 68 (2008) PARA 979.

19 *Westminster Corpn v Haste* [1950] Ch 442, [1950] 2 All ER 65.

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1335. Effect of moratoriums on property subject to security.

Where company directors intend to make a proposal for a voluntary arrangement¹, they may take steps to obtain a moratorium for the company², and during the period for which the moratorium is in force³ no steps may be taken to enforce any security over company property and no proceedings, execution or other legal process may be commenced or continued against the company or its property except with the leave of the court and subject to such terms as the court may impose⁴. A company in respect of which a moratorium is in force may dispose of property which is subject to a security if either the holder of the security consents or the court gives leave⁵.

When a company is in administration⁶ then, without the court's permission⁷ or the administrator's consent⁸, no step may be taken to enforce security over the company's property⁹, and no legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the company or property of the company¹⁰. The administrator of a company may dispose of or take action relating to property which is subject to a floating charge as if it were not subject to the charge¹¹.

1 As to voluntary arrangements and the making of proposals see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 71 et seq.

2 See the Insolvency Act 1986 s 1A(1); **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 73; and **MORTGAGE** vol 77 (2010) PARA 519. Not every type of company is eligible for a moratorium: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 73-74.

3 As to when a moratorium comes into force see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 78. As to the duration and extension of moratoriums see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 78-82.

4 See the Insolvency Act 1986 Sch A1 para 12; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 88.

5 See the Insolvency Act 1986 Sch A1 para 20; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 91. Where property subject to a security which, as created, was a floating charge is so disposed of, the holder of the security has the same priority in respect of any property of the company directly or indirectly representing the property disposed of as he would have had in respect of the property subject to the security: see Sch A1 para 20(4); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 91. In relation to a charge other than a floating charge, it is a condition of any such consent or leave that the net proceeds of the disposal and, where those proceeds are less than such amount as may be agreed or determined by the court to represent market value, such sums as may be required to make good any deficiency, be applied towards discharging the sums secured by the security: see Sch A1 para 20(5), (6); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 91.

6 As to companies in administration see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 212 et seq.

7 As to the courts having jurisdiction see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 438 et seq.

8 As to administrators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 212 et seq.

9 See the Insolvency Act 1986 s 8, Sch B1 para 43; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 263.

10 See the Insolvency Act 1986 Sch B1 para 43; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 263.

11 See the Insolvency Act 1986 Sch B1 para 70; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 257.

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1336. Construction of references to receivers and managers in the Companies Acts and in the Insolvency Act 1986.

Any reference in the Companies Acts¹ to a receiver or manager of the property of a company² (or to a receiver of it) includes a receiver or manager or (as the case may be) a receiver of part only of that property and a receiver only of the income arising from the property or from part of it³; and any reference in the Companies Acts to the appointment of a receiver or manager under powers contained in an instrument includes an appointment made under powers that by virtue of an enactment⁴ are implied in and have effect as if contained in an instrument⁵.

Except where the context otherwise requires, any reference in the Insolvency Act 1986⁶ to a receiver or manager⁷ of the property of a company⁸ (or to a receiver of it) includes a reference to a receiver or manager or (as the case may be) to a receiver of part only of that property, and to a receiver only of the income arising from that property or from part of it⁹; and any reference in the Insolvency Act 1986 to the appointment of a receiver or manager under powers

contained in an instrument includes an appointment made under powers which, by virtue of any enactment, are implied in and have effect as if contained in an instrument¹⁰.

- 1 As to the meaning of the 'Companies Acts' see PARA 16.
- 2 As to the meaning of 'company' under the Companies Acts see PARA 24.
- 3 Companies Act 2006 s 1170A(1) (s 1170A added by SI 2009/1941).
- 4 As to the meaning of 'enactment' see PARA 17 note 2.
- 5 Companies Act 2006 s 1170A(2) (as added: see note 3).
- 6 As to the Insolvency Act 1986 see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 reissue) PARA 1 et seq.
- 7 'Receiver', in the expression 'receiver or manager', does not include a receiver appointed under the Insolvency Act 1986 Pt III Ch II (ss 50-71) (Receivers (Scotland)): s 251.
- 8 As to the meaning of 'property' see PARA 1337 note 4.
- 9 Insolvency Act 1986 s 29(1)(a) (amended by SI 2009/1941). As to administrative receivers see PARA 1337; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 380 et seq.
- 10 Insolvency Act 1986 s 29(1)(b) (amended by SI 2009/1941).

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(B) ADMINISTRATIVE RECEIVERS

1337. In general.

In relation to a company registered in England and Wales¹, 'administrative receiver' means²: (1) a receiver or manager³ of the whole (or substantially the whole) of a company's property⁴ appointed by or on behalf of the holders of any debentures⁵ of the company secured by a charge which, as created, was a floating charge⁶ (or by such a charge and one or more other securities)⁷; or (2) a person who would be such a receiver or manager but for the appointment of some other person as the receiver of part of the company's property⁸.

An administrative receiver must be a person who is qualified to act as an insolvency practitioner in relation to the company⁹. However, the acts of an individual as administrative receiver of a company are valid notwithstanding any defect in his appointment, nomination or qualifications¹⁰.

When an administration order takes effect in respect of a company¹¹, any administrative receiver of the company must vacate office¹²; and where a company is in administration¹³, any receiver of part of the company's property must vacate office if the administrator requires him to¹⁴. During the period for which such an order is in force, no administrative receiver of the company may be appointed¹⁵; and no other steps may be taken to enforce any security over the company's property, or to repossess goods in the company's possession under any hire-purchase agreement except with the consent of the administrator or the permission of the court¹⁶ and subject, where the court gives permission, to such a condition or requirement as the court may impose¹⁷.

1 See the Companies Act 2006 s 28(1) (s 28 substituted by SI 2009/1941). As to company formation and registration under the Companies Act 2006 see PARA 78 et seq. As to the meanings of 'England' and 'Wales' see PARA 1 note 5. However, since the general purpose and the nature of the statutory scheme relating to the qualifications, functions, powers and duties of administrative receivers are as appropriate to unregistered companies (including foreign companies conducting business in England and Wales) as to registered companies, the scheme of administrative receivership is not confined to appointments of receivers made over the property of registered companies: *Re International Bulk Commodities Ltd* [1993] Ch 77, [1993] 1 All ER 361. As to the meaning of 'unregistered company' see PARA 1666. The Insolvency Act 1986 Pt III Ch I (ss 28-49) (Receivers and Managers (England and Wales)) does not apply to receivers appointed under Pt III Ch II (ss 50-71) (Receivers (Scotland)): see s 28(2) (as so substituted).

2 Insolvency Act 1986 s 29(2). As to administrative receivers generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 380 et seq.

3 As to the construction of references to receivers and managers see PARA 1336.

4 For these purposes, 'property' includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property: Insolvency Act 1986 s 436. A waste disposal licence is 'property' for the purposes of s 436: *Re Mineral Resources Ltd, Environment Agency v Stout* [1999] 1 All ER 746 (liquidator owed an obligation to realise for the benefit of the creditors the value of the licence in a market where people were prepared to pay for a transfer of such licences); *Re Celtic Extraction Ltd (in liquidation), Re Bluestone Chemicals Ltd (in liquidation)* [2001] Ch 475, [1999] 4 All ER 684, CA. In the application of the Insolvency Act 1986 to proceedings by virtue of EC Council Regulation 1346/2000 (OJ L160, 30.6.2000, p 1) on insolvency proceedings, art 3 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 46 et seq; **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 476), a reference to property is a reference to property which may be dealt with in the proceedings: Insolvency Act 1986 s 436A (added by the Insolvency Act 1986 (Amendment) (No 2) Regulations 2002, SI 2002/1240, regs 3, 18).

5 As to the meaning of 'debenture' see PARA 1299.

6 For these purposes, 'floating charge' means a charge which as created was a floating charge and includes a floating charge within the Companies Act 1985 s 462 (Scottish floating charges): Insolvency Act 1986 s 251. As to the meaning of 'floating charge' generally see PARA 1269.

7 Insolvency Act 1986 s 29(2)(a).

8 Insolvency Act 1986 s 29(2)(b). In Pts I-VII (ss 1-251), except in so far as the context otherwise requires, 'insolvency', in relation to a company, includes the appointment of an administrator or administrative receiver: s 247(1) (amended by the Enterprise Act 2002 s 248(3), Sch 17 paras 9, 33(1), (2)). As to administrators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 158 et seq.

9 See the Insolvency Act 1986 s 388(1)(a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 392.

10 See the Insolvency Act 1986 s 232; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 159. The defects in question are limited to defects in the form or procedure for the appointment; and the Insolvency Act 1986 s 232 does not protect acts done where there was no power to appoint at all and the appointment is invalid: see s 34; and PARA 1341.

11 See under the Insolvency Act 1986 Pt II (s 8), Sch B1: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 146 et seq.

12 See the Insolvency Act 1986 Sch B1 para 41(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 262. As to the interrelationship between administration orders and administrative receiverships see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 381.

13 See note 11.

14 See the Insolvency Act 1986 Sch B1 para 41(2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 262. As to remuneration, expenses and indemnity on vacation of office see PARA 1357.

15 See the Insolvency Act 1986 Sch B1 para 43(6A); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 263.

16 See the Insolvency Act 1986 Sch B1 para 43(2), (3); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 263.

17 See the Insolvency Act 1986 Sch B1 para 43(7); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 263.

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1338. Prohibition of appointment of administrative receiver by floating charge holder.

Subject to specified exceptions¹, the holder of a qualifying floating charge in respect of a company's property² may not appoint an administrative receiver of the company³. This prohibition applies to a floating charge created on or after 15 September 2003⁴, and applies in spite of any provision of an agreement or instrument which purports to empower a person to appoint an administrative receiver (by whatever name)⁵.

However, this prohibition does not prevent the appointment of an administrative receiver:

- 594 (1) in pursuance of an agreement which is or forms part of a capital market arrangement if a party incurs or, when the agreement was entered into was expected to incur, a debt of at least £50 million under the arrangement, and the arrangement involves the issue of a capital market investment⁶;
- 595 (2) of a project company of a project which is a public-private partnership project, and includes step-in rights⁷;
- 596 (3) of a project company of a project which is a utility project, and includes step-in rights⁸;
- 597 (4) of a project company of a project which is designed wholly or mainly to develop land which at the commencement of the project is wholly or partly in a designated disadvantaged area outside Northern Ireland, and includes step-in rights⁹;
- 598 (5) of a project company of a project which is a financed project, and includes step-in rights¹⁰;
- 599 (6) of a company by virtue of a market charge, a system-charge, or a collateral security charge¹¹;
- 600 (7) of a company which is registered as a social landlord¹²;
- 601 (8) of a company holding an appointment under the Water Industry Act 1991¹³, of a protected railway company or of a licence company¹⁴.

1 The subject to the Insolvency Act 1986 ss 72B-72GA (see the text and notes 7-14): see s 72A(6); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 382.

2 For these purposes, 'holder of a qualifying floating charge in respect of a company's property' has the same meaning as in the Insolvency Act 1986 s 8, Sch B1 para 14 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 212): see s 72A(3); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 382. As to when a floating charge qualifies for these purposes see Sch B1 para 14; PARA 1339 note 1; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 228. As to the meaning of 'floating charge' for these purposes see PARA 1337 note 6. As to the application of the Insolvency Act 1986 Sch B1 see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 145.

3 See the Insolvency Act 1986 s 72A(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 382.

4 See the Insolvency Act 1986 s 72A(4)(a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 382. The text refers to a floating charge created on or after a date appointed by the Secretary of State by order made by statutory instrument: see the Insolvency Act 1986 s 72A(4)(a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 382. An order under s 72A(4)(a) may make provision which applies generally or only for a specified person, may make different provision for different purposes, and may make transitional provision: see s 72A(5); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 382. In exercise of the powers so conferred, the Secretary of State has made the Insolvency Act 1986, Section 72A (Appointed Date) Order 2003, SI 2003/2095, which appoints 15 September 2003 as the relevant date for these purposes (see art 2).

5 See the Insolvency Act 1986 s 72A(4)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 382.

6 See the Insolvency Act 1986 s 72B; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 383.

7 See the Insolvency Act 1986 s 72C; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 384. For these purposes, a project has 'step-in rights' if a person who provides finance in connection with the project has a conditional entitlement under an agreement to assume sole or principal responsibility under an agreement for carrying out all or part of the project or make arrangements for carrying out all or part of the project: see the Insolvency Act 1986 Sch 2A para 6; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 384. See *Feetum v Levy* [2005] EWCA Civ 1601, [2006] Ch 585, [2006] 2 BCLC 102.

8 See the Insolvency Act 1986 s 72D; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 385.

9 See the Insolvency Act 1986 s 72DA; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 386.

10 See the Insolvency Act 1986 s 72E; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 387. See also *Feetum v Levy* [2005] EWCA Civ 1601, [2006] Ch 585, [2006] 2 BCLC 102.

11 See the Insolvency Act 1986 s 72F; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 388.

12 See the Insolvency Act 1986 s 72G; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 389.

13 In an appointment under the Water Industry Act 1991 Pt II Ch I (ss 6-17) (see **WATER AND WATERWAYS** vol 100 (2009) PARA 137 et seq): see the Insolvency Act 1986 s 72GA; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 390.

14 See the Insolvency Act 1986 s 72GA; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 390.

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(C) ADMINISTRATION

1339. Power of floating charge holder to appoint administrator.

The holder of a qualifying floating charge¹ in respect of a company's property may appoint an administrator of the company without a court order², provided that: (1) he has given at least two business days' written notice (the 'notice of intention to appoint') to the holder of any prior qualifying floating charge³; and (2) the holder of any such charge⁴ has consented in writing to the making of the appointment⁵. He may also apply to the court for an order appointing a person as administrator⁶.

An administrator may not be so appointed while a floating charge on which the appointment relies is not enforceable⁷ or if a provisional liquidator of the company has been appointed⁸ or an administrative receiver⁹ of the company is in office¹⁰.

1 As to the meaning of 'floating charge' for these purposes see PARA 1337 note 6. As to the meaning of 'holder of a qualifying floating charge' for these purposes see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 212. A floating charge qualifies for these purposes if it is created by an instrument which: (1) states that the Insolvency Act 1986 s 8, Sch B1 para 14 applies to the floating charge; (2) purports to empower the holder of the floating charge to appoint an administrator of the company; or (3) purports to empower the holder of the floating charge to make an appointment which would be the appointment of an administrative receiver within the meaning given by s 29(2) (see PARA 1337): see Sch B1 para 14(2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 228. As to the meaning of 'administrator' see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 212. As to the application of the Insolvency Act 1986 Sch B1 see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 145.

2 See the Insolvency Act 1986 Sch B1 paras 2, 14(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 228. As to the persons who may appoint an administrator see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 212.

3 See the Insolvency Act 1986 Sch B1 para 15(1)(a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 228. In order for a prior floating charge holder to require notice of intention to appoint, the prior floating charge must satisfy Sch B1 para 14(2) (see note 1); and one floating charge is prior to another for these purposes if it was created first, or if it is to be treated as having priority in accordance with an agreement to which the holder of each floating charge was party: see Sch B1 para 15; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 228.

4 The one which satisfies the Insolvency Act 1986 Sch B1 para 14(2) (see note 1): see Sch B1 para 15(1)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 228.

5 See the Insolvency Act 1986 Sch B1 para 15(1)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 228.

6 See the Insolvency Act 1986 Sch B1 para 10; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 212 et seq.

7 See the Insolvency Act 1986 Sch B1 para 16; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 228.

8 The one under the Insolvency Act 1986 s 135 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 491): see Sch B1 para 17; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 228.

9 As to administrative receivers generally see PARAS 1337, 1338.

10 See the Insolvency Act 1986 Sch B1 para 17; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 228.

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(D) RECEIVERS OR MANAGERS

1340. Appointment of receiver or manager.

A debenture¹ or trust deed² often gives power to appoint a receiver or manager³ on specified events⁴. Such a power given in debentures of a series is a fiduciary power; and, if an appointment is made which is not for the benefit of the debenture holders, but with a view to

the benefit of the company or third persons, the court will interfere and appoint its own receiver⁵. The appointment of a person as a receiver or manager of a company's property under powers contained in an instrument⁶ is, however, of no effect unless it is accepted by that person before the end of the business day⁷ next following that on which the instrument of appointment is received by him or on his behalf⁸; and, subject to this, the appointment is deemed to be made at the time at which the instrument of appointment is so received⁹. The date of the document is immaterial¹⁰. These provisions apply to the appointment of two or more persons as joint receivers or managers of a company's property under powers contained in an instrument, subject to such modifications as may be prescribed by the rules¹¹.

The power of a secured creditor to appoint a receiver under his security may be exercised, assuming that all conditions necessary for the appointment have been satisfied, at any time the creditor chooses; and, as regards timing, he owes no duty either to the company or to any guarantors to select any time other than one which suits his own convenience¹². In making any such appointment, the person making it is under no duty to refrain from so doing because this may cause loss to the company or its unsecured creditors, as, for example, where a liquidator who could do all that the receiver could do has already been appointed¹³.

1 As to the meaning of 'debenture' see PARAS 1299, 1309.

2 As to trust deeds securing payment of money owing on debentures see PARA 1302.

3 As to the construction of references to receivers and managers see PARA 1336.

4 As to the statutory power of a mortgagee by deed to appoint a receiver (commonly referred to as 'LPA receivers') see the Law of Property Act 1925 s 101(1)(iii); and **MORTGAGE** vol 77 (2010) PARA 476. Cf PARA 1300. As to an invalid appointment by deed taking effect as an appointment in writing see *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 375, [1961] 1 All ER 277, CA. The power to appoint often arises under the terms of a debenture upon failure by the company to make repayment of all sums due thereunder on demand. Such a demand need not specify the actual sum due (*Bank of Baroda v Panessar* [1987] Ch 335, [1986] 3 All ER 751, following *Bunbury Foods Pty Ltd v National Bank of Australasia Ltd* (1984) 58 ALJR 199, Aust HC; and see *NRG Vision Ltd v Churchfield Leasing Ltd* [1988] BCLC 624, 4 BCC 56), but must give the company sufficient time to carry out any necessary mechanics of payment in relation to sums assumed to be already at its disposal (*RA Cripps & Son Ltd v Wickenden* [1973] 2 All ER 606, [1973] 1 WLR 944; *Bank of Baroda v Panessar*). However, where the debtor makes it clear to the creditor that the required funds are not available, that admission establishes the debtor's default and the creditor does not have to wait for any minimum period before appointing a receiver: *Sheppard & Cooper Ltd v TSB Bank plc (No 2)* [1996] 2 All ER 654. If the power to appoint a receiver has become exercisable on the happening of a specified event, the appointment is valid notwithstanding that the reason given for the appointment at the time is not on those grounds but only adduced subsequently; and the power to appoint a receiver is valid even if the charge documents take effect only under hand so that any receiver appointed cannot execute deeds on the company's behalf: *Byblos Bank SAL v Al-Khudhairy* [1987] BCLC 232, CA.

5 *Re Maskelyne British Typewriter Ltd, Stuart v Maskelyne British Typewriter Ltd* [1898] 1 Ch 133, CA; *Re Slogger Automatic Feeder Co Ltd* [1915] 1 Ch 478 (where the order was made on the application of the equitable mortgagees of some of the debentures).

6 As to the meaning of references to 'the appointment of a receiver or manager under powers contained in an instrument' see PARA 1336.

7 For these purposes, 'business day' means any day other than a Saturday, a Sunday, Christmas Day, Good Friday, or a day which is a bank holiday in any part of Great Britain: see the Insolvency Act 1986 s 251. As to the meaning of 'Great Britain' see PARA 1 note 5. As to bank holidays generally see **TIME** vol 97 (2010) PARA 321.

8 Insolvency Act 1986 s 33(1)(a).

9 Insolvency Act 1986 s 33(1)(b).

10 *RA Cripps & Son Ltd v Wickenden* [1973] 2 All ER 606, [1973] 1 WLR 944.

11 Insolvency Act 1986 s 33(2). As to the rules mentioned in the text see the Insolvency Rules 1986, SI 1986/1925, r 3.1; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 394. See also

Gwembe Valley Development Co Ltd (in receivership) v Koshy and others (No 2), DEG-Deutsche Investitions- und Entwicklungsgesellschaft mbH v Koshy [2000] 2 BCLC 705.

12 *Shamji v Johnson Matthey Bankers Ltd* [1986] BCLC 278; on appeal [1986] 1 FTLR 329, CA.

13 *Re Potters Oils Ltd (No 2)* [1986] 1 All ER 890, [1986] 1 WLR 201.

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1341. Liability for invalid appointment.

Where the appointment of a person as the receiver or manager¹ of a company's property² under powers contained in an instrument³ is discovered to be invalid (whether by virtue of the invalidity of the instrument or otherwise) the court may order the person by whom or on whose behalf the appointment was made to indemnify the person appointed against any liability which arises solely by reason of the invalidity of the appointment⁴.

1 As to the construction of references to receivers and managers see PARA 1336.

2 As to the meaning of 'property' see PARA 1337 note 4.

3 As to the meaning of references to 'the appointment of a receiver or manager under powers contained in an instrument' see PARA 1336.

4 Insolvency Act 1986 s 34.

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1342. Effect of appointment of receiver.

The appointment of a receiver¹ is one of the events which causes a floating charge to crystallise². As regards all the property comprised in the security over which the receiver is appointed, the directors' powers are of necessity paralysed. The powers exercisable by the receiver depend, however, entirely upon the combination of the precise terms of the debenture and his appointment, as supplemented, in the case of an administrative receiver (where it is still possible so to appoint)³, by certain statutory powers⁴ if not inconsistent with the terms of the debenture. The receiver's status, whether as agent for the debenture holders⁵ or as agent for the company (as is usual, and is, in the case of an administrative receiver, expressly provided for by statute⁶), depends on similar considerations⁷.

A person dealing with an administrative receiver of a company in good faith and for value is not, however, concerned to inquire whether the administrative receiver is acting within his powers⁸.

The appointment of a receiver normally has no effect upon the company's contracts, except such as cannot well subsist concurrently with the receivership, such as contracts of management. Ordinary contracts of employment, for example, will not be affected⁹, save that, if they are adopted by an administrative receiver in the carrying out of his functions, he will become personally liable on them but only to the extent of any qualifying liability¹⁰. Apart from that, if, as is usual, the receiver has powers of management, the decision whether to cause the company to fulfil existing contracts is solely a matter for his discretion, at any rate where the repudiation of the contract would not adversely affect the realisation of the assets or seriously affect the trading prospects of the company, if it is able to trade in the future¹¹. However, where there is a subsisting contractual obligation capable of enforcement by an order for specific performance in the form of a mandatory injunction the appointment of a receiver does not of itself preclude the making of an order for specific performance which otherwise ought to be made¹².

A provision in a debenture empowering the receiver to bring a claim in the name of the company whose assets are charged is merely an enabling provision, investing the receiver with the capacity to bring such a claim, and does not divest the company's directors of their power to institute proceedings on behalf of the company, provided that the proceedings do not interfere with the receiver's function of getting in the company's assets or prejudicially affect the debenture holder by imperilling the assets¹³.

1 As to the construction of references to receivers see PARA 1336.

2 See PARA 1274.

3 As to the meaning of 'administrative receiver' see PARA 1337. As to the prohibition on the appointment of administrative receivers by a floating charge holder see PARA 1338. As to administrative receivers generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 380 et seq.

4 As to such powers see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 396 et seq.

5 See eg *Re Vimbos Ltd* [1900] 1 Ch 470.

6 See the Insolvency Act 1986 s 44(1)(a) (following the Law of Property Act 1925 s 109(2)); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 402. As in any other case of agency, this agency is determined by the liquidation of the company: see the Insolvency Act 1986 s 44(1)(a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 402.

7 See note 6.

8 See the Insolvency Act 1986 s 42(3); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 396.

9 *Re Mack Trucks (Britain) Ltd* [1967] 1 All ER 977, [1967] 1 WLR 780; *Re Foster Clark Ltd's Indenture Trusts, Loveland v Horscroft* [1966] 1 All ER 43 at 49, [1966] 1 WLR 125 at 132 per Plowman J; *Griffiths v Secretary of State for Social Services* [1974] QB 468, [1973] 3 All ER 1184 (employment of managing director under a service contract subject to the control of the board was not determined by the appointment of a receiver); *Re Peek Winch & Tod Ltd* (1980) 130 NLJ 116, [1979] CA Transcript 190, CA.

10 See the Insolvency Act 1986 s 44(1)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 402. For this purpose, the administrative receiver will not be taken to have adopted a contract of employment by reason of anything done or omitted to be done within 14 days after his appointment: see s 44(2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 402. In the case of an ordinary receiver, this provision does not apply, and accordingly employees who continue to work for the company after his appointment will not be regarded as employed by him: see *Nicoll v Cutts* [1985] BCLC 322, CA.

11 *Airlines Airspares Ltd v Handley Page Ltd* [1970] Ch 193, [1970] 1 All ER 29n. See also *Re TransTec Automotive (Campsie) Ltd* [2001] BCC 403.

12 *Land Rover Group Ltd v UPF (UK) Ltd (in receivership)* [2002] EWHC 303 (QB), [2003] 2 BCLC 222.

13 *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] QB 814, [1978] 2 All ER 896, CA; distinguished in *Tudor Grange Holdings Ltd v Citibank NA* [1992] Ch 53, [1991] 4 All ER 1.

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1343. Rates and taxes.

So long as the receiver¹ is the agent of the company, the company remains as rateable occupier of any premises occupied by it; and the company remains liable to pay any rates². If and when the receiver ceases to be the agent of the company, he or his then principal³ may become liable to pay the rates, if he takes such possession as constitutes rateable occupation⁴.

So far as corporation tax is concerned, if and so long as the receiver is the agent of the company, the tax position of the company remains unchanged, and the company will be the person chargeable to tax. If and when the receiver is not, or ceases to be, the agent of the company, since nevertheless it remains entitled to the benefit of the income produced by the receiver's conduct of its affairs, it would appear that the company will be chargeable on it⁵.

While in theory a receiver appears to have a discretion⁶ as to whether or not to pay over VAT, there is in fact, on grounds of public policy, no such discretion⁷.

¹ As to the construction of references to receivers see PARA 1336.

² *Liverpool Corp'n v Hope* [1938] 1 KB 751, [1938] 1 All ER 492, CA (action against receiver for rates dismissed; it was held that the receiver is under no statutory duty pursuant to the Law of Property Act 1925 s 109(8)(i) (see **MORTGAGE** vol 77 (2010) PARA 483) owed to the rating authority); *Ratford v Northavon District Council* [1987] QB 357, [1986] 3 All ER 193, DC; *Re Sobam BV and Satelscoop BV, Brown v City of London Corp'n* [1996] 1 WLR 1070, [1996] 1 BCLC 446; *Rees v Boston Borough Council* [2001] EWCA Civ 1934, [2002] 1 WLR 1304, sub nom *Boston Borough Council v Rees* [2002] BCC 495, (2002) Times, 15 January (the mere fact that a receiver uses a company's premises for the purpose of managing its business does not, of itself, amount to rateable occupation of the company's premises imposing liability on the receiver). The situation would be different if the receiver had dispossessed the company, or taken possession in an independent capacity: *Ratford v Northavon District Council*.

³ See PARA 1355.

⁴ *Richards v Kidderminster Overseers* [1896] 2 Ch 212.

⁵ See the Income and Corporation Taxes Act 1988 s 8(2); and **INCOME TAXATION** vol 23(1) (Reissue) PARA 835.

⁶ *Ie* under the Law of Property Act 1925 s 109(8)(i) (see **MORTGAGE** vol 77 (2010) PARA 482).

⁷ *Sargent v Customs and Excise Comrs* [1995] 1 WLR 821, [1995] 2 BCLC 34, CA. See also *Re John Willment (Ashford) Ltd* [1979] 2 All ER 615, [1980] 1 WLR 73.

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1344. Notification of appointment.

If a person obtains an order for the appointment of a receiver or manager¹ of a company's property², or appoints such a receiver or manager under powers contained in an instrument, he must within seven days of the order or of the appointment under those powers, give notice of the fact to the registrar of companies³. Where a person appointed receiver or manager of a company's property under powers contained in an instrument ceases to act as such receiver or manager, he must, on so ceasing, give the registrar notice to that effect⁴. The registrar must enter a fact of which he is given notice in this way⁵ in the register of charges⁶.

A person who makes default in complying with these requirements⁷ commits an offence⁸; and a person guilty of such an offence is liable (on summary conviction) to a fine not exceeding level 3 on the standard scale⁹ and (for continued contravention) a daily default fine¹⁰ not exceeding one-tenth of level 3 on the standard scale¹¹.

Where a receiver or manager of the property of a company has been appointed, every invoice, order for goods or services, business letter or order form (whether in hard copy, electronic or any other form) issued by or on behalf of the company or the receiver or manager or the liquidator of the company, and all the company's websites, must contain a statement that a receiver or manager has been appointed¹². If default is made in complying with this requirement, the company, and any officer or liquidator of the company and any receiver or manager who knowingly and wilfully authorises or permits the default, is liable on summary conviction to a fine not exceeding one-fifth of the statutory maximum¹³.

1 As to the construction of references to receivers and managers see PARA 1336.

2 As to the meaning of 'company' for the purposes of registration see PARA 1277 note 1. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

3 See the Companies Act 2006 s 871(1); and PARA 1292. As to the meaning of 'registrar of companies' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

As to the power of the Secretary of State by regulations to amend the Companies Act 2006 Pt 25 (ss 860-894) see s 894; and PARA 1277 note 1.

4 See the Companies Act 2006 s 871(2); and PARA 1292. As to the meaning of references to 'the appointment of a receiver or manager under powers contained in an instrument' see PARA 1336.

5 See under the Companies Act 2006 s 871: see s 871(3); and PARA 1292.

6 See the Companies Act 2006 s 871(3); and PARA 1292. As to the register of charges see PARA 1289.

7 See in complying with the Companies Act 2006 s 871: see s 871(4); and PARA 1292.

8 See the Companies Act 2006 s 871(4); and PARA 1292.

9 As to the meaning of 'standard scale' see PARA 1622.

10 As to the meaning of 'daily default fine' see PARA 1622.

11 See the Companies Act 2006 s 871(5); and PARA 1292.

12 Insolvency Act 1986 s 39(1) (substituted by SI 2008/1897).

13 Insolvency Act 1986 ss 39(2), 430, Sch 10. As to the meaning of the 'statutory maximum' see PARA 1622.

1345. Corporation not to act as receiver.

A body corporate¹ is not qualified for appointment as receiver² of the property of a company³; and an attempt to appoint such a body as receiver is a nullity⁴. Any body corporate which acts as such a receiver is liable (on conviction on indictment) to a fine or (on summary conviction) to a fine not exceeding the statutory maximum⁵.

1 As to companies and corporations see PARA 2.

2 As to the construction of references to receivers see PARA 1336.

3 Insolvency Act 1986 s 30. As to the meaning of 'property' see PARA 1337 note 4.

4 *Portman Building Society v Gallwey* [1955] 1 All ER 227, [1955] 1 WLR 96.

5 Insolvency Act 1986 ss 30, 430, Sch 10. As to the meaning of the 'statutory maximum' see PARA 1622.

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1346. Bankrupt or person in respect of whom a debt relief order is made not to act as receiver or manager.

A person who acts as receiver or manager¹ of a company's property² on behalf of debenture³ holders while he is an undischarged bankrupt⁴, while a moratorium period under a debt relief order applies in relation to him⁵, or while a bankruptcy restrictions order or a debt relief restrictions order is in force in respect of him⁶, commits an offence⁷; and a person guilty of such an offence is liable (on conviction on indictment) to imprisonment for a term not exceeding two years or a fine (or to both) or (on summary conviction) to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum⁸ (or to both)⁹. This restriction does not apply, however, to a receiver or a manager acting under an appointment made by the court¹⁰.

1 As to the construction of references to receivers and managers see PARA 1336.

2 As to the meaning of 'property' see PARA 1337 note 4.

3 As to the meaning of 'debenture' see PARAS 1299, 1309.

4 Insolvency Act 1986 s 31(1)(a) (s 31 substituted by the Enterprise Act 2002 s 257(3), Sch 21 para 1).

5 Insolvency Act 1986 s 31(1)(aa) (s 31 as substituted (see note 4); s 31(1)(aa) added by the Tribunals, Courts and Enforcement Act 2007 s 108(3), Sch 20 Pt 1 paras 1, 2(1)(a)).

6 Insolvency Act 1986 s 31(1)(b) (s 31 as substituted (see note 4); s 31(1)(b) amended by the Tribunals, Courts and Enforcement Act 2007 Sch 20 Pt 1 paras 1, 2(1)(b)).

7 Insolvency Act 1986 s 31(1) (as substituted: see note 4).

8 As to the meaning of the 'statutory maximum' see PARA 1622.

9 Insolvency Act 1986 s 31(2) (as substituted: see note 4), s 430, Sch 10 (amended by the Enterprise Act 2002 ss 269, 278(2), Sch 23 paras 1, 17(a), Sch 26; and the Tribunals, Courts and Enforcement Act 2007 Sch 20 Pt 1 paras 1, 15(1), (2)).

10 Insolvency Act 1986 s 31(3) (as substituted: see note 4).

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1347. Powers of receiver appointed out of court.

The powers of a receiver¹, other than an administrative receiver², appointed out of court depend upon the provisions of the debenture³ under which he is appointed, together with any appropriate statutory powers⁴. Normally, the debenture will confer upon him power to carry on part of the business of the company, for he will have no such power unless specifically so authorised⁵. If he has such power, he will normally have, as incidental to it, power to borrow upon the security of the assets in his hands⁶; but he will require express power to borrow on such security in priority to the debenture holders' charge thereon.

1 As to the construction of references to receivers see PARA 1336.

2 As to the meaning of 'administrative receiver' see PARA 1337. As to the prohibition on the appointment of administrative receivers by a floating charge holder see PARA 1338. As to the powers of administrative receivers generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 396 et seq.

3 As to the meaning of 'debenture' see PARAS 1299, 1309.

4 Eg the Law of Property Act 1925 s 109: see **MORTGAGE** vol 77 (2010) PARA 476.

5 *Bompas v King* (1886) 33 ChD 279.

6 *Robinson Printing Co Ltd v Chic Ltd* [1905] 2 Ch 123.

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1348. Getting in uncalled capital.

Unless the terms of the instrument under which he was appointed contain provisions to the contrary, an administrative receiver¹ has power to call up any uncalled capital of the company². In all other cases, if uncalled capital is included in the security, the liquidator³ is the proper person to get it in and what he receives, less the expenses of making and enforcing the call, is paid to the receiver; but the court may authorise the receiver, on giving a proper indemnity, to get in the calls in the name of the liquidator⁴.

- 1 As to the meaning of 'administrative receiver' see PARA 1337. As to the prohibition on the appointment of administrative receivers by a floating charge holder see PARA 1338. As to administrative receivers generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 380 et seq.
- 2 See the Insolvency Act 1986 s 42(1), Sch 1 para 19; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 396. As to called up or uncalled share capital see PARA 1048.
- 3 As to liquidators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 555.
- 4 See the cases cited in PARA 1369 note 5.

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1349. Liability of trustees etc for receiver's acts.

An administrative receiver¹ of a company is deemed to be the agent of the company unless and until it goes into liquidation². In all other cases, the question of the status of a receiver depends upon the construction of the relevant power of appointment. Where the receiver is appointed under a document which provides that the person appointed receiver is to be the agent of the company, and that the company is alone to be answerable³ for his acts, contracts and defaults, neither the trustees nor the debenture holders are personally liable in respect of contracts entered into by him, even in respect of contracts entered into after the company has gone into liquidation⁴. In such circumstances he becomes, if the company goes into liquidation, a principal⁵, unless by his acts he puts himself in the position of an agent of the debenture holder⁶.

When a receiver is declared to be the agent of the company, he has power to sue in its name⁷. Where there is no such provision, he will be the agent primarily of the debenture holders, and they will be liable on his contracts⁸, and liable to pay him reasonable remuneration⁹.

A receiver who incurs liability in respect of proper contracts is entitled to be indemnified out of the property subject to the security¹⁰.

A receiver and manager may be ordered at the instance of the claimant to disclose documents belonging to a company of which he was formerly managing director but in his possession as receiver (and so held by him on behalf of the debenture holders) in proceedings involving him and the company as co-defendants¹¹.

- 1 As to the meaning of 'administrative receiver' see PARA 1337. As to the prohibition on the appointment of administrative receivers by a floating charge holder see PARA 1338. As to administrative receivers generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 380 et seq.
- 2 See the Insolvency Act 1986 s 44(1)(a) (following the Law of Property Act 1925 s 109(2)); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 402. As in any other case of agency, this agency is determined by the liquidation of the company: see the Insolvency Act 1986 s 44(1)(a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 402. This is in any event the normal position under the provisions of the instrument of charge.
- 3 As to the receiver's liability see, however, PARA 1350.
- 4 *Gosling v Gaskell* [1897] AC 575, HL, disapproving the dictum of Lord Esher MR in *Owen & Co v Cronk* [1895] 1 QB 265 at 272, CA, that the receiver is the agent of the trustees. Cf the Law of Property Act 1925 s 109(2) (see **MORTGAGE** vol 77 (2010) PARA 478), which provides that a receiver appointed under the powers conferred by that Act (see PARA 1340) is deemed to be the agent of the mortgagor, and the mortgagor is to be

solely responsible for the receiver's acts or defaults unless the mortgage deed otherwise provides. See also *Deyes v Wood* [1911] 1 KB 806, CA, where the corresponding provision of the Conveyancing Act 1881 s 24(2) (now repealed), was, on the construction of the debenture, deemed to be incorporated, but it was held that the mortgage otherwise provided that the receiver was to be the agent of the debenture holder. This case was distinguished in *Cully v Parsons* [1923] 2 Ch 512, where a provision was inserted that a debenture holder should not in making or consenting to the appointment of a receiver incur any liability to him for his remuneration or otherwise. As to a receiver's liability as occupier of a factory see *Meigh v Wickenden* [1942] 2 KB 160, [1942] 2 All ER 68.

5 *Gosling v Gaskell* [1897] AC 575, HL. His status is thus akin to that of a receiver appointed by the court.

6 *American Express International Banking Corp v Hurley* [1985] 3 All ER 564, [1986] BCLC 52.

7 *M Wheeler & Co Ltd v Warren* [1928] Ch 840, CA. After a winding-up order has been made, a receiver is entitled to continue a claim begun before the order for the grant of a new lease under the Landlord and Tenant Act 1954 Pt II (ss 23-46): *Gough's Garages Ltd v Pugsley* [1930] 1 KB 615 (decided under the Landlord and Tenant Act 1927 (now repealed)). As to the renewal of business tenancies generally see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 701 et seq.

8 *Robinson Printing Co Ltd v Chic Ltd* [1905] 2 Ch 123; *Re Vimbos Ltd* [1900] 1 Ch 470.

9 *Deyes v Wood* [1911] 1 KB 806, CA.

10 See PARAS 1350, 1370; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 402. Cf *Batten v Wedgwood Coal and Iron Co* (1884) 28 ChD 317; and the cases cited in PARA 1370 note 2.

11 *Fenton Textile Association Ltd v Lodge* [1928] 1 KB 1, CA. As to the ownership of documents coming into existence during the receivership see *Gomba Holdings UK Ltd v Minorities Finance Ltd* [1989] 1 All ER 261, [1988] 1 WLR 1231, CA (ownership depends on the capacity in which the receivers acted when they brought the documents into existence).

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1350. Liability of a receiver other than an administrative receiver.

A receiver or manager¹ appointed under powers contained in an instrument² (other than an administrative receiver³) is, to the same extent as if he had been appointed by order of the court⁴:

- 602 (1) personally liable on any contract entered into by him in the performance of his functions (except in so far as the contract otherwise provides) and on any contract of employment adopted by him⁵ in the performance of those functions⁶; and
- 603 (2) entitled in respect of that liability to indemnity out of the assets⁷.

This provision does not, however, limit any right to indemnity which the receiver or manager would otherwise have, nor limit his liability on contracts entered into without authority, nor confer any right to indemnity in respect of that liability⁸.

On the termination of his agency by the liquidation of the company, he will be personally bound by any contracts made by him, and, if he contracts in the name of the company, he may be liable for breach of warranty of authority⁹. Otherwise, he is entitled to ratify contracts made by others ostensibly as agents for the company¹⁰.

A receiver for debenture holders who intends to sell the benefit of a contract may be restrained from doing so if the assignment is one which will not be valid without the consent of the other party to the contract, and that consent is withheld¹¹.

Where a receiver has received money from the company and paid it into a receivership account and the money was obtained by the company wrongfully, the receiver is not liable personally to repay the money, if, at the time when he paid it in, he had no knowledge that it had been wrongfully obtained¹². A receiver is not a debtor to the company from time to time of the amount which may ultimately prove to be the balance in his hands after payment of preferential claims and the amount due to debenture holders¹³.

A receiver who is appointed by debenture holders and is acting as their agent is liable as a trespasser if he deals with assets which are not the property of the company¹⁴.

A receiver managing mortgaged property owes duties to the mortgagor and anyone else interested in the equity of redemption, which duties include but are not necessarily confined to a duty of good faith, though the extent and scope of any duty additional to that of good faith will depend upon the facts and circumstances of the particular case¹⁵. In exercising a power of sale, a receiver owes the same equitable duty to the mortgagor and to others interested in the equity of redemption as the mortgagee to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it¹⁶. In exercising his powers of management, the primary duty of the receiver is to try and bring about a situation in which interest on the secured debt can be paid and the debt itself repaid¹⁷. Subject to that primary duty, the receiver owes a duty to manage the property with due diligence¹⁸. Due diligence does not oblige the receiver to continue to carry on a business on the mortgaged premises previously carried on by the mortgagor; but, if the receiver does carry on a business on the mortgaged premises, due diligence requires reasonable steps to be taken in order to try to do so profitably¹⁹.

The receiver's conveyance of the company's property even after liquidation is not in contravention of the provisions of the Insolvency Act 1986 prohibiting dispositions of the company's property made after the commencement of the winding up without the leave of the court²⁰, since the relevant disposition is the charge under which the receiver was appointed²¹.

1 As to the construction of references to receivers or managers see PARA 1336.

2 As to the meaning of references to 'the appointment of a receiver or manager under powers contained in an instrument' see PARA 1336.

3 As to the liability of an administrative receiver see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 402. As to the prohibition on the appointment of administrative receivers by a floating charge holder see PARA 1338.

4 Insolvency Act 1986 s 37(1). As to the liability of a receiver appointed by the court see PARA 1370.

5 For these purposes, the receiver or manager is not to be taken to have adopted a contract of employment by reason of anything done or omitted to be done within 14 days after his appointment: Insolvency Act 1986 s 37(2). As to contracts of employment adopted by an administrative receiver see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 402.

6 Insolvency Act 1986 s 37(1)(a). A receiver who pursues unsuccessfully a claim against a third party is not personally responsible for the costs of the successful party, although the effect of authority is that, in appropriate cases, a non-party order against a receiver or against a secured creditor could be made, especially where the non-party was the 'real party': *Dolphin Quays Developments Ltd v Mills* [2008] EWCA Civ 385, [2008] 4 All ER 58, [2008] 1 WLR 1829. As to non-party costs orders in respect of directors see PARA 309. Where there are grounds for believing that a claimant company, if it were unsuccessful in its proceedings against a third party, would be unable to pay the costs of that third party, the latter should take the prudent routine step of invoking the court's discretion under CPR 25.13(2)(c) (as to which see **CIVIL PROCEDURE** vol 11 (2009) PARA 746) to make an order for security for costs against the company as claimant in the proceedings: *Dolphin Quays Developments Ltd v Mills* at [92] per Mummery LJ. See also *Bacal Contracting Ltd v Modern Engineering (Bristol) Ltd* [1980] 2 All ER 655 (receiver joined as defendant ordered to pay personally the costs of an action continued

by him after his appointment provided he had recourse to debenture holders). As to the circumstances under which it may be proper to make the receiver a defendant to a claim against the company with resultant liability for costs see *Telemetrix plc v Modern Engineers of Bristol (Holdings) plc* [1985] BCLC 213.

7 Insolvency Act 1986 s 37(1)(b).

8 Insolvency Act 1986 s 37(3).

9 *Gosling v Gaskell* [1897] AC 575, HL; *Thomas v Todd* [1926] 2 KB 511.

10 *Lawson (Inspector of Taxes) v Hosemaster Machine Co Ltd* [1966] 2 All ER 944, [1966] 1 WLR 1300, CA.

11 *Griffith v Tower Publishing Co Ltd and Moncreiff* [1897] 1 Ch 21.

12 *Owen & Co v Cronk* [1895] 1 QB 265, CA (excessive amount charged for work done by the company; payment obtained by duress); *Bissell v Ariel Motors (1906) Ltd and Walker* (1910) 27 TLR 73 (contract induced by misrepresentation). In *Owen & Co v Cronk*, Lord Esher MR at 271, and Rigby LJ at 275, drew a distinction between the liability of a receiver appointed under an instrument and a receiver appointed by the court. However, see the text and notes 1-4.

13 *Seabrook Estate Co Ltd v Ford* [1949] 2 All ER 94 (where a judgment creditor of the company sought unsuccessfully to attach money alleged to be owing from the receiver to the company).

14 *Re Goldberg (No 2), ex p Page* [1912] 1 KB 606 (where a sale by a bankrupt to a company was set aside as a fraudulent assignment and an act of bankruptcy, and the receiver was held liable as a trespasser to account for the assets of the bankrupt which had come into his hands).

15 *Silven Properties Ltd v Royal Bank of Scotland* [2003] EWCA Civ 1409, [2004] 1 WLR 997, [2004] 1 BCLC 359. See also *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295, [1993] 3 All ER 626, PC; *Burgess v Auger, Burgess v Vanstock Ltd* [1998] 2 BCLC 478; *Medforth v Blake* [2000] Ch 86 at 102, [1999] 3 All ER 97 at 111, CA, per Scott V-C; *Bell v Long* [2008] EWHC 1273 (Ch), [2008] 2 BCLC 706.

16 *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, [1971] 2 All ER 633, CA; *Silven Properties Ltd v Royal Bank of Scotland* [2003] EWCA Civ 1409, [2004] 1 WLR 997, [2004] 1 BCLC 359; *Medforth v Blake* [2000] Ch 86, [1999] 3 All ER 97, CA; *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295, [1993] 3 All ER 626, PC; *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54, [1983] 1 WLR 1349, PC; *Standard Chartered Bank Ltd v Walker* [1982] 3 All ER 938, [1982] 1 WLR 1410, CA (overruling *Barclays Bank Ltd v Thienel* (1978) 247 Estates Gazette 385; *Latchford v Beirne* [1981] 3 All ER 705); *American Express International Banking Corpn v Hurley* [1985] 3 All ER 564, [1986] BCLC 52. If the purchaser is a company controlled by the mortgagee, the burden of proof is on the mortgagee to show that all reasonable care had been taken to secure a purchaser at the best price, and that the price given was not at the time inadequate, though more might have been obtained by postponing the sale: *Farrar v Farrars Ltd* (1888) 40 ChD 395, CA; *Tse Kwong Lam v Wong Chit Sen*. In selling property, the receiver, once the power has arisen, can sell when he likes, even though the market is likely to improve if he holds his hand (*Cuckmere Brick Co Ltd v Mutual Finance Ltd*; *Tse Kwong Lam v Wong Chit Sen*, *Bell v Long* [2008] EWHC 1273 (Ch), [2008] 2 BCLC 706); and he had to be entitled (like the mortgagee) to sell the property in the condition in which it was, and in particular without awaiting or effecting any increase in value or improvement in the property by securing planning permission or by acceding leases (*Silven Properties Ltd v Royal Bank of Scotland*); a degree of latitude must be given to receivers and mortgagees alike not only as to the timing of any sale but also as to the method of sale to be employed (*Bell v Long*). See also *Cohen v TSB Bank plc* [2002] 2 BCLC 32. A receiver is not under a duty to exercise his power of sale over the mortgaged securities at any particular time (or at all) and does not become liable if the value of the security declines in the meantime: *China and South Sea Bank Ltd v Tan Soon Gin (alias George Tan)* [1990] 1 AC 536, [1989] 3 All ER 839, PC.

17 *Medforth v Blake* [2000] Ch 86 at 102, [1999] 3 All ER 97 at 111, CA, per Scott V-C. See also *Silven Properties Ltd v Royal Bank of Scotland* [2003] EWCA Civ 1409, [2004] 1 WLR 997, [2004] 1 BCLC 359.

18 *Medforth v Blake* [2000] Ch 86 at 102, [1999] 3 All ER 97 at 111, CA, per Scott V-C.

19 *Medforth v Blake* [2000] Ch 86 at 102, [1999] 3 All ER 97 at 111, CA, per Scott V-C. The origin of the receiver's duty, like the mortgagee's duty, lies in equity rather than in tort: *Medforth v Blake* at 102 and 111 per Scott V-C. See also *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295, [1993] 3 All ER 626, PC; *Silven Properties Ltd v Royal Bank of Scotland* [2003] EWCA Civ 1409, [2004] 1 WLR 997, [2004] 1 BCLC 359.

20 See the Insolvency Act 1986 s 127 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 700).

21 *Sowman v David Samuel Trust Ltd* [1978] 1 All ER 616, [1978] 1 WLR 22 (if the debentures under which the receiver is appointed contain a full power of attorney, the receiver and the debenture holders will be able to execute any necessary assurance in the name of the company, since such power continues to subsist, both at common law and under the provisions of the Powers of Attorney Act 1971 s 4, even after the liquidation of the company); *Barrows v Chief Land Registrar* (1977) Times, 20 October.

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1351. Application to court for directions.

A receiver or manager¹ of a company's property² appointed under powers contained in an instrument³, or the persons by whom or on whose behalf a receiver or manager has been so appointed, may apply to the court for directions in relation to any particular matter arising in connection with the performance of the functions of the receiver or manager⁴. On such an application, the court may give such directions, or may make such order declaring the rights of persons before the court or otherwise, as it thinks just⁵.

1 As to the construction of references to receivers and managers see PARA 1336.

2 As to the meaning of 'property' see PARA 1337 note 4.

3 As to the meaning of references to 'the appointment of a receiver or manager under powers contained in an instrument' see PARA 1336.

4 Insolvency Act 1986 s 35(1). Section 35 is drafted in wide terms and should be given scope wide enough to embrace any dispute concerning a receiver or manager's remuneration. Further, s 35 should be read as a whole; it follows that all those matters which can be the subject of an application under s 35(1) can be the subject of directions or a declaration under s 35(2) (see the text and note 5) and vice versa: *Morris v Lewis* [1996] 3 All ER 228, [1996] 2 BCLC 400. See also *Re Whistlejacket Capital Ltd (in receivership)* [2008] EWCA Civ 575, [2008] 2 BCLC 683; and *Re Golden Key Ltd (in receivership)* [2009] EWCA Civ 636, [2009] All ER (D) 18 (Jul) (application to court for directions as to order of repayments); and see PARA 1306 note 5.

5 Insolvency Act 1986 s 35(2).

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1352. Filing receiver's accounts.

Subject to certain exceptions¹, every receiver or manager² of a company's property³ who has been appointed under powers contained in an instrument⁴ must deliver to the registrar of companies⁵ for registration the requisite accounts of his receipts and payments⁶.

The accounts must be delivered within one month (or such longer period as the registrar may allow) after the expiration of 12 months⁷ from the date of his appointment and of every subsequent period of six months, and also within one month after he ceases to act as receiver or manager⁸. The requisite accounts must be an abstract in the prescribed form⁹ showing¹⁰:

- 604 (1) receipts and payments during the relevant period of 12 or six months¹¹; or
 605 (2) where the receiver or manager ceases to act, receipts and payments during the period from the end of the period of 12 or six months to which the last preceding abstract related (or, if no preceding abstract has been so delivered, from the date of his appointment) up to the date of his so ceasing, and the aggregate amount of receipts and payments during all preceding periods since his appointment¹².

A receiver or manager who makes default in complying with these provisions is liable (on summary conviction) to a fine not exceeding one-fifth of the statutory maximum¹³ and (on conviction after continued contravention) to a daily default fine¹⁴ not exceeding one-fiftieth of the statutory maximum¹⁵.

1 Eg in the case where an administrative receiver has been appointed: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 427. As to the meaning of 'administrative receiver' see PARA 1337. As to the prohibition on the appointment of administrative receivers by a floating charge holder see PARA 1338.

2 As to the construction of references to receivers or managers see PARA 1336.

3 As to the meaning of 'property' see PARA 1337 note 4.

4 As to the meaning of references to 'the appointment of a receiver or manager under powers contained in an instrument' see PARA 1336.

5 As to the registrar of companies see PARA 131 et seq. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

6 Insolvency Act 1986 s 38(1).

7 Before 29 December 1986, when the relevant provisions of the Insolvency Act 1986 were brought into force (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 2), this period was six months only: see the Companies Act 1985 s 498(2) (repealed).

8 Insolvency Act 1986 s 38(2).

9 For this purpose, 'prescribed' means prescribed by regulations made by statutory instrument by the Secretary of State: Insolvency Act 1986 s 38(4). As to the prescribed form of abstract see the Insolvency Rules 1986, SI 1986/1925, r 12.7, Sch 4, Form 3.6. As to the Secretary of State see PARA 6.

10 Insolvency Act 1986 s 38(3).

11 Insolvency Act 1986 s 38(3)(a). Before 29 December 1986 (see note 7), this period was uniformly six months: see the Companies Act 1985 s 498(2) (repealed).

12 Insolvency Act 1986 s 38(3)(b).

13 As to the meaning of 'statutory maximum' see PARA 1622.

14 As to the meaning of 'daily default fine' see PARA 1622.

15 Insolvency Act 1986 ss 38(5), 430, Sch 10.

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1353. Default in rendering accounts.

A receiver or manager¹ is under a duty, as an accounting party to the company², and also, where this is the case, as its agent, to keep and deliver to the company when required full accounts of his dealings with the company's property³. This duty, which may be enforced by proceedings taken in the ordinary way, is not displaced by the provisions described below⁴.

If a receiver or manager of a company's property:

- 606 (1) having made default in filing, delivering or making any return, account or other document, or in giving any notice, which a receiver or manager is by law required to file, deliver, make or give, fails to make good the default within 14 days after the service on him of a notice requiring him to do so⁵; or
- 607 (2) having been appointed under powers contained in an instrument⁶, has, after being required at any time by the liquidator of the company to do so, failed to render proper accounts of his receipts and payments and to vouch them and pay over to the liquidator the amount properly payable to him⁷,

the court may, on an application made for the purpose⁸, make an order directing the receiver or manager, as the case may be, to make good the default within such time as may be specified in the order⁹.

In the case of a default mentioned in head (1) above, application to the court may be made by any member¹⁰ or creditor¹¹ of the company or by the registrar of companies¹²; and, in the case of a default mentioned in head (2) above, the application must be made by the liquidator¹³. In either case, the court's order may provide that all costs of and incidental to the application are to be borne by the receiver or manager, as the case may be¹⁴.

1 As to the construction of references to receivers or managers see PARA 1336.

2 See the Law of Property Act 1925 s 109(8); and **RECEIVERS** vol 39(2) (Reissue) PARA 305.

3 *Smiths Ltd v Middleton* [1979] 3 All ER 842. As to the meaning of 'property' see PARA 1337 note 4.

4 See the Insolvency Act 1986 s 41(3). Nothing in s 41 prejudices the operation of any enactment imposing penalties on receivers in respect of any such default as is mentioned in s 41(1): s 41(3).

5 Insolvency Act 1986 s 41(1)(a).

6 As to the meaning of references to 'the appointment of a receiver or manager under powers contained in an instrument' see PARA 1336.

7 Insolvency Act 1986 s 41(1)(b).

8 As to the mode of application and the procedure see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1055 et seq.

9 Insolvency Act 1986 s 41(1).

10 As to who qualifies as a member of a company generally see PARA 321.

11 As to the meaning of 'creditor' see PARA 1427.

12 Insolvency Act 1986 s 41(2). As to the registrar of companies see PARA 131 et seq.

13 Insolvency Act 1986 s 41(2). As to liquidators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 555.

14 Insolvency Act 1986 s 41(2).

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1354. Transfer of rights under insurance contracts.

In the case of a receiver or manager¹ of the company's business or undertaking being duly appointed, or of possession being taken, by or on behalf of holders of debentures² secured by a floating charge³, then, if the company has entered into contracts of insurance against any liability to third parties, its rights against the insurers in respect of that liability are automatically transferred to and vested in the third party; but the third party retains his rights to recover any balance not covered by insurance⁴.

1 As to the construction of references to receivers or managers see PARA 1336.

2 As to the meaning of 'debenture' see PARAS 1299, 1309.

3 See the Third Parties (Rights against Insurers) Act 1930 s 1(1)(b); and **INSURANCE** vol 25 (2003 Reissue) PARA 679. As to the meaning of 'floating charge' see PARA 1337.

4 See the Third Parties (Rights against Insurers) Act 1930 s 1(3); and **INSURANCE** vol 25 (2003 Reissue) PARA 680. See also the Workmen's Compensation Act 1925 s 7(1), (2) (repealed); the Marine and Aviation Insurance (War Risks) Act 1952 s 4; and **INSURANCE** vol 25 (2003 Reissue) PARA 813. As to the application of these provisions in winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 673, 755.

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1355. Change of status on making of order for winding up or on administration.

Save that on the liquidation of the company the receiver, receiver and manager or administrative receiver¹ ceases to be agent of the company² and in general becomes a principal³, such liquidation has no effect on the status or powers of the receiver. It is, however, possible for the receiver and the debenture holder so to conduct themselves that the receiver becomes the agent of the debenture holder⁴.

When an administration order takes effect in respect of a company⁵, any administrative receiver of the company must vacate office⁶; and where a company is in administration⁷, any receiver of part of the company's property⁸ must vacate office if the administrator requires him to⁹. Where an administrative receiver or receiver vacates office under these provisions, his remuneration¹⁰ will be charged on and paid out of any property of the company which was in his custody or under his control immediately before he vacated office¹¹; and he need not take any further steps¹² in connection with the payment of the company's preferential debts¹³.

1 As to the meaning of 'administrative receiver' see PARA 1337. As to the prohibition on the appointment of administrative receivers by a floating charge holder see PARA 1338. As to administrative receivers generally see also **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 380 et seq.

2 See the Insolvency Act 1986 s 44(1)(a) (administrative receivers); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 402. As to other receivers see *Gosling v Gaskell* [1897] AC 575, HL.

3 *Thomas v Todd* [1926] 2 KB 511.

4 *American Express International Banking Corp v Hurley* [1985] 3 All ER 564 (in which case the receiver will be liable to the debenture holder to indemnify him against any loss caused by his negligence). As to the meaning of 'debenture' see PARAS 1299, 1309.

5 Ie under the Insolvency Act 1986 Pt II (s 8), Sch B1: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 146 et seq. As to the application of Sch B1 see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 145.

6 See the Insolvency Act 1986 Sch B1 para 41(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 262. See also PARA 1337. As to the interrelationship between administration orders and administrative receiverships see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 381.

7 See note 5.

8 As to the meaning of 'property' see PARA 1337 note 4.

9 See the Insolvency Act 1986 Sch B1 para 41(2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 262. See also PARA 1337.

10 For these purposes, 'remuneration' includes expenses properly incurred and any indemnity to which the administrative receiver or receiver is entitled out of the assets of the company: see the Insolvency Act 1986 Sch B1 para 41(4)(a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 262.

11 See the Insolvency Act 1986 Sch B1 para 41(3)(a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 262. The charge imposed takes priority over security held by the person by whom or on whose behalf the administrative receiver or receiver was appointed; and the provision for payment is subject to Sch B1 para 43 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 263): see Sch B1 para 41(4)(b), (c); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 262.

12 Ie under the Insolvency Act 1986 s 40 (see PARA 1334): see Sch B1 para 41(3)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 262.

13 See the Insolvency Act 1986 Sch B1 para 41(3)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 262.

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1356. Court's power to fix remuneration.

On an application made by the liquidator of a company¹, the court may by order fix the amount to be paid by way of remuneration to a person who, under the powers contained in an instrument, has been appointed receiver or manager² of the company's property³. The power so given is intended to be confined to cases where the remuneration can clearly be seen to be excessive; it is not intended to ensure a routine assessment of the remuneration by the court⁴. Where no such previous order has been made, the court's power so conferred extends to fixing the remuneration for any period before the making of the order or the application for it⁵, and is exercisable notwithstanding that the receiver or manager has died or ceased to act before the making of the order or the application for it⁶. Where the receiver or manager has been paid or

has retained for his remuneration for any period before the making of the order any amount in excess of that so fixed for that period, the court's power extends to requiring him or his personal representatives to account for the excess or such part of it as may be specified in the order⁷; but this last power⁸ must not be exercised as respects any period before the making of the application for the order, unless in the court's opinion there are special circumstances making it proper for the power to be exercised⁹. On an application made either by the liquidator or by the receiver or manager, the court may from time to time vary or amend any such order¹⁰.

The statutory power does not extend to disbursements, the receiver's right to be indemnified in respect of them depending upon the ordinary law of agency¹¹.

- 1 As to company liquidators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 555.
- 2 As to the meaning of references to 'the appointment of a receiver or manager under powers contained in an instrument', and as to the construction of references to receivers or managers, see PARA 1336.
- 3 Insolvency Act 1986 s 36(1). As to the meaning of 'property' see PARA 1337 note 4.
- 4 *Re Potters Oils Ltd (No 2)* [1986] 1 All ER 890, [1986] 1 WLR 201.
- 5 Insolvency Act 1986 s 36(2)(a).
- 6 Insolvency Act 1986 s 36(2)(b).
- 7 Insolvency Act 1986 s 36(2)(c).
- 8 I.e. the power conferred by the Insolvency Act 1986 s 36(2)(c) (see the text and note 7): see s 36(2).
- 9 Insolvency Act 1986 s 36(2).
- 10 Insolvency Act 1986 s 36(3).
- 11 *Re Potters Oils Ltd (No 2)* [1986] 1 All ER 890, [1986] 1 WLR 201.

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1357. Vacation of office by receiver.

A receiver¹ appointed by or on behalf of debenture holders will be displaced by the appointment of a receiver by debenture holders with a higher priority². The instrument under which he was appointed may contain power to remove him, in which case he will vacate office when notice of his removal is received by him³. He is in any event liable to be displaced by the appointment of a receiver by the court; and when an administration order takes effect in respect of a company⁴, any administrative receiver of the company⁵ must vacate office⁶; and where a company is in administration⁷, any receiver of part of the company's property⁸ must vacate office if the administrator requires him to⁹.

Where at any time the receiver or manager appointed under powers contained in an instrument¹⁰, other than an administrative receiver, vacates office, his remuneration and any expenses properly incurred by him¹¹, and any indemnity to which he is entitled out of the assets of the company¹², are charged on and must be paid out of any property of the company which

is in his custody or under his control at that time in priority to any charge or other security held by the person by or on whose behalf he was appointed¹³.

- 1 As to the construction of references to receivers or managers see PARA 1336.
- 2 As to the meaning of 'debenture' see PARAS 1299, 1309.
- 3 *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 375, [1961] 1 All ER 277, CA.
- 4 See under the Insolvency Act 1986 Pt II (s 8), Sch B1: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 146 et seq. As to the application of Sch B1 see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 145.
- 5 As to the meaning of 'administrative receiver' see PARA 1337. As to the prohibition on the appointment of administrative receivers by a floating charge holder see PARA 1338. As to administrative receivers generally see also **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 380 et seq.
- 6 See the Insolvency Act 1986 Sch B1 para 41(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 262. See also PARA 1337. As to the interrelationship between administration orders and administrative receiverships see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 381.
- 7 See note 6.
- 8 As to the meaning of 'property' see PARA 1337 note 4.
- 9 See the Insolvency Act 1986 Sch B1 para 41(2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 262. See also PARA 1337.
- 10 As to the meaning of references to 'the appointment of a receiver or manager under powers contained in an instrument' see PARA 1336.
- 11 Insolvency Act 1986 s 37(4)(a).
- 12 Insolvency Act 1986 s 37(4)(b).
- 13 Insolvency Act 1986 s 37(4).

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1358. Cross-border operation of receivership provisions.

A receiver¹ appointed under the law of either part of Great Britain² in respect of the whole or any part of any property³ or undertaking of a company and in consequence of the company having created a charge which, as created, was a floating charge⁴, may exercise his powers in the other part of Great Britain so far as their exercise is not inconsistent with the law applicable there⁵.

- 1 For these purposes, 'receiver' includes a manager and a person who is appointed both receiver and manager: Insolvency Act 1986 s 72(2). As to the construction of references to receivers or managers see PARA 1336.
- 2 As to the meaning of 'Great Britain' see PARA 1 note 5.
- 3 As to the meaning of 'property' see PARA 1337 note 4.

4 As to the meaning of 'floating charge' see PARA 1337 note 6.

5 Insolvency Act 1986 s 72(1).

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B. REMEDIES ON APPLICATION TO THE COURT

(A) REMEDIES IN GENERAL

1359. Specific mortgage.

A specific legal mortgage or equitable charge¹ given by a company may, subject to the statutory restrictions² when an application for an administration order is pending, or notice of intention to appoint is filed with the court, or such an order is in force, or an appointment has been made³, be enforced in the same manner as similar securities given by an individual⁴.

1 As to mortgages generally see **MORTGAGE** vol 77 (2010) PARA 101 et seq.

2 As to which see PARA 1333.

3 As to administration orders generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 146 et seq.

4 See **MORTGAGE** vol 77 (2010) PARA 514 et seq.

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1360. Debenture holder's remedies.

A debenture holder may obtain the appointment of a receiver or receiver and manager¹. He may also sue for the recovery of his principal or interest if in arrear; or present a petition for the winding up of the company²; or enforce his security by obtaining an order for sale or, in some instances, for foreclosure³; or where, as is sometimes the case, the principal money and interest is guaranteed by some other company or person, enforce the guarantee. The passing of a resolution for voluntary winding up does not prevent a debenture holder from commencing proceedings to enforce his security⁴, and the court will not restrain the claim upon the liquidator's application⁵. Where a compulsory order has been made, a claim by debenture holders cannot be begun or proceeded with except with the permission of the winding-up court, but permission is granted as a matter of course unless the same relief is given to the debenture holder in the winding up as he would obtain in the claim⁶.

The right of the debenture holder to exercise the remedies otherwise open to him is subject to certain statutory restrictions⁷.

Provisions may be included in debentures restraining a holder from taking action without the consent of a specified number of the holders of the debentures⁸.

1 See PARAS 1361, 1372. As to the meaning of 'debenture' see PARAS 1299, 1309. As to the construction of references to receivers or managers see PARA 1336.

2 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 451.

3 See PARA 1379.

4 *Re Longdendale Cotton Spinning Co* (1878) 8 ChD 150; *Re Henry Pound, Son and Hutchins* (1889) 42 ChD 402, CA; *Re David Lloyd & Co, Lloyd v David Lloyd & Co* (1877) 6 ChD 339, CA.

5 *Re Longdendale Cotton Spinning Co* (1878) 8 ChD 150.

6 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 893. As to proof by debenture holders and other secured creditors see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 797 et seq.

7 See PARA 1335. As to the position where a petition has been presented for an administration order see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 149; and as to the powers of an administrator with regard to a company's property see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 163-164.

8 *Pethybridge v Unibifocal Co Ltd* [1918] WN 278.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(22) BORROWING AND SECURING MONEY/(v) Remedies for enforcing Securities/B. REMEDIES ON APPLICATION TO THE COURT/(B) Appointment of Receiver by the Court/1361. Application for appointment of receiver.

(B) APPOINTMENT OF RECEIVER BY THE COURT

1361. Application for appointment of receiver.

A receiver or a receiver and manager¹ may be appointed by the court². The court will normally only consider an application for such an appointment before proceedings are started after notice of the application has been served³. The application usually claims to have the debentures⁴ enforced by foreclosure or sale⁵, and asks for accounts and inquiries, which will include an account of what is due to the debenture holders upon the security of the debentures, and an inquiry as to what property is comprised in or charged by the debentures⁶.

1 As to the construction of references to receivers or managers see PARA 1336.

2 See **RECEIVERS**. See also PARA 1362.

3 See *Practice Direction--Court's power to appoint a Receiver* PD 69 PARA 2.1; and **RECEIVERS**.

4 As to the meaning of 'debenture' see PARAS 1299, 1309.

5 See PARAS 1379-1380.

6 As to claims by debenture holders generally see PARA 1381 et seq. As to orders made for inquiries as to charges see PARA 1385.

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1362. When a receiver will be appointed.

A receiver or receiver and manager¹ will be appointed by the court where the principal² or interest³ is in arrear; or where the security is in jeopardy, even if no event has happened which either under the debentures or the trust deed⁴ makes the security enforceable⁵; or where the company has sold the whole, or substantially the whole, of its undertaking and assets otherwise than in the ordinary course of business, and has ceased to be a going concern⁶; or on an order being made or a resolution being passed for the winding up of the company⁷. In some cases, the court will also appoint a receiver in place of a receiver appointed by debenture holders under a power contained in the debentures⁸.

1 As to the construction of references to receivers or managers see PARA 1336.

2 *Hopkins v Worcester and Birmingham Canal Proprietors* (1868) LR 6 Eq 437.

3 *Bissill v Bradford Tramways Co Ltd* [1891] WN 51. Cf *Re New York Taxicab Co Ltd*, *Sequin v New York Taxicab Co Ltd* [1913] 1 Ch 1 (where the interest was postponed). If a debenture holders' claim is issued before the principal is payable or the interest is in default, the court has jurisdiction to and will appoint a receiver as soon as the money becomes payable: *Re Carshalton Park Estate Ltd*, *Graham v Carshalton Park Estate Ltd*, *Turnell v Carshalton Park Estate Ltd* [1908] 2 Ch 62. As to the meaning of 'debenture' see PARAS 1299, 1309.

4 As to trust deeds securing payment of money owing on debentures see PARA 1302.

5 *Re Tilt Cove Copper Co Ltd* [1913] 2 Ch 588 (where the company was proposing to distribute among its shareholders a reserve fund which constituted practically its only asset); *McMahon v North Kent Ironworks Co* [1891] 2 Ch 148 (where the company was insolvent and its works closed); *Thorn v Nine Reefs Ltd* (1892) 67 LT 93, CA; *Edwards v Standard Rolling Stock Syndicate* [1893] 1 Ch 574; *Re London Pressed Hinge Co Ltd*, *Campbell v London Pressed Hinge Co Ltd* [1905] 1 Ch 576; *Grigson v Taplin & Co* (1915) 85 LJ Ch 75 (where judgments had been recovered and executions were likely to issue); *Re Victoria Steamboats Ltd*, *Smith v Wilkinson* [1897] 1 Ch 158 (where a winding-up petition had been presented and creditors were pressing); *Re Braunstein and Marjoraine Ltd* (1914) 112 LT 25 (where the directors had allowed to pass unchallenged statements by the company's auditors at a general meeting to the effect that, after providing for liabilities, the assets would cover only the principal secured, and one of the directors had stated that the company's credit and funds were exhausted). Cf *Re New York Taxicab Co*, *Sequin v New York Taxicab Co Ltd* [1913] 1 Ch 1 (where it was held that mere insolvency was not enough, and that there must be threats from creditors or some jeopardy to the assets).

6 *Hubbuck v Helms* (1887) 56 LJ Ch 536. See also *Re Borax Co*, *Foster v Borax Co* [1901] 1 Ch 326, CA.

7 *Hodson v Tea Co* (1880) 14 ChD 859; *Re Panama, New Zealand and Australian Royal Mail Co* (1870) 5 Ch App 318. Cf *Re Crompton & Co Ltd* [1914] 1 Ch 954 (where it was unsuccessfully contended that a provision in the debentures that the security should become enforceable in the event of a winding up otherwise than for reconstruction impliedly prevented the security becoming enforceable on a reconstruction). It would appear, however, that provision may be made in the debenture excluding the operation of this decision: see *Re Crompton & Co Ltd* at 965.

8 See PARA 1340.

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1363. Appointment of receiver.

The written evidence in support of an application for the appointment of a receiver¹ should normally identify an individual whom the court is to be asked to appoint as receiver (the 'nominee')². If the applicant does not nominate a person to be appointed as receiver, or if the court decides not to appoint the nominee, the court may order that a suitable person be appointed as receiver, and may direct any party to nominate a suitable individual to be appointed³. A body corporate cannot be appointed⁴, nor, in the case of the appointment of an administrative receiver⁵, may any person other than an insolvency practitioner be appointed⁶.

1 As to applications for the appointment of a receiver see PARA 1361.

2 See *Practice Direction--Court's power to appoint a Receiver* PD 69 para 4.2; and **RECEIVERS**. The written evidence should also: (1) state the name, address and position of the nominee; (2) include written evidence by a person who knows the nominee, stating that he believes the nominee is a suitable person to be appointed as receiver, and the basis of that belief; and (3) be accompanied by written consent, signed by the nominee, to act as receiver if appointed: see para 4.2; and **RECEIVERS**.

3 See *Practice Direction--Court's power to appoint a Receiver* PD 69 para 4.3; and **RECEIVERS**. A party directed to nominate a person to be appointed as receiver must file written evidence containing the information required by para 4.2 (see note 2) and accompanied by the written consent of the nominee: see para 4.4; and **RECEIVERS**.

4 See PARA 1345. As to the position of an undischarged bankrupt see PARA 1346.

5 As to the meaning of 'administrative receiver' see PARA 1337. As to the prohibition on the appointment of administrative receivers by a floating charge holder see PARA 1338.

6 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 392.

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1364. Receiver's security.

The court may direct that before a receiver begins to act or within a specified time he must either give such security as the court may determine¹ or file² and serve³ on all parties to the proceedings evidence that he already has in force sufficient security⁴ to cover his liability for his acts and omissions as a receiver⁵. An order appointing a receiver will normally specify the date by which the receiver must give security or file and serve evidence to satisfy the court that he already has security in force⁶; and the court may terminate the appointment of the receiver if he fails to give the security or satisfy the court as to the security he has in force by the date specified⁷.

If it is important that the receiver should act at once, application is made for liberty for him so to act, and an immediate appointment is made on the claimant's undertaking to be personally answerable, pending the completion of the security, for all the liabilities of the receiver which would be covered by the security when completed⁸.

Where the applicant is a limited company, an undertaking from the company is not usually accepted, but must be given by some responsible person who signs an undertaking in the court's book. Where such an undertaking is not given, the appointment is conditional, taking effect only upon his giving security, and any disposition of the mortgaged assets pending completion of the security is not a contempt of court⁹.

If the receiver is appointed with power to take possession but the order does not direct security to be given, the appointment takes effect on the making of the order¹⁰. Where a receiver is appointed until judgment or further order and is continued after judgment, he must give further security¹¹.

Premiums paid by a receiver to a guarantee society for joining in his security are allowed in his accounts¹².

1 See CPR 69.5(1)(a); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1504.

2 As to filing see **CIVIL PROCEDURE** vol 12 (2009) PARA 1832.

3 As to service see **CIVIL PROCEDURE** vol 11 (2009) PARA 138.

4 See CPR 69.5(1)(b); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1504.

5 See CPR 69.5(1); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1504. See also *Rowley v Desborough* (1916) 60 Sol Jo 429; *Re Sims and Woods Ltd* (1916) 60 Sol Jo 539. As to security of receivers generally see also **RECEIVERS** vol 39(2) (Reissue) PARA 362 et seq.

6 See *Practice Direction--Court's power to appoint a Receiver* PD 69 para 7.1; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1504.

7 See CPR 69.5(2); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1504.

8 *Re Debenture-Holders' Actions* (1900) 16 TLR 256.

9 *Re Watkins, ex p Evans* (1879) 13 ChD 252, CA, explaining *Edwards v Edwards* (1876) 2 ChD 291, CA.

10 *Morrison v Skerne Ironworks Co Ltd* (1889) 60 LT 588.

11 *Brinsley v Lynton and Lynmouth Hotel and Property Co* (1895) 2 Mans 244.

12 *Harris v Sleep* [1897] 2 Ch 80, CA. This was limited to cases where the receiver was appointed without remuneration, but the modern practice is to allow the receiver to charge such premiums in his accounts even where he is remunerated.

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1365. Official receiver or liquidator as receiver.

Where application is made to the court to appoint a receiver¹ on behalf of the debenture² holders or other creditors³ of a company which is being wound up by the court, the official receiver⁴ may be appointed⁵. Although the debenture holders cannot insist upon their own nominee being appointed or retained in office as against the official receiver or liquidator, the court will not as a rule displace a receiver appointed by the debenture holders or mortgagees under their special powers, and, except under special circumstances, the Court of Appeal will not interfere when the court of first instance has refused to displace a receiver by a liquidator⁶.

The court sometimes appoints the liquidator as receiver in respect of some or all of the assets⁷; and he may be appointed in the place of a receiver appointed by the court⁸ where the assets are of an unusual character. In such a case, the official receiver may be appointed receiver of part of them, leaving the receiver originally appointed to receive the other assets⁹. The liquidator cannot obtain the discharge of the receiver unless with a view to his being appointed receiver in his place¹⁰.

In considering whether the same person shall act as receiver and liquidator, the court usually gives effect to the wishes of the parties most interested in the beneficial realisation of the company's assets¹¹.

1 See PARA 1361.

2 As to the meaning of 'debenture' see PARAS 1299, 1309.

3 As to the meaning of 'creditor' see PARA 1427.

4 As to the official receiver see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 503 et seq.

5 Insolvency Act 1986 s 32. See also *British Linen Co v South American and Mexican Co* [1894] 1 Ch 108, CA.

6 *Re Joshua Stubbs Ltd, Barney v Joshua Stubbs Ltd* [1891] 1 Ch 475, CA; *Re Henry Pound, Son and Hutchins* (1889) 42 ChD 402, CA.

7 *Re Joshua Stubbs Ltd, Barney v Joshua Stubbs Ltd* [1891] 1 Ch 475, CA; *Willmott v London Celluloid Co* (1885) 52 LT 642, CA.

8 *Perry v Oriental Hotels Co* (1870) 5 Ch App 420; *Campbell v Compagnie Générale de Bellegarde, Re Compagnie Générale de Bellegarde* (1876) 2 ChD 181; *Tottenham v Swansea Zinc Ore Co Ltd* (1884) 53 LJ Ch 776; *Bartlett v Northumberland Avenue Hotel Co Ltd* (1885) 53 LT 611, CA.

9 *British Linen Co v South American and Mexican Co* [1894] 1 Ch 108, CA.

10 *Strong v Carlyle Press* [1893] 1 Ch 268, CA.

11 *Boyle v Bettws Llantwit Colliery Co* (1876) 2 ChD 726 (where the secured creditor was appointed receiver); *Re Karamelli and Barnett Ltd* [1917] 1 Ch 203 (where a receiver who was also liquidator was removed from the office of liquidator at the request of the unsecured creditors).

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1366. Receiver of land abroad.

A receiver may be appointed of land out of the jurisdiction¹. Until what is necessary has been done in accordance with foreign law to put the receiver in possession of that property, no one, whether a British subject or a foreigner, is guilty of contempt of court by taking proceedings in a foreign country with reference to that property²; but the company may be ordered to revoke a power of attorney which is being used by the holder to prevent the receiver's agent from obtaining possession of property situated in a foreign country, and to execute a power of attorney in favour of the receiver's agent³.

1 *Mercantile Investment and General Trust Co v River Plate Trust, Loan and Agency Co* [1892] 2 Ch 303.

2 *Re Maudslay, Sons and Field, Maudslay v Maudslay, Sons and Field* [1900] 1 Ch 602; *Re West Cumberland Iron and Steel Co* [1893] 1 Ch 713; *Re Derwent Rolling Mills Co Ltd* (1905) 21 TLR 701, CA.

3 *Re Huinac Copper Mines Ltd* [1910] WN 218.

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1367. Receiver's statutory and other obligations.

A receiver or manager¹ appointed by the court is under the same statutory obligations as a receiver appointed under powers contained in an instrument². A receiver, other than an administrative receiver³, must:

- 608 (1) give notification of his appointment⁴;
- 609 (2) pay the preferential debts⁵; and
- 610 (3) deliver receivership accounts to the registrar of companies⁶.

An administrative receiver must comply with the statutory obligations in heads (1) and (2) above, and must also:

- 611 (a) give certain information as to his appointment⁷;
- 612 (b) require the submission of a statement as to the affairs of the company⁸;
- 613 (c) make a report as to specified matters⁹;
- 614 (d) furnish to a creditors' committee such information relating to the carrying out by him of his functions¹⁰; and
- 615 (e) issue a certificate of insolvency upon his forming the opinion that the relevant circumstances in which a company is deemed insolvent for the purposes of the provisions relating to VAT bad debt relief are satisfied¹¹.

An administrative receiver may be compelled to make good any default in filing, delivering or making any return, account or other document which he is by law required to file, deliver, make or give¹².

An administrative receiver is also under a non-statutory duty to keep and deliver to the company when required full accounts of his dealings with the company's property¹³. This duty is enforced by proceedings taken in the ordinary manner¹⁴.

1 As to the construction of references to receivers or managers see PARA 1336.

2 As to the meaning of references to 'the appointment of a receiver or manager under powers contained in an instrument' see PARA 1336.

3 As to the meaning of 'administrative receiver' see PARA 1337. As to the prohibition on the appointment of administrative receivers by a floating charge holder see PARA 1338.

4 See the Insolvency Act 1986 s 39(1); and PARA 1344.

5 See the Insolvency Act 1986 s 40; and PARA 1334.

- 6 See the Insolvency Act 1986 s 38; and PARA 1352. As to the registrar of companies see PARA 131 et seq.
- 7 See the Insolvency Act 1986 s 46; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 395.
- 8 See the Insolvency Act 1986 s 47; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 403.
- 9 See the Insolvency Act 1986 s 48; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 409.
- 10 See the Insolvency Act 1986 s 49(2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 415.
- 11 See the Insolvency Rules 1986, SI 1986/1925, rr 3.36-3.38; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 428.
- 12 See the Insolvency Act 1986 s 41; and PARA 1353.
- 13 As to the meaning of 'property' see PARA 1337 note 4.
- 14 *Smiths Ltd v Middleton* [1979] 3 All ER 842. See also PARA 1353.

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1368. Default in making returns etc.

If a receiver or manager¹ of a company's property², having made default in filing, delivering or making any return, account³ or other document or in giving any notice, which a receiver or manager is by law required to file, deliver, make or give, fails to make good the default within 14 days after the service on him of a notice requiring him to do so, the court may, on an application made for the purpose, make an order directing him to make good the default within such time as may be specified in the order⁴. The application may be made by any member⁵ or creditor⁶ of the company or by the registrar of companies⁷ and the order may provide that all costs of and incidental to the application are to be borne by the receiver or manager, as the case may be⁸.

- 1 As to the construction of references to receivers or managers see PARA 1336.
- 2 As to the meaning of 'property' see PARA 1337 note 4.
- 3 The accounts are those required by the Insolvency Rules 1986, SI 1986/1925, r 3.32: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 427. As to the liability of any receiver to deliver accounts see also PARA 1353.
- 4 See the Insolvency Act 1986 s 41(1)(a); and PARA 1353. Nothing in s 41 prejudices the operation of any enactment imposing penalties on receivers in respect of such default as is mentioned in s 41(1): see s 41(3); and PARA 1353.
- 5 As to the meaning of 'member' for these purposes see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 72.
- 6 As to the meaning of 'creditor' see PARA 1427.
- 7 As to the registrar of companies see PARA 131 et seq.

8 See the Insolvency Act 1986 s 41(2); and PARA 1353.

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1369. Status of receiver.

A receiver appointed by the court is an officer of the court; any interference with him as such receiver is a contempt of court¹. He is disqualified from purchasing the interests of the debenture holders on whose behalf he has been appointed².

The receiver must do his best to collect, get in and realise all the property subject to the security, except uncalled capital³. If the company is in liquidation, the liquidator⁴ is the proper person to make and enforce the calls, the proceeds of which he pays over to the receiver; but leave may be given to the receiver on giving a proper indemnity to take proceedings in the liquidator's name to enforce the calls⁵.

1 See *Ames v Birkenhead Docks (Trustees)* (1855) 20 Beav 332; *Russell v East Anglian Rly Co* (1850) 3 Mac & G 104; and **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 441. As to proceedings against receivers and claims to property in their possession see *Re Maidstone Palace of Varieties Ltd* [1909] 2 Ch 283.

2 *Re Magadi Soda Co Ltd* (1925) 94 LJ Ch 217. As to the meaning of 'debenture' see PARAS 1299, 1309.

3 Although an administrative receiver (see PARA 1337) has power to call up any uncalled capital of the company (see the Insolvency Act 1986 s 42(1), Sch 1 para 19; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 396), this is effected by deeming the power to be included in the powers conferred by the debenture, unless its terms are inconsistent (see s 42; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 396). As to called up or uncalled share capital see PARA 1048. This power is, therefore, not conferred upon a receiver appointed by the court. The court may order the trustees of a trust deed to deliver possession of the title deeds to the receiver: see *Re Ind, Coope & Co Ltd* (1909) 26 TLR 11, CA. As to a receiver enforcing an order made in his favour for possession of assets of the company see *Savage v Bentley* (1904) 90 LT 641; *Re Derwent Rolling Mills Co Ltd* (1905) 21 TLR 701, CA. A solicitor to a company may retain money in his hands in payment of costs incurred prior to the appointment of the receiver, but must pay over the balance: *Re British Tea Table Co (1897) Ltd* (1909) 101 LT 707. As to the rights of a receiver appointed by the court of retaining rents received by him where a receiver appointed by a prior mortgagee had taken no steps see *Re Metropolitan Amalgamated Estates Ltd* [1912] 2 Ch 497.

4 As to liquidators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 555.

5 *Fowler v Broad's Patent Night Light Co* [1893] 1 Ch 724; *Harrison v St Etienne Brewery Co* (1893) 37 Sol Jo 562; *Re Westminster Syndicate Ltd* (1908) 99 LT 924. As to the liquidator's power to make calls see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 734.

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1370. Receiver's liability.

A receiver appointed by the court is personally liable on the contracts made by him as receiver¹, subject to his right to be indemnified out of the property subject to the debentures². He is not the agent of the company or of the court, or of anyone else³. A receiver may, however, by a term in the contract exclude personal liability to a person with whom he contracts⁴.

Where a receiver appointed by the court takes possession of leasehold property of the company, whether it is mortgaged by sub-demise to the trustees for debenture holders or is subject to an equitable mortgage, he is not liable for rent to the landlord⁵; and the same rule applies to chattels which have been hired by the company⁶. Even if the receiver has, by court order, sold goods upon which the landlord might have distrained, the court will not order him to pay the landlord out of the proceeds⁷, nor, in similar circumstances, will an order be made for payment of rates in default of recovery by distress⁸.

1 Cf the Insolvency Act 1986 s 37(1): see PARA 1350.

2 *Owen & Co v Cronk* [1895] 1 QB 265, CA; *Burt, Boulton and Hayward v Bull* [1895] 1 QB 276, CA; *Re Glasdir Copper Mines Ltd, English Electro-Metallurgical Co Ltd v Glasdir Copper Mines Ltd* [1906] 1 Ch 365 at 378, CA, per Vaughan Williams LJ. See also **RECEIVERS** vol 39(2) (Reissue) PARAS 432, 441. As to costs where a receiver is given leave to appeal in proceedings against the company see *Re Griffiths Cycle Corp Ltd* (1902) 85 LT 776, CA. A receiver signing a bill of exchange as 'R, Receiver X Co Ltd' merely adds words describing him as an agent within the meaning of the Bills of Exchange Act 1882 s 26, and may sue or be sued personally on the bill of exchange: see *Kettle v Dunster and Wakefield* (1927) 138 LT 158; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1476.

3 *Burt, Boulton and Hayward v Bull* [1895] 1 QB 276 at 279, CA, per Lord Esher MR, and at 284 per Rigby LJ; *Re Glasdir Copper Mines Ltd, English Electro-Metallurgical Co Ltd v Glasdir Copper Mines Ltd* [1906] 1 Ch 365, CA. See also *Moss Steamship Co Ltd v Whinney* [1912] AC 254 at 259, HL, per Lord Loreburn LC, and at 261 per Earl of Halsbury.

4 *Re Ernest Hawkins & Co Ltd* (1915) 31 TLR 247.

5 *Hand v Blow* [1901] 2 Ch 721, CA; *Re JW Abbott & Co Ltd, Abbott v JW Abbott & Co Ltd* (1913) 30 TLR 13; *Re Westminster Motor Garage Co, Boyers v Westminster Motor Garage Co* (1914) 84 LJ Ch 753. A receiver is entitled to treat tax paid by him in respect of rent due prior to his appointment as a pro tanto payment of rent: see *Re Sturmeys Motors Ltd* [1913] 1 Ch 16; *Re Hayman, Christy and Lilly Ltd (No 2), Christy v Hayman, Christy and Lilly Ltd* [1917] 1 Ch 545; *Consolidated Entertainments Ltd v Taylor* [1937] 4 All ER 432.

6 *Hay v Swedish and Norwegian Rly Co Ltd* (1892) 8 TLR 775.

7 *Hand v Blow* [1901] 2 Ch 721, CA.

8 *Re British Fullers' Earth Co Ltd, Gibbs v British Fullers' Earth Co Ltd* (1901) 17 TLR 232; *Re Mayfair and General Property Trust Ltd, Crang v Mayfair and General Property Trust Ltd* [1945] 2 All ER 523 (where the receiver received 'inclusive rentals').

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1371. Applications and proceedings by receiver.

A receiver appointed by the court should not apply to the court for directions unless the circumstances are exceptional; as a rule, applications should be made by the claimant¹.

The question what proceedings a receiver should be allowed to take or continue at the expense of the company's assets is one solely for the discretion of the court, and debenture holders may

not prevent a receiver from continuing a claim by the company against themselves in another capacity².

1 *Parker v Dunn* (1845) 8 Beav 497; *Windschuegl v Irish Polishes Ltd* [1914] 1 IR 33.

2 *Viola v Anglo-American Cold Storage Co* [1912] 2 Ch 305.

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(C) APPOINTMENT OF RECEIVER AND MANAGER BY THE COURT

1372. When a receiver and manager will be appointed.

Where a company on whose assets debentures¹ are charged is a going concern, the court will, at the instance of the debenture holders, appoint not merely a receiver, but a receiver and manager², provided that the company is carrying on a business which is included in the charge and which it is advisable to continue in the interests of the debenture holders for the more beneficial realisation of their security. The court will appoint a receiver and manager even where the charge does not in terms include the goodwill if it includes all the company's property or contains other words showing an intention to include the business³. If the debenture, as created, was a floating charge⁴ comprising the whole, or substantially the whole, of the company's property⁵, so that any receiver appointed under it will be an administrative receiver⁶, then, provided that there is nothing inconsistent in any of the provisions of that debenture, such receiver will have power to carry on the business of the company, and will therefore be a manager⁷. Otherwise, to justify the appointment the company's goodwill must be charged, expressly or by implication⁸. In the case, however, of a company incorporated for purposes of a public nature, and having statutory powers and duties, whether incorporated by a special Act or by charter, or under the Companies Acts, a holder of debentures or debenture stock cannot obtain the appointment of a manager⁹, but an order may be made appointing a receiver of the tolls or other money receivable by the company and charged by the debenture or debenture stock¹⁰.

A special case must be made out for the appointment of a manager by the affidavit supporting the application, and a manager is appointed only for a limited period (usually three months); and any extension of time required must be applied for before the period expires¹¹. A receiver and manager will not be allowed the expenses of management incurred after the expiration of the period of his appointment¹². Where no business is being carried on, or it is not in the interests of the debenture holders to continue it, a receiver only is appointed.

Jeopardy justifies the appointment of a manager of the company's business if there is a probability of a sale¹³.

1 As to the meaning of 'debenture' see PARAS 1299, 1309.

2 *Reid v Explosives Co Ltd* (1887) 19 QBD 264, CA. The provisions of the Companies Act 2006 s 871 (see PARA 1292) and the Insolvency Act 1986 ss 29(1), 39, 41, 46, 47 apply to receivers and managers appointed by the court (see PARA 1340 et seq). As to the construction of references to receivers or managers see PARA 1336.

3 *Peek v Trinsmaran Iron Co* (1876) 2 ChD 115; *Makins v Percy Ibotson & Sons* [1891] 1 Ch 133; *Whitley v Challis* [1892] 1 Ch 64, CA; *Gloucester County Bank v Rudry Merthyr Steam and House Coal Colliery Co* [1895] 1

Ch 629, CA; *Jennings v Jennings* [1898] 1 Ch 378; *Re David and Matthews* [1899] 1 Ch 378; *Edwards v Standard Rolling Stock Syndicate* [1893] 1 Ch 574. See also *Campbell v Lloyd's, Barnett's and Bosanquet's Bank Ltd* [1891] 1 Ch 136n (where a manager was appointed on the application of a mortgagee); *Whitley v Challis* [1892] 1 Ch 64, CA.

4 As to the meaning of 'floating charge' see PARA 1337 note 6.

5 As to the meaning of 'property' see PARA 1337 note 4.

6 As to the meaning of 'administrative receiver' see PARA 1337. As to the prohibition on the appointment of administrative receivers by a floating charge holder see PARA 1338.

7 See the Insolvency Act 1986 s 42(1), Sch 1 para 14; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 396.

8 *Re Victoria Steamboats Ltd, Smith v Wilkinson* [1897] 1 Ch 158; *Re Leas Hotel Co, Salter v Leas Hotel Co* [1902] 1 Ch 332. As to registration of the manager's appointment see PARA 1344.

9 *Gardner v London, Chatham and Dover Rly Co, Drawbridge v London, Chatham and Dover Rly Co, Gardner v London, Chatham and Dover Rly Co (No 2), Imperial Mercantile Credit Association v London, Chatham and Dover Rly Co* (1867) 2 Ch App 201; *Blaker v Herts and Essex Waterworks Co* (1889) 41 ChD 399; *Marshall v South Staffordshire Tramways Co* [1895] 2 Ch 36, CA (disapproving *Bartlett v West Metropolitan Tramways Co* [1893] 3 Ch 437, [1894] 2 Ch 286). Cf *Re Crystal Palace Co, Fox v Crystal Palace Co* (1911) 104 LT 898, CA (affd sub nom *Saunders v Bevan* (1912) 107 LT 70, HL).

10 *Blaker v Herts and Essex Waterworks Co* (1889) 41 ChD 399; *Re Mitchell's Estate, Mitchell v Moberly* (1877) 6 Ch App 655; *Holdsworth v Davenport* (1876) 3 ChD 185; *Attree v Hawe* (1878) 9 ChD 337, CA. As to a form of order see *Re Ticehurst and District Water and Gas Co* (1910) 128 LT Jo 516. See also PARA 1750.

11 *Day v Sykes, Walker & Co Ltd* (1886) 55 LT 763; *Re Victoria Steamboats Ltd, Smith v Wilkinson* [1897] 1 Ch 158. As to appointing a director or receiver and manager see *Budgett v Improved Patent Forced Draught Furnace Syndicate Ltd* [1901] WN 23. As to forms of order see *Davies v Vale of Evesham Preserves Ltd* (1895) 73 LT 150.

12 *Re Wood Green and Hornsey Steam Laundry* [1918] 1 Ch 423.

13 *Re Victoria Steamboats Ltd, Smith v Wilkinson* [1897] 1 Ch 158. As to jeopardy see PARA 1362.

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1373. Effect of appointment on current contracts.

The appointment by the court of a receiver and manager operates as a dismissal of the company's employees¹; on his appointment they do not become his employees². An administrative receiver³ is, however, personally liable on any contract of employment adopted by him in the carrying out of his functions as such administrative receiver, but only to the extent of any qualifying liability⁴, although he is not to be taken to have adopted a contract of employment by reason of anything done or omitted to be done within 14 days after his appointment⁵.

It is the duty of a receiver and manager to complete contracts entered into by the company prior to his appointment if the completion of the contracts will assist in the preservation of the goodwill⁶, but not otherwise⁷. When a receiver and manager has partly performed a continuing contract for the sale of goods between the company and another person and fails to perform the rest of the contract, that other person may set off the damages for breach of the contract against a claim for the purchase money for goods already supplied⁸.

1 *Reid v Explosives Co Ltd* (1887) 19 QBD 264, CA; *Midland Counties District Bank Ltd v Attwood* [1905] 1 Ch 357 at 362 per Warrington J. See also *Parsons v Sovereign Bank of Canada* [1913] AC 160, PC; *Re Great Cobar Ltd* [1915] 1 Ch 682 at 689 per Warrington J. Cf the position where a receiver is appointed out of court: see PARA 1342.

2 *Re Marriage, Neave & Co, North of England Trustee, Debenture and Assets Corpn v Marriage, Neave & Co* [1896] 2 Ch 663, CA.

3 As to the meaning of 'administrative receiver' see PARA 1337. As to the prohibition on the appointment of administrative receivers by a floating charge holder see PARA 1338.

4 See the Insolvency Act 1986 s 44(1)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 402.

5 See the Insolvency Act 1986 s 44(2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 402. He will be entitled to the usual indemnity out of the assets (see PARA 1349); see s 44(1)(c); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 402. Section 44 does not limit any right to indemnity which he would have apart from it, nor limit his liability on contracts entered into or adopted without authority, nor confer any right to indemnity in respect of that liability: see s 44(3); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 402.

6 *Re Newdigate Colliery Ltd* [1912] 1 Ch 468, CA. Cf *Re Great Cobar Ltd* [1915] 1 Ch 682.

7 *Re Thames Ironworks, Shipbuilding and Engineering Co Ltd* (1912) 106 LT 674.

8 *Forster v Nixon's Navigation Co Ltd* (1906) 23 TLR 138; *Parsons v Sovereign Bank of Canada* [1913] AC 160, PC.

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1374. Prior lien securities.

The court sometimes empowers a receiver and manager to borrow money for the purpose of carrying on the company's business or preserving its property, and to secure it by creating a charge having priority to the charge created by the debentures¹. Unless all the parties interested are before the court, liberty to raise money by a charge having priority over the debentures in order to preserve property in the receiver's possession is granted only where special urgency is shown². It will not be granted to enable a receiver and manager to complete a contract made prior to his appointment unless completion will assist in the preservation of the goodwill³. Where a receiver is authorised to borrow generally up to a fixed amount, and he has borrowed a part of the amount and repaid it, his original borrowing power is not diminished⁴.

1 *Greenwood v Algeiras (Gibraltar) Rly Co* [1894] 2 Ch 205, CA. See also *Moss Steamship Co Ltd v Whinney* [1912] AC 254 at 263, HL, per Lord Atkinson (where he stated that a receiver had no power to create a prior lien for an existing debt of the company without leave of the court).

2 *Securities and Properties Corpn Ltd v Brighton Alhambra Ltd* (1893) 62 LJ Ch 566.

3 *Re Thames Ironworks, Shipbuilding and Engineering Co Ltd* (1912) 106 LT 674.

4 *Milward v Avill and Smart Ltd* (1897) 4 Mans 403.

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1375. Right of indemnity.

Where orders are made in order to preserve the company's property and carry on the business, giving the receiver liberty to borrow in priority to the debentures, and he borrows the money from the claimant or other parties to the proceedings, and the assets when sold are insufficient to satisfy both the prior lien charges and the receiver's costs and expenses, including remuneration, the costs and expenses have priority over the prior lien charges unless the agreement for loan expressly or impliedly provides otherwise. It is doubtful whether the same rule applies where a stranger makes the advance; and the order ought to state whether the charge to be given by the receiver is to be subject to or free from his right to indemnity¹.

Expenses and liabilities incurred in good faith by a manager in the ordinary course of business are prima facie properly incurred and within the rules as to indemnity; and where he is authorised to borrow a sum not exceeding a certain limit for the general purposes of the business, the effect is to provide, at the expense of the parties interested, a special fund out of which the manager may indemnify himself. He is not, however, entitled without any further authority to incur expenses and liabilities to an unlimited extent, and to require them to be met out of the assets, since, if he finds that the fund provided by the court is not sufficient, his duty is to cause the matter to be brought before the court, so that it may increase the fund or give him leave to incur further expenses and liabilities. If he incurs expenses and liabilities exceeding the limit without such an application, he is not entitled to be indemnified against them unless he can justify it by showing special circumstances. It is not enough to show that the expenses or liabilities were incurred in good faith and in the ordinary course of business².

Where debts are properly incurred by a receiver and manager appointed by the court in carrying on the company's business, the court will see that those debts are satisfied either by the receiver himself or, in the case of his bankruptcy, or if for any other reason it is deemed advisable to do so, by payment direct to the creditors out of the funds in court available for the purpose³. Where the receiver and manager has incurred liabilities and is entitled to an indemnity for them out of the estate, but his cash account is deficient, the creditors may claim through him only to the extent of his right of indemnity against the estate (that is, the net amount of the indemnity after deducting the deficiency)⁴.

1 See *Strapp v Bull, Sons & Co, Shaw v London School Board* [1895] 2 Ch 1, CA; *Re Glasdir Copper Mines Ltd, English Electro-Metallurgical Co Ltd v Glasdir Copper Mines Ltd* [1906] 1 Ch 365, CA; *Re New Zealand Midland Rly Co, Smith v Lubbock* [1901] 2 Ch 357, CA; *Re Boynton Ltd, Hoffman v A Boynton Ltd* [1910] 1 Ch 519.

2 *Re British Power Traction and Lighting Co Ltd, Halifax Joint Banking Co Ltd v British Power Traction and Lighting Co Ltd* [1906] 1 Ch 497; *Re British Power Traction and Lighting Co Ltd, Halifax Joint Stock Banking Co Ltd v British Power Traction and Lighting Co Ltd (No 2)* [1907] 1 Ch 528; *Re Ernest Hawkins & Co Ltd* (1915) 31 TLR 247. Cf *Lathom v Greenwich Ferry Co* (1895) 72 LT 790.

3 *Re London United Breweries Ltd, Smith v London United Breweries Ltd* [1907] 2 Ch 511.

4 *Re British Power Traction and Lighting Co Ltd* [1910] 2 Ch 470.

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1376. Effect of possession for the purposes of the receivership.

Where the court's order appointing the receiver does not direct him to take possession, there is no change of occupation¹; but there may be a change of occupation where the company is directed to deliver possession to the receiver². Where the order appointing a receiver (other than an administrative receiver³ where the position is different⁴), does not direct him to take possession, or directs him to take possession only so far as necessary for the purposes of the receivership, the receiver is not entitled to require a supply of electricity⁵ or gas⁶ and is not protected from liability to pay arrears⁷; and in such a case the supply of electricity⁸ or gas⁹ may be cut off, unless the receiver pays arrears owing by the company¹⁰.

1 See *Re Marriage, Neave & Co* [1896] 2 Ch 663, CA (decided under the Poor Rate Assessment and Collection Act 1869); *National Provincial Bank of England Ltd v United Electric Theatres Ltd* (1916) as reported in 85 LJ Ch 106. See also *Re British Fullers' Earth Co Ltd*, *Gibbs v British Fullers' Earth Co Ltd* (1901) 17 TLR 232; and *Gyton v Palmour* [1945] KB 426, [1944] 2 All ER 540 (both cases concerning rateable occupation of premises).

2 See *Richards v Kidderminster Overseers*, *Richards v Kidderminster Corpn* [1896] 2 Ch 212; *Madge v Debenture Corpn* (1896) 12 TLR 203 (cases where possession was taken by the receiver appointed under the powers contained in a trust deed securing debentures); *Re Marriage, Neave & Co* [1896] 2 Ch 663 at 671-672, CA, per Lindley LJ, at 674 per Lopes LJ, and at 676-678 per Rigby LJ.

3 As to the meaning of 'administrative receiver' see PARA 1337.

4 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 399.

5 Ie under the Electricity Act 1989 ss 16, 16A, 17 (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARAS 1094-1095).

6 Ie under the Gas Act 1986 s 10 (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARAS 836-838).

7 Ie under the Electricity Act 1989 s 24, Sch 6 (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1001 et seq) or, as the case may be, the Gas Act 1986 s 8B, Sch 2B (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 856 et seq).

8 Ie under the Electricity Act 1989 Sch 6 (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1001 et seq). A public electricity supplier may not, however, exercise its power of disconnection as respects any amount which is genuinely in dispute: see Sch 6 para 2; and **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1003.

9 Ie under the Gas Act 1986 Sch 2B (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 856 et seq). A public gas supplier may not, however, exercise its power of disconnection as respects any amount which is genuinely in dispute: see Sch 2B para 7; and **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 858.

10 *Paterson v Gas Light and Coke Co* [1896] 2 Ch 476, CA; *Husey v Gas Light and Coke Co* (1902) 18 TLR 299. Contrast *Husey v London Electric Supply Corpn* [1902] 1 Ch 411, CA (where the court, without deciding whether the receiver was a new occupier, held him to be in any case disentitled to a supply until he had entered into a contract with the undertakers). These cases were decided partly upon provisions contained in special Acts, but it seems that the same principles will still apply in cases falling under the enactments cited in notes 5-9.

In *Granger v South Wales Electric Power Distribution Co* [1931] 1 Ch 551, a receiver was held entitled to a supply without paying arrears where an undertaker's special Act provided that a supply should be given to any person who required a supply.

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(D) APPOINTMENT OF ADMINISTRATOR BY THE COURT

1377. Administration order made on application to court.

An application to the court¹ for an order appointing a person as administrator in respect of a company (an 'administration order')² may be made by specified persons³; and the court may make such an order, whether or not it is satisfied that the company is or is likely to become unable to pay its debts, if the administration application is made by the holder of a qualifying floating charge in respect of the company's property⁴.

However, the court is not obliged to make an administration order when one is applied for: it may also dismiss the application, adjourn the hearing or make other orders at its discretion⁵; and, where there is an administrative receiver⁶ of a company, the court must dismiss an administration application in respect of the company unless: (1) the person by or on behalf of whom the receiver was appointed consents to the making of the administration order⁷; (2) the court thinks that the security by virtue of which the receiver was appointed would be liable to be released or discharged if an administration order were made⁸; (3) the court thinks that the security by virtue of which the receiver was appointed would be avoided if an administration order were made⁹; or (4) the court thinks that the security by virtue of which the receiver was appointed would be challengeable¹⁰.

1 As to the courts having winding-up jurisdiction see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 438 et seq.

2 As to the meaning of 'administration order' see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 212.

3 See the Insolvency Act 1986 s 8, Sch B1 para 12; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 216. As to the application of the Insolvency Act 1986 Sch B1 see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 145.

4 See the Insolvency Act 1986 Sch B1 para 35; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 215. The court may make the order in these circumstances provided it is satisfied that the applicant could appoint an administrator under Sch B1 para 14 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 228) and the applicant includes in his application a statement that he is making the application in reliance on Sch B1 para 35: see Sch B1 para 35(1)(b), (2)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 215. As to the meaning of 'floating charge' for these purposes see PARA 1337 note 6. As to the meaning of 'holder of a qualifying floating charge' see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 212. As to when a floating charge qualifies for these purposes see Sch B1 para 14; PARA 1339 note 1; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 228.

5 See the Insolvency Act 1986 Sch B1 para 36; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 226.

6 As to administrative receivers see PARA 1337; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 380 et seq. As to the prohibition on the appointment of administrative receivers by a floating charge holder see PARA 1338.

7 See the Insolvency Act 1986 Sch B1 para 39(1)(a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 227.

8 See the Insolvency Act 1986 Sch B1 para 39(1)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 227.

9 See the Insolvency Act 1986 Sch B1 para 39(1)(c); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 227.

10 See the Insolvency Act 1986 Sch B1 para 39(1)(d); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 227.

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(E) FORECLOSURE OR SALE

1378. Effect of trust deed.

Where debentures¹ or debenture stock² are secured by a trust deed³ and the security has become enforceable, the court will, in a claim for that purpose, make an order for administration by the court of the trusts of the deed and grant the ordinary relief given in a claim for enforcing debentures. In such a case, the right of a debenture holder to begin a claim to enforce the debentures, by foreclosure or sale, may be qualified by the trust deed or conditions⁴.

Where the objects for which the money was raised by the issue of debentures cannot be carried into effect and part of it remains in the hands of the trustees, the court will, on the application even of a minority of the debenture holders, order the unspent portion to be distributed among the debenture holders after payment of expenses of saving and realising the property charged and costs⁵.

1 As to the meaning of 'debenture' see PARA 1299.

2 As to the meaning of 'debenture stock' see PARA 1309.

3 As to trust deeds securing payment of money owing on debentures see PARA 1302.

4 See *Re Rogers & Co v British and Colonial Colliery Supply Association* (1898) 68 LJQB 14 (where the debenture holder had the right only if the trustees failed to take steps); and *Cleary v Brazil Rly Co* (1915) 85 LJB 32.

5 *Collingham v Sloper, Foreign, American and General Investments Trust Co v Sloper* [1893] 2 Ch 96 (on appeal [1894] 3 Ch 716, CA); *National Bolivian Navigation Co v Wilson* (1880) 5 App Cas 176, HL.

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1379. Foreclosure.

Foreclosure may be obtained in a claim or in proceedings¹. Where there is a trust deed² which does not contain a legal mortgage, the claim should be for a declaration of a charge, execution of the trusts, an account and enforcement of the charge by sale. Where there is no trust deed,

foreclosure may be ordered where all the debenture holders are before the court and concur³; but foreclosure cannot be ordered in the absence of any one debenture holder⁴.

The judgment should give liberty to the defendant company, at any time before foreclosure absolute, to apply to the judge in chambers for payment and transfer to the claimant, on account of the money due to him, of any money or securities in court to the credit of the claim or in the hands of the receiver⁵.

An order for sale may also be obtained in foreclosure proceedings but, as a general rule, it is not made until after judgment has been obtained in the claim and notice has been given to all the debenture holders by circular, letter or advertisement. This rule does not apply where the claim is not a representative one⁶. Where the order is asked for on motion for judgment on admissions in the pleadings, an affidavit of the facts is required⁷. In such a case, an immediate sale will be ordered where the property is in jeopardy; but, unless all the subsequent debenture holders are parties, the order will be for sale with the approbation of the judge so that the absent parties may be brought in on the application to approve the conditional contract for sale⁸.

1 This was so even under the old procedure: see *Oldrey v Union Works Ltd* (1895) 72 LT 627; *Sadler v Worley* [1894] 2 Ch 170. As to the remedy of foreclosure of an equitable mortgage see **MORTGAGE** vol 77 (2010) PARA 568 et seq.

2 As to trust deeds securing payment of money owing on debentures see PARA 1302. As to the meaning of 'debenture' see PARA 1299.

3 *Sadler v Worley* [1894] 2 Ch 170.

4 *Re Continental Oxygen Co, Elias v Continental Oxygen Co* [1897] 1 Ch 511.

5 *Cumming v Metcalfe's London Hydro Ltd* (1895) 2 Mans 418.

6 *Parkinson v Wainwright & Co and Wainwright* (1895) 64 LJ Ch 493.

7 *Re Day and Night Advertising Co, Upward v Day and Night Advertising Co* (1900) 48 WR 362.

8 *Re Crigglestone Coal Co, Stewart v Crigglestone Coal Co* [1906] 1 Ch 523.

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1380. Sale.

Where an order is made for the sale of the property charged by the debentures, the sale must generally be carried out under the directions of the court; and the purchase money will normally be ordered to be paid into court to the credit of the claim. The court may, however, direct a sale to be carried out by laying proposals before the judge in chambers for his sanction, or by proceedings altogether out of court¹.

The judge will normally require to be satisfied by evidence that all the persons interested in the property to be sold are before the court or are bound by the order for sale². Where an order for sale has been made, the court may authorise the trustees to sell where a majority of the holders of the debentures approve, if the trustees are acting in good faith and no injustice will be done to the minority³.

A sale will not be ordered in the case of a company incorporated for purposes of a public nature and having statutory powers and duties⁴.

1 See generally CPR 40.16; *Practice Direction--1. Court's Powers in Relation to Land. 2. Conveyancing Counsel of the Court* PD 40D para 2; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1215. An order for sale out of court generally requires the reserved bidding and the auctioneer's remuneration to be fixed by the master, and the purchase money to be paid directly into court. Where the master has by inadvertence inserted a lower figure than that fixed by the judge, there is nothing to compel the court to certify the highest bidder to be the purchaser when his bid is not as high as the reserve fixed by the judge: *Re Joseph Clayton Ltd* [1920] 1 Ch 257.

2 Where a contract for the sale of property is made subject to the approval of the court, that approval must be obtained before the date fixed for completion: *Re Sandwell Park Colliery Co* [1929] 1 Ch 277. The receiver should apply for leave to employ an agent for the sale; if he fails to do so, the agent is not entitled to any commission, though the court has a discretion to allow what seems equitable: *Re National Flying Services Ltd, Cousins v National Flying Services Ltd* [1936] Ch 271.

3 *Re Buenos Aires Port and City Tramways* (1920) 89 LJ Ch 597.

4 See the cases cited in PARA 1372 note 9.

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(F) PRACTICE IN DEBENTURE HOLDERS' CLAIMS

1381. Beginning a claim by debenture holders.

When a winding-up order has been made or a provisional liquidator has been appointed, no proceedings may be proceeded with or commenced against the company or its property except with the permission of the court, and subject to such terms as the court may impose¹. In either case, however, permission will almost invariably be given as a matter of course to a claim by debenture holders.

1 See the Insolvency Act 1986 s 130(2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 490; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 893.

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1382. Parties.

Usually the claimant is a debenture¹ holder, proceeding on behalf of himself and all other debenture holders of the class to which he belongs²; and the defendants are the company, and any other incumbrancers on the same property, as in the case of proceedings to enforce ordinary mortgages³.

If there is a trust deed securing the debentures⁴, the trustees must also be made parties to the claim⁵; and the relief claimed must include a claim that the trusts of the deed be carried into execution under the direction of the court.

In a foreclosure claim by the holder of a mortgage of specific assets of a company which has subsequently given a floating charge⁶ by debentures on all its assets, the debenture holders should be made defendants, even when the principal money secured to them is not yet payable⁷.

1 As to the meaning of 'debenture' see PARAS 1299, 1309.

2 Holders or representatives of only one class of debentures cannot obtain judgments and orders for sale in the absence of holders of another class of debentures: *Parkinson v Wainwright & Co and Wainwright* (1895) 64 LJ Ch 493.

3 *Re Wilcox & Co (late WH Fox & Co) Ltd, Hilder v Wilcox & Co (late WH Fox & Co) Ltd* [1903] WN 64. See also *Re Crigglestone Coal Co, Stewart v Crigglestone Coal Co* [1906] 1 Ch 523. For a case where a debenture holder sued on behalf of himself only and no other holders and it was held that there was no estoppel as regards other debenture holders see *Cox v Dublin City Distillery (No 2)* [1915] 1 IR 345, CA.

4 As to trust deeds securing payment of money owing on debentures see PARA 1302.

5 *Mortgage Insurance Corp'n Ltd v Canadian Agricultural Coal and Colonization Co Ltd* [1901] 2 Ch 377. The trustees may sue as claimants, in which case they will represent the debenture holders, but they will normally be made defendants.

6 As to the meaning of 'floating charge' see PARA 1337 note 6.

7 *Wallace v Evershed* [1899] 1 Ch 891. See also *Griffith v Pound* (1890) 45 ChD 553; *Fairfield Shipbuilding and Engineering Co Ltd v London and East Coast Express Steamship Co Ltd* [1895] WN 64.

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1383. Claim by representative.

A claimant proceeding on behalf of himself and other debenture¹ holders cannot compromise or give up any of the rights of those he represents without the permission of the court². If, after judgment, he has been paid off, and there is evidence that no other debentures have been issued, all further proceedings in the claim will be stayed³. If the claimant becomes bankrupt and a trustee is appointed, his estate vests in his trustee in bankruptcy, and the claim will be stayed unless his trustee continues it⁴. If any debenture holder objects to being represented by the claimant or any defendant appointed to represent his class, he may apply in the claim to be added as a defendant, but at his own risk as to costs⁵.

Where a debenture holder is sued in a representative capacity, an order may sometimes be obtained authorising him to defend in that capacity⁶.

Trustees represent their beneficiaries⁷. Where foreclosure is sought and there are no trustees, the debenture holders who are subsequent incumbrancers must all be made parties⁸. It is not sufficient to make some of them parties as representing the whole⁹. The court may, however, direct a sale before all the persons interested are ascertained¹⁰.

The court may give the conduct of the claim to such person as it thinks fit¹¹. The conduct of the claim may be taken away from the claimant where he has an interest conflicting with the

interests of the other debenture holders, as, for example, when he is or may be liable to the company; in such a case the court will give leave to add an independent debenture holder as defendant and transfer the conduct of the claim to him¹².

1 As to the meaning of 'debenture' see PARAS 1299, 1309.

2 *Re Calgary and Medicine Hat Land Co Ltd, Pigeon v Calgary and Medicine Hat Land Co Ltd* [1908] 2 Ch 652 at 659, CA, per Cozens-Hardy MR, and at 662 per Farwell LJ; *Collingham v Sloper, Foreign, American and General Investments Trust Co v Sloper* [1894] 3 Ch 716, CA.

3 *Re Alpha Co Ltd, Ward v Alpha Co Ltd* [1903] 1 Ch 203.

4 *Wolff v Van Boonen* (1906) 94 LT 502. See also **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 434.

5 *Watson v Cave* (1881) 17 ChD 19, CA; *Fraser v Cooper, Hall & Co* (1882) 21 ChD 718; *Debenture Corp v De Murrieta & Co Ltd* (1892) 8 TLR 496. See also *Re Services Club Estate Syndicate Ltd* [1930] 1 Ch 78.

6 *Fairfield Shipbuilding and Engineering Co Ltd v London and East Coast Express Steamship Co Ltd* [1895] WN 64; *Re Kent Coal Concessions Ltd* [1923] WN 328, CA. See, however, *Re Cadogan and Hans Place Estate (No 2) Ltd, Graham v Cadogan and Hans Place Estate (No 2) Ltd* (1906) 50 Sol Jo 499 (where it was said that such an order was unnecessary in the case of second debenture holders being defendants).

7 See CPR 19.7A; and **CIVIL PROCEDURE** vol 11 (2009) PARA 225.

8 *Wallace v Evershed* [1899] 1 Ch 891.

9 *Griffith v Pound* (1890) 45 ChD 553; *Westminster Bank Ltd v Residential Properties Improvement Co Ltd* [1938] Ch 639, [1938] 2 All ER 374.

10 See PARA 1380.

11 See CPR 19.7; and **CIVIL PROCEDURE** vol 11 (2009) PARA 230.

12 *Re Services Club Estate Syndicate Ltd* [1930] 1 Ch 78; *Re Rhodesia Goldfields Ltd, Partridge v Rhodesia Goldfields Ltd* [1910] 1 Ch 239 at 240 per Swinfen Eady J; *Watson v Cave* (1881) 17 ChD 19 at 21, CA, per James LJ.

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1384. Procedure.

Often, on the hearing of an application for the appointment of a receiver, all the parties to the claim attend and agree to treat the hearing as the trial of the issues, and a judgment by consent is then taken; but, if this is not done, a claim form should be served, and, if no defence is served, or if the parties agree upon the form of the judgment, the claim may then be disposed of¹.

1 *Re Dupont Ltd, Dupont v Dupont Ltd* [1906] WN 14. Proposed minutes of judgment must always be left even if a common form judgment only is required: *Re Automatic Machines (Haydon and Urry's Patents) Ltd, Graafe v Automatic Machines (Haydon and Urry's Patents) Ltd* [1902] WN 236 per Swinfen Eady J.

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1385. Form of judgment.

On the trial of a debenture¹ holders' claim, the court sometimes declares that the debenture holders are entitled to a charge². A declaration of charge will be omitted from the judgment if there are debenture holders, other than those of the class which the claimant represents, who are not parties to the proceedings³, or if there is a question of priorities to be decided⁴. There is no power to make the declaration in chambers⁵.

If, in a representative claim by a debenture holder, a personal judgment against the company is asked for in order to reach property not charged, judgment cannot be given for the claimant for the whole amount secured by the debentures; but the court may declare that the debenture holders are entitled to stand in the position of judgment creditors and appoint a receiver of the uncharged property⁶.

The usual form of judgment in a debenture holders' claim directs an account of what is due to the debenture holders, an inquiry of what the property charged consists, an inquiry what other incumbrances affect the property and, if a receiver is appointed and there are preferential payments to be made, an inquiry whether there are any and what preferential debts⁷.

Special inquiries are sometimes ordered, for example, as to determining priorities between claims of debenture holders. Under an inquiry directed by the judgment in a representative claim as to the property charged by the debentures, the master may certify what uncalled capital, if uncalled capital is subject to the security, is due from the several shareholders, notwithstanding that no calls may actually be made in such a claim⁸; and, where the claimant is himself a shareholder and is found indebted in a sum of uncalled capital, he, being a party to the claim, is bound by that finding, unless it is varied by the judge⁹.

1 As to the meaning of 'debenture' see PARAS 1299, 1309.

2 *Marwick v Lord Thurlow* [1895] 1 Ch 776; *Re Crigglestone Coal Co, Stewart v Crigglestone Coal Co* [1906] 1 Ch 523; *Brinsley v Lynton and Lynmouth Hotel and Property Co* (1895) 2 Mans 244; *Parkinson v Wainwright & Co and Wainwright* (1895) 64 LJ Ch 493. However, when he was the winding-up judge, Vaughan Williams J would not make such a declaration in a short cause unless the company by its liquidator appeared and consented (see *Marwick v Lord Thurlow*). It is not the practice to insert a declaration in a judgment made by consent on an application which is treated as the trial of the claim; and the usual judgment in such a case does not estop the company or its liquidator from establishing the invalidity of any of the debentures: *Re Gregory Love & Co* [1916] 1 Ch 203 at 209. A company should not consent to a judgment including a charge, unless it is proved otherwise than by consent: *Re Gregory Love & Co*.

3 *Re Prince and Baugh Ltd, Bedell v Prince and Baugh Ltd* [1902] WN 96.

4 *Re Ehrmann Bros Ltd, Albert v Ehrmann Bros Ltd* (1904) 48 Sol Jo 298.

5 *Halifax and Huddersfield Union Banking Co v Radcliffe Ltd* [1895] WN 63.

6 *Hope v Croydon and Norwood Tramways Co* (1887) 34 ChD 730. Where a personal judgment for interest is not sought in a debenture holders' claim, any debenture holder may begin a separate claim for it: *Cleary v Brazil Rly Co* (1915) 85 LJB 32.

7 See the form in *Re Burradon and Coxlodge Coal Co Ltd* [1929] WN 15, reverting to the form in *Re Wolverhampton District Brewery Ltd, Downes v Wolverhampton District Brewery Ltd* (1899) 44 Sol Jo 74, prior to the variation made by the Practice Note in *Debenture-Holders' Actions* (1900) 16 TLR 256. The same form had been adopted where no sum was presently due, but the security was in jeopardy: *Re Levison and Steiner Ltd* (1900) 44 Sol Jo 573; *Re Day and Night Advertising Co, Upward v Day and Night Advertising Co* (1900) 48

WR 362. Cf *Re British Rly Carriage Metal Fittings etc Co Ltd* (1898) 43 Sol Jo 140 (judgment on admissions). As to the form of order for inquiries as to incumbrances where none is known to exist see *Re Addressograph Ltd, Backhouse v Addressograph Ltd* [1909] WN 260. A liquidator may in special circumstances appeal from the master's certificate as to the final accounts: *Re Gregory Love & Co* [1916] 1 Ch 203. Where, as is usually the case, interest on debentures is payable before principal, the fact that orders have been made for applying proceeds of sale in payment of principal will not be regarded as a final appropriation of the sums paid to principal, and the court will make the proper appropriation by a subsequent order: *Re Calgary and Medicine Hat Land Co Ltd, Pigeon v Calgary and Medicine Hat Land Co Ltd* [1908] 2 Ch 652, CA. As to the form of order and the inquiries directed where some of the debenture holders have not been registered in time see *Re Ehrmann Bros Ltd, Albert v Ehrmann Bros Ltd* (1904) 48 Sol Jo 298. As to the effect on liability for income tax of appropriating money as principal or interest by orders in an claim to administer the trusts of a debenture trust deed see *Smith v Law Guarantee and Trust Society Ltd* [1904] 2 Ch 569, CA.

8 As to the meaning of 'uncalled share capital' see PARA 1048. As to shareholders generally see PARA 321.

9 *Madeley v Ross, Sleeman & Co* [1897] 1 Ch 505.

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1386. Service of judgment.

In ordinary cases, the judgment in a debenture¹ holders' claim should not be served on the debenture holders, but notice should be given to them by circular or letter, or by advertisement if the case so requires². Sums due to persons who do not put in their claims in answer to the advertisements are normally carried over to a fund³.

1 As to the meaning of 'debenture' see PARAS 1299, 1309.

2 See Directions of Chancery Judges, May 1896. In the case of bearer debentures, advertisements are invariably directed. As to the costs of serving notice of the judgment and of the meetings of debenture holders to sanction a scheme of arrangement see *Re Commonwealth Oil Corp Ltd* [1917] 1 Ch 404. The costs of acknowledging and giving receipt for and returning debentures sent by a debenture holder in pursuance of the present form of notice of judgment are properly included in the claimant's costs of the claim: *Re W Mate & Sons Ltd* [1920] 1 Ch 551. However, distinguish *Re Ticehurst and District Water and Gas Co* (1915) 139 LT Jo 295. A debenture holder served with notice of judgment may not enter an appearance, but may with permission attend the proceedings: *Re W Mate & Sons Ltd*. As to debentures payable to bearer see PARA 1304.

3 The court will exclude persons who have not sent in their claims after a long period of time and after the court has fixed a certain date before which the claims are to be brought or to be excluded: *Wilson v Church* (1911) 106 LT 31; *Wilson v Church* (1912) 133 LT Jo 282. See also *Elkins v Capital Guarantee Society* (1900) 16 TLR 423, CA. Cf *Saragossa and Mediterranean Rly Co v Collingham* [1904] AC 159, HL (revsg *Collingham v Sloper* [1901] 1 Ch 769, CA).

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1387. Costs.

Even where debentures¹ do not rank *pari passu* and, in the event, nothing is payable in respect of his debentures, the claimant is entitled to the costs of the claim except such, if any, as are incurred solely in supporting his own security².

As a general rule, the claimant in a representative claim is entitled to costs only on the standard basis³; but, where the assets are insufficient for the payment of the debentures in full, he is entitled to costs on the indemnity basis⁴. If he is unable to pay the difference between indemnity and standard basis costs, and property has been recovered or preserved more than enough to pay the debenture holders, the solicitor is entitled to a charging order for the difference on so much of the property as belongs to the debenture holders⁵.

Trustees of a debenture trust deed⁶ are entitled to be paid their costs before the funds are distributed among the debenture holders, even when they and the company appear by the same solicitor⁷. The defendant company is not entitled to costs unless the whole claim fails, nor are second debenture holders who are made defendants; both must look to the surplus⁸.

1 As to the meaning of 'debenture' see PARAS 1299, 1309.

2 *Carrick v Wigan Tramways Co* [1893] WN 98. As to what these costs include see *Re W Mate & Sons Ltd* [1920] 1 Ch 551.

3 *Re Queen's Hotel Co, Cardiff Ltd, Re Vernon Tin Plate Co Ltd* [1900] 1 Ch 792.

4 *Re New Zealand Midland Rly Co, Smith v Lubbock* [1901] 2 Ch 357, CA (where the order was for costs as between solicitor and client, a basis no longer possible, parties attending by leave were given party and party costs). See also *Re A Boynton Ltd, Hoffman v A Boynton Ltd* [1910] 1 Ch 519 (solicitor and client basis).

5 *Re WC Horne & Sons Ltd, Horne v WC Horne & Sons Ltd* [1906] 1 Ch 271 (where it was also held that the solicitor, who had acted as solicitor to the receiver in realising the assets, was entitled to a charging order for his costs in that capacity on the balance of the funds payable to the liquidator).

6 As to trust deeds securing payment of money owing on debentures see PARA 1302.

7 *Mortgage Insurance Corp'n Ltd v Canadian Agricultural Coal and Colonization Co Ltd* [1901] 2 Ch 377. See also *Batten v Wedgwood Coal and Iron Co* (1884) 28 ChD 317.

8 *Re Clayton Engineering and Electrical Construction Co Ltd* (1904) 90 LT 283.

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1388. Order of administration.

The order for distribution of the amount realised in a debenture¹ holders' claim, where a receiver has been appointed and there is a deficiency, is:

- 616 (1) costs of realisation²;
- 617 (2) costs including the receiver's remuneration³;
- 618 (3) costs, charges, and expenses of the debenture trust deed, if any, including the trustees' remuneration where by the trust deed these are made a first charge on the amount realised⁴;
- 619 (4) the claimant's costs of proceedings;
- 620 (5) the amount due to and available for preferential creditors to the extent to which they have priority⁵; and

621 (6) the amount due to and available for debenture holders⁶.

1 As to the meaning of 'debenture' see PARAS 1299, 1309.

2 This includes costs of an abortive sale: *Batten v Wedgwood Coal and Iron Co* (1884) 28 ChD 317.

3 As to the receiver's appointment see PARA 1361.

4 As to trust deeds securing payment of money owing on debentures see PARA 1302.

5 See PARA 1334.

6 *Re Glyncorrwg Colliery Co Ltd* [1926] Ch 951; *Batten v Wedgwood Coal and Iron Co* (1884) 28 ChD 317; *Re London United Breweries Ltd, Smith v London United Breweries Ltd* [1907] 2 Ch 511. As to the payment of preferential debts on assets subject to a floating charge see also the Insolvency Act 1986 s 40; and PARA 1334.

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(23) DISTRIBUTIONS OF PROFITS AND ASSETS TO THE MEMBERS

(i) Limits of Company's Power of Distribution

1389. Meaning of 'distribution'.

For the purposes of Part 23 of the Companies Act 2006¹, which restricts distributions, 'distribution' means every description of distribution of a company's² assets to its members³, whether in cash or otherwise, subject to the following exceptions⁴.

The following are not distributions for the purposes of that Part⁵:

- 622 (1) an issue of shares⁶ as fully or partly paid bonus shares⁷;
- 623 (2) the reduction of share capital either by extinguishing or reducing the liability of any of the members on any of the company's shares in respect of share capital not paid up⁸, or by repaying paid-up share capital⁹;
- 624 (3) the redemption or purchase of any of the company's own shares out of capital, including the proceeds of any fresh issue of shares, or out of unrealised profits in accordance with certain provisions of Part 18¹⁰ of the Companies Act 2006¹¹;
- 625 (4) a distribution of assets to members of the company on its winding up¹².

1 For the purposes of the Companies Act 2006 Pt 23 (ss 829-853): see the text and notes 2-12; and PARA 1390 et seq.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 As to who qualifies as a member of a company see PARA 321.

4 Companies Act 2006 s 829(1). A characteristic of an unlawful distribution is that the sale was known to be and was intended to be a sale at an undervalue: see *Aveling Barford Ltd v Perion Ltd* [1989] BCLC 626 (the sale by a company of an asset at a gross undervalue for the purpose of enabling a profit to be realised by an entity controlled by the company's sole beneficial shareholder, at a time when the company had no distributable reserves, was an unlawful distribution and hence was ultra vires and unratifiable); *Progress Property Company Ltd v Moorgrath Group Ltd* [2009] EWCA Civ 629, [2009] All ER (D) 294 (Jun) (sale of claimant's shares to the

defendant at an undervalue could only properly and objectively be characterised as consideration for the sale of an asset without any element of gratuitous benefit rather than as a disguised distribution of assets).

5 Companies Act 2006 s 829(2).

6 As to the meaning of 'issue' in relation to shares see PARA 1045; and as to the meaning of 'share' see PARA 1042.

7 Companies Act 2006 s 829(2)(a). As to the issue of bonus shares see PARA 1420.

8 Companies Act 2006 s 829(2)(b)(i).

9 Companies Act 2006 s 829(2)(b)(ii).

10 In accordance with the Companies Act 2006 Pt 18 Ch 3 (ss 684-689) (see PARA 1229 et seq), Pt 18 Ch 4 (ss 690-708) (see PARA 1234 et seq) or Pt 18 Ch 5 (ss 709-723) (see PARA 1244 et seq).

11 Companies Act 2006 s 829(2)(c).

12 Companies Act 2006 s 829(2)(d). As to distribution in a winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 804 et seq. See also *MacPherson v European Strategic Bureau Ltd* [2000] 2 BCLC 683, CA (an agreement which seeks to distribute company assets as if on a winding up but without making proper provision for creditors is an attempt to distribute company profits unlawfully, being prohibited by what is now the Companies Act 2006 s 830 (see PARA 1390)).

UPDATE

1389 Meaning of 'distribution'

NOTE 4--*Progress Property*, cited, reported at [2010] 1 BCLC 1, [2009] Bus LR 1544.

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1390. Restriction on distributions by company other than out of available profits.

A company¹ may only make a distribution² out of profits³ available for the purpose⁴. A company's profits available for distribution are its accumulated, realised profits⁵, so far as not previously utilised by distribution or capitalisation⁶, less its accumulated, realised losses⁷, so far as not previously written off in a reduction or reorganisation of capital duly made⁸, and subject to special provisions⁹ for investment and other companies¹⁰.

A company must not apply an unrealised profit in paying up debentures¹¹ or any amounts unpaid on its issued shares¹².

Where the directors¹³ of a company are, after making all reasonable inquiries, unable to determine whether a particular profit made before the relevant date¹⁴ is realised or unrealised, they may treat the profit as realised¹⁵; and where they are, after making all reasonable inquiries, unable to determine whether a particular loss made before the relevant date is realised or unrealised, they may treat the loss as unrealised¹⁶.

1 As to the meaning of 'company' under the Companies Acts see PARA 24.

2 As to the meaning of 'distribution' see PARA 1389.

3 For the purposes of the Companies Act 2006 Pt 23 (ss 829-853) (see the text and notes 1-2, 4-16; and PARAS 1389, 1391 et seq), references to profit or losses of any description are to profits or losses of that description made at any time, and, except where the context otherwise requires, are to profits or losses of a revenue or capital character: s 853(1), (2).

4 Companies Act 2006 s 830(1).

5 For the purposes of the Companies Act 2006 Pt 23, references to 'realised profits' and 'realised losses', in relation to a company's accounts, are to such profits or losses of the company as fall to be treated as realised in accordance with principles generally accepted at the time when the accounts are prepared, with respect to the determination for accounting purposes of realised profits or losses: s 853(4). Section 853(4) is without prejudice to (1) the construction of any other expression (where appropriate) by reference to accepted accounting principles or practice; or (2) any specific provision for the treatment of profits or losses of any description as realised: s 853(5). As to the circumstances in which a reserve arising from the reduction of capital may be treated as a realisable profit for these purposes see PARA 1196.

6 For the purposes of the Companies Act 2006 Pt 23, 'capitalisation', in relation to a company's profits, means any of the following operations (whenever carried out): (1) applying the profits in wholly or partly paying up unissued shares in the company to be allotted to members of the company as fully or partly paid bonus shares; or (2) transferring the profits to capital redemption reserve: s 853(3). As to who qualifies as a member of a company see PARA 321; as to the meaning of 'share' see PARA 1042; and as to the meaning of 'capital redemption reserve' see PARA 1236.

7 As to the meaning of 'realised losses' see note 5.

8 Companies Act 2006 s 830(2).

9 le subject to the Companies Act 2006 ss 832, 835 (investment companies etc: distributions out of accumulated revenue profits: see PARA 1394): s 830(3).

10 Companies Act 2006 s 830(3).

11 As to the meaning of 'debenture' see PARA 1299.

12 Companies Act 2006 s 849.

13 As to the meaning of 'director' under the Companies Acts see PARA 478.

14 For these purposes, the relevant date is (1) for companies registered in Great Britain, 22 December 1980; (2) for companies registered in Northern Ireland, 1 July 1983: Companies Act 2006 s 850(3).

15 Companies Act 2006 s 850(1).

16 Companies Act 2006 s 850(2).

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1391. Continued application of rules of law restricting distributions.

Except as provided below¹, the statutory provisions restricting distributions² are without prejudice to any rule of law restricting the sums out of which, or the cases in which, a distribution may be made³. For the purposes of any rule of law requiring distributions⁴ to be paid out of profits⁵ or restricting the return of capital to members⁶, then⁷:

- 626 (1) the statutory provision for determining the amount of distributions in kind⁸ applies to determine the amount of any distribution or return of capital consisting

of or including, or treated as arising in consequence of the sale, transfer or other disposition by a company⁹ of a non-cash asset¹⁰; and
 627 (2) the statutory provision regarding the treatment of unrealised profits on a distribution in kind¹¹ applies as it applies for the purposes of the statutory restrictions¹² on distributions¹³.

1 Ie except as provided in the Companies Act 2006 s 851: see the text and notes 2-12.

2 Ie the provisions of the Companies Act 2006 Pt 23 (ss 829-853): see PARAS 1389-1390, 1392 et seq.

3 Companies Act 2006 s 851(1). See *Re Exchange Banking Co, Flitcroft's Case* (1882) 21 ChD 519, CA (dividends may not be paid out of capital); and *Trevor v Whitworth* (1887) 12 App Cas 409, HL (no return of capital may be made to members other than in accordance with a statutory scheme).

4 For these purposes, references to distributions are to amounts regarded as distributions for the purposes of any such rule of law as is referred to in the Companies Act 2006 s 851(1): s 851(3).

5 Ie the rule in *Re Exchange Banking Co, Flitcroft's Case* (1882) 21 ChD 519, CA (see note 3). As to the meaning of 'profits' see PARA 1390 note 3.

6 Ie the rule in *Trevor v Whitworth* (1887) 12 App Cas 409, HL (see note 3). As to who qualifies as a member of a company see PARA 321.

7 See the Companies Act 2006 s 851(2).

8 Ie the Companies Act 2006 s 845: see PARA 1404.

9 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

10 Companies Act 2006 s 851(2)(a). As to the meaning of 'non-cash asset' see PARA 564 note 6.

11 Ie the Companies Act 2006 s 846: see PARA 1404.

12 Ie for the purposes of the Companies Act 2006 Pt 23: see PARAS 1389-1390, 1392 et seq.

13 Companies Act 2006 s 851(2)(b).

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1392. Saving for other restrictions on distributions.

The statutory provisions restricting distributions¹ are without prejudice to any enactment², or any provision of a company's³ articles⁴, restricting the sums out of which, or the cases in which, a distribution⁵ may be made⁶.

1 Ie the provisions of the Companies Act 2006 Pt 23 (ss 829-853): see PARAS 1389-1391, 1393 et seq.

2 As to the meaning of 'enactment' see PARA 17 note 2.

3 As to the meaning of 'company' under the Companies Acts see PARA 24.

4 As to the meaning of 'articles' under the Companies Act 2006 see PARA 228 note 2.

5 As to the meaning of 'distribution' see PARA 1389.

6 Companies Act 2006 s 852.

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1393. Restriction on distribution of assets by public companies.

Subject to special provisions¹ for investment and other companies², a public company³ may only make a distribution⁴:

- 628 (1) if the amount of its net assets⁵ is not less than the aggregate of its called-up share capital⁶ and undistributable reserves⁷; and
- 629 (2) if, and to the extent that, the distribution does not reduce the amount of those assets to less than that aggregate⁸.

A public company must not include any uncalled share capital⁹ as an asset in any accounts relevant for the purposes of these provisions¹⁰.

1 Ie subject to the Companies Act 2006 ss 832, 835 (investment companies etc: distributions out of accumulated revenue profits: see PARA 1394): s 831(6).

2 Companies Act 2006 s 831(6).

3 As to the meaning of 'public company' under the Companies Acts see PARA 102.

4 Companies Act 2006 s 831(1). As to the meaning of 'distribution' see PARA 1389.

5 For this purpose, a company's 'net assets' means the aggregate of the company's assets less the aggregate of its liabilities: Companies Act 2006 s 831(2). 'Liabilities' here includes (1) where the relevant accounts are Companies Act accounts, provisions of a kind specified for these purposes by regulations under s 396 (see PARA 728); (2) where the relevant accounts are IAS accounts, provisions of any kind: s 831(3). As to the meaning of 'Companies Act accounts' see PARAS 717, 776; and as to the meaning of 'IAS accounts' see PARAS 717, 776.

In relation to companies other than those which are subject to the small companies regime under Pt 15 (ss 380-474) (see PARA 693 et seq), the specified provisions for the purposes of s 831(3)(a) (see head (1) above) are (a) provisions within the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 9 para 2 (ie any amount retained as reasonably necessary for the purpose of providing for any liability the nature of which is clearly defined and which is either likely to be incurred, or certain to be incurred but uncertain as to amount or as to the date on which it will arise: see Sch 9 para 2); and (b) in the case of an insurance company, any amount included under liabilities items Ba (fund for future appropriations), C (technical provisions) and D (technical provisions for linked liabilities) in a balance sheet drawn up in accordance with Sch 3 (see PARA 701): regs 2(4), 12(c), Sch 9 para 5.

6 As to the meaning of 'called-up share capital' see PARA 1048.

7 Companies Act 2006 s 831(2)(a). A company's undistributable reserves are (1) its share premium account; (2) its capital redemption reserve; (3) the amount by which its accumulated, unrealised profits (so far as not previously utilised by capitalisation) exceed its accumulated, unrealised losses (so far as not previously written off in a reduction or reorganisation of capital duly made); (4) any other reserve that the company is prohibited from distributing (a) by any enactment (other than one contained in the Companies Act 2006 Pt 23 (ss 829-853)); or (b) by its articles: s 831(4). The reference in s 831(4)(c) (see head (3) above) to capitalisation does not include a transfer of profits of the company to its capital redemption reserve: s 831(4). As to the meaning of 'share premium account' see PARA 1146; as to the meaning of 'capital redemption reserve' see PARA 1236; as to the meanings of 'profit' and 'loss' see PARA 1390 note 3; as to the meaning of 'capitalisation' generally for the

purposes of Pt 23 see PARA 1390 note 6; as to the meaning of 'enactment' see PARA 17 note 2; and as to the meaning of 'articles' under the Companies Act 2006 see PARA 228 note 2.

8 Companies Act 2006 s 831(2)(b). No reserve apparently thrown up by any alteration in the accounts due to fluctuations in the rate of exchange required to convert share capital expressed in any currency other than the currency in which the accounts are drawn is a reserve capable of distribution or capitalisation: *Re Scandinavian Bank Group plc* [1988] Ch 87 at 107, [1987] 2 All ER 70 at 79 per Harman J.

9 As to the meaning of 'uncalled share capital' see PARA 1048 note 11.

10 Companies Act 2006 s 831(5).

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1394. Distributions by investment companies out of accumulated revenue profits.

An investment company¹ may make a distribution² out of its accumulated, realised revenue profits³ if the following conditions are met⁴. It may make such a distribution only:

- 630 (1) if, and to the extent that, its accumulated, realised revenue profits, so far as not previously utilised by a distribution or capitalisation⁵, exceed its accumulated revenue losses⁶, whether realised⁷ or unrealised, so far as not previously written off in a reduction or reorganisation of capital duly made⁸;
- 631 (2) if the amount of its assets is at least equal to one and a half times the aggregate of its liabilities to creditors⁹, and if, and to the extent that, the distribution does not reduce that amount to less than one and a half times that aggregate¹⁰.

The company must not include any uncalled share capital¹¹ as an asset in any accounts relevant for the purposes of these provisions¹².

The following conditions must also be met¹³:

- 632 (a) the company's shares¹⁴ must be listed on a recognised UK investment exchange¹⁵;
- 633 (b) during the relevant period¹⁶ it must not have distributed any capital profits otherwise than by way of the redemption or purchase of any of the company's own shares¹⁷ or have applied any unrealised profits or any capital profits, realised or unrealised, in paying up debentures¹⁸ or amounts unpaid on its issued shares¹⁹;
- 634 (c) it must have given notice to the registrar²⁰ of intention to carry on business as an investment company²¹ either before the beginning of the relevant period, or as soon as reasonably practicable after the date of its incorporation²².

For these purposes an 'investment company' means a public company that has given notice (which has not been revoked) to the registrar of its intention to carry on business as an investment company, and has since the date of that notice complied with the following requirements²³:

- 635 (i) that the business of the company consists of investing its funds mainly in securities, with the aim of spreading investment risk and giving members²⁴ of the company the benefit of the results of the management of its funds²⁵;
- 636 (ii) that the statutory condition²⁶ is met as regards holdings in other companies²⁷, namely that that none of the company's holdings in companies²⁸, other than those that are for the time being investment companies, represents more than 15 per cent by value of the company's investments²⁹;
- 637 (iii) that distribution of the company's capital profits is prohibited by its articles³⁰;
- 638 (iv) that the company has not retained, otherwise than in compliance with the statutory provisions restricting distributions³¹, in respect of any accounting reference period more than 15 per cent of the income it derives from securities³².

Such notice to the registrar may be revoked at any time by the company on giving notice to the registrar that it no longer wishes to be an investment company within the meaning of these provisions³³; and on giving such a notice, the company ceases to be such a company³⁴.

The Secretary of State³⁵ may by regulations³⁶ extend the above provisions, with or without modifications, to other companies whose principal business consists of investing their funds in securities, land or other assets with the aim of spreading investment risk and giving their members the benefit of the results of the management of the assets³⁷.

1 As to the meaning of 'investment company' for these purposes see the text and notes 23-32.

2 As to the meaning of 'distribution' see PARA 1389.

3 As to the meanings of 'profit' and 'realised profit' see PARA 1390 notes 3, 5.

4 Companies Act 2006 s 832(1).

5 As to the meaning of 'capitalisation' see PARA 1390 note 6.

6 As to the meaning of 'losses' see PARA 1390 note 3.

7 As to the meaning of 'realised losses' see PARA 1390 note 5.

8 Companies Act 2006 s 832(2).

9 For this purpose a company's liabilities to creditors include (1) in the case of Companies Act accounts, provisions of a kind specified for these purposes by regulations under the Companies Act 2006 s 396 (see PARA 728); (2) in the case of IAS accounts, provisions for liabilities to creditors: s 832(4). As to the meaning of 'Companies Act accounts' see PARAS 717, 776; and as to the meaning of 'IAS accounts' see PARAS 717, 776.

In relation to companies other than those which are subject to the small companies regime under Pt 15 (ss 380-474) (see PARA 693 et seq), the specified provisions for the purposes of s 832(4)(a) (see head (1) above) are provisions within the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 9 para 2 (ie any amount retained as reasonably necessary for the purpose of providing for any liability the nature of which is clearly defined and which is either likely to be incurred, or certain to be incurred but uncertain as to amount or as to the date on which it will arise: see Sch 9 para 2): regs 2(4), 12(c), Sch 9 para 6.

10 Companies Act 2006 s 832(3).

11 As to the meaning of 'uncalled share capital' see PARA 1048 note 11.

12 Companies Act 2006 s 832(7).

13 Companies Act 2006 s 832(5).

14 As to the meaning of 'share' see PARA 1042.

15 Companies Act 2006 s 832(5)(a). For these purposes, 'recognised UK investment exchange' means a recognised investment exchange within the meaning of the Financial Services and Markets Act 2000 Pt XVIII (ss

285-313) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 684), other than an overseas investment exchange within the meaning of that Part (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 710): Companies Act 2006 s 832(6)(a).

16 For these purposes, the 'relevant period' is the period beginning with (1) the first day of the accounting reference period immediately preceding that in which the proposed distribution is to be made; or (2) where the distribution is to be made in the company's first accounting reference period, the first day of that period, and ending with the date of the distribution: Companies Act 2006 s 832(6)(b).

17 In accordance with the Companies Act 2006 Pt 18 Ch 3 (ss 684-689) (see PARA 1229 et seq) or Pt 18 Ch 4 (ss 690-708) (see PARA 1234 et seq).

18 As to the meaning of 'debenture' see PARA 1299.

19 Companies Act 2006 s 832(5)(b).

20 As to the meaning of 'registrar' see PARA 131 note 2.

21 In under the Companies Act 2006 s 833(1): see the text and note 23.

22 Companies Act 2006 s 832(5)(c).

23 Companies Act 2006 s 833(1).

24 As to who qualifies as a member of a company see PARA 321.

25 Companies Act 2006 s 833(2)(a).

26 In the condition in the Companies Act 2006 s 834: see the text and notes 28-29.

27 Companies Act 2006 s 833(2)(b).

28 For the purposes of the Companies Act 2006 s 834, 'company' and 'shares' are to be construed in accordance with the Taxation of Chargeable Gains Act 1992 s 99 (unit trust schemes: see **CAPITAL GAINS TAXATION** vol 5(1) (2004 Reissue) PARA 257) and s 288 (interpretation: see **CAPITAL GAINS TAXATION** vol 5(1) (2004 Reissue) PARA 173): Companies Act 2006 s 834(5).

29 Companies Act 2006 s 834(1). For this purpose, holdings in companies that are members of a group (whether or not including the investing company), and are not for the time being investment companies, are treated as holdings in a single company (s 834(2)(a)); and where the investing company is a member of a group, money owed to it by another member of the group is treated as a security of the latter held by the investing company, and is accordingly treated as, or as part of, the holding of the investing company in the company owing the money (s 834(2)(b)). 'Group' means a company and all companies that are its 51% subsidiaries (within the meaning of the Income and Corporation Taxes Act 1988 s 838: see **INCOME TAXATION** vol 23(2) (Reissue) PARA 952): Companies Act 2006 s 834(5).

The condition in s 834(1) does not apply (1) to a holding in a company acquired before 6 April 1965 that on that date represented not more than 25% by value of the investing company's investments; or (2) to a holding in a company that, when it was acquired, represented not more than 15% by value of the investing company's investments, so long as no addition is made to the holding: s 834(3). For the purposes of s 834(3): (a) 'holding' means the shares or securities (whether or one class or more than one class) held in any one company; (b) an addition is made to a holding whenever the investing company acquires shares or securities of that one company, otherwise than by being allotted shares or securities without becoming liable to give any consideration, and if an addition is made to a holding that holding is acquired when the addition or latest addition is made to the holding; and (c) where in connection with a scheme of reconstruction a company issues shares or securities to persons holding shares or securities in a second company in respect of and in proportion to (or as nearly as may be in proportion to) their holdings in the second company, without those persons becoming liable to give any consideration, a holding of the shares or securities in the second company and a corresponding holding of the shares or securities so issued are to be regarded as the same holding: s 834(4). 'Scheme of reconstruction' has the same meaning as in the Taxation of Chargeable Gains Act 1992 s 136 (see **CAPITAL GAINS TAXATION** vol 5(1) (2004 Reissue) PARA 329): Companies Act 2006 s 834(5).

30 Companies Act 2006 s 833(2)(c). As to the meaning of 'articles' under the Companies Acts see PARA 228 note 2. The Companies Act 2006 s 833(2)(c) does not, however, require an investment company to be prohibited by its articles from redeeming or purchasing its own shares in accordance with Pt 18 Ch 3 (see PARA 1229 et seq) or Pt 18 Ch 4 (see PARA 1234 et seq) out of its capital profits: s 833(3).

31 In compliance with the provisions of the Companies Act 2006 Pt 23 (ss 829-853): see PARA 1389 et seq; the text and notes 1-30, 32-37; and PARA 1395 et seq.

32 Companies Act 2006 s 833(2)(d).

33 Companies Act 2006 s 833(4).

34 Companies Act 2006 s 833(5).

35 As to the Secretary of State see PARA 6.

36 Such regulations are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): Companies Act 2006 ss 835(2), 1290.

37 Companies Act 2006 s 835(1).

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(ii) Justification of Distribution by Reference to Accounts

1395. Distribution to be justified by reference to relevant accounts.

Whether a distribution¹ may be made by a company² without contravening the statutory provisions restricting distributions³ is determined by reference to the following items as stated in the relevant accounts⁴:

- 639 (1) profits⁵, losses⁶, assets and liabilities⁷;
- 640 (2) provisions of the specified⁸ kinds⁹;
- 641 (3) share capital and reserves, including undistributable reserves¹⁰.

The relevant accounts are the company's last annual accounts¹¹, except that¹²:

- 642 (a) where the distribution would be found to contravene the statutory provisions restricting distributions by reference to the company's last annual accounts, it may be justified by reference to interim accounts¹³ that enable a reasonable judgment to be made as to the amounts of the items mentioned in heads (1) to (3) above¹⁴; and
- 643 (b) where the distribution is proposed to be declared during the company's first accounting reference period¹⁵, or before any accounts have been circulated in respect of that period, it may be justified by reference to initial accounts¹⁶ that enable a reasonable judgment to be made as to the amounts of the above-mentioned items¹⁷.

The statutory requirements as regards the company's last annual accounts¹⁸, interim accounts¹⁹ and initial accounts²⁰ must be complied with, as and where applicable²¹; and if any such applicable requirement is not complied with, the accounts may not be relied on for these purposes and the distribution is accordingly treated as contravening the statutory provisions restricting distributions²².

1 As to the meaning of 'distribution' see PARA 1389.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 le the provisions of the Companies Act 2006 Pt 23 (ss 829-853): see PARA 1389 et seq; the text and notes 4-22; and PARA 1396 et seq.

4 Companies Act 2006 s 836(1). The provisions of s 836 have effect subject to s 845 (distributions in kind: see PARA 1404): s 845(5).

5 As to the meaning of 'profit' see PARA 1390 note 3.

6 As to the meaning of 'losses' see PARA 1390 note 3.

7 Companies Act 2006 s 836(1)(a).

8 le (1) where the relevant accounts are Companies Act accounts, provisions of a kind specified for these purposes by regulations under the Companies Act 2006 s 396 (see PARA 728); (2) where the relevant accounts are IAS accounts, provisions of any kind: s 836(1)(b)(i), (ii). As to the meaning of 'Companies Act accounts' see PARAS 717, 776; and as to the meaning of 'IAS accounts' see PARAS 717, 776.

In relation to companies other than those which are subject to the small companies regime under Pt 15 (ss 380-474) (see PARA 693 et seq), the specified provisions for the purposes of s 836(1)(b)(i) (see head (1) above) are (a) are provisions of any of the kinds mentioned in the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 9 paras 1, 2 (ie any amount written off by way of providing for depreciation or diminution in value of assets (see Sch 9 para 1) and any amount retained as reasonably necessary for the purpose of providing for any liability the nature of which is clearly defined and which is either likely to be incurred, or certain to be incurred but uncertain as to amount or as to the date on which it will arise (see Sch 9 para 2)); and (b) in the case of an insurance company, any amount included under liabilities items Ba (fund for future appropriations), C (technical provisions) and D (technical provisions for linked liabilities) in a balance sheet drawn up in accordance with Sch 3 (see PARA 701): regs 2(4), 12(c), Sch 9 para 7. In relation to companies subject to the small companies regime under the Companies Act 2006 Pt 15, the specified provisions for the purposes of s 836(1)(b)(i) are provisions of any of the kinds mentioned in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 7 paras 1, 2 (ie any amount written off by way of providing for depreciation or diminution in value of assets (see Sch 7 para 1) and any amount retained as reasonably necessary for the purpose of providing for any liability the nature of which is clearly defined and which is either likely to be incurred, or certain to be incurred but uncertain as to amount or as to the date on which it will arise (see Sch 7 para 2)): regs 2(3), 12(c), Sch 7 para 5.

9 Companies Act 2006 s 836(1)(b).

10 Companies Act 2006 s 836(1)(c). As to the meaning of 'undistributable reserves' see PARA 1393 note 7.

11 The company's last annual accounts means the company's individual accounts (1) that were last circulated to members in accordance with the Companies Act 2006 s 423 (duty to circulate copies of annual accounts and reports: see PARA 850); or (2) if in accordance with s 426 (see PARA 853) the company provided a summary financial statement instead, that formed the basis of that statement: s 837(1). As to the statutory requirements where the last annual accounts are used see PARA 1396. As to who qualifies as a member of a company see PARA 321.

12 Companies Act 2006 s 836(2).

13 Companies Act 2006 s 836(2)(a).

14 Companies Act 2006 s 838(1). As to the statutory requirements where interim accounts are used by a public company see PARA 1397.

The statutory references to 'reasonable judgment' point against an intention to render a dividend unlawful if it is only with hindsight that it can properly be said that provision ought to have been made for a particular liability; what the relevant provisions require is the making of a reasonable judgment based on facts as reasonably perceived, or that would have been ascertained by reasonable inquiry: see *Re Paycheck Services 3 Ltd, Revenue and Customs Comrs v Holland* [2008] EWHC 2200 (Ch) at [197]-[198], [2008] STC 3142 at [197]-[198], [2008] 2 BCLC 613 at [197]-[198] per Mark Cawson QC (sitting as a deputy judge of the High Court) (revsd without affecting this point [2009] EWCA Civ 625, [2009] 2 BCLC 309).

15 As to the meaning of 'accounting reference period' see PARA 712.

16 Companies Act 2006 s 836(2)(b).

17 Companies Act 2006 s 839(1). As to the statutory requirements where initial accounts are used by a public company see PARA 1398.

18 le the Companies Act 2006 s 837: see PARA 1396.

19 le the Companies Act 2006 s 838: see PARA 1397.

20 le the Companies Act 2006 s 839: see PARA 1398.

21 Companies Act 2006 s 836(3).

22 Companies Act 2006 s 836(4). Where accounts have not been prepared according to the statutory requirements, the distribution will not be considered lawful even if the company does in fact have some distributable profits: *Bairstow v Queens Moat Houses plc* [2001] EWCA Civ 712, [2001] 2 BCLC 531 (the requirement that distributions may only be made in accordance with the company's accounts properly prepared is strict and mandatory and not a mere procedural technicality). See also *Allied Carpets Group plc v Nethercott* [2001] BCC 81 (even if it was assumed that the misstatements in the accounts might not have materially altered the amounts available as profits, so that the company would have declared much the same dividend in any event, the accounts were not properly prepared as required and the distributions made were unlawful); *Re Loquitur Ltd, IRC v Richmond* [2003] EWHC 999 (Ch), [2003] 2 BCLC 442 (where directors drew up interim accounts which failed to provide for a potential corporation tax liability, the accounts failed to comply with the statutory requirements and any distribution declared on their basis was unlawful); *Re Paycheck Services 3 Ltd, Revenue and Customs Comrs v Holland* [2009] EWCA Civ 625, [2009] 2 BCLC 309. See also *Inn Spirit Ltd v Burns* [2002] EWHC 1731 (Ch), [2002] 2 BCLC 780 (there were no accounts, interim or final, by which a purported dividend payment might have been justified).

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1396. Requirements where last annual accounts used.

If the company's¹ last annual accounts² constitute the only accounts relevant for justifying the distribution³, the accounts must have been properly prepared in accordance with the Companies Act 2006⁴, or have been so prepared subject only to matters that are not material for determining⁵ whether the distribution would contravene the statutory provisions⁶ restricting distributions⁷.

Unless the company is exempt from audit⁸ and the directors⁹ take advantage of that exemption, the auditor¹⁰ must have made his report¹¹ on the accounts¹². If that report was qualified¹³, the auditor must have stated in writing, either at the time of his report or subsequently¹⁴, whether in his opinion the matters in respect of which his report is qualified are material for determining whether a distribution would contravene the statutory restrictions on distributions¹⁵; and a copy of that statement must, in the case of a private company¹⁶, have been circulated to members¹⁷, or, in the case of a public company¹⁸, have been laid before the company in general meeting¹⁹. An auditor's statement is sufficient for the purposes of a distribution if it relates to distributions of a description that includes the distribution in question, even if at the time of the statement it had not been proposed²⁰.

1 As to the meaning of 'company' under the Companies Acts see PARA 24.

2 As to the meaning of 'last annual accounts' for these purposes see PARA 1395 note 11.

3 le the only accounts relevant under the Companies Act 2006 s 836: see PARA 1395. As to the meaning of 'distribution' see PARA 1389.

4 As to the preparation of annual accounts see PARA 714 et seq.

5 le by reference to the items mentioned in the Companies Act 2006 s 836(1): see PARA 1395 heads (1)-(3).

6 le the provisions of the Companies Act 2006 Pt 23 (ss 829-853): see PARA 1389 et seq; the text and notes 1-5, 7-20; and PARA 1397 et seq.

7 Companies Act 2006 s 837(2). The provisions of s 837 have effect subject to s 845 (distributions in kind: see PARA 1404): s 845(5).

8 As to exemptions from audit see PARA 908 et seq.

9 As to the meaning of 'director' under the Companies Acts see PARA 478.

10 As to the appointment of auditors see PARA 912 et seq.

11 As to the auditor's report on the annual accounts see PARA 924.

12 Companies Act 2006 s 837(3).

13 As to the meaning of 'qualified' see PARA 924 note 13.

14 le but before the distribution is made: *Precision Dippings Ltd v Precision Dippings Marketing Ltd* [1986] Ch 447, [1985] 3 WLR 812, CA. This requirement of a written statement by the auditors is not a merely procedural matter which may be waived by the unanimous consent of all members: *Precision Dippings Ltd v Precision Dippings Marketing Ltd* [1986] Ch 447, [1985] 3 WLR 812, CA. As to informal unanimous consent see PARA 666.

15 Companies Act 2006 s 837(4)(a).

16 As to the meaning of 'private company' under the Companies Acts see PARA 102.

17 le in accordance with the Companies Act 2006 s 423: see PARA 850. As to who qualifies as a member of a company see PARA 321.

18 As to the meaning of 'public company' under the Companies Acts see PARA 102.

19 Companies Act 2006 s 837(4)(b). As to meetings of members see PARA 629 et seq.

20 Companies Act 2006 s 837(5).

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1397. Requirements where interim accounts used by a public company.

Where interim accounts¹ are prepared for a proposed distribution² by a public company³, the following requirements apply⁴. The accounts must have been properly prepared⁵, or have been so prepared subject to matters that are not material for determining⁶ whether the distribution would contravene the statutory provisions⁷ restricting distributions⁸. The balance sheet⁹ comprised in the accounts must have been signed¹⁰ in accordance with the relevant statutory provision¹¹; and a copy of the accounts must have been delivered to the registrar¹². Any statutory requirement¹³ as to the delivery of a certified translation into English of any document forming part of the accounts must also have been met¹⁴.

1 As to interim accounts see PARA 1395 the text and notes 13-14.

2 As to the meaning of 'distribution' see PARA 1389.

3 As to the meaning of 'public company' under the Companies Acts see PARA 102. As to when the use of interim accounts is permissible see the Companies Act 2006 ss 836(2)(a), 838(1); and PARA 1395.

4 Companies Act 2006 s 838(2). The provisions of s 838 have effect subject to s 845 (distributions in kind: see PARA 1404): s 845(5).

5 'Properly prepared' means prepared in accordance with the Companies Act 2006 ss 395-397 (requirements for company individual accounts: see PARA 716 et seq), applying those requirements with such modifications as are necessary because the accounts are prepared otherwise than in respect of an accounting reference period: Companies Act 2006 ss 838(4), 839(4). As to the meaning of 'accounting reference period' see PARA 712. Special statutory provisions apply with regard to the preparation of company individual accounts for banking and insurance companies: see PARA 701 et seq.

6 Ie by reference to the items mentioned in the Companies Act 2006 s 836(1): see PARA 1395 heads (1)-(3).

7 Ie the provisions of the Companies Act 2006 Pt 23 (ss 829-853): see PARA 1389 et seq; the text and notes 1-6, 8-14; and PARA 1398 et seq.

8 Companies Act 2006 s 838(3).

9 As to the meaning of 'balance sheet' see PARA 715.

10 Ie signed in accordance with the Companies Act 2006 s 414: see PARA 815.

11 Companies Act 2006 s 838(5).

12 Companies Act 2006 s 838(6). As to the meaning of 'registrar' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

13 Ie any requirement of the Companies Act 2006 Pt 35 (ss 1059A-1120): see PARA 131 et seq.

14 Companies Act 2006 s 838(6). See also the Companies (Forms) Regulations 1985, SI 1985/854, reg 6 (persons who may certify a translation of a document into English to be a correct translation for the purposes of the Companies Act 1985 s 272 (repealed and replaced by the Companies Act 2006 s 838)).

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1398. Requirements where initial accounts used by a public company.

Where initial accounts¹ are prepared for a proposed distribution² by a public company³, the following requirements apply⁴. The accounts must have been properly prepared⁵, or have been so prepared subject to matters that are not material for determining⁶ whether the distribution would contravene the statutory provisions⁷ restricting distributions⁸. The company's auditor⁹ must have made a report stating whether, in his opinion, the accounts have been properly prepared¹⁰. If that report was qualified¹¹ the auditor must have stated in writing, either at the time of his report or subsequently¹², whether in his opinion the matters in respect of which his report is qualified are material for determining whether a distribution would contravene the statutory provisions restricting distributions¹³; and a copy of that statement must have been laid before the company in general meeting¹⁴. A copy of the accounts, of the auditor's report and of any auditor's statement must have been delivered to the registrar¹⁵; and any statutory requirement¹⁶ as to the delivery of a certified translation into English of any of those documents must also have been met¹⁷.

1 As to initial accounts see PARA 1395 the text and notes 16-17.

2 As to the meaning of 'distribution' see PARA 1389.

3 As to the meaning of 'public company' under the Companies Acts see PARA 102. As to when the use of interim accounts is permissible see the Companies Act 2006 ss 836(2)(b), 839(1); and PARA 1395.

4 Companies Act 2006 s 839(2).

The provisions of s 839 have effect subject to s 845 (distributions in kind: see PARA 1404): s 845(5).

5 As to the meaning of 'properly prepared' for these purposes see PARA 1397 note 5. Note that special statutory provisions apply with regard to the preparation of company individual accounts for banking and insurance companies: see PARA 701 et seq.

6 le by reference to the items mentioned in the Companies Act 2006 s 836(1): see PARA 1395 heads (1)-(3).

7 le the provisions of the Companies Act 2006 Pt 23 (ss 829-853): see PARA 1389 et seq; the text and notes 1-6, 8-17; and PARA 1399 et seq.

8 Companies Act 2006 s 839(3).

9 As to the appointment of auditors see PARA 912 et seq.

10 Companies Act 2006 s 839(5).

11 As to the meaning of 'qualified' see PARA 924 note 13.

12 See PARA 1396 note 14.

13 Companies Act 2006 s 839(6)(a).

14 Companies Act 2006 s 839(6)(b) (substituted by SI 2009/1941). As to meetings of members see PARA 629 et seq.

15 Companies Act 2006 s 839(7). As to the meaning of 'registrar' see PARA 131 note 2.

16 le any requirement of the Companies Act 2006 Pt 35 (ss 1059A-1120): see PARA 131 et seq.

17 Companies Act 2006 s 839(7).

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1399. Application of provisions to successive distributions etc.

In determining whether a proposed distribution¹ may be made by a company² in a case where one or more previous distributions have been made in pursuance of a determination made by reference to the same relevant accounts³, or relevant financial assistance⁴ has been given, or other relevant payments have been made, since those accounts were prepared, the statutory provisions restricting distributions⁵ apply as if the amount of the proposed distribution was increased by the amount of the previous distributions, financial assistance and other payments⁶. The financial assistance and other payments that are relevant for this purpose are⁷:

644 (1) financial assistance lawfully given by the company out of its distributable profits⁸;

645 (2) prohibited financial assistance given by the company⁹ in a case where the giving of that assistance reduces the company's net assets¹⁰ or increases its net liabilities¹¹;

- 646 (3) payments made by the company in respect of the purchase by it of shares¹² in the company, except a payment lawfully made otherwise than out of distributable profits¹³;
- 647 (4) payments of any specified description¹⁴ to be made out of distributable profits¹⁵.

1 As to the meaning of 'distribution' see PARA 1389.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 As to the accounts which are relevant for these purposes see PARA 1395.

4 For these purposes, 'financial assistance' has the same meaning as in the Companies Act 2006 Pt 18 Ch 2 (ss 277-683) (see s 677; and PARA 1223): s 840(3).

5 I.e. the Companies Act 2006 Pt 23 (ss 829-853): see PARA 1389 et seq; the text and notes 1-4, 6-15; and PARA 1400 et seq.

6 Companies Act 2006 s 840(1). The provisions of s 840 have effect subject to s 845 (distributions in kind: see PARA 1404): s 845(5).

7 Companies Act 2006 s 840(2).

8 Companies Act 2006 s 840(2)(a). As to the meaning of 'profit' see PARA 1390 note 3.

9 I.e. financial assistance given by the company in contravention of the Companies Act 2006 s 678 or s 679: see PARAS 1224-1225.

10 For the purpose of applying the Companies Act 2006 s 840(2)(b) (see head (2) in the text) in relation to any financial assistance, 'net assets' means the amount by which the aggregate amount of the company's assets exceeds the aggregate amount of its liabilities, and 'net liabilities' means the amount by which the aggregate amount of the company's liabilities exceeds the aggregate amount of its assets, taking the amount of the assets and liabilities to be as stated in the company's accounting records immediately before the financial assistance is given: Companies Act 2006 s 840(4). For this purpose a company's liabilities include any amount retained as reasonably necessary for the purposes of providing for any liability the nature of which is clearly defined, and which is either likely to be incurred or certain to be incurred but uncertain as to amount or as to the date on which it will arise: s 840(5).

11 Companies Act 2006 s 840(2)(b); and see note 10.

12 As to the meaning of 'share' see PARA 1042.

13 Companies Act 2006 s 840(2)(c).

14 I.e. payments of any description specified in the Companies Act 2006 s 705 (payments apart from purchase price of shares to be made out of distributable profits): see PARA 1235.

15 Companies Act 2006 s 840(2)(d).

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1400. Treatment in relevant accounts of realised losses and profits and revaluation of fixed assets.

The following provisions have effect for the purposes of the statutory provisions¹ restricting distributions². The following are treated as realised losses³:

- 648 (1) in the case of Companies Act accounts⁴, provisions of a kind specified for these purposes by regulations⁵, except revaluation provisions⁶;
- 649 (2) in the case of IAS accounts⁷, provisions of any kind, except revaluation provisions⁸.

Where on the revaluation of a fixed asset, an unrealised profit⁹ is shown to have been made, and on or after the revaluation, a sum is written off or retained for depreciation of that asset over a period, an amount equal to the amount by which that sum exceeds the sum which would have been so written off or retained for the depreciation of that asset over that period, if that profit had not been made, is treated as a realised profit¹⁰ made over that period¹¹. In determining¹² whether a company has made a profit or loss in respect of an asset where there is no record of the original cost of the asset, or where a record cannot be obtained without unreasonable expense or delay, its cost is taken to be the value ascribed to it in the earliest available record of its value made on or after its acquisition by the company¹³.

1 Ie for the purposes of the Companies Act 2006 Pt 23 (ss 829-853): see PARA 1389 et seq; the text and notes 2-13; and PARA 1401 et seq.

2 Companies Act 2006 s 841(1).

3 Companies Act 2006 s 841(2). As to the meanings of 'losses' and 'realised losses' see PARA 1390 notes 3, 5.

4 As to the meaning of 'Companies Act accounts' see PARAS 717, 776.

5 Ie specified for these purposes by regulations under the Companies Act 2006 s 396: see PARA 728. Accordingly, in relation to companies subject to the small companies regime under the Companies Act 2006 Pt 15 (ss 380-474) (see PARA 693 et seq), the specified provisions for the purposes of s 841(2)(a) are provisions of any of the kinds mentioned in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, Sch 7 paras 1, 2 (ie any amount written off by way of providing for depreciation or diminution in value of assets (see Sch 7 para 1) and any amount retained as reasonably necessary for the purpose of providing for any liability the nature of which is clearly defined and which is either likely to be incurred, or certain to be incurred but uncertain as to amount or as to the date on which it will arise (see Sch 7 para 2)): regs 2(3), 12(d), Sch 7 para 6 (reg 12(d), Sch 7 para 6 both added by SI 2009/1581). In relation to companies other than those which are subject to the small companies regime under the Companies Act 2006 Pt 15, the specified provisions for the purposes of s 841(2)(a) are: (1) provisions within the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, Sch 9 para 2 (ie any amount retained as reasonably necessary for the purpose of providing for any liability the nature of which is clearly defined and which is either likely to be incurred, or certain to be incurred but uncertain as to amount or as to the date on which it will arise: see Sch 9 para 2); and (2) in the case of an insurance company, any amount included under liabilities items Ba (fund for future appropriations), C (technical provisions) and D (technical provisions for linked liabilities) in a balance sheet drawn up in accordance with Sch 3 (see PARA 701): regs 2(4), 12(d), Sch 9 para 8 (reg 12(d), Sch 9 para 8 both added by SI 2009/1581). The Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 12(d), Sch 7 para 6, and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 12(d), Sch 9 para 8 apply in relation to financial years beginning on or after 6 April 2008 which have not ended before 1 October 2009 (ie before the date of coming into force of the Companies Act 2006 (Accounts, Reports and Audit) Regulations 2009, SI 2009/1581: see reg 1(2)): see reg 1(4).

6 Companies Act 2006 s 841(2)(a). A 'revaluation provision' means a provision in respect of a diminution in value of a fixed asset appearing on a revaluation of all the fixed assets of the company, or of all of its fixed assets other than goodwill: s 841(3). For the purpose of s 841(2), (3) any consideration by the directors of the value at a particular time of a fixed asset is treated as a revaluation provided (1) the directors are satisfied that the aggregate value at that time of the fixed assets of the company that have not actually been revalued is not less than the aggregate amount at which they are then stated in the company's accounts; and (2) it is stated in a note to the accounts (a) that the directors have considered the value of some or all of the fixed assets of the company without actually revaluing them; (b) that they are satisfied that the aggregate value of those assets at the time of their consideration was not less than the aggregate amount at which they were then stated in the company's accounts; and (c) that accordingly, by virtue of this provision, amounts are stated in the accounts on the basis that a revaluation of fixed assets of the company is treated as having taken place at that time: s 841(4). For the purposes of Pt 23, 'fixed assets' means assets of a company which are intended for use on a continuing basis in the company's activities: s 853(1), (6). As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of 'director' see PARA 478.

Special statutory provisions apply with regard to the preparation of company individual accounts for banking and insurance companies: see PARA 701 et seq. See also PARA 1401.

- 7 As to the meaning of 'IAS accounts' see PARAS 717, 776.
- 8 Companies Act 2006 s 841(2)(b); and see note 6.
- 9 As to the meaning of 'profit' see PARA 1390 note 3.
- 10 As to the meaning of 'realised profit' see PARA 1390 note 5.
- 11 Companies Act 2006 s 841(5).
- 12 Ie for the purposes of the Companies Act 2006 Pt 23.
- 13 Companies Act 2006 s 842.

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1401. Treatment in accounts of realised profits and loss of long term insurance company business.

The following provisions have effect for the purposes of the statutory provisions restricting distributions¹ as they apply in relation to an authorised insurance company², other than an insurance special purpose vehicle³, carrying on long-term business⁴:

- 650 (1) an amount included in the relevant part of the company's balance sheet⁵ that represents a surplus in the fund or funds maintained by it in respect of its long-term business⁶, and that has not been allocated to policy holders or, as the case may be, carried forward unappropriated in accordance with asset identification rules made under the Financial Services and Markets Act 2000⁷, is treated as a realised profit⁸;
- 651 (2) a deficit in the fund or funds⁹ maintained by the company in respect of its long-term business is treated as a realised loss¹⁰.

Subject to heads (1) and (2) above, any profit or loss arising in the company's long-term business is to be left out of account¹¹.

1 Ie for the purposes of the Companies Act 2006 Pt 23 (ss 829-853): see PARA 1389 et seq; the text and notes 2-11; and PARA 1402 et seq.

2 As to the meaning of 'authorised insurance company' under the Companies Acts see PARA 701 note 4.

3 For these purposes, 'insurance special purpose vehicle' means a special purpose vehicle within the meaning of European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.05, p 1) of 16 November 2005 on reinsurance and amending EEC Council Directive 73/239 (OJ L228, 16.8.73, p 3) and EEC Council Directive 92/49 (OJ L228, 11.8.92, p 1) as well as EC Council Directive 98/78 (OJ L330, 5.12.98, p 1) and EC Council Directive 2002/83 (OJ L345, 19.12.02, p 1) (ie any undertaking, whether incorporated or not, other than an existing insurance or reinsurance undertaking, which assumes risks from insurance or reinsurance undertakings and which fully funds its exposure to such risks through the proceeds of a debt issuance or some other financing mechanism where the repayment rights of the providers of such debt or other financing mechanism are subordinated to the reinsurance obligations of such a vehicle: European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.05, p 1) art 2.1(p)): Companies Act 2006 s 843(8) (added by SI 2007/3253).

4 Companies Act 2006 s 843(1) (amended by SI 2007/3253). For these purposes, 'long-term business' means business that consists of effecting or carrying out contracts of long-term insurance; but this definition must be read with the Financial Services and Markets Act 2000 s 22 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 84), any relevant order under s 22 and Sch 2 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 84-85): Companies Act 2006 s 843(7).

5 For these purposes, the relevant part of the balance sheet is that part of the balance sheet that represents accumulated profit or loss: Companies Act 2006 s 843(3)(a). As to the meanings of 'profit' and 'loss' see PARA 1390 note 3; and as to the meaning of 'balance sheet' see PARA 715.

6 For these purposes, a surplus in the fund or funds maintained by the company in respect of its long-term business means an excess of the assets representing that fund or those funds over the liabilities of the company attributable to its long-term business, as shown by an actuarial investigation: Companies Act 2006 s 843(3)(b). An 'actuarial investigation' means an investigation made into the financial condition of an authorised insurance company in respect of its long-term business (1) carried out once in every period of 12 months in accordance with rules made under the Financial Services and Markets Act 2000 Pt X (ss 138-164) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 447 et seq); or (2) carried out in accordance with a requirement imposed under s 166 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 448), by an actuary appointed as actuary to the company: Companies Act 2006 s 843(6).

7 The asset identification rules made under the Financial Services and Markets Act 2000 s 142(2): see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 27.

8 Companies Act 2006 s 843(2). As to the meaning of 'realised profit' see PARA 1390 note 5.

9 For this purpose a deficit in any such fund or funds means an excess of the liabilities of the company attributable to its long-term business over the assets representing that fund or those funds, as shown by an actuarial investigation: Companies Act 2006 s 843(4).

10 Companies Act 2006 s 843(4). As to the meanings of 'loss' and 'realised loss' see PARA 1390 notes 3, 5.

11 Companies Act 2006 s 843(5).

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1402. Treatment in accounts of company's development costs.

Subject to the following exceptions, where development costs are shown or included as an asset in a company's¹ accounts, any amount shown or included in respect of those costs is treated²:

- 652 (1) in relation to distributions³ to be made out of profits⁴ available for the purpose⁵, as a realised loss⁶; and
- 653 (2) in relation to distributions by investment companies out of accumulated revenue profits⁷, as a realised revenue loss⁸.

This does not, however, apply to any part of that amount representing an unrealised profit made on revaluation of those costs⁹. Nor does it apply¹⁰ if:

- 654 (a) there are special circumstances in the company's case justifying the directors¹¹ in deciding that the amount there mentioned is not to be treated as so required¹²;

- 655 (b) it is stated in a note to the accounts¹³ that the amount is not to be so treated¹⁴; and
- 656 (c) the note explains the circumstances relied upon to justify the decision of the directors to that effect¹⁵.

1 As to the meaning of 'company' under the Companies Acts see PARA 24.

2 Companies Act 2006 s 844(1).

3 As to the meaning of 'distribution' see PARA 1389.

4 As to the meaning of 'profit' see PARA 1390 note 3.

5 Ie for the purposes of the Companies Act 2006 s 830: see PARA 1390.

6 Companies Act 2006 s 844(1)(a). As to the meanings of 'loss' and 'realised loss' see PARA 1390 notes 3, 5.

7 Ie for the purposes of the Companies Act 2006 s 832: see PARA 1394.

8 Companies Act 2006 s 844(1)(b).

9 Companies Act 2006 s 844(2).

10 Companies Act 2006 s 844(3).

11 As to the meaning of 'director' under the Companies Acts see PARA 478.

12 Companies Act 2006 s 844(3)(a).

13 Ie (1) in the case of Companies Act accounts, in the note required by regulations under the Companies Act 2006 s 396 (see PARA 728) as to the reasons for showing development costs as an asset; or (2) in the case of IAS accounts, in any note to the accounts: s 844(3)(b)(i), (ii). As to the meaning of 'Companies Act accounts' see PARAS 717, 776; and as to the meaning of 'IAS accounts' see PARAS 717, 776. As to the treatment of development costs as an asset see PARA 720. Special statutory provisions apply with regard to the preparation of company individual accounts for banking and insurance companies: see PARA 701 et seq.

14 Companies Act 2006 s 844(3)(b).

15 Companies Act 2006 s 844(3)(c).

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1403. Saving for provision in articles operative before the commencement of the Companies Act 1980.

Where immediately before the relevant date¹ a company² was authorised by a provision of its articles³ to apply its unrealised profits⁴ in paying up in full or in part unissued shares⁵ to be allotted to members⁶ of the company as fully or partly paid bonus shares⁷, that provision continues, subject to any alteration of the articles, as authority for those profits to be so applied after that date⁸.

1 For this purpose, the relevant date is: (1) for companies registered in Great Britain, 22 December 1980; (2) for companies registered in Northern Ireland, 1 July 1983: Companies Act 2006 s 848(2).

- 2 As to the meaning of 'company' under the Companies Acts see PARA 24.
- 3 As to the meaning of 'articles' under the Companies Acts see PARA 228 note 2.
- 4 As to the meaning of 'profit' see PARA 1390 note 3.
- 5 As to the meaning of 'share' see PARA 1042.
- 6 As to who qualifies as a member of a company see PARA 321.
- 7 As to bonus shares see PARA 1053.
- 8 Companies Act 2006 s 848(1).

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(iii) Distributions in Kind

1404. Distributions in kind.

The following provisions apply for determining the amount of a distribution¹ consisting of or including, or treated as arising in consequence of, the sale, transfer or other disposition by a company² of a non-cash asset³ where at the time of the distribution the company has profits⁴ available for distribution⁵, and if the amount of the distribution were to be determined in accordance with these provisions, the company could make the distribution without contravening the statutory provisions⁶ restricting distributions⁷. The amount of the distribution, or the relevant part of it, is taken to be⁸:

- 657 (1) in a case where the amount or value of the consideration for the disposition is not less than the book value of the asset, zero⁹;
- 658 (2) in any other case, the amount by which the book value of the asset exceeds the amount or value of any consideration for the disposition¹⁰.

Where a company makes a distribution consisting of or including, or treated as arising in consequence of, the sale, transfer or other disposition by the company of a non-cash asset, and any part of the amount at which that asset is stated in the relevant accounts represents an unrealised profit¹¹, that profit is treated as a realised profit¹²:

- 659 (a) for the purpose of determining the lawfulness of the distribution¹³, whether before or after the distribution takes place¹⁴; and
- 660 (b) for the purpose of the application, in relation to anything done with a view to or in connection with the making of the distribution, of any provision of regulations¹⁵ under which only realised profits are to be included in or transferred to the profit and loss account¹⁶.

- 1 As to the meaning of 'distribution' see PARA 1389.
- 2 As to the meaning of 'company' under the Companies Acts see PARA 24.
- 3 As to the meaning of 'non-cash asset' see PARA 564 note 6.
- 4 As to the meaning of 'profit' see PARA 1390 note 3.

5 For these purposes, the company's profits available for distribution are treated as increased by the amount (if any) by which the amount or value of any consideration for the disposition exceeds the book value of the asset: Companies Act 2006 s 845(3). 'Book value', in relation to an asset, means (1) the amount at which the asset is stated in the relevant accounts; or (2) where the asset is not stated in those accounts at any amount, zero: s 845(4).

6 Ie the provisions of the Companies Act 2006 Pt 23 (ss 829-853): see PARA 1389 et seq; the text and notes 7-16; and PARA 1405 et seq.

7 Companies Act 2006 s 845(1). The provisions of Pt 23 Ch 2 (ss 836-840) (justification of distribution by reference to accounts: see PARAS 1395-1399) have effect subject to s 845: s 845(5). As to the application of ss 845, 846 for the purposes of any rule of law requiring distributions to be paid out of profits or restricting the return of capital to members see s 851; and PARA 1391.

8 Companies Act 2006 s 845(2).

9 Companies Act 2006 s 845(2)(a).

10 Companies Act 2006 s 845(2)(b).

11 Companies Act 2006 s 846(1).

12 Companies Act 2006 s 846(2). As to the meaning of 'realised profit' see PARA 1390 note 5.

13 Ie in accordance with the Companies Act 2006 Pt 23.

14 Companies Act 2006 s 846(2)(a).

15 Ie any regulations under the Companies Act 2006 s 396: see PARA 728.

16 Companies Act 2006 s 846(2)(b). As to the meaning of 'profit and loss account' see PARA 715. As to the accounting principles set out in regulations whereby only realised profits may be included in the profit and loss account see PARA 718. Special statutory provisions apply with regard to the preparation of company individual accounts for banking and insurance companies: see PARA 701 et seq.

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(iv) Unlawful Distributions

1405. Consequences of unlawful distribution under statute.

Where a distribution¹, or part of one, made by a company² to one of its members³ is made in contravention of the statutory provisions restricting distributions⁴, then if at the time of the distribution the member knows or has reasonable grounds for believing that it is so made⁵, he is liable to repay it, or that part of it, as the case may be, to the company, or, in the case of a distribution made otherwise than in cash⁶, to pay the company a sum equal to the value of the distribution, or part, at that time⁷. This does not, however, apply in relation to financial assistance given by a company in contravention of the statutory prohibition⁸ or any payment made by a company in respect of the redemption or purchase by the company of shares⁹ in itself¹⁰; and the liability to repay is without prejudice to any obligation otherwise imposed on a member of a company to repay a distribution unlawfully made to him¹¹.

1 As to the meaning of 'distribution' see PARA 1389.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 As to who qualifies as a member of a company see PARA 321.

4 Ie in contravention of the provisions of the Companies Act 2006 Pt 23 (ss 829-853): see PARA 1389 et seq; the text and notes 1-3, 5-10; and PARA 1406. As to a distribution which was in part unlawful see *Re Marini Ltd* [2003] EWHC 334 (Ch), [2004] BCC 172.

5 Applying settled principles of Community law, and EEC Council Directive 77/91 (OJ L26, 31.1.1977, p 1), arts 15, 16, which the domestic legislation is designed to implement, a shareholder is liable under what is now the Companies Act 2006 s 847 to repay a distribution if he knew or ought reasonably to have known of the facts which constituted a contravention of the Act, regardless of whether or not he knew of the legal rules which restrict distributions; accordingly, it is not open to a shareholder to claim that he is not liable to return a distribution because he did not know of the restrictions on the making of distributions in the Act: *It's a Wrap (UK) Ltd v Gula* [2006] EWCA Civ 544, [2006] 2 BCLC 634 (rvsg *It's a Wrap (UK) Ltd v Gula* [2005] EWHC 2015 (Ch), [2006] 1 BCLC 143) (decided under the Companies Act 1985 s 277 (repealed and replaced by the Companies Act 2006 s 847); held that since the defendants knew that the company had no profits, they were to be taken as having known that the dividend payments for 2001 and 2002 were made in contravention of the 1985 Act).

6 As to distributions in kind see PARA 1404.

7 Companies Act 2006 s 847(1), (2).

8 Ie financial assistance given by a company in contravention of the Companies Act 2006 s 678 or s 679: see PARAS 1224-1225.

9 As to the meaning of 'share' see PARA 1042.

10 Companies Act 2006 s 847(4).

11 See the Companies Act 2006 s 847(3); and PARA 1406.

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1406. Consequences of unlawful distribution at common law.

The statutory provision¹ imposing an obligation on a member² of a company³ to repay an unlawful distribution made to him is without prejudice to any obligation otherwise imposed on a member of a company to repay a distribution⁴ unlawfully made to him⁵. The liability to repay does not, however, apply in relation to financial assistance given by a company in contravention of the statutory prohibition⁶ or any payment made by a company in respect of the redemption or purchase by the company of shares⁷ in itself⁸.

1 Ie the Companies Act 2006 s 847(1), (2): see PARA 1405.

2 As to who qualifies as a member of a company see PARA 321.

3 As to the meaning of 'company' under the Companies Acts see PARA 24.

4 As to the meaning of 'distribution' see PARA 1389.

5 Companies Act 2006 s 847(3). Shareholders who receive an improperly-declared dividend with knowledge that it is improper hold the dividend on constructive trust for the company: see PARA 1407.

6 Ie financial assistance given by a company in contravention of the Companies Act 2006 s 678 or s 679: see PARAS 1224-1225.

7 As to the meaning of 'share' see PARA 1042.

8 Companies Act 2006 s 847(4).

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1407. Liability of directors, auditors and shareholders where improper dividend is paid.

Directors¹ and auditors² who are parties to the payment of an improper dividend are liable to claims for recovery, or, in the case of winding up, for misfeasance³; and the amount improperly paid may be recovered from them with interest⁴. Directors are accountable, because of their trustee-like responsibilities, for the full amount paid out to the shareholders and not just for the difference between the unlawful dividend and any dividend which could lawfully have been paid⁵. In an appropriate case, the payment of an improper dividend may justify the disqualification of a director⁶.

Where directors have paid improper dividends, shareholders who have received the dividend with knowledge that it was improper are bound to indemnify the directors against their liability in respect of the payment⁷. A shareholder who knows all the relevant facts and who has been paid an improper dividend cannot maintain a claim against the company and its directors to make the directors liable for paying such a dividend unless he has first returned the dividend to the company, although he may be ordered to repay that dividend on a counterclaim by the company⁸. Shareholders who receive an improperly-declared dividend with knowledge that it is improper hold the dividend on constructive trust for the company⁹. Improper dividends which are innocently received by shareholders, even if directors, cannot be recovered, at any rate where there is no winding up¹⁰.

1 See *Denham & Co* (1883) 25 ChD 752; *Municipal Freehold Land Co Ltd v Pollington* (1890) 59 LJ Ch 734; *Prefontaine v Grenier* [1907] AC 101, PC; *Turquand v Marshall* (1869) 4 Ch App 376 (bad debts); *Re Mercantile Trading Co, Stringer's Case* (1869) 4 Ch App 475; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688 et seq. As to the consequences of an unlawful distribution see PARAS 1405-1406. The solvency of the company is irrelevant to a director's liability in respect of an improper dividend: *Bairstow v Queens Moat Houses plc* [2001] EWCA Civ 712, [2001] 2 BCLC 531.

2 See *Re London and General Bank* [1895] 2 Ch 166, CA; *Re London and General Bank (No 2)* [1895] 2 Ch 673, CA (auditors appointed as such in pursuance of statute and articles of association); *Re Thomas Gerrard & Son Ltd* [1968] Ch 455, [1967] 2 All ER 525.

3 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688 et seq.

4 *Re National Bank of Wales Ltd* [1899] 2 Ch 629, CA; affd without affecting the decision on this point sub nom *Dovey v Cory* [1901] AC 477, HL (where the rate of interest allowed was 5% per annum); overruled in part, as to the deduction of income tax, by *Riches v Westminster Bank Ltd* [1947] AC 390, [1947] 1 All ER 469, HL.

5 *Bairstow v Queens Moat Houses plc* [2001] EWCA Civ 712, [2001] 2 BCLC 531; *Inn Spirit Ltd v Burns* [2002] EWHC 1731 (Ch), [2002] 2 BCLC 780. See however *Re Loquitur Ltd, IRC v Richmond* [2003] EWHC 999 (Ch), [2003] 2 BCLC 442 (distribution was unlawful because the accounts failed to make proper provision for a tax liability and the court, exercising its direction under the Insolvency Act 1986 s 212(3) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688), limited the directors' obligation to account to the repayment of an amount equal to the tax liability rather than the full amount of the unlawful distribution). In *Re Paycheck Services 3 Ltd, Revenue and Customs Comrs v Holland* [2009] EWCA Civ 625 at [93]-[98], [2009] 2 BCLC 309 at [93]-[98], Rimer LJ stated (obiter) that the established remedy against a director liable in respect of the payment of an unlawful dividend is to require the director to reinstate the amount of the payment. At [125], Elias LJ (also obiter) agreed with this principle and added that it is permissible to have regard to the question of

loss when considering the issue of relief under the Insolvency Act 1986 s 212 (misfeasance provisions: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688 et seq). On this latter point, see also *Re Paycheck Services 3 Ltd, Revenue and Customs Comrs v Holland* at [110] per Rimer LJ (court would obviously have a discretion under the Insolvency Act 1986 s 212 to confine any order to the amount of the company's deficiency on winding up).

6 See *Re AG (Manchester) Ltd (in liq), Official Receiver v Watson* [2008] EWHC 64 (Ch), [2008] 1 BCLC 321 (abdication of responsibility by director with regard to how and whether substantial dividends should be paid justified a finding of unfitness to be a director and, consequently, disqualification).

7 *Moxham v Grant* [1900] 1 QB 88, CA; *Re National Funds Assurance Co* (1878) 10 ChD 118; *Re Alexandra Palace Co* (1882) 21 ChD 149.

8 *Towers v African Tug Co* [1904] 1 Ch 558, CA.

9 *Precision Dippings Ltd v Precision Dippings Marketing Ltd* [1986] Ch 447, [1985] 3 WLR 812, CA (parent company affixed with knowledge of all the facts which made the dividend improper; liable as constructive trustee); *Re Cleveland Trust plc* [1991] BCLC 424, [1991] BCC 33 (to the extent that the dividend was unauthorised, recipient was a constructive trustee to hand back the dividend); *Allied Carpets Group plc v Nethercott* [2001] BCC 81 (director, as shareholder, held dividend on constructive trust for the company when he received it with knowledge that it was improper). See also *Moxham v Grant* [1900] 1 QB 88, CA.

10 *Towers v African Tug Co* [1904] 1 Ch 558, CA; *Lucas v Fitzgerald* (1903) 20 TLR 16. See also *James v Eve* (1873) LR 6 HL 335. The prospect of former directors being able to claim contributions from innocent recipients of unlawful dividends (who became aware of the illegality subsequently) was raised but left open in *Bairstow v Queens Moat Houses plc* [2001] EWCA Civ 712 at [45]-[48], [2001] 2 BCLC 531 at [45]-[48].

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(v) Declaration and Payment of Dividends

1408. Meaning of 'dividend'.

The ordinary meaning of 'dividend' is a share of profits, whether at a fixed rate or otherwise, allocated to the holders of shares in a company¹. The term is generally used with reference to trading or other companies², and to payments made to members of a company as such and not by way of remuneration for services³. Although it usually implies a share of profits periodically payable, it may also refer to such shares of profits as are divided only occasionally and are usually called 'bonuses' or 'bonus dividends'⁴. The terms 'preference dividend', 'preferential dividend', and 'cumulative preferential dividend' refer to shares having preferential rights⁵. An 'interim dividend' is a dividend declared at some date between ordinary general meetings⁶.

A voucher or written authority for payment to a shareholder of the amount of a dividend on his shares is usually described as a dividend warrant⁷.

1 *Henry v Great Northern Rly Co* (1857) 1 De G & J 606; *Chelsea Water Works Co v Metropolitan Water Board* [1904] 2 KB 77, CA; *Bond v Barrow Haematite Steel Co* [1902] 1 Ch 353 at 363 per Farwell J. Cf *Lamplough v Kent Waterworks (Company of Proprietors)* [1903] 1 Ch 575 at 580-581, CA, per Collins MR (on appeal without taking this point sub nom *Kent Waterworks (Company of Proprietors) v Lamplough* [1904] AC 27, HL).

2 *Jones v Ogle* (1872) 8 Ch App 192 at 197, CA, per Lord Selborne LC (decided under the Apportionment Act 1870).

3 *Royal College of Music v Vestry of St Margaret's and St John's, Westminster* [1898] 1 QB 809 at 819, CA, per Smith LJ. The payment of a dividend by a company to its shareholders is not a transaction relating to securities for the purposes of the Income and Corporation Taxes Act 1988 s 703 (see **INCOME TAXATION** vol 23(2)).

(Reissue) PARA 1569) because neither the shares themselves nor the rights attached to them are affected by a payment which merely gives effect to the shareholders' rights: *IRC v Laird Group plc* [2003] UKHL 54, [2003] 4 All ER 669, [2003] 1 WLR 2476.

4 *Re Griffith, Carr v Griffith* (1879) 12 ChD 655.

5 See PARA 1059. Even as regards preference shares, 'interest' is not an apt word to express the return by way of share of profits to which a shareholder is entitled in respect of shares paid up in due course and not by way of advance, although it may be used as an inaccurate mode of expressing the measure of the share of profits: *Bond v Barrow Haematite Steel Co* [1902] 1 Ch 353. It is a fundamental misconception to argue that the receipt of dividends is merely a distribution of assets belonging to the shareholder: see *Hood-Barrs v IRC* [1946] 2 All ER 768, CA.

6 See further PARA 1414.

7 As to the recipient's right to request a written statement showing the amount or value of a qualifying distribution and whether or not he is entitled to a tax credit see **INCOME TAXATION** vol 23(1) (Reissue) PARA 934. As to bankers' duties and liabilities with regard to dividend warrants as cheques see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 900.

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1409. Right to dividends.

The general rights of shareholders with reference to dividends, and the manner in which they are to be declared and paid, are usually stated in the articles of association¹. The model articles prescribed for the purposes of the Companies Act 2006² contain provisions relating to dividends³, in particular with respect to the procedure for declaring dividends⁴ and manner of payment⁵.

1 As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 229. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102.

2 Ie the Companies (Model Articles) Regulations 2008, SI 2008/3229.

3 The Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 arts 30-35, Sch 3 arts 70-77 relate to dividends and other distributions. In particular, they give power to declare dividends, including interim dividends (see PARA 1414), for the payment of non-cash distributions (see PARA 1420), and for the payment of dividends interest free (see PARA 1415). Under the Companies (Model Articles) Regulations 2008, SI 2008/3229, entitlement to a dividend or other distribution payable in respect of a share may be waived by giving the company notice in writing to that effect; but if the share has more than one holder, or more than one person is entitled to the share, whether by reason of the death or bankruptcy of one or more joint holders, or otherwise, the notice is not effective unless it is expressed to be given, and signed, by all the holders or persons otherwise entitled to the share: see Sch 1 art 35, Sch 3 art 77.

The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A arts 102-108 (disapplied by Table C art 1 in relation to companies limited by guarantee and not having a share capital) relate to dividends.

As to restrictions imposed by the Secretary of State on the payment of dividends on any shares see PARA 1547.

4 See PARA 1414.

5 See PARA 1415.

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1410. Provision for different amounts to be paid on shares.

If under the articles dividends are payable on shares, without qualifying words, this means without regard to the amount paid up on them¹, and it is not competent for a company to pay a dividend to shareholders in proportion to the amount paid up on the shares held by them². If so authorised by its articles³, a company⁴ may, however, pay a dividend in proportion to the amount paid up⁵ on each share⁶ where a larger amount is paid up on some shares than on others⁷.

1 *Oakbank Oil Co v Crum* (1882) 8 App Cas 65, HL; *Wilkinson v Cummins* (1853) 11 Hare 337. Cf *Birch v Cropper, Re Bridgewater Navigation Co Ltd* (1889) 14 App Cas 525, HL; *Re Wakefield Rolling Stock Co* [1892] 3 Ch 165 at 172 per Vaughan Williams J.

2 *Oakbank Oil Co v Crum* (1882) 8 App Cas 65, HL; *Morgan v Great Eastern Rly Co (No 2)* (1863) 1 Hem & M 560.

3 As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 229. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

4 As to the meaning of 'company' see PARA 24.

5 As to the meaning of 'paid up' (in relation to shares) see PARA 1091.

6 As to the meaning of 'share' see PARA 1042.

7 Companies Act 2006 s 581(c). Under the Companies (Model Articles) Regulations 2008, SI 2008/3229, in relation to a public company, and except as otherwise provided by the articles or the rights attached to shares, all dividends must be (1) declared and paid according to the amounts paid up on the shares on which the dividend is paid; and (2) apportioned and paid proportionately to the amounts paid up on the shares during any portion or portions of the period in respect of which the dividend is paid. If, however, any share is issued on terms providing that it ranks for dividend as from a particular date, that share ranks for dividend accordingly: Sch 3 art 71(1), (2) For the purposes of calculating dividends, no account is to be taken of any amount which has been paid up on a share in advance of the due date for payment of that amount: Sch 3 art 71(3).

See also the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 104.

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1411. Guarantee by vendor of business.

A guarantee given by the vendor on the sale of a business to a company guaranteeing the payment of dividends on its shares during a certain period is valid and enforceable¹. In such a case there is no implied contract on the company's part to carry on business² during the whole of the period, so as to disentitle it to enforce the guarantee if it discontinues; and, if there are several businesses, the discontinuance of one does not release the vendor³. In a proper case such a guarantee may be released by the company⁴. In a bona fide case payments under such a guarantee are not assets of the company which may be claimed by the creditors⁵, although it will be otherwise in the case of a guarantee fund furnished out of the purchase money payable to the vendor⁶. A guarantor of the dividends on preference shares is entitled to be subrogated to the rights of the preference shareholders, but is not entitled to claim against the company as a creditor for sums paid under such a guarantee, and any provision to this effect in the guarantee is ultra vires the company⁷.

1 *Re South Llanharran Colliery Co, ex p Jegon* (1879) 12 ChD 503, CA (where the amount payable under the guarantee was repayable out of future profits). See also *Addison v Ness* (1839) 9 TLR 607, HL.

2 As to the meaning of 'carry on business' generally see PARA 1 note 1.

3 *Brown & Co v Brown* (1877) 36 LT 272, CA.

4 *Sheffield Nickel Co v Unwin* (1877) 2 QBD 214.

5 *Re South Llanharran Colliery Co, ex p Jegon* (1879) 12 ChD 503; *Re Gelly Deg Colliery Co* (1878) 38 LT 440; *Richardson v English Crown Spelter Co Ltd* (1885) 1 TLR 249.

6 *Re Stuart's Trusts* (1876) 4 ChD 213; *Re Menell et Cie Ltd* [1915] 1 Ch 759 (where the money deposited pursuant to the guarantee was held to be available for the creditors of the purchaser company).

7 *Re Walters' Deed of Guarantee, Walters' Palm Toffee Ltd v Walters* [1933] Ch 321.

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1412. Court's interference as to dividends.

If the directors have fairly come to a conclusion as to what proportion of the profits available for distribution should be distributed as dividend, then prima facie the court will not interfere¹. The court will not compel directors to declare a dividend against their judgment², but, at the instance of an individual shareholder, it will restrain the payment of an improper dividend³. Thus payment of a dividend may be restrained if proper provision has not been made for expenses, which ought to be paid out of income⁴, or if the dividend is proposed to be paid out of any moneys not available for that purpose⁵.

Where, after properly investigating the company's financial position, the directors make an estimate of the available profits and declare a dividend on that basis, the court will not review the decision on the ground that their estimates were erroneous, if the view taken was one which reasonable persons might take⁶. Where, however, directors act without proper investigation or professional assistance, the burden lies on them to show that the payment was fairly made out of profits available for that purpose⁷. Therefore, if it would be evident on proper accounts that there were no profits available for distribution, the directors have no power to declare and pay it, and the shareholders' receipt of the dividend does not protect the directors;

for they cannot bind the company by an act which is ultra vires⁸. The court will not interfere at the instance of an unsecured creditor⁹, or at the instance of a holder of debenture stock unless his security is presently enforceable¹⁰.

1 *Stewart v Sashalite Ltd* [1936] 2 All ER 1481 at 1485 per Branson J.

2 *Lambert v Neuchatel Asphalte Co Ltd* (1882) 51 LJ Ch 882; *Yool v Great Western Rly Co* (1869) 20 LT 74; *Bond v Barrow Haematite Steel Co* [1902] 1 Ch 353. The directors have a discretion as to reserve funds: see PARA 1413.

3 *Hoole v Great Western Rly Co* (1867) 3 Ch App 262; *Bloxam v Metropolitan Rly Co* (1868) 3 Ch App 337.

4 *Re Mercantile Trading Co, Stringer's Case* (1869) 4 Ch App 475; *Davison v Gillies* (1879) cited 16 ChD 347n; *City of Glasgow Bank (Liquidators) v Mackinnon* (1882) 9 R 535; *Lee v Neuchatel Asphalte Co* (1889) 41 ChD 1, CA.

5 *Guinness v Land Corp'n of Ireland* (1882) 22 ChD 349, CA. See also *Famatina Development Corp'n Ltd v Bury* [1910] AC 439, HL.

6 *Re Peruvian Guano Co, ex p Kemp* [1894] 3 Ch 690; *Re Kingston Cotton Mill Co (No 2)* [1896] 1 Ch 331; *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 477 per Romer J. The court will not hold directors liable for erroneous estimates after they have been laid before and approved by the company: *Ammonia Soda Co Ltd v Chamberlain* [1918] 1 Ch 266 at 272, CA, per Peterson J. However, these cases must be read in the light of the statutory requirement for distributable profits (see the Companies Act 2006 s 830; and PARA 1390), determined on the basis of proper accounts (see s 836; and PARA 1395), and in the light of the modern duty owed by directors to exercise reasonable care, skill and diligence (see s 174; and PARA 548).

7 *Rance's Case* (1870) 6 Ch App 104. As to the reading of this case in the light of the statutory requirement for distributable profits etc, and in the light of the modern duty owed by directors to exercise reasonable care, skill and diligence, see note 6.

8 *Flitcroft's Case* (1882) 21 ChD 519, CA; *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 477 per Romer J. The onus of proving that a payment of dividend is ultra vires is on the person so alleging: *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 477 per Romer J. A case comparable to *Re National Bank of Wales Ltd* [1899] 2 Ch 629, CA, where revenue items were improperly charged to capital in order to swell revenue profits, could not now arise in view of the Companies Act 2006 s 853(2): see PARA 1390 note 3.

9 *Mills v Northern Rly of Buenos Ayres Co* (1870) 5 Ch App 621.

10 *Lawrence v West Somerset Mineral Rly Co* [1918] 2 Ch 250; *Cross v Imperial Continental Gas Association* [1923] 2 Ch 553.

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1413. Discretion as to reserve fund.

If the directors have power, as is usual, to set aside out of the profits a sum for or towards a reserve fund, their discretion cannot be questioned on the ground that it reduces the amount available for dividend, whether on ordinary or preference shares¹. If they have no such express power, the company has an implied power to the same effect; for there is no principle which compels a company while a going concern to divide the whole of its profits among the shareholders². The power may, however, be negated by the articles³. Subject to any provisions in the articles, the questions what portion of the profits available for distribution should be divided and what portion retained, are questions of internal management which the shareholders must decide for themselves⁴. The court cannot control or review their decision, and it makes no difference whether the undivided balance is retained to the credit of the profit

and loss account, or carried to the credit of a reserve fund, or appropriated to any other use of the company, though a power to invest would not justify speculating in stocks and shares. The company⁵ may invest the undivided money on such securities as the directors, subject to the control of a general meeting, may select⁶. As a rule, a reserve fund formed out of profits retains its character of profits, and is capable of future division as such⁷. If the formation of a reserve fund is forbidden, the articles may be altered to authorise it⁸.

1 *Long Acre Press Ltd v Odhams Press Ltd* [1930] 2 Ch 196; *Fisher v Black and White Publishing Co* [1901] 1 Ch 174, CA; *Re Buenos Ayres Great Southern Rly Co Ltd, Buenos Ayres Great Southern Rly Co Ltd v Preston* [1947] Ch 384, [1947] 1 All ER 729. See also *Burland v Earle* [1902] AC 83, PC; *Wemyss Collieries Trust Ltd v Melville* (1905) 8 F 143. Similarly, where an outside contractor agrees to take a share in the profits available for dividend, his right to share in them is subject to any provisions which may be made for reserves: *Bagot Pneumatic Tyre Co v Clipper Pneumatic Tyre Co* [1902] 1 Ch 146, CA; *Stewart v Sashalite Ltd* [1936] 2 All ER 1481.

2 *Burland v Earle* [1902] AC 83, PC.

3 *Evlving v Israel and Oppenheimer Ltd* [1918] 1 Ch 101; *R Paterson & Sons Ltd v Paterson* [1916] WN 352, HL.

4 A failure to declare dividends where profits are available, and there is an understanding between the members as to participation in the financial returns of the business, may be unfairly prejudicial conduct meriting a petition: see PARA 470.

5 *Burland v Earle* [1902] AC 83 at 95, PC.

6 *Burland v Earle* [1902] AC 83 at 96, PC.

7 *Lever v Land Securities Co Ltd* (1891) 8 TLR 94; *Re Hoare & Co Ltd and Reduced* [1904] 2 Ch 208, CA. Cf *Drown v Gaumont-British Picture Corp Ltd* [1937] Ch 402, [1937] 2 All ER 609 (the actual decision in this case is overridden by the Companies Act 2006 s 610: see PARA 1146).

8 *British Equitable Assurance Co Ltd v Baily* [1906] AC 35, HL; *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, CA.

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1414. Declaration of dividends.

Before any dividend is declared, there must be profits in an amount necessary to sustain the dividend in existence in the company itself¹. By declaring a dividend, the directors effectively release funds due to the shareholders from the directors' power to retain those funds to pay creditors and carry on the business². A power to pay interim dividends³ is usually vested by the articles in the directors⁴. The directors may pay an interim dividend, if, after making proper inquiries and subject to any statutory constraints, the profits available for distribution will be sufficient⁵. In such a case the court will not interfere with the directors' discretion at the instance of a shareholder⁶. A directors' declaration of an interim dividend may be rescinded before payment has been made⁷.

Under the model articles, the company may by ordinary resolution declare a dividend in accordance with the respective rights of the members, but no dividends may exceed the amount recommended by the directors⁸.

A failure to declare dividends where profits are available, and there is an understanding between the members as to participation in the financial returns of the business, may be unfairly prejudicial conduct meriting a petition⁹.

1 *Industrial Equity Ltd v Blackburn* (1977) 17 ALR 575, Aust HC. See also *Re Queen's Moat Houses plc, Secretary of State for Trade and Industry v Bairstow* [2004] EWHC 1730 (Ch), [2005] 1 BCLC 136 (profits may have existed in group but not in the company itself). As to the restriction on distributions by a company other than out of available profits see PARA 1390.

2 *IRC v Laird Group plc* [2003] UKHL 54, [2003] 4 All ER 669, [2003] 1 WLR 2476. See also PARA 1415 note 1.

3 An interim dividend is one payable at some date between ordinary general meetings. An interim dividend is not apportionable under the Apportionment Act 1870 unless it is declared in respect of a definite period: *Re Jowitt, Jowitt v Keeling* [1922] 2 Ch 442 at 447 per PO Lawrence J.

Under the Companies (Model Articles) Regulations 2008, SI 2008/3229, if the company's share capital is divided into different classes, no interim dividend may be paid on shares carrying deferred or non-preferred rights if, at the time of payment, any preferential dividend is in arrear: reg 2, Sch 1 art 30(5); reg 4, Sch 3 art 70(5). If the directors act in good faith, they do not incur any liability to the holders of shares conferring preferred rights for any loss they may suffer by the lawful payment of an interim dividend on shares with deferred or non-preferred rights: Sch 1 art 30(7); Sch 3 art 70(7).

4 See eg the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 30(1), Sch 3 art 70(1); and the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 103. Under such an article, the payment of an interim dividend is in the sole hands of the directors, and cannot be usurped by the company: *Scott v Scott* [1943] 1 All ER 582.

As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 229. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

5 *Lucas v Fitzgerald* (1903) 20 TLR 16. See also *Towers v African Tug Co* [1904] 1 Ch 558, CA; and PARA 1390. These cases must be read in the light of the statutory requirement for distributable profits (see the Companies Act 2006 s 830; and PARA 1390), determined on the basis of proper accounts (see s 836; and PARA 1395), and in the light of the modern duty owed by directors to exercise reasonable care, skill and diligence (see s 174; and PARA 548).

6 *Lever v Land Securities Co Ltd* (1891) 8 TLR 94 (where a reserve fund of past profits was resorted to).

7 *Lagunas Nitrate Co Ltd v Schroeder & Co and Schmidt* (1901) 85 LT 22 (where an interim dividend account had been opened at a bank); *Potel v IRC* [1971] 2 All ER 504.

8 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 30(1)-(3), Sch 3 art 70(1)-(3). Unless the shareholders' resolution to declare or directors' decision to pay a dividend, or the terms on which shares are issued, specify otherwise, it must be paid by reference to each shareholder's holding of shares on the date of the resolution or decision to declare or pay it: Sch 1 art 30(4), Sch 3 art 70(4). The directors may pay at intervals any dividend payable at a fixed rate if it appears to them that the profits available for distribution justify the payment: Sch 1 art 30(6), Sch 3 art 70(6). See also the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 102.

In the absence of any evidence of discussion or agreement to declare a dividend, shareholders cannot be said to have assented to a declaration and the principle set out in *Re Duomatic Ltd* [1969] 2 Ch 365, [1969] 1 All ER 161 (see PARA 666), as to unanimous assent, cannot apply: *Queensway Systems Ltd (in liq) v Walker* [2006] EWHC 2496 (Ch), [2007] 2 BCLC 577.

9 See PARA 470.

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1415. Payment of dividends.

Upon the declaration of a dividend for the payment of which no time is stipulated, the sums due for dividend become debts immediately due from the company to the shareholders¹, and the shareholders may sue the company for the dividend. Nevertheless, the relation of trustee and beneficiary is not created, and time immediately begins to run² under the Limitation Act 1980, the period of limitation being six years³. If, however, the articles contain the usual power of the directors to manage the company's business⁴, they normally specify, when recommending a final dividend, the date on which the dividend is to be paid⁵. In this case a shareholder has no right to enforce payment until the due date for payment arrives⁶.

The articles sometimes provide that amounts due from any member in respect of calls may be deducted from any dividends payable to him⁷; but, even in the absence of such a provision, calls and dividends may be set off⁸ before a winding up commences⁹.

In the absence of special provision to the contrary¹⁰, dividends must be paid in money¹¹ and not in shares or securities¹². The articles usually provide that dividends shall not bear interest against the company¹³.

1 *Bond v Barrow Haematite Steel Co* [1902] 1 Ch 353; *Re Accrington Corp'n Steam Tramways Co* [1909] 2 Ch 40. See also *Godfrey Phillips Ltd v Investment Trust Corp'n Ltd* [1953] Ch 449, [1953] 1 All ER 7. In the case of a fixed preference dividend, the declaration of a dividend is not always essential: *Evling v Israel and Oppenheimer Ltd* [1918] 1 Ch 101. However, see *Re Catalinas Warehouses and Mole Co Ltd* [1947] 1 All ER 51. Cf *Re Buenos Ayres Great Southern Rly Co Ltd, Buenos Ayres Great Southern Rly Co Ltd v Preston* [1947] Ch 384, [1947] 1 All ER 729.

2 *Re Severn and Wye and Severn Bridge Rly Co* [1896] 1 Ch 559; *Dalton v Midland Counties Rly Co* (1853) 13 CB 474 at 478 per Jervis CJ.

3 See the Limitation Act 1980 s 5; and **LIMITATION PERIODS** vol 68 (2008) PARA 956. See also *Re Compania De Electricidad de la Provincia de Buenos Aires Ltd* [1980] Ch 146, [1978] 3 All ER 668 (not following *Re Artisans' Land and Mortgage Corp'n* [1904] 1 Ch 796 and *Re Drogheda Steampacket Co* [1903] 1 IR 512). Cf *Smith v Cork and Bandon Rly Co* (1870) IR 5 Eq 65, CA. The Companies (Model Articles) Regulations 2008, SI 2008/3229, provide that if 12 years have passed from the date on which a dividend or other sum became due for payment, and the distribution recipient has not claimed it, the distribution recipient is no longer entitled to that dividend or other sum and it ceases to remain owing by the company: see reg 2, Sch 1 art 33(3); reg 4, Sch 3 art 75(3). In the articles, the 'distribution recipient' means, in respect of a share in respect of which a dividend or other sum is payable (1) the holder of the share; or (2) if the share has two or more joint holders, whichever of them is named first in the register of members; or (3) if the holder is no longer entitled to the share by reason of death or bankruptcy, or otherwise by operation of law, the transmittee: Sch 1 arts 1, 31(2); Sch 3 arts 1, 72(2). As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 229. Different versions of model articles have been so prescribed for use by private companies limited by shares (see Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230. Schedule, Table A art 108 provides that any dividend which has remained unclaimed for 12 years from the date when it became due for payment, will, if the directors so resolve, be forfeited and cease to remain owing by the company.

4 See eg the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 3, Sch 3 art 3; the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 70 (cited in PARA 541 note 3).

5 *Thairwall v Great Northern Rly Co* [1910] 2 KB 509; *Potel v IRC* [1971] 2 All ER 504.

6 *Re Kidner, Kidner v Kidner* [1929] 2 Ch 121; *Potel v IRC* [1971] 2 All ER 504.

7 In relation to a public company, if a share is subject to the company's lien, and the directors are entitled to issue a lien enforcement notice in respect of it, they may, under the Companies (Model Articles) Regulations 2008, SI 2008/3229, instead of issuing a lien enforcement notice, deduct from any dividend or other sum payable in respect of the share any sum of money which is payable to the company in respect of that share to the extent that they are entitled to require payment under a lien enforcement notice: Sch 3 art 73(1). Money so deducted must be used to pay any of the sums payable in respect of that share: Sch 3 art 73(2). The company must notify the distribution recipient in writing of the fact and amount of any such deduction, of any non-payment of a dividend or other sum payable in respect of a share resulting from any such deduction and of how the money deducted has been applied: Sch 3 art 73(3).

8 Cf *Christie v Taunton, Delmard, Lane & Co, Re Taunton, Delmard, Lane & Co* [1893] 2 Ch 175 (calls and debentures). See also CPR 16.6; and **CIVIL PROCEDURE** vol 11 (2009) PARA 601.

9 As to set-off in winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 738.

10 See eg the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 art 34(1), reg 4, Sch 3 art 76(1); and PARA 1420.

11 As to method of payment, the Companies (Model Articles) Regulations 2008, SI 2008/3229, provide that, where a dividend or other sum which is a distribution is payable in respect of a share, it must be paid by one or more of the following means (1) transfer to a bank or building society account specified by the distribution recipient either in writing or as the directors may otherwise decide; (2) sending a cheque made payable to the distribution recipient by post to the distribution recipient at the distribution recipient's registered address (if the distribution recipient is a holder of the share), or (in any other case) to an address specified by the distribution recipient either in writing or as the directors may otherwise decide; (3) sending a cheque made payable to such person by post to such person at such address as the distribution recipient has specified either in writing or as the directors may otherwise decide; or (4) any other means of payment as the directors agree with the distribution recipient either in writing or by such other means as the directors decide: Sch 1 art 31(1), Sch 3 art 72(1). In the absence of a provision such as this in the articles, a shareholder may impliedly agree to payment by cheque sent through the post: see *Thairllwall v Great Northern Rly Co* [1910] 2 KB 509.

The Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 106 provides that any dividend or other moneys payable in respect of shares may be paid by cheque sent by post to the registered address of the person entitled, and makes provision for payment of dividends to joint holders.

12 *Hoole v Great Western Rly Co* (1867) 3 Ch App 262; *Wood v Odessa Waterworks Co* (1889) 42 ChD 636.

13 Under the Companies (Model Articles) Regulations 2008, SI 2008/3229, the company may not pay interest on any dividend or other sum payable in respect of a share unless otherwise provided by the terms on which the share was issued, or by the provisions of another agreement between the holder of that share and the company: Sch 1 art 32, Sch 3 art 74. See also the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 107, which provides that no dividend or other moneys payable in respect of a share shall bear interest against the company unless otherwise provided by the rights attached to the share.

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1416. Participation in dividend.

As between the company and its members, and subject to the articles¹, only those members who are on the register when the dividend is declared are entitled to participate in it². As between the vendor and the purchaser of shares, where the contract for sale is silent as to dividends, the purchaser is, however, entitled to dividends declared on the shares after the date of the contract, even where the dividend is declared in respect of a period before that date³. It is otherwise where the dividend is declared prior to the date of the contract, even where it is payable by instalments, some of which are unpaid at that date⁴.

1 As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 229 et seq. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

Under the Companies (Model Articles) Regulations 2008, SI 2008/3229, a transmittee (ie a person entitled to a share by reason of the death or bankruptcy of a shareholder or otherwise by operation of law) who produces such evidence of entitlement to shares as the directors may properly require may, subject to the articles, choose either to become the holder of those shares or to have them transferred to another person, and has, subject to the articles, and pending any transfer of the shares to another person, the same rights to a dividend as the holder had: see Sch 1 arts 1, 27(2), Sch 3 arts 1, 66(1). See also the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 31, under which persons to whom shares are transmitted by reason of the holder's death or bankruptcy are entitled to dividends even though not registered.

2 *Re Wakley, Wakley v Vachell* [1920] 2 Ch 205, CA; *Godfrey Phillips Ltd v Investment Trust Corp'n Ltd* [1953] Ch 449, [1953] 1 All ER 7 (payment of arrears of underpayments on preference shares).

3 *Black v Homersham* (1878) 4 ExD 24; *Re Wimbush, Richards v Wimbush* [1940] Ch 92, [1940] 1 All ER 229. Similarly, the purchaser may claim all rights accrued due to the vendor in respect of the shares after the date of purchase, such as the right to an allotment of further shares in the company: see *Stewart v Lupton* (1874) 22 WR 855; *Rooney v Stanton* (1900) 17 TLR 28, CA; cf *Re Morgan, ex p Phillips, ex p Marnham* (1860) 2 De GF & J 634.

4 *Re Kidner, Kidner v Kidner* [1929] 2 Ch 121.

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1417. Dividends on settled shares.

Where a person who holds shares as trustee for another person is registered as a shareholder, he is the only person recognised by the company as entitled to payment of a dividend¹, and the company is not concerned with the interests of the beneficiaries or the apportionment or distribution of profits between capital and income².

1 See the Companies Act 2006 s 126; and PARA 343. See also the Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 27(1), Sch 3 art 65(1); and the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 29 (cited in PARA 434 note 6).

2 See the Companies Act 2006 s 126. As to the division of dividends on settled shares between the tenant for life and remainderman see eg *Re Kleinwort's Settlements, Westminster Bank Ltd v Bennett* [1951] Ch 860, [1951] 2 All ER 328; and **SETTLEMENTS** vol 42 (Reissue) PARA 950.

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1418. Payment of dividends on preference shares.

The question whether preference shareholders are entitled to be paid their arrears of dividends in priority to the holders of other shares out of any profit distributed by the company, or merely to rank in priority in respect of any profits distributed in the current year, depends on whether their dividends are cumulative or non-cumulative¹. Where cumulative preference shares of the same class have been issued at different times and the arrears of dividend due on them are of varying amounts, the fund available for dividend must be distributed pro rata among the holders of those shares according to the respective amounts of the arrears on the shares held by them². Holders of preference shares may obtain an injunction to restrain a proposed payment of an interim dividend in excess of that authorised by the articles³ or of any ordinary dividend in prejudice of their rights⁴. Where business is carried on⁵ abroad, holders of preference shares are entitled, in the absence of express stipulation, to their full dividend without deducting any income tax payable there⁶.

1 As to the priority of preference shares as regards dividend and the circumstances in which the dividend is cumulative see PARA 1059. As to the rights of preference shareholders in a winding up to payments in respect of past dividends see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 833.

2 *First Garden City Ltd v Bonham-Carter* [1928] Ch 53.

3 *Durlacher v Hotchkiss Ordnance Co Ltd* (1887) 3 TLR 807.

4 *Henry v Great Northern Rly Co* (1857) 1 De G & J 606; *Sturge v Eastern Union Rly Co* (1855) 7 De GM & G 158, CA; *Matthews v Great Northern Rly Co* (1859) 28 LJ Ch 375; *Webb v Earle* (1875) LR 20 Eq 556; *Foster v Coles and MB Foster & Sons Ltd* (1906) 22 TLR 555; *Godfrey Phillips Ltd v Investment Trust Corp Ltd* [1953] Ch 449, [1953] 1 All ER 7.

5 As to the meaning of 'carry on business' generally see PARA 1 note 1.

6 *Spiller v Turner* [1897] 1 Ch 911 (followed in *Indian and General Investment Trust Ltd v Borax Consolidated Ltd* [1920] 1 KB 539; and *London and South American Investment Trust Ltd v British Tobacco Co (Australia) Ltd* [1927] 1 Ch 107). As to the taxation of company distributions see **INCOME TAXATION** vol 23(1) (Reissue) PARA 901 et seq.

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1419. Treatment of unclaimed dividends.

Under the model articles prescribed for the purposes of the Companies Act 2006¹, all dividends or other sums which are payable in respect of shares, and which are unclaimed after having been declared or become payable, may be invested or otherwise made use of by the directors for the benefit of the company until claimed². The payment of any such dividend or other sum into a separate account does not, however, make the company a trustee in respect of it³. If 12 years have passed from the date on which a dividend or other sum became due for payment, and the distribution recipient⁴ has not claimed it, the distribution recipient is no longer entitled to that dividend or other sum and it ceases to remain owing by the company⁵.

The articles sometimes provide that a dividend, unclaimed within a specified period from its declaration, may be forfeited by a resolution of the directors⁶; such an article will only be enforced, if at all, on its being strictly complied with⁷.

1 As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 229. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

2 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 33(1), Sch 3 art 75(1).

3 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 33(2), Sch 3 art 75(2).

4 As to the meaning of 'distribution recipient' see PARA 1415 note 3.

5 Companies (Model Articles) Regulations 2008, SI 2008/3229, Sch 1 art 33(3), Sch 3 art 75(3).

6 See eg the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 108 (cited in PARA 1415 note 3).

7 *Ward v Dublin North City Milling Co Ltd* [1919] 1 IR 5. This case is not a binding authority for the proposition that such an article will be enforced.

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1420. Dividends in specie and capitalisation of profits.

Articles of association¹ usually provide that the company² declaring a dividend³ may resolve that the dividend be paid wholly or partly by the distribution of specific assets such as paid up shares⁴ or debentures⁵ in that or any other company⁶. Further, they usually provide⁷ that any undivided profits available for dividend⁸ may be capitalised and distributed among the shareholders⁹ on the footing that they become entitled to the profits as capital, and that any undivided profits distributed may be applied in paying up in full unissued shares¹⁰ or debentures¹¹ of the company or towards payment of the amount unpaid on any issued shares¹² or debentures. In the absence of such express authority, dividends may not be paid otherwise than in cash¹³; and, although profits may to some extent be capitalised without any such provisions in the articles¹⁴, the provisions in question enable the company definitely to determine whether the fund distributed is to be regarded as capital or income¹⁵.

1 As to a company's articles of association generally see PARA 228 et seq. As to model articles of association prescribed for the purposes of the Companies Act 2006, and their application generally, see PARA 229. Different versions of model articles have been so prescribed for use by private companies limited by shares (see the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1), private companies limited by guarantee (see reg 3, Sch 2), and public companies (see reg 4, Sch 3). As to the meanings of 'company limited by guarantee', 'company limited by shares', 'limited company', 'private company' and 'public company' see PARA 102. The default articles prescribed for the purposes of the Companies Act 1985 ('legacy articles'), ie the Companies (Tables A to F) Regulations 1985, SI 1985/805, have not been revoked and may, in their amended form, continue to be used by companies after the commencement of the Companies Act 2006: see PARA 230.

2 As to meetings of members see PARA 629 et seq.

3 As to the meaning of 'dividend' see PARA 1408.

4 As to the meaning of 'paid up' in relation to shares see PARA 1091.

5 As to the meaning of 'debenture' see PARA 1299.

6 Under the Companies (Model Articles) Regulations 2008, SI 2008/3229, subject to the terms of issue of the share in question, the company may, by ordinary resolution on the recommendation of the directors, decide to pay all or part of a dividend or other distribution payable in respect of a share by transferring non-cash assets of equivalent value (including, without limitation, shares or other securities in any company): Sch 1 art 34(1), Sch 3 art 76(1). In the case of a public company, if the shares in respect of which such a non-cash distribution is paid are uncertificated, any shares in the company which are issued as a non-cash distribution in respect of them must be uncertificated: Sch 3 art 76(2). For the purposes of paying a non-cash distribution, the directors may make whatever arrangements they think fit, including, where any difficulty arises regarding the distribution, (1) fixing the value of any assets; (2) paying cash to any distribution recipient on the basis of that value in order to adjust the rights of recipients; and (3) vesting any assets in trustees: Sch 1 art 34(2), Sch 3 art 76(3). See also the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 105. For an example of such a distribution see *Pool v Guardian Investment Trust Co* [1922] 1 KB 347.

7 Under the Companies (Model Articles) Regulations 2008, SI 2008/3229, subject to the articles the directors may, if they are so authorised by an ordinary resolution (1) decide to capitalise any profits of the company (whether or not they are available for distribution) which are not required for paying a preferential dividend, or any sum standing to the credit of the company's share premium account or capital redemption reserve; and (2) appropriate any sum which they so decide to capitalise (a 'capitalised sum') to the persons who would have been entitled to it if it were distributed by way of dividend (the 'persons entitled') and in the same proportions: Sch 1 art 36(1), Sch 3 art 78(1). Capitalised sums must be applied on behalf of the persons entitled, and in the same proportions as a dividend would have been distributed to them: Sch 1 art 36(2), Sch 3 art 78(2). Any capitalised sum may be applied in paying up new shares of a nominal amount equal to the capitalised sum which are then allotted credited as fully paid to the persons entitled or as they may direct: Sch 1 art 36(3), Sch 3 art 78(3). A capitalised sum which was appropriated from profits available for distribution may be applied (a) in the case of a private company, in paying up new debentures of the company which are then allotted credited as fully paid to the persons entitled or as they may direct (Sch 1 art 36(4)); (b) in the case of a public company, in or towards paying up any amounts unpaid on existing shares held by the persons entitled, or in paying up new debentures of the company which are then allotted credited as fully paid to the persons entitled or as they may direct (Sch 3 art 78(4)). Subject to the articles the directors may: (i) apply capitalised sums in accordance with Sch 1 art 36(3), (4) or, as the case may be, Sch 3 art 78(3), (4), partly in one way and partly in another; (ii) make such arrangements as they think fit to deal with shares or debentures becoming distributable in fractions under these provisions (including the issuing of fractional certificates or the making of cash payments); and (iii) authorise any person to enter into an agreement with the company on behalf of all the persons entitled which is binding on them in respect of the allotment of shares and debentures to them under these provisions: Sch 1 art 36(5), Sch 3 art 78(5).

See also the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 110.

8 As to profits available for distribution see PARA 1393.

9 As to shareholders and membership of companies generally see PARA 321 et seq.

10 As to the meaning of 'unissued' in relation to share capital see PARA 1045. See *Re Cleveland Trust plc* [1991] BCLC 424, [1991] BCC 33 (bonus issue declared void because both directors and shareholders were mistaken as to the availability of profits to be capitalised); *EIC Services Ltd v Phipps* [2004] EWCA Civ 1069, [2005] 1 All ER 338, [2005] 1 WLR 1377, [2004] 2 BCLC 589 (rvs *EIC Services Ltd v Phipps* [2003] EWHC 1507 (Ch), [2003] 3 All ER 804, [2003] 1 WLR 2360) (capitalisation resolution based on fundamental mistake as to shareholder entitlement rendered the issue of bonus shares void; a shareholder receiving such shares is not a person 'dealing with the company' so as to be able to rely on the statutory protections (now to be found in the Companies Act 2006 s 40: see PARA 263) against constitutional limitations on the powers of directors).

11 See *IRC v Fisher's Executors* [1926] AC 395, HL.

12 As to the meaning of 'issue' in relation to shares see PARA 1045.

13 *Wood v Odessa Waterworks Co* [1889] 42 ChD 636; *Hoole v Great Western Rly* (1867) 3 Ch App 262. See also PARA 1415 note 10.

14 *Bouch v Sproule* (1887) 12 App Cas 385, HL (where accumulated profits were in substance credited to shareholders as payment on new shares allotted to them; the shareholders could individually have refused to accept the new shares).

15 *Bouch v Sproule* (1887) 12 App Cas 385, HL; *IRC v Blott* [1921] 2 AC 171 at 182, HL, per Viscount Haldane; *Re Outen's Will Trusts*, *Starling v Outen* [1963] Ch 291, [1962] 3 All ER 478. As to the taxation of company distributions generally see **INCOME TAXATION** vol 23(1) (Reissue) PARA 901 et seq. As to restrictions on the issue of bonus shares in connection with the restrictions on shares on the investigation of ownership of a company see PARA 1547.

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(24) ANNUAL RETURNS

(i) Duty on Company to Deliver Annual Returns

1421. Duty to deliver annual returns to registrar.

Every company¹ must deliver to the registrar² successive annual returns each of which is made up to a date not later than the date that is from time to time the company's return date³, that is⁴:

- 661 (1) the anniversary of the company's incorporation⁵; or
- 662 (2) if the company's last return duly delivered⁶ was made up to a different date, the anniversary of that date⁷.

Each return must contain the information required by or under the relevant statutory provisions⁸ and must be delivered to the registrar within 28 days after the date to which it is made up⁹.

If a company fails to deliver an annual return before the end of the period of 28 days after a return date, an offence is committed¹⁰ by:

- 663 (a) the company¹¹;
- 664 (b) every director¹² of the company¹³, and, in the case of a private company¹⁴ with a secretary¹⁵ or a public company¹⁶, every secretary of the company¹⁷; and
- 665 (c) every other officer¹⁸ of the company who is in default¹⁹.

It is, however, a defence for a director or secretary charged with such an offence to prove that he took all reasonable steps to avoid the commission or continuation of the offence²⁰. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale²¹ and, for continued contravention, a daily default fine²² not exceeding one-tenth of level 5 on the standard scale²³. The contravention continues until such time as an annual return made up to that return date is delivered by the company to the registrar²⁴. In the case of continued contravention, an offence is also committed by every officer of the company who did not commit an offence under these provisions in relation to the initial contravention but is in default in relation to the continued contravention²⁵.

1 As to the meaning of 'company' under the Companies Acts see PARA 24.

2 As to the meaning of 'registrar' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

3 Companies Act 2006 s 854(1). A company's annual return is subject to the disclosure requirements in s 1078: see PARA 144. As to fees payable for the registration of all relevant documents in respect of a company delivered during a relevant period payable at the end of that period on the registration of the annual return of the company under s 655 see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited

Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(e). As to the meanings of 'relevant documents' and 'relevant period' for these purposes see Sch 1 paras 2, 3.

The provisions of the Companies Act 2006 ss 854, 858 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 13: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 2006 s 854(2).

5 Companies Act 2006 s 854(2)(a). As to the date of incorporation see PARA 119.

6 It is delivered in accordance with the Companies Act 2006 Pt 24 (ss 854-858). Any reference in the Companies Act 2006 to a company's last return, or to a return delivered in accordance with Pt 24 of that Act, must be read as including (so far as necessary to ensure the continuity of the law) a return made up to a date before 1 October 2009 or delivered in accordance with the Companies Act 1985 Act or the corresponding Northern Ireland legislation: see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 81(3).

7 Companies Act 2006 s 854(2)(b).

8 It is the information required by or under the Companies Act 2006 ss 855-858: see the text and notes 10-25; and PARAS 1422-1424.

9 Companies Act 2006 s 854(3).

10 Companies Act 2006 s 858(1).

11 Companies Act 2006 s 858(1)(a).

12 For this purpose a shadow director is treated as a director: Companies Act 2006 s 858(1) (amended by SI 2008/3000, in relation to annual returns made up to 1 October 2009 or a later date). With regard to annual returns made up to an earlier date, a shadow director is also treated as a director: see the Companies Act 2006 s 859 (repealed by SI 2008/3000). As to the meaning of 'director' under the Companies Acts see PARA 478; and as to the meaning of 'shadow director' see PARA 479.

The Companies Act 2006 ss 854-859 are disapplied in respect of certain specified persons while: (1) Northern Rock; (2) Bradford & Bingley; and (3) Deposits Management (Heritable) are wholly owned by the Treasury: see the Northern Rock plc Transfer Order 2008, SI 2008/432, art 17, Schedule para 2(n); the Bradford & Bingley plc Transfer of Securities and Property etc Order 2008, SI 2008/2546, art 13(1), Schedule para 2(n); the Heritable Bank plc Transfer of Certain Rights and Liabilities Order 2008, SI 2008/2644, art 26, Sch 2 para 2(n). Those Orders are made by the Secretary of State in exercise of the powers conferred by the Banking (Special Provisions) Act 2008 ss 3, 4, 12, 13(2): see **FINANCIAL SERVICES AND INSTITUTIONS**.

13 Companies Act 2006 s 858(1)(b)(i).

14 As to the meaning of 'private company' see PARA 102.

15 As to the meaning of 'private company with a secretary' see PARA 601 note 3.

16 As to the meaning of 'public company' see PARA 102.

17 Companies Act 2006 s 858(1)(b)(i).

18 As to the meaning of 'officer' see PARA 607.

19 Companies Act 2006 s 858(1)(c). As to the meaning of 'officer who is in default' see PARA 315.

20 Companies Act 2006 s 858(4).

21 As to the meaning of 'standard scale' see PARA 1622.

22 As to the meaning of 'daily default fine' see PARA 1622.

23 Companies Act 2006 s 858(2).

24 Companies Act 2006 s 858(3).

25 Companies Act 2006 s 858(5). A person guilty of an offence under s 858(5) is liable on summary conviction to a fine not exceeding one-tenth of level 5 on the standard scale for each day on which the contravention continues and he is in default: s 858(5).

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(ii) Contents of Annual Returns

1422. General requirements in relation to contents of annual returns.

With regard to annual returns¹ made up to 1 October 2009 or a later date, the following provisions apply. Every annual return must state the date to which it is made up and contain the following information²:

- 666 (1) the address of the company's registered office³;
- 667 (2) the type of company it is⁴ and its principal business activities⁵;
- 668 (3) the required particulars⁶ of the directors of the company⁷, and, in the case of a private company⁸ with a secretary⁹ or a public company¹⁰, the secretary or joint secretaries¹¹;
- 669 (4) if any company records are kept¹² at a place other than the company's registered office, the address of that place and the records that are kept there¹³;
- 670 (5) whether the company was a traded company¹⁴ at any time during the return period¹⁵.

1 As to the duty to deliver annual returns to the registrar see PARA 1421.

2 Companies Act 2006 s 855(1). The general requirement set out in the text to this note also applies to annual returns made up to a date earlier than 1 October 2009.

The provisions of the Companies Act 2006 ss 855, 855A apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 13, but with the modifications as specified thereby: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Companies Act 2006 s 855(1)(a). This requirement also applies to annual returns made up to a date earlier than 1 October 2009. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the registered office of a company see PARA 129.

4 The information as to the company's type must be given by reference to the classification scheme prescribed for these purposes: Companies Act 2006 s 855(2). The following classification scheme for each type of company is prescribed for the purposes of s 855(2): (1) public limited company (code T1); (2) private company limited by shares (code T2); (3) private company limited by guarantee (code T3); (4) private company limited by shares exempt under the Companies Act 2006 s 60 (see PARA 201) (code T4); (5) private company limited by guarantee exempt under s 60 (code T5); (6) private unlimited company with share capital (code T6); (7) private unlimited company without share capital (code T7): see the Companies Act 2006 (Annual Return and Service Addresses) Regulations 2008, SI 2008/3000, reg 5(1), Sch 1, Table. The annual return must indicate the type of company to which the return relates as set out in Sch 1, Table by reference to the code opposite that type in Sch 1, Table: reg 5(2). As to the meanings of 'limited company', 'unlimited company', 'company limited by shares' and 'company limited by guarantee', 'public company' and 'private company' see PARA 102; and as to the meaning of 'share capital' see PARA 1042.

5 Companies Act 2006 s 855(1)(b). The information as to the company's principal business activities may be given by reference to one or more categories of any prescribed system of classifying business activities: s 855(3). Head (2) in the text also applies to annual returns made up to a date earlier than 1 October 2009. The prescribed system of classifying business activities is the UK Standard Industrial Classification of Economic Activities 2003, prepared by the Office for National Statistics (now the Statistics Board) and published by The Stationery Office with ISBN no 0116216417, with the addition of the codes and designations in the Companies

Act 2006 (Annual Return and Service Addresses) Regulations 2008, SI 2008/3000, Sch 2, Table, where the code set out in Sch 2, Table col 1 represents the designation opposite it in Sch 2, Table col 2: reg 6(1), (2).

6 With regard to annual returns made up to a date earlier than 1 October 2009, the wording in head (3) in the text is 'the prescribed particulars': see the Companies Act 2006 s 855(1)(c) (as originally enacted).

7 For these purposes, the required particulars of a director are (1) where the director is an individual, the particulars required by the Companies Act 2006 s 163 (see PARA 499) to be entered in the register of directors (subject to s 855A(2)); and (2) where the director is a body corporate or a firm that is a legal person under the law by which it is governed, the particulars required by s 164 (see PARA 499) to be entered in the register of directors: s 855A(1) (s 855A added by SI 2008/3000, in relation to annual returns made up to 1 October 2009 or a later date). The former name of a director who is an individual is a required particular in relation to an annual return only if the director was known by the name for business purposes during the return period: Companies Act 2006 s 855A(2) (as so added). As to the meaning of 'director' under the Companies Acts see PARA 478. See also PARA 1421 note 12.

8 As to the meaning of 'private company' see PARA 102.

9 As to the company secretary see PARA 601 et seq.

10 As to the meaning of 'public company' see PARA 102.

11 Companies Act 2006 s 855(1)(c) (amended by SI 2008/3000). For these purposes, the required particulars of a secretary are (1) where a secretary is an individual, the particulars required by the Companies Act 2006 s 277 (see PARA 605) to be entered in the register of secretaries (subject to s 855A(4)); and (2) where a secretary is a body corporate or a firm that is a legal person under the law by which it is governed, the particulars required by s 278(1) (see PARA 605) to be entered in the register of secretaries: s 855A(3) (as added: see note 7). The former name of a secretary who is an individual is a required particular in relation to an annual return only if the secretary was known by the name for business purposes during the return period: s 855A(4) (as so added). Where all the partners in a firm are joint secretaries, the required particulars are the particulars that would be required to be entered in the register of secretaries if the firm were a legal person and the firm had been appointed secretary: s 855A(5) (as so added).

12 In accordance with regulations under the Companies Act 2006 s 1136: see PARA 676.

13 Companies Act 2006 s 855(1)(d) (substituted by SI 2008/3000). In relation to annual returns made up to a date earlier than 1 October 2009, the address of the place where any register of members or debenture holders not kept at the company's registered office is kept must be included: see the Companies Act 2006 s 855(1)(d), (e) (as originally enacted).

14 For the purposes of the Companies Act 2006 Pt 24 (ss 854-858), 'traded company' means a company any of whose shares are shares admitted to trading on a regulated market (so that 'non-traded company' means a company none of whose shares are shares admitted to trading on a regulated market): s 855(4) (added by SI 2008/3000). As to the meaning of 'regulated market' see PARA 334 note 11.

15 Companies Act 2006 s 855(1)(f) (added by SI 2008/3000). For the purposes of Pt 24, 'return period', in relation to an annual return, means the period beginning immediately after the date to which the last return was made up (or, in the case of the first return, with the incorporation of the company) and ending with the date to which the return is made up: Companies Act 2006 s 855(4). As to the meaning of 'last return' under the Companies Acts see PARA 1421 note 6.

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1423. Required information in annual return about share capital and shareholders.

With regard to annual returns¹ made up to 1 October 2009 or a later date, the following provisions apply. The annual return of a company² having a share capital³ must also contain a statement of capital⁴. The statement of capital must state with respect to the company's share capital at the date to which the return is made up⁵:

- 671 (1) the total number of shares of the company⁶;
- 672 (2) the aggregate nominal value of those shares⁷;
- 673 (3) for each class of shares⁸, the voting rights⁹ attached to the shares¹⁰, the total number of shares of that class¹¹, and the aggregate nominal value of shares of that class¹²; and
- 674 (4) the amount paid up¹³ and the amount, if any, unpaid on each share, whether on account of the nominal value of the share or by way of premium¹⁴.

The annual return of a company that was a non-traded company¹⁵ throughout the return period¹⁶ must also contain the following information¹⁷. The return must contain the name, as it appears in the company's register of members¹⁸, of every person who was a member¹⁹ of the company at any time during the return period, and must conform to the following requirements for the purpose of enabling the entries relating to any given person to be easily found²⁰:

- 675 (a) the entries must be listed in alphabetical order by name²¹; or
- 676 (b) the return must have annexed to it an index that is sufficient to enable the name of the person in question to be easily found²².

The return must also state²³:

- 677 (i) the number of shares of each class held at the end of the date to which the return is made up by each person who was a member of the company at that time²⁴;
- 678 (ii) the number of shares of each class transferred during the return period by or to each person who was a member of the company at any time during that period²⁵; and
- 679 (iii) the dates of registration of those transfers²⁶.

If, however, either of the two immediately preceding returns has given the full particulars so required²⁷, the return need only give such particulars as relate to persons who became, or ceased to be, members during the return period, and to shares transferred during that period²⁸.

The annual return of a company that was a traded company²⁹ at any time during the return period must also contain the following information³⁰. The return must contain the name and address, as they appear in the company's register of members, of every person who held at least 5 per cent of the issued³¹ shares of any class of the company at any time during the return period and must conform to the requirements set out in head (a) or head (b) above³² for the purpose of enabling the entries relating to any given person to be easily found³³. The return must also state³⁴:

- 680 (A) the number of shares of each class held at the end of the date to which the return is made up by each person who held at least 5 per cent of the issued shares of any class of the company at that time³⁵;
- 681 (B) the number of shares of each class transferred during the return period by or to each person who held at least 5 per cent of the issued shares of any class of the company at any time during that period³⁶; and
- 682 (C) the dates of registration of those transfers³⁷.

If, however, either of the two immediately preceding returns has given the full particulars so required³⁸, the return need only give such particulars as relate to persons who came to hold, or ceased to hold, at least 5 per cent of the issued shares of any class of the company during the return period, and to shares transferred during that period³⁹.

- 1 As to the duty to deliver annual returns to the registrar see PARA 1421.
- 2 As to the meaning of 'company' under the Companies Acts see PARA 24.
- 3 As to the meaning of 'share capital' see PARA 1042.
- 4 Companies Act 2006 s 856(1) (amended by SI 2008/3000). Any statement of capital of a public company is subject to the disclosure requirements in s 1078: see PARA 144. The requirement for a statement of capital also applies to annual returns made up to a date earlier than 1 October 2009: see the Companies Act 2006 s 856(1) (a) (as originally enacted). As to the meaning of 'public company' see PARA 102.
The provisions of the Companies Act 2006 ss 856, 856A, 856B apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 13: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.
- 5 Companies Act 2006 s 856(2).
- 6 Companies Act 2006 s 856(2)(a). Head (1) in the text also applies to annual returns made up to a date earlier than 1 October 2009.
- 7 Companies Act 2006 s 856(2)(b). Head (2) in the text also applies to annual returns made up to a date earlier than 1 October 2009. As to the nominal value of shares see PARA 1044.
- 8 As to classes of shares generally see PARA 1057 et seq.
- 9 As to the meaning of 'voting rights' see PARA 1493 note 4.
- 10 Companies Act 2006 s 856(2)(c)(i) (amended by SI 2008/3000). With regard to annual returns made up to a date earlier than 1 October 2009, prescribed particulars of the rights attached to the shares must be stated rather than voting rights: see the Companies Act 2006 s 856(2)(c)(i) (as originally enacted).
- 11 Companies Act 2006 s 856(2)(c)(ii) (which also applies to annual returns made up to a date earlier than 1 October 2009).
- 12 Companies Act 2006 s 856(2)(c)(iii) (which also applies to annual returns made up to a date earlier than 1 October 2009).
- 13 As to the meaning of 'paid up' see PARA 1048.
- 14 Companies Act 2006 s 856(2)(d). Head (4) in the text also applies to annual returns made up to a date earlier than 1 October 2009.
- 15 As to the meaning of 'non-traded company' for these purposes see PARA 1422 note 14.
- 16 As to the meaning of 'return period' for these purposes see PARA 1422 note 15.
- 17 Companies Act 2006 s 856A(1) (ss 856A, 856B added by SI 2008/3000). As to the information about shareholders to be contained in an annual return made up to a date earlier than 1 October 2009 see the Companies Act 2006 s 856(3)-(6) (repealed by SI 2008/3000).
- 18 As to the register of members see PARA 335 et seq.
- 19 As to who qualifies as a member of a company see PARA 123.
- 20 Companies Act 2006 s 856A(2) (as added: see note 17).
- 21 Companies Act 2006 s 856A(2)(a) (as added: see note 17).
- 22 Companies Act 2006 s 856A(2)(b) (as added: see note 17).
- 23 Companies Act 2006 s 856A(3) (as added: see note 17).
- 24 Companies Act 2006 s 856A(3)(a) (as added: see note 17).
- 25 Companies Act 2006 s 856A(3)(b) (as added: see note 17).
- 26 Companies Act 2006 s 856A(3)(c) (as added: see note 17).

- 27 le the full particulars required by the Companies Act 2006 s 856A(2), (3): see the text and notes 18-26.
- 28 Companies Act 2006 s 856A(4) (as added: see note 17).
- 29 As to the meaning of 'traded company' for these purposes see PARA 1422 note 14.
- 30 Companies Act 2006 s 856B(1) (as added: see note 17). As to the information about shareholders to be contained in an annual return made up to a date earlier than 1 October 2009 see the Companies Act 2006 s 856(3)-(6) (repealed by SI 2008/3000).
- 31 As to the meaning of 'issued' in relation to shares see PARA 1045.
- 32 See the Companies Act 2006 s 856B(2)(a), (b) (as added: see note 17), which are expressed in identical terms to s 856A(2), (b) set out in heads (a), (b) in the text.
- 33 Companies Act 2006 s 856B(2) (as added: see note 17).
- 34 Companies Act 2006 s 856B(3) (as added: see note 17).
- 35 Companies Act 2006 s 856B(3)(a) (as added: see note 17).
- 36 Companies Act 2006 s 856B(3)(b) (as added: see note 17).
- 37 Companies Act 2006 s 856B(3)(c) (as added: see note 17).
- 38 le the full particulars required by the Companies Act 2006 s 856B(2), (3): see the text and notes 31-37.
- 39 Companies Act 2006 s 856B(4) (as added: see note 17).

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1424. Secretary of State's power to make further provision about contents of annual return.

The Secretary of State¹ may by regulations² make further provision as to the information to be given in a company's³ annual return⁴. The regulations may:

- 683 (1) amend or repeal the statutory provisions setting out general requirements in relation to the contents of the annual return⁵ and requiring information⁶ about share capital⁷; and
- 684 (2) provide for exceptions from the requirements of those provisions as they have effect from time to time⁸.

1 As to the Secretary of State see PARA 6.

2 Regulations under the Companies Act 2006 s 857 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 857(3), 1289.

The provisions of the Companies Act 2006 s 857 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 13: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 As to the meaning of 'company' under the Companies Acts see PARA 24.

4 Companies Act 2006 s 857(1). In the exercise of this power, the Secretary of State has made the Companies Act 2006 (Annual Return and Service Addresses) Regulations 2008, SI 2008/3000, Pt 2 (regs 2-9) which came into force on 1 October 2009 (see reg 1(1)) and which applies in relation to annual returns made up to 1 October 2009 or a later date (reg 1(2)). See further PARAS 1421 note 12, 1422, 1423.

As to the duty to deliver annual returns to the registrar see PARA 1421; and as to the information to be given in such returns see PARAS 1422, 1423.

5 The provisions referred to in the text are the provisions of the Companies Act 2006 s 855: see PARA 1422.

6 The provisions referred to in the text are the provisions of the Companies Act 2006 s 856: see PARA 1423.

7 Companies Act 2006 s 857(2)(a). As to the exercise of this power see note 4.

8 Companies Act 2006 s 857(2)(b).

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(25) SCHEMES OF ARRANGEMENT AND RECONSTRUCTION

(i) Schemes of Arrangement

A. INTRODUCTION

1425. Meaning of 'arrangement' and application of statutory provisions.

The provisions of Part 26 of the Companies Act 2006¹ apply² where a compromise or arrangement is proposed between a company³ and:

- 685 (1) its creditors⁴, or any class of them; or
- 686 (2) its members⁵, or any class of them⁶.

For these purposes, 'arrangement' includes a reorganisation of the company's share capital⁷ by the consolidation of shares of different classes⁸ or by the division of shares into shares of different classes, or by both of those methods⁹. The word 'arrangement' should not be limited to something analogous in some sense to 'compromise'¹⁰.

A scheme of arrangement sanctioned under Part 26 of the Companies Act 2006 is not a contract or notice within the meaning of the Unfair Contract Terms Act 1977¹¹ because, although it might bind the parties to the same extent as if they had made a contract, it was a statutory procedure involving the proposal of the scheme, its approval by the statutory majorities of creditors and its sanction by the court¹².

1 le the provisions of the Companies Act 2006 Pt 26 (ss 895-901): see the text and notes 2-9; and PARA 1426 et seq.

2 The provisions of the Companies Act 2006 Pt 26 have effect subject to Part 27 (ss 902-941) (mergers and divisions of public companies: see PARA 1449 et seq) where that Part applies (see ss 902, 903; and PARAS 1449-1450); s 895(3).

3 In the Companies Act 2006 s 900 (powers of court to facilitate reconstruction or amalgamation: see PARA 1434), 'company' means a company within the meaning of the 2006 Act (see PARA 24); and elsewhere in Pt 26

'company' means any company liable to be wound up under the Insolvency Act 1986: Companies Act 2006 s 895(2)(a), (b). As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq. The court's statutory jurisdiction to approve an arrangement extends to a foreign company, by virtue of a foreign company being an 'unregistered company' which the court has jurisdiction to wind up under the Insolvency Act 1986: *Re Drax Holdings Ltd*, *Re InPower Ltd* [2003] EWHC 2743 (Ch), [2004] 1 All ER 903, [2004] 1 WLR 1049. See also *Re Sovereign Marine & General Insurance Co Ltd* [2006] EWHC 1335 (Ch), [2007] 1 BCLC 228 (it was not necessary to show that any of the conditions set out in the Insolvency 1986 Act was in fact fulfilled, as those conditions went to discretion to wind up a company, and not to jurisdiction, and, accordingly, a foreign company was capable of being wound up in the sense that, if any of the circumstances set out in the 1986 Act arose, then the court had power, subject to its discretion and thus, in particular, to the three conditions set out in established authority, to wind it up).

4 As to the meaning of 'creditor' for these purposes see PARA 1427.

5 As to who qualifies as a member of a company see PARA 321.

6 Companies Act 2006 s 895(1).

7 As to a company's share capital see PARA 1042 et seq.

8 As to classes of shares generally see PARA 1057 et seq.

9 Companies Act 2006 s 895(2).

10 *Re Guardian Assurance Co Ltd* [1917] 1 Ch 431, CA, explaining the dictum of Buckley LJ in *Re General Motor Cab Co Ltd* [1913] 1 Ch 377 at 384, CA. See also *Re Odhams Press Ltd* [1925] WN 10; *Re Barclays Bank Ltd* (1918) 62 Sol Jo 752; and see PARA 1432. The word 'arrangement' is not, however, appropriate to a scheme where membership rights are proposed to be confiscated or surrendered without compensation: *Re NFU Development Trust Ltd* [1973] 1 All ER 135, [1972] 1 WLR 1548. 'Compromise' implies some element of accommodation on each side; and 'arrangement' implies some element of give and take: *Re NFU Development Trust Ltd* at 140, 1555 per Brightman J. See also *Re Equitable Life Assurance Society* [2002] EWHC 140 (Ch) at [31], [86], [2002] 2 BCLC 510 at [31], [86] per Lloyd J; and *Re T & N Ltd (No 3)* [2006] EWHC 1447 (Ch) at [49], [2007] 1 All ER 851 at [49], [2007] 1 BCLC 563 at [49] per David Richards J (the great majority of schemes of arrangement involving members do not involve a compromise). A scheme of arrangement which did no more than expropriate the interest of a member or creditor would not be a compromise or arrangement for these purposes but beyond that it is neither necessary nor desirable to attempt a definition of 'arrangement': see *Re NFU Development Trust Ltd*; and *Re Savoy Hotel Ltd* [1981] Ch 351 at 359, [1981] 3 All ER 646 at 652 per Nourse J. As members' schemes such as that in *Re Savoy Hotel Ltd* show, the give and take need not be between the members and the company, but may be between the members and a third party purchaser, with the company's only function being to register the transfer of shares and thereby terminate the existing members' status as members: see *Re T & N Ltd (No 3)* at [50] per David Richards J. Nevertheless, it is not a necessary element of an arrangement for these purposes that it should alter the rights existing between the company and the creditors or members with whom it is made, although no doubt in most cases it will alter those rights: see *Re T & N Ltd (No 3)* at [53] per David Richards J.

The word 'arrangement' in the Companies Act 2006 Pt 26 has a very wide meaning; it is generally accepted that an arrangement can contain provisions which could be contained in a contract, and it is clear that a contract can contain provisions for subsequent amendments binding on the parties: see *Re Cape plc* [2006] EWHC 1316 (Ch), [2006] 3 All ER 1222, [2007] 2 BCLC 546 (decided under the Companies Act 1985 s 425).

11 As to the Unfair Contract Terms Act 1977, which places statutory controls on contract terms or notices purporting to exclude or restrict liability for negligence or breach of contract, see **CONTRACT** vol 9(1) (Reissue) PARA 820 et seq.

12 *Re Cape plc* [2006] EWHC 1316 (Ch), [2006] 3 All ER 1222, [2007] 2 BCLC 546.

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B. REQUIRED PROCEDURE FOR CONVENING NECESSARY MEETINGS

1426. Court order to hold meeting of creditors or members.

The court¹ may, on an application² under these provisions, order a meeting of the creditors or class of creditors³, or of the members of the company or class of members⁴, as the case may be, to be summoned in such manner as the court directs⁵. Such an application may be made by:

- 687 (1) the company;
- 688 (2) any creditor or member of the company;
- 689 (3) if the company is being wound up, the liquidator⁶; or
- 690 (4) if the company is in administration⁷, the administrator⁸.

The application for an order to summon meetings is made by the issue of a Part 8 claim form⁹ out of the Companies Court or a Chancery district registry or out of a county court office¹⁰. The claim form must be supported by written evidence, including statutory information about the company and the terms of the proposed compromise or arrangement¹¹; and the form must seek:

- 691 (a) directions for convening a meeting of creditors or members or both, as the case requires;
- 692 (b) the sanction of the court to the compromise or arrangement, if it is approved at the meeting or meetings, and a direction for a further hearing for that purpose; and
- 693 (c) a direction that the claimant files¹² a copy of a report to the court by the chairman of the meeting or of each meeting¹³.

The parties are responsible for service of documents in such proceedings¹⁴. Where the application is made by the company concerned, or by a liquidator or administrator of the company, there need be no defendant to the claim unless the court so orders¹⁵.

The order directing a meeting to be summoned usually appoints someone, for example, the liquidator, to act as chairman of the meeting, and directs him to report the result to the court¹⁶. It also directs that advertisements are to be made and that notices convening the meeting, enclosing a copy of the proposed compromise or arrangement, and a form of proxy¹⁷, are to be sent. Where a class of creditors to be summoned consists of holders of bearer securities, the only practicable method of summoning them is to give public notice of the meeting by advertisement in selected newspapers. Where the company is not in winding up and a petition for winding up is not pending, the court cannot, after ordering meetings to be summoned and before approving the scheme, stay an execution on a judgment recovered before the order¹⁸.

Any challenge to the outcome of a members' meeting must be supported by cogent evidence that there has been a failure to comply with the statutory requirements¹⁹. Similarly cogent evidence is required before a court will consider disenfranchising a member of a class who is entitled to vote²⁰.

1 As to the meaning of 'court' see PARA 212 note 1.

2 As to the method of making the application see the text and notes 9-11.

3 The Companies Act 2006 s 323 (representation of corporations at meetings: see PARA 661) applies to a meeting of creditors under s 896 as to a meeting of the company (references to a member of the company being read as references to a creditor): s 896(3) (added by SI 2008/948). As to the meaning of 'company' for these purposes see PARA 1425 note 3 (and see also note 8); as to the meaning of 'creditor' for these purposes see PARA 1427; and as to meetings to identify classes of creditor see PARA 1428. A creditors' meeting of the company must be attended by more than one creditor (*Re Altitude Scaffolding Ltd, Re T & N Ltd* [2006] EWHC

1401 (Ch), [2007] 1 BCLC 199) and it is possible for an arrangement to apply to only some of a company's creditors (*Re Perusahaan Perseroan (Persero) PT Perusahaan Penerbangan Garuda Indonesia* [2001] All ER (D) 53 (Oct) (scheme dealt with one type of unsecured creditor while other creditors, both secured and unsecured, were dealt with outside the scheme)). See also *Re Bluebrook* [2009] EWHC 2114 (Ch), [2009] All ER (D) 101 (Aug).

4 As to who qualifies as a member of a company see PARA 321; and as to meetings to identify classes of member see PARA 1428.

5 Companies Act 2006 s 896(1). As to the practice to be followed on such an application see *Practice Statement (companies: schemes of arrangement)* [2002] 3 All ER 96, [2002] 1 WLR 1345; and see PARA 1428 et seq. The function of the court at the first stage is 'emphatically not' to consider the merits or fairness of the proposed scheme: see *Re Telewest Communications plc, Re Telewest Finance (Jersey) Ltd* [2004] EWHC 924 (Ch) at [14], [2005] 1 BCLC 752 at [14] per David Richards J.

The statutory procedure under the Companies Act 2006 Pt 26 (ss 895-901) is available as an alternative means to effect a take-over under Pt 28 Ch 3 (ss 974-991) (see PARA 1511 et seq): *Re BTR plc* [2000] 1 BCLC 740, CA; *Re National Bank Ltd* [1966] 1 All ER 1006, [1966] 1 WLR 819.

6 As to liquidators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 555.

7 As to companies in administration see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 212 et seq.

8 Companies Act 2006 s 896(2) (amended by SI 2008/948). As to the application of the law about compromise or arrangement with creditors to certain industrial and provident societies and friendly societies see the Enterprise Act 2002 s 255; and **COMPANY AND PARTNERSHIP INSOLVENCY**. As to the application of the Companies Act 1985 s 896 to open-ended investment companies see the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 (amended by SI 2008/948); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 665, 666.

9 See *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 5(1). As to the procedure under CPR Pt 8 see **CIVIL PROCEDURE** vol 11 (2009) PARA 127 et seq. The claim form must be entitled 'In the matter of [*the name of the company in question*] and in the matter of the Companies Act 2006': *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 4(1). Where a company changes its name in the course of proceedings, the title must be altered by substituting the new name for the old and by inserting the old name in brackets at the end of the title: para 4(2).

10 See *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 5(2). The company must generally be made a party to a claim under the Companies Act 2006 (see *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 7); but see the text and note 15.

11 *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 15(1), (3).

12 As to filing for the purposes of the Civil Procedure Rules see **CIVIL PROCEDURE** vol 12 (2009) PARA 1832.

13 *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 15(1), (4).

14 *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 28.

15 *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 15(1), (2).

16 See *Re Abbey National plc* [2004] EWHC 2776 (Ch), [2005] 2 BCLC 15.

17 The forms of any advertisements, notices and proxy papers that may be required are settled in the chambers of the court. The proxy papers used must be in the special form approved by the court where the company is in winding up: *Re Magadi Soda Co Ltd* (1925) 94 LJ Ch 217. There is no particular time for lodging proxies for a creditors' meeting: see *Lainière de Roubaix v Glen Glove and Hosiery Co Ltd* 1926 SC 91, Ct of Sess. Directors who, pursuant to the court's order, receive proxies are bound to use them: *Re Dorman, Long & Co Ltd, Re South Durham Steel and Iron Co Ltd* [1934] Ch 635. On the construction of a proxy see *Re Waxed Papers Ltd* [1937] 2 All ER 481, CA. In all cases the liquidator or chairman of the meeting, or, where the company is being wound up by the court, the official receiver, may be appointed as proxy: *Re General Mortgage Society (Great Britain) Ltd* [1942] Ch 274, [1942] 1 All ER 414. See the Insolvency Rules 1986, SI 1986/1925, r 8.1(1), (3), (4); and **COMPANY AND PARTNERSHIP INSOLVENCY** (2004 Reissue) PARAS 657 et seq, 949. Where, in the case of a company being wound up, the official receiver is acting as liquidator, foreign creditors may be authorised to give proxies to a person named by him, and to deposit them at a place named by him in the foreign country: *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385, CA. Cf PARA 1353 et seq. Proxies so given are valid, and may be used at the meeting, particulars of them being sent to the chairman of the meeting: *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385, CA.

18 *Booth v Walkden Spinning and Manufacturing Co Ltd* [1909] 2 KB 368, DC. Cf *Bowkett v Fuller's United Electric Works Ltd* [1923] 1 KB 160, CA (where a winding-up petition had been presented and an execution was stayed under what is now the Insolvency Act 1986 s 126 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 887)). See also *Re Richards & Co* (1879) 11 ChD 676 (where the company was in winding up).

19 *Re Linton Park plc* [2005] All ER (D) 174 (Nov) (where there was no evidence to support the contention that there had been greater opposition to the scheme than the voting record suggested).

20 *Re Linton Park plc* [2005] All ER (D) 174 (Nov) (an allegation that a voting shareholder had a collateral interest was serious, and strong. Unless the interests of all of the voting shareholders were considered, it was impossible to say whether the particular financial interests of one shareholder had influenced the vote, or whether they had been cancelled out by the interests of another shareholder, or whether, in the absence of such financial interest, that shareholder would have cast his vote differently. To take account of the interests of each of the shareholders was an impracticable exercise).

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1427. Meaning of 'creditor'.

Every person having a pecuniary claim against the company, whether actual or contingent, is a creditor.

Thus, debenture holders or other secured creditors can be bound by a scheme¹, and also foreign and Commonwealth creditors when their rights are in question in England².

The assignor of a lease to the company whom the company has indemnified against liability under the lease is barred by a scheme under which the assets and liabilities of the company giving the indemnity are to be transferred to another company, and cannot assert any claim to have the assets of the former company impounded to meet any claim arising under the indemnity³.

An actual or potential claimant for contribution is a contingent creditor and thus a creditor for these purposes, with the right to recover contribution accruing when the contribution claimant was held liable in respect of relevant damage by judgment or arbitration award or when he compromised the claim⁴. However, a person who recovers judgment against the company in a claim for unliquidated damages subsequent to the scheme being approved is not bound by it⁵.

1 *Re Empire Mining Co* (1890) 44 ChD 402 at 409 per North J (where dissentient debenture holders were deprived of their security).

2 *Re Alabama, New Orleans, Texas and Pacific Junction Rly Co* [1891] 1 Ch 213, CA; *New Zealand Loan and Mercantile Agency Co v Morrison* [1898] AC 349 at 357, PC. See also *Armani v Castrique* (1844) 13 M & W 443 at 447 per Pollock CB; *Dane v Mortgage Insurance Corp Ltd* [1894] 1 QB 54, CA (where a scheme was sanctioned by the colonial as well as the English court in order to bind the company's assets in both jurisdictions).

3 *Craig's Claim* [1895] 1 Ch 267, CA; compromised on appeal sub nom *Craig v Midland Coal and Iron Co* (1896) 74 LT 744, HL.

4 See *Re T & N Ltd (No 3)* [2006] EWHC 1447 (Ch), [2007] 1 All ER 851, [2007] 1 BCLC 563.

5 *Trocko v Renlita Products Pty Ltd, Commonwealth Trading Bank (Claimant)* (1973) 5 SASR 207, 5 Aust SC.

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1428. Class meetings: class composition.

The court has no jurisdiction to sanction a scheme where the meeting of creditors or members has not been properly constituted¹.

It is necessary for different classes of those affected by the scheme, that is, those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest, to have separate meetings². In determining whether creditors fall into separate classes, it is necessary first to determine whether the rights to be released or varied under the scheme are so distinct that the scheme has to be treated as a compromise or arrangement with more than one class of creditor; and secondly, whether the new rights which the scheme gives to those whose rights are to be released or varied leads to such a conclusion³. It is not practical, nor is it required, to hold separate meetings of shareholders who have the same class rights but different interests or motives in connection with the scheme⁴; and the court will take care lest by ordering separate meetings the court gives a veto to a minority group⁵. Rights, not interests, are the governing factor in the composition of classes and it is the extent to which the relevant rights are dissimilar which will determine the composition of classes in any particular case⁶. In considering the rights of creditors which are to be affected by the scheme, it is essential to identify the correct comparator⁷.

The differing interests within a class is a factor relevant to the court's discretion to sanction a scheme⁸.

Thus where there were matured and unmatured policy holders of an insurance company, a dissentient holder of a matured policy was not bound by a resolution passed at a meeting to which all the policy holders were summoned, as he was a member of the class of matured policy holders⁹; and, for this purpose, holders of shares partly paid with the uncalled balance paid in advance of calls and carrying interest are a different class from holders of fully paid shares¹⁰. Where a separate meeting of one class has not been held but is ordered to be convened on the application to sanction the scheme, the court, after the holding of that meeting, will sanction the scheme without requiring fresh meetings of the other classes¹¹.

Where there are several classes of creditors or contributories, and the scheme does not affect the rights of some particular class, it is not the practice, nor is it necessary, for notice of any meeting to be sent to the members of that class¹².

1 See *Re British Aviation Insurance Co Ltd* [2005] EWHC 1621 (Ch), [2006] 1 BCLC 665; and PARA 1432. See also note 7. Proper composition for these purposes is governed by the test in *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573 at 583, CA, per Bowen LJ (see the text and note 2), as restated by the Court of Appeal in *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241, [2001] 2 BCLC 480 (see the text and note 3).

2 *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573 at 583, CA, per Bowen LJ; *Re United Provident Assurance Co Ltd* [1910] 2 Ch 477; *Re BTR plc* [2000] 1 BCLC 740, CA; *Re Anglo American Insurance Ltd* [2001] 1 BCLC 755; *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241, [2001] 2 BCLC 480. The statutory scheme is concerned with the rights of the shareholders, and not with how they see their rights, or in what way they are interested in their rights, or how they wish to exercise their rights: *Re Waste Recycling Group plc* [2003] EWHC 2065 (Ch) at [17], [2004] 1 BCLC 352 at [17] per Lloyd J. See also *Lainière de Roubaix v Glen Glove and Hosiery Co Ltd* 1926 SC 91, Ct of Sess (where a secured creditor was held to have voted wrongly at a meeting of unsecured creditors).

3 *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241, [2001] 2 BCLC 480; *Re Equitable Life Assurance Society* [2002] EWHC 140 (Ch), [2002] 2 BCLC 510. See also *Re T & N Ltd (No 3)* [2006] EWHC 1447 (Ch) at [99], [2007] 1 All ER 851 at [99], [2007] 1 BCLC 563 at [99] per David Richards J (rights of contribution claimants under the scheme, viewed as a whole, and their common interest in the litigation with the insurers enables them to be part of a single class with the employees for the purpose of considering the scheme with a view to their common interest); and *Re Sovereign Marine & General Insurance Co Ltd* [2006] EWHC 1335 (Ch), [2007] 1 BCLC 228 (impossibility for many of the scheme companies, in respect of their outstanding claims, to consult together with many other scheme claimants, in respect of their incurred but not reported claims, made a single class inappropriate).

4 *Re BTR plc* [2000] 1 BCLC 740, CA.

5 *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241 at [33], [2001] 2 BCLC 480 at [33] per Chadwick LJ; *Re Equitable Life Assurance Society* [2002] EWHC 140 (Ch) at [45], [2002] 2 BCLC 510 at [45] per Lloyd J.

6 *Re Telewest Communications plc, Re Telewest Finance (Jersey) Ltd* [2004] EWHC 924 (Ch), [2005] 1 BCLC 752. See also *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241, [2001] 2 BCLC 480; and *Re T & N Ltd (No 3)* [2006] EWHC 1447 (Ch) at [99], [2007] 1 All ER 851 at [99], [2007] 1 BCLC 563 at [99] per David Richards J (the possibility of different rights under the scheme was not such as to require a separate meeting of the contribution claimants).

7 See *Re T & N Ltd (No 3)* [2006] EWHC 1447 (Ch) at [87], [2007] 1 All ER 851 at [87], [2007] 1 BCLC 563 at [87] per David Richards J. In the case of rights against an insolvent company, where the scheme is proposed as an alternative to an insolvent liquidation, it is their rights as creditors in an insolvent liquidation of the company (see *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241, [2001] 2 BCLC 480) but against a company which is solvent and will continue in business, the creditors' rights against the company as a continuing entity are the appropriate comparator (see *Re British Aviation Insurance Co Ltd* [2005] EWHC 1621 (Ch), [2006] 1 BCLC 665): see *Re T & N Ltd (No 3)* at [87] per David Richards J.

8 See *Re Cape plc* [2006] EWHC 1316 (Ch) at [52], [2006] 3 All ER 1222 at [52], [2007] 2 BCLC 546 at [52] per David Richards J; and *Re T & N Ltd (No 3)* [2006] EWHC 1447 (Ch) at [85], [2007] 1 All ER 851 at [85], [2007] 1 BCLC 563 at [85] per David Richards J.

9 *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573, CA. However, see *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241 at [43]-[48], [2001] 2 BCLC 480 at [43]-[48] per Chadwick LJ.

10 *Re United Provident Assurance Co Ltd* [1910] 2 Ch 477.

11 *Re United Provident Assurance Co Ltd* [1911] WN 40.

12 *Re Tea Corpn Ltd, Sorsbie v Tea Corpn Ltd* [1904] 1 Ch 12, CA; *Re Clydesdale Bank Ltd* 1950 SC 30, Ct of Sess. The dissent of a class which is not interested may be disregarded: *Re Tea Corpn Ltd, Sorsbie v Tea Corpn Ltd* [1904] 1 Ch 12, CA; *Re Oceanic Steam Navigation Co Ltd* [1939] Ch 41 at 47, [1938] 3 All ER 740 at 742 per Simonds J. As to the costs of notices of meetings to sanction a scheme of arrangement with debenture holders which should be allowed on assessment in a debenture holders' claim see *Re Commonwealth Oil Corpn Ltd, Pearson v Commonwealth Oil Corpn Ltd* [1917] 1 Ch 404.

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1429. Information to be made available for the purposes of the meeting.

Where a meeting of creditors or members or of any class of creditors or members is summoned¹, every notice summoning the meeting that is sent to a creditor² or member³ must be accompanied by a statement complying with the following provisions⁴ and every notice summoning the meeting that is given by advertisement must either include such a statement, or state where and how creditors or members entitled to attend the meeting may obtain copies of such a statement⁵. The statement must⁶:

- 694 (1) explain the effect of the compromise or arrangement⁷; and
 695 (2) in particular, state any material interests of the directors⁸ of the company⁹, whether as directors or as members or as creditors of the company or otherwise¹⁰, and the effect on those interests of the compromise or arrangement, in so far as it is different from the effect on the like interests of other persons¹¹.

Where the compromise or arrangement affects the rights of debenture¹² holders of the company, the statement must give the like explanation as respects the trustees of any deed for securing the issue of the debentures as it is required to give as respects the company's directors¹³. Where a notice given by advertisement states that copies of an explanatory statement can be obtained by creditors or members entitled to attend the meeting, every such creditor or member is entitled, on making application in the manner indicated by the notice, to be provided by the company with a copy of the statement free of charge¹⁴.

If a company makes default in complying with any requirement of the above provisions, an offence is committed¹⁵ by the company, and by every officer¹⁶ of the company who is in default¹⁷; but a person is not guilty of such an offence if he shows that the default was due to the refusal of a director or trustee for debenture holders to supply the necessary particulars of his interests¹⁸.

It is the duty of any director of the company, and of any trustee for its debenture holders, to give notice to the company of such matters relating to himself as may be necessary for the above purposes¹⁹; and any person who makes default in complying with this requirement commits an offence²⁰.

1 lie under the Companies Act 2006 s 896 (see PARA 1426): s 897(1).

2 As to the meaning of 'creditor' for this purpose see PARA 1427.

3 As to who qualifies as a member of a company see PARA 321.

4 Companies Act 2006 s 897(1)(a). In the case of a merger by absorption where all of the relevant securities of the transferor company (or, if there is more than one transferor company, of each of them) are held by or on behalf of the transferee company, s 897 does not apply: s 915(1), (3).

5 Companies Act 2006 s 897(1)(b); and see note 4.

6 Companies Act 2006 s 897(2).

7 Companies Act 2006 s 897(2)(a). As to the meaning of 'arrangement' see PARA 1425.

An explanation of the effect of the scheme requires, if the person called to vote on it is to be able to exercise a reasonable judgment on whether the scheme is in his interest or not, an explanation of how the scheme will affect him commercially: *Re Heron International NV* [1994] 1 BCLC 667; *Re Allied Domecq plc* [2000] 1 BCLC 134. A copy of the heading to the scheme is not a sufficient statement (*Re Peter Scott & Co Ltd* 1950 SC 507, Ct of Sess) nor is a copy of the petition (*Re Rankin and Blackmore Ltd* 1950 SC 218, Ct of Sess). In considering the adequacy of the notice of a meeting which is accompanied by a circular, it is necessary to look at both the notice and the circular: *Tiessen v Henderson* [1899] 1 Ch 861 at 866-867 per Kekewich J; *Re Moorgate Mercantile Holdings Ltd* [1980] 1 All ER 40 at 54, [1980] 1 WLR 227 at 242 per Slade J (notices and circulars can and should be treated ordinarily as one document); *Re RAC Motoring Services Ltd, Royal Automobile Club Ltd* [2000] 1 BCLC 307 at 327 per Neuberger J.

8 As to the meaning of 'director' under the Companies Acts see PARA 478.

9 As to the meaning of 'company' for these purposes see PARA 1425 note 3.

10 Companies Act 2006 s 897(2)(b)(i). The precise extent of the directors' interests must be disclosed (*Coltness Iron Co Ltd, Petitioners* 1951 SC 476, Ct of Sess), including interests held as trustees (*Second Scottish Investment Trust Co Ltd, Petitioners* 1962 SLT (Notes) 78, Ct of Sess).

11 Companies Act 2006 s 897(2)(b)(ii). A statement of the effect on the directors' interests is not required if the effect is the same as on the similar interests of other persons: *City Property Investment Trust Corp'n Ltd, Petitioners* 1951 SC 570, Ct of Sess. Failure to comply with this requirement in summoning a shareholders' meeting was held not sufficient to invalidate proceedings where all shares in the company were held by the bank which had originated the proposed scheme: *Re Clydesdale Bank Ltd* 1950 SC 30, Ct of Sess. The court did not refuse to sanction a scheme where there was a failure to disclose material but small interests of directors as trustees (*Second Scottish Investment Trust Co Ltd, Petitioners* 1962 SLT (Notes) 78, Ct of Sess), or a failure to disclose information which did not require to be disclosed in the statutory accounts (*Re National Bank Ltd* [1966] 1 All ER 1006, [1966] 1 WLR 819).

If, prior to the relevant class meetings, a director's material interests alter in such a way as possibly to affect the attitude of those receiving the statement, it is the duty of the directors to communicate the alteration to those to whom the original circular was sent: *Re Jessel Trust Ltd* [1985] BCLC 119. Disclosure is not limited to changes in a directors' interests; and all changes of circumstances which are material, in the sense that a reasonable shareholder would be likely to be affected in his voting by a new fact which becomes known to the board between the issuing of a circular and the holding of a scheme meeting, ought to be disclosed to the persons entitled to vote: *Re MB Group plc* [1989] BCLC 672 at 680 per Harman J. Otherwise the company will have to satisfy the court that no reasonable shareholder would have changed his decision as to how to act on the scheme if the changes had been disclosed: *Re Minster Assets plc* [1985] BCLC 200. As to sufficiency of information see *Re Heron International NV* [1994] 1 BCLC 667; *Re Allied Domecq plc* [2000] 1 BCLC 134.

12 As to the meaning of 'debenture' see PARA 1299.

13 Companies Act 2006 s 897(3).

14 Companies Act 2006 s 897(4). Failure to comply with this requirement cannot be cured by sending the statement to all members entitled to attend the meeting (*City Property Investment Trust Corp'n Ltd, Petitioners* 1951 SC 570, Ct of Sess), or by sending each shareholder a copy of the petition (*Re Rankin and Blackmore Ltd* 1950 SC 218, Ct of Sess). A scheme was sanctioned under the Companies (Consolidation) Act 1908 (repealed) (which contained no provision corresponding to the Companies Act 2006 s 897) in a case where advertisements were not inserted owing to an oversight, but notices were sent to and received by all except one of the shareholders: see *Re Anglo-Spanish Tartar Refineries Ltd* (1924) 68 Sol Jo 738.

15 In subject to the Companies Act 2006 s 897(7): see the text and note 18.

16 For this purpose, the following are treated as officers of the company: (1) a liquidator or administrator of the company; and (2) a trustee of a deed for securing the issue of debentures of the company: Companies Act 2006 s 897(6). As to the meaning of 'officer' generally see PARA 607. As to trust deeds securing payment of money owing on debentures see PARA 1302. As to liquidators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 555. As to administrators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 158 et seq.

17 Companies Act 2006 s 897(5). As to the meaning of 'officer in default' see PARA 315; and see note 16. A person guilty of such an offence is liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum: s 897(8). As to the statutory maximum see PARA 1622.

18 Companies Act 2006 s 897(7).

19 Companies Act 2006 s 898(1).

20 Companies Act 2006 s 898(2). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 898(3). As to the meaning of 'standard scale' see PARA 1622.

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C. REQUIRED MAJORITIES

1430. Majorities required at meetings.

The majority required is a majority in number representing 75 per cent in value of those present and voting at the meeting in person or by proxy¹. Where the debentures are registered, only the registered holder or his proxy may vote.

In the absence of any improper motive there is nothing to prevent a creditor who is also a shareholder from voting at a meeting of creditors or shareholders²; but the court will not sanction a scheme³ when the required majority is made up of persons not acting in good faith in the interest of the class to which they belong, as, for example, where their votes are given to rid themselves of their liability for amounts unpaid on their shares⁴. If, owing to insufficient notice or conflicting interests, there is a doubt whether the resolutions passed at any meeting really represent the views of the bulk of the members of the class, the court may direct another meeting to be called⁵.

Where a person has two claims against a company and votes in respect of one only, he is not thereby estopped from ranking in a scheme of arrangement in respect of both claims⁶.

Persons who enter into a secret bargain with a creditor by which, in return for a guarantee of payment of his claim, he agrees to support a scheme, are guilty of conspiracy⁷.

1 See the Companies Act 2006 s 899(1); and PARA 1431. As to proxies see PARA 1426 note 12; as to voting at meetings see PARA 653 et seq; and as to voting by proxy see PARA 662. Where, in the case of a company limited by guarantee, each member has precisely the same stake in the company, the position is the same as if each member owned a single share in it, and a three-fourths' majority of votes satisfies the requirements set out in the text: *Re NFU Development Trust Ltd* [1973] 1 All ER 135, [1972] 1 WLR 1548. As to the meaning of 'company limited by guarantee' under the Companies Acts see PARA 102. As to shares generally see PARA 1055.

A majority of those present and voting does not mean an absolute majority of shareholders of the class: see eg *Re TDG plc* [2008] EWHC 2334 (Ch), [2009] 1 BCLC 445, [2009] All ER (D) 274 (Feb). As to the conduct of the meeting see *Re Abbey National plc* [2004] EWHC 2776 (Ch), [2005] 2 BCLC 15.

2 *Re Madras Irrigation and Canal Co* [1881] WN 172.

3 As to the exercise of the court's sanction see PARA 1432. As to the meaning of 'court' see PARA 212 note 1.

4 *Re Wedgwood Coal and Iron Co* (1877) 6 ChD 627.

5 *Re Alabama, New Orleans, Texas and Pacific Junction Rly Co* [1891] 1 Ch 213 at 240, CA, per Lindley LJ.

6 *Curtis v BURT Co Ltd* (1912) 28 TLR 585, CA.

7 *R v Potter* [1953] 1 All ER 296; and see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 67 et seq.

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D. COURT SANCTION

1431. Court sanction for compromise or arrangement.

If a majority in number¹ representing 75 per cent in value of the creditors² or class of creditors³, or members⁴ or class of members, as the case may be, of the company⁵, present and voting either in person or by proxy at the meeting summoned⁶ agree a compromise or arrangement⁷, the court⁸ may, on an application⁹ under these provisions, sanction the compromise or arrangement¹⁰. Such an application may be made by:

- 696 (1) the company;
- 697 (2) any creditor or member of the company;
- 698 (3) if the company is being wound up, the liquidator¹¹; or
- 699 (4) if the company is in administration¹², the administrator¹³.

A compromise or arrangement sanctioned by the court is binding on all creditors or the class of creditors or on the members or class of members, as the case may be¹⁴, and on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company¹⁵. The interests of creditors must always be safeguarded¹⁶; but in the case of a scheme which involves the application of the provisions of the Companies Act 2006 for facilitating such reconstructions or amalgamations¹⁷, the protection of creditors is to be left to the procedure under such provisions¹⁸.

The courts do not, as a rule, make costs orders against objecting shareholders or creditors when their objections are not frivolous and have been of assistance to the court¹⁹.

1 As to majorities required at meetings see PARA 1430.

2 As to the meaning of 'creditor' for these purposes see PARA 1427.

3 The fact that a creditor may fall into more than one class does not mean that separate classes are inappropriate: *Re British Aviation Insurance Co Ltd* [2005] EWHC 1621 (Ch), [2006] 1 BCLC 665. See also *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241, [2001] 2 BCLC 480 (it is dissimilarity in legal rights, not interests or motives that matter when considering whether all members and creditors are able to consult together; where dissimilar rights are thus identified, separate meetings must be held); applied in *Re Telewest Communications plc*, *Re Telewest Finance (Jersey) Ltd* [2004] EWHC 924 (Ch), [2005] 1 BCLC 752. In *Re Mytravel Group plc* [2004] EWCA Civ 1734, [2005] 2 BCLC 123, one group of creditors was excluded altogether as they stood to receive nothing if the appropriate comparator (ie an insolvent winding-up) was allowed to occur; reversing in part *Re Mytravel Group plc* [2004] EWHC 2741 (Ch), [2005] 1 WLR 2365, [2005] 2 BCLC 123 (it was of the essence of a reconstruction that substantially the same shareholders should be involved in both old and new companies; in the instant case where that substantial identity was not present, what might be said to be reconstructed was not so much the company as its debts. The court would therefore decline to order the meetings on the basis of the scheme proposed).

4 As to who qualifies as a member of a company see PARA 321.

5 As to the meaning of 'company' for these purposes see PARA 1425 note 3.

6 Ie the meeting summoned under the Companies Act 2006 s 896: see PARA 1426. Section 323 (representation of corporations at meetings: see PARA 661) applies to a meeting of creditors under this provision as to a meeting of the company (references to a member of the company being read as references to a creditor): s 899(5) (added by SI 2008/948).

7 As to the meaning of 'arrangement' see PARA 1425.

8 As to the meaning of 'court' see PARA 212 note 1.

9 As to the procedure for making such an application see the text and notes 14-20.

10 Companies Act 2006 s 899(1). See PARA 1432. The court must not, however, sanction the compromise or arrangement unless the relevant requirements of Pt 27 (ss 902-941) (mergers and divisions of public companies: see PARA 1449 et seq) have been complied with: s 903(1). Even where the scheme involves the purchase by an outsider of all the issued shares of the company, it is not necessarily one which falls within Pt 28 Ch 3 (ss 974-991) (see PARA 1480 et seq) and which thus requires approval by a 90% majority: *Re National Bank Ltd* [1966] 1 All ER 1006, [1966] 1 WLR 819. Cf PARA 1429. Instead, it may be approved as a scheme within the Companies Act 2006 Pt 26 (ss 985-901) (see PARA 1425 et seq). The court will not sanction a scheme where in the case of creditors it is impossible to estimate the amount of debts: *Re Albert Life Assurance Co* (1871) 6 Ch App 381. As to the application of the law about compromise or arrangement with creditors to certain industrial and provident societies and friendly societies see the Enterprise Act 2002 s 255; and **COMPANY AND PARTNERSHIP INSOLVENCY**. As to the application of the Companies Act 1985 s 899 to open-ended investment companies see the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 (amended by SI 2008/948); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 665, 666.

- 11 As to liquidators see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 555.
- 12 As to companies in administration see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 212 et seq.
- 13 Companies Act 2006 s 899(2) (amended by SI 2008/948).
- 14 Companies Act 2006 s 899(3)(a). The order is, however, of no effect until a copy of it has been delivered to the registrar: see PARA 1433. The process by which a compromise or arrangement becomes binding on the company and its creditors is a three-stage process consisting of: (1) the application to the court under s 896 (summoning of class meetings to consider proposal: see PARAS 1426-1429); (2) the scheme proposals being put to the meeting or meetings of creditors for approval by the requisite majority (see PARA 1430); and (3) if the scheme proposals had been approved, the application to the court under s 899(1) (obtaining the court's sanction to the arrangement: see the text and notes 1-10; and PARA 1432 et seq): *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241, [2001] 2 BCLC 480. The court will not deprive creditors of the protection afforded by these provisions by sanctioning on the liquidator's application a conditional agreement of compromise under the Insolvency Act 1986 s 167 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 578): *Re Trix Ltd, Re Ewart Holdings Ltd* [1970] 3 All ER 397, [1970] 1 WLR 1421.
- 15 Companies Act 2006 s 899(3)(b); and see note 21. An agreement which is an element of an arrangement sanctioned by the court is binding on a company even if such an agreement might otherwise be ultra vires and void: *British and Commonwealth Holdings plc v Barclays Bank plc* [1996] 1 All ER 381, [1996] 1 WLR 1, CA. The approval of a scheme and its sanction by the court such that it binds all members is in compliance with the European Convention on Human Rights First Protocol art 1 (protection of property) (as incorporated into English law by the Human Rights Act 1998 s 1(3), Sch I Pt II): *Re Waste Recycling Group plc* [2003] EWHC 2065 (Ch) at [12]-[18], [2004] 1 BCLC 352 at [12]-[18] per Lloyd J; *Re Equitable Life Assurance Society* [2002] EWHC 140 (Ch) at [86], [2002] 2 BCLC 510 at [86] per Lloyd J (no arrangement capable of being approved under the Companies Act 1985 s 425 (repealed and replaced by provisions of the Companies Act 2006 s 895 et seq) could amount to a confiscation of property such that the European Convention on Human Rights First Protocol art 1 (protection of property) would be infringed). See also *Re Pan Atlantic Insurance Co* [2003] EWHC 1696 (Ch), [2003] 2 BCLC 678.
- 16 In *Re Sandwell Park Colliery Co Ltd* [1914] 1 Ch 589, this was effected by a provision that the company should not part with its assets to a new company until all its creditors had either been paid in full or assented to the scheme and accepted the new company as their debtor.
- 17 Ie the Companies Act 2006 s 900: see PARA 1434.
- 18 *Clydesdale Bank Ltd, Petitioners* 1950 SC 30, Ct of Sess; *Re Bramall & Ogden Ltd* [1981] LS Gaz R 813.
- 19 Sometimes no order for costs is made; sometimes an order is made in favour of the objector. There is no established principle that that treatment, which differs from the ordinary rule in litigation that costs usually follow the event, applies to other objectors; the matter however remains in all cases at the court's discretion. Whether a costs order is made pursuant to rules of court as between parties or directly pursuant to the Senior Courts Act 1981 s 51, costs only include the costs of or incidental to the litigation: *Re Peninsular and Oriental Steam Navigation Co* [2006] EWHC 3279 (Ch), [2006] All ER (D) 82 (Oct) (in which there was no order as to costs, save that the objector was to pay the company a proportion of counsel's fees).

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1432. Compromises or arrangements sanctioned.

Any kind of compromise or arrangement may be sanctioned by the court¹, including jurisdiction to sanction a scheme which contains provision for future amendment, either of the arrangement itself or of agreements and other documents to be made pursuant to it².

In exercising its power of sanction the court must be satisfied³:

- 700 (1) that the provisions of the statute had been complied with⁴;

- 701 (2) that the classes of creditors or members have been fairly represented by those who attended the meeting and that the statutory majority approving the scheme is acting in good faith in the interest of the class it professes to represent and is not coercing the minority in order to promote interests adverse to those of the class whom they purported to represent⁵; and
- 702 (3) that the arrangement was such as an intelligent and honest person, a member of the class concerned and acting in respect of his interest, might reasonably approve⁶.

The court may sanction arrangements containing the following provisions: that first mortgage debenture holders are to be postponed to other debentures or charges about to be issued or created⁷; that, in place of debentures guaranteed by a third party, debentures without a guarantee are to be issued to the holders and the guarantor released⁸; that debenture holders and other creditors of the company are to accept, in satisfaction of their debts, shares in a company to be formed⁹; that debentures, the interest on which is to be payable only out of the company's profits, are to be taken in satisfaction of debentures, the interest on which is payable whether profits are made or not¹⁰; that debentures repayable at periods of from three to five years shall be converted into debenture stock repayable only in a certain limited number of events¹¹; or that shares in a company shall be sub-divided and that each shareholder shall surrender some of the shares resulting from the sub-division to another company whose undertaking is to be merged in that of the company whose shares they hold¹².

The court may approve an arrangement which is to be binding after liquidation¹³. Arrangements may be entered into for the purpose of reconstructing the company, staying any pending winding-up proceedings, or distributing assets amongst creditors¹⁴. They may also involve reduction of the company's capital, but, if so, the proceedings must comply with the other requirements of the Companies Act 2006 applicable in such cases¹⁵. They may be concerned solely with the rights of classes of shareholders among themselves¹⁶. Where a company in winding up is to continue to carry on its business, the arrangement should provide for the liquidation to be stayed, the liquidator discharged and the assets handed over by him to the company¹⁷.

An arrangement may be sanctioned under which the company's undertaking is to be transferred to a new company and members of the company are to receive fully paid or partly paid shares in the new company in the proportions specified in the scheme¹⁸. In such a case the court usually requires, as a condition of its sanction, provisions to be made for dissentient members to have the same rights as they would have had if the sale had been effected under the provision¹⁹ permitting a liquidator to accept shares etc as consideration for the sale of the company's property²⁰; and, where the arrangement involves a sale of the company's undertaking to a new company in the manner contemplated by that provision, that provision must be complied with²¹. An agreement which is an element of an arrangement sanctioned by the court is binding on a company even if such an agreement might otherwise be an ultra vires return of capital and void²².

An arrangement need not expressly reserve the rights of any creditors against sureties for the company's debts, as those rights are unaffected²³. In case of ambiguity the provisions of an arrangement should be construed in the sense in which an ordinary business person would understand them²⁴.

The court has no jurisdiction to sanction a compromise or arrangement of which the company disapproves, and hence, unless it is proposed as part of the compromise or arrangement that a general meeting of the company should be convened to obtain such approval, the court will not convene meetings to sanction a compromise or arrangement of which the board of the company disapproves²⁵.

The court must not sanction the compromise or arrangement under the provisions relating to arrangements and reconstructions²⁶ unless the relevant requirements of Part 27 of the Companies Act 2006²⁷ have been complied with²⁸.

1 The sanctioned under the Companies Act 2006 s 899: see PARA 1431. The procedure under s 899 with its built-in safeguards should be adopted where what is proposed is in fact a compromise or arrangement rather than other procedures (eg under the Insolvency Act 1986 s 167: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 578): *Re Trix Ltd, Re Ewart Holdings Ltd* [1970] 3 All ER 397, [1970] 1 WLR 1421. The court may sanction a scheme under the Companies Act 2006 Pt 26 (ss 895-901) (see PARA 1425 et seq) as an alternative to a take-over under Pt 28 Ch 3 (ss 974-991) (see PARA 1511 et seq): *Re TDG plc* [2008] EWHC 2334 (Ch), [2009] 1 BCLC 445, [2009] All ER (D) 274 (Feb); *Re BTR plc* [2000] 1 BCLC 740, CA; *Re National Bank Ltd* [1966] 1 All ER 1006, [1966] 1 WLR 819. Cf PARA 1430 note 1. As to the meaning of 'arrangement' see PARA 1425.

2 *Re Cape plc* [2006] EWHC 1316 (Ch), [2006] 3 All ER 1222, [2007] 2 BCLC 546 (although there are strong reasons why in most cases the court is unlikely to exercise the jurisdiction to sanction an arrangement with provisions for future amendments, the particular circumstances of a case may make it appropriate to sanction such an arrangement, eg where asbestos-related personal injuries may be expected to arise over a period of decades). An arrangement should ordinarily provide that it may be modified with the court's approval; and the court has often acted on such a clause: see *Re Canning Jarrah Timber Co (Western Australia) Ltd* [1900] 1 Ch 708, CA.

3 See *Re National Bank Ltd* [1966] 1 All ER 1006 at 1012, [1966] 1 WLR 819 at 829 per Plowman J, citing *Buckley On The Companies Acts* (13th Edn, 1957) p 409; *Re Osiris Insurance Ltd* [1999] 1 BCLC 182 at 188-189; *Re Allied Domecq plc* [2000] 1 BCLC 134; *Re RAC Motoring Services Ltd, Royal Automobile Club Ltd* [2000] 1 BCLC 307 at 321 per Neuberger J; *Re BTR plc* [2000] 1 BCLC 740, CA; *Re Equitable Life Assurance Society* [2002] EWHC 140 (Ch), [2002] 2 BCLC 510; *Re Marconi plc, Marconi Corp plc* [2003] EWHC 1083 Ch, [2003] All ER (D) 126 (May); *Re Waste Recycling Group plc* [2003] EWHC 2065 (Ch), [2004] 1 BCLC 352.

4 *Re Alabama, New Orleans, Texas and Pacific Junction Rly Co* [1891] 1 Ch 213, CA; *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385, CA; *Re Anglo-Continental Supply Co Ltd* [1922] 2 Ch 723 at 736 per Astbury J; *Re Shandon Hydropathic Co Ltd* 1911 SC 1153, Ct of Sess; *Lainière de Roubaix v Glen Glove and Hosiery Co Ltd* 1926 SC 91, Ct of Sess. Cf *Re Neath and Brecon Rly Co* [1892] 1 Ch 349, CA; *Re London Chartered Bank of Australia* [1893] 3 Ch 540 at 545 per Vaughan Williams J.

5 See the cases cited in note 3; and see *Re Altitude Scaffolding Ltd, Re T & N Ltd* [2006] EWHC 1401 (Ch), [2007] 1 BCLC 199 (a creditors' meeting of the company must be attended by more than one creditor). As to class composition see PARA 1428. If the court is satisfied that the class meeting was unrepresentative, or those voting at the meeting had voted to promote a special interest which differed from the interest of the ordinary independent and objective shareholder, the court would refuse to sanction the scheme: *Re BTR plc* [2000] 1 BCLC 740, CA; and see *Re British Aviation Insurance Co Ltd* [2005] EWHC 1621 (Ch), [2006] 1 BCLC 665.

6 See *Re Dorman, Long & Co Ltd, Re South Durham Steel and Iron Co Ltd* [1934] Ch 635 at 655-657 per Maugham J; the cases cited in note 3; and *Re Telewest Communications plc, Re Telewest Finance (Jersey) Ltd* [2004] EWHC 1466 (Ch), [2005] 1 BCLC 772; *Re Abbey National plc* [2004] EWHC 2776 (Ch), [2005] 2 BCLC 15; *Re TDG plc* [2008] EWHC 2334 (Ch), [2009] 1 BCLC 445, [2009] All ER (D) 274 (Feb). See also *Re Equitable Life Assurance Society* [2002] EWHC 140 (Ch) at [109], [2002] 2 BCLC 510 at [109] per Lloyd J (the fact that large numbers and majorities have approved the scheme is a major factor in considering whether an intelligent and honest person, a member of the class concerned and acting in respect of his interest, might reasonably approve). As to the requisite majorities see PARA 1430.

7 *Re Western of Canada Oil, Lands and Works Co* [1874] WN 148.

8 *Shaw v Royce Ltd* [1911] 1 Ch 138.

9 *Slater v Darlaston Steel and Iron Co* [1877] WN 165; *Re Empire Mining Co* (1890) 44 ChD 402.

10 *Re Alabama, New Orleans, Texas and Pacific Junction Rly Co* [1891] 1 Ch 213, CA.

11 *Re Shandon Hydropathic Co Ltd* 1911 SC 1153, Ct of Sess.

12 *Re Guardian Assurance Co* [1917] 1 Ch 431, CA; *Re Barclays Bank Ltd* (1918) 62 Sol Jo 752. In Scotland a scheme has been sanctioned which involved an alteration in the memorandum of association in order to clarify the rights of the several classes of shareholders, these rights not being clearly stated in the memorandum: *Edinburgh Railway Access and Property Co v Scottish Metropolitan Assurance Co* 1932 SC 2, Ct of Sess.

13 See *Re Anglo American Insurance Ltd* [2001] 1 BCLC 755 (sanction of arrangement which, following liquidation, imposed provisions on liquidator differing from the statutory scheme on a liquidation).

14 *Re Dominion of Canada Freehold Estate and Timber Co Ltd* (1886) 55 LT 347; *Re Marine Investment Co, ex p Poole's Executors* (1873) 8 Ch App 702. See also *Re Stephen Walters & Sons Ltd* [1926] WN 236. As to provisions for ex gratia payments to officers and employees see now the Companies Act 2006 s 247; and PARA 546. As to the former law see *Hutton v West Cork Rly Co* (1883) 23 ChD 654, followed in *Parke v Daily News Ltd* [1962] Ch 927, [1962] 2 All ER 929.

15 *Re Cooper, Cooper and Johnson Ltd* [1902] WN 199; *Re White Pass and Yukon Rly Co Ltd* (1918) 63 Sol Jo 55. See also *Re Stephen Walters & Sons Ltd* [1926] WN 236. As to a reduction of capital see PARA 1173 et seq. A reduction and arrangement scheme has been sanctioned which involved the issue of participation certificates to shareholders, part of whose paid up capital and whose arrears of dividend had been cancelled, with provision for the payment of dividend on the certificates, and their redemption at their nominal value, out of profits: see *Re Hoare & Co Ltd and Reduced* [1910] WN 87.

16 *Re Odhams Press Ltd* [1925] WN 10.

17 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1014.

18 *Re Canning Jarrah Timber Co (Western Australia) Ltd* [1900] 1 Ch 708, CA; *Re Standard Exploration Co Ltd* (1902) Times, 21, 26 March; *Re Tea Corp Ltd, Sorsbie v Tea Corp Ltd* [1904] 1 Ch 12, CA; *Re Sandwell Park Colliery Co Ltd* [1914] 1 Ch 589. These cases were discussed in *Re Anglo-Continental Supply Co Ltd* [1922] 2 Ch 723. See also the Companies Act 2006 s 900; and PARAS 1434, 1436. Section 900(2)(e) (see PARA 1434) specifically enables the court to make provisions for dissentients. For a scheme involving a transfer to another company and an application to the court under provisions now re-enacted in s 900 for facilitation of the scheme see *Re Star Tea Co Ltd* [1930] WN 4.

19 See the Insolvency Act 1986 s 110; and PARA 1438 et seq.

20 See *Re Canning Jarrah Timber Co (Western Australia) Ltd* [1900] 1 Ch 708, CA; *Re Sandwell Park Colliery Co Ltd* [1914] 1 Ch 589 (where the scheme itself made provision for dissentient shareholders similar to those in the Companies Act 2006 s 427(2)). Cf *Re Standard Exploration Co Ltd* (1902) Times, 21, 26 March; *Re Tea Corp Ltd, Sorsbie v Tea Corp Ltd* [1904] 1 Ch 12 (where no provisions for dissentients were included); *Re Anglo-Continental Supply Co Ltd* [1922] 2 Ch 723 (where provisions for dissentients were made which did not correspond with those in the Insolvency Act 1986 s 110); *Re Star Tea Co Ltd* [1930] WN 4.

21 *Re General Motor Cab Co Ltd* [1913] 1 Ch 377, CA (distinguished in *Re Sandwell Park Colliery Co Ltd* [1914] 1 Ch 589; and explained in *Re Anglo-Continental Supply Co Ltd* [1922] 2 Ch 723); *Re Guardian Assurance Co* [1917] 1 Ch 431 at 441, CA, per Younger J, and at 540 per Warrington LJ. See also *Re Needhams Ltd* [1923] WN 289.

22 *British and Commonwealth Holdings plc v Barclays Bank plc* [1996] 1 All ER 381, [1996] 1 WLR 1, CA. See, however, *Re Oceanic Steam Navigation Co Ltd* [1939] Ch 41, [1938] 3 All ER 740 (court cannot sanction any arrangement which involves the doing of an act which is ultra vires the company). As to ultra vires acts generally see PARA 259 et seq.

23 *Re London Chartered Bank of Australia* [1893] 3 Ch 540 at 546 per Vaughan Williams J; *Dane v Mortgage Insurance Corp Ltd* [1894] 1 QB 54, CA; *Finlay v Mexican Investment Corp Ltd* [1897] 1 QB 517. The scheme may vary the rights of creditors as to interest: *Re New English Bank of River Plate Ltd* (1898) 14 TLR 526, CA. When sanctioned by the court, a scheme has statutory operation and thus a discharge effected by the scheme of one of several joint debtors does not release the others: *Re Garner's Motors Ltd* [1937] Ch 594, [1937] 1 All ER 671.

24 *Re Land Securities Co Ltd, ex p Farquhar* [1896] 2 Ch 320, CA (where it was held that 'under discount at the rate of 4% per annum' meant a rebate of interest at that rate).

25 *Re Savoy Hotel Ltd* [1981] Ch 351, [1981] 3 All ER 646.

26 Ie under the Companies Act 2006 Pt 26 (see PARA 1425 et seq).

27 Ie the Companies Act 2006 Pt 27 (ss 902-941) (see PARA 1449 et seq). As to the application of Pt 27 see PARA 1449.

28 See the Companies Act 2006 s 903(1); and PARA 1450.

UPDATE

1432 Compromises or arrangements sanctioned

NOTE 1--See *Re Lehman Brothers International (Europe) (in administration)* (No 2) [2009] EWCA Civ 1161, [2010] Bus LR 489, [2009] All ER (D) 83 (Nov).

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1433. Registration of order sanctioning compromise or arrangement.

The court's¹ order sanctioning a compromise or arrangement² has no effect until a copy of it has been delivered to the registrar³.

If the order amends either the company's⁴ articles⁵, or any resolution or agreement affecting the company's constitution⁶, the copy of the order so delivered to the registrar by the company must be accompanied by a copy of the company's articles, or the resolution or agreement in question, as amended⁷. Every copy of the company's articles issued by the company after the order is made must be accompanied by a copy of the order, unless the effect of the order⁸ has been incorporated into the articles by amendment⁹. If a company makes default in complying with these requirements an offence is committed by the company, and by every officer¹⁰ of the company who is in default¹¹.

1 As to the meaning of 'court' see PARA 212 note 1.

2 I.e. the order under the Companies Act 2006 s 899: see PARA 1431. As to the meaning of 'arrangement' see PARA 1425.

3 Companies Act 2006 s 899(4). As to the meaning of 'registrar' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. An order under s 899 in relation to a non-profit registered provider of social housing which is a registered company is effective only if the Regulator of Social Housing has first consented, and does not take effect until a copy of the consent is delivered to the registrar of companies: see the Housing and Regeneration Act 2008 s 160(1), (3); and **HOUSING**. A copy of any order under the Companies Act 2006 s 899 in respect of a compromise or arrangement to which Pt 27 (ss 902-941) (mergers and divisions of public companies: see PARA 1449 et seq) applies is subject to the disclosure requirements in s 1078: see PARA 144.

Although the sanction of the court is necessary for the scheme to become binding (see PARA 1431), and it takes effect when the order expressing that sanction is delivered to the registrar, it is not accurate to say that the court (rather than the liquidators who proposed the scheme or the creditors who agreed to it) makes the scheme by its order: *Kempe v Ambassador Insurance Co* [1998] 1 WLR 271, [1998] 1 BCLC 234, PC.

4 As to the meaning of 'company' for these purposes see PARA 1425 note 3.

5 As to the meaning of 'articles' under the Companies Acts see PARA 228 note 2. For these purposes, in the case of a company not having articles, references to its articles are to be read as references to the instrument constituting the company or defining its constitution: Companies Act 2006 s 901(4)(b). As to the meaning of a 'company's constitution' under the Companies Acts see PARA 227.

6 I.e. any resolution or agreement to which the Companies Act 2006 Pt 3 Ch 3 (ss 29, 30) (see PARA 231) applies: s 901(2)(b).

7 Companies Act 2006 s 901(1)(a), (2).

8 For these purposes, references to the effect of the order include the effect of the compromise or arrangement to which the order relates: Companies Act 2006 s 901(4)(a).

9 Companies Act 2006 s 901(3).

10 As to the meaning of 'officer' under the Companies Acts see PARA 607.

11 Companies Act 2006 s 901(5). As to the meaning of 'officer in default' see PARA 315. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 901(6). As to the meaning of 'standard scale' see PARA 1622.

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1434. Provisions for facilitating reconstruction and amalgamation.

Where application is made to the court¹ to sanction a compromise or arrangement² and it is shown that:

- 703 (1) the compromise or arrangement is proposed for the purposes of, or in connection with, a scheme for the reconstruction³ of any company⁴ or companies, or the amalgamation⁵ of any two or more companies; and
- 704 (2) under the scheme the whole or any part of the undertaking or the property⁶ of any company concerned in the scheme (a 'transferor company') is to be transferred to another company (the 'transferee company'),

the following provisions apply⁷. The court may, either by the order sanctioning the compromise or arrangement or by a subsequent order⁸, make provision for all or any of the following matters⁹:

- 705 (a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities¹⁰ of any transferor company¹¹;
- 706 (b) the allotting or appropriation by the transferee company of any shares¹², debentures¹³, policies or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person¹⁴;
- 707 (c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company¹⁵;
- 708 (d) the dissolution, without winding up, of any transferor company¹⁶;
- 709 (e) the provision to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or arrangement¹⁷;
- 710 (f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation is fully and effectively carried out¹⁸.

If an order under these provisions provides for the transfer of property or liabilities, the property is by virtue of the order transferred to, and vests in, the transferee company, and the liabilities are, by virtue of the order, transferred to and become liabilities of that company¹⁹. If the order so directs, the property vests freed from any charge that is by virtue of the compromise or arrangement to cease to have effect²⁰.

If a scheme by inadvertence orders or prohibits an act which otherwise the parties could not bind themselves to do or not do, it is to that extent a nullity²¹.

- 1 le under the Companies Act 2006 s 899: see PARA 1431. As to the meaning of 'court' see PARA 212 note 1.
- 2 As to the meaning of 'arrangement' see PARA 1425.
- 3 As to the meaning of 'reconstruction' see PARA 1435.
- 4 As to the meaning of 'company' for these purposes see PARA 1425 note 3.
- 5 As to the meaning of 'amalgamation' see PARA 1435.
- 6 For these purposes, 'property' includes property, rights and powers of every description: Companies Act 2006 s 900(5). Non-transferable contracts are not included; thus corporation tax allowances as to deductions for wear and tear and losses are not transferred: *United Steel Companies Ltd v Cullington (Inspector of Taxes)* [1940] AC 812, [1940] 2 All ER 170, HL. See **INCOME TAXATION** vol 23(2) (Reissue) PARA 1073. As to the transfer of certain contracts for personal services see the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246; and **EMPLOYMENT** vol 39 (2009) PARA 111 et seq.
- 7 Companies Act 2006 s 900(1).
- 8 An order takes effect on delivery to the registrar: see the Companies Act 2006 ss 899(4), 900(6); and PARAS 1433, 1436.
- 9 Companies Act 2006 s 900(2). The court must not, however, sanction the compromise or arrangement unless the relevant requirements of Pt 27 (ss 902-941) (mergers and divisions of public companies: see PARA 1449 et seq) have been complied with: s 903(1). As to cross-border mergers of limited liability companies, for which no provision is made by the Companies Act 2006, see the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974; and PARA 1451. As to the application of the law about compromise or arrangement with creditors to certain industrial and provident societies and friendly societies see the Enterprise Act 2002 s 255; and **COMPANY AND PARTNERSHIP INSOLVENCY**.
- 10 For these purposes, 'liabilities' includes duties: Companies Act 2006 s 900(5). Duties as a personal representative are not transferred: *Re Skinner* [1958] 3 All ER 273, [1958] 1 WLR 1043.
- 11 Companies Act 2006 s 900(2)(a).
- 12 As to shares generally see PARA 1055.
- 13 As to the meaning of 'debentures' see PARA 1299.
- 14 Companies Act 2006 s 900(2)(b).
- 15 Companies Act 2006 s 900(2)(c).
- 16 Companies Act 2006 s 900(2)(d).
- 17 Companies Act 2006 s 900(2)(e).
- 18 Companies Act 2006 s 900(2)(f).
- 19 Companies Act 2006 s 900(3).
- 20 Companies Act 2006 s 900(4).
- 21 *Re Skinner* [1958] 3 All ER 273, [1958] 1 WLR 1043, following *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014, [1940] 3 All ER 549, HL (but note that the effect of the decision in *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014, [1940] 3 All ER 549, HL, so far as referring to the transfer of contracts for personal services, has been reversed by the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246: see note 6; and **EMPLOYMENT** vol 39 (2009) PARA 111 et seq). See also *Re L Hotel Co Ltd and Langham Hotel Co Ltd* [1946] 1 All ER 319.

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1435. Meanings of 'reconstruction' and 'amalgamation'.

Neither 'reconstruction' nor 'amalgamation'¹ has a precise legal meaning².

Where an undertaking is being carried on by a company and is in substance transferred, not to an outsider, but to another company consisting substantially of the same shareholders with a view to its being continued by the transferee company, there is a reconstruction³. It is nonetheless a reconstruction because all the assets do not pass to the new company, or all the shareholders of the transferor company are not shareholders in the transferee company, or the liabilities of the transferor company are not taken over by the transferee company⁴.

Amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company becoming substantially the shareholders in the company which is to carry on the blended undertakings⁵. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company⁶. Strictly 'amalgamation' does not, it seems, cover the mere acquisition by a company of the share capital of other companies which remain in existence and continue their undertakings⁷, but the context in which the term is used may show that it is intended to include such an acquisition⁸.

The question whether a winding up is for the purposes of reconstruction or amalgamation depends upon the whole of the circumstances of the winding up⁹.

¹ As to provisions for facilitating the reconstruction and amalgamation of companies see the Companies Act 2006 s 900; and PARA 1434.

² *Re South African Supply and Cold Storage Co, Wild v South African Supply and Cold Storage Co* [1904] 2 Ch 268 at 281 per Buckley J.

³ *Hooper v Western Counties and South Wales Telephone Co Ltd* (1892) 68 LT 78 at 80; *Re South African Supply and Cold Storage Co, Wild v South African Supply and Cold Storage Co* [1904] 2 Ch 268 at 286 per Buckley J; *Swithland Investments Ltd v IRC* [1990] STC 448; *Re MyTravel Group plc* [2004] EWCA Civ 1734, [2005] 2 BCLC 123.

⁴ *Re South African Supply and Cold Storage Co, Wild v South African Supply and Cold Storage Co* [1904] 2 Ch 268 at 286 per Buckley J. The business and persons interested must, however, be substantially the same: *Re South African Supply and Cold Storage Co, Wild v South African Supply and Cold Storage Co* [1904] 2 Ch 268. For instances where these requirements were not fulfilled see *Brooklands Selangor Holdings Ltd v IRC* [1970] 2 All ER 76, [1970] 1 WLR 429 (where, after the transfer of part of a company's undertaking, the stockholders in the new company comprised a majority in number, but less than half in value, of the stockholders in the original company); *Baytrust Holdings Ltd v IRC* [1971] 3 All ER 76, [1971] 1 WLR 1333 (not a reconstruction when all that happened was that certain assets not required by a company in its business were passed on to its shareholders in the form of shares in a new company); *Re MyTravel Group plc* [2004] EWCA Civ 1734, [2005] 2 BCLC 123 (a state of affairs in which 4% by value of the shareholding in the new company was held by 100% of the shareholders in the old was not one in which there was a substantial identity between the two bodies of shareholders of the shares in the new company).

⁵ *Re South African Supply and Cold Storage Co, Wild v South African Supply and Cold Storage Co* [1904] 2 Ch 268 at 287 per Buckley J; *Swithland Investments Ltd v IRC* [1990] STC 448.

⁶ See note 5.

⁷ See *Re Walker's Settlement, Royal Exchange Assurance Corpn v Walker* [1935] Ch 567, CA ('amalgamation' in the Trustee Act 1925 s 10(3)(c) (repealed); but the actual decision in this case was nullified by the Trustee Investments Act 1961 s 9(1) (repealed)).

⁸ See *Lever Bros Ltd v IRC* [1938] 2 KB 518 at 524, [1938] 2 All ER 808 at 809, CA, per Greene MR (where it was said that the Finance Act 1927 s 55 (now repealed) contemplated two methods of amalgamation 'or what is commonly called amalgamation': (1) where a company acquires the undertaking or part of the undertaking of another; and (2) where a company acquires the shares of another without acquiring the assets).

9 *Re South African Supply and Cold Storage Co, Wild v South African Supply and Cold Storage Co* [1904] 2 Ch 268 at 282 per Buckley J. See also *Hooper v Western Counties and South Wales Telephone Co Ltd* (1892) 68 LT 78 (reconstruction); *Re Bank of Hindustan, China and Japan Ltd, Higg's Case* (1865) 2 Hem & M 657; *Re Empire Assurance Corpn, ex p Bagshaw* (1867) LR 4 Eq 341 at 349; *Imperial Bank of China, India and Japan v Bank of Hindustan, China and Japan* (1868) LR 6 Eq 91; *New Zealand Gold Extraction Co (Newbery-Vautin Process) v Peacock* [1894] 1 QB 622 at 627-628 per Kennedy J (affd [1894] 1 QB 622 at 632, CA, per Davey LJ); *Wall v London and Northern Assets Corpn* [1898] 2 Ch 469, CA; *Re Borax Co, Foster v Borax Co* [1899] 2 Ch 130 at 135 per North J; *Greenwich Pier Co v Thames River Conservators* (1905) 21 TLR 669 (amalgamation).

As to the fiscal problems involved in amalgamations see **CAPITAL GAINS TAXATION; INCOME TAXATION**.

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1436. Making of order to facilitate reconstruction and amalgamation.

Every company¹ in relation to which an order is made for facilitating reconstruction and amalgamation² must cause a copy of the order to be delivered to the registrar³ within seven days after its making⁴. If default is made in complying with this requirement an offence is committed by the company, and by every officer⁵ of the company who is in default⁶.

If such an order which alters the company's constitution⁷ amends either the company's articles⁸, or any resolution or agreement affecting the company's constitution⁹, the copy of the order so delivered to the registrar by the company must be accompanied by a copy of the company's articles, or the resolution or agreement in question, as amended¹⁰. Every copy of the company's articles issued by the company after the order is made must be accompanied by a copy of the order, unless the effect of the order¹¹ has been incorporated into the articles by amendment¹². If a company makes default in complying with these requirements an offence is committed by the company, and by every officer of the company who is in default¹³.

1 As to the meaning of 'company' for these purposes see PARA 1425 note 3.

2 Ie an order under the Companies Act 2006 s 900: see PARA 1434.

3 As to the meaning of 'registrar' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

4 Companies Act 2006 s 900(6). An order under s 900 in relation to a non-profit registered provider of social housing which is a registered company is effective only if the Regulator of Social Housing has first consented, and does not take effect until a copy of the consent is delivered to the registrar of companies: see the Housing and Regeneration Act 2008 s 160(1), (4); and **HOUSING**. A copy of any order under the Companies Act 2006 s 900 in respect of a compromise or arrangement to which Pt 27 (ss 902-941) (mergers and divisions of public companies: see PARA 1449 et seq) applies is subject to the disclosure requirements in s 1078: see PARA 144.

5 As to the meaning of 'officer' under the Companies Acts see PARA 112 note 1.

6 Companies Act 2006 s 900(7). As to the meaning of 'officer in default' see PARA 315. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: s 900(8). As to the meaning of 'standard scale' see PARA 1622.

7 As to the meaning of a 'company's constitution' under the Companies Acts see PARA 227.

8 As to the meaning of 'articles' under the Companies Acts see PARA 228 note 2. For these purposes, in the case of a company not having articles, references to its articles are to be read as references to the instrument constituting the company or defining its constitution: Companies Act 2006 s 901(4)(b).

9 le any resolution or agreement to which the Companies Act 2006 Pt 3 Ch 3 (ss 29, 30) (see PARA 231) applies: s 901(2)(b).

10 Companies Act 2006 s 901(1)(a), (2).

11 For these purposes, references to the effect of the order include the effect of the compromise or arrangement to which the order relates: Companies Act 2006 s 901(4)(a).

12 Companies Act 2006 s 901(3).

13 Companies Act 2006 s 901(5). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 901(6).

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(ii) Sale of Undertaking for Shares in Contemplation of Voluntary Winding Up

1437. Sale of undertaking with a view to winding up.

A sale of the company's undertaking with a view to winding up may be made and carried out by the company before liquidation, or by the liquidator after the winding-up resolution¹; or the agreement may be made by the company to be carried out by the liquidator. In any such scheme of reorganisation, if the agreement for sale contains provisions for the distribution of shares or other consideration among the members of the selling company, the sale must be carried out in accordance with the statutory provisions which govern the transfer or sale of the whole or part of the business of a company which is or is proposed to be wound up²; and any clause in the articles of the company is invalid in so far as it purports to authorise the distribution of such shares or consideration otherwise than in accordance with the statutory provisions or to deprive a dissenting shareholder of his rights under those provisions³.

1 As to the powers of a liquidator in a voluntary winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 959-960.

2 le the sale must be carried out in accordance with the Insolvency Act 1986 s 110: see PARA 1438 et seq.

3 *Bisgood v Henderson's Transvaal Estates Ltd* [1908] 1 Ch 743, CA; *Etheridge v Central Uruguay Northern Extension Rly Co* [1913] 1 Ch 425. Cf *Baring-Gould v Sharpington Combined Pick and Shovel Syndicate* [1899] 2 Ch 80, CA; *Payne v Cork Co Ltd* [1900] 1 Ch 308; *Re Canning Jarrah Timber Co (Western Australia) Ltd* [1900] 1 Ch 708, CA. As to the meaning of 'articles' under the Companies Acts see PARA 228 note 2.

The case may be different where the sale is of part of the assets only: see *Wall v London and Northern Assets Corpn* [1898] 2 Ch 469, CA. It has long been usual for companies to state in their memoranda that one of the objects is to sell the undertakings or any part of them for any consideration, and in particular for shares or other securities of any other company having similar objects, and to provide in their memoranda and articles for the distribution of such shares in specie among the members. Such a power was held to be valid, even when the whole of the company's assets were sold, and the winding up, which is required before the proceeds of the sale may be distributed amongst the shareholders, was not resolved upon at the same time: *Cotton v Imperial and Foreign Agency and Investment Corpn* [1892] 3 Ch 454. Hence dissentient members were deprived of the rights which they would have possessed on a statutory reconstruction under the provisions now re-enacted in the Insolvency Act 1986 s 111 (see PARA 1438) to have their interests bought out. The fact that a resolution for voluntary winding up was passed at the time when the sale was sanctioned was held to be immaterial in *Doughty v Lomagunda Reefs Ltd* [1902] 2 Ch 837 (on appeal [1903] 1 Ch 673, CA). See also *Re Paterson, Laing and Bruce Ltd* (1902) 18 TLR 515. It was further held that, unless there was something in the memorandum or

articles to qualify the meaning of 'shares', a company could, under the power of sale in its memorandum, accept partly paid shares in another company: *Mason v Motor Traction Co Ltd* [1905] 1 Ch 419. Where the memorandum expressly gave power to sell for fully paid or partly paid shares, the Court of Appeal, without deciding that such a power was illegal, held that an agreement with another company which provided for the distribution of the partly paid shares of the purchasing company among the shareholders of the selling company, and the proceeds of sale of the shares not taken up being applied in reduction of the purchase money, was not within the power: *Manners v St David's Gold and Copper Mines Ltd* [1904] 2 Ch 593, CA. An agreement under which the proceeds of the partly paid shares unclaimed were to be distributed rateably amongst the members who might have claimed them was also held to be ultra vires in *Bisgood v Nile Valley Co Ltd* [1906] 1 Ch 747. In a somewhat similar case the agreement was held to be valid (*Fuller v White Feather Reward Ltd* [1906] 1 Ch 823), but the Court of Appeal in *Bisgood v Henderson's Transvaal Estates Ltd* [1908] 1 Ch 743, CA subsequently approved *Bisgood v Nile Valley Co Ltd* [1906] 1 Ch 747 and overruled *Cotton v Imperial and Foreign Agency and Investment Corpn* [1892] 3 Ch 454 and *Fuller v White Feather Reward Ltd* [1906] 1 Ch 823, in so far as those cases decided that it was possible for a company to evade the provisions now embodied in the Insolvency Act 1986 ss 110, 111 (see PARA 1438).

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1438. Sale in voluntary winding up.

Where a company (the 'transferor company') is proposed to be or is being wound up voluntarily and the whole or part of its business or property is proposed to be transferred or sold to another company (the 'transferee company'), whether or not the latter is a company registered under the Companies Act 2006¹, the liquidator of the company being, or proposed to be, wound up (the 'transferor company') may, with the requisite sanction², receive, in compensation or part compensation for the transfer or sale, shares, policies or other like interests in the transferee company for distribution³ among the members of the transferor company⁴. Alternatively, the liquidator may, with that sanction, enter into any other arrangement⁵ whereby the members of the transferor company may, in lieu of receiving cash, shares, policies or other like interests, or in addition thereto, participate in the profits of, or receive any other benefit from, the transferee company⁶. Any such sale or arrangement is binding on the members of the transferor company⁷.

If a member of the transferor company who did not vote in favour of the special resolution sanctioning the arrangement expresses his dissent from it in writing, addressed to the liquidator and left at the company's registered office within seven days after the passing of the resolution, he may require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or by arbitration in the manner specified⁸.

1 Insolvency Act 1986 s 110(1)(a) (renumbered by SI 2001/1090; amended by SI 2009/1941). See PARA 1439. As to company registration under the Companies Act 2006 see PARA 78 et seq. As to companies registered but not formed under the Companies Act 2006, and as to overseas companies, see PARA 32. The Insolvency Act 1986 s 110(1)(b), (2)(b), (4)(b) (added by SI 2001/1090) applies these provisions to limited liability partnerships (see **PARTNERSHIP** vol 79 (2008) PARA 244).

2 See PARA 1441. The sanction so required is: (1) in the case of a members' voluntary winding up (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 939 et seq), that of a special resolution of the company, conferring either a general authority on the liquidator or an authority in respect of any particular arrangement; and (2) in the case of a creditors' voluntary winding up (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 939 et seq), that of either the court or of the liquidation committee: Insolvency Act 1986 s 110(3). A special resolution is not invalid for these purposes by reason that it is passed before or concurrently with a resolution for voluntary winding up or for appointing liquidators; but, if an order is

made within a year for winding up the company by the court, the special resolution is not valid unless sanctioned by the court: s 110(6).

3 As to the distribution of proceeds see PARA 1443.

4 Insolvency Act 1986 s 110(2)(a) (substituted and renumbered by SI 2001/1090). As to who qualifies as a member of a company see PARA 321.

5 As to terms of the agreement see PARA 1440.

6 Insolvency Act 1986 s 110(4)(a) (renumbered by SI 2001/1090). By registering under the Companies Act 2006 an unregistered company can avail itself of this provision: see *Southall v British Mutual Life Assurance Society* (1871) 6 Ch App 614 (decided in relation to earlier legislation).

7 Insolvency Act 1986 s 110(5).

8 Insolvency Act 1986 s 111(1), (2). As to special resolutions see PARA 614. See further PARA 1446. Where the registered office of the company is abroad, notice given to the liquidator in England within the seven days' time limit is sufficient: *Brailey v Rhodesia Consolidated Ltd* [1910] 2 Ch 95. As to notice of dissent see PARA 1446; as to the rights of a dissentient member see PARA 1448; and as to the manner specified for arbitration see PARA 1447.

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1439. When power of sale may be exercised.

The statutory power of sale¹ may be exercised even though the company's constitution² contains no express power of sale³. The transferor company⁴ may sell to another company, whether or not a company within the meaning of the Companies Act 2006⁵, but the transferor company cannot sell to an individual under that power⁶, except perhaps to an agent or trustee for a company to be formed⁷. The sale binds both the shareholders and the creditors of the transferor company⁸, although mortgagees may be entitled under the terms of their mortgage to prevent a sale of its assets⁹.

1 See PARA 1438.

2 As to the meaning of a 'company's constitution' under the Companies Acts see PARA 227.

3 *Clinch v Financial Corpn* (1868) LR 5 Eq 450 at 472 per Page Wood V-C (affd (1868) 4 Ch App 117 at 121 per Lord Cairns LC, and at 123 per Wood LJ); *Nicholl v Eberhardt Co* (1889) 59 LJ Ch 103, CA.

4 See PARA 1438.

5 See the Insolvency Act 1986 s 110(1); and PARA 1438. Under the Companies Act 1862 s 161 (now repealed) a sale to a foreign company was permissible: *Re Irrigation Co of France, ex p Fox* (1871) 6 Ch App 176 at 192, CA, per Mellish LJ. The Companies (Consolidation) Act 1908, by its definition of the word 'company' (see s 285 (repealed)), prevented a transfer to a foreign company (*Thomas v United Butter Co of France Ltd* [1909] 2 Ch 484), and such a transfer could only be effected under the Companies (Consolidation) Act 1908 s 120 (repealed) (*Re Anglo-Continental Supply Co Ltd* [1922] 2 Ch 723). The wording of the Insolvency Act 1986 s 110(1), however, permits a transfer to a foreign company. As to a company's change of residence see PARA 123.

6 *Bird v Bird's Patent Deodorizing and Utilizing Sewage Co* (1874) 9 Ch App 358.

7 *Re Hester & Co Ltd* (1875) 44 LJ Ch 757 at 759; *Re Canning Jarrah Timber Co (Western Australia) Ltd* [1900] 1 Ch 708, CA.

8 *Re City and County Investment Co* (1879) 13 ChD 475, CA.

9 *Re Borax Co, Foster v Borax Co* [1899] 2 Ch 130. Cf *Re HH Vivian & Co Ltd, Metropolitan Bank of England and Wales Ltd v HH Vivian & Co Ltd* [1900] 2 Ch 654.

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1440. Agreement for sale.

The agreement for sale¹ may validly provide that the transferor company shall call up its unpaid capital and transfer the amount so realised to the transferee company², or that shares in the transferee company shall be allotted either to the liquidator or directly to the members of the transferor company, and as either partly or fully paid up³. However, except with the consent of the members of the transferor company, a liability to pay cash cannot be imposed on those members by allotting them shares credited as partly paid up⁴.

Even if he has not served notice of dissent, a member of the transferor company cannot be compelled to accept shares in the transferee company. If he has served no such notice, he is not entitled to receive compensation for his interest in the transferor company⁵; but, if the shares which he declines to accept are sold, he is entitled to the net proceeds of sale⁶.

If members of the transferor company accept such shares, they become liable for the amount not credited as paid on them, the shareholder sometimes being required to make a payment of parts of the amount on application and on allotment⁷.

The agreement for sale is not invalid because it provides that part of the purchase money shall be paid to the directors and secretary of the transferor company as compensation for loss of office, although proper disclosure of the proposed payment must be made to the shareholders⁸.

The court has no power to authorise a sale to a transferee company in consideration of its agreeing to pay the creditors of the transferor company by instalments⁹; nor may it authorise an agreement or resolution compelling the members of that company to pay a premium upon the shares of the transferee company¹⁰.

1 See PARA 1438.

2 *New Zealand Gold Extraction Co (Newbury-Vautin Process) v Peacock* [1894] 1 QB 622 at 630, CA; *Re Bank of South Australia (No 2)* [1895] 1 Ch 578, CA. The agreement cannot validly provide for a call to be made on the shares of the transferor company in case its assets do not realise a specified amount: *Clinch v Financial Corpn* (1868) 4 Ch App 117.

3 See eg *Re City and County Investment Co* (1879) 13 ChD 475 at 482, CA, per Jessel MR; *Postlethwaite v Port Phillip and Colonial Gold Mining Co* (1889) 43 ChD 452.

4 See *Re Imperial Mercantile Credit Association* (1871) LR 12 Eq 504; *Simpson v Palace Theatre Ltd* (1893) 69 LT 70, CA.

5 *Re Bank of Hindustan, China and Japan, ex p Los* (1865) 34 LJ Ch 609; *Re Bank of Hindustan, China and Japan, Higgs' Case* (1865) 2 Hem & M 657; *Re Bank of Hindustan, China and Japan, ex p Martin* (1865) 2 Hem & M 669; *Re Empire Assurance Corpn, ex p Bagshaw* (1867) LR 4 Eq 341; *Re London, Bombay and Mediterranean Bank Ltd, Drew's Case* (1867) 36 LJ Ch 785. See also PARA 1443.

6 *Re Lake View Extended Gold Mine (Western Australia) Ltd* [1900] WN 44.

7 *Weston v New Guston Co* (1889) 1 Meg 225, 352, CA; affd (1891) 64 LT 815, HL. Where the shares are to be taken as partly paid, the agreement should provide for the allotment being made directly to the members of

the old company so as to free the liquidator from any liability: *Re City and County Investment Co* (1879) 13 ChD 475 at 482, CA, per Jessel MR; *Postlethwaite v Port Phillip and Colonial Gold Mining Co* (1889) 43 ChD 452 at 464-465 per Stirling J. A shareholder may be required to elect within a reasonable time whether he will accept such shares: *Zuccani v Nacupai Gold Mining Co* (1889) 61 LT 176, CA; *Burdett-Coutts v True Blue (Hannan's) Gold Mine* [1899] 2 Ch 616, CA.

8 See PARAS 560, 580.

9 *Re General Exchange Bank* (1867) 15 WR 477.

10 *Imperial Bank of China, India and Japan v Bank of Hindustan, China and Japan* (1868) LR 6 Eq 91.

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1441. Special resolution conferring authority.

It is necessary to pass a special resolution conferring a general or special authority on the liquidator¹, authorising him to accept compensation for a transfer otherwise than in cash; it is not enough to pass special resolutions for voluntary winding up and for distributing the proceeds of any sale². A special resolution sanctioning a transfer is not invalid because it is passed before or concurrently with a resolution to wind up the company or to appoint liquidators³. If, however, an order is made within a year to wind up the company by the court, the special resolution is not valid unless sanctioned by the court⁴. The court's sanction must be obtained at or after the making of the winding-up order and cannot be previously obtained in the voluntary winding up⁵.

A special resolution passed at a meeting is invalid unless the notice convening the meeting distinctly states that it is intended to proceed under the statutory provision relating to the acceptance of shares as consideration for the sale of company property⁶. A special resolution is invalid so far as it authorises the liquidator to pay for the underwriting of the transferee company's shares out of the transferor company's assets⁷, unless the statutory requirements as to underwriting are complied with⁸.

1 See PARA 1438. As to special resolutions see PARA 614.

2 *Etheridge v Central Uruguay Northern Extension Rly Co* [1913] 1 Ch 425.

3 See the Insolvency Act 1986 s 110(6); and PARA 1438.

4 See the Insolvency Act 1986 s 110(6); and PARA 1438.

5 *Re Callao Bis Co* (1889) 42 ChD 169, CA.

6 *Imperial Bank of China, India and Japan v Bank of Hindustan, China and Japan* (1868) LR 6 Eq 91; *Re Irrigation Co of France, ex p Fox* (1871) 6 Ch App 176 at 193 per Mellish LJ; *Etheridge v Central Uruguay Northern Extension Rly Co* [1913] 1 Ch 425. Cf *Re Teede and Bishop Ltd* (1901) 70 LJ Ch 409. As to the statutory provision referred to in the text see the Insolvency Act 1986 s 110; and PARA 1438. The requirement in the text would apply equally to a special resolution which is passed by a written resolution of a private company (as to which see PARA 623).

7 *Re Canning Jarrah Timber Co (Western Australia) Ltd* [1900] 1 Ch 708, CA.

8 *Barrow v Paringa Mines (1909) Ltd* [1909] 2 Ch 658. As to underwriting shares see PARA 1151 et seq.

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1442. Time limit for acceptance.

A special resolution¹ directing shares in the transferee company to be offered to members of the transferor company and fixing a reasonable limit of time for acceptance is *intra vires*². In the absence of such a stipulation, a reasonable time must be allowed, and, if the time is not reasonable, the members are not bound by it³. A contract for sale does not create a contractual relation between a member of the transferor company and the transferee company; and, if he applies for shares in the transferee company in pursuance of the scheme, he may withdraw his offer before it is accepted⁴.

1 le a special resolution for the purpose of sanctioning a transfer: see PARA 1438.

2 *Postlethwaite v Port Phillip and Colonial Gold Mining Co* (1889) 43 ChD 452; *Burdett-Coutts v True Blue (Hannan's) Gold Mine* [1899] 2 Ch 616, CA. Cf *Nicholl v Eberhardt Co* (1889) 59 LJ Ch 103, CA.

3 *Zuccani v Nacupai Gold Mining Co* (1880) 61 LT 176, CA; *Re South Australian Petroleum Fields Ltd* [1894] WN 189.

4 *Re Metropolitan Fire Insurance Co, Wallace's Case* [1900] 2 Ch 671.

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1443. Distribution of proceeds.

The consideration for the sale must be distributed among the members of the transferor company in proportion to their rights and interests, under its regulations, in the company's assets remaining after payment of its liabilities, and any persons prejudicially affected by any other mode of distribution can only be bound by their individual consents¹. Where the liquidator disposes of all the shares in the transferee company without reserving any for a member of the transferor company who is entitled to them, the court has no jurisdiction to award damages against the liquidator in the winding up of the transferor company².

The question as to the validity of the sale cannot be decided in the winding-up proceedings; it can be decided only in proceedings instituted by a non-assenting shareholder suing on behalf of himself and all other shareholders³.

A proper contract with regard to the fully or partly paid shares in the new company, and a return of the allotments, must be delivered to the registrar⁴.

1 *Griffith v Paget* (1877) 6 ChD 511 at 517 per Jessel MR; *Postlethwaite v Port Phillip and Colonial Gold Mining Co* (1889) 43 ChD 452 at 469 per Stirling J; *Simpson v Palace Theatre Ltd* (1893) 69 LT 70, CA; *Re North*

West Argentine Rly Co [1900] 2 Ch 882 (where Wright J repudiated his former decision in *Re Beeston Pneumatic Tyre Co Ltd* (1898) 14 TLR 338).

2 *Re Hill's Waterfall Estate and Gold Mining Co* [1896] 1 Ch 947.

3 *Re Imperial Bank of China, India and Japan* (1866) 1 Ch App 339 at 347-348 per Turner LJ; *Re International Life Assurance Society* (1868) 20 LT 433; *Clinch v Financial Corpn* (1868) LR 5 Eq 450 (affd 4 Ch App 117). Cf *Re City and County Investment Co* (1879) 13 ChD 475, CA; *Re Hester & Co Ltd* (1875) 44 LJ Ch 757. An agreement for sale will not be set aside in the absence of the transferee company as a party: see *Doughty v Lomagunda Reefs Ltd* [1903] 1 Ch 673, CA.

4 As to the delivery of contracts and returns to the registrar of companies for registration see PARA 1108.

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1444. Allotment to wrong person.

Where, under a contract made before the reconstruction scheme is sanctioned, the purchaser is entitled to be registered as transferee of shares in the transferor company, and the vendor obtains the allotment of the shares in the transferee company to which the owner of the shares is entitled under the scheme, the allottee is a trustee of them for the purchaser, even though he has delayed registration of the transfer¹.

1 *Rooney v Stanton* (1900) 17 TLR 28, CA.

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1445. Position of transferee company.

The transferee company is in no sense the servant or agent of the transferor company, and is not bound by injunctions granted against it¹.

1 *Bosch v Simms Manufacturing Co Ltd* (1909) 25 TLR 419. Where a reconstruction has been carried out by forming a new company (the 'transferee company') with the same name which takes over all the liabilities of the transferor company, payments made by the transferee company to a creditor of the transferor company who dealt with the transferee company under the belief that he was continuing to deal with the transferor company must be applied in discharge of debts of the transferor company, and not of those due to him by the transferee company: *Re Taurine Co Ltd, Anning and Cobb's Claim* (1877) 38 LT 53.

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1446. Notice of dissent.

A notice of dissent by a member¹ must contain a notice to the liquidator either to abstain from carrying the resolution into effect or to purchase the dissentient member's interest at a price to be determined by agreement or arbitration².

A deceased member's personal representatives, even though not registered as members, may exercise the right of dissent in respect of the shares registered in the deceased member's name, and a provision in the articles that they may not exercise any of the rights and privileges of a member in respect of those shares unless they are registered as members in respect of them does not prevent them from exercising the statutory right of dissent³.

¹ See PARA 1438.

² See the Insolvency Act 1986 s 111(2); and PARA 1438. See also *Re Demerara Rubber Co Ltd* [1913] 1 Ch 331. As to the clauses to be inserted in the reconstruction or amalgamation agreement to provide funds to pay dissentients see *Re Hester & Co Ltd* (1875) 44 LJ Ch 757. As to provisions for dissentients where a compromise or arrangement under the Companies Act 2006 Pt 26 (ss 895-901) involves a sale and a transfer of a company's undertakings to a new company see PARA 1432 text and notes 19-21.

For the purposes of arbitration, the provisions of the Companies Clauses Consolidation Act 1845 with respect to the settlement of disputes by arbitration (see PARA 1814 et seq) are incorporated with the Insolvency Act 1986; and, in the construction of those provisions, the Insolvency Act 1986 is deemed the special Act, the 'company' means the transferor company, and any appointment directed by the incorporated provisions to be made under the hand of the secretary or any two of the directors may be made in writing by the liquidator or, if there is more than one liquidator, of any two or more of them (s 111(4)); but, if the articles provide for arbitration between the company and its members, either the provision in the articles or the statutory mode of arbitration may be resorted to (*De Rosaz v Anglo-Italian Bank Ltd* (1869) LR 4 QB 462).

³ *Llewellyn v Kasintoe Rubber Estates Ltd* [1914] 2 Ch 670, CA.

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1447. Arbitration as to amount payable.

A provision in the articles purporting to exclude a reference to arbitration¹ and providing that the sum payable to a dissentient member shall be such sum as the liquidator can obtain by selling the shares to which the dissentient member, but for his dissent, would have been entitled is not binding on dissentient members²; nor is a provision which purports to authorise a sale, in the case of a voluntary winding up, of the undertaking and assets of the company for shares under the statutory power but which omits the statutory provision³ in favour of dissentient shareholders⁴.

The amount payable to a dissentient shareholder is not determined by the price to be paid in shares by the transferee company. The value of a dissentient member's interest depends on the value of his proportionate share of the assets of the transferor company⁵. A commission to examine witnesses abroad may be granted in order to ascertain the value of those assets⁶. The court will not, however, allow a shareholder to examine officers of the company in order to obtain evidence for use on the arbitration⁷.

Interest is not payable on the amount awarded until payment is demanded in writing, but it is payable from that time until the date of payment of the amount awarded⁸.

- 1 As to arbitration see PARA 1446 note 2.
- 2 *Baring-Gould v Sharpington Combined Pick and Shovel Syndicate* [1899] 2 Ch 80, CA.
- 3 In the Insolvency Act 1986 s 111(2): see PARAS 1438, 1446.
- 4 *Payne v Cork Co Ltd* [1900] 1 Ch 308; *Re Irrigation Co of France, ex p Fox* (1871) 6 Ch App 176. See also PARA 1437 note 4.
- 5 *Re Mysore West Gold Mining Co Ltd* (1889) 42 ChD 535 at 538 per Chitty J.
- 6 *Re Mysore West Gold Mining Co Ltd* (1889) 42 ChD 535.
- 7 *Re British Building Stone Co Ltd* [1908] 2 Ch 450. The company's books cannot be examined by the dissentient to see whether acceptance of the offer would be for his advantage: *Morgan's Case* (1884) 28 ChD 620.
- 8 *Re United States Direct Cable Co Ltd* (1879) 48 LJ Ch 665.

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1448. Dissentient member's rights.

If the liquidator elects to purchase a dissentient member's interest¹, the purchase money must be paid before the company is dissolved and must be raised by the liquidator in such manner as may be determined by special resolution². Unless provision is made to satisfy money payable to a dissentient member, an injunction will be granted to restrain the liquidator from parting with the assets without providing for that member's claim³.

A dissentient member is not entitled to have his name omitted from the list of contributories even if he transfers his shares to the liquidator⁴, but the transfer relieves him from liability as to the costs of the liquidation⁵.

Where a scheme is eminently unfair, a dissentient minority may stop it by obtaining a compulsory winding-up order⁶.

- 1 As to a dissentient member's right to require the liquidator to elect see PARAS 1438, 1446.
- 2 Insolvency Act 1986 s 111(3). As to special resolutions see PARA 614. As to the dissolution of a company see PARA 1521 et seq.
- 3 *Re Hester & Co Ltd* (1875) 44 LJ Ch 757; *Baring-Gould v Sharpington Combined Pick and Shovel Syndicate* [1899] 2 Ch 80, CA; *Payne v Cork Co Ltd* [1900] 1 Ch 308.
- 4 *Re Imperial Land Co of Marseilles, ex p Jeaffreson* (1870) LR 11 Eq 109; *Vining's Case* (1870) 6 Ch App 96; *Part's Case* (1870) LR 10 Eq 622.
- 5 *Re Marine Investment Co, ex p Poole's Executors* (1873) 8 Ch App 702 at 710 per James LJ.
- 6 *Re Consolidated South Rand Mines Deep Ltd* [1909] 1 Ch 491.

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(26) MERGERS AND DIVISIONS OF PUBLIC COMPANIES

(i) Framework of Statutory Provisions

1449. Application to specified mergers and divisions: third and sixth company law directives.

The Companies Act 2006 Part 27 on 'Mergers and Divisions of Public Companies'¹ seeks to implement the Third Company Law Directive relating to particular types of mergers of public limited liability companies², and the Sixth Company Law Directive relating to the division of public limited liability companies³.

The Companies Act 2006 Part 27 applies where:

- 711 (1) a compromise or arrangement is proposed between a public company⁴ and its creditors or any class of them⁵, or its members⁶ or any class of them⁷, for the purposes of, or in connection with, a scheme for the reconstruction of any company⁸ or companies or the amalgamation of any two or more companies⁹;
- 712 (2) the scheme involves a merger¹⁰ or a division¹¹; and
- 713 (3) the consideration for the transfer (or each of the transfers) envisaged is to be shares¹² in the transferee company (or one or more of the transferee companies) receivable by members of the transferor company (or transferor companies), with or without any cash payment to members¹³.

In this context, a 'new company' means a company formed for the purposes of, or in connection with, the scheme¹⁴; and an 'existing company' means a company other than one formed for the purposes of, or in connection with, the scheme¹⁵.

The Companies Act 2006 Part 27 does not apply where the company in respect of which the compromise or arrangement is proposed is being wound up¹⁶.

1 Ie the Companies Act 2006 Pt 27 (ss 902-941).

2 Ie EC Council Directive 78/855 (OJ L295, 20.10.78, p 36): see PARA 23.

3 Ie EC Council Directive 82/891 (OJ L378, 31.12.82, p 47): see PARA 23.

4 As to the meaning of 'public company' see PARA 102.

5 Companies Act 2006 s 902(1)(a)(i).

6 As to the meaning of 'member of the company' see PARA 321.

7 Companies Act 2006 s 902(1)(a)(ii).

8 As to the meaning of 'company' see PARA 24.

9 Companies Act 2006 s 902(1)(a). As to reconstructions and amalgamations see PARA 1434 et seq. As to the relationship between Pt 27 (ss 902-941) and the provisions relating to arrangements and reconstructions (ie Pt 26 (ss 985-901): see PARA 1425 et seq) see PARA 1450.

10 Companies Act 2006 s 902(1)(b)(i). 'Merger' is as defined in s 904 (see PARA 1452): s 902(1)(b)(i).

11 Companies Act 2006 s 902(1)(b)(ii). 'Division' is as defined in s 919 (see PARA 1464): s 902(1)(b)(ii).

12 As to the meaning of 'share' see PARA 1042.

13 Companies Act 2006 s 902(1)(c). As to fixing the date for the transfer see PARA 1478.

14 Companies Act 2006 s 902(2)(a).

15 Companies Act 2006 s 902(2)(b).

16 Companies Act 2006 s 902(3). As to the winding up of companies see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

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1450. Relationship of compromise or arrangement provisions to arrangements and reconstructions provisions.

The court¹ must not sanction the compromise or arrangement under the provisions relating to arrangements and reconstructions² unless the relevant requirements of the Companies Act 2006 Pt 27³ have been complied with⁴.

In relation to the requirements applicable to a merger⁵, certain of those requirements, and certain general requirements of the provisions relating to arrangements and reconstructions⁶, are modified or excluded⁷; and in relation to the requirements applicable to a division⁸, certain of those requirements, and certain general requirements of the provisions relating to arrangements and reconstructions, are also modified or excluded⁹.

1 As to the meaning of 'court' see PARA 212 note 1.

2 Ie under the Companies Act 2006 Pt 26 (ss 985-901): see PARA 1425 et seq.

3 Ie the Companies Act 2006 Pt 27 (ss 902-941). As to the application of Pt 27 see PARA 1449.

4 Companies Act 2006 s 903(1).

5 Ie the requirements specified in the Companies Act 2006 ss 905-914: see PARA 1453 et seq.

6 Ie the Companies Act 2006 Pt 26 (ss 985-901): see PARA 1425 et seq.

7 See the Companies Act 2006 s 903(2). Such modification or exclusion is effected by the provisions of ss 915-918: see s 903(2); and PARAS 1455, 1457-1458, 1460.

8 Ie the requirements specified in the Companies Act 2006 ss 920-930: see PARA 1465 et seq.

9 See the Companies Act 2006 s 903(3). Such modification or exclusion is effected by the provisions of ss 931-934: see s 903(3); and PARAS 1467, 1470-1474.

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1451. Implementation of the cross-border mergers Directive.

In addition to the Third Company Law Directive relating to particular types of mergers of public limited liability companies¹, and the Sixth Company Law Directive relating to the division of public limited liability companies², the Directive on cross-border mergers of limited liability companies³ aims to facilitate the carrying-out of cross-border mergers between various types of limited liability company governed by the laws of different member states⁴.

For the purpose of implementing the Directive, the Companies (Cross-Border Mergers) Regulations 2007⁵ have been made. The Regulations provide a framework whereby companies may engage in a cross-border merger⁶. 'Cross-border merger' means a merger by absorption, a merger by absorption of a wholly-owned subsidiary, or a merger by formation of a new company⁷. The merger must involve at least one company formed and registered in the United Kingdom⁸, and at least one company formed and registered in an EEA state⁹ other than the United Kingdom¹⁰. Certain pre-merger requirements must be met¹¹. The court¹² may, on the joint application of all the merging companies, make an order approving the completion of the cross-border merger¹³, the consequences of a cross-border merger being that: (1) the assets and liabilities of the transferor companies are transferred to the transferee company; (2) the rights and obligations arising from the contracts of employment of the transferor companies are transferred to the transferee company; (3) the transferor companies are dissolved; and (4) in the case of a merger by absorption or a merger by formation of a new company, the members of the transferor companies except the transferee company (if it is a member of a transferor company) become members of the transferee company¹⁴. Employee participation in the merger is provided for¹⁵.

1 Ie EC Council Directive 78/855 (OJ L295, 20.10.78, p 36): see PARA 23.

2 Ie EC Council Directive 82/891 (OJ L378, 31.12.82, p 47): see PARA 23.

3 Ie European Parliament and Council Directive 2005/56 (OJ L310, 25.11.2005, p 1).

4 See European Parliament and Council Directive 2005/56 (OJ L310, 25.11.2005, p 1) preamble para 1.

5 Ie the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974.

6 See the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974, Explanatory Note.

7 See the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974, reg 2.

8 As to the meaning of 'United Kingdom' see PARA 1 note 5.

9 As to the meaning of 'EEA State' see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Legislative and Regulatory Reform Act 2006 s 26(1)).

10 See the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974, reg 2.

11 See the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974, Pt 2 (regs 6-15).

12 For these purposes, 'court' means, in England and Wales, the High Court: see the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974, reg 3(1). As to the meanings of 'England' and 'Wales' see PARA 1 note 5. As to the procedure for making applications to the court under the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974, see *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 paras 22-25.

13 See the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974, reg 16. Where an order is made under reg 16, obligations are imposed on the UK transferee company regarding circulation of copies of the order (see reg 18), the UK transferee company, and every UK transferor company, must deliver the order and related documentation to the registrar of companies (see regs 19, 20), and the registrar of companies must give notice and take specified steps in relation to any such order that he receives in this way (see reg 21).

14 See the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974, reg 17.

15 See the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974, Pt 4 (regs 22-64).

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(ii) Merger of UK Companies

1452. When scheme involves a merger.

The scheme¹ involves a merger where under the scheme:

- 714 (1) the undertaking², property³ and liabilities⁴ of one or more public companies⁵, including the company in respect of which the compromise or arrangement is proposed, are to be transferred to another existing public company⁶ (a 'merger by absorption')⁷; or
- 715 (2) the undertaking, property and liabilities of two or more public companies, including the company in respect of which the compromise or arrangement is proposed, are to be transferred to a new company⁸, whether or not a public company, (a 'merger by formation of a new company')⁹.

References in the statutory provisions on mergers and divisions of public companies¹⁰ to the 'merging companies' are: (a) in relation to a merger by absorption, to the transferor and transferee companies¹¹; (b) in relation to a merger by formation of a new company, to the transferor companies¹².

1 As to the scheme, and as to the application of the Companies Act 2006 Pt 27 (ss 902-941), see PARA 1449.

2 As to the meaning of 'undertaking' see PARA 26 note 2.

3 'Property' includes property, rights and powers of every description: Companies Act 2006 s 941.

4 'Liabilities' includes duties: Companies Act 2006 s 941.

5 As to the meaning of 'public company' see PARA 102.

6 As to the meaning of 'existing company' see PARA 1449.

7 Companies Act 2006 s 904(1)(a).

8 As to the meaning of 'new company' see PARA 1449.

9 Companies Act 2006 s 904(1)(b).

10 Ie the Companies Act 2006 Pt 27 (ss 902-941).

11 Companies Act 2006 s 904(2)(a).

12 Companies Act 2006 s 904(2)(b).

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1453. Draft terms to be drawn up and adopted by directors of merging companies.

A draft of the proposed terms of the scheme¹ must be drawn up and adopted by the directors² of the merging companies³. The draft terms must give particulars of at least the following matters:

- 716 (1) in respect of each transferor company and the transferee company, its name⁴, the address of its registered office⁵, and whether it is a company limited by shares⁶ or a company limited by guarantee⁷ and having a share capital⁸;
- 717 (2) the number of shares in the transferee company to be allotted to members⁹ of a transferor company for a given number of their shares (the 'share exchange ratio') and the amount of any cash payment¹⁰;
- 718 (3) the terms relating to the allotment of shares in the transferee company¹¹;
- 719 (4) the date from which the holding of shares in the transferee company will entitle the holders to participate in profits, and any special conditions affecting that entitlement¹²;
- 720 (5) the date from which the transactions of a transferor company are to be treated for accounting purposes as being those of the transferee company¹³;
- 721 (6) any rights or restrictions attaching to shares or other securities in the transferee company to be allotted under the scheme to the holders of shares or other securities in a transferor company to which any special rights or restrictions attach, or the measures proposed concerning them¹⁴;
- 722 (7) any amount of benefit paid or given or intended to be paid or given to any expert¹⁵, or to any director of a merging company¹⁶, and the consideration for the payment of benefit¹⁷.

The directors of each of the merging companies must deliver a copy of the draft terms to the registrar¹⁸. The registrar must publish in the Gazette¹⁹ notice of receipt by him from that company of a copy of the draft terms²⁰; and that notice must be published at least one month²¹ before the date of any meeting of that company summoned for the purpose of approving the scheme²².

1 As to the scheme, and as to the application of the Companies Act 2006 Pt 27 (ss 902-941), see PARA 1449.

2 As to the meaning of 'director' see PARA 478.

3 Companies Act 2006 s 905(1). As to the meaning of 'merging companies' see PARA 1452. As to the publication by the directors of an explanatory report relating to the draft terms see PARA 1457. As to an expert's report thereon see PARA 1458. As to provision by the scheme in respect of securities to which special rights attach see PARA 1462; and as to the allotment of shares see PARA 1463.

4 Companies Act 2006 s 905(2)(a)(i).

5 Companies Act 2006 s 905(2)(a)(ii). As to a company's registered office see PARA 129.

6 As to the meaning of 'limited by shares' see PARA 102. As to the meaning of 'share' see PARA 1042.

- 7 As to the meaning of 'limited by guarantee' see PARA 102.
- 8 Companies Act 2006 s 905(2)(a)(iii). As to the meaning of 'share capital' see PARA 1042.
- 9 As to the meaning of 'member of a company' see PARA 321.
- 10 Companies Act 2006 s 905(2)(b). The requirements in s 905(2)(b), (c) (see the text to note 11) and (d) (see the text to note 12) are subject to s 915: s 905(3). In the case of a merger by absorption where all of the relevant securities of the transferor company (or, if there is more than one transferor company, of each of them) are held by or on behalf of the transferee company, the draft terms of the scheme need not give the particulars mentioned in s 905(2)(b), (c) or (d): s 915(1), (2). As to the meaning of 'merger by absorption' see PARA 1452. 'Relevant securities', in relation to a company, means shares or other securities carrying the right to vote at general meetings of the company: s 915(6). As to general meetings see PARA 629.
- 11 Companies Act 2006 s 905(2)(c). See also note 10.
- 12 Companies Act 2006 s 905(2)(d). See also note 10.
- 13 Companies Act 2006 s 905(2)(e).
- 14 Companies Act 2006 s 905(2)(f).
- 15 In any of the experts referred to in the Companies Act 2006 s 909 (expert's report: see PARA 1458): s 905(2)(g)(i).
- 16 Companies Act 2006 s 905(2)(g)(ii).
- 17 Companies Act 2006 s 905(2)(g).
- 18 Companies Act 2006 s 906(1). As to the meaning of 'registrar' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.
- 19 As to the meaning of the 'Gazette' see PARA 138 note 2.
- 20 Companies Act 2006 s 906(2).
- 21 As to the meaning of 'month' see PARA 1625 note 10.
- 22 Companies Act 2006 s 906(3). As to the approval of the scheme see PARA 1454.

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1454. Approval of members of merging companies.

The scheme¹ must be approved by a majority in number, representing 75 per cent in value, of each class of members² of each of the merging companies³, present and voting either in person or by proxy at a meeting⁴. In certain circumstances this requirement need not be met⁵.

- 1 As to the scheme, and as to the application of the Companies Act 2006 Pt 27 (ss 902-941), see PARA 1449.
- 2 As to the meaning of 'member of the company' see PARA 321.
- 3 As to the meaning of 'merging companies' see PARA 1452.
- 4 Companies Act 2006 s 907(1). As to voting by proxy see PARA 662 et seq.

5 The requirement of the Companies Act 2006 s 907(1) is subject to ss 916, 917 and 918 (circumstances in which meetings of members not required: see PARA 1455): s 907(2).

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1455. Circumstances in which meetings not required.

In the case of a merger by absorption¹ where 90 per cent or more (but not all) of the relevant securities² of the transferor company (or, if there is more than one transferor company, of each of them) are held by or on behalf of the transferee company³, it is not necessary for the scheme to be approved at a meeting of the members⁴, or any class of members, of the transferee company if the court⁵ is satisfied that the following conditions have been complied with⁶:

- 723 (1) the first condition is that publication of notice of receipt of the draft terms by the registrar⁷ took place in respect of the transferee company at least one month⁸ before the date of the first meeting of members, or any class of members, of the transferor company summoned for the purpose of agreeing to the scheme⁹;
- 724 (2) the second condition is that the members of the transferee company were able during the period beginning one month before, and ending on, that date to inspect at the registered office¹⁰ of the transferee company copies of the documents¹¹ relating to that company and the transferor company (or, if there is more than one transferor company, each of them)¹², and to obtain copies of those documents or any part of them on request free of charge¹³;
- 725 (3) the third condition is that one or more members of the transferee company, who together held not less than 5 per cent of the paid-up¹⁴ capital of the company which carried the right to vote at general meetings of the company (excluding any shares in the company held as treasury shares¹⁵) would have been able, during that period, to require a meeting of each class of members to be called for the purpose of deciding whether or not to agree to the scheme¹⁶, and no such requirement was made¹⁷.

In the case of a merger by absorption where all of the relevant securities¹⁸ of the transferor company (or, if there is more than one transferor company, of each of them) are held by or on behalf of the transferee company¹⁹, it is not necessary for the scheme to be approved at a meeting of the members, or any class of members, of any of the merging companies²⁰ if the court is satisfied that the following conditions have been complied with²¹:

- 726 (a) the first condition is that publication of notice of receipt of the draft terms by the registrar took place in respect of all the merging companies at least one month before the date of the court's order²²;
- 727 (b) the second condition is that the members of the transferee company were able during the period beginning one month before, and ending on, that date to inspect at the registered office of that company copies of the documents²³ relating to that company and the transferor company (or, if there is more than one transferor company, each of them)²⁴, and to obtain copies of those documents or any part of them on request free of charge²⁵;
- 728 (c) the third condition is that one or more members of the transferee company, who together held not less than 5 per cent of the paid-up capital of the company which carried the right to vote at general meetings of the company (excluding any

shares in the company held as treasury shares) would have been able, during that period, to require a meeting of each class of members to be called for the purpose of deciding whether or not to agree to the scheme²⁶, and no such requirement was made²⁷.

In the case of any merger by absorption, it is not necessary for the scheme to be approved by the members of the transferee company if the court is satisfied that the following conditions have been complied with²⁸:

- 729 (i) the first condition is that publication of notice of receipt of the draft terms by the registrar took place in respect of that company at least one month before the date of the first meeting of members, or any class of members, of the transferor company (or, if there is more than one transferor company, any of them) summoned for the purposes of agreeing to the scheme²⁹;
- 730 (ii) the second condition is that the members of that company were able during the period beginning one month before, and ending on, the date of any such meeting to inspect at the registered office of that company copies of the documents³⁰ relating to that company and the transferor company (or, if there is more than one transferor company, each of them)³¹, and to obtain copies of those documents or any part of them on request free of charge³²;
- 731 (iii) the third condition is that one or more members of that company, who together held not less than 5 per cent of the paid-up capital of the company which carried the right to vote at general meetings of the company (excluding any shares in the company held as treasury shares) would have been able, during that period, to require a meeting of each class of members to be called for the purpose of deciding whether or not to agree to the scheme³³, and no such requirement was made³⁴.

1 As to the meaning of 'merger by absorption' see PARA 1452.

2 For these purposes, 'relevant securities', in relation to a company, means shares or other securities carrying the right to vote at general meetings of the company: Companies Act 2006 s 916(6). As to the meaning of 'company' see PARA 24. As to the meaning of 'share' see PARA 1042. As to general meetings see PARA 629. As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449.

3 Companies Act 2006 s 916(1).

4 As to such meetings see PARA 1454. As to the draft terms of a scheme see PARA 1453. As to the meaning of 'member of a company' see PARA 321.

5 As to the meaning of 'court' see PARA 212 note 1. See also PARA 1451 note 12.

6 Companies Act 2006 s 916(2). As to the power of the court to summon a meeting of members see PARA 1426.

7 As to notices see PARA 1453. As to the meaning of 'registrar' see PARA 131 note 2.

8 As to the meaning of 'month' see PARA 1625 note 10.

9 Companies Act 2006 s 916(3).

10 As to a company's registered office see PARA 129.

11 Ie the documents listed in the Companies Act 2006 s 911(3)(a), (d), (e): see PARA 1460.

12 Companies Act 2006 s 916(4)(a).

13 Companies Act 2006 s 916(4)(b).

14 As to the meaning of 'paid-up' see PARA 1048.

- 15 As to the meaning of 'treasury shares' see PARA 1251.
- 16 Companies Act 2006 s 916(5)(a).
- 17 Companies Act 2006 s 916(5)(b).
- 18 For these purposes 'relevant securities', in relation to a company, means shares or other securities carrying the right to vote at general meetings of the company: Companies Act 2006 s 917(6).
- 19 Companies Act 2006 s 917(1).
- 20 As to the meaning of 'merging companies' see PARA 1452.
- 21 Companies Act 2006 s 917(2).
- 22 Companies Act 2006 s 917(3).
- 23 Ie the documents listed in the Companies Act 2006 s 911(3): see PARA 1460.
- 24 Companies Act 2006 s 917(4)(a).
- 25 Companies Act 2006 s 917(4)(b).
- 26 Companies Act 2006 s 917(5)(a).
- 27 Companies Act 2006 s 917(5)(b).
- 28 Companies Act 2006 s 918(1).
- 29 Companies Act 2006 s 918(2).
- 30 Ie the documents specified in the Companies Act 2006 s 911(3): see PARA 1460.
- 31 Companies Act 2006 s 918(3)(a).
- 32 Companies Act 2006 s 918(3)(b).
- 33 Companies Act 2006 s 918(4)(a).
- 34 Companies Act 2006 s 918(4)(b).

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1456. Power of court to summon meeting of members or creditors.

The court¹ may order a meeting of (1) the members² of an existing transferee company³, or any class of them⁴; or (2) the creditors of an existing transferee company, or any class of them⁵, to be summoned in such manner as the court directs⁶. An application for such an order may be made by: (a) the company concerned⁷; (b) a member or creditor of the company⁸; (c) if the company is being wound up, the liquidator⁹; or (d) if the company is in administration, the administrator¹⁰.

1 As to the meaning of 'court' see PARA 212 note 1. See also PARA 1451 note 12.

2 As to the meaning of 'member of a company' see PARA 321.

3 As to the meaning of 'existing company' see PARA 1449.

4 Companies Act 2006 s 938(1)(a). As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449. As to meetings to approve mergers see PARA 1454. As to circumstances in which such meetings are not required see PARA 1455.

5 Companies Act 2006 s 938(1)(b).

6 Companies Act 2006 s 938(1). Section 323 (representation of corporations at meetings: see PARA 661) applies to a meeting of creditors under s 938 as to a meeting of the company (references to a member being read as references to a creditor): s 938(3) (added by SI 2008/948).

7 Companies Act 2006 s 938(2)(a).

8 Companies Act 2006 s 938(2)(b).

9 Companies Act 2006 s 938(2)(c) (substituted by SI 2009/1941). As to liquidators generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 555 et seq.

10 Companies Act 2006 s 938(2)(d) (added by SI 2009/1941). As to administrators generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 158 et seq.

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1457. Directors of merging companies to publish explanatory report.

The directors¹ of each of the merging companies² must draw up and adopt a report³. The report must consist of: (1) a statement⁴ explaining the effect of the compromise or arrangement⁵; and (2) in so far as that statement does not deal with the following matters, a further statement setting out the legal and economic grounds for the draft terms, and in particular for the share exchange ratio⁶, and specifying any special valuation difficulties⁷.

These requirements do not apply in certain circumstances⁸.

1 As to the meaning of 'director' see PARA 478.

2 As to the meaning of 'merging companies' see PARA 1452.

3 Companies Act 2006 s 908(1). As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449.

4 I.e. the statement required by the Companies Act 2006 s 897: see PARA 1429.

5 See the Companies Act 2006 s 908(2)(a).

6 Companies Act 2006 s 908(2)(b)(i). As to the draft terms and the share exchange ratio see PARA 1453.

7 Companies Act 2006 s 908(2)(b)(ii).

8 The requirement in the Companies Act 2006 s 908 is subject to s 915 (circumstances in which reports not required): s 908(3). The requirements of s 908 do not apply in the case of a merger by absorption where all of the relevant securities of the transferor company (or, if there is more than one transferor company, of each of them) are held by or on behalf of the transferee company: see s 915(1), (4). As to the meaning of 'merger by absorption' see PARA 1452. As to the meaning of 'relevant securities' see PARA 1453 note 10.

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1458. Expert's report to be drawn up on behalf of merging companies.

An expert's report must be drawn up on behalf of each of the merging companies¹. The report required is a written report on the draft terms² to the members³ of the company⁴, and must: (1) indicate the method or methods used to arrive at the share exchange ratio⁵; (2) give an opinion as to whether the method or methods used are reasonable in all the circumstances of the case, indicate the values arrived at using each such method and (if there is more than one method) give an opinion on the relative importance attributed to such methods in arriving at the value decided on⁶; (3) describe any special valuation difficulties that have arisen⁷; (4) state whether in the expert's opinion the share exchange ratio is reasonable⁸; and (5) in the case of a valuation made by a person⁹ other than himself¹⁰, state that it appeared to him reasonable to arrange for it to be so made or to accept a valuation so made¹¹.

The expert must be a person who is eligible for appointment as a statutory auditor¹², and meets the independence requirement¹³. The court¹⁴ may on the joint application of all the merging companies approve the appointment of a joint expert to draw up a single report on behalf of all those companies¹⁵. If no such appointment is made, there must be a separate expert's report to the members of each merging company drawn up by a separate expert appointed on behalf of that company¹⁶. The expert (or each of them) has the right of access to all such documents of all the merging companies¹⁷, and the right to require from the companies' officers all such information¹⁸, as he thinks necessary for the purposes of making his report¹⁹.

In certain circumstances these requirements do not apply²⁰; and if certain conditions are met agreement may be reached to dispense with an expert's report²¹.

1 Companies Act 2006 s 909(1). As to the meaning of 'merging companies' see PARA 1452. As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449.

2 As to the draft terms see PARA 1453.

3 As to the meaning of 'member of a company' see PARA 321.

4 Companies Act 2006 s 909(2).

5 Companies Act 2006 s 909(5)(a). As to the share exchange ratio see PARA 1453.

6 Companies Act 2006 s 909(5)(b).

7 Companies Act 2006 s 909(5)(c).

8 Companies Act 2006 s 909(5)(d).

9 As to the meaning of 'person' see PARA 311 note 2.

10 Where it appears to an expert (1) that a valuation is reasonably necessary to enable him to draw up his report (Companies Act 2006 s 935(1)(a)); and (2) that it is reasonable for that valuation, or part of it, to be made by (or for him to accept a valuation made by) another person who appears to him to have the requisite knowledge and experience to make the valuation or that part of it (s 935(1)(b)(i)), and meets the independence requirement in s 936 (see note 13) (s 935(1)(b)(ii)), he may arrange for or accept such a valuation, together with a report which will enable him to make his own report (s 935(1)). Where any valuation is made by a person other than the expert himself, the latter's report must state that fact and must also state the former's name and what knowledge and experience he has to carry out the valuation (s 935(2)(a)), and describe so much of the undertaking, property and liabilities as was valued by the other person, and the method used to value them, and specify the date of the valuation (s 935(2)(b)). As to the meaning of 'undertaking' see PARA 26 note 2. As to the meaning of 'property' see PARA 1452 note 3. As to the meaning of 'liabilities' see PARA 1452 note 4.

11 Companies Act 2006 s 909(5)(e).

12 Companies Act 2006 s 909(4)(a). The appointment referred to is one under s 1212 (see PARA 969): see s 909(4)(a).

13 Companies Act 2006 s 909(4)(b). The independence requirement is that in s 936: see s 909(4)(b). A person meets the independence requirement for the purposes of s 909 or s 924 (see PARA 1471) or s 935 (see note 10) only if:

2188 (1) he is not an officer or employee of any of the companies concerned in the scheme (s 936(1)(a)(i)), or a partner or employee of such a person, or a partnership of which such a person is a partner (s 936(1)(a)(ii));

2189 (2) he is not an officer or employee of an associated undertaking of any of the companies concerned in the scheme (s 936(1)(b)(i)), or a partner or employee of such a person, or a partnership of which such a person is a partner (s 936(1)(b)(ii)); and

2190 (3) there does not exist between the person or an associate of his (s 936(1)(c)(i)), and any of the companies concerned in the scheme or an associated undertaking of such a company (s 936(1)(c)(ii)), a connection of any such description as may be specified by regulations made by the Secretary of State (s 936(1)(c)).

An auditor of a company is not regarded as an officer or employee of the company for this purpose: s 936(2). For these purposes, the 'companies concerned in the scheme' means every transferor and existing transferee company (s 936(3)(a)); 'associated undertaking', in relation to a company, means a parent undertaking or subsidiary undertaking of the company (s 936(3)(b)(i)), or a subsidiary undertaking of a parent undertaking of the company (s 936(3)(b)(ii)); and 'associate' has the meaning given by s 937 (s 936(3)(c)). Regulations under s 936 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 936(4), 1289. As to the Secretary of State see PARA 6. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. At the date at which this volume states the law no such order or regulations had been made. As to the scheme see PARA 1449. As to the meaning of 'officer' see PARA 607. As to the meanings of 'parent undertaking' and 'subsidiary undertaking' see PARA 26.

In relation to an individual, 'associate' means that individual's spouse or civil partner or minor child or step-child (s 937(1), (2)(a)), any body corporate of which that individual is a director (s 937(1), (2)(b)), and any employee or partner of that individual (s 937(1), (2)(c)). In relation to a body corporate, 'associate' means any body corporate of which that body is a director (s 937(1), (3)(a)), any body corporate in the same group as that body (s 937(1), (3)(b)), and any employee or partner of that body or of any body corporate in the same group (s 937(1), (3)(c)). In relation to a partnership that is a legal person under the law by which it is governed, 'associate' means any body corporate of which that partnership is a director (s 937(1), (4)(a)), any employee of or partner in that partnership (s 937(1), (4)(b)), and any person who is an associate of a partner in that partnership (s 937(1), (4)(c)). In relation to a partnership that is not a legal person under the law by which it is governed, 'associate' means any person who is an associate of any of the partners: s 937(1), (5). For these purposes, in relation to a limited liability partnership, for 'director' read 'member': s 937(1), (6). As to the meaning of 'civil partner' see PARA 1512 note 9. As to the construction of references to any relationship between two persons see the Interpretation Act 1978 s 5, Sch 1 (amended by the Family Law Reform Act 1987 s 33(1), Sch 2 PARA 73, Sch 3 PARA 1); Family Law Reform Act 1987 s 1 (amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 50, 51); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 125; **STATUTES** vol 44(1) (Reissue) PARA 1382. As to the meaning of 'body corporate' see PARA 1 note 5. As to the meaning of 'director' see PARA 478. As to limited liability partnerships see PARA 4 note 6.

14 As to the meaning of 'court' see PARA 212 note 1. See also PARA 1451 note 12.

15 Companies Act 2006 s 909(3).

16 Companies Act 2006 s 909(3).

17 Companies Act 2006 s 909(6)(a).

18 Companies Act 2006 s 909(6)(b).

19 Companies Act 2006 s 909(6).

20 The requirement in the Companies Act 2006 s 909 is subject to s 915: see s 909(7). The requirements of s 909 do not apply in the case of a merger by absorption where all of the relevant securities of the transferor company (or, if there is more than one transferor company, of each of them) are held by or on behalf of the

transferee company: see s 915(1), (4). As to the meaning of 'merger by absorption' see PARA 1452. As to the meaning of 'relevant securities' see PARA 1453 note 10.

21 The requirement in the Companies Act 2006 s 909 is subject to s 918A: see s 909(7) (amended by SI 2008/690). If all members holding shares in, and all persons holding other securities of, the companies involved in the merger, being shares or securities that carry a right to vote in general meetings of the company in question, so agree, the requirement of the Companies Act 2006 s 909 does not apply: s 918A(1) (s 918A added by SI 2008/690). For these purposes the members, or holders of other securities, of a company (Companies Act 2006 s 918A(2)(a) (as so added)), and whether shares or other securities carry a right to vote in general meetings of the company (s 918A(2)(b) (as so added)), are determined as at the date of the application to the court under s 896 (see PARA 1426) (s 918A(2) (as so added)). As to the meaning of 'share' see PARA 1042. As to general meetings see PARA 629.

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1459. Circumstances where merging company must prepare supplementary accounting statement.

If the last annual accounts¹ of any of the merging companies² relate to a financial year³ ending more than seven months⁴ before the first meeting of the company summoned for the purposes of approving the scheme⁵, the directors⁶ of that company must prepare a supplementary accounting statement⁷. That statement must consist of: (1) a balance sheet dealing with the state of affairs of the company as at a date not more than three months before the draft terms were adopted⁸ by the directors⁹; and (2) where the company would be required¹⁰ to prepare group accounts if that date were the last day of a financial year, a consolidated balance sheet dealing with the state of affairs of the company and the undertakings¹¹ that would be included in such a consolidation¹².

1 As to annual accounts see PARA 714 et seq.

2 As to the meaning of 'merging companies' see PARA 1452.

3 As a company's financial year see PARA 711.

4 As to the meaning of 'month' see PARA 1625 note 10.

5 As to meetings to approve a scheme see PARA 1454. As to the scheme see PARA 1449.

6 As to the meaning of 'director' see PARA 478.

7 Companies Act 2006 s 910(1). As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449.

8 As to the adoption of the draft terms by the directors see PARA 1453.

9 Companies Act 2006 s 910(2)(a). The requirements of the Companies Act 2006 (and where relevant article 4 of the IAS Regulation) as to the balance sheet forming part of a company's annual accounts, and the matters to be included in notes to it, apply to the balance sheet required for an accounting statement under s 910, with such modifications as are necessary by reason of its being prepared otherwise than as at the last day of a financial year: s 910(3). The provisions of s 414 (see PARA 815) as to the approval and signing of accounts apply to the balance sheet required for an accounting statement under s 910: s 910(4). As to the meaning of 'IAS Regulation' see PARA 693 note 1.

10 Ie under the Companies Act 2006 s 399: see PARA 775.

11 As to the meaning of 'undertaking' see PARA 26 note 2.

12 Companies Act 2006 s 910(2)(b). See also note 9.

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1460. Inspection of documents relating to merger.

The members¹ of each of the merging companies² must be able, during the specified period³, to inspect at the registered office⁴ of that company copies of the documents listed below relating to that company and every other merging company⁵, and to obtain copies of those documents or any part of them on request free of charge⁶. The documents are:

- 732 (1) the draft terms⁷;
- 733 (2) the directors' explanatory report⁸;
- 734 (3) the expert's report⁹;
- 735 (4) the company's annual accounts¹⁰ and reports for the last three financial years¹¹ ending on or before the first meeting of the members, or any class of members, of the company summoned for the purposes of approving the scheme¹²; and
- 736 (5) any required¹³ supplementary accounting statement¹⁴.

1 As to the meaning of 'member of a company' see PARA 321.

2 As to the meaning of 'merging companies' see PARA 1452. As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449.

3 The specified period is the period beginning one month before (Companies Act 2006 s 911(2)(a)), and ending on the date of (s 911(2)(b)), the first meeting of the members, or any class of members, of the company for the purposes of approving the scheme (s 911(2)). As to the meaning of 'month' see PARA 1625 note 10. As to meetings to approve a scheme see PARA 1454. As to the scheme see PARA 1449.

4 As to a company's registered office see PARA 129.

5 Companies Act 2006 s 911(1)(a).

6 Companies Act 2006 s 911(1)(b).

7 Companies Act 2006 s 911(3)(a). As to the draft terms see PARA 1453.

8 Companies Act 2006 s 911(3)(b). The requirements of s 911(3)(b) and (c) (see the text to note 9) are subject to s 915 (circumstances in which reports not required): s 911(4). The requirements of s 911(3)(b), (c) do not apply in the case of a merger by absorption where all of the relevant securities of the transferor company (or, if there is more than one transferor company, of each of them) are held by or on behalf of the transferee company: see s 915(1), (5). (By reference to s 911(4), it is submitted that there is a drafting error in s 915(5) in that the reference in that subsection to the provisions mentioned in s 915(3) should be a reference to the provisions mentioned in s 915(4)). As to the explanatory report see PARA 1457. As to the meaning of 'merger by absorption' see PARA 1452. As to the meaning of 'relevant securities' see PARA 1453 note 10.

9 Companies Act 2006 s 911(3)(c). See also note 8. As to the expert's report see PARA 1458.

10 As to annual accounts see PARA 714 et seq.

11 As to the meaning of 'financial year' see PARA 711.

12 Companies Act 2006 s 911(3)(d).

13 le required by the Companies Act 2006 s 910: see PARA 1459.

14 Companies Act 2006 s 911(3)(e).

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1461. Approval of articles of transferee company where merger forms new company.

In the case of a merger by formation of a new company¹, the articles² of the transferee company, or a draft of them, must be approved by ordinary resolution³ of the transferor company or, as the case may be, each of the transferor companies⁴.

1 As to the meaning of 'merger by formation of a new company' see PARA 1452.

2 As to the meaning of 'articles' see PARA 228 note 2.

3 As to the meaning of 'ordinary resolution' see PARA 613.

4 Companies Act 2006 s 912. As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449.

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1462. Securities of transferor company to which special rights attached.

The scheme¹ must provide that where any securities of a transferor company (other than shares²) to which special rights are attached are held by a person³ otherwise than as a member⁴ or creditor of the company, that person is to receive rights in the transferee company of equivalent value⁵. This provision does not apply if (1) the holder has agreed otherwise⁶; or (2) the holder is, or under the scheme is to be, entitled to have the securities purchased by the transferee company on terms that the court⁷ considers reasonable⁸.

1 As to the scheme, and as to the application of the Companies Act 2006 Pt 27 (ss 902-941), see PARA 1449.

2 As to the meaning of 'share' see PARA 1042.

3 As to the meaning of 'person' see PARA 311 note 2.

4 As to the meaning of 'member of a company' see PARA 321.

5 Companies Act 2006 s 913(1).

6 Companies Act 2006 s 913(2)(a).

- 7 As to the meaning of 'court' see PARA 212 note 1. See also PARA 1451 note 12.
- 8 Companies Act 2006 s 913(2)(b).

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1463. Scheme of merger not to provide for allotment of shares to transferor company or transferee company.

The scheme¹ must not provide for any shares² in the transferee company to be allotted to (1) a transferor company (or its nominee) in respect of shares in the transferor company held by the transferor company itself (or its nominee)³; or (2) the transferee company (or its nominee) in respect of shares in a transferor company held by the transferee company (or its nominee)⁴.

- 1 As to the scheme, and as to the application of the Companies Act 2006 Pt 27 (ss 902-941), see PARA 1449.
- 2 As to the meaning of 'share' see PARA 1042.
- 3 Companies Act 2006 s 914(a) (s 914 substituted by SI 2008/690).
- 4 Companies Act 2006 s 914(b) (as substituted: see note 3).

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(iii) Division of UK Companies

1464. When scheme involves a division.

The scheme¹ involves a division where under the scheme the undertaking², property³ and liabilities⁴ of the company⁵ in respect of which the compromise or arrangement is proposed are to be divided among and transferred to two or more companies each of which is either an existing public company⁶, or a new company (whether or not a public company)⁷.

References in statutory provisions on mergers and divisions of public companies⁸ to the companies involved in the division are to the transferor company and any existing transferee companies⁹.

- 1 As to the scheme see PARA 1449.
- 2 As to the meaning of 'undertaking' see PARA 26 note 2.
- 3 As to the meaning of 'property' see PARA 1452 note 3.
- 4 As to the meaning of 'liabilities' see PARA 1452 note 4.

5 As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449.

6 Companies Act 2006 s 919(1)(a). As to the meaning of 'public company' see PARA 102. As to the meaning of 'existing company' see PARA 1449.

7 Companies Act 2006 s 919(1)(b). As to the meaning of 'new company' see PARA 1449.

8 Ie the Companies Act 2006 Pt 27 (ss 902-941).

9 Companies Act 2006 s 919(2).

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1465. Draft terms of scheme to be drawn up and adopted by directors of companies involved.

A draft of the proposed terms of the scheme¹ must be drawn up and adopted by the directors² of each of the companies involved in the division³. The draft terms must give particulars of at least the following matters:

- 737 (1) in respect of the transferor company and each transferee company its name⁴, the address of its registered office⁵, and whether it is a company limited by shares⁶ or a company limited by guarantee⁷ and having a share capital⁸;
- 738 (2) the number of shares in a transferee company to be allotted to members⁹ of the transferor company for a given number of their shares (the 'share exchange ratio') and the amount of any cash payment¹⁰;
- 739 (3) the terms relating to the allotment of shares in a transferee company¹¹;
- 740 (4) the date from which the holding of shares in a transferee company will entitle the holders to participate in profits, and any special conditions affecting that entitlement¹²;
- 741 (5) the date from which the transactions of the transferor company are to be treated for accounting purposes as being those of a transferee company¹³;
- 742 (6) any rights or restrictions attaching to shares or other securities in a transferee company to be allotted under the scheme to the holders of shares or other securities in the transferor company to which any special rights or restrictions attach, or the measures proposed concerning them¹⁴;
- 743 (7) any amount of benefit paid or given or intended to be paid or given to any expert¹⁵, or to any director of a company involved in the division¹⁶, and the consideration for the payment of benefit¹⁷.

The draft terms must also: (a) give particulars of the property¹⁸ and liabilities¹⁹ to be transferred (to the extent that these are known to the transferor company) and their allocation among the transferee companies²⁰; (b) make provision for the allocation among and transfer to the transferee companies of any other property and liabilities that the transferor company has acquired or may subsequently acquire²¹; and (c) specify the allocation to members of the transferor company of shares in the transferee companies and the criteria upon which that allocation is based²².

The directors of each company involved in the division must deliver a copy of the draft terms to the registrar²³. The registrar must publish in the Gazette²⁴ notice of receipt by him from that

company of a copy of the draft terms²⁵; and that notice must be published at least one month²⁶ before the date of any meeting of that company summoned for the purposes of approving the scheme²⁷. These requirements²⁸ are subject to the power of the court²⁹ to exclude certain requirements³⁰.

- 1 As to the scheme, and as to the application of the Companies Act 2006 Pt 27 (ss 902-941), see PARA 1449.
- 2 As to the meaning of 'director' see PARA 478.
- 3 Companies Act 2006 s 920(1). As to the meaning of 'division' see PARA 1464. As to the liability of transferee companies under a division see PARA 1479.
- 4 Companies Act 2006 s 920(2)(a)(i). As to the transferor company and transferee companies see PARA 1464.
- 5 Companies Act 2006 s 920(2)(a)(ii). As to a company's registered office see PARA 129.
- 6 As to the meaning of 'limited by shares' see PARA 102. As to the meaning of 'share' see PARA 1042.
- 7 As to the meaning of 'limited by guarantee' see PARA 102.
- 8 Companies Act 2006 s 920(2)(a)(iii). As to the meaning of 'share capital' see PARA 1042.
- 9 As to the meaning of 'member of a company' see PARA 321.
- 10 Companies Act 2006 s 920(2)(b).
- 11 Companies Act 2006 s 920(2)(c).
- 12 Companies Act 2006 s 920(2)(d).
- 13 Companies Act 2006 s 920(2)(e).
- 14 Companies Act 2006 s 920(2)(f).
- 15 In any of the experts referred to in the Companies Act 2006 s 924 (expert's report: see PARA 1471): Companies Act 2006 s 920(2)(g)(i).
- 16 Companies Act 2006 s 920(2)(g)(ii).
- 17 Companies Act 2006 s 920(2)(g).
- 18 As to the meaning of 'property' see PARA 1452 note 3.
- 19 As to the meaning of 'liabilities' see PARA 1452 note 4.
- 20 Companies Act 2006 s 920(3)(a).
- 21 Companies Act 2006 s 920(3)(b).
- 22 Companies Act 2006 s 920(3)(c).
- 23 Companies Act 2006 s 921(1). As to the meaning of 'registrar' see PARA 131 note 2. As to the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.
- 24 As to the meaning of the 'Gazette' see PARA 138 note 2.
- 25 Companies Act 2006 s 921(2).
- 26 As to the meaning of 'month' see PARA 1625 note 10.
- 27 Companies Act 2006 s 921(3). As to meetings to approve the scheme see PARA 1466.
- 28 In the requirements of the Companies Act 2006 s 921: see the text to notes 23-27.

29 lie under the Companies Act 2006 s 934: see PARA 1469. As to the meaning of 'court' see PARA 212 note 1. See also PARA 1451 note 12.

30 Companies Act 2006 s 921(4).

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1466. Approval of members of companies involved in division.

The compromise or arrangement¹ must be approved by a majority in number, representing 75 per cent in value, of each class of members² of each of the companies involved in the division³, present and voting either in person or by proxy⁴ at a meeting⁵. In certain circumstances a meeting of members is not required⁶.

1 As to the compromise or arrangement, and as to the application of the Companies Act 2006 Pt 27 (ss 902-941), see PARA 1449.

2 As to the meaning of 'member of a company' see PARA 321.

3 As to the meaning of 'division' see PARA 1464.

4 As to voting by proxy see PARA 662 et seq.

5 Companies Act 2006 s 922(1).

6 The requirement of the Companies Act 2006 s 922(1) (see the text to notes 1-5) is subject to ss 931 and 932 (circumstances in which meeting of members not required: see PARA 1467): s 922(2).

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1467. Circumstances in which meetings etc not required.

In the case of a division¹ where all of the shares² or other securities of the transferor company carrying the right to vote at general meetings³ of the company are held by or on behalf of one or more existing transferee companies⁴, it is not necessary for the scheme⁵ to be approved by a meeting of the members⁶, or any class of members, of the transferor company if the court⁷ is satisfied that the following conditions have been complied with⁸:

744 (1) the first condition is that publication of notice of receipt of the draft terms by the registrar⁹ took place in respect of all the companies involved in the division at least one month¹⁰ before the date of the court's order¹¹;

745 (2) the second condition is that the members of every company involved in the division were able during the period beginning one month before, and ending on, that date to inspect at the registered office¹² of their company copies of the documents¹³ relating to every company involved in the division¹⁴, and to obtain copies of those documents or any part of them on request free of charge¹⁵;

- 746 (3) the third condition is that one or more members of the transferor company, who together held not less than 5 per cent of the paid-up¹⁶ capital of the company (excluding any shares in the company held as treasury shares¹⁷) would have been able, during that period, to require a meeting of each class of members to be called for the purpose of deciding whether or not to agree to the scheme¹⁸, and no such requirement was made¹⁹;
- 747 (4) the fourth condition is that the directors²⁰ of the transferor company have sent to every member who would have been entitled to receive notice of a meeting to agree to the scheme (had any such meeting been called)²¹, and to the directors of every existing transferee company²², a report of any material change in the property²³ and liabilities²⁴ of the transferor company between the date when the terms were adopted by the directors²⁵ and the date one month before the date of the court's order²⁶.

In the case of a division, it is not necessary for the scheme to be approved by the members of a transferee company if the court is satisfied that the following conditions have been complied with in relation to that company²⁷:

- 748 (a) the first condition is that publication of notice of receipt of the draft terms by the registrar took place in respect of that company at least one month before the date of the first meeting of members of the transferor company summoned for the purposes of agreeing to the scheme²⁸;
- 749 (b) the second condition is that the members of that company were able during the period beginning one month before, and ending on, that date to inspect at the registered office of that company copies of the documents²⁹ relating to that company and every other company involved in the division³⁰, and to obtain copies of those documents or any part of them on request free of charge³¹;
- 750 (c) the third condition is that one or more members of that company, who together held not less than 5 per cent of the paid-up capital of the company which carried the right to vote at general meetings of the company (excluding any shares in the company held as treasury shares) would have been able, during that period, to require a meeting of each class of members to be called for the purpose of deciding whether or not to agree to the scheme³², and no such requirement was made³³.

Conditions (a) and (b) above are subject to the power³⁴ of the court to exclude certain requirements³⁵.

1 As to the meaning of 'division' see PARA 1464.

2 As to the meaning of 'share' see PARA 1042.

3 As to the transferor company see PARA 1464. As to general meetings see PARA 629.

4 Companies Act 2006 s 931(1). As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449. As to existing transferee companies see PARA 1464.

5 As to the scheme see PARA 1449.

6 As to the meaning of 'member of a company' see PARA 321. As to meetings to approve the scheme see PARA 1466.

7 As to the meaning of 'court' see PARA 212 note 1. See also PARA 1451 note 12.

8 Companies Act 2006 s 931(2).

9 As to such notice see PARA 1465. As to the meaning of 'registrar' see PARA 131 note 2.

- 10 As to the meaning of 'month' see PARA 1625 note 10.
- 11 Companies Act 2006 s 931(3).
- 12 As to a company's registered office see PARA 129.
- 13 Ie the documents listed in the Companies Act 2006 s 926(3): see PARA 1473.
- 14 Companies Act 2006 s 931(4)(a).
- 15 Companies Act 2006 s 931(4)(b).
- 16 As to the meaning of 'paid-up' see PARA 1048.
- 17 As to the meaning of 'treasury share' see PARA 1251.
- 18 Companies Act 2006 s 931(5)(a).
- 19 Companies Act 2006 s 931(5)(b).
- 20 As to the meaning of 'director' see PARA 478.
- 21 Companies Act 2006 s 931(6)(a).
- 22 Companies Act 2006 s 931(6)(b). As to the meaning of 'existing company' see PARA 1449.
- 23 As to the meaning of 'property' see PARA 1452 note 3.
- 24 As to the meaning of 'liabilities' see PARA 1452 note 4.
- 25 As to the adoption of the terms by the directors see PARA 1465.
- 26 Companies Act 2006 s 931(6).
- 27 Companies Act 2006 s 932(1).
- 28 Companies Act 2006 s 932(2).
- 29 Ie the documents specified in the Companies Act 2006 s 926(3): see PARA 1473.
- 30 Companies Act 2006 s 932(3)(a).
- 31 Companies Act 2006 s 932(3)(b).
- 32 Companies Act 2006 s 932(4)(a).
- 33 Companies Act 2006 s 932(4)(b).
- 34 Ie under the Companies Act 2006 s 934: see PARA 1469.
- 35 Companies Act 2006 s 932(5).

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1468. Power of court to summon meeting of members or creditors of existing transferee company.

The court¹ may order a meeting of: (1) the members² of an existing transferee company³, or any class of them⁴; or (2) the creditors of an existing transferee company, or any class of them⁵, to be summoned in such manner as the court directs⁶. An application for such an order may be made by: (a) the company concerned⁷; (b) a member or creditor of the company⁸; (c) if the company is being wound up, the liquidator⁹; or (d) if the company is in administration, the administrator¹⁰.

1 As to the meaning of 'court' see PARA 212 note 1. See also PARA 1451 note 12.

2 As to the meaning of 'member of a company' see PARA 321.

3 As to the meaning of 'existing company' see PARA 1449.

4 Companies Act 2006 s 938(1)(a). As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449. As to meetings to approve the compromise or arrangement see PARA 1466. As to circumstances in which such meetings are not required see PARA 1467.

5 Companies Act 2006 s 938(1)(b).

6 Companies Act 2006 s 938(1). Section 323 (representation of corporations at meetings: see PARA 661) applies to a meeting of creditors under s 938 as to a meeting of the company (references to a member being read as references to a creditor): s 938(3) (added by SI 2008/948).

7 Companies Act 2006 s 938(2)(a).

8 Companies Act 2006 s 938(2)(b).

9 Companies Act 2006 s 938(2)(c) (substituted by SI 2009/1941). As to liquidators generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 555 et seq.

10 Companies Act 2006 s 938(2)(d) (added by SI 2009/1941). As to administrators generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 158 et seq.

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1469. Power of court to exclude certain requirements.

In the case of a division¹, the court² may by order direct that:

- 751 (1) in relation to any company involved in the division³, the requirements⁴ as to the publication of draft terms⁵, and those⁶ as to the inspection of documents⁷, do not apply⁸; and
- 752 (2) in relation to an existing transferee company⁹, the provisions¹⁰ relating to the circumstances in which a meeting of members¹¹ of a transferee company are not required have effect with the omission of certain conditions¹²,

if the court is satisfied that the following conditions will be fulfilled in relation to that company¹³:

- 753 (a) the first condition is that the members of that company will have received, or will have been able to obtain free of charge, copies of the specified documents¹⁴ (i) in time to examine them before the date of the first meeting of the members, or any class of members, of that company summoned for the purposes of agreeing to the scheme¹⁵; or (ii) in the case of an existing transferee company where no

- meeting is held¹⁶, in time to require a meeting¹⁷ of each class of members to be called for the purpose of deciding whether or not to agree to the scheme¹⁸;
- 754 (b) the second condition is that the creditors of that company will have received or will have been able to obtain free of charge copies of the draft terms¹⁹ in time to examine them (i) before the date of the first meeting of the members, or any class of members, of the company summoned for the purposes of agreeing to the scheme²⁰; or (ii) in the circumstances mentioned in head (a)(ii) above, at the same time as the members of the company²¹;
- 755 (c) the third condition is that no prejudice would be caused to the members or creditors of the transferor company²² or any transferee company by making the order in question²³.

1 As to the meaning of 'division' see PARA 1464.

2 As to the meaning of 'court' see PARA 212 note 1. See also PARA 1451 note 12.

3 As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449.

4 Ie the requirements of the Companies Act 2006 s 921: see PARA 1465.

5 Companies Act 2006 s 934(1)(a)(i).

6 Ie the requirements of the Companies Act 2006 s 926: see PARA 1473.

7 Companies Act 2006 s 934(1)(a)(ii).

8 Companies Act 2006 s 934(1)(a).

9 As to existing transferee companies see PARA 1464.

10 Ie the Companies Act 2006 s 932: see PARA 1467.

11 As to the meaning of 'member of a company' see PARA 321.

12 See the Companies Act 2006 s 934(1)(b). The conditions in question are the first and second conditions specified in s 932 (see heads (a) and (b) in PARA 1467): see s 934(1)(b).

13 Companies Act 2006 s 934(1).

14 Ie the documents listed in the Companies Act 2006 s 926: see PARA 1473.

15 Companies Act 2006 s 934(2)(a). As to meetings to approve the scheme see PARA 1466. As to the scheme see PARA 1449.

16 Ie in the circumstances described in the Companies Act 2006 s 932: see PARA 1467.

17 Ie a meeting as mentioned in the Companies Act 2006 s 932(4): see PARA 1467.

18 See the Companies Act 2006 s 934(2)(b).

19 As to the draft terms see PARA 1465.

20 Companies Act 2006 s 934(3)(a).

21 Companies Act 2006 s 934(3)(b).

22 As to the transferor company see PARA 1464.

23 Companies Act 2006 s 934(4).

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1470. Directors' explanatory report regarding division.

The directors¹ of the transferor and each existing transferee company² must draw up and adopt a report³. The report must consist of:

- 756 (1) a statement⁴ explaining effect of the compromise or arrangement⁵; and
- 757 (2) in so far as that statement does not deal with the following matters, a further statement setting out the legal and economic grounds for the draft terms⁶, and in particular for the share exchange ratio⁷ and for the criteria on which the allocation to the members⁸ of the transferor company of shares⁹ in the transferee companies was based¹⁰, and specifying any special valuation difficulties¹¹.

The report must also state (a) whether a report has been made¹² to any transferee company concerning the valuation of non-cash consideration for shares¹³; and (b) if so, whether that report has been delivered to the registrar of companies¹⁴.

In certain circumstances agreement may be reached to dispense with these requirements¹⁵.

1 As to the meaning of 'director' see PARA 478.

2 As to the transferor company and existing transferee companies see PARA 1464.

3 Companies Act 2006 s 923(1). As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449.

4 Ie the statement required by the Companies Act 2006 s 897: see PARA 1429.

5 Companies Act 2006 s 923(2)(a). As to the compromise or arrangement see PARA 1449.

6 As to the draft terms see PARA 1465.

7 As to the share exchange ratio see PARA 1465.

8 As to the meaning of 'member of a company' see PARA 321.

9 As to the meaning of 'share' see PARA 1042.

10 Companies Act 2006 s 923(2)(b)(i).

11 Companies Act 2006 s 923(2)(b)(ii).

12 Ie under the Companies Act 2006 s 593: see PARA 1120.

13 Companies Act 2006 s 923(3)(a).

14 Companies Act 2006 s 923(3)(b). As to the meaning of 'registrar of companies' see PARA 131 note 2.

15 The requirement in the Companies Act 2006 s 923 (see the text to notes 1-14) is subject to s 933 (agreement to dispense with reports etc): s 923(4). If all members holding shares in, and all persons holding other securities of, the companies involved in the division, being shares or securities that carry a right to vote in general meetings of the company in question, so agree, the requirements of s 923 may be dispensed with: see s 933(1), (2)(a)(i). For these purposes the members, or holders of other securities, of a company (s 933(3)(a)), and whether shares or other securities carry a right to vote in general meetings of the company (s 933(3)(b)), are determined as at the date of the application to the court under s 896 (see PARA 1426) (s 933(3)). As to the meaning of 'person' see PARA 311 note 2. As to the meaning of 'division' see PARA 1464. As to general meetings see PARA 629. As to the meaning of 'court' see PARA 212 note 1. See also PARA 1451 note 12.

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1471. Expert's report to be drawn up on behalf of companies involved in division.

An expert's report must be drawn up on behalf of each company involved in the division¹. The report required is a written report on the draft terms² to the members of the company³, and must:

- 758 (1) indicate the method or methods used to arrive at the share exchange ratio⁴;
- 759 (2) give an opinion as to whether the method or methods used are reasonable in all the circumstances of the case, indicate the values arrived at using each such method and (if there is more than one method) give an opinion on the relative importance attributed to such methods in arriving at the value decided on⁵;
- 760 (3) describe any special valuation difficulties that have arisen⁶;
- 761 (4) state whether in the expert's opinion the share exchange ratio is reasonable⁷; and
- 762 (5) in the case of a valuation made by a person other than himself⁸, state that it appeared to him reasonable to arrange for it to be so made or to accept a valuation so made⁹.

The expert must be a person who is eligible for appointment as a statutory auditor¹⁰, and meets the independence requirement¹¹. The court¹² may on the joint application of the companies involved in the division approve the appointment of a joint expert to draw up a single report on behalf of all those companies¹³. If no such appointment is made, there must be a separate expert's report to the members of each company involved in the division drawn up by a separate expert appointed on behalf of that company¹⁴. The expert (or each of them) has the right of access to all such documents of the companies involved in the division¹⁵, and the right to require from the companies' officers¹⁶ all such information¹⁷, as he thinks necessary for the purposes of making his report¹⁸.

In certain circumstances agreement may be reached to dispense with these requirements¹⁹.

1 Companies Act 2006 s 924(1). As to the meaning of 'division' see PARA 1464. As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449.

2 As to the draft terms see PARA 1465.

3 Companies Act 2006 s 924(2). As to the meaning of 'member of a company' see PARA 321.

4 Companies Act 2006 s 924(5)(a). As to the share exchange ratio see PARA 1465. As to the meaning of 'share' see PARA 1042.

5 Companies Act 2006 s 924(5)(b).

6 Companies Act 2006 s 924(5)(c).

7 Companies Act 2006 s 924(5)(d).

8 Where it appears to an expert (1) that a valuation is reasonably necessary to enable him to draw up his report (Companies Act 2006 s 935(1)(a)); and (2) that it is reasonable for that valuation, or part of it, to be made by (or for him to accept a valuation made by) another person who appears to him to have the requisite

knowledge and experience to make the valuation or that part of it (s 935(1)(b)(i)), and meets the independence requirement in s 936 (see PARA 1458 note 13) (s 935(1)(b)(ii)), he may arrange for or accept such a valuation, together with a report which will enable him to make his own report (s 935(1)). Where any valuation is made by a person other than the expert himself, the latter's report must state that fact and must also state the former's name and what knowledge and experience he has to carry out the valuation (s 935(2)(a)), and describe so much of the undertaking, property and liabilities as was valued by the other person, and the method used to value them, and specify the date of the valuation (s 935(2)(b)). As to the meaning of 'person' see PARA 311 note 2. As to the meaning of 'undertaking' see PARA 26 note 2. As to the meaning of 'property' see PARA 1452 note 3. As to the meaning of 'liabilities' see PARA 1452 note 4.

9 Companies Act 2006 s 924(5)(e).

10 Companies Act 2006 s 924(4)(a). The appointment referred to is one under s 1212 (see PARA 969): see s 924(4)(a).

11 Companies Act 2006 s 924(4)(b). The independence requirement is that in s 936 (see PARA 1458 note 13): see s 924(4)(b).

12 As to the meaning of 'court' see PARA 212 note 1. See also PARA 1451 note 12.

13 Companies Act 2006 s 924(3).

14 Companies Act 2006 s 924(3).

15 Companies Act 2006 s 924(6)(a).

16 As to the meaning of 'officer' see PARA 607.

17 Companies Act 2006 s 924(6)(b).

18 Companies Act 2006 s 924(6).

19 The requirement in the Companies Act 2006 s 924 (see the text to notes 1-18) is subject to s 933 (agreement to dispense with reports etc): s 924(7). If all members holding shares in, and all persons holding other securities of, the companies involved in the division, being shares or securities that carry a right to vote in general meetings of the company in question, so agree, the requirements of s 924 may be dispensed with: see s 933(1), (2)(a)(ii). For these purposes the members, or holders of other securities, of a company (s 933(3)(a)), and whether shares or other securities carry a right to vote in general meetings of the company (s 933(3)(b)), are determined as at the date of the application to the court under s 896 (see PARA 1426) (s 933(3)).

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1472. Circumstances where company involved in division must prepare supplementary accounting statement.

If the last annual accounts¹ of a company involved in the division² relate to a financial year³ ending more than seven months⁴ before the first meeting of the company summoned for the purposes of approving the scheme⁵, the directors⁶ of that company must prepare a supplementary accounting statement⁷. That statement must consist of: (1) a balance sheet dealing with the state of affairs of the company as at a date not more than three months before the draft terms were adopted⁸ by the directors⁹; and (2) where the company would be required¹⁰ to prepare group accounts if that date were the last day of a financial year, a consolidated balance sheet dealing with the state of affairs of the company and the undertakings¹¹ that would be included in such a consolidation¹².

In certain circumstances agreement may be reached to dispense with these requirements¹³.

- 1 As to annual accounts see PARA 714 et seq.
- 2 As to the meaning of 'division' see PARA 1464. As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449.
- 3 As to the meaning of 'financial year' see PARA 711.
- 4 As to the meaning of 'month' see PARA 1625 note 10.
- 5 As to meetings to approve the scheme see PARA 1466. As to the scheme see PARA 1449.
- 6 As to the meaning of 'director' see PARA 478.
- 7 Companies Act 2006 s 925(1).
- 8 As to the adoption of the draft terms by the directors see PARA 1465.
- 9 Companies Act 2006 s 925(2)(a). The requirements of the Companies Act 2006 (and where relevant article 4 of the IAS Regulation) as to the balance sheet forming part of a company's annual accounts, and the matters to be included in notes to it, apply to the balance sheet required for an accounting statement under s 925, with such modifications as are necessary by reason of its being prepared otherwise than as at the last day of a financial year: s 925(3). The provisions of s 414 (see PARA 815) as to the approval and signing of accounts apply to the balance sheet required for an accounting statement under s 925: s 925(4). As to the meaning of 'IAS Regulation' see PARA 693 note 1.
- 10 le under the Companies Act 2006 s 399: see PARA 775.
- 11 As to the meaning of 'undertaking' see PARA 26 note 2.
- 12 Companies Act 2006 s 925(2)(b). See also note 9.
- 13 The requirement in the Companies Act 2006 s 925 is subject to s 933 (agreement to dispense with reports etc): s 925(5). If all members holding shares in, and all persons holding other securities of, the companies involved in the division, being shares or securities that carry a right to vote in general meetings of the company in question, so agree, the requirements of s 925 may be dispensed with: see s 933(1), (2)(a)(iii). For these purposes the members, or holders of other securities, of a company (s 933(3)(a)), and whether shares or other securities carry a right to vote in general meetings of the company (s 933(3)(b)), are determined as at the date of the application to the court under s 896 (see PARA 1426) (s 933(3)). As to the meaning of 'share' see PARA 1042. As to the meaning of 'person' see PARA 311 note 2. As to general meetings see PARA 629. As to the meaning of 'court' see PARA 212 note 1. See also PARA 1451 note 12.

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1473. Inspection of documents relating to division.

The members¹ of each company involved in the division² must be able, during the specified period³, to inspect at the registered office⁴ of that company copies of the documents listed below relating to that company and every other company involved in the division⁵, and to obtain copies of those documents or any part of them on request free of charge⁶. The documents are:

- 763 (1) the draft terms⁷;
- 764 (2) the directors' explanatory report⁸;
- 765 (3) the expert's report⁹;
- 766 (4) the company's annual accounts and reports¹⁰ for the last three financial years¹¹ ending on or before the first meeting of the members, or any class of

members, of the company summoned for the purposes of approving the scheme¹²; and
 767 (5) any supplementary accounting statement¹³.

In certain circumstances the requirements in heads (2), (3) and (5) above may be dispensed with¹⁴, or may be excluded by the court¹⁵.

1 As to the meaning of 'member of a company' see PARA 321.

2 As to the meaning of 'division' see PARA 1464. As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449.

3 The specified period is the period beginning one month before (Companies Act 2006 s 926(2)(a)), and ending on the date of (s 926(2)(b)), the first meeting of the members, or any class of members, of the company for the purposes of approving the scheme (s 926(2)). As to the meaning of 'month' see PARA 1625 note 10. As to meetings for the purpose of approving the scheme see PARA 1466. As to the scheme see PARA 1449.

4 As to a company's registered office see PARA 129.

5 Companies Act 2006 s 926(1)(a).

6 Companies Act 2006 s 926(1)(b).

7 Companies Act 2006 s 926(3)(a). As to the draft terms see PARA 1465.

8 Companies Act 2006 s 926(3)(b). As to the directors' explanatory report see PARA 1470.

9 Companies Act 2006 s 926(3)(c). As to the expert's report see PARA 1471.

10 As to annual accounts and reports see PARA 693 et seq.

11 As to the meaning of 'financial year' see PARA 711.

12 Companies Act 2006 s 926(3)(d).

13 Companies Act 2006 s 926(3)(e). As to supplementary accounting statements see PARA 1472.

14 The requirements in the Companies Act 2006 s 926(3)(b), (c) and (e) are subject to s 933 (agreement to dispense with reports etc): see s 926(4). If all members holding shares in, and all persons holding other securities of, the companies involved in the division, being shares or securities that carry a right to vote in general meetings of the company in question, so agree, the requirements of s 926 may be dispensed with so far as relating to any directors' explanatory report, expert's report or supplementary accounting statement required to be drawn up: see s 933(1), (2)(b). For these purposes the members, or holders of other securities, of a company (s 933(3)(a)), and whether shares or other securities carry a right to vote in general meetings of the company (s 933(3)(b)), are determined as at the date of the application to the court under s 896 (see PARA 1426) (s 933(3)). As to the meaning of 'share' see PARA 1042. As to the meaning of 'person' see PARA 311 note 2. As to general meetings see PARA 629. As to the meaning of 'court' see PARA 212 note 1. See also PARA 1451 note 12.

15 The requirements in the Companies Act 2006 s 926(3)(b), (c) and (e) are subject to s 934 (power of court to exclude certain requirements: see PARA 1469): see s 926(4).

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1474. Report on material changes of assets of transferor company involved in division.

The directors¹ of the transferor company² must report:

- 768 (1) to every meeting of the members³, or any class of members, of that company summoned for the purpose of agreeing to the scheme⁴; and
- 769 (2) to the directors of each existing transferee company⁵,

any material changes in the property⁶ and liabilities⁷ of the transferor company between the date when the draft terms were adopted⁸ and the date of the meeting in question⁹.

The directors of each existing transferee company must in turn report those matters to every meeting of the members, or any class of members, of that company summoned for the purpose of agreeing to the scheme¹⁰, or send a report of those matters to every member entitled to receive notice of such a meeting¹¹.

In certain circumstances agreement may be reached to dispense with these requirements¹².

1 As to the meaning of 'director' see PARA 478.

2 As to the transferor company see PARA 1464.

3 As to the meaning of 'member of a company' see PARA 321.

4 Companies Act 2006 s 927(1)(a). As to meetings for the purpose of agreeing to the scheme see PARA 1466. As to the scheme see PARA 1449.

5 Companies Act 2006 s 927(1)(b). As to existing transferee companies see PARA 1464.

6 As to the meaning of 'property' see PARA 1452 note 3.

7 As to the meaning of 'liabilities' see PARA 1452 note 4.

8 As to the adoption of the draft terms see PARA 1465.

9 Companies Act 2006 s 927(1).

10 Companies Act 2006 s 927(2)(a).

11 Companies Act 2006 s 927(2)(b).

12 The requirement in the Companies Act 2006 s 927 is subject to s 933 (agreement to dispense with reports etc): s 927(3). If all members holding shares in, and all persons holding other securities of, the companies involved in the division, being shares or securities that carry a right to vote in general meetings of the company in question, so agree, the requirements of s 927 may be dispensed with: see s 933(1), (2)(a)(iv). For these purposes the members, or holders of other securities, of a company (s 933(3)(a)), and whether shares or other securities carry a right to vote in general meetings of the company (s 933(3)(b)), are determined as at the date of the application to the court under s 896 (see PARA 1426) (s 933(3)). As to the meaning of 'share' see PARA 1042. As to the meaning of 'person' see PARA 311 note 2. As to general meetings see PARA 629. As to the meaning of 'court' see PARA 212 note 1. See also PARA 1451 note 12.

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1475. Approval of articles of transferee company where division forms new company.

The articles¹ of every new transferee company², or a draft of them, must be approved by ordinary resolution³ of the transferor company⁴.

1 As to the meaning of 'articles' see PARA 228 note 2.

2 As to the meaning of 'new company' see PARA 1449. As to division of companies see PARA 1464.

3 As to the meaning of 'ordinary resolution' see PARA 613.

4 Companies Act 2006 s 928. As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449. As to the transferor company see PARA 1464.

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1476. Protection of securities other than shares to which special rights attached.

The scheme¹ must provide that where any securities of the transferor company² (other than shares³) to which special rights are attached are held by a person⁴ otherwise than as a member⁵ or creditor of the company, that person is to receive rights in a transferee company of equivalent value⁶. However, this provision does not apply if the holder has agreed otherwise⁷, or the holder is, or under the scheme is to be, entitled to have the securities purchased by a transferee company on terms that the court considers reasonable⁸.

1 As to the scheme see PARA 1449.

2 As to the transferor company see PARA 1464.

3 As to the meaning of 'share' see PARA 1042.

4 As to the meaning of 'person' see PARA 311 note 2.

5 As to the meaning of 'member of a company' see PARA 321.

6 Companies Act 2006 s 929(1). As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449.

7 Companies Act 2006 s 929(2)(a).

8 Companies Act 2006 s 929(2)(b).

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1477. Scheme of division not to provide for allotment of shares to transferor company or transferee company.

The scheme¹ must not provide for any shares² in a transferee company³ to be allotted to:

- 770 (1) the transferor company⁴ (or its nominee) in respect of shares in the transferor company held by the transferor company itself (or its nominee)⁵; or
- 771 (2) a transferee company (or its nominee) in respect of shares in the transferor company held by the transferee company (or its nominee)⁶.

1 As to the scheme see PARA 1449.

2 As to the meaning of 'share' see PARA 1042.

3 As to division of companies see PARA 1464.

4 As to the transferor company see PARA 1464.

5 Companies Act 2006 s 930(a) (s 930 substituted by SI 2008/690). As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449.

6 Companies Act 2006 s 930(b) (as substituted: see note 5).

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(iv) Effect of Scheme

1478. Date and consequences of compromise or arrangement.

Where the court¹ sanctions the compromise or arrangement², it must in the order sanctioning the compromise or arrangement³, or in a subsequent order⁴ under the powers of the court to facilitate reconstruction or amalgamation⁵, fix a date on which the transfer (or transfers) to the transferee company (or transferee companies) of the undertaking⁶, property⁷ and liabilities⁸ of the transferor company is (or are) to take place⁹. Any such order that provides for the dissolution of the transferor company must fix the same date for the dissolution¹⁰.

If it is necessary for the transferor company to take steps to ensure that the undertaking, property and liabilities are fully transferred, the court must fix a date, not later than six months¹¹ after the date fixed for the transfer¹², by which such steps must be taken¹³. In that case, the court may postpone the dissolution of the transferor company until that date¹⁴; and may postpone or further postpone that date if it is satisfied that the steps mentioned cannot be completed by the date (or latest date) fixed¹⁵.

1 As to the meaning of 'court' see PARA 212 note 1. See also PARA 1451 note 12.

2 As to the sanction of a compromise or arrangement see PARA 1431.

3 Companies Act 2006 s 939(1)(a). As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449.

4 Ie under the Companies Act 2006 s 900: see PARAS 1434-1436.

5 Companies Act 2006 s 939(1)(b).

6 As to the meaning of 'undertaking' see PARA 26 note 2.

- 7 As to the meaning of 'property' see PARA 1452 note 3.
- 8 As to the meaning of 'liabilities' see PARA 1452 note 4.
- 9 Companies Act 2006 s 939(1).
- 10 Companies Act 2006 s 939(2).
- 11 As to the meaning of 'month' see PARA 1625 note 10.
- 12 Ie the date fixed under the Companies Act 2006 s 939(1): see the text to notes 1-9.
- 13 Companies Act 2006 s 939(3).
- 14 Companies Act 2006 s 939(4).
- 15 See the Companies Act 2006 s 939(5).

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1479. Liability of transferee companies for default of another.

In the case of a division¹, each transferee company² is jointly and severally liable for any liability³ transferred to any other transferee company under the scheme⁴ to the extent that the other company has made default in satisfying that liability⁵. This is subject to the following provisions⁶:

- 772 (1) if a majority in number representing 75 per cent in value of the creditors or any class of creditors of the transferor company⁷, present and voting either in person or by proxy⁸ at a meeting summoned for the purposes of agreeing to the scheme⁹, so agree, it does not apply in relation to the liabilities owed to the creditors or that class of creditors¹⁰;
- 773 (2) a transferee company is not so liable for an amount greater than the net value transferred¹¹ to it under the scheme¹².

- 1 As to the meaning of 'division' see PARA 1464.
- 2 As to companies involved in a division see PARA 1464.
- 3 As to the meaning of 'liabilities' see PARA 1452 note 4.
- 4 As to the scheme see PARA 1449.
- 5 Companies Act 2006 s 940(1). As to the application of the Companies Act 2006 Pt 27 (ss 902-941) see PARA 1449.
- 6 Companies Act 2006 s 940(1).
- 7 As to the transferor company see PARA 1464.
- 8 As to voting by proxy see PARA 662 et seq.
- 9 As to meetings summoned for the purposes of agreeing to the scheme see PARA 1466.
- 10 Companies Act 2006 s 940(2).

11 The 'net value transferred' is the value at the time of the transfer of the property transferred to it under the scheme less the amount at that date of the liabilities so transferred: Companies Act 2006 s 940(3). As to the meaning of 'property' see PARA 1452 note 3.

12 Companies Act 2006 s 940(3).

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(27) THE PANEL ON TAKEOVERS AND MERGERS; ITS CODE

(i) Introduction

1480. The Panel on Takeovers and Mergers and the City Code on Takeovers and Mergers.

In 1959 the Governor of the Bank of England set up the City Working Party, consisting of representatives of the Accepting Houses Committee, the Association of Investment Trust Companies, the Association of Unit Trust Managers, the British Insurance Association, the Committee of London Clearing Bankers, the Confederation of British Industry, the Issuing Houses Association, the National Association of Pension Funds, and the Stock Exchange, London, for the purpose of considering good business practice in the conduct of takeovers and mergers.

This body produced the City Code on Takeovers and Mergers (the 'Code'), which of necessity at the time represented a code of business ethics, not a code of law¹. The current version of this Code is issued on the authority of the Panel on Takeovers and Mergers (the 'Panel')².

The Panel is an independent body, established in 1968, whose main functions are to issue and administer the Code and to supervise and regulate takeovers and other matters to which the Code applies in accordance with the rules set out in the Code. It has been designated as the supervisory authority to carry out certain regulatory functions in relation to takeovers pursuant to the Takeovers Directive³. Its statutory functions are set out in and under Chapter 1 of Part 28 of the Companies Act 2006⁴. Rules are set out in the Code (with related Notes and Appendices) and the Rules of Procedure of the Hearings Committee. These rules may be changed from time to time, and rules may also be set out in other documents as specified by the Panel⁵. The Listing Rules impose additional requirements⁶.

The Panel assumes overall responsibility for the policy, financing and administration of the Panel's functions and for the functioning and operation of the Code. The Panel operates through a number of committees and is directly responsible for those matters which are not dealt with through one of its committees⁷. The Panel comprises up to 34 members, comprising the Chairman, who is appointed by the Panel; up to two deputy chairmen, who are appointed by the Panel; up to 20 other members, who are appointed by the Panel; and individuals appointed by a number of financial bodies⁸. The Panel has an Executive which carries out the day-to-day work of takeover supervision and regulation; it is headed by the Director General who is assisted by deputies, assistants, secretaries and various members of permanent and seconded staff⁹.

The Companies Act 2006 puts the Panel on a statutory footing for the first time. The Panel is to have the functions conferred on it by or under Chapter 1 of Part 28 of the Act¹⁰. It may do anything that it considers necessary or expedient for the purposes of, or in connection with, its

functions¹¹. The Panel may make arrangements for any of its functions to be discharged by: (1) a committee or sub-committee of the Panel; or (2) an officer or member of staff of the Panel, or a person acting as such¹².

1 As to judicial recognition of the City Code on Takeovers and Mergers see *Fiske Nominees Ltd v Dwyka Diamonds Ltd* [2002] EWHC 770 (Ch) at [34], [2002] 2 BCLC 123 at [34] per Peter Leaver QC; *Re Joseph Holt plc, Winpar Holdings Ltd v Joseph Holt Group plc* [2001] EWCA Civ 770, [2001] 2 BCLC 604; *Re Chez Nico (Restaurants) Ltd* [1992] BCLC 192 at 209 per Browne-Wilkinson V-C; *Crabtree v Hinchcliffe* [1972] AC 707 at 730, [1971] 3 All ER 967 at 976, HL, per Lord Reid, and at 740 and 984 per Viscount Dilhorne.

2 Copies of the current Code (*City Code on Takeovers and Mergers* (9th Edn, 30 March 2009) (as amended from time to time)), published in loose-leaf format, may be obtained from the secretary of the Panel on Takeovers and Mergers, PO Box No 226, The Stock Exchange Building, London EC2P 2JX. The address of the Panel is 10 Paternoster Square, London EC4M 7DY; telephone 020 7382 9026; fax 020 7236 7005. There is also a website containing the Code and details of the Panel, its staff and its committees, and the names of members of the Panel and the designated alternates: www.thetakeoverpanel.org.uk.

The Code comprises:

- 2191 (1) Section A: Mergers Introduction;
- 2192 (2) Section B: General Principles;
- 2193 (3) Section C: Definitions;
- 2194 (4) Section D (rr 1-3): the Approach, Announcements and Independent Advice;
- 2195 (5) Section E (rr 4-8): Restrictions on Dealings;
- 2196 (6) Section F (r 9): the Mandatory Offer and its Terms;
- 2197 (7) Section G (rr 10-13): the Voluntary Offer and its Terms;
- 2198 (8) Section H (rr 14-18): Provisions applicable to all Offers;
- 2199 (9) Section I (rr 19-22): Conduct during the Offer;
- 2200 (10) Section J (rr 23-27): Documents from the Offeror and the Offeree Board;
- 2201 (11) Section K (r 28): Profit Forecasts;
- 2202 (12) Section L (r 29): Asset Valuations;
- 2203 (13) Section M (rr 30-34): Timing and Revision;
- 2204 (14) Section N (r 35): Restrictions following Offers;
- 2205 (15) Section O (r 36): Partial Offers;
- 2206 (16) Section P (r 37): Redemption or Purchase by a Company of its own Securities;
- 2207 (17) Section Q (r 38): Dealings by Connected Exempt Principal Traders;
- 2208 (18) Appendix 1: Whitewash Guidance Note;
- 2209 (19) Appendix 2: Formula Offers Guidance Note;
- 2210 (20) Appendix 3: Directors' Responsibilities and Conflicts of Interest Guidance Note;
- 2211 (21) Appendix 4: Receiving Agents' Code of Practice;

2212 (22) Appendix 5: Tender Offers;

2213 (23) Appendix 6: Bid Documentation Rules for the purpose of the Companies Act 2006 s 953;

2214 (24) Appendix 7: Schemes of Arrangement.

3 The European Parliament and EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) on takeover bids. As to the provision made for the Panel to make rules giving effect to certain provisions of the Takeovers Directive see the Companies Act 2006 s 943; and PARA 1487.

4 The Companies Act 2006 Pt 28 Ch 1 (ss 942-965): see also PARA 1484 et seq.

5 City Code on Takeovers and Mergers Introduction Overview.

6 As to the Financial Services Authority's Listing Rules generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385.

7 City Code on Takeovers and Mergers Introduction para 4.

8 City Code on Takeovers and Mergers Introduction para 4. See also note 3.

9 As to the Panel executive see the City Code on Takeovers and Mergers Introduction para 5.

10 Companies Act 2006 s 942(1).

11 Companies Act 2006 s 942(2).

12 Companies Act 2006 s 942(3). This is subject to s 943(4), (5): see PARA 1487.

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1481. The Takeovers Directive.

The Takeovers Directive¹ lays down measures coordinating the laws, regulations, administrative provisions, codes of practice and other arrangements of the member states, including arrangements established by organisations officially authorised to regulate the markets (known as 'rules'), relating to takeover bids² for the securities of companies governed by the laws of member states, where all or some of those securities are admitted to trading on a regulated market³ in one or more member states (known as a 'regulated market')⁴. The Directive does not apply to takeover bids for securities issued by companies, the object of which is the collective investment of capital provided by the public⁵, or to takeover bids for securities issued by the member states' central banks⁶.

For the purpose of implementing the Directive, member states must ensure that the following principles are complied with⁷:

- 774 (1) all holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected⁸;
- 775 (2) the holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the offeree company must give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company's places of business⁹;

- 776 (3) the board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid¹⁰;
- 777 (4) false markets must not be created in the securities of the offeree company, of the offeror company¹¹ or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted¹²;
- 778 (5) an offeror must announce a bid only after ensuring that he/she can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration¹³;
- 779 (6) an offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities¹⁴.

With a view to ensuring compliance with these principles, member states must ensure that the minimum requirements set out in the Directive are observed¹⁵, but may lay down additional conditions and provisions more stringent than those of the Directive for the regulation of bids¹⁶.

Member states must designate the authority or authorities competent to supervise bids for the purposes of the rules which they make or introduce pursuant to the Directive¹⁷. The Directive makes provision for protection of minority shareholders, the mandatory bid and the equitable price¹⁸, information concerning bids¹⁹, time allowed for acceptance²⁰, disclosure²¹, obligations of the board of the offeree company²², the publication of information²³, pre-bid defences²⁴, other rules applicable to the conduct of bids²⁵, information for and consultation of employees' representatives²⁶, the right of squeeze-out²⁷, the right of sell-out²⁸, and sanctions²⁹.

Five years after 20 May 2006³⁰, the Commission must examine the Directive in the light of the experience acquired in applying it and, if necessary, propose its revision³¹. To that end, member states must provide the Commission annually with information on the takeover bids which have been launched against companies the securities of which are admitted to trading on their regulated markets; and that information must include the nationalities of the companies involved, the results of the offers and any other information relevant to the understanding of how takeover bids operate in practice³².

1 I.e. European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) on takeover bids.

2 'Takeover bid' or 'bid' means a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law: European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 2(1)(a). 'Offeree company' means a company, the securities of which are the subject of a bid: art 2(1)(b). 'Securities' means transferable securities carrying voting rights in a company: art 2(1)(e).

3 I.e. within the meaning of EC Council Directive 93/22 (OJ L141, 11.6.1993, p 27) on investment services in the securities field (as last amended by European Parliament and Council Directive 2002/87 (OJ L35, 11.2.2003, p 1).

4 European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 1(1).

5 See European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 1(2).

6 European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 1(3).

7 Provision for the purpose of implementing the Directive in the United Kingdom was originally made by the Takeovers Directive (Interim Implementation) Regulations 2006, SI 2006/1183 (revoked). Provision is now contained in the Companies Act 2006 Pt 28 (ss 942-992) (see PARAS 1480 et seq, 1482 et seq) and in rules made by the Takeover Panel which give effect to certain provisions of the Takeovers Directive (see s 943; and PARA 1487). See also PARA 1482 et seq. As to the meaning of 'United Kingdom' see PARA 1 note 5.

8 European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 3(1)(a). However, Community law does not include any general principle of law under which minority shareholders are protected

by an obligation on the dominant shareholder, when acquiring or exercising control of a company, to offer to buy their shares under the same conditions as those agreed when a shareholding conferring or strengthening the control of the dominant shareholder was acquired: Case C-101/08 *Audiolux SA v Groupe Bruxelles Lambert SA (GBL)* [2009] All ER (D) 236 (Oct), ECJ.

- 9 European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 3(1)(b).
- 10 European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 3(1)(c).
- 11 'Offeror' means any natural or legal person governed by public or private law making a bid: European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 2(1)(c).
- 12 European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 3(1)(d).
- 13 European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 3(1)(e).
- 14 European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 3(1)(f).
- 15 European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 3(2)(a).
- 16 European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 3(2)(b).
- 17 See European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 4. The Panel on Takeovers and Mergers is designated for these purposes: see PARAS 1480, 1482 et seq.
- 18 See European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 5.
- 19 See European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 6.
- 20 See European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 7.
- 21 See European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 8.
- 22 See European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 9. The provisions of this article are also referred to as 'post-bid defences'. Member states may reserve the right not to require companies which have their registered offices within their territories to apply certain of these provisions: see art 12. This right has been exercised in the United Kingdom in so far as companies may opt-in to the provisions: see PARAS 1507-1509.
- 23 See European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 10. As to disclosures that are so required of certain publicly-traded companies, achieved by means of the directors' report, see PARA 830.
- 24 See European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 11. Pre-bid defences are known in the Directive as 'breakthrough provisions'. Member states may reserve the right not to require companies which have their registered offices within their territories to apply art 11: see art 12. This right has been exercised in the United Kingdom in so far as companies may opt-in to the provisions. However, if a member state opts out, it must allow companies to opt in and to opt out: see art 12; and PARAS 1507-1509.
- 25 See European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 13.
- 26 See European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 14.
- 27 See European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 15.
- 28 See European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 16.
- 29 See European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 17.
- 30 Is the date for the implementation by member states of the Directive: see European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) arts 20, 21(1).
- 31 European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 20. That examination must include a survey of the control structures and barriers to takeover bids that are not covered by the Directive: art 20.
- 32 European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 20.

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1482. Power to extend provisions to Isle of Man and Channel Islands.

Her Majesty may by Order in Council direct that any of the provisions of Part 28 Chapter 1 of the Companies Act 2006¹ extend, with such modifications as may be specified in the Order, to the Isle of Man or any of the Channel Islands².

1 Ie the Companies Act 2006 Pt 28 Ch 1 (ss 942-965) (see also PARAS 1480-1481, 1483 et seq): see s 965.

2 Companies Act 2006 s 965. In exercise of the powers conferred upon Her Majesty by s 965, the Companies Act 2006 (Extension of Takeover Panel Provisions) (Isle of Man) Order 2009, SI 2009/1378, has been made, which extends the Companies Act 2006 Sch 2 (Sch 2 substituted by SI 2009/1208) (see PARA 1486) to the Isle of Man.

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(ii) The Panel on Takeovers and Mergers

A. IN GENERAL

1483. Panel's exemption from liability in damages.

Neither the Panel on Takeovers and Mergers (the 'Panel')¹, nor any person if: (1) he is (or is acting as) a member, officer or member of staff of the Panel; or (2) he is a person authorised to exercise powers to require documents and information², is to be liable in damages for anything done (or omitted to be done) in, or in connection with, the discharge or purported discharge of the Panel's functions³.

The above provision⁴ does not apply: (a) if the act or omission is shown to have been in bad faith; or (b) so as to prevent an award of damages in respect of the act or omission on the ground that it was unlawful⁵ for a public authority to act in a way which is incompatible with a Convention right⁶.

1 As to the Panel generally see PARA 1480.

2 Ie a person authorised under the Companies Act 2006 s 947(5): see PARA 1485.

3 Companies Act 2006 s 961(1), (2). As to the Panel's functions see PARA 1480.

4 Ie the Companies Act 2006 s 961(1).

5 Ie as a result of the Human Rights Act 1998 s 6(1) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**): see the Companies Act 2006 s 961(3).

6 Companies Act 2006 s 961(3).

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1484. Panel as party to proceedings.

The Panel on Takeovers and Mergers¹ is capable (despite being an unincorporated body) of: (1) bringing proceedings under Part 28 Chapter 1 of the Companies Act 2006² in its own name; (2) bringing or defending any other proceedings in its own name³.

1 As to the Panel generally see PARA 1480.

2 Ie the Companies Act 2006 Pt 28 Ch 1 (ss 942-965); see also PARAS 1480-1483, 1485 et seq.

3 Companies Act 2006 s 960.

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B. POWERS ETC OF THE PANEL

1485. Power for the Panel to require documents and information.

The Panel on Takeovers and Mergers (the 'Panel')¹ may by notice in writing require a person: (1) to produce any documents that are specified or described in the notice²; (2) to provide, in the form and manner specified in the notice, such information as may be specified or described in the notice³. Such a requirement⁴ must be complied with at a place specified in the notice, and before the end of such reasonable period as may be so specified⁵.

The Panel may require: (a) any document produced to be authenticated; or (b) any information provided (whether in a document or otherwise) to be verified, in such manner as it may reasonably require⁶.

The Panel may authorise a person to exercise any of its powers under this provision⁷. A person exercising such a power⁸ must, if required to do so, produce evidence of his authority to exercise the power⁹.

The production of a document in pursuance of this provision¹⁰ does not affect any lien that a person has on the document¹¹. The Panel may take copies of or extracts from a document produced in pursuance of this provision¹².

A person is not required¹³ to disclose documents or information in respect of which a claim to legal professional privilege could be maintained in legal proceedings¹⁴.

A statement made by a person in response to: (i) a requirement¹⁵ by the Panel to produce documents or information; or (ii) an order made by the court¹⁶ to secure compliance with such a

requirement, may not be used against him in criminal proceedings in which he is charged with a relevant offence¹⁷.

1 As to the Panel generally see PARA 1480.

2 Companies Act 2006 s 947(1)(a). Section 947 applies only to documents and information reasonably required in connection with the exercise by the Panel of its functions: s 947(3). See also the City Code on Takeovers and Mergers Introduction para 9(b) and also the Introduction para 9(a) in regard to providing assistance and information to the Panel.

3 Companies Act 2006 s 947(1)(b).

4 Ie under the Companies Act 2006 s 947(1).

5 Companies Act 2006 s 947(2).

6 Companies Act 2006 s 947(4).

7 Companies Act 2006 s 947(5). The reference is to s 947.

8 Ie a power by virtue of the Companies Act 2006 s 947(5).

9 Companies Act 2006 s 947(6).

10 Ie the Companies Act 2006 s 947.

11 Companies Act 2006 s 947(7). A reference in s 947 to the production of a document includes a reference to the production of: (1) a hard copy of information recorded otherwise than in hard copy form; or (2) information in a form from which a hard copy can be readily obtained: s 947(9). As to documents or information sent or supplied in hard copy form see PARA 678.

12 Companies Act 2006 s 947(8).

13 Ie by the Companies Act 2006 s 947.

14 Companies Act 2006 s 947(10). As to legal professional privilege see **CIVIL PROCEDURE** vol 11 (2009) PARA 558 et seq; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1479.

15 Ie under the Companies Act 2006 s 947(1): see heads (1) and (2) in the text.

16 Ie under the Companies Act 2006 s 955: see PARA 1495.

17 Companies Act 2006 s 962(1). The reference is to an offence other than an offence under the Perjury Act 1911 s 5 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 717): Companies Act 2006 s 962(2).

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1486. Restrictions on disclosure; penalty for contravention.

No information (in whatever form) (1) relating to the private affairs of an individual; or (2) relating to any particular business, that is provided to the Panel on Takeovers and Mergers (the 'Panel')¹ in connection with the exercise of its functions may, during the lifetime of the individual or so long as the business continues to be carried on, be disclosed without the consent of that individual or (as the case may be) the person for the time being carrying on that business².

This restriction³ does not apply to any disclosure of information that (a) is made for the purpose of facilitating the carrying out by the Panel of any of its functions; (b) is made to certain specified persons⁴; (c) is of certain specified descriptions⁵; or (d) is made in accordance with the provisions on overseas regulatory bodies⁶.

A person who discloses information in contravention of the above provision⁷ is guilty of an offence, unless (i) he did not know, and had no reason to suspect, that the information had been provided as mentioned above⁸; or (ii) he took all reasonable steps and exercised all due diligence to avoid the commission of the offence⁹.

A person guilty of such an offence¹⁰ is liable (A) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine (or both); (B) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine¹¹ (or both)¹². Where a company¹³ or other body corporate commits such an offence, an offence is also committed by every officer of the company or other body corporate who is in default¹⁴.

1 As to the Panel generally see PARA 1480.

2 Companies Act 2006 s 948(1), (2). Section 948(2) does not apply to (1) the disclosure by an authority within s 948(7) (see below) of information disclosed to it by the Panel in reliance on s 948(3) (see heads (a), (b) and (c) in the text); (2) the disclosure of such information by anyone who has obtained it directly or indirectly from an authority within s 948(7): s 948(6). Such authorities are: (a) the Financial Services Authority; (b) an authority designated as a supervisory authority for the purposes of European Parliament and EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) on takeover bids art 4.1; (c) any other person or body that exercises functions of a public nature, under legislation in an EEA state other than the United Kingdom, that are similar to the Panel's functions or those of the Financial Services Authority: s 948(7). As to the Financial Services Authority see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 4, 6 et seq. As to the meaning of 'United Kingdom' see PARA 1 note 5. See also s 943; and PARA 1487 note 2.

Section 948 does not prohibit the disclosure of information if the information is or has been available to the public from any other source: s 948(8). Nothing in s 948 authorises the making of a disclosure in contravention of the Data Protection Act 1998: s 948(9). As to the Data Protection Act 1998 see **CONFIDENCE AND DATA PROTECTION**.

3 Ie the Companies Act 2006 s 948(2).

4 Ie a person specified in the Companies Act 2006 Sch 2 Pt 1(A) (paras 1-12), Pt 1(B) (paras 1-8), Pt 1(C) (paras 1-7), Pt 1(D) (paras 1-5) (Sch 2 substituted by SI 2009/1208): see below. The Secretary of State may amend the Companies Act 2006 Sch 2 by order subject to negative resolution procedure (ie the statutory instrument containing the order is subject to annulment in pursuance of a resolution of either House of Parliament): ss 948(4), 1289. Such an order must not amend Sch 2 Pt 1 by specifying a person unless the person exercises functions of a public nature (whether or not he exercises any other function): s 948(5)(a). As to an order under s 948(4) see the Companies Act 2006 (Amendment of Schedule 2) (No 2) Order 2009, SI 2009/1208. See also the Companies Act 2006 (Amendment of Schedule 2) Order 2009, SI 2009/202, which substituted a new Schedule for that originally enacted (revoked by SI 2009/1208). As to the Secretary of State see PARA 6.

The persons specified in the Companies Act 2006 Sch 2 Pt 1(A) (United Kingdom) are as follows: (1) the Secretary of State; (2) the Department of Enterprise, Trade and Investment for Northern Ireland; (3) the Treasury; (4) the Bank of England; (5) the Financial Services Authority; (6) the Commissioners for Her Majesty's Revenue and Customs; (7) the Lord Advocate; (8) the Director of Public Prosecutions; (9) the Director of Public Prosecutions for Northern Ireland; (10) a constable; (11) a procurator fiscal; (12) the Scottish Ministers. Schedule 2 Pt 1(B) has corresponding specified persons for Jersey, Sch 2 Pt 1(C) for Guernsey and Sch 2 Pt 1(D) for the Isle of Man.

5 Ie a description specified in the Companies Act 2006 Sch 2 Pt 2(A) (paras 1-53), Pt 2(B) (paras 1-13), Pt 2(C) (paras 1-8), Pt 2(D) (paras 1-17), Pt 2(E) (paras 1-5) (Sch 2 substituted by SI 2009/1208): see below. An order under the Companies Act 2006 s 948(4) (see note 4) must not amend Sch 2 Pt 2 by adding or modifying a description of disclosure unless the purpose for which the disclosure is permitted is likely to facilitate the exercise of a function of a public nature: s 948(5)(b).

The specified descriptions of disclosures in Sch 2 Pt 2(A) (United Kingdom) are as follows: (1) a disclosure for the purpose of enabling or assisting a person authorised under s 457 (revision of defective accounts: persons authorised to apply to court) (see PARA 902) to exercise his functions; (2) a disclosure for the purpose of enabling or assisting an inspector appointed under the Companies Act 1985 Pt XIV (ss 431-453D) (investigation of companies and their affairs, etc) (see PARA 1541 et seq) to exercise his functions; (3) a disclosure for the

purpose of enabling or assisting a person authorised under the Companies Act 1985 s 447 (power to require production of documents) s 447 or the Companies Act 1989 s 84 (exercise of powers by officer etc) to exercise his functions; (4) a disclosure for the purpose of enabling or assisting a person appointed under the Financial Services and Markets Act 2000 s 167 (general investigations) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 449) to conduct an investigation to exercise his functions; (5) a disclosure for the purpose of enabling or assisting a person appointed under the Financial Services and Markets Act 2000 s 168 (investigations in particular cases) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 449) to conduct an investigation to exercise his functions; (6) a disclosure for the purpose of enabling or assisting a person appointed under the Financial Services and Markets Act 2000 s 169(1)(b) (investigation in support of overseas regulator) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 450) to conduct an investigation to exercise his functions; (7) a disclosure for the purpose of enabling or assisting the body corporate responsible for administering the scheme referred to in the Financial Services and Markets Act 2000 s 225 (the ombudsman scheme) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 575) to exercise its functions; (8) a disclosure for the purpose of enabling or assisting a person appointed under the Financial Services and Markets Act 2000 Sch 17 para 4 (the panel of ombudsmen) or Sch 17 para 5 (the Chief Ombudsman) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 575) to exercise his functions; (9) a disclosure for the purpose of enabling or assisting a person appointed under regulations made under the Financial Services and Markets Act 2000 s 262(1), (2)(k) (investigations into open-ended investment companies) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 621) to conduct an investigation to exercise his functions; (10) a disclosure for the purpose of enabling or assisting a person appointed under the Financial Services and Markets Act 2000 s 284 (investigations into affairs of certain collective investment schemes) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 683) to conduct an investigation to exercise his functions; (11) a disclosure for the purpose of enabling or assisting the investigator appointed under the Financial Services and Markets Act 2000 Sch 1 para 7 (arrangements for investigation of complaints) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 36) to exercise his functions; (12) a disclosure for the purpose of enabling or assisting a person appointed by the Treasury to hold an inquiry into matters relating to financial services (including an inquiry under the Financial Services and Markets Act 2000 s 15 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 11)) to exercise his functions; (13) a disclosure for the purpose of enabling or assisting the Secretary of State or the Treasury to exercise any of their functions under any of the following: (a) the Companies Acts; (b) the Insolvency Act 1986 (see **COMPANY AND PARTNERSHIP INSOLVENCY**); (c) the Company Directors Disqualification Act 1986 (see PARA 1578 et seq); (d) the Companies Act 1989 Pt III (ss 55-91) (investigations and powers to obtain information) (see PARA 1568 et seq) or Pt VII (ss 154-191) (financial markets and insolvency) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 509 et seq); (e) the Criminal Justice Act 1993 Pt V (ss 52-64) (insider dealing) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**); (f) the Financial Services and Markets Act 2000 (see **FINANCIAL SERVICES AND INSTITUTIONS**); (g) the Companies Act 2006 Pt 42 (ss 1209-1264) (statutory auditors) (see PARA 957 et seq); (14) a disclosure for the purpose of enabling or assisting the Scottish Ministers to exercise their functions under the enactments relating to insolvency; (15) a disclosure for the purpose of enabling or assisting the Department of Enterprise, Trade and Investment for Northern Ireland to exercise any powers conferred on it by the enactments relating to companies or insolvency; (16) a disclosure for the purpose of enabling or assisting a person appointed or authorised by the Department of Enterprise, Trade and Investment for Northern Ireland under the enactments relating to companies or insolvency to exercise his functions; (17) a disclosure for the purpose of enabling or assisting an official receiver (including the Accountant in Bankruptcy in Scotland and the Official Assignee in Northern Ireland) to exercise his functions under the enactments relating to insolvency (see **COMPANY AND PARTNERSHIP INSOLVENCY**); (18) a disclosure for the purpose of enabling or assisting the Insolvency Practitioners Tribunal (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 26 et seq) to exercise its functions under the Insolvency Act 1986; (19) a disclosure for the purpose of enabling or assisting a body that is for the time being a recognised professional body for the purposes of the Insolvency Act 1986 s 391 (recognised professional bodies) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 14) to exercise its functions as such; (20) a disclosure for the purpose of enabling or assisting the Pensions Regulator to exercise the functions conferred on it by or by virtue of any of the following: (a) the Pension Schemes Act 1993 (see **SOCIAL SECURITY AND PENSIONS**); (b) the Pensions Act 1995 (see **SOCIAL SECURITY AND PENSIONS**); (c) the Welfare Reform and Pensions Act 1999 (see **SOCIAL SECURITY AND PENSIONS**); (d) the Pensions Act 2004 (see **SOCIAL SECURITY AND PENSIONS**); (e) any enactment in force in Northern Ireland corresponding to any of those enactments; (21) a disclosure for the purpose of enabling or assisting the Board of the Pension Protection Fund to exercise the functions conferred on it by or by virtue of the Pensions Act 2004 Pt 2 (ss 107-220) (see **SOCIAL SECURITY AND PENSIONS**) or any enactment in force in Northern Ireland corresponding to Pt 2; (22) a disclosure for the purpose of enabling or assisting the Bank of England to exercise its functions; (23) a disclosure for the purpose of enabling or assisting the Commissioners for Her Majesty's Revenue and Customs to exercise their functions (see **INCOME TAXATION**); (24) a disclosure for the purpose of enabling or assisting organs of the Society of Lloyd's (being organs constituted by or under the Lloyd's Act 1982) to exercise their functions under or by virtue of the Lloyd's Acts 1871 to 1982; (25) a disclosure for the purpose of enabling or assisting the Office of Fair Trading to exercise its functions under any of the following: (a) the Fair Trading Act 1973; (b) the Consumer Credit Act 1974; (c) the Estate Agents Act 1979; (d) the Competition Act 1980; (e) the Competition Act 1998; (f) the Financial Services and Markets Act 2000; (g) the Enterprise Act 2002; (h) the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083; (i) the Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276; (j) the Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277 (see **COMPETITION**); (26) a disclosure for the purpose of enabling or assisting the Competition Commission to exercise

its functions under any of the following: (a) the Fair Trading Act 1973; (b) the Competition Act 1980; (c) the Competition Act 1998; (d) the Enterprise Act 2002 (see **COMPETITION**); (27) a disclosure with a view to the institution of, or otherwise for the purposes of, proceedings before the Competition Appeal Tribunal; (28) a disclosure for the purpose of enabling or assisting an enforcer under the Enterprise Act 2002 Pt 8 (ss 210-236) (enforcement of consumer legislation) (see **COMPETITION**) to exercise its functions under Pt 8; (29) a disclosure for the purpose of enabling or assisting the Charity Commission to exercise its functions (see **CHARITIES** vol 8 (2010) PARA 540); (30) a disclosure for the purpose of enabling or assisting the Attorney General to exercise his functions in connection with charities; (31) a disclosure for the purpose of enabling or assisting the National Lottery Commission to exercise its functions under the National Lottery etc Act 1993 ss 5-10 (licensing) and s 15 (power of Secretary of State to require information) (see **LICENSING AND GAMBLING**); (32) a disclosure by the National Lottery Commission to the National Audit Office for the purpose of enabling or assisting the Comptroller and Auditor General to carry out an examination under the National Audit Act 1983 Pt 2 (ss 6-9) into the economy, effectiveness and efficiency with which the National Lottery Commission has used its resources in discharging its functions under National Lottery etc Act 1993 ss 5-10; (33) a disclosure for the purpose of enabling or assisting a qualifying body under the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (see **CONSUMER CREDIT; CONTRACT**) to exercise its functions under those Regulations; (34) a disclosure for the purpose of enabling or assisting an enforcement authority under the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334 (see **CONSUMER CREDIT**) to exercise its functions under those Regulations; (35) a disclosure for the purpose of enabling or assisting an enforcement authority under the Financial Services (Distance Marketing) Regulations 2004, SI 2004/2095 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 84 note 4) to exercise its functions under those Regulations; (36) a disclosure for the purpose of enabling or assisting a local weights and measures authority in England and Wales to exercise its functions under the Enterprise Act 2002 s 230(2) (notice of intention to prosecute, etc) (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 400); (37) a disclosure for the purpose of enabling or assisting the Financial Services Authority to exercise its functions under any of the following: (a) the legislation relating to friendly societies (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2081 et seq) or to industrial and provident societies (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2394 et seq); (b) the Building Societies Act 1986 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1856 et seq); (c) the Companies Act 1989 Pt VII (ss 154-191) (financial markets and insolvency) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 509 et seq); (d) the Financial Services and Markets Act 2000 (see **FINANCIAL SERVICES AND INSTITUTIONS**); (38) a disclosure for the purpose of enabling or assisting the competent authority for the purposes of the Financial Services and Markets Act 2000 Pt VI (ss 72-103) (official listing) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385 et seq) to exercise its functions under Pt VI; (39) a disclosure for the purpose of enabling or assisting a body corporate established in accordance with the Financial Services and Markets Act 2000 s 212(1) (compensation scheme manager) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 583) to exercise its functions; (40) a disclosure for the purpose of enabling or assisting a recognised investment exchange or a recognised clearing house to exercise its functions as such ('recognised investment exchange' and 'recognised clearing house' have the same meaning as in the Financial Services and Markets Act 2000 s 285) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 684); (41) a disclosure for the purpose of enabling or assisting a person approved under the Uncertificated Securities Regulations 2001, SI 2001/3755 (see PARA 340 et seq) as an operator of a relevant system (within the meaning of those Regulations) to exercise his functions; (42) a disclosure for the purpose of enabling or assisting a body designated under the Financial Services and Markets Act 2000 s 326(1) (designated professional bodies) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 749) to exercise its functions in its capacity as a body designated under that provision; (43) a disclosure with a view to the institution of, or otherwise for the purposes of, civil proceedings arising under or by virtue of the Financial Services and Markets Act 2000 (see **FINANCIAL SERVICES AND INSTITUTIONS**); (44) a disclosure for the purpose of enabling or assisting a body designated by order under the Companies Act 2006 s 1252 (delegation of functions of Secretary of State) (see PARA 960) to exercise its functions under Pt 42 (ss 1209-1264) (statutory auditors) (see PARA 957 et seq); (45) a disclosure for the purpose of enabling or assisting a recognised supervisory or qualifying body, within the meaning of Pt 42, to exercise its functions as such; (46) a disclosure for the purpose of enabling or assisting the Regulator of Community Interest Companies to exercise functions under the Companies (Audit, Investigations and Community Enterprise) Act 2004 (see PARA 83); (47) a disclosure for the purpose of enabling or assisting a person authorised by the Secretary of State under the Proceeds of Crime Act 2002 Pts 2, 3 or 4 (ss 6-239) (see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 391 et seq) to exercise his functions; (48) a disclosure with a view to the institution of, or otherwise for the purposes of, proceedings on an application under the Company Directors Disqualification Act 1986 s 6, 7 or 8 (disqualification for unfitness) (see PARA 1592 et seq); (49) a disclosure with a view to the institution of, or otherwise for the purposes of, proceedings before the Financial Services and Markets Tribunal (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 43 et seq); (50) a disclosure for the purposes of proceedings before the Pensions Regulator Tribunal (see **SOCIAL SECURITY AND PENSIONS**); (51) a disclosure for the purpose of enabling or assisting a body appointed under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 14 (supervision of periodic accounts and reports of issuers of listed securities) (see PARA 698) to exercise functions mentioned in s 14(2); (52) a disclosure with a view to the institution of, or otherwise for the purposes of, disciplinary proceedings relating to the performance by a lawyer, auditor, accountant, valuer or actuary of his professional duties ('lawyer' means (a) a person who for the purposes of the Legal Services Act 2007 is an authorised person in relation to an activity that constitutes a reserved legal activity (within the meaning of that Act); (b) a solicitor or barrister in Northern Ireland; (c) a solicitor or advocate in Scotland; or (d) a person who is a member, and entitled to

practise as such, of a legal profession regulated in a jurisdiction outside the United Kingdom; and in heading (a) above until the coming into force of the Legal Services Act 2007 s 18, the following is substituted: '(a) a solicitor or barrister in England and Wales'; (53) a disclosure with a view to the institution of, or otherwise for the purposes of, disciplinary proceedings relating to the performance by a public servant of his duties ('public servant' means an officer or employee of the Crown or of any public or other authority for the time being designated for the purposes of this head by the Secretary of State by order subject to negative resolution procedure). The Companies Act 2006 Sch 2 Pt 2(B) has corresponding specified descriptions of disclosure for Jersey, Sch 2 Pt 2(C) for Guernsey and Sch 2 Pt 2(D) for the Isle of Man.

The specified descriptions of disclosures in Sch 2 Pt 2(E) (General) are as follows: (i) a disclosure for the purpose of enabling or assisting the European Central Bank, or the central bank of any country or territory outside the British Islands, to exercise its functions; (ii) a disclosure for the purpose of enabling or assisting an overseas regulatory authority to exercise its regulatory functions ('overseas regulatory authority' and 'regulatory functions' have the same meaning as in the Companies Act 1989 s 82 (see PARA 1568); (iii) a disclosure with a view to the institution of, or otherwise for the purposes of, criminal proceedings in the British Islands or elsewhere (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**); (iv) a disclosure for the purpose of the provision of a summary or collection of information framed in such a way as not to enable the identity of any person to whom the information relates to be ascertained; and (v) a disclosure in pursuance of any Community obligation. In any Act, 'British Islands' means the United Kingdom, the Channel Islands and the Isle of Man: see the Interpretation Act 1978 ss 5, 22, Sch 1.

6 Companies Act 2006 s 948(3). The reference in head (d) in the text is to Sch 2 Pt 3 (paras 1, 2) (Sch 2 substituted by SI 2009/1208): see below. An order under the Companies Act 2006 s 948(4) (see note 4) must not amend Sch 2 Pt 3 so as to have the effect of permitting disclosures to be made to a body other than one that exercises functions of a public nature in a country or territory outside the United Kingdom: s 948(5)(c).

A disclosure is made in accordance with Sch 2 Pt 3 if: (1) it is made to a person or body exercising relevant functions under legislation in a country or territory outside the British Islands; and (2) it is made for the purpose of enabling or assisting that person or body to exercise those functions: Sch 2 Pt 3 para 1(1) (as so substituted). 'Relevant functions' for this purpose are functions of a public nature that appear to the Panel to be similar to its own functions or those of the Financial Services Authority: Sch 2 Pt 3 para 1(2) (as so substituted). In determining whether to disclose information to a person or body in accordance with Sch 2 Pt 1 (see note 4), the Panel must have regard to the following considerations: (a) whether the use that the person or body is likely to make of the information is sufficiently important to justify making the disclosure; (b) whether the person or body has adequate arrangements to prevent the information from being used or further disclosed otherwise than for the purposes of carrying out the functions mentioned in head (1) above or any other purposes substantially similar to those for which information disclosed to the Panel could be used or further disclosed: Sch 2 Pt 3 para 2 (as so substituted).

7 Ie the Companies Act 2006 s 948.

8 Ie as mentioned in the Companies Act 2006 s 948(1).

9 Companies Act 2006 s 949(1).

10 Ie under the Companies Act 2006 s 949.

11 Ie a fine not exceeding the statutory maximum: see the Companies Act 2006 s 949(2). As to the statutory maximum see PARA 1622.

12 Companies Act 2006 s 949(2). As to head (b) in the text the person is liable in Scotland or Northern Ireland, to imprisonment for a term not exceeding six months, or to a fine not exceeding the statutory maximum (or both): see s 949(2).

13 As to the meaning of 'company' see PARA 24.

14 Companies Act 2006 s 949(3). As to the meaning of 'officer in default' see PARA 315.

UPDATE

1486 Restrictions on disclosure; penalty for contravention

NOTE 5--Head (13)(e). In relation to insider dealing, reference to **CRIMINAL LAW, EVIDENCE AND PROCEDURE** is now to **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 574A. Head (52). Legal Services Act 2007 s 18 in force in part 1 January 2010: SI 2009/3250.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(27) THE PANEL ON TAKEOVERS AND MERGERS; ITS CODE/(ii) The Panel on Takeovers and Mergers/C. RULE-MAKING POWERS/1487. Provision for the Panel to make rules.

C. RULE-MAKING POWERS

1487. Provision for the Panel to make rules.

The Panel on Takeovers and Mergers (the 'Panel')¹ must make rules giving effect to certain provisions of the Takeovers Directive².

Rules made by the Panel may also make other provision: (1) for or in connection with the regulation of: (a) takeover bids³; (b) merger transactions; and (c) transactions (not falling within heads (a) or (b) above) that have or may have, directly or indirectly, an effect on the ownership or control of companies⁴; (2) for or in connection with the regulation of things done in consequence of, or otherwise in relation to, any such bid or transaction; (3) about cases where (a) any such bid or transaction is, or has been, contemplated or apprehended; or (b) an announcement is made denying that any such bid or transaction is intended⁵.

The provision that may be made under heads (1), (2) and (3) above includes, in particular, provision for a matter that is, or is similar to, a matter provided for by the Panel in the City Code on Takeovers and Mergers⁶ as it had effect immediately before the passing of the Companies Act 2006⁷.

In relation to rules made by virtue of the provision on fees and charges⁸, functions under the above provision⁹ may be discharged either by the Panel itself or by a committee of the Panel (but not otherwise)¹⁰. In relation to rules of any other description, the Panel must discharge its functions¹¹ by a committee of the Panel¹².

Rules may: (i) make different provision for different purposes; (ii) make provision subject to exceptions or exemptions; (iii) contain incidental, supplemental, consequential or transitional provision; (iv) authorise the Panel to dispense with or modify the application of rules in particular cases and by reference to any circumstances¹³.

Rules must be made by an instrument in writing¹⁴. Immediately after an instrument containing rules is made, the text must be made available to the public, with or without payment, in whatever way the Panel thinks appropriate¹⁵. A person is not to be taken to have contravened a rule if he shows that at the time of the alleged contravention the text of the rule had not been made available as required above¹⁶.

The production of a printed copy of an instrument purporting to be made by the Panel on which is endorsed a certificate signed by an officer of the Panel authorised by it for that purpose and stating: (A) that the instrument was made by the Panel; (B) that the copy is a true copy of the instrument; and (C) that on a specified date the text of the instrument was made available to the public as required¹⁷, is evidence of the facts stated in the certificate¹⁸. A certificate purporting to be so signed¹⁹ is to be treated as having been properly signed unless the contrary is shown²⁰. A person who wishes in any legal proceedings to rely on an instrument by which rules are made may require the Panel to endorse a copy of the instrument with such a certificate²¹.

1 As to the Panel generally see PARA 1480.

2 Companies Act 2006 s 943(1), (8). The reference is to European Parliament and EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) on takeover bids arts 3.1, 4.2, 5, 6.1-6.3, 7-9, 13. Note that the Financial Services and Markets Act 2000 s 143 (power to make rules endorsing the City Code on Takeovers and Mergers etc) is repealed by the Companies Act 2006 ss 964(1), (2), 1295, Sch 16.

A reference to rules in the other provisions of Pt 28 Ch 1 (ss 942-965) (see PARAS 1480-1486, 1488 et seq) is to rules under s 943: s 943(9). Part 28 Ch 1 generally also implements European Parliament and EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12): see in particular the Companies Act 2006 s 942; and PARA 1480.

3 For these purposes, 'takeover bid' includes a takeover bid within the meaning of European Parliament and EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12): Companies Act 2006 s 943(7).

4 The Companies Act 2006 s 1 (meaning of 'company') (see PARA 24) does not apply for the purposes of s 943: s 943(6).

5 Companies Act 2006 s 943(2).

6 As to the City Code on Takeovers and Mergers generally see PARA 1480.

7 Companies Act 2006 s 943(3).

8 Ie the Companies Act 2006 s 957: see PARA 1489.

9 Ie the Companies Act 2006 s 943.

10 Companies Act 2006 s 943(4).

11 Ie under the Companies Act 2006 s 943.

12 Companies Act 2006 s 943(5).

13 Companies Act 2006 s 944(1). Rules made by virtue of head (iv) in the text must require the Panel to give reasons for acting as mentioned in that head: see s 944(1).

14 Companies Act 2006 s 944(2).

15 Companies Act 2006 s 944(3).

16 Companies Act 2006 s 944(4). The reference is to the requirement by s 944(3).

17 Ie by the Companies Act 2006 s 944(3).

18 Companies Act 2006 s 944(5).

19 Ie as mentioned in the Companies Act 2006 s 944(5).

20 Companies Act 2006 s 944(6).

21 Companies Act 2006 s 944(7). The reference is to a certificate of the kind mentioned in s 944(5).

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1488. Rules governing hearings and appeals.

Rules¹ must provide for a decision of the Panel on Takeovers and Mergers (the 'Panel')² to be subject to review by a committee of the Panel (the 'Hearings Committee') at the instance of such persons affected by the decision as are specified in the rules³. Rules may also confer other functions on the Hearings Committee⁴.

Rules must provide for there to be a right of appeal against a decision of the Hearings Committee to an independent tribunal (the 'Takeover Appeal Board') in such circumstances and subject to such conditions as are specified in the rules⁵.

Rules may contain (1) provision as to matters of procedure in relation to proceedings before the Hearings Committee (including provision imposing time limits); (2) provision about evidence in such proceedings; (3) provision as to the powers of the Hearings Committee dealing with a matter referred to it; (4) provision about enforcement of decisions of the Hearings Committee and the Takeover Appeal Board⁶.

Rules must contain provision (a) requiring the Panel, when acting in relation to any proceedings before the Hearings Committee or the Takeover Appeal Board, to do so by an officer or member of staff of the Panel (or a person acting as such); (b) preventing a person who is or has been a member of a committee of the Panel⁷ from being a member of the Hearings Committee or the Takeover Appeal Board; (c) preventing a person who is a member of a committee of the Panel⁸, of the Hearings Committee or of the Takeover Appeal Board from acting as mentioned in head (a) above⁹.

1 As to rules generally see PARA 1487.

2 As to the Panel generally see PARA 1480.

3 Companies Act 2006 s 951(1). See also the City Code on Takeovers and Mergers Introduction para 7. As to the Code generally see PARA 1480.

4 Companies Act 2006 s 951(2). See also PARA 1505.

5 Companies Act 2006 s 951(3). See also the City Code on Takeovers and Mergers Introduction para 7.

6 Companies Act 2006 s 951(4).

7 I.e. the committee mentioned in the Companies Act 2006 s 943(5); see PARA 1487.

8 See note 7.

9 Companies Act 2006 s 951(5).

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(27) THE PANEL ON TAKEOVERS AND MERGERS; ITS CODE/(ii) The Panel on Takeovers and Mergers/C. RULE-MAKING POWERS/1489. Rules on fees etc.

1489. Rules on fees etc.

Rules may provide for fees or charges to be payable to the Panel on Takeovers and Mergers (the 'Panel')¹ for the purpose of meeting any part of its expenses².

For the purpose of meeting any part of the expenses of the Panel, the Secretary of State³ may by regulations⁴ provide for a levy to be payable to the Panel (1) by specified⁵ persons or bodies, or persons or bodies of a specified description; or (2) on transactions, of a specified description, in securities on specified markets⁶.

The power to specify (or to specify descriptions of) persons or bodies must be exercised in such a way that the levy is payable only by persons or bodies that appear to the Secretary of State (a) to be capable of being directly affected by the exercise of any of the functions of the Panel; or (b) otherwise to have a substantial interest in the exercise of any of those functions⁷.

In determining the rate of the levy payable in respect of a particular period, the Secretary of State (i) must take into account any other income received or expected by the Panel in respect of that period; (ii) may take into account estimated as well as actual expenses of the Panel in respect of that period⁸.

The Panel must (A) keep proper accounts in respect of any amounts of levy received⁹; (B) prepare, in relation to each period in respect of which any such amounts are received, a statement of account relating to those amounts in such form and manner as is specified in the regulations¹⁰. Those accounts must be audited, and the statement certified, by persons appointed by the Secretary of State¹¹.

An amount payable by any person or body¹² is a debt due from that person or body to the Panel, and is recoverable accordingly¹³.

1 As to the Panel generally see PARA 1480.

2 Companies Act 2006 s 957(1). A reference in ss 957, 958 to expenses of the Panel is to any expenses that have been or are to be incurred by the Panel in, or in connection with, the discharge of its functions, including in particular: (1) payments in respect of the expenses of the Takeover Appeal Board; (2) the cost of repaying the principal of, and of paying any interest on, any money borrowed by the Panel; (3) the cost of maintaining adequate reserves: s 957(2). See also the City Code on Takeovers and Mergers Introduction para 13. As to appeals and the Takeover Appeal Board see PARA 1488.

3 As to the Secretary of State see PARA 6.

4 Regulations under the Companies Act 2006 s 958 may in particular: (1) specify the rate of the levy and the period in respect of which it is payable at that rate; (2) make provision as to the times when, and the manner in which, payments are to be made in respect of the levy: s 958(3). Regulations under s 958: (a) are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament) if s 958(7) (see below) applies to them; (b) otherwise, they are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 958(6), 1289, 1290. This provision applies to: (i) the first regulations under s 958; (ii) any other regulations under s 958 that would result in a change in the persons or bodies by whom, or the transactions on which, the levy is payable: s 958(7). At the date at which this volume states the law no such regulations had been made.

If a draft of an instrument containing regulations under s 958 would, apart from this subsection, be treated for the purposes of the Standing Orders of either House of Parliament as a hybrid instrument, it is to proceed in that House as if it were not such an instrument: s 958(8).

5 For these purposes, 'specified' means specified in regulations: Companies Act 2006 s 958(1). As to regulations see note 4.

6 Companies Act 2006 s 958(1).

7 Companies Act 2006 s 958(2).

8 Companies Act 2006 s 958(4).

9 Ie received under the Companies Act 2006 s 958.

10 Companies Act 2006 s 958(5).

11 Companies Act 2006 s 958(5).

12 Ie by virtue of the Companies Act 2006 s 957 or s 958.

13 Companies Act 2006 s 959.

COMPANIES ACTS/(27) THE PANEL ON TAKEOVERS AND MERGERS; ITS CODE/(ii) The Panel on Takeovers and Mergers/D. APPLICATION AND ENFORCEMENT OF RULES/1490. Power to give rulings on the interpretation, application or effect of rules.

D. APPLICATION AND ENFORCEMENT OF RULES

1490. Power to give rulings on the interpretation, application or effect of rules.

The Panel on Takeovers and Mergers (the 'Panel')¹ may give rulings on the interpretation, application or effect of rules².

To the extent and in the circumstances specified in rules, and subject to any review or appeal³, a ruling has binding effect⁴.

1 As to the Panel generally see PARA 1480.

2 Companies Act 2006 s 945(1). See also the City Code on Takeovers and Mergers Introduction para 6. As to provision for rules generally see PARA 1487.

3 As to review and appeal see PARA 1488.

4 Companies Act 2006 s 945(2).

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1491. Power to give directions.

Rules¹ may contain provision conferring power on the Panel on Takeovers and Mergers (the 'Panel')² to give any direction that appears to the Panel to be necessary in order (1) to restrain a person from acting (or continuing to act) in breach of rules; (2) to restrain a person from doing (or continuing to do) a particular thing, pending determination of whether that or any other conduct of his is or would be a breach of rules; (3) otherwise to secure compliance with rules³.

1 As to provision for rules generally see PARA 1487.

2 As to the Panel generally see PARA 1480.

3 Companies Act 2006 s 946.

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1492. Sanctions for contravention of rules etc.

Rules¹ may contain provision conferring power on the Panel on Takeovers and Mergers (the 'Panel')² to impose sanctions on a person who has: (1) acted in breach of rules; or (2) failed to comply with a direction³.

Where such rules⁴ confer power on the Panel to impose a sanction of a kind not provided for by the City Code on Takeovers and Mergers⁵ as it had effect immediately before the passing of the Companies Act 2006⁶ the Panel must prepare a statement (a 'policy statement') of its policy with respect to: (a) the imposition of the sanction in question; and (b) where the sanction is in the nature of a financial penalty, the amount of the penalty that may be imposed⁷.

An element of the policy must be that, in making a decision about any such matter, the Panel has regard to the following factors⁸: (i) the seriousness of the breach or failure in question in relation to the nature of the rule or direction contravened; (ii) the extent to which the breach or failure was deliberate or reckless; (iii) whether the person on whom the sanction is to be imposed is an individual⁹.

The Panel may at any time revise a policy statement¹⁰. The Panel must prepare a draft of any proposed policy statement (or revised policy statement) and consult such persons about the draft as the Panel considers appropriate¹¹. The Panel must publish, in whatever way it considers appropriate, any policy statement (or revised policy statement) that it prepares¹².

In exercising, or deciding whether to exercise, its power to impose a sanction¹³ in the case of any particular breach or failure, the Panel must have regard to any relevant policy statement published and in force at the time when the breach or failure occurred¹⁴.

1 As to provision for rules generally see PARA 1487.

2 As to the Panel generally see PARA 1480.

3 Companies Act 2006 s 952(1). The reference is to a direction given by virtue of s 946: see PARA 1491. See also the City Code on Takeovers and Mergers Introduction para 11.

4 Ie rules made by virtue of the Companies Act 2006 s 952(1).

5 As to the City Code on Takeovers and Mergers generally see PARA 1480.

6 Companies Act 2006 s 952(2).

7 Companies Act 2006 s 952(3).

8 Ie the facts mentioned in the Companies Act 2006 s 952(4).

9 Companies Act 2006 s 952(3), (4).

10 Companies Act 2006 s 952(5).

11 Companies Act 2006 s 952(6).

12 Companies Act 2006 s 952(7).

13 Ie within the Companies Act 2006 s 952(2).

14 Companies Act 2006 s 952(8).

Takeovers and Mergers/D. APPLICATION AND ENFORCEMENT OF RULES/1493. Failure to comply with rules about bid documentation.

1493. Failure to comply with rules about bid documentation.

Where a takeover bid¹ is made for a company² that has securities³ carrying voting rights⁴ admitted to trading on a regulated market⁵ in the United Kingdom⁶ and where an offer document⁷ published in respect of the bid does not comply with offer document rules⁸, an offence is committed (1) by the person making the bid; and (2) where the person making the bid is a body of persons, by any director⁹, officer¹⁰ or member¹¹ of that body who caused the document to be published¹².

A person commits such an offence¹³ only if (a) he knew that the offer document did not comply, or was reckless as to whether it complied; and (b) he failed to take all reasonable steps to secure that it did comply¹⁴.

Where a response document¹⁵ published in respect of the bid does not comply with response document rules¹⁶, an offence is committed by any director or other officer of the company referred to above¹⁷ who (i) knew that the response document did not comply, or was reckless as to whether it complied; and (ii) failed to take all reasonable steps to secure that it did comply¹⁸.

Where an offence is committed under head (2) above¹⁹ or under heads (i) and (ii) above²⁰ by a company or other body corporate (the 'relevant body') (A) head (2) above has effect as if the reference to a director, officer or member of the person making the bid included a reference to a director, officer or member of the relevant body; (B) heads (i) and (ii) above have effect as if the reference to a director or other officer of the company²¹ included a reference to a director, officer or member of the relevant body²².

A person guilty of such an offence²³ is liable on conviction on indictment or on summary conviction, to a fine²⁴.

Nothing in the provisions above²⁵ affects any power of the Panel on Takeovers and Mergers in relation to the enforcement of its rules²⁶.

1 For these purposes, 'takeover bid' has the same meaning as in European Parliament and EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) on takeover bids: Companies Act 2006 s 953(9).

2 The Companies Act 2005 s 1 (meaning of 'company') (see PARA 24) does not apply for the purposes of s 953: s 953(8).

3 For these purposes, 'securities' means shares or debentures: Companies Act 2006 s 953(9). As to shares and debentures generally see PARA 1042 et seq.

4 For these purposes, 'voting rights' means rights to vote at general meetings of the company in question, including rights that arise only in certain circumstances: Companies Act 2006 s 953(9). As to general meetings generally see PARA 629.

5 As to the meaning of 'regulated market' see PARA 334 note 11.

6 Companies Act 2006 s 953(1). As to the meaning of 'United Kingdom' see PARA 1 note 5.

7 For these purposes, 'offer document' means a document required to be published by rules giving effect to European Parliament and EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) on takeover bids, art 6.2: Companies Act 2006 s 953(9). See also s 943; and PARA 1487 note 2.

8 For these purposes, 'offer document rules' means rules designated as rules that give effect to European Parliament and EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) on takeover bids, art 6.3; and 'designated' means designated in rules of that Directive: Companies Act 2006 s 953(9). See also s 943; and PARA 1487 note 2.

9 As to the meaning of 'director' see PARA 478.

- 10 As to the meaning of 'officer' see PARA 607.
- 11 As to the meaning of 'member' see PARA 321.
- 12 Companies Act 2006 s 953(2). See also the City Code on Takeovers and Mergers Introduction para 10.
- 13 Is an offence under the Companies Act 2006 s 953(2).
- 14 Companies Act 2006 s 953(3).
- 15 For these purposes, 'response document' means a document required to be published by rules giving effect to European Parliament and EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) on takeover bids, art 9.5: Companies Act 2006 s 953(9). See also s 943; and PARA 1487 note 2.
- 16 For these purposes, 'response document rules' means rules designated as rules that give effect to European Parliament and EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) on takeover bids, art 9.5, first sentence: Companies Act 2006 s 953(9). See also s 943; and PARA 1487 note 2.
- 17 Is in the Companies Act 2006 s 953(1).
- 18 Companies Act 2006 s 953(4).
- 19 Is the Companies Act 2006 s 953(2)(b).
- 20 Is the Companies Act 2006 s 953(4).
- 21 Is referred to in the Companies Act 2006 s 953(1).
- 22 Companies Act 2006 s 953(5).
- 23 Is an offence under the Companies Act 2006 s 953.
- 24 Companies Act 2006 s 953(6). In the case of liability on summary conviction the fine is one not exceeding the statutory maximum: see s 953(6). As to the statutory maximum see PARA 1622.
- 25 Is the Companies Act 2006 s 953.
- 26 Companies Act 2006 s 953(7). As to the Panel generally see PARA 1480. As to provision for rules by the Panel generally see PARA 1487. As to bid documentation rules for the purposes of s 953 see the City Code on Takeovers and Mergers Appendix 6.

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1494. Provision in rules regarding compensation to be paid for breach.

Rules¹ may confer power on the Panel on Takeovers and Mergers (the 'Panel')² to order a person to pay such compensation as it thinks just and reasonable if he is in breach of a rule the effect of which is to require the payment of money³. Such rules⁴ may include provision for the payment of interest (including compound interest)⁵.

- 1 As to provision for rules generally see PARA 1487.
- 2 As to the Panel generally see PARA 1480.
- 3 Companies Act 2006 s 954(1). See also the City Code on Takeovers and Mergers Introduction para 10.

4 le rules made by virtue of the Companies Act 2006 s 954.

5 Companies Act 2006 s 954(2).

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1495. Order by court to secure compliance with requirement imposed by rules.

If, on the application of the Panel on Takeovers and Mergers (the 'Panel')¹, the court² is satisfied (1) that there is a reasonable likelihood that a person will contravene³ a rule-based requirement⁴; or (2) that a person has contravened a rule-based requirement or a disclosure requirement⁵, the court may make any order it thinks fit to secure compliance with the requirement⁶.

Except as provided above⁷, no person has a right to seek an injunction⁸ to prevent a person from contravening (or continuing to contravene) a rule-based requirement or a disclosure requirement⁹.

A statement made by a person in response to (a) a requirement¹⁰ by the Panel to produce documents or information; or (b) an order made by the court¹¹ to secure compliance with such a requirement, may not be used against him in criminal proceedings in which he is charged with a relevant offence¹².

1 As to the Panel generally see PARA 1480. Proceedings for an order under the Companies Act 2006 s 955 must be started by a CPR Pt 7 claim form: *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 16. As to CPR Pt 7 see **CIVIL PROCEDURE** vol 11 (2009) PARA 116 et seq.

2 For these purposes 'court' means the High Court: Companies Act 2006 s 955(2).

3 For these purposes 'contravene' includes fail to comply: Companies Act 2006 s 955(4).

4 For these purposes 'rule-based requirement' means a requirement imposed by or under rules: Companies Act 2006 s 955(4). As to provision for rules generally see PARA 1487.

5 For these purposes, 'disclosure requirement' means a requirement imposed under the Companies Act 2006 s 947 (see PARA 1485): s 955(4).

6 Companies Act 2006 s 955(1). See also the City Code on Takeovers and Mergers Introduction para 10. See note 1.

7 Ie by the Companies Act 2006 s 955(1).

8 As to the procedure for granting injunctions generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq. As to Scotland the reference is to a person who has title or interest to seek an interdict or an order for specific performance: see the Companies Act 2006 s 955(3).

9 Companies Act 2006 s 955(3).

10 Ie under the Companies Act 2006 s 947(1): see PARA 1485. See also note 5.

11 Ie under the Companies Act 2006 s 955.

12 Companies Act 2006 s 962(1). The reference is to an offence other than an offence under the Perjury Act 1911 s 5 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 717): Companies Act 2006 s 962(2).

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1496. No action for breach of statutory duty etc.

Contravention¹ of a rule-based requirement² or a disclosure requirement³ does not give rise to any right of action for breach of statutory duty⁴.

Contravention of a rule-based requirement does not make any transaction void or unenforceable or (subject to any provision made by rules⁵) affect the validity of any other thing⁶.

1 For these purposes, 'contravention' means failure to comply: Companies Act 2006 s 956(3).

2 As to the meaning of 'rule-based requirement' see PARA 1495 note 4; definition applied by the Companies Act 2006 s 956(3).

3 As to the meaning of 'disclosure requirement' see PARA 1495 note 5; definition applied by the Companies Act 2006 s 956(3).

4 Companies Act 2006 s 956(1).

5 As to provision for rules generally see PARA 1487.

6 Companies Act 2006 s 956(2).

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1497. Panel's decisions subject to judicial review.

Having regard to the fact that the Panel on Takeovers and Mergers (the 'Panel')¹ performs a public duty, its decisions have been subject to judicial review on the grounds of illegality, irrationality or procedural impropriety². However, save for cases where there has been a breach of natural justice, it has been the practice that the court will allow contemporary decisions of the Panel to take their course and will intervene, if at all, later and in retrospect by means of declaratory orders³ to prevent the Panel from repeating any error or to relieve individuals of the disciplinary consequences of any erroneous finding on breaches of the City Code on Takeovers and Mergers (the 'Code')⁴.

Nevertheless, because the Companies Act 2006 placed both the Panel and the Code on a statutory basis for the first time⁵, including some scope for the review and appeal of Panel decisions⁶, it seems, on general principles, that these statutory avenues must be exhausted before an application for judicial review may be made by a person so aggrieved.

1 As to the Panel generally see PARA 1480.

2 *R v Panel on Takeovers and Mergers, ex p Datafin plc* [1987] QB 815, [1987] 1 All ER 564, CA. As to judicial review see **JUDICIAL REVIEW** vol 61 (2010) PARA 601 et seq. As to the Panel on Takeovers and Mergers and its executive see PARA 1480.

3 As to judicial remedies available on an application for judicial review see **JUDICIAL REVIEW** vol 61 (2010) PARA 687 et seq.

4 *R v Panel on Takeovers and Mergers, ex p Datafin plc* [1987] QB 815, [1987] 1 All ER 564, CA. It remains to be seen whether a different approach will be taken by the courts, when asked to consider applications for judicial review of the Panel's conduct, in light of the statutory basis upon which the Panel is now founded (see European Parliament and EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) on takeover bids (see PARA 1481) and the Companies Act 2006 Pt 28 Ch 1 (ss 942-965) (see PARAS 1480 et seq, 1499 et seq)). The test of whether particular acts or decisions of a body, such as the Panel on Takeovers and Mergers, whose constitution, functions and powers are *sui generis*, should be subject to judicial review is whether, considering the matter in the round, something has gone wrong with that body's procedure such as to cause real injustice and require the intervention of the court: *R v Panel on Takeovers and Mergers, ex p Guinness plc* [1990] 1 QB 146, [1989] 1 All ER 509, CA (decision whether to adjourn a hearing essentially a matter for the exercise of judicial discretion by the court or tribunal seised of the matter; and, where a right of appeal from the decision-making body existed but was not exercised, the court would grant relief by way of judicial review only in exceptional circumstances). As to the City Code on Takeovers and Mergers see PARA 1501 et seq. As to breaches of the Code see PARA 1490 et seq and PARA 1505.

5 See PARA 1480.

6 See PARA 1488.

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E. DUTIES OF PANEL

1498. Panel's duties in general.

The City Code on Takeovers and Mergers (the 'Code')¹ is issued on behalf of the Panel on Takeovers and Mergers (the 'Panel')² and the Code is kept under review by the Panel and its committees³. The Code is designed principally to ensure that shareholders are treated fairly and are not denied an opportunity to decide on the merits of a takeover and that shareholders of the same class are afforded equivalent treatment by an offeror⁴. The Code also provides an orderly framework within which takeovers are conducted and it is also designed to promote, in conjunction with other regulatory regimes, the integrity of the financial markets⁵.

The Code is not concerned with the financial or commercial advantages or disadvantages of a takeover⁶. These are matters for the company and its shareholders; nor is the Code concerned with those issues, such as competition policy, which are the responsibility of government and other bodies⁷.

The Code has been developed since 1968 to reflect the collective opinion of those professionally involved in the field of takeovers as to appropriate business standards and as to how fairness to shareholders and an orderly framework for takeovers can be achieved⁸. Following the implementation of the Takeovers Directive⁹ by means of the Companies Act 2006¹⁰, the rules set out in the Code have a statutory basis in relation to the United Kingdom and comply with the relevant requirements of the Directive¹¹. The Panel's duties arise specifically with respect to the functioning and operating of the Code and to this end it now has the relevant statutory rule-making power¹².

- 1 As to the Code generally see PARA 1480.
- 2 As to the Panel generally see PARA 1480.
- 3 See the City Code on Takeovers and Mergers Introduction.
- 4 See the City Code on Takeovers and Mergers Introduction para 2(a).
- 5 See the City Code on Takeovers and Mergers Introduction para 2(a).
- 6 See the City Code on Takeovers and Mergers Introduction para 2(a).
- 7 See the City Code on Takeovers and Mergers Introduction para 2(a).
- 8 See the City Code on Takeovers and Mergers Introduction para 2(a).
- 9 Ie European Parliament and EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) on takeover bids.
- 10 Ie the Companies Act 2006 Pt 28 Ch 1 (ss 942-965).
- 11 See the City Code on Takeovers and Mergers Introduction para 2(a). See also PARA 1487.
- 12 As to provision for rules generally see the Companies Act 2006 ss 942, 943; and PARAS 1480, 1487.

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1499. Panel's duty to publish annual report.

After the end of each financial year the Panel on Takeovers and Mergers (the 'Panel')¹ must publish a report².

The report must (1) set out how the Panel's functions were discharged in the year in question; (2) include the Panel's accounts for that year; (3) mention any matters the Panel considers to be of relevance to the discharge of its functions³.

- 1 As to the Panel generally see PARA 1480.
- 2 Companies Act 2006 s 963(1).
- 3 Companies Act 2006 s 963(2).

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1500. Panel's duty of co-operation with other authorities, bodies etc.

The Panel on Takeovers and Mergers (the 'Panel')¹ must take such steps as it considers appropriate to co-operate with (1) the Financial Services Authority²; (2) an authority designated

as a supervisory authority for the purposes of the Takeovers Directive³; (3) any other person or body that exercises functions of a public nature, under legislation in any country or territory outside the United Kingdom⁴, that appear to the Panel to be similar to its own functions or those of the Financial Services Authority⁵.

Co-operation may include the sharing of information that the Panel is not prevented from disclosing⁶.

1 As to the Panel generally see PARA 1480.

2 As to the Financial Services Authority see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 4, 6 et seq. As to the Authority's duty to co-operate with others, including the Panel, see the Financial Services and Markets Act 2000 s 354; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 489.

3 See for the purposes of European Parliament and EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) on takeover bids, art 4.1. See also s 943; and PARA 1487 note 2.

4 As to the meaning of 'United Kingdom' see PARA 1 note 5.

5 Companies Act 2006 s 950(1). See also the City Code on Takeovers and Mergers Introduction para 12. See note 2.

6 Companies Act 2006 s 950(2). As to restrictions on disclosure see PARA 1486.

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(iii) The City Code on Takeovers and Mergers

1501. Directors' obligations in the context of takeover bid or possible bid.

It has been long established under company law that a director occupies a fiduciary position towards the company of which he is a director¹, but it is equally well established that he owes no fiduciary duty towards any individual shareholder in the company². Accordingly, the general law is virtually silent³ as to the duties of a board of directors when faced by a takeover bid for the company beyond the duty to be honest and not to mislead⁴, or as to the duties of the intending acquirer, beyond the duty not to misuse confidential information⁵. Where there are rival bids, directors are not under a duty to advise shareholders to accept the higher offer but, if they decide to advise the shareholders on the merits of the competing bids, they must provide sufficient information and advice to enable shareholders to reach an informed decision and must refrain from giving misleading advice or exercising their fiduciary powers in ways which would prevent shareholders from being able to make an uninhibited choice⁶. Where directors in the exercise of their powers have to consider rival bidders, the interests of the company are the interests of the current shareholders⁷.

There are steps which a company threatened by a takeover bid may take in order to hamper one bidder or prefer another, such as the issue of additional shares⁸, the alteration of voting rights attached to a particular class of shares⁹, or the reduction of the company's capital¹⁰. Some of these steps, particularly the issue of shares, might successfully be challenged as contravening the directors' duty only to exercise powers for the purposes for which they are conferred¹¹, but in many cases the issue could only be set aside, if at all, after considerable litigation, which would deter the making of the offer.

In practice, many of these matters are constrained by the City Code on Takeovers and Mergers¹², and now the Takeovers Directive¹³, and it is a general principle of both the Code and of the Directive that the board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid¹⁴. This obligation is reinforced by a director's general duty¹⁵ to act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, having regard (*inter alia*) to the likely consequences of any decision in the long term, the interests of the company's employees, and the need to act fairly as between members of the company. More specifically, the City Code on Takeovers and Mergers and the Takeovers Directive both require, in certain circumstances, prior shareholder approval of any specified acts which may result in any offer, or bona fide possible offer, being frustrated or the shareholders being denied the opportunity to decide on its merits¹⁶.

1 A position that is given a statutory framework under the Companies Act 2006, which specifies the general duties that are owed by a director of a company to the company: see ss 171-177; and PARA 532 et seq.

2 See PARA 534 et seq.

3 Provisions of the general law which are relevant to takeover bids include the prohibition on insider dealing contained in the Criminal Justice Act 1993 Pt V (ss 52-64) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**) and the requirements of the rules contained in the Market Conduct Sourcebook (see the Business Standards section of the Financial Services Authority's Handbook of Rules and Guidance), which provide guidance on the prevention of market abuse. Company law provisions of relevance include the Companies Act 2006 s 218 (shareholder approval required for payment for loss of office on a transfer of undertaking or property: see PARA 580) and s 678 (prohibiting financial assistance for the acquisition of shares in a public company: see PARA 1224); and see eg *R v Sinclair* [1968] 3 All ER 241, [1968] 1 WLR 1246, CA (conspiracy to cheat and defraud by using company's assets in a manner known to be not in the company's best interests and prejudicial to minority shareholders); *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073, [1968] 1 WLR 1555 (breach of the Companies Act 1948 s 54 (repealed)).

4 *Gething v Kilner* [1972] 1 All ER 1166, [1972] 1 WLR 337; *Coleman v Myers* [1977] 2 NZLR 225, NZ CA. This latter case suggests that, in certain circumstances, the directors may owe a duty to disclose matters as to which they know, or have reason to believe, their shareholders are inadequately informed. See also PARA 532 et seq.

5 *Dunford & Elliot v Johnson & Firth Brown* [1977] 1 Lloyd's Rep 505, CA (information given to acquirer in confidence; use would normally have been restrained but it was unreasonable in the circumstances to do so). As to whether the directors of a target company might assume responsibility for information provided to a single bidder see *Morgan Crucible Co plc v Hill Samuel & Co Ltd* [1991] Ch 295, sub nom *Morgan Crucible Co Ltd v Hill Samuel Bank Ltd* [1991] 1 All ER 148, CA; *Partco Group Ltd v Wragg* [2002] EWCA Civ 594, [2002] 2 Lloyd's Rep 343, [2002] 2 BCLC 323. See also *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 WLR 830, HL; and *Macquarie Internationale Investments Ltd v Glencore (UK) Ltd* [2008] EWHC 1716 (Comm), [2008] 2 BCLC 565.

6 *Re a Company* [1986] BCLC 382.

7 *Heron International Ltd v Grade* [1983] BCLC 244, CA.

8 See eg *Hogg v Cramphorn Ltd* [1967] Ch 254, [1966] 3 All ER 420 (issue by directors of shares with inflated voting rights to trustees for employees; allottees entitled to retain without such inflated rights; company given opportunity to ratify acts of directors); *Bamford v Bamford* [1970] Ch 212, [1969] 1 All ER 969, CA (voidable issue of shares by directors ratified by company). See also the Companies Act 2006 s 171(b); and PARA 540.

9 See eg *Rights and Issues Investment Trust Ltd v Stylo Shoes Ltd* [1965] Ch 250, [1964] 3 All ER 628.

10 See eg *IRC v Brebner* [1967] 2 AC 18, [1967] 1 All ER 779, HL.

11 See the Companies Act 2006 s 171(b); and PARA 540.

12 As to which see PARA 1480.

13 Ie European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) on takeover bids: see PARAS 23, 1481 et seq.

14 See European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 3(1)(c); and the City Code on Takeovers and Mergers, Section B (General Principles) para 3.

15 See under the Companies Act 2006 s 172 (see PARA 544).

16 See European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 9(2); and the City Code on Takeovers and Mergers, Section I (Conduct during the Offer) r 21.1. Quere whether it is open to a board of directors of a public company to authorise the signing on the company's behalf of a 'poison pill' agreement intended to deter outsiders from making offers to shareholders to purchase their shares: *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28 at [29], [2004] 1 WLR 1846 at [29], [2006] 1 BCLC 729 at [29] per Lord Scott.

UPDATE

1501 Directors' obligations in the context of takeover bid or possible bid

NOTE 3--For **CRIMINAL LAW, EVIDENCE AND PROCEDURE** read **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 574A.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(27) THE PANEL ON TAKEOVERS AND MERGERS; ITS CODE/(iii) The City Code on Takeovers and Mergers/1502. Scope of the Takeovers and Mergers Code.

1502. Scope of the Takeovers and Mergers Code.

In determining whether or not the City Code on Takeovers and Mergers (the 'Code')¹ applies, it is the nature of the company which is the offeree or potential offeree company, or in which control may change or be consolidated, that is relevant². The Code applies to offers for all listed and unlisted public companies (and, where appropriate, statutory and chartered companies) considered by the Panel on Takeovers and Mergers³ to be resident in the United Kingdom, the Channel Islands or the Isle of Man⁴. The Code also applies to offers for certain private companies considered to be so resident and there is also scope for shared jurisdiction between the United Kingdom and other EEA registered and traded companies⁵.

1 As to the Code generally see PARA 1480.

2 See the City Code on Takeovers and Mergers Introduction para 3. As to transactions in particular see PARA 1503.

3 As to the Panel generally see PARA 1480.

4 See the City Code on Takeovers and Mergers Introduction para 3. Generally this means companies or *societas Europaea* incorporated in and having their registered offices or central management in the United Kingdom, the Channel Islands or the Isle of Man if any of their securities are admitted to trading on a regulated market in the United Kingdom or on any stock exchange in the Channel Islands or the Isle of Man. As to the Channel Islands and the Isle of Man see also PARAS 1482, 1486.

5 See the City Code on Takeovers and Mergers Introduction para 3.

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COMPANIES ACTS/(27) THE PANEL ON TAKEOVERS AND MERGERS; ITS CODE/(iii) The City Code on Takeovers and Mergers/1503. Transactions to which the Code applies.

1503. Transactions to which the Code applies.

Generally the City Code on Takeovers and Mergers (the 'Code')¹ is concerned with regulating takeover bids and merger transactions of the relevant companies², however effected, including by means of statutory merger or scheme of arrangement³. The Code is also concerned with regulating other transactions (including offers by a parent company for shares in its subsidiary, dual holding company transactions, new share issues, share capital reorganisations and offers to minority shareholders) which have as their objective or potential effect (directly or indirectly) obtaining or consolidating control⁴ of the relevant companies, as well as partial offers⁵ to shareholders for securities in the relevant companies⁶. The Code also applies to unitisation proposals which are in competition with another transaction to which the Code applies⁷.

The Code applies to all the above transactions at whatever stage of their implementation, including possible transactions which have not yet been announced⁸. The Code does not apply to offers for non-voting, non-equity capital unless they are offers required for the rule on offers for convertibles⁹.

In addition to regulating the transactions referred to above, the Code also contains many other types of rules including rules for the regulation of things done in consequence of, or otherwise in relation to, takeovers and about cases where any such takeover is, or has been, contemplated or apprehended or an announcement is made denying that any such takeover is intended¹⁰.

1 As to the Code generally see PARA 1480.

2 As to the companies generally within the scope of the Code see PARA 1502.

3 See the City Code on Takeovers and Mergers Introduction para 3(b). 'Scheme of arrangement' means a transaction effected by means of a scheme of arrangement under the Companies Act 2006 (see PARA 1425 et seq) or similar statutory provisions in the Channel Islands or the Isle of Man: City Code on Takeovers and Mergers Definitions.

4 'Control' means a holding or aggregate holdings of shares carrying 30% or more of the voting rights of a company, irrespective of whether the holding or holdings gives or give de facto control; and 'voting rights' means, except for the purposes of the City Code on Takeovers and Mergers r 11 (see generally PARA 1480 note 3), all the voting rights attributable to the share capital of a company which are currently exercisable at a general meeting: see the City Code on Takeovers and Mergers, Definitions.

5 ie including tender offers pursuant to the City Code on Takeovers and Mergers Appendix 5. 'Offers' means only any public offer (other than by the company itself) made to the holders of the company's securities to acquire those securities (whether mandatory or voluntary) which follows or has as its objective the acquisition of control of the company concerned, and references in the Code to 'takeovers' and 'offers' include all transactions subject to the Code as referred to in the Introduction para 3(b).

6 See the City Code on Takeovers and Mergers Introduction para 3(b).

7 See the City Code on Takeovers and Mergers Introduction para 3(b).

8 See the City Code on Takeovers and Mergers Introduction para 3(b).

9 See the City Code on Takeovers and Mergers Introduction para 3(b). The reference is to r 15: see generally PARA 1480 note 3.

10 See the City Code on Takeovers and Mergers Introduction para 3(c). As to dual jurisdiction see the Introduction para 3(d), as to re-registration of a public company as a private company see the Introduction para 3(e), and as to Code responsibilities and obligations including the application of the Code in the course of a takeover of advisers, directors, officers, employees, representatives and other persons see the Introduction para 3(f).

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(27) THE PANEL ON TAKEOVERS AND MERGERS; ITS CODE/(iii) The City Code on Takeovers and Mergers/1504. General Principles of the Code.

1504. General Principles of the Code.

The City Code on Takeovers and Mergers (the 'Code')¹ is based upon a number of General Principles, which are essentially statements of standards of commercial behaviour². These General Principles are the same as the general principles set out in the Takeovers Directive³. They apply to takeovers and other matters to which the Code applies. They are expressed in broad general terms and the Code does not define the precise extent of, or the limitations on, their application⁴. They are applied in accordance with their spirit in order to achieve their underlying purpose⁵. In addition, the Code contains rules which, although expressed in less general terms than the General Principles, are not framed in technical language and, like the General Principles, the rules are to be interpreted to achieve their underlying purpose⁶. Therefore, similarly their spirit must be also observed as well as their letter⁷.

The following General Principles should be observed:

- 780 (1) all holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected⁸;
- 781 (2) the holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the offeree company must give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company's places of business⁹;
- 782 (3) the board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid¹⁰;
- 783 (4) false markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted¹¹;
- 784 (5) an offeror must announce a bid only after ensuring that he/she can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration¹²;
- 785 (6) an offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities¹³.

1 As to the Code generally see PARA 1480.

2 See the City Code on Takeovers and Mergers Introduction para 2(b); but see also note 3.

3 These General Principles must correspond to the general principles set out in European Parliament and EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) on takeover bids art 3: see the Companies Act 2006 s 943(1); and PARA 1487 note 2.

4 See the City Code on Takeovers and Mergers Introduction para 2(b).

5 See the City Code on Takeovers and Mergers Introduction para 2(b).

6 See the City Code on Takeovers and Mergers Introduction para 2(b).

- 7 See the City Code on Takeovers and Mergers Introduction para 2(b).
- 8 City Code on Takeovers and Mergers General Principles, 1.
- 9 City Code on Takeovers and Mergers General Principles, 2.
- 10 City Code on Takeovers and Mergers General Principles, 3.
- 11 City Code on Takeovers and Mergers General Principles, 4.
- 12 City Code on Takeovers and Mergers General Principles, 5.
- 13 City Code on Takeovers and Mergers General Principles, 6.

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1505. Breaches of the Code.

The Panel on Takeovers and Mergers (the 'Panel')¹ has disciplinary rules in connection with breaches and alleged breaches of the City Code on Takeovers and Mergers (the 'Code')². The Executive of the Panel may itself deal with a disciplinary matter where the person who is to be subject to the disciplinary action agrees the facts and the action proposed by the Executive but in any other case, where it considers that there has been a breach of the Code, the Executive may commence disciplinary proceedings before the Hearings Committee³. The person concerned is informed in writing of the alleged breach and of the matters which the Executive will present to the Hearings Committee; and disciplinary actions are conducted in accordance with the Rules of Procedure of the Hearings Committee⁴.

If the Hearings Committee finds a breach of the Code or of a ruling of the Panel, it may: (1) issue a private statement of censure; (2) issue a public statement of censure; (3) suspend or withdraw any exemption, approval or other special status which the Panel has granted to a person, or impose conditions on the continuing enjoyment of such exemption, approval or special status, in respect of all or part of the activities to which such exemption, approval or special status relates; (4) report the offender's conduct to a United Kingdom or overseas regulatory authority or professional body, most notably the Financial Services Authority⁵, so that that authority or body can consider whether to take disciplinary or enforcement action⁶; or (5) publish a Panel Statement indicating that the offender is someone who, in the Hearings Committee's opinion, is not likely to comply with the Code⁷. These disciplinary rules and related matters are now reinforced by the Companies Act 2006⁸.

Any party to the hearing before the Hearings Committee (or any person denied permission to be a party to the hearing before the Hearings Committee) may appeal to the Takeover Appeal Board against any ruling of the Hearings Committee or the chairman of the hearing (including in respect of procedural directions)⁹. Like other aspects of the Code this right of review or appeal also now has statutory backing in the Companies Act 2006¹⁰.

1 As to the Panel and the Executive generally see PARA 1480.

2 As to the Code generally see PARA 1480.

3 See the City Code on Takeovers and Mergers Introduction para 11(a). As to the Hearings Committee and rights of appeal see the Introduction para 7; and see also PARA 1488.

- 4 See the City Code on Takeovers and Mergers Introduction para 11(a). These rules are available on the Panel's website and see also the Introduction para 7; and generally PARA 1480.
- 5 As to the Financial Services Authority see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 4, 6 et seq. Other bodies likely to be informed include the Department for Business, Innovation and Skills (BIS) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**) and the Stock Exchange (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 75).
- 6 For example, the Financial Services Authority has power to take certain actions against an authorised person or an approved person who fails to observe proper standards of market conduct, including the power to fine.
- 7 See the City Code on Takeovers and Mergers Introduction para 11(a). In regard to head (4) in the text the rules of the Financial Services Authority and certain professional bodies oblige their members, in certain circumstances, not to act for the person in question in a transaction subject to the Code, including a dealing in relevant securities requiring disclosure under r 8 (so called 'cold-shouldering') (see generally PARA 1480 note 3). For example, the Authority's rules require a person authorised under the Financial Services and Markets Act 2000 not to act, or continue to act, for any person in connection with a transaction to which the Code applies if the firm has reasonable grounds for believing that the person in question, or his principal, is not complying or is not likely to comply with the Code: see Market Conduct r 4.3.1 (contained in the Business Standards section of the Financial Services Authority's Handbook of Rules and Guidance).
- 8 See the Companies Act 2006 ss 952-956; and PARAS 1492-1496.
- 9 See the City Code on Takeovers and Mergers Introduction para 7(e). See generally the Introduction para 7.
- 10 See the Companies Act 2006 s 951; and PARA 1488.

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1506. References of certain transactions to the Competition Commission.

Provision is made for the Office of Fair Trading¹ and the Secretary of State² to refer certain transactions to the Competition Commission³ for investigation where, in specified circumstances, those transactions have resulted, or may result, in a lessening of competition within a market in the United Kingdom for goods or services, or where they prevent, restrict or distort competition in such a market⁴.

- 1 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARAS 6-8.
- 2 As to the Secretary of State see PARA 6.
- 3 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARA 9 et seq.
- 4 See the Enterprise Act 2002 ss 22, 131-132; and **COMPETITION** vol 18 (2009) PARAS 172, 173, 276, 277. As to the meaning of 'United Kingdom' see PARA 1 note 5.

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(28) TAKEOVER OFFERS

(i) Opting in and Opting out of Takeovers Provisions

1507. Company's power to make opting-in and opting-out resolutions.

A company¹ may by special resolution² (an 'opting-in resolution') opt in for the purposes of the provisions relating to impediments to takeovers³ if the following three conditions are met in relation to the company⁴:

- 786 (1) the first condition is that the company has voting shares⁵ admitted to trading on a regulated market⁶;
- 787 (2) the second condition is that:
- 155 390. (a) the company's articles of association⁷ do not contain any such restrictions as are mentioned in article 11 of the Takeovers Directive⁸ or, if they do contain any such restrictions, provide for the restrictions not to apply at a time when, or in circumstances in which, they would be disapplied by that article⁹; and
- 391. (b) those articles do not contain any other provision which would be incompatible with that article¹⁰;
- 156 788 (3) the third condition is that:
- 157 392. (a) no shares conferring special rights in the company are held by a minister¹¹, a nominee of, or any other person acting on behalf of, a minister¹², or a company directly or indirectly controlled by a minister¹³; and
- 393. (b) no such rights are exercisable by or on behalf of a minister under any enactment¹⁴.
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A company may revoke an opting-in resolution by a further special resolution (an 'opting-out resolution')¹⁵.

An opting-in resolution or an opting-out resolution must specify the date from which it is to have effect (the 'effective date')¹⁶. The second and third conditions above must be met at the time when an opting-in resolution is passed, but the first one does not need to be met until the effective date¹⁷. The effective date of an opting-out resolution may not be earlier than the first anniversary of the date on which a copy of the opting-in resolution was forwarded to the registrar¹⁸. Where a company has passed an opting-in resolution, any alteration of its articles of association that would prevent the second condition above from being met is of no effect until the effective date of an opting-out resolution passed by the company¹⁹.

1 As to the meaning of 'company' see PARA 24.

2 As to the meaning of 'special resolution' see PARA 614.

3 Ie for the purposes of the Companies Act 2006 Pt 28 Ch 2 (ss 966-973), implementing European Parliament and EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 12.

4 Companies Act 2006 s 966(1). As to the consequences of opting-in see PARA 1509.

The provisions of the Companies Act 2006 ss 966, 967 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 14: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

- 5 'Voting shares' means shares carrying voting rights; and 'voting rights' means rights to vote at general meetings of the company in question, including rights that arise only in certain circumstances: Companies Act 2006 s 971(1). For these purposes (1) securities of a company are treated as shares in the company if they are convertible into or entitle the holder to subscribe for such shares (s 971(2)(a)); (2) debentures issued by a company are treated as shares in the company if they carry voting rights (s 971(2)(b)). As to the meaning of 'share' see PARA 1042. As to the meaning of 'debenture' see PARA 1299. As to general meetings see PARA 629.
- 6 Companies Act 2006 s 966(2). As to the meaning of 'regulated market' see PARA 334 note 11.
- 7 As to the articles of association see PARA 228 et seq.
- 8 Companies Act 2006 s 966(3)(a)(i). 'Takeovers Directive' means European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12). For the purposes of the Companies Act 2006 s 966(3), a reference in European Parliament and Council Directive 2004/25 art 11 to art 7.1 or art 9 of that Directive is to be read as referring to rules under the Companies Act 2006 s 943(1) (see PARA 1487) giving effect to the relevant article: s 966(6). As to European Parliament and Council Directive 2004/25 see PARA 1481.
- 9 Companies Act 2006 s 966(3)(a)(ii). See also note 8.
- 10 Companies Act 2006 s 966(3)(b). See also note 8.
- 11 Companies Act 2006 s 966(4)(a)(i). The Secretary of State may by order subject to negative resolution procedure (ie whereby the statutory instrument containing the order is subject to annulment in pursuance of a resolution of either House of Parliament) provide that s 966(4) applies in relation to a specified person or body that exercises functions of a public nature as it applies in relation to a minister: ss 966(8), 1289. 'Specified' means specified in the order: s 966(8). As to the Secretary of State see PARA 6. As to the meaning of 'person' see PARA 311 note 2. 'Minister' means the holder of an office in Her Majesty's Government in the United Kingdom (s 966(7)(a)), the Scottish Ministers (s 966(7)(b)), a minister within the meaning given by the Northern Ireland Act 1998 s 7(3) (s 966(7)(c)), the Welsh Ministers (s 966(7)(d) (added by SI 2007/1388)); and for these purposes 'minister' also includes the Treasury, the Board of Trade and the Defence Council (Companies Act 2006 s 966(7) (amended by SI 2007/1388)). As to the meaning of 'United Kingdom' see PARA 1 note 5. As to the Scottish Ministers, the Welsh Ministers and as to devolved government in Northern Ireland see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517. As to the Board of Trade see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 505. As to the Defence Council see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 443-447.
- 12 Companies Act 2006 s 966(4)(a)(ii). See also note 11.
- 13 Companies Act 2006 s 966(4)(a)(iii). See also note 11.
- 14 Companies Act 2006 s 966(4)(b). See also note 11. As to the meaning of 'enactment' see PARA 17 note 2.
- 15 Companies Act 2006 s 966(5).
- 16 Companies Act 2006 s 967(1). The effective date of an opting-in resolution may not be earlier than the date on which the resolution is passed: s 967(2). An opting-in resolution passed before the time when voting shares of the company are admitted to trading on a regulated market complies with the requirement in s 967(1) if, instead of specifying a particular date, it provides for the resolution to have effect from that time: s 967(4). An opting-in resolution passed before 6 April 2007 (ie date of the commencement of s 967) complies with the requirement in s 967(1) if, instead of specifying a particular date, it provides for the resolution to have effect from that commencement: s 967(5); Companies Act 2006 (Commencement No 2, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/1093, art 2(1)(b).
- 17 Companies Act 2006 s 967(3).
- 18 Companies Act 2006 s 967(6). As to the meaning of 'registrar' see PARA 131 note 2. As to the notification of resolutions see PARA 1508.
- 19 Companies Act 2006 s 967(7).

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1508. Requirement to notify passing of resolutions.

A company¹ that has passed an opting-in resolution or an opting-out resolution² must notify: (1) the Panel on Takeovers and Mergers³; and (2) where the company has voting shares⁴ admitted to trading on a regulated market⁵ in an EEA State⁶ other than the United Kingdom⁷, or has requested such admission⁸, the authority designated⁹ by that state as the supervisory authority¹⁰. Notification must be given within 15 days after the resolution is passed and, if any admission or request such as is mentioned in head (1) above occurs at a later time, within 15 days after that time¹¹.

If a company fails to comply with these provisions, an offence¹² is committed by the company¹³, and every officer of it who is in default¹⁴.

1 As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

2 As to opting-in resolutions and opting-out resolutions see PARA 1507.

3 Companies Act 2006 s 970(1)(a). As to the Panel on Takeovers and Mergers see PARA 1480 et seq.

The provisions of the Companies Act 2006 s 970 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 14: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 As to the meaning of 'voting shares' see PARA 1507 note 5.

5 As to the meaning of 'regulated market' see PARA 334 note 11.

6 As to the meaning of 'EEA State' see PARA 29 note 5.

7 Companies Act 2006 s 970(1)(b)(i). As to the meaning of 'United Kingdom' see PARA 1 note 5.

8 Companies Act 2006 s 970(1)(b)(ii).

9 ie the authority designated for the purposes of European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 4.1: see PARA 1481.

10 Companies Act 2006 s 970(1)(b).

11 Companies Act 2006 s 970(2).

12 A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale: Companies Act 2006 s 970(4). As to the meaning of 'person' see PARA 311 note 2. As to the standard scale and as to the meaning of 'daily default fine' see PARA 1622.

13 Companies Act 2006 s 970(3)(a).

14 Companies Act 2006 s 970(3)(b). As to the meaning of 'officer in default' see PARA 315.

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1509. Consequences of opting in.

Where a takeover bid¹ is made for an opted-in company², an agreement³ is invalid in so far as it places any restriction:

- 789 (1) on the transfer to the offeror⁴, or at his direction to another person, of shares
in the company during the offer period⁵;
- 790 (2) on the transfer to any person of shares in the company at a time during the
offer period when the offeror holds shares amounting to not less than 75 per cent
in value of all the voting shares⁶ in the company⁷;
- 791 (3) on rights to vote at a general meeting of the company⁸ that decides whether
to take any action which might result in the frustration of the bid⁹;
- 792 (4) on rights to vote at a general meeting of the company that is the first such
meeting to be held after the end of the offer period¹⁰, and is held at a time when
the offeror holds shares amounting to not less than 75 per cent in value of all the
voting shares in the company¹¹.

If a person suffers loss as a result of any act or omission that would (but for these provisions) be a breach of such an agreement, he is entitled to compensation, of such amount as the court¹² considers just and equitable, from any person who would (but for these provisions) be liable to him for committing or inducing the breach¹³.

Where a takeover bid is made for an opted-in company, the offeror may by making a request to the directors¹⁴ of the company require them to call a general meeting of the company if, at the date at which the request is made, he holds shares amounting to not less than 75 per cent in value of all the voting shares¹⁵ in the company¹⁶.

1 As to the meaning of 'takeover bid' see PARA 1481 note 2: definition applied by the Companies Act 2006 s 971(1).

2 See the Companies Act 2006 s 968(1). 'Opted-in company' means a company in relation to which an opting-in resolution has effect, and the conditions in s 966(2) and (4) (see PARA 1507) continue to be met: s 971(1). As to opting-in resolutions see PARA 1507. As to the meaning of 'company' under the Companies Acts see PARA 24; and as to the meaning of the 'Companies Acts' see PARA 16.

The provisions of the Companies Act 2006 ss 968, 969 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 14: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 I.e. an agreement: (1) entered into between a person holding shares in the company and another such person on or after 21 April 2004 (Companies Act 2006 s 968(3)(a)); or (2) entered into at any time between such a person and the company (s 968(3)(b)); and it applies to such an agreement even if the law applicable to the agreement (apart from s 968) is not the law of a part of the United Kingdom (s 968(3)). As to the meaning of 'person' see PARA 311 note 2. As to the meaning of 'share' see PARA 1042. As to the meaning of 'United Kingdom' see PARA 1 note 5.

4 As to the meaning of 'offeror' see PARA 1481 note 11: definition applied by the Companies Act 2006 s 971(1).

5 Companies Act 2006 s 968(2)(a). 'Offer period', in relation to a takeover bid, means the time allowed for acceptance of the bid by: (1) rules under s 943(1) (see PARA 1487) giving effect to European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 7.1 (see PARA 1507); or (2) where the rules giving effect to that article which apply to the bid are those of an EEA State other than the United Kingdom, those rules: Companies Act 2006 s 971(1). As to the meaning of 'EEA State' see PARA 29 note 5.

6 A reference in the Companies Act 2006 s 968 to voting shares in the company does not include (1) debentures (s 968(8)(a)); or (2) shares that, under the company's articles of association, do not normally carry rights to vote at its general meetings (for example, shares carrying rights to vote that, under those articles, arise only where specified pecuniary advantages are not provided) (s 968(8)(b)). As to the meaning of 'voting shares' see PARA 1507 note 5. As to the meaning of 'debenture' see PARA 1299. As to the meaning of 'share' see PARA 1042. As to articles of association see PARA 228 et seq.

7 Companies Act 2006 s 968(2)(b).

8 This reference to rights to vote at a general meeting of the company that decides whether to take any action which might result in the frustration of the bid includes a reference to rights to vote on a written resolution concerned with that question: Companies Act 2006 s 968(4). As to general meetings see PARA 629.

9 Companies Act 2006 s 968(2)(c). For these purposes, action which might result in the frustration of a bid is any action of that kind specified in rules under s 943(1) (see PARA 1487) giving effect to European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 9 (see PARA 1481): Companies Act 2006 s 968(5).

10 Companies Act 2006 s 968(2)(d)(i).

11 Companies Act 2006 s 968(2)(d)(ii).

12 'Court' means the High Court: see the Companies Act 2006 s 968(7). As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

13 Companies Act 2006 s 968(6). Proceedings to recover compensation under s 968(6) must be started by a CPR Pt 7 claim form: *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 17. As to CPR Pt 7 see **CIVIL PROCEDURE** vol 11 (2009) PARA 116 et seq.

14 As to the meaning of 'director' see PARA 478.

15 This reference to voting shares in the company does not include debentures (Companies Act 2006 s 969(2)(a)), or shares that, under the company's articles of association, do not normally carry rights to vote at its general meetings (for example, shares carrying rights to vote that, under those articles, arise only where specified pecuniary advantages are not provided) (s 969(2)(b)).

16 Companies Act 2006 s 969(1). Sections 303-305 (members' power to require general meetings to be called: see PARA 641) apply as they would do if s 969(1) were substituted for s 303(1)-(3), and with any other necessary modifications: s 969(3).

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1510. Power to extend provisions to Isle of Man and Channel Islands.

Her Majesty may by order in Council direct that any of the provisions relating to impediments to takeovers¹ extend, with such modifications as may be specified in the order, to the Isle of Man or any of the Channel Islands².

1 Ie the provisions of the Companies Act 2006 Pt 28 Ch 2 (ss 966-973): see PARAS 1507-1509.

2 Companies Act 2006 s 973. At the date at which this volume states the law no such order had been made. The provisions of the Companies Act 2006 s 973 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 14: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

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(ii) Takeover Offers: Squeeze-outs and Sell-outs

A. TAKEOVER OFFERS FOR THESE PURPOSES

1511. Meaning of 'takeover offer' for these purposes.

For the purposes of the provisions relating to 'squeeze-out' and 'sell out'¹ an offer to acquire shares² in a company is a 'takeover offer' if the following two conditions are satisfied in relation to the offer³:

- 793 (1) the first condition is that it is an offer to acquire:
159
394. (a) all the shares in a company⁴; or
395. (b) where there is more than one class of shares in a company, all the shares
of one or more classes⁵,
396. other than shares that at the date of the offer are already held by the offeror⁶.
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794 (2) the second condition is that the terms of the offer are the same: (a) in
relation to all the shares to which the offer relates⁷; or (b) where the shares to
which the offer relates include shares of different classes, in relation to all the
shares of each class⁸.

Where the terms of an offer make provision for their revision and for acceptances on the previous terms to be treated as acceptances on the revised terms, then, if the terms of the offer are revised in accordance with that provision the revision is not to be regarded⁹ as the making of a fresh offer¹⁰.

1 le the provisions of the Companies Act 2006 Pt 28 Ch 3 (ss 974-991): see PARA 1512 et seq. The Companies Act 2006 s 987(4) (rights and obligations of offeror in takeover offer made by two or more persons jointly) is subject to ss 974-976: see s 987(4), (7); and PARA 1520.

2 In the Companies Act 2006 s 974(1)-(3) (see the text to notes 3-8) 'shares' means shares, other than relevant treasury shares, that have been allotted on the date of the offer (but see s 974(5) below): s 974(4). A takeover offer may include among the shares to which it relates: (1) all or any shares that are allotted after the date of the offer but before a specified date (s 974(5)(a)); (2) all or any relevant treasury shares that cease to be held as treasury shares before a specified date (s 974(5)(b)); (3) all or any other relevant treasury shares (s 974(5)(c)). 'Relevant treasury shares' means shares that (a) are held by the company as treasury shares on the date of the offer (s 974(6)(a)); or (b) become shares held by the company as treasury shares after that date but before a specified date (s 974(6)(b)); and 'specified date' means a date specified in or determined in accordance with the terms of the offer (s 974(6)). As to the meaning of 'share' see PARA 1042. As to the meaning of 'treasury share' see PARA 1251. 'Company' means the company whose shares are the subject of a takeover offer: s 991(1). 'Date of the offer' means (i) where the offer is published, the date of publication; (ii) where the offer is not published, or where any notices of the offer are given before the date of publication, the date when notices of the offer (or the first such notices) are given; and references to the date of the offer are to be read in accordance with s 974(7) (revision of offer terms: see the text to notes 9-10) where that applies: s 991(1).

For the purposes of Pt 28 Ch 3 (ss 974-991) securities of a company are treated as shares in the company if they are convertible into or entitle the holder to subscribe for such shares; and references to the holder of shares or a shareholder are to be read accordingly: s 989(1). Section 989(1) is not to be read as requiring any securities to be treated: (A) as shares of the same class as those into which they are convertible or for which the holder is entitled to subscribe (s 989(2)(a)); or (B) as shares of the same class as other securities by reason only that the shares into which they are convertible or for which the holder is entitled to subscribe are of the same class (s 989(2)(b)). For the purposes of Pt 28 Ch 3 (ss 974-991) debentures issued by a company that has voting shares, or debentures carrying voting rights, which are admitted to trading on a regulated market, are treated as shares in the company if they carry voting rights: s 990(1), (2). In relation to debentures so treated as shares references to the holder of shares or a shareholder are to be read accordingly (s 990(3)(a)); and references to shares being allotted are to be read as references to debentures being issued (s 990(3)(b)). As to the meaning of 'debenture' see PARA 1299. 'Voting shares' means shares carrying voting rights; and 'voting rights' means rights to vote at general meetings of the company, including rights that arise only in certain circumstances: s 991(1). As to general meetings see PARA 1653.

The provisions of the Companies Act 2006 ss 974-976, 989, 990 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 14: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Companies Act 2006 s 974(1). As to joint offers see PARA 1520. As to what may constitute a valid offer see *Re Chez Nico (Restaurants) Ltd* [1992] BCLC 192; *Re Joseph Holt plc, Winpar Holdings Ltd v Joseph Holt Group plc* [2001] EWCA Civ 770, [2001] 2 BCLC 604 (both decided under the Companies Act 1985 s 428 (repealed)).

4 Companies Act 2006 s 974(2)(a).

5 Companies Act 2006 s 974(2)(b). As to classes of shares generally see PARA 1057 et seq.

6 Companies Act 2006 s 974(2). Subject to s 975(2), the reference to shares already held by the offeror includes a reference to shares that he has contracted to acquire, whether unconditionally or subject to conditions being met: s 975(1). The reference to shares already held by the offeror does not include a reference to shares that are the subject of a contract (1) intended to secure that the holder of the shares will accept the offer when it is made (s 975(2)(a)); and (2) entered into by deed and for no consideration (s 975(2)(b)(i)), for consideration of negligible value (s 975(2)(b)(ii)), or for consideration consisting of a promise by the offeror to make the offer (s 975(2)(b)(iii)). The condition in s 974(2) is treated as satisfied where the offer does not extend to shares that associates of the offeror hold or have contracted to acquire (whether unconditionally or subject to conditions being met) (s 975(4)(a)), and the condition would be satisfied if the offer did extend to those shares (s 975(4)(b)). For further provision about such shares see s 977(2) (PARA 1513): s 975(4). 'Offeror' means (subject to s 987: see PARA 1520) the person making a takeover offer: s 991(1). As to the meaning of 'associate' see PARA 1512. A person contracts unconditionally to acquire shares if his entitlement under the contract to acquire them is not (or is no longer) subject to conditions or if all conditions to which it was subject have been met; and a reference to a contract becoming unconditional is to be read accordingly: s 991(2).

7 Companies Act 2006 s 974(3)(a). See also note 8.

8 Companies Act 2006 s 974(3)(b). The condition in s 974(3) is treated as satisfied where the following provisions apply (s 976(1)):

2215 (1) shares carry an entitlement to a particular dividend which other shares of the same class, by reason of being allotted later, do not carry (s 976(2)(a)), there is a difference in the value of consideration offered for the shares allotted earlier as against that offered for those allotted later (s 976(2)(b)), that difference merely reflects the difference in entitlement to the dividend (s 976(2)(c)), and the condition in s 974(3) would be satisfied but for that difference (s 976(2)(d));

2216 (2) (a) the law of a country or territory outside the United Kingdom precludes an offer of consideration in the form, or any of the forms, specified in the terms of the offer (the 'specified form') (s 976(3)(a)(i)), or precludes it except after compliance by the offeror with conditions with which he is unable to comply or which he regards as unduly onerous (s 976(3)(a)(ii));

2217 (b) the persons to whom an offer of consideration in the specified form is precluded are able to receive consideration in another form that is of substantially equivalent value (s 976(3)(b)); and

2218 (c) the condition in s 974(3) would be satisfied but for the fact that an offer of consideration in the specified form to those persons is precluded (s 976(3)(c)).

As to the meaning of 'United Kingdom' see PARA 1 note 5. As to the meaning of 'person' see PARA 311 note 2.

9 Ie for the purposes of the Companies Act 2006 Pt 28 Ch 3 (ss 974-991).

10 Companies Act 2006 s 976(7)(a). In such a case, references in Pt 28 Ch 3 (ss 974-991) to the date of the offer are accordingly to be read as references to the date of the original offer: s 976(7)(b).

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1512. Meaning of 'associate' for these purposes.

In the provisions relating to 'squeeze-out' and 'sell out'¹ 'associate', in relation to an offeror², means:

- 795 (1) a nominee of the offeror³;
- 796 (2) a holding company⁴, subsidiary or fellow subsidiary of the offeror or a nominee of such a holding company, subsidiary or fellow subsidiary⁵;
- 797 (3) a body corporate in which the offeror is substantially interested⁶;
- 798 (4) a person⁷ who is, or is a nominee of, a party to a share acquisition agreement with the offeror⁸; or
- 799 (5) (where the offeror is an individual) his spouse or civil partner⁹ and any minor child¹⁰ or step-child of his¹¹.

1 In the provisions of the Companies Act 2006 Pt 28 Ch 3 (ss 974-991): see PARAS 1511, 1513 et seq. The Companies Act 2006 s 987(4) (rights and obligations of offeror in takeover offer made by two or more persons jointly) is subject to s 988: see s 987(4), (7); and PARA 1520.

2 As to the meaning of 'offeror' see PARA 1511 note 6. As to joint offers see PARA 1520.

3 Companies Act 2006 s 988(1)(a).

The provisions of the Companies Act 2006 s 988 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 14: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 As to the meaning of 'holding company' see PARA 25.

5 Companies Act 2006 s 988(1)(b). For these purposes a company is a fellow subsidiary of another body corporate if both are subsidiaries of the same body corporate but neither is a subsidiary of the other: s 988(2). As to the meaning of 'company' see PARA 24. As to the meaning of 'body corporate' see PARA 1 note 5.

6 Companies Act 2006 s 988(1)(c). For these purposes an offeror has a substantial interest in a body corporate if: (1) the body or its directors are accustomed to act in accordance with his directions or instructions (s 988(3)(a)); or (2) he is entitled to exercise or control the exercise of one-third or more of the voting power at general meetings of the body (s 988(3)(b)). Section 823(2), (3) (which contains provision about when a person is treated as entitled to exercise or control the exercise of voting power: see PARA 439) applies for these purposes as it applies for the purposes of that section: s 988(3). As to the meaning of 'director' see PARA 478. As to general meetings see PARA 629.

7 As to the meaning of 'person' see PARA 311 note 2.

8 Companies Act 2006 s 988(1)(d). For these purposes an agreement is a share acquisition agreement if:

2219 (1) it is an agreement for the acquisition of, or of an interest in, shares to which the offer relates (s 988(4)(a));

2220 (2) it includes provisions imposing obligations or restrictions on any one or more of the parties to it with respect to their use, retention or disposal of such shares, or their interests in such shares, acquired in pursuance of the agreement (whether or not together with any other shares to which the offer relates or any other interests of theirs in such shares) (s 988(4)(b)); and

2221 (3) it is not an excluded agreement (s 988(4)(c)).

An agreement is an 'excluded agreement': (a) if it is not legally binding, unless it involves mutuality in the undertakings, expectations or understandings of the parties to it (s 988(5)(a)); or (b) if it is an agreement to underwrite or sub-underwrite an offer of shares in a company, provided the agreement is confined to that purpose and any matters incidental to it (s 988(5)(b)). The reference in s 988(4)(b) (see head (2) above) to the use of interests in shares is to the exercise of any rights or of any control or influence arising from those interests (including the right to enter into an agreement for the exercise, or for control of the exercise, of any of those rights by another person): s 988(6). As to the meaning of 'share' see PARA 1042; and see also PARA 1511 note 2. 'Agreement' includes any agreement or arrangement; and references to provisions of an agreement include (i) undertakings, expectations or understandings operative under an arrangement; and (ii) any provision whether express or implied and whether absolute or not: s 988(7).

9 'Civil partnership' means a civil partnership which exists under or by virtue of the Civil Partnership Act 2004 (and any reference to a 'civil partner' is to be read accordingly): Interpretation Act 1978 s 5, Sch 1 (definition added by the Civil Partnership Act 2004 s 261(1), Sch 27 para 59). As to civil partnership see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 2.

10 As to the meaning of 'minor' see the Family Law Reform Act 1969 s 1; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 1. As to the interpretation of references to any relationship between two persons see the Interpretation Act 1978 s 5, Sch 1; the Family Law Reform Act 1987 s 1; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 125.

11 Companies Act 2006 s 988(1)(e).

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1513. Shares to which an offer relates.

Subject as provided¹, where a takeover offer² is made and, during the period beginning with the date of the offer³ and ending when the offer can no longer be accepted, the offeror⁴ acquires or unconditionally contracts⁵ to acquire any of the shares⁶ to which the offer relates⁷, but does not do so by virtue of acceptances of the offer⁸, those shares are treated for the purposes of the provisions relating to 'squeeze-out' and 'sell out'⁹ as excluded from those to which the offer relates¹⁰. For these purposes shares that an associate¹¹ of the offeror holds or has contracted¹² to acquire, whether at the date of the offer or subsequently, are not treated as shares to which the offer relates, even if the offer extends to such shares¹³.

1 The subject to the Companies Act 2006 s 979(8), (9) (see PARA 1515): s 977(3). The Companies Act 2006 s 987(4) (rights and obligations of offeror in takeover offer made by two or more persons jointly) is subject to s 977: see s 987(4), (7); and PARA 1520.

The provisions of the Companies Act 2006 s 977 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 14: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

2 As to the meaning of 'takeover offer' see PARA 1511.

3 As to the meaning of 'date of the offer' see PARA 1511 note 2.

4 As to the meaning of 'offeror' see PARA 1511 note 6. As to joint offers see PARA 1520.

5 As to the meaning of 'unconditionally contract' see PARA 1511 note 6.

6 As to the meaning of 'share' see PARA 1042; and see also PARA 1511 note 2.

7 Companies Act 2006 s 977(1)(a).

8 Companies Act 2006 s 977(1)(b).

9 The provisions of the Companies Act 2006 Pt 28 Ch 3 (ss 974-991): see PARA 1511 et seq.

10 Companies Act 2006 s 977(1).

11 As to the meaning of 'associate' see PARA 1512.

12 'Contracted' means contracted unconditionally or subject to conditions being met: Companies Act 2006 s 977(2).

13 Companies Act 2006 s 977(2).

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1514. Effect of impossibility etc of communicating or accepting offer.

Where there are holders of shares¹ in a company to whom an offer to acquire shares in the company² is not communicated, that does not prevent the offer from being a takeover offer³ for the purposes of the provisions relating to 'squeeze-out' and 'sell out'⁴ if:

- 800 (1) those shareholders have no registered address⁵ in the United Kingdom⁶;
- 801 (2) the offer was not communicated to those shareholders in order not to contravene the law of a country or territory outside the United Kingdom⁷; and
- 802 (3) either the offer is published in the Gazette⁸, or the offer can be inspected, or a copy of it obtained, at a place in an EEA state⁹ or on a website, and a notice is published in the Gazette specifying the address of that place or website¹⁰.

Where an offer is made to acquire shares in a company and there are persons¹¹ for whom, by reason of the law of a country or territory outside the United Kingdom, it is impossible to accept the offer, or more difficult to do so, that does not prevent the offer from being a takeover offer¹².

It is not to be inferred (a) that an offer which is not communicated to every holder of shares in the company cannot be a takeover offer unless the requirements of heads (1) to (3) above are met¹³; or (b) that an offer which is impossible, or more difficult, for certain persons to accept cannot be a takeover offer for those purposes unless the reason for the impossibility or difficulty is the one mentioned¹⁴ above¹⁵.

1 As to the meaning of 'share' see PARA 1042; and see also PARA 1511 note 2.

2 As to the meaning of 'company' see PARA 1511 note 2.

3 As to the meaning of 'takeover offer' see PARA 1511. As to joint offers see PARA 1520.

4 I.e. the provisions of the Companies Act 2006 Pt 28 Ch 3 (ss 974-991): see PARA 1511 et seq.

5 The term 'registered address' is usually defined to mean any address for the time being shown as a current address in relation to that person in the part of the register available for public inspection. As to the meaning of the 'register' see PARA 146.

6 Companies Act 2006 s 978(1)(a). As to the meaning of 'United Kingdom' see PARA 1 note 5.

The provisions of the Companies Act 2006 s 978 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 14: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

7 Companies Act 2006 s 978(1)(b).

8 Companies Act 2006 s 978(1)(c)(i). As to the meaning of the 'Gazette' see PARA 138 note 2.

9 As to the meaning of 'EEA State' see PARA 29 note 5.

10 Companies Act 2006 s 978(1)(c)(ii).

11 As to the meaning of 'person' see PARA 311 note 2.

12 Companies Act 2006 s 978(2).

13 Companies Act 2006 s 978(3)(a). Under the Companies Act 1985, it was held that the validity of a takeover offer depends on the primary contractual terms being the same for all shareholders, not the mechanics of the acceptance of the offer; and such an offer need not be communicated to each and every shareholder, provided that all shareholders have the opportunity to accept it: see *Re Joseph Holt plc, Winpar Holdings Ltd v Joseph Holt Group plc* [2001] EWCA Civ 770, [2001] 2 BCLC 604. The Companies Act 2006 s 978(3)(a) confirms that position.

14 Ie in the Companies Act 2006 s 978(2): see the text to notes 11-12.

15 Companies Act 2006 s 978(3)(b).

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B. SQUEEZE-OUT

1515. Right of offeror to buy out minority shareholder.

In a case where a takeover offer¹ does not relate to shares of different classes², if the offeror³ has, by virtue of acceptances of the offer, acquired or unconditionally contracted⁴ to acquire: (1) not less than 90 per cent in value of the shares to which the offer relates⁵; and (2) in a case where the shares to which the offer relates are voting shares⁶, not less than 90 per cent of the voting rights carried by those shares⁷, he may give notice to the holder of any shares to which the offer relates which the offeror has not acquired or unconditionally contracted to acquire that he desires to acquire those shares⁸.

In a case where a takeover offer relates to shares of different classes⁹, if the offeror has, by virtue of acceptances of the offer, acquired or unconditionally contracted to acquire (a) not less than 90 per cent in value of the shares of any class to which the offer relates¹⁰; and (b) in a case where the shares of that class are voting shares, not less than 90 per cent of the voting rights carried by those shares¹¹, he may give notice to the holder of any shares of that class to which the offer relates which the offeror has not acquired or unconditionally contracted to acquire that he desires to acquire those shares¹².

In the case of a takeover offer which includes among the shares to which it relates shares that are allotted after the date of the offer¹³, or relevant treasury shares¹⁴ that cease to be held as treasury shares after the date of the offer¹⁵, the offeror's entitlement to give a notice under the above provisions¹⁶ on any particular date must be determined as if the shares to which the offer relates did not include any allotted, or ceasing to be held as treasury shares, on or after that date¹⁷. Where the requirements for the giving of any such notice are satisfied¹⁸, and there are shares in the company¹⁹ which the offeror, or an associate²⁰ of his, has contracted to acquire subject to conditions being met, and in relation to which the contract has not become unconditional²¹, the offeror's entitlement to give the notice must be determined as if the shares to which the offer relates included those shares²².

Where:

803 (i) a takeover offer is made²³;

804 (ii) during the period beginning with the date of the offer and ending when the offer can no longer be accepted, the offeror acquires or unconditionally contracts to

acquire any of the shares to which the offer relates²⁴, but does not do so by virtue of acceptances of the offer²⁵; and
 805 (iii) the specified conditions apply²⁶,

then for the purposes of these provisions²⁷ those shares are not excluded²⁸ from those to which the offer relates, and the offeror is treated as having acquired or contracted to acquire them by virtue of acceptances of the offer²⁹. Likewise, where:

- 806 (A) a takeover offer is made³⁰;
- 807 (B) during the period beginning with the date of the offer and ending when the offer can no longer be accepted, an associate of the offeror acquires or unconditionally contracts to acquire any of the shares to which the offer relates³¹; and
- 808 (C) the specified conditions apply³²,

then for the purposes of these provisions³³ those shares are not excluded³⁴ from those to which the offer relates³⁵.

A notice under the above provisions must be given in the prescribed manner³⁶. No notice may be given after the end of the period of three months³⁷ beginning with the day after the last day on which the offer can be accepted³⁸, or the period of six months beginning with the date of the offer, where that period ends earlier and the offer is one in respect of which the time allowed for acceptance of the offer is not governed by statutory rules³⁹. At the time when the offeror first gives a notice in relation to an offer, he must send to the company a copy of the notice⁴⁰, and a statutory declaration by him in the prescribed form, stating that the conditions for the giving of the notice are satisfied⁴¹. A person commits an offence⁴² if he fails to send a copy of a notice or a statutory declaration as so required⁴³, or he makes such a declaration knowing it to be false or without having reasonable grounds for believing it to be true⁴⁴.

1 As to the meaning of 'takeover offer' see PARA 1511.

2 Companies Act 2006 s 979(1). As to the meaning of 'share' see PARA 1042; and see also PARA 1511 note 2. As to classes of shares generally see PARA 1057 et seq. The Companies Act 2006 s 987(4) (rights and obligations of offeror in takeover offer made by two or more persons jointly) is subject to ss 979, 980: see s 987(4)-(7); and PARA 1520.

The provisions of the Companies Act 2006 ss 979, 980 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 14: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 As to the meaning of 'offeror' see PARA 1511 note 6. As to joint offers see PARA 1520.

4 As to the meaning of 'unconditionally contract' see PARA 1511 note 6.

5 Companies Act 2006 s 979(2)(a).

6 As to the meaning of 'voting shares' see PARA 1511 note 2.

7 Companies Act 2006 s 979(2)(b).

8 Companies Act 2006 s 979(2). As to the effect of such notices see PARA 1516. As to applications to the court in respect of such notices see PARA 1519. As to any uncertificated units of a security (other than a wholly dematerialised security) to which a notice given under s 979 relates see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 42; and PARA 1516.

In relation to the law as it previously was under the Companies Act 1985, see *Re Joseph Holt plc, Winpar Holdings Ltd v Joseph Holt Group plc* [2001] EWCA Civ 770, [2001] 2 BCLC 604 (notice sent to overseas company pursuant to the Companies Act 1985 s 429(1) (now repealed) was valid notwithstanding non-receipt of takeover offer by company); *Re Greythorn Ltd* [2002] 1 BCLC 437 at 450 (as to whether a notice, once served, can be withdrawn). See also *Rock (Nominees) Ltd v RCO Holdings Ltd* [2004] EWCA Civ 118, [2004] 1 BCLC 439,

where an offeror who was unable to exercise acquisition rights by buying out minority shareholders (because the 90% threshold could not be met) achieved the same result by buying the company's assets.

9 Companies Act 2006 s 979(3).

10 Companies Act 2006 s 979(4)(a).

11 Companies Act 2006 s 979(4)(b).

12 Companies Act 2006 s 979(4). As to the effect of such notices see PARA 1516. As to applications to the court in respect of such notices see PARA 1519.

13 Companies Act 2006 s 979(5)(a). As to the meaning of 'date of the offer' see PARA 1511 note 2.

14 Ie within the meaning of the Companies Act 2006 s 974: see PARA 1511 note 2.

15 Companies Act 2006 s 979(5)(b).

16 Ie under the Companies Act 2006 s 979(2) or (4): see the text to notes 1-8, 10-12.

17 Companies Act 2006 s 979(5).

18 Companies Act 2006 s 979(6)(a).

19 As to the meaning of 'company' see PARA 1511 note 2.

20 As to the meaning of 'associate' see PARA 1512.

21 Companies Act 2006 s 979(6)(b).

22 See the Companies Act 2006 s 979(7)(a). The offeror's entitlement to give the notice must also be determined as if in relation to such shares, the words 'by virtue of acceptances of the offer' in s 979(2) or (4) (see the text to notes 1-8, 10-12) were omitted: s 979(7)(b).

23 Companies Act 2006 s 979(8)(a).

24 Companies Act 2006 s 979(8)(b)(i).

25 Companies Act 2006 s 979(8)(b)(ii).

26 Companies Act 2006 s 979(8)(c). The specified conditions apply if: (1) at the time the shares are acquired or contracted to be acquired as mentioned in s 979(8) or (9) (see the text to notes 23-25, 30-31) (as the case may be), the value of the consideration for which they are acquired or contracted to be acquired (the 'acquisition consideration') does not exceed the value of the consideration specified in the terms of the offer (s 979(10)(a)); or (2) those terms are subsequently revised so that when the revision is announced the value of the acquisition consideration, at the time mentioned in s 979(10)(a), no longer exceeds the value of the consideration specified in those terms (s 979(10)(b)).

27 Ie for the purposes of the Companies Act 2006 s 979.

28 Ie by the Companies Act 2006 s 977(1): see PARA 1513.

29 Companies Act 2006 s 979(8).

30 Companies Act 2006 s 979(9)(a).

31 Companies Act 2006 s 979(9)(b).

32 Companies Act 2006 s 979(9)(c). The specified conditions are those of s 979(10): see note 26.

33 Ie for the purposes of the Companies Act 2006 s 979.

34 Ie by the Companies Act 2006 s 977(2): see PARA 1513.

35 Companies Act 2006 s 979(9).

36 Companies Act 2006 s 980(1). In the Companies Acts 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: s 1167. As to the meaning of the 'Companies Acts' see PARA 16. As to the

Secretary of State see PARA 6. As to making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. At the date at which this volume states the law no such order or regulations had been made.

37 As to the meaning of 'month' see PARA 1625 note 10.

38 Companies Act 2006 s 980(2)(a).

39 See the Companies Act 2006 s 980(2)(b), (3). The rules referred to are those made under s 943(1) (see PARA 1487) that give effect to European Parliament and Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) art 7: see the Companies Act 2006 s 980(3). As to European Parliament and Council Directive 2004/25 see PARA 1481.

40 Companies Act 2006 s 980(4)(a).

41 Companies Act 2006 s 980(4)(b). The requirements as to the statutory declaration are directory and not mandatory and, accordingly, a failure to comply with them does not nullify the whole procedure: *Re Chez Nico (Restaurants) Ltd* [1992] BCLC 192. Where the offeror is a company (whether or not a company within the meaning of the Companies Act 2006) the statutory declaration must be signed by a director: s 980(5). As to the meaning of 'director' see PARA 478. As to the meaning of 'company' generally see PARA 24. At the date at which this volume states the law no order or regulations prescribing the form of declaration had been made. As to statutory declarations see the Statutory Declarations Act 1835; and **CIVIL PROCEDURE** vol 11 (2009) PARA 1024.

42 A person guilty of such an offence is liable: (1) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine (or both) (Companies Act 2006 s 980(8)(a)); (2) on summary conviction (a) in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or both) and, for continued contravention, a daily default fine not exceeding one-fiftieth of the statutory maximum (s 980(8)(b)(i)); (b) in Scotland or Northern Ireland, to imprisonment for a term not exceeding six months, or to a fine not exceeding the statutory maximum (or both) and, for continued contravention, a daily default fine not exceeding one-fiftieth of the statutory maximum (s 980(8)(b)(ii)). Until the commencement of the Criminal Justice Act 2003 s 154(1), the reference in the Companies Act 2006 s 980(8)(b)(i) above to '12 months' must be read as a reference to 'six months': see ss 1131, 1133; and PARA 1625. As to the meaning of 'person' see PARA 311 note 2. As to the meanings of 'England' and 'Wales' see PARA 1 note 5. As to the statutory maximum and as to the meaning of 'daily default fine' see PARA 1622. As to offences generally see PARA 1622 et seq.

43 Companies Act 2006 s 980(6)(a). It is a defence for a person charged with an offence for failing to send a copy of a notice as required by s 979(4) (see the text to notes 10-12) to prove that he took reasonable steps for securing compliance with that provision: s 980(7).

44 Companies Act 2006 s 980(6)(b).

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1516. Effect of notice to buy out minority shareholder.

Subject to the provisions relating to applications to the court¹, where the offeror² gives a shareholder a notice³ to buy him out⁴ the offeror is entitled and bound to acquire the shares⁵ to which the notice relates on the terms of the offer⁶.

Where the terms of an offer are such as to give the shareholder a choice of consideration, the notice must give particulars of the choice and state (1) that the shareholder may, within six weeks from the date of the notice, indicate his choice by a written communication sent to the offeror at an address specified in the notice⁷; and (2) which consideration specified in the offer will apply if he does not indicate a choice⁸; and this applies whether or not any time-limit or other conditions applicable to the choice under the terms of the offer can still be complied with⁹. If the consideration offered to or (as the case may be) chosen by the shareholder is not cash and the offeror is no longer able to provide it¹⁰, or was to have been provided by a third party who is no longer bound or able to provide it¹¹, the consideration is to be taken to consist

of an amount of cash, payable by the offeror, which at the date of the notice is equivalent to the consideration offered or (as the case may be) chosen¹².

At the end of six weeks from the date of the notice the offeror must immediately send a copy of the notice to the company¹³, and pay or transfer to the company the consideration for the shares to which the notice relates¹⁴. The company must hold any money or other consideration thus received by it on trust for the person who, before the offeror acquired them, was entitled to the shares in respect of which the money or other consideration was received¹⁵.

1 The subject to the Companies Act 2006 s 986: see PARA 1519. The Companies Act 2006 s 987(4) (rights and obligations of offeror in takeover offer made by two or more persons jointly) is subject to ss 981, 982: see s 987(4),(5), (7)-(9); and PARA 1520.

2 As to the meaning of 'offeror' see PARA 1511 note 6. As to joint offers see PARA 1520.

3 The notice under the Companies Act 2006 s 979: see PARA 1515.

4 Companies Act 2006 s 981(1). Under the law as it stood prior to the Companies Act 2006 it was held that such provisions cannot be used to enable the majority simply to expropriate a small minority by arranging an ostensible takeover (see *Re Bugle Press Ltd, Re Houses and Estates Ltd* [1961] Ch 270, [1960] 3 All ER 791, CA, transferee company a mere alias for majority shareholder); and that a dissenting minority may properly complain if they are being subjected to a compulsory purchase as a result of a breach on the part of the board of the company of the duty to be honest and not to mislead shareholders (see *Gething v Kilner* [1972] 1 All ER 1166, [1972] 1 WLR 337, where, in the absence of bad faith on the part of the boards of the two companies, the court refused to grant interlocutory injunctions restraining the board of the transferor company from recommending acceptance of the offer and the transferee company from declaring the offer unconditional; cf *Coleman v Myers* [1977] 2 NZLR 225, NZ CA, in certain circumstances the directors may owe a duty to disclose matters of which they are aware, or have reason to believe, that their shareholders are inadequately informed). See PARA 1501.

The provisions of the Companies Act 2006 ss 981, 982 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 14: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 As to the meaning of 'share' see PARA 1042; and see also PARA 1511 note 2.

6 Companies Act 2006 s 981(2). See also note 8.

7 Companies Act 2006 s 981(3)(a).

8 Companies Act 2006 s 981(3)(b). The reference in s 981(2) (see the text to notes 5-6) to the terms of the offer is to be read accordingly: s 981(3).

9 Companies Act 2006 s 981(4).

10 Companies Act 2006 s 981(5)(a).

11 Companies Act 2006 s 981(5)(b).

12 Companies Act 2006 s 981(5).

13 Companies Act 2006 s 981(6)(a). If the shares to which the notice relates are registered, the copy of the notice sent to the company under s 981(6)(a) must be accompanied by an instrument of transfer executed on behalf of the holder of the shares by a person appointed by the offeror: s 981(7). On receipt of that instrument the company must register the offeror as the holder of those shares: s 981(7). If the shares to which the notice relates are transferable by the delivery of warrants or other instruments, the copy of the notice sent to the company under s 981(6)(a) must be accompanied by a statement to that effect; and on receipt of that statement the company must issue the offeror with warrants or other instruments in respect of the shares, and those already in issue in respect of the shares become void: s 981(8). As to the meaning of 'company' see PARA 1511 note 2. As to the registration of shares see PARA 335. As to the meaning of 'person' see PARA 311 note 2.

In relation to any uncertificated units of a security (other than a wholly dematerialised security) to which a notice given under the Companies Act 2006 s 979 relates (see PARA 1515), then, in place of the provisions of s 981(7), see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 42 (amended by SI 2007/1093; SI 2009/1889).

14 Companies Act 2006 s 981(6)(b). Where the consideration consists of shares or securities to be allotted by the offeror, the reference in s 981(6)(b) to the transfer of the consideration is to be read as a reference to the allotment of the shares or securities to the company: s 981(6).

15 Companies Act 2006 s 981(9). Where an offeror pays or transfers consideration to the company under s 981(6) the company must pay into a separate complying bank account any money it receives under s 981(6)(b) (see the text to note 14) (s 982(1), (2)(a)), and any dividend or other sum accruing from any other consideration it receives under that provision (s 982(1), (2)(b)). A bank account is a complying account if the balance on the account bears interest at an appropriate rate (see s 982(2), (3)(a)), and can be withdrawn by such notice (if any) as is appropriate (see s 982(2), (3)(b)). If the person entitled to the consideration held on trust by virtue of s 981(9) cannot be found (s 982(4)(a)), and reasonable inquiries have been made at reasonable intervals to find the person (see s 982(4)(b), (5)(a)) and 12 years have elapsed since the consideration was received, or the company is wound up (see s 982(4)(b), (5)(b)), the consideration (together with any interest, dividend or other benefit that has accrued from it) must be paid into court (s 982(4)). The expenses of any such inquiries may be paid out of the money or other property held on trust for the person to whom the inquiry relates: s 982(9). Separate provision is made in the case of a company registered in Scotland: see s 982(6)-(8).

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C. SELL-OUT

1517. Right of minority shareholder to be bought out by offeror.

In a case where a takeover offer¹ relates to all the shares² in a company³, the holder of any voting shares⁴ to which the offer relates who has not accepted the offer may require the offeror⁵ to acquire those shares if, at any time before the end of the period within which the offer can be accepted: (1) the offeror has by virtue of acceptances of the offer acquired or unconditionally contracted⁶ to acquire some (but not all) of the shares to which the offer relates⁷; and (2) those shares, with or without any other shares in the company which he has acquired or contracted to acquire⁸ (whether unconditionally or subject to conditions being met) amount to not less than 90 per cent in value of all the voting shares⁹ in the company¹⁰, and carry not less than 90 per cent of the voting rights¹¹ in the company¹².

In a case where a takeover offer relates to all the shares in a company¹³, the holder of any non-voting shares¹⁴ to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the period within which the offer can be accepted (a) the offeror has by virtue of acceptances of the offer acquired or unconditionally contracted to acquire some (but not all) of the shares to which the offer relates¹⁵; and (b) those shares, with or without any other shares in the company which he has acquired or contracted to acquire (whether unconditionally or subject to conditions being met), amount to not less than 90 per cent in value of all the shares¹⁶ in the company¹⁷.

If a takeover offer relates to shares of one or more classes¹⁸ and at any time before the end of the period within which the offer can be accepted:

- 809 (i) the offeror has by virtue of acceptances of the offer acquired or unconditionally contracted to acquire some (but not all) of the shares of any class to which the offer relates¹⁹; and
- 810 (ii) those shares, with or without any other shares of that class which he has acquired or contracted to acquire (whether unconditionally or subject to conditions being met) amount to not less than 90 per cent in value of all the shares of that

class²⁰, and in a case where the shares of that class are voting shares, carry not less than 90 per cent of the voting rights carried by the shares of that class²¹,

the holder of any shares of that class to which the offer relates who has not accepted the offer may require the offeror to acquire those shares²².

The rights conferred on a shareholder by the above provisions²³ are exercisable by a written communication addressed to the offeror²⁴. The rights are not exercisable after the end of the period of three months²⁵ from the end of the period within which the offer can be accepted²⁶, or, if later, the date of the notice required to be given by the offeror²⁷. Within one month of the time specified²⁸, the offeror must give any shareholder who has not accepted the offer notice in the prescribed²⁹ manner of the rights that are exercisable³⁰ by the shareholder³¹ and the period within which the rights are exercisable³²; and if the notice is given before the end of the period within which the offer can be accepted, it must state that the offer is still open for acceptance³³. An offeror who fails to comply with these provisions³⁴ commits an offence³⁵.

1 As to the meaning of 'takeover offer' see PARA 1511.

2 As to the meaning of 'share' see PARA 1042; and see also PARA 1511 note 2.

3 Companies Act 2006 s 983(1). A takeover offer relates to all the shares in a company if it is an offer to acquire all the shares in the company within the meaning of s 974 (see PARA 1511 note 2): s 983(1). As to the meaning of 'company' see PARA 1511 note 2. As to the meaning of 'company' generally see PARA 24. The Companies Act 2006 s 987(4) (rights and obligations of offeror in takeover offer made by two or more persons jointly) is subject to ss 983, 984: see s 987(4), (5), (7); and PARA 1520.

The provisions of the Companies Act 2006 ss 983, 984 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 14: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 As to the meaning of 'voting shares' see PARA 1511 note 2.

5 As to the meaning of 'offeror' see PARA 1511 note 6. As to joint offers see PARA 1520.

6 As to the meaning of 'unconditionally contract' see PARA 1511 note 6.

7 Companies Act 2006 s 983(2)(a).

8 A reference in the Companies Act 2006 s 983(2)(b), (3)(b) (see the text to notes 16-17) or (4)(b) (see the text to notes 20-21) to shares which the offeror has acquired or contracted to acquire includes a reference to shares which an associate of his has acquired or contracted to acquire: s 983(8). As to the meaning of 'associate' see PARA 1512.

9 Ie or would do so but for the Companies Act 2006 s 990(1): see PARA 1511.

10 Companies Act 2006 s 983(2)(b)(i). For the purposes of s 983(2)-(4), in calculating 90% of the value of any shares, shares held by the company as treasury shares are to be treated as having been acquired by the offeror: s 983(5). As to the meaning of 'treasury shares' see PARA 1251.

11 Ie or would do so but for the Companies Act 2006 s 990(1): see PARA 1511. As to the meaning of 'voting rights' see PARA 1511 note 2.

12 Companies Act 2006 s 983(2)(b)(ii). As to the effect of such a requirement to acquire shares see PARA 1518.

13 See the Companies Act 2006 s 983(1).

14 'Non-voting shares' means shares that are not voting shares: Companies Act 2006 s 991(1).

15 Companies Act 2006 s 983(3)(a).

16 Ie or would do so but for the Companies Act 2006 s 990(1): see PARA 1511.

- 17 Companies Act 2006 s 983(3)(b). See also notes 8, 10. As to the effect of such a requirement to acquire shares see PARA 1518.
- 18 As to classes of shares generally see PARA 1057 et seq.
- 19 Companies Act 2006 s 983(4)(a).
- 20 Companies Act 2006 s 983(4)(b)(i). See also notes 8, 10.
- 21 Companies Act 2006 s 983(4)(b)(ii).
- 22 Companies Act 2006 s 983(4). As to the effect of such a requirement to acquire shares see PARA 1518.
- 23 Ie by the Companies Act 2006 s 983(2), (3) or (4): see the text to notes 4-22.
- 24 Companies Act 2006 s 984(1).
- 25 As to the meaning of 'month' see PARA 1625 note 10.
- 26 Companies Act 2006 s 984(2)(a).
- 27 See the Companies Act 2006 s 984(2)(b). The prescribed notice is that which must be given under s 984(3) (see the text to notes 28-33): s 984(2)(b).
- 28 Ie the time specified in the Companies Act 2006 s 983(2), (3) or (4): see the text to notes 4-22.
- 29 The Companies Act 2006 s 984(3) does not apply if the offeror has given the shareholder a notice in respect of the shares in question under s 979 (see PARA 1515): s 984(4). In the Companies Acts 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: s 1167. As to the meaning of the 'Companies Acts' see PARA 16. As to the Secretary of State see PARA 6. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. At the date at which this volume states the law no such order or regulations had been made.
- 30 Ie under the Companies Act 2006 s 983(2), (3) or (4) (as the case may be): see the text to notes 4-22.
- 31 Companies Act 2006 s 984(3)(a).
- 32 Companies Act 2006 s 984(3)(b).
- 33 Companies Act 2006 s 984(3).
- 34 Ie with the Companies Act 2006 s 984(3): see the text to notes 28-33.
- 35 Companies Act 2006 s 984(5). A person guilty of such an offence is liable (1) on conviction on indictment, to a fine (s 984(7)(a)); (2) on summary conviction, to a fine not exceeding the statutory maximum and, for continued contravention, a daily default fine not exceeding one-fiftieth of the statutory maximum (s 984(7)(b)). If the offeror is a company, every officer of that company who is in default or to whose neglect the failure is attributable also commits an offence: s 984(5). If an offeror other than a company is charged with such an offence, it is a defence for him to prove that he took all reasonable steps for securing compliance with s 984(3): s 984(6). As to the meaning of 'officer in default' see PARA 315. As to the meaning of 'person' see PARA 311 note 2. As to the statutory maximum and as to the meaning of 'daily default fine' see PARA 1622.

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1518. Effect of requirement by minority shareholder to be bought out.

Subject to the provisions relating to applications to the court¹, where a shareholder exercises his rights to be bought out² in respect of any shares³ held by him⁴, the offeror is entitled and

bound to acquire those shares on the terms of the offer or on such other terms as may be agreed⁵.

Where the terms of an offer are such as to give the shareholder a choice of consideration, the shareholder may indicate his choice when requiring the offeror to acquire the shares⁶, and the notice given to the shareholder⁷ must give particulars of the choice and of the rights so conferred⁸ and may state which consideration specified in the offer will apply if he does not indicate a choice⁹.

If the consideration offered to or (as the case may be) chosen by the shareholder:

- 811 (1) is not cash and the offeror is no longer able to provide it¹⁰; or
- 812 (2) was to have been provided by a third party who is no longer bound or able to provide it¹¹,

the consideration is to be taken to consist of an amount of cash, payable by the offeror, which at the date when the shareholder requires the offeror to acquire the shares is equivalent to the consideration offered or (as the case may be) chosen¹².

1 Is subject to the Companies Act 2006 s 986: see PARA 1519. The Companies Act 2006 s 987(4) (rights and obligations of offeror in takeover offer made by two or more persons jointly) is subject to s 985: see s 987(4), (5); and PARA 1520.

2 Is his rights under the Companies Act 2006 s 983: see PARA 1517.

3 As to the meaning of 'share' see PARA 1042; and see also PARA 1511 note 2.

4 Companies Act 2006 s 985(1). Where:

2222 (1) a shareholder exercises rights conferred on him by s 983(2), (3) or (4) (see PARA 1517) (s 983(6)(a));

2223 (2) at the time when he does so, there are shares in the company which the offeror has contracted to acquire subject to conditions being met, and in relation to which the contract has not become unconditional (s 983(6)(b)); and

2224 (3) the requirement imposed by s 983(2)(b), (3)(b) or (4)(b) (see PARA 1517) (as the case may be) would not be satisfied if those shares were not taken into account (s 983(6)(c)),

the shareholder is treated for the purposes of s 985 as not having exercised his rights under s 983 unless the requirement imposed by s 983(2)(b), (3)(b) or (4)(b) (as the case may be) would be satisfied if (a) the reference in s 983(2)(b), (3)(b) or (4)(b) (as the case may be) to other shares in the company which the offeror has contracted to acquire unconditionally or subject to conditions being met were a reference to such shares which he has unconditionally contracted to acquire (s 983(7)(a)); and (b) the reference in s 983(2), (3) or (4) (as the case may be) to the period within which the offer can be accepted were a reference to the period referred to in s 984(2) (see PARA 1517) (s 983(7)(b)). A reference in s 983(6) or (7) to shares which the offeror has acquired or contracted to acquire includes a reference to shares which an associate of his has acquired or contracted to acquire: s 983(8). As to the meaning of 'offeror' see PARA 1511 note 6. As to the meaning of 'company' see PARA 1511 note 2. As to the meaning of 'company' generally see PARA 24. As to the meaning of 'unconditionally contract' see PARA 1511 note 6. As to the meaning of 'associate' see PARA 1512.

The provisions of the Companies Act 2006 ss 983, 985 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 14: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 Companies Act 2006 s 985(2). See also note 9. As to joint offers see PARA 1520.

6 Companies Act 2006 s 985(3)(a).

7 Is under the Companies Act 2006 s 984(3): see PARA 1517.

8 Companies Act 2006 s 985(3)(b)(i).

9 Companies Act 2006 s 985(3)(b)(ii). The reference in s 985(2) (see the text to note 5) to the terms of the offer is to be read accordingly: s 985(3). Section 985(3) applies whether or not any time-limit or other conditions applicable to the choice under the terms of the offer can still be complied with: s 985(4).

10 Companies Act 2006 s 985(5)(a).

11 Companies Act 2006 s 985(5)(b).

12 Companies Act 2006 s 985(5).

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D. APPLICATIONS TO THE COURT

1519. Applications to the court.

Where a notice is given to a shareholder to buy him out¹ the court² may, on an application made by him³, order that the offeror⁴ is not entitled and bound to acquire the shares⁵ to which the notice relates⁶, or that the terms on which the offeror is entitled and bound to acquire the shares must be such as the court thinks fit⁷.

Where a shareholder exercises his rights to be bought out⁸ in respect of any shares held by him, the court may, on an application made by him or the offeror, order that the terms on which the offeror is entitled and bound to acquire the shares must be such as the court thinks fit⁹.

On any such application¹⁰: (1) the court may not require consideration of a higher value than that specified in the terms of the offer (the 'offer value') to be given for the shares to which the application relates unless the holder of the shares shows that the offer value would be unfair¹¹; (2) the court may not require consideration of a lower value than the offer value to be given for the shares¹². No order for costs or expenses may be made against a shareholder making any such application unless the court considers that: (a) the application was unnecessary, improper or vexatious¹³; (b) there has been unreasonable delay in making the application¹⁴; or (c) there has been unreasonable conduct on the shareholder's part in conducting the proceedings on the application¹⁵.

A shareholder who has made an application must give notice of the application to the offeror¹⁶. An offeror who is given notice of an application must give a copy of the notice to any person¹⁷ (other than the applicant) to whom a notice has been given¹⁸ previously¹⁹, and any person who has exercised his rights²⁰ to be bought out²¹. An offeror who makes an application²² must give notice of the application to any person to whom a notice has been given²³ previously²⁴, and any person who has exercised his rights²⁵ to be bought out²⁶.

Where a takeover offer has not been accepted to the extent necessary for entitling the offeror to give the statutory notice²⁷ the court may, on an application made by him, make an order authorising him to give such notice if it is satisfied that: (i) the offeror has after reasonable inquiry been unable to trace one or more of the persons holding shares to which the offer relates²⁸; (ii) the statutory requirements²⁹ would have been met if the person, or all the persons, mentioned in head (i) above had accepted the offer³⁰; and (iii) the consideration offered is fair and reasonable³¹. However, the court may not make such an order unless it considers that it is just and equitable to do so having regard, in particular, to the number of shareholders who have been traced but who have not accepted the offer³².

1 le under the Companies Act 2006 s 979: see PARA 1515. The Companies Act 2006 s 987(4) (rights and obligations of offeror in takeover offer made by two or more persons jointly) is subject to s 986: see s 987(4), (5), (10); and PARA 1520.

2 As to the meaning of 'court' see PARA 212 note 1.

3 An application must be made within six weeks from the date on which the notice was given: Companies Act 2006 s 986(2). If an application to the court is pending at the end of that period, s 981(6) (see PARA 1516) does not have effect until the application has been disposed of: s 986(2). As to the general procedure for making applications to the court see *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49; and PARA 305.

The provisions of the Companies Act 2006 s 986 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 14: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 As to the meaning of 'offeror' see PARA 1511 note 6. As to joint offers see PARA 1520.

5 As to the meaning of 'share' see PARA 1042; and see also PARA 1511 note 2.

6 Companies Act 2006 s 986(1)(a).

7 Companies Act 2006 s 986(1)(b). See eg *Fiske Nominees Ltd v Dwyka Diamonds Ltd* [2002] EWHC 770 (Ch), [2002] 2 BCLC 123.

8 le his rights under the Companies Act 2006 s 983: see PARA 1517.

9 Companies Act 2006 s 986(3).

10 le under the Companies Act 2006 s 986(1) or (3): see the text to notes 1-9.

11 Companies Act 2006 s 986(4)(a). The following cases were decided under the law prior to the Companies Act 2006. The court will not make an order unless the dissentient shareholder establishes that notwithstanding the views of the majority the scheme is unfair: *Re Hoare & Co Ltd* (1933) 150 LT 374; *Re Evertite Locknuts Ltd* [1945] Ch 220, [1945] 1 All ER 401; *Re Press Caps Ltd* [1949] Ch 434, [1949] 1 All ER 1013, CA; *Re Sussex Brick Co Ltd* [1961] Ch 289n, [1960] 1 All ER 772n; *Nidditch v Calico Printers' Association Ltd* 1961 SLT 282, Ct of Sess; *Re Grierson, Oldham and Adams Ltd* [1968] Ch 17, [1967] 1 All ER 192; *Fiske Nominees Ltd v Dwyka Diamonds Ltd* [2002] EWHC 770 (Ch), [2002] 2 BCLC 123. The test of fairness is whether the offer is fair to offerees as a whole, not to the applicant as an individual; the onus of proving that the offer is unfair is a heavy one where the offer price is above the market price: *Re Grierson, Oldham and Adams Ltd*. The mere fact that the dissentient shareholder was not provided with all the materials on which he could come to a just conclusion regarding the proposal will not normally be sufficient in itself to establish that the scheme is unfair: *Re Evertite Locknuts Ltd*; *Re Press Caps Ltd*. Cf *Fiske Nominees Ltd v Dwyka Diamonds Ltd*. Where the bidder is an insider in the offeree company, the onus, it seems, is on those serving the compulsory acquisition notice to establish that the offer is fair: *Re Bugle Press Ltd, Re Houses and Estates Ltd* [1961] Ch 270, [1960] 3 All ER 791, CA; see *Re Chez Nico Restaurants Ltd* [1992] BCLC 192 at 207 per Browne-Wilkinson V-C; *Fiske Nominees Ltd v Dwyka Diamonds Ltd* at 128-129 per Peter Leaver QC (sitting as a Deputy Judge of the High Court).

12 Companies Act 2006 s 986(4)(b).

13 Companies Act 2006 s 986(5)(a).

14 Companies Act 2006 s 986(5)(b).

15 Companies Act 2006 s 986(5)(c).

16 Companies Act 2006 s 986(6).

17 As to the meaning of 'person' see PARA 311 note 2.

18 le under the Companies Act 2006 s 979 (notice to buy out minority shareholder): see PARA 1515.

19 Companies Act 2006 s 986(7)(a).

20 le his rights under the Companies Act 2006 s 983 (right of minority shareholder to be bought out by offeror): see PARA 1517.

21 Companies Act 2006 s 986(7)(b).

- 22 le under the 2006 s 986(3): see the text to notes 8-9.
- 23 le under the Companies Act 2006 s 979: see PARA 1515.
- 24 Companies Act 2006 s 986(8)(a).
- 25 le his rights under the Companies Act 2006 s 983: see PARA 1517.
- 26 Companies Act 2006 s 986(8)(b).
- 27 le under the Companies Act 2006 s 979(2) or (4): see PARA 1515.
- 28 Companies Act 2006 s 986(9)(a).
- 29 le the requirements of the Companies Act 2006 s 979(2) or (4): see PARA 1515.
- 30 Companies Act 2006 s 986(9)(b).
- 31 Companies Act 2006 s 986(9)(c).
- 32 See the Companies Act 2006 s 986(9), (10).

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E. APPLICATION OF PROVISIONS

1520. Effect of provisions in relation to joint offers.

In the case of a takeover offer¹ made by two or more persons² jointly, the provisions relating to 'squeeze out' and 'sell out'³ have effect as follows⁴:

- 813 (1) the conditions for the exercise of the rights of an offeror⁵ to buy out minority shareholders⁶ are satisfied: (a) in the case of acquisitions by virtue of acceptances of the offer, by the joint offerors acquiring or unconditionally contracting⁷ to acquire the necessary shares jointly⁸; (b) in other cases, by the joint offerors acquiring or unconditionally contracting to acquire the necessary shares either jointly or separately⁹;
- 814 (2) the conditions for the exercise of the rights of a minority shareholder to be bought out by an offeror¹⁰ are satisfied: (a) in the case of acquisitions by virtue of acceptances of the offer, by the joint offerors acquiring or unconditionally contracting to acquire the necessary shares jointly¹¹; (b) in other cases, by the joint offerors acquiring or contracting (whether unconditionally or subject to conditions being met) to acquire the necessary shares either jointly or separately¹²;
- 815 (3) the rights and obligations of the offeror¹³ are respectively joint rights and joint and several obligations of the joint offerors¹⁴.

1 As to the meaning of 'takeover offer' see PARA 1511.

2 As to the meaning of 'person' see PARA 311 note 2.

3 le the Companies Act 2006 Pt 28 Ch 3 (ss 974-991): see PARAS 1511-1519, 1521.

4 Companies Act 2006 s 987(1).

The provisions of the Companies Act 2006 s 987 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 14: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

- 5 As to the meaning of 'offeror' see PARA 1511 note 6.
- 6 le the rights conferred by the Companies Act 2006 s 979: see PARA 1515.
- 7 As to the meaning of 'unconditionally contract' see PARA 1511 note 6.
- 8 Companies Act 2006 s 987(2)(a). As to the meaning of 'share' see PARA 1042; and see also PARA 1511 note 2.
- 9 Companies Act 2006 s 987(2)(b).
- 10 le the rights conferred by the Companies Act 2006 s 983: see PARA 1517.
- 11 Companies Act 2006 s 987(3)(a).
- 12 Companies Act 2006 s 987(3)(b).
- 13 le under the Companies Act 2006 ss 979-985: see PARAS 1515-1518.
- 14 Companies Act 2006 s 987(4). This provision is expressed to be subject to the following provisions (see s 987(4)):
 - 2225 (1) a provision of ss 979-986 (see PARAS 1515-1519) that requires or authorises a notice or other document to be given or sent by or to the joint offerors is complied with if the notice or document is given or sent by or to any of them (but see s 987(6) below) (s 987(5));
 - 2226 (2) the statutory declaration required by s 980(4) (see PARA 1515) must be made by all of the joint offerors and, where one or more of them is a company, signed by a director of that company (s 987(6));
 - 2227 (3) in ss 974-977 (see PARAS 1511, 1513), s 979(9) (see PARA 1515), s 981(6) (see PARA 1516), s 983(8) (see PARAS 1517, 1518) and s 988 (see PARA 1512) references to the offeror are to be read as references to the joint offerors or any of them (s 987(7));
 - 2228 (4) in s 981(7) and (8) (see PARA 1516) references to the offeror are to be read as references to the joint offerors or such of them as they may determine (s 987(8));
 - 2229 (5) in s 981(5)(a) (see PARA 1516) and s 985(5)(a) (see PARA 1518) references to the offeror being no longer able to provide the relevant consideration are to be read as references to none of the joint offerors being able to do so (s 987(9));
 - 2230 (6) in s 986 (see PARA 1519) references to the offeror are to be read as references to the joint offerors, except that (a) an application under s 986(3) or (9) may be made by any of them (s 987(10)(a)); and (b) the reference in s 986(9)(a) to the offeror having been unable to trace one or more of the persons holding shares is to be read as a reference to none of the offerors having been able to do so (s 987(10)(b)).

As to the meaning of 'director' see PARA 478. As to the meaning of 'company' see PARA 24.

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(29) DISSOLUTION AND RESTORATION TO THE REGISTER

(i) Striking Off

A. REGISTRAR'S POWER TO STRIKE OFF DEFUNCT COMPANY

1521. Registrar's power to strike defunct company off register.

If the registrar¹ has reasonable cause to believe that a company² is not carrying on business or in operation, he may send to the company by post a letter inquiring whether the company is carrying on business or in operation³. If the registrar does not within one month of sending the letter receive any answer to it, he must within 14 days after the expiration of that month send to the company by post a registered letter⁴ referring to the first letter, and stating that no answer to it has been received, and that if an answer is not received to the second letter within one month from its date, a notice will be published in the Gazette⁵ with a view to striking the company's name off the register⁶.

If the registrar either receives an answer to the effect that the company is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer, he may publish in the Gazette, and send to the company by post, a notice that at the expiration of three months from the date of the notice the name of the company mentioned in it will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved⁷.

1 As to the meaning of 'registrar' see PARA 131 note 2.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 Companies Act 2006 s 1000(1). As to service of letters and notices see PARA 1524.

4 Any enactment which requires or authorises a document or other thing to be sent by registered post, whether or not it makes any other provision in relation to it, has effect as if it required, or, as the case may be, authorised that thing to be sent by registered post or the recorded delivery service: Recorded Delivery Service Act 1962 s 1(1). As to the Recorded Delivery Service see **POST OFFICE** vol 36(2) (Reissue) PARAS 116-119.

5 As to the meaning of the 'Gazette' see PARA 138 note 2; and as to alternatives to publication in the Gazette see the Companies Act 2006 s 1116; and PARA 138.

6 Companies Act 2006 s 1000(2). As to the meaning of 'register' see PARA 146.

7 Companies Act 2006 s 1000(3). As to striking off and dissolution see PARA 1523.

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1522. Striking off: companies in liquidation.

If, in a case where a company¹ is being wound up, the registrar² has reasonable cause to believe either that no liquidator is acting, or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator³ have not been made for a period of six consecutive months, the registrar must publish in the Gazette⁴ and send to the company or the liquidator, if any, a notice⁵ that at the expiration of three months from the date of the notice the name of the company mentioned in it will, unless cause is shown to the contrary, be struck off the register⁶ and the company will be dissolved⁷.

- 1 As to the meaning of 'company' under the Companies Acts see PARA 24.
- 2 As to the meaning of 'registrar' see PARA 131 note 2.
- 3 As to the returns required to be made by the liquidator see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 598; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1005-1008, 1021.
- 4 As to the meaning of the 'Gazette' see PARA 138 note 2; and as to alternatives to publication in the Gazette see the Companies Act 2006 s 1116; and PARA 138.
- 5 As to service of the notice see PARA 1524.
- 6 As to the meaning of 'register' see PARA 146.
- 7 Companies Act 2006 s 1001(1).

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1523. Striking company off the register; dissolution.

At the expiration of the time mentioned in the notice sent by the registrar¹ he may, unless cause to the contrary is previously shown by the company², strike its name off the register³. The registrar must publish notice in the Gazette⁴ of the company's name having been struck off the register⁵; and on the publication of that notice the company is dissolved⁶. However, the liability, if any, of every director⁷, managing officer⁸ and member⁹ of the company continues and may be enforced as if the company had not been dissolved¹⁰; and nothing in these provisions¹¹ affects the power of the court¹² to wind up a company the name of which has been struck off the register¹³.

- 1 I.e. the notice mentioned in the Companies Act 2006 s 1000(3) (see PARA 1521) or, in the case of a company in liquidation, s 1001(1) (see PARA 1522). As to the meaning of 'registrar' see PARA 131 note 2.
- 2 As to the meaning of 'company' under the Companies Acts see PARA 24.
- 3 Companies Act 2006 ss 1000(4), 1001(2); and see *Steans Fashions Ltd v Legal and General Assurance Society Ltd* [1995] 1 BCLC 332, CA (decided under the Companies Act 1985 s 652(5) (repealed and replaced by the provisions set out in the text)). As to the meaning of 'register' see PARA 146.
- 4 As to the meaning of the 'Gazette' see PARA 138 note 2; and as to alternatives to publication in the Gazette see the Companies Act 2006 s 1116; and PARA 138.
- 5 Companies Act 2006 ss 1000(5), 1001(3).
- 6 Companies Act 2006 ss 1000(6), 1001(4).
- 7 As to the meaning of 'director' under the Companies Acts see PARA 478.
- 8 As to the meaning of 'officer' see PARA 607.
- 9 As to who qualifies as a member of a company see PARA 321.
- 10 Companies Act 2006 ss 1000(7)(a), 1001(5)(a).
- 11 I.e. nothing in the Companies Act 2006 ss 1000, 1001: see the text and notes 1-11; and PARAS 1521, 1522.

12 As to the meaning of 'court' see PARA 212 note 1.

13 Companies Act 2006 ss 1000(7)(b), 1001(5)(b). These provisos would appear to be intended to empower the court to wind up a company without first restoring it to the register; but as to the practical disadvantages of such an order see *Re Cambridge Coffee Room Association Ltd* [1952] 1 All ER 112n; cf *Re Beith Unionist Association Trustees* 1950 SC 1, Ct of Sess. As to restoration to the register see PARA 1532 et seq.

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1524. Service of letter or notice.

A notice to be sent to a liquidator¹ may be addressed to him at his last known place of business²; and a letter or notice to be sent to a company³ may be addressed to the company at its registered office⁴ or, if no office has been registered, to the care of some officer⁵ of the company⁶. If there is no officer of the company whose name and address are known to the registrar⁷, the letter or notice may be sent to each of the persons who subscribed the memorandum⁸ if their addresses are known to the registrar⁹.

1 le under the Companies Act 2006 s 1001: see PARA 1522.

2 Companies Act 2006 s 1002(3).

3 le under the Companies Act 2006 s 1000 or s 1001: see PARAS 1521, 1522. As to the meaning of 'company' under the Companies Acts see PARA 24.

4 As to a company's registered office see PARA 129.

5 As to the meaning of 'officer' see PARA 607.

6 Companies Act 2006 s 1002(1).

7 As to the meaning of 'registrar' see PARA 131 note 2.

8 As to the memorandum of association, and subscribers of the memorandum, see PARA 104.

9 Companies Act 2006 s 1002(2).

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B. VOLUNTARY STRIKING OFF ON APPLICATION

1525. Registrar's power to strike company off register on application.

On application by a company¹, the registrar of companies² may strike the company's name off the register³. The application must be made on the company's behalf by its directors⁴ or by a majority of them⁵, and must contain the prescribed information⁶, namely a declaration⁷ that no

activities of the company or unconcluded proceedings prevent⁸ the application from being made⁹.

The registrar may not strike a company off under these provisions until after the expiration of three months from the publication by the registrar in the Gazette¹⁰ of a notice stating that the registrar may exercise the power under these provisions in relation to the company and inviting any person to show cause why that should not be done¹¹.

1 As to the meaning of 'company' under the Companies Acts see PARA 24. The power set out in the text extends to any 'company' (as so defined) whereas it was previously restricted to private companies (see the wording used in the Companies Act 1985 s 652A (repealed); and see now the Companies Act 2006 s 1003).

2 As to the meaning of 'registrar of companies' see PARA 131 note 2.

3 Companies Act 2006 s 1003(1). As to the meaning of 'register' see PARA 146. As to the fees payable for the striking off the register of a company's name payable on an application under s 1003 see the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 7(h).

4 As to the meaning of 'director' under the Companies Acts see PARA 478.

5 Companies Act 2006 s 1003(2)(a).

6 Companies Act 2006 s 1003(2)(b). In the Companies Acts, 'prescribed' means prescribed (by order or by regulations) by the Secretary of State: Companies Act 2006 s 1167. As to the Secretary of State see PARA 6. As to the making of orders and regulations under the Companies Act 2006 generally see ss 1288-1292. In exercise of the powers conferred by s 1003(2)(b), the Secretary of State has made the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 2, which came into force on 1 October 2009 (see reg 1(1)): see the text and notes 7-9.

7 The declaration must be made by the directors who are making the application on behalf of the company: Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 2(2).

8 I.e. a declaration that neither the Companies Act 2006 s 1004 (see PARA 1526) nor s 1005 (see PARA 1527) prevents: see the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 2(1).

9 See the Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803, reg 2(1).

10 As to the meaning of the 'Gazette' see PARA 138 note 2; and as to alternatives to publication in the Gazette see the Companies Act 2006 s 1116; and PARA 138.

11 Companies Act 2006 s 1003(3).

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1526. Application not to be made due to company's activities.

An application for voluntary striking off¹ on behalf of a company² must not be made if, at any time in the previous three months³, the company has:

- 816 (1) changed its name;
- 817 (2) traded or otherwise carried on business⁴;

- 818 (3) made a disposal for value of property or rights that, immediately before
ceasing to trade or otherwise carry on business, it held for the purpose of disposal
for gain in the normal course of trading or otherwise carrying on business; or
- 819 (4) engaged in any other activity, except one which is:
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397. (a) necessary or expedient for the purpose of making an application for the
company to be struck off the register⁵, or deciding whether to do so;
398. (b) necessary or expedient for the purpose of concluding the affairs of the
company;
399. (c) necessary or expedient for the purpose of complying with any statutory
requirement; or
400. (d) specified by the Secretary of State by order⁶ for these purposes⁷.
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It is an offence for a person to make an application in contravention of these provisions⁸. In proceedings for such an offence it is, however, a defence for the accused to prove that he did not know, and could not reasonably have known, of the existence of the facts that led to the contravention⁹.

1 le an application under the Companies Act 2006 s 1003: see PARA 1525.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 The Secretary of State may by order amend the Companies Act 2006 s 1004(1) for the purpose of altering the period in relation to which the doing of the things mentioned in s 1004(1)(a)-(d) (see heads (1)-(4) in the text) is relevant: s 1004(3). An order under s 1004 is subject to negative resolution procedure (ie the statutory instrument containing the order is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1004(4), 1289. As to the Secretary of State see PARA 6. At the date at which this volume states the law, no such order had been made.

4 For these purposes, a company is not to be treated as trading or otherwise carrying on business by virtue only of the fact that it makes a payment in respect of a liability incurred in the course of trading or otherwise carrying on business: Companies Act 2006 s 1004(2).

5 See note 1.

6 As to the procedure for making the order see note 3.

7 Companies Act 2006 s 1004(1).

8 Companies Act 2006 s 1004(5). A person guilty of such an offence is liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum: s 1004(6). As to the statutory maximum see PARA 1622.

9 Companies Act 2006 s 1004(7).

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1527. Application not to be made due to unconcluded proceedings.

An application for voluntary striking off¹ on behalf of a company² must not be made at a time when³:

- 820 (1) an application to the court⁴ under Part 26 of the Companies Act 2006⁵ has been made on behalf of the company for the sanctioning of a compromise or arrangement and the matter has not been finally concluded⁶;
- 821 (2) a voluntary arrangement in relation to the company has been proposed under Part I of the Insolvency Act 1986⁷ or the corresponding Northern Ireland legislation⁸ and the matter has not been finally concluded⁹;
- 822 (3) the company is in administration under Part II of the Insolvency Act 1986¹⁰ or the corresponding Northern Ireland legislation¹¹;
- 823 (4) the statutory provisions imposing an interim moratorium on proceedings where application to the court for an administration order has been made or notice of intention to appoint an administrator has been filed¹² apply¹³;
- 824 (5) the company is being wound up under Part IV of the Insolvency Act 1986¹⁴ or the corresponding Northern Ireland legislation¹⁵, whether voluntarily or by the court, or a petition¹⁶ for winding up of the company by the court has been presented and not finally dealt with or withdrawn¹⁷;
- 825 (6) there is a receiver or manager of the company's property¹⁸;
- 826 (7) the company's estate is being administered by a judicial factor¹⁹.

It is an offence for a person to make an application in contravention of these provisions²⁰. In proceedings for such an offence it is, however, a defence for the accused to prove that he did not know, and could not reasonably have known, of the existence of the facts that led to the contravention²¹.

1 I.e. an application under the Companies Act 2006 s 1003: see PARA 1525.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 Companies Act 2006 s 1005(1).

4 As to the meaning of 'court' see PARA 212 note 1.

5 I.e. under the Companies Act 2006 Pt 26 (ss 895-901): see PARA 1425 et seq.

6 Companies Act 2006 s 1005(1)(a). For the purposes of s 1005(1)(a), the matter is finally concluded if (1) the application has been withdrawn; (2) the application has been finally dealt with without a compromise or arrangement being sanctioned by the court; or (3) a compromise or arrangement has been sanctioned by the court and has, together with anything required to be done under any provision made in relation to the matter by order of the court, been fully carried out: s 1005(2).

7 I.e. under the Insolvency Act 1986 Pt I (ss 1-7B) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 71 et seq).

8 I.e. under the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Pt II.

9 Companies Act 2006 s 1005(1)(b). For the purposes of s 1005(1)(b), the matter is finally concluded if (1) no meetings are to be summoned under the Insolvency Act 1986 s 3 or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 16; (2) meetings summoned thereunder fail to approve the arrangement with no, or the same, modifications; (3) an arrangement approved by meetings summoned under the Insolvency Act 1986 s 3, or in consequence of a direction under s 6(4)(b) or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 19(4)(b), has been fully implemented; (4) the court makes an order under the Insolvency Act 1986 s 6(5) or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 19(5) revoking approval given at previous meetings and, if the court gives any directions under the Insolvency Act 1986 s 6(6) or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 19(6), the company has done whatever it is required to do under those directions: Companies Act 2006 s 1005(3).

10 I.e. under the Insolvency Act 1986 Pt II (s 8) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 145 et seq).

11 Companies Act 2006 s 1005(1)(c). The Northern Ireland legislation referred to in the text is the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Pt III.

12 le the Insolvency Act 1986 Sch B1 para 44 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 224).

13 Companies Act 2006 s 1005(1)(d).

14 le under the Insolvency Act 1986 Pt IV (s 73-219) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 433 et seq).

15 le under the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Pt V.

16 le a petition under the provisions referred to in notes 14, 15.

17 Companies Act 2006 s 1005(1)(e).

18 Companies Act 2006 s 1005(1)(f). As to the construction of references to receivers and managers in the Companies Acts, and in the Insolvency Act 1986, see PARA 1336.

19 Companies Act 2006 s 1005(1)(g).

20 Companies Act 2006 s 1005(4). A person guilty of such an offence is liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum: s 1005(6). As to the statutory maximum see PARA 1622.

21 Companies Act 2006 s 1005(5).

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1528. Duties in connection with making application.

A person who makes an application for voluntary striking off¹ on behalf of a company² must secure that, within seven days from the day on which the application is made, a copy of it is given³ to every person who at any time on that day is:

- 827 (1) a member of the company⁴;
- 828 (2) an employee of the company;
- 829 (3) a creditor of the company;
- 830 (4) a director⁵ of the company;
- 831 (5) a manager or trustee of any pension fund established for the benefit of employees of the company; or
- 832 (6) a person of a description specified for these purposes by regulations⁶ made by the Secretary of State⁷;

but this does not require a copy of the application to be given to a director who is a party to the application⁸. The duty so imposed ceases to apply if the application is withdrawn⁹ before the end of the period for giving the copy application¹⁰. A person who fails to perform the duty imposed on him by the above provisions commits an offence¹¹; and if he does so with the intention of concealing the making of the application from the person concerned, he commits an aggravated offence¹². In proceedings for an offence under these provisions it is, however, a defence for the accused to prove that he took all reasonable steps to perform the duty¹³.

In relation to any time after the day on which a company makes an application for voluntary striking off¹⁴ and before the day on which the application is finally dealt with or withdrawn, the

following provisions apply¹⁵. A person who is a director of the company at the end of a day on which a person other than himself becomes a person such as is described in heads (1) to (5) above, or becomes a person of a description specified for these purposes by regulations made by the Secretary of State¹⁶, must secure that a copy of the application is given to that person within seven days from that day¹⁷. The duty so imposed ceases to apply if the application is finally dealt with or withdrawn before the end of the period for giving the copy application¹⁸. A person who fails to perform the duty imposed on him by these provisions commits an offence¹⁹; and if he does so with the intention of concealing the making of the application from the person concerned, he commits an aggravated offence²⁰. In proceedings for an offence under these provisions it is, however, a defence for the accused to prove either that at the time of the failure he was not aware of the fact that the company had made an application for voluntary striking off²¹ or that he took all reasonable steps to perform the duty²².

1 le an application under the Companies Act 2006 s 1003: see PARA 1525.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 A document is treated as given to a person for the purposes of the Companies Act 2006 ss 1006, 1007 (see the text and notes 1, 2, 4-22) if it is (1) delivered to him; or (2) left at his proper address; or (3) sent by post to him at that address: s 1008(1), (2). For these purposes, and the purposes of the Interpretation Act 1978 s 7 (service of documents by post: see **STATUTES** vol 44(1) (Reissue) PARA 1388) as it applies in relation to the Companies Act 2006 s 1008(2), the proper address of a person is (a) in the case of a firm incorporated or formed in the United Kingdom, its registered or principal office; (b) in the case of a firm incorporated or formed outside the United Kingdom: (i) if it has a place of business in the United Kingdom, its principal office in the United Kingdom; or (ii) if it does not have a place of business in the United Kingdom, its registered or principal office; (c) in the case of an individual, his last known address: s 1008(3). In the case of a creditor of the company a document is treated as given to him if it is left or sent by post to him (A) at the place of business of his with which the company has had dealings by virtue of which he is a creditor of the company; or (B) if there is more than one such place of business, at each of them: s 1008(4). As to the meaning of 'firm' under the Companies Acts see PARA 112 note 15; and as to the meaning of 'United Kingdom' see PARA 1 note 5.

For the purposes of the Companies Act 2006 Pt 31 Ch 1 (ss 1000-1011), 'creditor' includes a contingent or prospective creditor: s 1011.

4 As to the meaning of 'member of the company' see PARA 321.

5 As to the meaning of 'director' see PARA 478.

6 Regulations under the Companies Act 2006 s 1006(1)(f) (see head (6) in the text) are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1006(1), 1289.

7 Companies Act 2006 s 1006(1). At the date at which this volume states the law, no regulations had been made for the purposes of s 1006(1)(f). As to the Secretary of State see PARA 6.

In the case of a community interest company, a copy of the application for voluntary striking off must also be given to the Regulator: see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 51(3). As to community interest companies see PARA 82 et seq; and as to the Regulator see PARA 83.

8 Companies Act 2006 s 1006(2).

9 An application under the Companies Act 2006 s 1003 (see PARA 1525) is withdrawn by notice to the registrar: s 1010. As to the meaning of 'registrar' see PARA 131 note 2.

10 Companies Act 2006 s 1006(3).

11 Companies Act 2006 s 1006(4). A person guilty of such an offence (other than an aggravated offence) is liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum: s 1006(6). As to the statutory maximum see PARA 1622.

12 Companies Act 2006 s 1006(4). A person guilty of an aggravated offence under s 1006 is liable on conviction on indictment to imprisonment for a term not exceeding seven years or a fine, or to both, or on summary conviction in England and Wales to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum, or to both: s 1006(7)(a), (b)(i).

13 Companies Act 2006 s 1006(5).

14 See note 1.

15 Companies Act 2006 s 1007(1).

16 Regulations for these purposes are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): Companies Act 2006 ss 1007(1), 1289. At the date at which this volume states the law, no such regulations had been made.

17 Companies Act 2006 s 1007(2).

18 Companies Act 2006 s 1007(3).

19 Companies Act 2006 s 1007(4). A person guilty of an offence under s 1007 (other than an aggravated offence) is liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum: s 1007(6).

20 Companies Act 2006 s 1007(4). A person guilty of an aggravated offence under s 1007 is liable on conviction on indictment to imprisonment for a term not exceeding seven years or a fine, or to both, or on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum, or to both: s 1007(7)(a), (b)(i).

21 See note 1.

22 Companies Act 2006 s 1007(5).

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1529. Circumstances in which application must be withdrawn.

The following provisions apply where, at any time on or after the day on which a company¹ makes an application for voluntary striking off² and before the day on which the application is finally dealt with or withdrawn³:

833 (1) the company:

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401. (a) changes its name;

402. (b) trades or otherwise carries on business⁴;

403. (c) makes a disposal for value of any property or rights other than those which it was necessary or expedient for it to hold for the purpose of making, or proceeding with, an application for voluntary striking off; or

404. (d) engages in any activity, except one which is excepted⁵ for these purposes⁶;

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834 (2) an application is made to the court⁷ under Part 26 of the Companies Act 2006⁸ on behalf of the company for the sanctioning of a compromise or arrangement⁹;

835 (3) a voluntary arrangement in relation to the company is proposed under Part I of the Insolvency Act 1986¹⁰ or the corresponding Northern Ireland legislation¹¹;

836 (4) an application to the court for an administration order in respect of the company is made under the specified¹² statutory provisions¹³;

837 (5) an administrator is appointed¹⁴ in respect of the company, or a copy of notice of intention to appoint an administrator of the company¹⁵ is filed with the court¹⁶;

- 838 (6) there arise any of the circumstances in which the company may be¹⁷
voluntarily wound up¹⁸;
- 839 (7) a petition is presented for the winding up of the company by the court under
Part 4 of the Insolvency Act 1986¹⁹ or the corresponding Northern Ireland
legislation²⁰;
- 840 (8) a receiver or manager of the company's property is appointed²¹; or
- 841 (9) a judicial factor is appointed to administer the company's estate²².

A person who, at the end of a day on which any of the events mentioned in heads (1) to (9) occurs, is a director²³ of the company must secure that the company's application is withdrawn forthwith²⁴; and if he fails to perform the duty so imposed on him he commits an offence²⁵. In proceedings for such an offence it is, however, a defence for the accused to prove either that at the time of the failure he was not aware of the fact that the company had made an application for voluntary striking off²⁶, or that he took all reasonable steps to perform the duty²⁷.

1 As to the meaning of 'company' under the Companies Acts see PARA 24.

2 Ie an application under the Companies Act 2006 s 1003: see PARA 1525.

3 Companies Act 2006 s 1009(1). As to withdrawal of an application see s 1010, cited in PARA 1528 note 9.

4 For these purposes, a company is not treated as trading or otherwise carrying on business by virtue only of the fact that it makes a payment in respect of a liability incurred in the course of trading or otherwise carrying on business: Companies Act 2006 s 1009(3).

5 Ie except one to which the Companies Act 2006 s 1009(4) applies: s 1009(1)(a)(iv). The excepted activities referred to in s 1009(1)(a)(iv) (see head (1)(d) in the text) are (1) any activity necessary or expedient for the purposes of (a) making, or proceeding with, an application under s 1003 (application for voluntary striking off: see PARA 1525); (b) concluding affairs of the company that are outstanding because of what has been necessary or expedient for the purpose of making, or proceeding with, such an application; or (c) complying with any statutory requirement; (2) any activity specified by the Secretary of State by order for these purposes: s 1009(4). An order under s 1009(4)(b) (see head (2) above) is subject to negative resolution procedure (ie the statutory instrument containing the order is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1009(4), 1289. As to the Secretary of State see PARA 6. At the date at which this volume states the law, no such order had been made.

6 Companies Act 2006 s 1009(1)(a).

7 As to the meaning of 'court' see PARA 212 note 1.

8 Ie under the Companies Act 2006 Pt 26 (ss 895-901): see PARA 1425 et seq.

9 Companies Act 2006 s 1009(1)(b).

10 Ie under the Insolvency Act 1986 Pt I (ss 1-7B) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 71 et seq).

11 Companies Act 2006 s 1009(1)(c). The Northern Ireland legislation referred to in the text is the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Pt II.

12 Ie under the Insolvency Act 1986 Sch B1 para 12 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 216).

13 Companies Act 2006 s 1009(1)(d).

14 Ie under the Insolvency Act 1986 Sch B1 para 14 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 228) or Sch B1 para 22 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 236).

15 Ie under any of the provisions referred to in note 14.

16 Companies Act 2006 s 1009(1)(e).

17 le under the Insolvency Act 1986 s 84(1) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 939).

18 Companies Act 2006 s 1009(1)(f).

19 le under the Insolvency Act 1986 Pt IV (s 73-219) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 433 et seq).

20 Companies Act 2006 s 1009(1)(g). The Northern Ireland legislation referred to in the text is the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Pt V.

21 Companies Act 2006 s 1009(1)(h). As to the construction of references to receivers and managers in the Companies Acts, and in the Insolvency Act 1986, see PARA 1336.

22 Companies Act 2006 s 1009(1)(i).

23 As to the meaning of 'director' see PARA 478.

24 Companies Act 2006 s 1009(2).

25 Companies Act 2006 s 1009(5). A person guilty of such an offence is liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum: s 1009(7). As to the statutory maximum see PARA 1622.

26 See note 2.

27 Companies Act 2006 s 1009(6).

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1530. Striking the company off the register: dissolution.

The registrar¹ must publish notice in the Gazette² of the company's³ name having been struck off⁴; and on the publication of that notice the company is dissolved⁵. However, the liability, if any, of every director⁶, managing officer⁷ and member⁸ of the company continues and may be enforced as if the company had not been dissolved⁹; and nothing in these provisions¹⁰ affects the power of the court¹¹ to wind up a company the name of which has been struck off the register¹².

1 As to the meaning of 'registrar' see PARA 131 note 2.

2 As to the meaning of the 'Gazette' see PARA 138 note 2; and as to alternatives to publication in the Gazette see the Companies Act 2006 s 1116; and PARA 138.

3 As to the meaning of 'company' under the Companies Acts see PARA 24.

4 Companies Act 2006 s 1003(4).

5 Companies Act 2006 s 1003(5).

6 As to the meaning of 'director' see PARA 478.

7 As to the meaning of 'officer' see PARA 607.

8 As to who qualifies as a member of a company see PARA 321.

- 9 Companies Act 2006 s 1003(6)(a).
- 10 ie nothing in the Companies Act 2006 s 1003: see the text and notes 1-9; and PARA 1525.
- 11 As to the meaning of 'court' see PARA 212 note 1.
- 12 Companies Act 2006 s 1003(6)(b).

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C. PROPERTY OF DISSOLVED COMPANY

1531. Property vesting as bona vacantia; Crown disclaimer.

When a company¹ is dissolved, then subject to the possible restoration of the company to the register², all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution, including leasehold property, but not including property held by the company on trust for another person, are deemed to be bona vacantia and accordingly belong to the Crown, or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, and vest and may be dealt with in the same manner as other bona vacantia accruing to the Crown, to the Duchy of Lancaster or to the Duke of Cornwall³.

Where, however, property so vests in the Crown⁴, the Crown's title to it may be disclaimed by a notice signed by the Crown representative⁵. A notice of disclaimer must be executed within three years after:

- 842 (1) the date on which the fact that the property may have vested in the Crown as bona vacantia first comes to the notice of the Crown representative; or
- 843 (2) if ownership of the property is not established at that date, the end of the period reasonably necessary for the Crown representative to establish the ownership of the property⁶.

If an application in writing is made to the Crown representative by a person interested in the property requiring him to decide whether he will or will not disclaim, any notice of disclaimer must be executed within 12 months after the making of the application or such further period as may be allowed by the court⁷. A notice of disclaimer is of no effect if it is shown to have been executed after the end of the specified⁸ period⁹. A notice of disclaimer must be delivered to the registrar¹⁰ and retained and registered by him¹¹. Copies of it must be published in the Gazette¹² and sent to any persons who have given the Crown representative notice that they claim to be interested in the property¹³.

The right to execute a notice of disclaimer under the above provisions may be waived by or on behalf of the Crown either expressly or by taking possession¹⁴.

Where notice of disclaimer is executed¹⁵ as respects any property, that property is deemed not to have vested in the Crown as bona vacantia¹⁶. The Crown's disclaimer operates so as to terminate, as from the date of the disclaimer, the rights, interests and liabilities of the company in or in respect of the property disclaimed¹⁷; but it does not, except so far as is necessary for the purpose of releasing the company from any liability, affect the rights or liabilities of any other person¹⁸.

The disclaimer of any property of a leasehold character does not take effect unless a copy of the disclaimer has been served, so far as the Crown representative¹⁹ is aware of their addresses, on every person claiming under the company as underlessee or mortgagee, and either:

- 844 (a) no application to the court to make a vesting order²⁰ is made with respect to that property before the end of the period of 14 days beginning with the day on which the last such notice was served; or
- 845 (b) where such an application has been made, the court²¹ directs that the disclaimer is to take effect²².

Where the court gives a direction under head (b) above, it may also, instead of or in addition to any vesting order it makes²³, make such order as it thinks fit with respect to fixtures, tenant's improvements and other matters arising out of the lease²⁴.

The court may on application by a person who claims an interest in the disclaimed property, or who is under a liability in respect of the disclaimed property that is not discharged by the disclaimer, make an order under the following provisions in respect of the property²⁵. Such an order is an order for the vesting of the disclaimed property in, or its delivery to:

- 846 (i) a person entitled to it, or a trustee for such a person; or
- 847 (ii) a person subject to such a liability as is mentioned above²⁶, or a trustee for such a person²⁷;

but an order under head (ii) above may only be made where it appears to the court that it would be just to do so for the purpose of compensating the person subject to the liability in respect of the disclaimer²⁸. An order under these provisions may be made on such terms as the court thinks fit²⁹. On a vesting order being so made, the property comprised in it vests in the person named in that behalf in the order without conveyance, assignment or transfer³⁰.

The court must not, however, make an order under the above provisions³¹ vesting property of a leasehold nature in a person claiming under the company as underlessee or mortgagee except on terms making that person:

- 848 (A) subject to the same liabilities and obligations as those to which the company was subject under the lease; or
- 849 (B) if the court thinks fit, subject to the same liabilities and obligations as if the lease had been assigned to him³²;

and where the order relates to only part of the property comprised in the lease, this applies as if the lease had comprised only the property comprised in the vesting order³³. A person claiming under the company as underlessee or mortgagee who declines to accept a vesting order on such terms is excluded from all interest in the property³⁴. If there is no person claiming under the company who is willing to accept an order on such terms, the court has power to vest the company's estate and interest in the property in any person who is liable, whether personally or in a representative character, and whether alone or jointly with the company, to perform the lessee's covenants in the lease³⁵. The court may vest that estate and interest in such a person freed and discharged from all estates, incumbrances and interests created by the company³⁶.

Where in consequence of the disclaimer land that is subject to a rentcharge vests in any person, neither he nor his successors in title are subject to any personal liability in respect of sums becoming due under the rentcharge, except sums becoming due after he, or some person claiming under or through him, has taken possession or control of the land or has entered into occupation of it³⁷.

Where on the dissolution of a company³⁸, land in England and Wales or Northern Ireland that is subject to a rentcharge vests by operation of law in the Crown or any other person (the 'proprietor'), neither the proprietor nor his successors in title are subject to any personal liability in respect of sums becoming due under the rentcharge, except sums becoming due after the proprietor, or some person claiming under or through him, has taken possession or control of the land or has entered into occupation of it³⁹.

- 1 As to the meaning of 'company' under the Companies Acts see PARA 24.
- 2 *Ie* under the Companies Act 2006 Pt 31 Ch 3 (ss 1024-1034) (see PARA 1532 *et seq*): see s 1034; and PARA 1539.
- 3 Companies Act 2006 s 1012(1), (2). As to *bona vacantia* see further **CROWN PROPERTY** vol 12(1) (Reissue) PARA 235 *et seq*.
- 4 The Companies Act 2006 s 1013 (see the text and notes 5-14) applies to property vested in the Duchy of Lancaster or the Duke of Cornwall under s 1012 (see the text and notes 1-3) as if for references to the Crown there were respectively substituted references to the Duchy of Lancaster or to the Duke of Cornwall, as the case may be: s 1013(8).
- 5 Companies Act 2006 s 1013(1). In relation to Crown property in England and Wales the Crown representative is the Treasury Solicitor: s 1013(1). The Companies Act 2006 s 1013 (see the text and notes 6-14) applies to property vested in the Duchy of Lancaster or the Duke of Cornwall under s 1012 (see the text and notes 1-3) as if for references to the Crown representative there were respectively substituted references to the Solicitor to the Duchy of Lancaster or to the Solicitor to the Duchy of Cornwall, as the case may be: s 1013(8).
- 6 Companies Act 2006 s 1013(3).
- 7 Companies Act 2006 s 1013(4).
- 8 *Ie* the period specified in the Companies Act 2006 s 1013(3) or (4): see the text and notes 6-7.
- 9 Companies Act 2006 s 1013(5).
- 10 As to the meaning of 'registrar' see PARA 131 note 2.
- 11 Companies Act 2006 s 1013(6).
- 12 As to the meaning of the 'Gazette' see PARA 138 note 2; and as to alternatives to publication in the Gazette see the Companies Act 2006 s 1116; and PARA 138.
- 13 Companies Act 2006 s 1013(7).
- 14 Companies Act 2006 s 1013(2).
- 15 *Ie* under the Companies Act 2006 s 1013: see the text and notes 4-13.
- 16 Companies Act 2006 s 1014(1).
- 17 Companies Act 2006 s 1015(1).
- 18 Companies Act 2006 s 1015(2).
- 19 For these purposes, the 'Crown representative' means (1) in relation to property vested in the Duchy of Lancaster, the Solicitor to that Duchy; (2) in relation to property vested in the Duke of Cornwall, the Solicitor to the Duchy of Cornwall; (3) in relation to property in Scotland, the Queen's and Lord Treasurer's Remembrancer; (4) in relation to other property, the Treasury Solicitor: Companies Act 2006 s 1016(3).
- 20 *Ie* no application under the Companies Act 2006 s 1017: see the text and notes 25-30.
- 21 As to the meaning of 'court' see PARA 212 note 1.
- 22 Companies Act 2006 s 1016(1).
- 23 *Ie* in addition to any order it makes under the Companies Act 2006 s 1017: see the text and notes 25-30.

- 24 Companies Act 2006 s 1016(2).
- 25 Companies Act 2006 s 1017(1).
- 26 Ie a person who is under a liability in respect of the disclaimed property that is not discharged by the disclaimer: see the Companies Act 2006 s 1017(1)(b), (2)(b).
- 27 Companies Act 2006 s 1017(2).
- 28 Companies Act 2006 s 1017(3).
- 29 Companies Act 2006 s 1017(4).
- 30 Companies Act 2006 s 1017(5).
- 31 Ie an order under the Companies Act 2006 s 1017: see the text and notes 25-30.
- 32 Companies Act 2006 s 1018(1).
- 33 Companies Act 2006 s 1018(2).
- 34 Companies Act 2006 s 1018(3).
- 35 Companies Act 2006 s 1018(4).
- 36 Companies Act 2006 s 1018(5).
- 37 Companies Act 2006 s 1019.
- 38 For this purpose, 'company' includes any body corporate: Companies Act 2006 s 1023(3). As to the meaning of 'body corporate' under the Companies Acts see PARA 1 note 5.
- 39 Companies Act 2006 s 1023(1), (2).

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(ii) Restoration to the Register

A. ADMINISTRATIVE RESTORATION

1532. Application for administrative restoration to the register.

An application may be made to the registrar¹ to restore to the register² a company³ that has been struck off the register under the registrar's powers⁴ to strike off a defunct company⁵. An application under these provisions may be made whether or not the company has in consequence been dissolved⁶. Such an application may only be made by a former director⁷ or former member⁸ of the company⁹; and it may not be made¹⁰ after the end of the period of six years from the date of the dissolution of the company¹¹.

An application for administrative restoration to the register¹² must be accompanied by a statement of compliance¹³. The statement of compliance required is a statement that the person making the application has standing to apply¹⁴ and that the requirements for administrative restoration¹⁵ are met¹⁶. The registrar may accept the statement of compliance as sufficient evidence of those matters¹⁷.

On such an application, the registrar must restore the company to the register if, and only if, the following conditions are met¹⁸. The first condition is that the company was carrying on business or in operation at the time of its striking off¹⁹. The second condition is that, if any property or right previously vested in or held on trust for the company has vested as bona vacantia²⁰, the Crown representative²¹ has signified to the registrar in writing consent²² to the company's restoration to the register²³. The third condition is that the applicant has delivered to the registrar such documents relating to the company as are necessary to bring up to date the records kept by the registrar, and has paid any civil penalties for failure to deliver accounts²⁴ that were outstanding at the date of dissolution or striking off²⁵.

1 As to the meaning of 'registrar' see PARA 131 note 2.

2 As to the meaning of 'register' see PARA 146.

3 As to the meaning of 'company' under the Companies Acts see PARA 24.

4 Ie under the Companies Act 2006 s 1000 (see PARAS 1521, 1523) or s 1001 (see PARAS 1522, 1523).

5 Companies Act 2006 s 1024(1).

6 Companies Act 2006 s 1024(2).

7 As to the meaning of 'director' see PARA 478.

8 As to who qualifies as a member of a company see PARA 321.

9 Companies Act 2006 s 1024(3).

10 For this purpose an application is made when it is received by the registrar: Companies Act 2006 s 1024(4).

11 Companies Act 2006 s 1024(4).

12 Ie an application under the Companies Act 2006 s 1024: see the text and notes 1-11.

13 Companies Act 2006 s 1026(1).

14 As to such standing see the Companies Act 2006 s 1024(3); and the text and notes 7-9.

15 Ie the requirements of the Companies Act 2006 s 1025: see the text and notes 18-25.

16 Companies Act 2006 s 1026(2).

17 Companies Act 2006 s 1026(3).

18 Companies Act 2006 s 1025(1).

19 Companies Act 2006 s 1025(2).

20 As to property vesting as bona vacantia see PARA 1531.

21 For these purposes, the 'Crown representative' means (1) in relation to property vested in the Duchy of Lancaster, the Solicitor to that Duchy; (2) in relation to property vested in the Duke of Cornwall, the Solicitor to the Duchy of Cornwall; (3) in relation to property in Scotland, the Queen's and Lord Treasurer's Remembrancer; (4) in relation to other property, the Treasury Solicitor: Companies Act 2006 s 1025(6).

22 It is the applicant's responsibility to obtain that consent and to pay any costs of the Crown representative either in dealing with the property during the period of dissolution, or in connection with the proceedings on the application, that may be demanded as a condition of giving consent: Companies Act 2006 s 1025(4).

23 Companies Act 2006 s 1025(3).

24 Ie any penalties under the Companies Act 2006 s 453 (see PARA 884) or corresponding earlier provisions.

25 Companies Act 2006 s 1025(5). See also s 1028(2); and PARA 1534.

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1533. Registrar's decision on application for administrative restoration.

The registrar¹ must give notice to the applicant of the decision on an application² for administrative restoration to the register³. If the decision is that the company⁴ should be restored to the register, the restoration takes effect as from the date that notice is sent⁵. In the case of such a decision, the registrar must enter on the register a note of the date as from which the company's restoration to the register takes effect, and must cause notice of the restoration to be published in the Gazette⁶. That notice of restoration must state the name of the company or, if the company is restored to the register under a different name⁷, that name and its former name, the company's registered number⁸, and the date as from which the restoration of the company to the register takes effect⁹.

1 As to the meaning of 'registrar' see PARA 131 note 2.

2 Ie an application under the Companies Act 2006 s 1024: see PARA 1532.

3 Companies Act 2006 s 1027(1). As to the meaning of 'register' see PARA 146.

4 As to the meaning of 'company' under the Companies Acts see PARA 24.

5 Companies Act 2006 s 1027(2).

6 Companies Act 2006 s 1027(3). As to the meaning of the 'Gazette' see PARA 138 note 2; and as to alternatives to publication in the Gazette see the Companies Act 2006 s 1116; and PARA 138.

7 As to the company's name on restoration see the Companies Act 2006 s 1033; and PARA 1539.

8 As to a company's registered number see PARAS 139, 140.

9 Companies Act 2006 s 1027(4).

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1534. Effect of administrative restoration.

The general effect of administrative restoration to the register¹ is that the company² is deemed to have continued in existence as if it had not been dissolved or struck off the register³.

The company is not liable to a civil penalty for failure to deliver accounts⁴ for a financial year⁵ in relation to which the period for filing accounts and reports ended after the date of dissolution or striking off, and before the restoration of the company to the register⁶.

The court⁷ may give such directions and make such provision as seems just for placing the company and all other persons in the same position, as nearly as may be, as if the company

had not been dissolved or struck off the register⁸. An application to the court for such directions or provision may be made any time within three years after the date of restoration of the company to the register⁹.

1 As to application for administrative restoration to the register see PARA 1532; and as to the registrar's decision on such an application see PARA 1533. As to the meaning of 'register' see PARA 146; and as to the meaning of 'registrar' see PARA 131 note 2.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 Companies Act 2006 s 1028(1).

4 Is a penalty under the Companies Act 2006 s 453 (see PARA 884) or corresponding earlier provisions.

5 As to the meaning of 'financial year' see PARA 711.

6 Companies Act 2006 s 1028(2).

7 As to the meaning of 'court' see PARA 212 note 1.

8 Companies Act 2006 s 1028(3).

9 Companies Act 2006 s 1028(4).

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B. RESTORATION BY THE COURT

1535. Application to court for restoration to the register.

An application may be made to the court¹ to restore to the register² a company³:

- 850 (1) that has been dissolved⁴ after winding up⁵;
- 851 (2) that is deemed to have been dissolved⁶ following administration⁷; or
- 852 (3) that has been struck off the register under the registrar's⁸ powers to strike off a defunct company⁹ or on an application for voluntary striking off¹⁰, whether or not the company has in consequence been dissolved¹¹.

Such an application may be made by:

- 853 (a) the Secretary of State¹²;
- 854 (b) any former director¹³ of the company¹⁴;
- 855 (c) any person having an interest in land in which the company had a superior or derivative interest¹⁵;
- 856 (d) any person having an interest in land or other property that was subject to rights vested in the company¹⁶, or that was benefited by obligations owed by the company¹⁷;
- 857 (e) any person who but for the company's dissolution would have been in a contractual relationship with it¹⁸;
- 858 (f) any person with a potential legal claim against the company¹⁹;

- 859 (g) any manager or trustee of a pension fund established for the benefit of employees of the company²⁰;
- 860 (h) any former member²¹ of the company, or the personal representatives of such a person²²;
- 861 (i) any person who was a creditor of the company at the time of its striking off or dissolution²³;
- 862 (j) any former liquidator of the company²⁴;
- 863 (k) where the company was struck off the register on an application for voluntary striking off²⁵, any person of a description specified by regulations²⁶ as a person entitled to notice of the application for voluntary striking off²⁷,

or by any other person appearing to the court to have an interest in the matter²⁸.

The above provisions apply whether the company was dissolved or struck off the register before, on or after 1 October 2009²⁹.

1 As to the meaning of 'court' see PARA 212 note 1.

2 As to the meaning of 'register' see PARA 146.

3 Companies Act 2006 s 1029(1). As to the meaning of 'company' under the Companies Acts see PARA 24.

Where the company was dissolved or struck off the register before 1 October 2009, no application under s 1029 may be made if an application in respect of the same dissolution or striking off has been made under the Companies Act 1985 s 653 (repealed), and has not been withdrawn: Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 91(1), (3).

4 Ie under the Insolvency Act 1986 Pt IV Ch IX (ss 201-205) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 929 et seq).

5 Companies Act 2006 s 1029(1)(a).

6 Ie under the Insolvency Act 1986 Sch B1 para 84(6) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 371).

7 Companies Act 2006 s 1029(1)(b).

8 As to the meaning of 'registrar' see PARA 131 note 2.

9 Ie under the Companies Act 2006 s 1000 (see PARAS 1521, 1523) or s 1001 (see PARAS 1522, 1523).

10 Ie under the Companies Act 2006 s 1003: see PARAS 1525, 1530.

11 Companies Act 2006 s 1029(1)(c).

12 Companies Act 2006 s 1029(2)(a). As to the Secretary of State see PARA 6.

13 As to the meaning of 'director' under the Companies Acts see PARA 478.

14 Companies Act 2006 s 1029(2)(b). The Companies Act 1985 s 653 (objection to striking off by person aggrieved) (repealed and not directly re-enacted by the Companies Act 2006) had to be construed so that, after the dissolution of the company, where the individual remained a director of the company at the date of dissolution but subsequently became bankrupt, he would, at the moment of his bankruptcy, be taken to have lost his authority subsequently to apply for the restoration of the company under the Companies Act 1985 s 653(2): *Witherdale Ltd v Registrar of Companies* [2005] EWHC 2964 (Ch), [2008] 1 BCLC 174, [2006] BPIR 1099.

15 Companies Act 2006 s 1029(2)(c).

16 Companies Act 2006 s 1029(2)(d)(i).

17 Companies Act 2006 s 1029(2)(d)(ii).

18 Companies Act 2006 s 1029(2)(e).

19 Companies Act 2006 s 1029(2)(f).

20 Companies Act 2006 s 1029(2)(g).

21 It was held for the purposes of the Companies Act 1985 s 653 (objection to striking off by person aggrieved) (repealed and not directly re-enacted by the Companies Act 2006) that 'member' included personal representatives of a deceased member (as head (h) in the text now provides): *Re Bayswater Trading Co Ltd* [1970] 1 All ER 608, [1970] 1 WLR 343. As to the meaning of 'personal representative' see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 4. As to who qualifies as a member of a company see PARA 321.

22 Companies Act 2006 s 1029(2)(h).

23 Companies Act 2006 s 1029(2)(i).

24 Companies Act 2006 s 1029(2)(j).

25 See note 10.

26 In any person of a description specified by regulations under the Companies Act 2006 s 1006(1)(f) (see PARA 1528 head 6) or s 1007(2)(f) (see PARA 1528 text to notes 16, 17). At the date at which this volume states the law, no regulations had been made for those purposes.

27 Companies Act 2006 s 1029(2)(k).

28 Companies Act 2006 s 1029(2).

29 Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 90. Where the company was dissolved or struck off the register before 1 October 2009, the references in the Companies Act 2006 s 1029(1) to enactments under which a company may have been dissolved or struck off (see heads (1)-(3) in the text) include corresponding earlier enactments (and for this purpose ss 1000, 1003 of that Act are regarded as corresponding to the Companies Act 1985 ss 652, 652A (repealed)): Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 91(1), (2).

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1536. When application to the court may be made.

An application to the court¹ for restoration of a company² to the register³ may be made at any time for the purpose of bringing proceedings against the company for damages for personal injury⁴; but no order may be made on such an application if it appears to the court that the proceedings would fail by virtue of any enactment⁵ as to the time within which proceedings must be brought⁶. In making that decision the court must have regard to its power⁷ to direct that the period between the dissolution, or striking off, of the company and the making of the order is not to count for the purposes of any such enactment⁸.

In any other case an application to the court for restoration of a company to the register may not be made after the end of the period of six years from the date of the dissolution of the company, subject as follows⁹. In a case where:

- 864 (1) the company has been struck off the register under the registrar's¹⁰ powers to strike off a defunct company¹¹;
- 865 (2) an application to the registrar has been made for administrative restoration to the register¹² within the time allowed for making such an application; and
- 866 (3) the registrar has refused the application,

an application to the court under these provisions may be made within 28 days of notice of the registrar's decision being issued by the registrar, even if the above-mentioned period of six years¹³ has expired¹⁴.

The above provisions apply whether the company was dissolved or struck off the register before, on or after 1 October 2009¹⁵.

1 As to the meaning of 'court' see PARA 212 note 1.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 As to the meaning of 'register' see PARA 146.

4 Companies Act 2006 s 1030(1). For these purposes, 'personal injury' includes any disease and any impairment of a person's physical or mental condition; and references to damages for personal injury include (1) any sum claimed by virtue of the Law Reform (Miscellaneous Provisions) Act 1934 s 1(2)(c) (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 817; **DAMAGES** vol 12(1) (Reissue) PARA 938), the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937 s 14(2)(c) (funeral expenses); and (2) damages under the Fatal Accidents Act 1976 (see **DAMAGES** vol 12(1) (Reissue) PARA 932 et seq), the Damages (Scotland) Act 1976 or the Fatal Accidents (Northern Ireland) Order 1977 (SI 1977/1251 (NI 18)): Companies Act 2006 s 1030(6).

5 As to the meaning of 'enactment' see PARA 17 note 2.

6 Companies Act 2006 s 1030(2). As to the time limits for bringing claims for personal injury see **LIMITATION PERIODS** vol 68 (2008) PARA 998 et seq.

7 Its power under the Companies Act 2006 s 1032(3): see PARA 1538.

8 Companies Act 2006 s 1030(3). As to the court's discretion to make such a direction see *Smith v White Knight Laundry Ltd* [2001] 2 BCLC 206, CA; and *Regent Leisuretime Ltd v NatWest Finance (Formerly County NatWest Ltd)* [2003] EWCA Civ 391, [2003] All ER (D) 385 (Mar).

9 Companies Act 2006 s 1030(4). Cf the Companies Act 1985 ss 651, 653 (repealed), which conferred overlapping jurisdictions (each with a different time limit) on the court to declare a dissolution void and restore a company to the register, a situation which was simplified by the provisions of the Companies Act 2006 s 1029 (see PARA 1535). Where the company was dissolved or struck off the register before 1 October 2009, s 1030(4) does not enable an application to be made in respect of a company dissolved before 1 October 2007, subject to the following provisions: Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 91(1), (4). If the company was struck off under the Companies Act 1985 s 652 or s 652A (both repealed), the Companies Act 2006 s 1030(4) does not prevent an application being made at any time before: (1) 1 October 2015 (that is, six years after commencement); or (2) the expiration of the period of 20 years from publication in the Gazette of notice of striking off under the relevant section or article, whichever occurs first: Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 91(5). The Companies Act 2006 s 1030(5) (see the text and notes 10-14) applies in relation to the time limit under the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 91(5) as in relation to the time limit in the Companies Act 2006 s 1030(4): Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 91(6). As to the meaning of the 'Gazette' under the Companies Acts see PARA 138 note 2.

10 As to the meaning of 'registrar' see PARA 131 note 2.

11 Its power under the Companies Act 2006 s 1000 (see PARAS 1521, 1523) or s 1001 (see PARAS 1522, 1523).

12 Its power under the Companies Act 2006 s 1024: see PARA 1532.

13 Its power under the Companies Act 2006 s 1030(4): see the text and note 9.

14 Companies Act 2006 s 1030(5).

15 Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 90.

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1537. Decision on application for restoration by the court.

On an application for restoration by the court¹, the court may order the restoration of the company² to the register³:

- 867 (1) if the company was struck off the register under the registrar's⁴ powers to strike off defunct companies⁵ and the company was, at the time of the striking off, carrying on business or in operation⁶;
- 868 (2) if the company was struck off the register on an application for voluntary striking off⁷ and any of the statutory requirements⁸ was not complied with⁹;
- 869 (3) if in any other case the court considers it just to do so¹⁰.

If the court orders restoration of the company to the register, the restoration takes effect on a copy of the court's order being delivered to the registrar¹¹. The registrar must cause to be published in the Gazette¹² notice of the restoration of the company to the register¹³. The notice must state the name of the company or, if the company is restored to the register under a different name¹⁴, that name and its former name¹⁵, the company's registered number¹⁶, and the date on which the restoration took effect¹⁷.

The above provisions apply whether the company was dissolved or struck off the register before, on or after 1 October 2009¹⁸.

1 Ie an application under the Companies Act 2006 s 1029: see PARA 1535. As to the meaning of 'court' see PARA 212 note 1.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 Companies Act 2006 s 1031(1). As to the meaning of 'register' see PARA 146.

4 As to the meaning of 'registrar' see PARA 131 note 2.

5 Ie under the Companies Act 2006 s 1000 (see PARAS 1521, 1523) or s 1001 (see PARAS 1522, 1523).

6 Companies Act 2006 s 1031(1)(a). A company, even though not carrying on business, may be in operation: see *Re Financial Corpn Ltd* (1883) 27 Sol Jo 199 (voluntary winding up); *Re Estates Investment Co* (1883) 27 Sol Jo 585 (compulsory winding up); *Re Priceland Ltd, Waltham Forest London Borough Council v Registrar of Companies* [1997] 1 BCLC 467 (the words 'in operation' should be construed to give the court the widest possible powers to restore); *Re Blue Note Enterprises Ltd* [2001] 2 BCLC 427. See also *Witherdale Ltd v Registrar of Companies* [2005] EWHC 2964 (Ch), [2008] 1 BCLC 174. All these cases were decided on earlier legislation not directly re-enacted in the Companies Act 2006.

7 Ie under the Companies Act 2006 s 1003: see PARAS 1525, 1530.

8 Ie any of the requirements of the Companies Act 2006 ss 1004-1009: see PARAS 1526-1529.

9 Companies Act 2006 s 1031(1)(b).

10 Companies Act 2006 s 1031(1)(c). Exercising the discretion against restoration should be the exception, not the rule: *Re Priceland Ltd, Waltham Forest London Borough Council v Registrar of Companies* [1997] 1 BCLC 467 at 476 per Laddie J. The court will usually make an order for restoration if there is any business or property to be dealt with, but on the terms that all proper returns are to be made: see *Re Carpenter's Patent Davit Boat*

Lowering and Detaching Gear Co (1888) 1 Meg 26; *Re Johannesburg Mining and General Syndicate Ltd* (1901) 45 Sol Jo 343. See also *Re Walter Wright Ltd* [1923] WN 128. In *Re New Timbiqui Gold Mines Ltd* [1961] Ch 319, [1961] 1 All ER 865, the court would not have made an order in any event as there was not sufficient evidence of likely benefit to members or creditors. See also *Re Lindsay Bowman Ltd* [1969] 3 All ER 601, [1969] 1 WLR 1443 (on a similar point). Third parties whose rights may be directly affected by a restoration order may apply to set it aside or to modify it: *Regent Leisuretime Ltd v NatWest Finance (Formerly County NatWest Ltd)* [2003] EWCA Civ 391, [2003] BCC 587, [2003] All ER (D) 385 (Mar). See also *Witherdale Ltd v Registrar of Companies* [2005] EWHC 2964 (Ch), [2008] 1 BCLC 174 (in circumstances where it was not possible to ascertain what the purpose of restoration was, the court, exceptionally, would refuse an order for restoration).

In considering whether it is 'just' to restore the company to the register, the personal circumstances of the shareholder may be relevant: *Re L Carroll Ltd* [1975] 1 NZLR 79, NZ SC (striking off due to illness). Whether it is just to order restoration depends upon all the circumstances of the case including the nature of the application and subsequent events: *Re Blenheim Leisure (Restaurants) Ltd* [2000] BCC 554, CA; and see *Re Blenheim Leisure (Restaurants) Ltd (No 2)* [2000] BCC 821.

All the cases cited in this note were decided on earlier legislation not directly re-enacted in the Companies Act 2006.

11 Companies Act 2006 s 1031(2).

12 As to the meaning of the 'Gazette' see PARA 138 note 2; and as to alternatives to publication in the Gazette see the Companies Act 2006 s 1116; and PARA 138.

13 Companies Act 2006 s 1031(3).

14 As to the company's name on restoration see the Companies Act 2006 s 1033; and PARA 1539.

15 Companies Act 2006 s 1031(4)(a).

16 Companies Act 2006 s 1031(4)(b). As to a company's registered number see PARAS 139, 140.

17 Companies Act 2006 s 1031(4)(c).

18 Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 90.

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1538. Effect of court order for restoration to the register.

The general effect of an order by the court¹ for restoration to the register² is that the company³ is deemed to have continued in existence as if it had not been dissolved or struck off the register⁴.

The company is not liable to a civil penalty for failure to deliver accounts⁵ for a financial year⁶ in relation to which the period for filing accounts and reports ended after the date of dissolution or striking off, and before the restoration of the company to the register⁷.

The court may give such directions and make such provision as seems just for placing the company and all other persons in the same position, as nearly as may be, as if the company had not been dissolved or struck off the register⁸. The court may also give directions⁹ as to:

870 (1) the delivery to the registrar¹⁰ of such documents relating to the company as are necessary to bring up to date the records kept by the registrar¹¹;

871 (2) the payment of the costs of the registrar in connection with the proceedings for the restoration of the company to the register¹²;

- 872 (3) where any property or right previously vested in or held on trust for the company has vested as bona vacantia¹³, the payment of the costs of the Crown representative¹⁴ in dealing with the property during the period of dissolution, or in connection with the proceedings on the application¹⁵.

The above provisions apply whether the company was dissolved or struck off the register before, on or after 1 October 2009¹⁶.

1 As to the meaning of 'court' see PARA 212 note 1.

2 As to the meaning of 'register' see PARA 146.

3 As to the meaning of 'company' under the Companies Acts see PARA 24.

4 Companies Act 2006 s 1032(1).

5 Is a penalty under the Companies Act 2006 s 453 (see PARA 884) or any corresponding earlier provision.

6 As to the meaning of 'financial year' see PARA 711.

7 Companies Act 2006 s 1032(2).

8 Companies Act 2006 s 1032(3). In *Re Donald Kenyon Ltd* [1956] 3 All ER 596, [1956] 1 WLR 1397, the court directed that, in the case of creditors whose debts were not statute-barred at the date when the company was struck off, the period between the date of striking off and the date when its name was restored to the register should not be counted for the purposes of the Limitation Acts. In *Re Huntingdon Poultry Ltd* [1969] 1 All ER 328, [1969] 1 WLR 204, a petition for a similar direction was refused as being unnecessary. See also *Shire Court Residents Ltd v Registrar of Companies* [1995] BCC 821 (directions as to leases). Terms in the order may not put a creditor in the same position as if the company had been struck off, thus preserving any right against the directors on a warranty of authority: *Re Lindsay Bowman Ltd* [1969] 3 All ER 601, [1969] 1 WLR 1443; *Re Priceland Ltd, Waltham Forest London Borough Council v Registrar of Companies* [1997] 1 BCLC 467. See also *Re Brown Bayley's Steel Works Ltd* (1905) 21 TLR 374 (explained in *Re Priceland Ltd, Waltham Forest London Borough Council v Registrar of Companies* [1997] 1 BCLC 467 at 475 per Laddie J). A limitation direction may be given, even if it runs in the company's favour, as it is the position at the date of dissolution rather than at the date of restoration which has to be considered; and, just as the company in its capacity as the applicant for the restoration order is entitled to be heard in opposition to the imposition of a limitation direction in favour of third party creditors, by the same token a third party who would be prejudiced by a limitation direction sought by the company is also entitled to be heard in opposition to it: *Regent Leisuretime Ltd v NatWest Finance (formerly County NatWest Ltd)* [2003] EWCA Civ 391, [2003] BCC 587, [2003] All ER (D) 385 (Mar). All the cases cited in this note were decided on earlier legislation not directly re-enacted in the Companies Act 2006.

9 Companies Act 2006 s 1032(4).

10 As to the meaning of 'registrar' see PARA 131 note 2.

11 Companies Act 2006 s 1032(4)(a).

12 Companies Act 2006 s 1032(4)(b).

13 As to property vesting as bona vacantia see PARA 1531. See also PARA 1540.

14 For these purposes, the 'Crown representative' means (1) in relation to property vested in the Duchy of Lancaster, the Solicitor to that Duchy; (2) in relation to property vested in the Duke of Cornwall, the Solicitor to the Duchy of Cornwall; (3) in relation to property in Scotland, the Queen's and Lord Treasurer's Remembrancer; (4) in relation to other property, the Treasury Solicitor: Companies Act 2006 s 1032(5).

15 Companies Act 2006 s 1032(4)(c).

16 Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 90.

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C. CONSEQUENCES OF RESTORATION

1539. Company's name on restoration.

A company¹ is restored to the register² with the name it had before it was dissolved or struck off the register, subject to the following provisions³.

If at the date of restoration the company could not be registered under its former name⁴ without contravening the statutory provision prohibiting registration under the same name as another in the registrar's⁵ index of company names⁶, it must be restored to the register⁷:

- 873 (1) under another name specified, in the case of administrative restoration⁸, in the application to the registrar, or in the case of restoration under a court order⁹, in the court's¹⁰ order¹¹; or
- 874 (2) as if its registered number¹² was also its name¹³.

If a company is restored to the register under a name specified in the application to the registrar, the statutory provisions relating to registration of a change of name and the issue of a new certificate of incorporation¹⁴ and the effect of a change of name¹⁵ apply as if the application to the registrar were notice of a change of name¹⁶. If a company is restored to the register under a name specified in the court's order, those statutory provisions¹⁷ apply as if the copy of the court order delivered to the registrar were notice of a change a name¹⁸.

If the company is restored to the register as if its registered number was also its name¹⁹:

- 875 (a) the company must change its name within 14 days after the date of the restoration²⁰;
- 876 (b) the change may be made by resolution of the directors²¹, without prejudice to any other method of changing the company's name²²;
- 877 (c) the company must give notice to the registrar of the change²³; and
- 878 (d) the statutory provisions referred to above²⁴ apply as regards the registration and effect of the change²⁵.

If the company fails to comply with head (a) or head (c) above an offence is committed by the company and by every officer²⁶ of the company who is in default²⁷.

1 As to the meaning of 'company' under the Companies Acts see PARA 24.

2 As to the meaning of 'register' see PARA 146; and as to restoration to the register see PARA 1535 et seq.

3 Companies Act 2006 s 1033(1).

4 References to a company's being registered in a name, and to registration in that context, are to be read as including the company's being restored to the register: Companies Act 2006 s 1033(2).

5 As to the meaning of 'registrar' see PARA 131 note 2.

6 Ie without contravening the Companies Act 2006 s 66 (see PARA 205). As to the index of company names see PARA 163. As to restrictions on the use of company names and trading names generally see PARAS 196 et seq, 214 et seq.

- 7 Companies Act 2006 s 1033(2).
- 8 As to administrative restoration see PARAS 1532-1534.
- 9 As to restoration under a court order see PARAS 1535-1538.
- 10 As to the meaning of 'court' see PARA 212 note 1.
- 11 Companies Act 2006 s 1033(2)(a).
- 12 As to a company's registered number see PARAS 139, 140.
- 13 Companies Act 2006 s 1033(2)(b).
- 14 Ie the provisions of the Companies Act 2006 s 80: see PARA 219.
- 15 Ie the provisions of the Companies Act 2006 s 81: see PARA 219.
- 16 Companies Act 2006 s 1033(3).
- 17 Ie the provisions referred to in notes 14, 15.
- 18 Companies Act 2006 s 1033(4).
- 19 Companies Act 2006 s 1033(5).
- 20 Companies Act 2006 s 1033(5)(a).
- 21 As to the meaning of 'director' see PARA 478.
- 22 Companies Act 2006 s 1033(5)(b).
- 23 Companies Act 2006 s 1033(5)(c).
- 24 Ie the provisions referred to in notes 14, 15.
- 25 Companies Act 2006 s 1033(5)(d).
- 26 As to the meaning of 'officer' under the Companies Acts see PARA 607.
- 27 Companies Act 2006 s 1033(6). As to the meaning of 'officer in default' see PARA 315.

A person guilty of an offence under ss 1033(6) is liable on summary conviction to a fine not exceeding level 5 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 5 on the standard scale: s 1033(7). As to the standard scale and the meaning of 'daily default fine' see PARA 1622.

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1540. Effect of restoration to the register where property has vested as bona vacantia.

The person in whom any property or right of a dissolved company is vested as bona vacantia¹ may dispose of, or of an interest in, that property or right despite the fact that the company² may be restored³ to the register⁴. If the company is restored to the register, the restoration does not affect the disposition, but without prejudice to its effect in relation to any other property or right previously vested in or held on trust for the company⁵; and the Crown or, as the case may be, the Duke of Cornwall must pay to the company an amount equal to:

- 879 (1) the amount of any consideration received for the property or right or, as the
 case may be, the interest in it⁶; or
 880 (2) the value of any such consideration at the time of the disposition⁷,

or, if no consideration was received, an amount equal to the value of the property, right or interest disposed of, as at the date of the disposition⁸. There may, however, be deducted from the amount so payable the reasonable costs of the Crown representative⁹ in connection with the disposition, to the extent that they have not been paid as a condition of administrative restoration¹⁰ or pursuant to a court order¹¹ for restoration¹².

The above provisions apply whenever the company was dissolved¹³.

1 le under the Companies Act 2006 s 1012: see PARA 1531.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 le under the Companies Act 2006 Pt 31 Ch 3 (ss 1024-1034): see PARA 1532 et seq.

4 Companies Act 2006 s 1034(1). As to the meaning of 'register' see PARA 146.

5 Companies Act 2006 s 1034(2)(a).

6 Companies Act 2006 s 1034(2)(b)(i).

7 Companies Act 2006 s 1034(2)(b)(ii).

8 Companies Act 2006 s 1034(2). Where a liability accrues under s 1034(2) in respect of any property or right which before the restoration of the company to the register had accrued as bona vacantia to the Duchy of Lancaster, the Attorney General of that Duchy must represent Her Majesty in any proceedings arising in connection with that liability (s 1034(4)); and where a liability accrues under s 1034(2) in respect of any property or right which before the restoration of the company to the register had accrued as bona vacantia to the Duchy of Cornwall, such persons as the Duke of Cornwall (or other possessor for the time being of the Duchy) may appoint must represent the Duke (or other possessor) in any proceedings arising out of that liability (s 1034(5)).

9 For these purposes, the 'Crown representative' means (1) in relation to property vested in the Duchy of Lancaster, the Solicitor to that Duchy; (2) in relation to property vested in the Duke of Cornwall, the Solicitor to the Duchy of Cornwall; (3) in relation to property in Scotland, the Queen's and Lord Treasurer's Remembrancer; (4) in relation to other property, the Treasury Solicitor: Companies Act 2006 s 1034(6).

10 As to administrative restoration see PARAS 1532-1534.

11 As to restoration pursuant to a court order see PARAS 1535-1538.

12 Companies Act 2006 s 1034(3).

13 Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 92(1). However, the following provisions apply where the company was dissolved before 1 October 2009: Sch 2 para 92(2). The reference in the Companies Act 2006 s 1034(1) to s 1012 (property of dissolved company to be bona vacantia: see the text and note 1) is to be read as a reference to the Companies Act 1985 s 654 (repealed) (or corresponding earlier provisions) (Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 92(3)); and no deduction is to be made under the Companies Act 2006 s 1034(3) (see the text and notes 10-12) from consideration realised before 1 October 2009 (Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 92(4)).

(30) INVESTIGATION OF COMPANIES AND THEIR AFFAIRS; REQUISITION OF DOCUMENTS

(i) Investigations

A. INVESTIGATION OF COMPANY'S AFFAIRS

1541. Appointment of inspectors on members' or company's own application.

The Secretary of State¹ may appoint one or more competent inspectors to investigate the affairs² of a company³ and to report the result of their investigations to him⁴. The appointment may be made⁵:

- 881 (1) in the case of a company having a share capital⁶, on the application of not less than 200 members⁷ or of members holding not less than one-tenth of the shares⁸ issued (excluding any shares held as treasury shares)⁹;
- 882 (2) in the case of a company not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members¹⁰; and
- 883 (3) in any case, on application of the company¹¹.

The application must be supported by such evidence as the Secretary of State may require for the purpose of showing that the applicant or applicants has or have good reason for requiring the investigation¹²; and he may, before appointing inspectors, require the applicant or applicants to give security, to an amount not exceeding £5,000, or such other sum as he may by order specify, for payment of the costs of the investigation¹³.

1 As to the Secretary of State see PARA 6.

2 The company's goodwill, profits and losses, contracts and assets are included in its affairs: *R v Board of Trade, ex p St Martin Preserving Co Ltd* [1965] 1 QB 603, [1964] 2 All ER 561, DC (where assets were held to include the company's investment or other property interests, and its control of a subsidiary company). As to whether the activities of a receiver and manager are affairs of the company for these purposes see *R v Board of Trade, ex p St Martin Preserving Co Ltd*.

3 As to the meaning of 'company' see PARA 1.

4 Companies Act 1985 s 431(1) (amended by the Companies Act 2006 s 1035(2)). The provisions of the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARA 1542 et seq) have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

The provisions of the Companies Act 1985 s 431 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. As to the application of the Companies Act 1985 s 431 to the investigation of possible offences committed by an officer of the company in connection with a moratorium, a voluntary arrangement or a voluntary winding up see the Insolvency Act 1986 ss 7A, 218(5); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1016, 1190.

Where an inspector appointed under the Companies Act 1985 s 431 knows or suspects or has reasonable grounds for knowing or suspecting that a person is or has engaged in money laundering or terrorist financing, he must, as soon as reasonably practicable, inform the Serious Organised Crime Agency: Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(r). As to money laundering see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 539 et seq.

5 Companies Act 1985 s 431(2). See also note 4.

- 6 As to the meaning of 'share capital' see PARA 1042.
- 7 As to who qualifies as a member of a company see PARA 321.
- 8 As to shares generally see PARA 1055.
- 9 Companies Act 1985 s 431(2)(a) (amended by SI 2003/1116). See also note 4. As to treasury shares see PARA 1251. The court will not interfere with the powers of the Secretary of State or an inspector appointed by him to prohibit an investigation: *Re Grosvenor and West End Railway Terminus Hotel Co Ltd* (1897) 76 LT 337, CA. See also *R v Board of Trade, ex p St Martin Preserving Co Ltd* [1965] 1 QB 603, [1964] 2 All ER 561, DC (a mandatory order was obtained where the Secretary of State declined to appoint an inspector; the statutory provisions at that time required an appointment where the company had passed a special resolution declaring that its affairs ought to be investigated).
- 10 Companies Act 1985 s 431(2)(b). See also note 4. As to the register of members see PARA 335.
- 11 Companies Act 1985 s 431(2)(c). See also note 4.
- 12 Companies Act 1985 s 431(3). See also note 4.
- 13 Companies Act 1985 s 431(4). See also note 4. As to costs of the investigation see PARA 1556. Such an order is made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 431(4). At the date at which this volume states the law, no such order had been made.

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1542. Appointment of inspectors in other cases.

Without prejudice to his powers of appointment on the application of members¹ of the company or of the company itself², the Secretary of State³ must appoint one or more competent inspectors to investigate the affairs of a company⁴ and report the result of their investigations to him, if the court⁵ by order⁶ declares that its affairs ought to be so investigated⁷.

The Secretary of State may also make such an appointment if it appears to him that there are circumstances suggesting⁸:

- 884 (1) that the company's affairs are being or have been conducted with intent to defraud its creditors⁹ or the creditors of any other person, or otherwise for a fraudulent or unlawful purpose¹⁰, or in a manner which is unfairly prejudicial to some part of its members¹¹; or
- 885 (2) that any actual or proposed act or omission of the company, including an act or omission on its behalf, is or would be so prejudicial, or that the company was formed for any fraudulent or unlawful purpose¹²; or
- 886 (3) that persons concerned with the company's formation or the management of its affairs have in connection with it been guilty of fraud, misfeasance or other misconduct towards it or towards its members¹³; or
- 887 (4) that the company's members have not been given all the information with respect to its affairs which they might reasonably expect¹⁴.

Inspectors may be so appointed¹⁵ on terms that any report they may make is not for publication; and, in such a case, the provisions relating to the availability and publication of inspectors' reports¹⁶ do not apply¹⁷.

The Secretary of State must exercise the power to appoint inspectors in good faith but it is not incumbent upon him to disclose the material he has before him or the reasons for the inquiry¹⁸; nor is he required to desist from making an appointment because it may involve investigating fraudulent or criminal activity which should be investigated by the police or the Serious Fraud Office¹⁹.

1 As to who qualifies as a member of a company see PARA 321.

2 Ie the powers conferred by the Companies Act 1985 s 431 (see PARA 1541). As to the meaning of 'company' see PARA 1. The provisions of the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541, 1543 et seq) have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

3 As to the Secretary of State see PARA 6.

4 As to what constitutes the affairs of a company see PARA 1541 note 2.

5 As to the meaning of 'court' see PARA 212 note 1.

6 Such an application, whether made in the High Court or in the county court, must be made by the issue of a CPR Pt 8 claim form (see **CIVIL PROCEDURE** vol 11 (2009) PARA 127 et seq): *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 5.

7 Companies Act 1985 s 432(1), (3). The provisions of the Companies Act 1985 s 432 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. As to the application of s 432 to the investigation of possible offences committed by an officer of the company in connection with a moratorium, a voluntary arrangement or a voluntary winding up see the Insolvency Act 1986 ss 7A, 218(5); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1016, 1190.

Where an inspector appointed under the Companies Act 1985 s 432 knows or suspects or has reasonable grounds for knowing or suspecting that a person is or has engaged in money laundering or terrorist financing, he must, as soon as reasonably practicable, inform the Serious Organised Crime Agency: Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(r). As to money laundering see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 539 et seq.

8 Companies Act 1985 s 432(2). While the provisions of s 432(1) are mandatory, those of s 432(2) merely empower the Secretary of State to appoint inspectors in the circumstances there specified. The power conferred by s 432(2) is exercisable with respect to a body corporate notwithstanding that it is in course of being voluntarily wound up: s 432(3). As to the meaning of 'body corporate' see PARA 1 note 5.

9 As to the meaning of 'intent to defraud creditors' see the cases cited in **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 911. As to the meaning of 'creditor' see PARA 1427. As to punishment for the offence of fraudulent trading see PARA 316.

10 As to the meaning of 'fraudulent purpose' see the cases cited in **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 911.

11 Companies Act 1985 s 432(2)(a). See also notes 7, 8. The reference in s 432(2)(a) to a company's members includes any person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law: s 432(4). As to shares generally see PARA 1055. As to the protection of a company's members against unfairly prejudicial conduct see PARA 466 et seq.

12 Companies Act 1985 s 432(2)(b). See also notes 7, 8.

13 Companies Act 1985 s 432(2)(c). See also notes 7, 8.

14 Companies Act 1985 s 432(2)(d). See also notes 7, 8.

15 Ie under the Companies Act 1985 s 432(2) (see the text and notes 8-14).

16 Ie the Companies Act 1985 s 437(3) (see PARA 1554).

17 Companies Act 1985 s 432(2A) (added by the Companies Act 1989 s 55). See also notes 7, 8.

18 *Norwest Holst Ltd v Secretary of State for Trade* [1978] Ch 201, [1978] 3 All ER 280, CA.

19 *Re London United Investments plc* [1992] Ch 578, [1992] 2 All ER 842, CA (the investigative powers in the companies legislation are separate from, even if they overlap, the investigative powers of other bodies). As to the Serious Fraud Office see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1089 et seq.

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1543. Inspectors' powers during investigation.

If inspectors appointed under any of the Secretary of State's powers¹ to investigate the affairs of a company² think it necessary for the purposes of their investigation to investigate also the affairs of another body corporate³ which is or at any relevant time has been the company's subsidiary⁴ or holding company⁵, or a subsidiary of its holding company or a holding company of its subsidiary, they have power to do so; and they must report on the affairs of the other body corporate so far as they think that the results of their investigation of its affairs are relevant to the investigation of the affairs of the first-mentioned company⁶.

1 le under the Companies Act 1985 s 431 (see PARA 1541) or s 432 (see PARA 1542). As to the Secretary of State see PARA 6. The provisions of the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1544 et seq) have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

2 As to the meaning of 'company' see PARA 1. As to what constitutes the affairs of a company see PARA 1541 note 2.

3 As to the meaning of 'body corporate' see PARA 1 note 5.

4 As to the meaning of 'subsidiary' see PARA 25.

5 As to the meaning of 'holding company' see PARA 25.

6 Companies Act 1985 s 433(1). The provisions of the Companies Act 1985 s 433 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

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1544. Conduct of investigation.

Where inspectors are appointed to investigate the affairs of a company¹, it is the duty of all officers and agents² of the company and of all officers and agents of any other body corporate whose affairs are investigated under the inspectors' powers³ during investigation⁴:

- 888 (1) to produce to the inspectors all documents⁵ of or relating to the company or,
 as the case may be, the other body corporate which are in their custody or power⁶;
 889 (2) to attend before the inspectors when required to do so⁷; and
 890 (3) otherwise to give the inspectors all assistance in connection with the
 investigation which they are reasonably able to give⁸.

If the inspectors consider that an officer or agent of the company or other body corporate, or any other person, is or may be in possession of information relating to a matter which they believe to be relevant to the investigation, they may require him⁹:

- 891 (a) to produce to them any documents in his custody or power relating to that
 matter¹⁰;
 892 (b) to attend before them¹¹; and
 893 (c) otherwise to give them all assistance in connection with the investigation
 which he is reasonably able to give¹²,

and it is that person's duty to comply with the requirement¹³.

An inspector may for the purposes of the investigation examine any person on oath¹⁴, and may administer an oath accordingly¹⁵.

The inspectors must act fairly in accordance with the rules of natural justice¹⁶. They must accordingly put to any witness any points of substance and give him a chance to explain or correct any statement prejudicial to him¹⁷. It is now effectively invariable practice for witnesses to be notified of any provisional criticism of them and to be given the opportunity to make further submissions¹⁸. However, inspectors are not required to put the substance of their conclusions to the witness for his comment, nor are they to be criticised for occasional omissions¹⁹. Inspectors do not owe a duty to persons from whom they have obtained information or documents to such an extent that their use of the material in the conduct of their investigation might be inhibited²⁰. The public interest that all relevant evidence should be available to the court will normally override the public interest in maintaining the confidentiality of evidence given²¹.

An answer given by a person to a question put to him in exercise of the statutory powers²² may be used in evidence against him²³ except that, in criminal proceedings in which that person is charged with an offence²⁴, no evidence relating to the answer may be adduced, and no question relating to it may be asked, by or on behalf of the prosecution, unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person²⁵. In civil proceedings, evidence given by a witness to inspectors is generally admissible²⁶; and evidence obtained under compulsory powers may be used in disqualification proceedings²⁷.

If any person²⁸:

- 894 (i) fails to produce to the inspectors any documents which it is his statutory duty
 so to produce²⁹ or to give the inspectors all assistance³⁰ in connection with the
 investigation which he is reasonably able to give³¹; or
 895 (ii) refuses to attend before the inspectors when required to do so³², or refuses to
 comply with the inspectors' requirement³³ where they consider that he may be in
 possession of information relating to a matter which they believe to be relevant to
 the investigation³⁴; or
 896 (iii) refuses to answer any question put to him by the inspectors for the purposes
 of the investigation³⁵,

the inspectors may certify that fact in writing to the court³⁶. The court may thereupon inquire into the case³⁷ and, after hearing any witnesses who may be produced against or on behalf of the alleged offender and after hearing any statement which may be offered in defence, may punish the offender in like manner as if he had been guilty of contempt of the court³⁸.

1 lie under the Companies Act 1985 s 431 (see PARA 1541) or s 432 (see PARA 1542). As to the meaning of 'company' see PARA 1. As to what constitutes the affairs of a company see PARA 1541 note 2. The provisions of the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1545 et seq) have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

2 For these purposes, a reference to officers or to agents includes past, as well as present, officers or agents, as the case may be; and 'agents', in relation to a company or other body corporate, includes its bankers and solicitors and persons employed by it as auditors, whether those persons are or are not officers of the company or other body corporate: Companies Act 1985 s 434(4). As to the meaning of 'officer' generally see PARA 607. As to the meaning of 'agent' generally see PARA 66 note 3. As to the meaning of 'body corporate' see PARA 1 note 5. As to the appointment of auditors see PARA 958 et seq. For the purposes of s 434(4), the reference to solicitors includes a body recognised under the Administration of Justice Act 1985 s 9 (see **LEGAL PROFESSIONS** vol 65 (2008) PARAS 688, 691): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1. As to savings in respect of matters required to be disclosed by solicitors and bankers see PARA 1564.

3 lie under the Companies Act 1985 s 433(1) (see PARA 1543).

4 Companies Act 1985 s 434(1). The provisions of the Companies Act 1985 ss 434, 436 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 For these purposes, 'document' includes information recorded in any form: Companies Act 1985 s 434(6) (s 434(6) substituted, and s 434(7), (8) added, by the Companies Act 2006 s 1038(1)). The power under the Companies Act 1985 s 434 to require production of a document includes power, in the case of a document not in hard copy form, to require the production of a copy of the document in hard copy form, or in a form from which a hard copy can be readily obtained: s 434(7) (as so added). An inspector may take copies of or extracts from a document produced in pursuance of s 434: s 434(8) (as so added). See note 4. As to the disclosure of information obtained under s 434 see s 451A; and PARA 1563. As to documents or information sent or supplied in hard copy form see PARA 678.

6 Companies Act 1985 s 434(1)(a) (amended by the Companies Act 1989 s 56(1), (2)). See note 4.

7 Companies Act 1985 s 434(1)(b). See note 4.

8 Companies Act 1985 s 434(1)(c). See note 4. If the demands for assistance go beyond what is either reasonable or necessary, a person's failure to comply with the demands will not be treated either as a breach of statutory duty or as a contempt of court (see the text and notes 9-13, 28-38): *Re an Inquiry into Mirror Group Newspapers plc* [2000] Ch 194, [1999] 2 All ER 641 (in the absence of any express statutory power to do so, the inspectors had not been entitled to require a witness to sign a confidentiality undertaking, which in any event went further than was either reasonable or necessary).

9 Companies Act 1985 s 434(2) (s 434(2) substituted by the Companies Act 1989 s 56(1), (3)). See note 4.

10 Companies Act 1985 s 434(2)(a) (as substituted: see note 9). See note 4.

11 Companies Act 1985 s 434(2)(b) (as substituted: see note 9). See notes 4, 8.

12 Companies Act 1985 s 434(2)(c) (as substituted: see note 9). See note 4.

13 Companies Act 1985 s 434(2) (as substituted: see note 9). See also note 4.

14 In any Act, unless the contrary intention appears, 'oath' includes affirmation and declaration: Interpretation Act 1978 s 5, Sch 1.

15 Companies Act 1985 s 434(3) (substituted by the Companies Act 1989 s 56(1), (4)). See note 4. Cf *Karak Rubber Co Ltd v Burden* [1971] 3 All ER 1118, [1971] 1 WLR 1748 (answers given in the course of informal questioning inadmissible). The inspector is entitled to have present at the examination any person whom he may reasonably require to enable him properly to carry out his statutory duty: *Re Gaumont-British Picture*

Corpn Ltd [1940] Ch 506, [1940] 2 All ER 415 (presence of a shorthand writer held to be reasonably necessary to enable the inspector to prepare his report).

16 *Re Pergamon Press Ltd* [1971] Ch 388, [1970] 3 All ER 535, CA (where it was observed that the inspectors' function under what is now the Companies Act 1985 s 432(2) (see PARA 1542) is administrative and not judicial). The proceedings conducted by inspectors do not involve the determination of a criminal charge within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(1) (right to a fair trial: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134): see *Fayed v United Kingdom (Application 17101/90)* (1994) 18 EHRR 393, ECtHR; *Saunders v United Kingdom (Application 19187/91)* (1996) 23 EHRR 313, ECtHR; *IJL, GMR and AKP v United Kingdom (Applications 29522/95, 30056/96, 30574/96)* [2002] BCC 380, ECtHR.

17 *Maxwell v Department of Trade and Industry* [1974] QB 523, [1974] 2 All ER 122, CA. Witnesses would generally be given the opportunity to correct or add to their evidence once they have seen a transcript of it: *British and Commonwealth Holdings plc (in administration) v Barclays de Zoete Wedd Ltd* [1999] 1 BCLC 86. However, transcripts of the evidence of other witnesses need not be supplied: *Maxwell v Department of Trade and Industry*.

18 *British and Commonwealth Holdings plc (in administration) v Barclays de Zoete Wedd Ltd* [1999] 1 BCLC 86. As to a witness's consideration of provisional criticisms which inspectors may be minded to make and the opportunity to make further submissions see *R (on the application of Clegg) v Secretary of State for Trade and Industry* [2002] EWCA Civ 519, [2003] BCC 128, [2002] All ER (D) 114 (Apr).

19 *Maxwell v Department of Trade and Industry* [1974] QB 523, [1974] 2 All ER 122, CA. The only relief which the court may give if these rules are not observed is a declaration that the rules of natural justice have not been followed, although the practical value of such a declaration is doubtful. The court cannot set aside the report, whether in whole or in part, or declare any part of it void: *Maxwell v Department of Trade and Industry*.

20 *Re an Inquiry into Mirror Group Newspapers plc* [2000] Ch 194, [1999] 2 All ER 641. Nor do inspectors have either a duty or a power to insist on a formal undertaking of confidentiality from a person interviewed by them to whom they might put information obtained from others in the course of their investigation as confidentiality could be protected simply by making the confidential character of the information and documents known: *Re an Inquiry into Mirror Group Newspapers plc*. As to the disclosure to parties in subsequent civil litigation of witness statements obtained by an inspector see the text and notes 26-27; and see *British and Commonwealth Holdings plc (in administration) v Barclays de Zoete Wedd Ltd* [1999] 1 BCLC 86.

21 *London and County Securities Ltd v Nicholson* [1980] 3 All ER 861, [1980] 1 WLR 948, distinguishing *Re Pergamon Press Ltd* [1971] Ch 388, [1970] 3 All ER 535, CA (where express but qualified assurances had been given to witnesses that their evidence would be treated as confidential).

22 *le* the powers conferred by the Companies Act 1985 s 434, whether as it has effect in relation to an investigation under any of ss 431-433 (see PARAS 1541-1543) or as applied by any other provision in Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1545 et seq).

23 Companies Act 1985 s 434(5). See note 4. Answers given as the result of informal questioning may not be included: *Karak Rubber Co Ltd v Burden* [1971] 3 All ER 1118, [1971] 1 WLR 1748. A person who is subsequently charged with criminal offences as the result of an investigation has no right to require production of witness statements made by other parties to the inspector, or to call the inspector: *R v Cheltenham Justices, ex p Secretary of State for Trade* [1977] 1 All ER 460, [1977] 1 WLR 95.

24 *le* an offence to which the Companies Act 1985 s 434 applies, being any offence other than an offence under the Perjury Act 1911 ss 2, 5 (false statements made on oath otherwise than in judicial proceedings or made otherwise than on oath: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARAS 716-717): Companies Act 1985 s 434(5B) (added by the Youth Justice and Criminal Evidence Act 1999 s 59, Sch 3 paras 4, 5; amended by SI 2009/1941). See note 4.

25 Companies Act 1985 s 434(5A) (added by the Youth Justice and Criminal Evidence Act 1999 Sch 3 paras 4, 5). See note 4. The amendment was made to this provision as a consequence of the decision in *Saunders v United Kingdom (Application 19187/91)* (1996) 23 EHRR 313, ECtHR (evidence disclosed by applicant when questioned under compulsory powers not admissible in criminal proceedings). As to the scope of this judgment's effect see *A-G's Reference (No 7 of 2000)* [2001] EWCA Crim 888, [2001] 1 WLR 1879, [2001] 2 Cr App Rep 286 (under the jurisprudence of the European Court of Human Rights, the right not to incriminate oneself was primarily concerned with respecting the will of an accused person to remain silent and did not extend to the use in criminal proceedings of material which might have been obtained from the accused through the use of compulsory powers but which had an existence independent of that person's will).

26 *London and County Securities Ltd v Nicholson* [1980] 3 All ER 861, [1980] 1 WLR 948. The inspectors' own notes, drafts, internal materials etc are not admissible nor subject to disclosure in any proceedings: *Re Astra*

Holdings plc, Secretary of State for Trade and Industry v Anderson [1998] 2 BCLC 44. Disclosure of transcripts may be sought in civil proceedings in accordance with CPR Pt 31 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 538 et seq); and the fact that the evidence in the transcripts had been provided under compulsion does not mean that their disclosure may not be ordered: *British and Commonwealth Holdings plc (in administration) v Barclays de Zoete Wedd Ltd* [1999] 1 BCLC 86. Witnesses should be given the opportunity to object to the production of all or part of the transcripts of which discovery is ordered: *British and Commonwealth Holdings plc (in administration) v Barclays de Zoete Wedd Ltd*. See also *Soden v Burns* [1996] 3 All ER 967, [1996] 1 WLR 1512.

27 *EDC v United Kingdom (Application 24433/94)* [1998] BCC 370, EComHR; *R v Secretary of State for Trade and Industry, ex p McCormick* [1998] BCC 379; *DC, HS and AD v United Kingdom (Application 39031/97)* [2000] BCC 710, ECtHR. As to the admissibility of evidence in disqualification proceedings see PARA 1607.

28 Companies Act 1985 s 436(1) (s 436(1) substituted by the Companies Act 1989 s 56(6)).

29 le pursuant to the Companies Act 1985 s 434(1)(a) (see head (1) in the text).

30 le pursuant to the Companies Act 1985 s 434(1)(c) (see head (3) in the text).

31 Companies Act 1985 s 436(1)(a) (as substituted: see note 28). See note 28.

32 le pursuant to the Companies Act 1985 s 434(1)(b) (see head (2) in the text) or s 434(2) (see head (b) in the text).

33 le to produce documents, to attend before them or to give all assistance pursuant to the Companies Act 1985 s 434(2) (see heads (a)-(c) in the text).

34 Companies Act 1985 s 436(1)(b) (as substituted: see note 28). See note 28.

35 Companies Act 1985 s 436(1)(c) (as substituted: see note 28). See note 28.

36 Companies Act 1985 s 436(1) (as substituted: see note 28). See note 28. For an example where inspectors did certify a refusal to the court under similar, but not identical, provisions relating to investigations into insider dealing under the Financial Services Act 1986 ss 177, 178(1) (now repealed) see *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660, [1988] 1 All ER 203, HL; and PARA 1571. As to the meaning of 'court' see PARA 212 note 1.

37 Such an application, whether made in the High Court or in the county court, must be made by the issue of a CPR Pt 8 claim form (see **CIVIL PROCEDURE** vol 11 (2009) PARA 127 et seq): *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 5(1), (2). In the High Court of Justice, the jurisdiction is assigned to the Companies Court or Chancery District Registry: *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 5(2). Every claim form by which an application under the Companies Act 1985 is begun and all affidavits, witness statements, notices and other documents in those proceedings must be entitled 'In the matter of [*the company in question*]' and in the matter of the Companies Act 1985: *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 4(1). As to the High Court and the distribution of business within the High Court see **COURTS** vol 10 (Reissue) PARA 602 et seq.

38 Companies Act 1985 s 436(3). See note 28. As to the powers of the court in cases of contempt see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 491 et seq.

UPDATE

1544 Conduct of investigation

NOTE 2--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

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B. INVESTIGATION OF OWNERSHIP OF COMPANY

(A) GENERAL POWERS OF INVESTIGATION

1545. Appointment and powers of inspectors.

Where it appears to the Secretary of State¹ that there is good reason to do so, he may appoint one or more competent inspectors to investigate and report on the membership of any company², and otherwise with respect to the company, for the purpose of determining the true persons who are or have been financially interested in its success or failure, real or apparent, or able to control or materially to influence its policy³.

If an application for such an investigation with respect to particular shares or debentures⁴ of a company is made to the Secretary of State by members of the company, and the number of applicants or the amount of shares held by them is not less than that required for an application by members for the appointment of inspectors to investigate a company's affairs⁵, then the Secretary of State must appoint inspectors to conduct the investigation applied for⁶. The Secretary of State must not, however, appoint inspectors if he is satisfied that the application is vexatious; and, where inspectors are appointed, their terms of appointment must exclude any matter in so far as the Secretary of State is satisfied that it is unreasonable for it to be investigated⁷. Before appointing inspectors, the Secretary of State may require the applicant or applicants to give security, to an amount not exceeding £5,000 or such other sum as he may by order specify, for payment of the costs of the investigation⁸. If, on such an application for investigation by members of the company, it appears to the Secretary of State that the powers conferred by the statutory provisions relating to the obtaining of information as to those interested in shares⁹ are sufficient for the purposes of investigating the matters which inspectors would be appointed to investigate, he may instead conduct the investigation under those statutory provisions¹⁰.

Subject to the terms of their appointment, the inspectors' powers extend to the investigation of any circumstances suggesting the existence of an arrangement or understanding which, though not legally binding, is or was observed or likely to be observed in practice and which is relevant to the purposes of the investigation¹¹.

For the purposes of an investigation under these provisions¹², the statutory provisions relating to the power of the inspectors to extend their investigations into the affairs of related companies¹³, the production of documents and taking of evidence¹⁴, the obstruction of inspectors¹⁵ and inspectors' reports¹⁶ apply as in the case of investigations into the affairs of a company¹⁷, with the necessary modifications of references to the affairs of the company or to those of any other body corporate¹⁸, but subject to the following provisions¹⁹, which apply to²⁰:

- 897 (1) all persons who are or have been, or whom the inspector has reasonable cause to believe to be or to have been, financially interested in the success or failure or the apparent success or failure of the company or any other body corporate whose membership is investigated with that of the company, or able to control or materially influence its policy, including persons concerned only on behalf of others²¹; and
- 898 (2) any other person whom the inspector has reasonable cause to believe possesses information relevant to the investigation²²,

as they apply in relation to officers and agents²³ of the company or the other body corporate, as the case may be²⁴. If the Secretary of State is of opinion that there is good reason for not divulging any part of a report²⁵, he may disclose the report²⁶ with the omission of that part; and

he may cause to be kept by the registrar of companies²⁷ a copy of the report with that part omitted, or in the case of any other such report, a copy of the whole report²⁸.

1 As to the Secretary of State see PARA 6 et seq.

2 As to who qualifies as a member of a company see PARA 321. As to the meaning of 'company' see PARA 1. As to the power of a public company to give notice requiring information on interests in shares that are held see the Companies Act 2006 Pt 22 (ss 791-828); and PARA 436 et seq.

3 Companies Act 1985 s 442(1). The provisions of the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1546 et seq) have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

The provisions of the Companies Act 1985 ss 442, 443 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. As to the disclosure of information obtained under the Companies Act 1985 s 442 see s 451A; and PARA 1563.

Where an inspector appointed under the Companies Act 1985 s 442 knows or suspects or has reasonable grounds for knowing or suspecting that a person is or has engaged in money laundering or terrorist financing, he must, as soon as reasonably practicable, inform the Serious Organised Crime Agency: Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(r). As to money laundering see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 539 et seq.

4 As to shares generally see PARA 1055. As to the meaning of 'debenture' see PARA 1299.

5 Ie under the Companies Act 1985 s 431(2)(a) or (b) (see PARA 1541 heads (1), (2)).

6 Companies Act 1985 s 442(3) (substituted by the Companies Act 1989 s 62). See also note 3.

7 Companies Act 1985 s 442(3A) (added by the Companies Act 1989 s 62). See also note 3.

8 Companies Act 1985 s 442(3B) (added by the Companies Act 1989 s 62). See also note 3. Any such order must be made by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: Companies Act 1985 s 442(3B) (as so added). At the date at which this volume states the law, no such order had been made.

9 Ie the Companies Act 1985 s 444 (see PARA 1546).

10 Companies Act 1985 s 442(3C) (added by the Companies Act 1989 s 62). See also note 3.

11 Companies Act 1985 s 442(4). See also note 3.

12 Ie the Companies Act 1985 s 442 (see the text and notes 1-11).

13 Ie the Companies Act 1985 s 433(1) (see PARA 1543).

14 Ie the Companies Act 1985 s 434 (see PARA 1544).

15 Ie the Companies Act 1985 s 436 (see PARA 1544).

16 Ie Companies Act 1985 s 437 (see PARA 1554).

17 See PARA 1541 et seq. As to what constitutes the affairs of a company see PARA 1541 note 2.

18 Companies Act 1985 s 443(1). As to the disclosure of information obtained under s 443 see s 451A; and PARA 1563. As to the meaning of 'body corporate' see PARA 1 note 5.

19 Ie subject to the Companies Act 1985 s 443(2), (3) (see the text and notes 20-28).

20 Companies Act 1985 s 443(2). See also note 18.

21 Companies Act 1985 s 443(2)(a). See also note 18.

22 Companies Act 1985 s 443(2)(b). See also note 18. As to savings in respect of matters required to be disclosed by solicitors and bankers see PARA 1564.

- 23 As to references to officers or to agents see PARA 1544 note 2.
- 24 Companies Act 1985 s 443(2). See also note 18.
- 25 le made under the Companies Act 1985 ss 442, 443.
- 26 le under the Companies Act 1985 s 437 (see PARA 1554).
- 27 As to the meaning of 'registrar of companies' see PARA 131 note 2.
- 28 Companies Act 1985 s 443(3). See also note 18.

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1546. Power to obtain information as to persons interested in shares or debentures.

If it appears to the Secretary of State¹ that there is good reason to investigate the ownership of any shares² in or debentures³ of a company⁴, and that it is unnecessary to appoint inspectors for the purpose, he may require any person⁵ whom he has reasonable cause to believe to have, or to be able to obtain, any information as to the present and past interests⁶ in those shares or debentures and the names and addresses of the persons interested and of any persons who act or have acted on their behalf in relation to the shares or debentures, to give any such information to the Secretary of State⁷.

A person who fails to give any information required of him⁸, or who in giving such information makes any statement which he knows to be false in a material particular⁹, or recklessly makes any statement which is false in a material particular, commits an offence¹⁰.

- 1 As to the Secretary of State see PARA 6 et seq.
- 2 As to shares generally see PARA 1055.
- 3 As to the meaning of 'debenture' see PARA 1299.
- 4 As to the meaning of 'company' see PARA 1.
- 5 As to restrictions on the disclosure of privileged information by solicitors and bankers see PARA 1564.
- 6 For these purposes, a person is deemed to have an interest in shares or debentures if he has any right to acquire or dispose of them or of any interest in them, or to vote in respect of them, or if his consent is necessary for the exercise of any of the rights of other persons interested in them, or if other persons interested in them can be required, or are accustomed, to exercise their rights in accordance with his instructions: Companies Act 1985 s 444(2).
- 7 Companies Act 1985 s 444(1). The provisions of the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1547 et seq) have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

The provisions of the Companies Act 1985 s 444 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. As to the disclosure of information obtained under the Companies Act 1985 s 444 see s 451A; and PARA 1563. As to savings in respect of matters required to be disclosed by solicitors and bankers see PARA 1564. As to the disclosure of interests in shares of public companies see PARA 435 et seq.

8 lie under the Companies Act 1985 s 444.

9 As to the materiality of misstatements see PARA 1073 (where the matter is discussed in relation to offer documents).

10 Companies Act 1985 s 444(3) (amended by the Companies Act 2006 s 1124, Sch 3 para 1(1)). A person guilty of such an offence is liable: (1) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine (or both); (2) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or both) and, for continued contravention, a daily default fine not exceeding one-fiftieth of the statutory maximum: Companies Act 1985 s 444(4) (added by the Companies Act 2006 Sch 3 para 1(2)). See also note 7. As to the statutory maximum see PARA 1622.

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(B) ORDERS IMPOSING RESTRICTIONS ON SHARES FOLLOWING INVESTIGATION

1547. Power to impose restrictions on shares and debentures.

If, in connection with an investigation of the ownership of a company¹ or of its shares or debentures², it appears to the Secretary of State³ that there is difficulty in finding out the relevant facts about any shares, whether issued or to be issued, he may by order direct that the shares until further order be subject to the restrictions of Part XV of the Companies Act 1985⁴. If, however, the Secretary of State is satisfied that such an order may unfairly affect the rights of third parties in respect of shares, he may, for the purpose of protecting such rights and subject to such terms as he thinks fit, direct that such acts by such persons or descriptions of persons and for such purposes as may be set out in the order, are not to constitute a breach of the restrictions of Part XV of the Companies Act 1985⁵.

1 lie under the Companies Act 1985 s 442 (see PARA 1545). As to the meaning of 'company' see PARA 1. The provisions of the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1551 et seq) have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

2 lie under the Companies Act 1985 s 444 (see PARA 1546). As to shares generally see PARA 1055. As to the meaning of 'debenture' see PARA 1299. Section 445, and Pt XV (ss 454-457) (see PARAS 1548-1550) in its application to orders under it, apply in relation to debentures as in relation to shares, save that s 445(1A) (see the text and note 5) does not so apply: s 445(2) (amended by SI 1991/1646).

The provisions of the Companies Act 1985 s 445 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

The Secretary of State may by regulations made by statutory instrument make such amendments of the provisions of the Companies Act 1985 s 445, and Pt XV, relating to orders imposing restrictions on shares as appear to him necessary or expedient, for enabling orders to be made in a form protecting the rights of third parties, or with respect to the circumstances in which restrictions may be relaxed or removed, or with respect to the making of interim orders by a court: Companies Act 1989 s 135(1), (2) (amended by SI 2008/948). The regulations may make different provision for different cases and may contain such transitional and other supplementary and incidental provisions as appear to the Secretary of State to be appropriate (Companies Act 1989 s 135(3)); but such regulations are not to be made unless a draft of the regulations has been laid before Parliament and approved by resolution of each House of Parliament (s 135(4)). In exercise of the powers so conferred, the Secretary of State has made the Companies (Disclosure of Interests in Shares) (Orders imposing

restrictions on shares) Regulations 1991, SI 1991/1646. As to the Secretary of State see PARA 6. As from a day to be appointed under the Companies Act 2006 s 1300(2), the Companies Act 1989 s 135 is to be repealed: see the Companies Act 2006 s 1295, Sch 16. However, at the date at which this volume states the law, no such day had been appointed.

See also the Companies Act 2006 ss 797-802 (see PARAS 446-449), restating the Companies Act 1985 Pt XV, which apply for the purposes of the Companies Act 2006 Pt 22 (ss 791-828) (see PARA 436 et seq).

3 As to the Secretary of State see PARA 6.

4 Companies Act 1985 s 445(1). As to the disclosure of information obtained under the Companies Act 1985 s 444 see s 451A; and PARA 1563.

Where before 3 December 1981 shares in a company were directed by order of the Secretary of State to be subject to the restrictions imposed by the Companies Act 1948 s 174 (now repealed), and the order remained in force on 1 July 1985, nothing in the Companies Consolidation (Consequential Provisions) Act 1985 prevents the continued application of the order with such effect as it had immediately before the repeal of the Companies Act 1948 s 174 took effect: Companies Consolidation (Consequential Provisions) Act 1985 s 23.

5 Companies Act 1985 s 445(1A) (added by SI 1991/1646). See also note 4.

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1548. Consequences of order imposing restrictions on shares.

So long as any shares¹ are directed to be subject to the restrictions of Part XV of the Companies Act 1985², then, subject to any directions made³ in relation to an order⁴:

- 899 (1) any transfer of those shares or, in the case of unissued shares⁵, any transfer of the right to be issued with them, and any issue of them, is void⁶;
- 900 (2) no voting rights are exercisable in respect of the shares⁷;
- 901 (3) no further shares may be issued in right of them or in pursuance of any offer made to their holder⁸; and
- 902 (4) except in a liquidation, no payment may be made of any sums due from the company⁹ on the shares¹⁰, whether in respect of capital or otherwise¹¹.

Where shares are subject to the restrictions under head (1) above, any agreement to transfer the shares or, in the case of unissued shares, the right to be issued with them is void, except such agreement or right as may be made or exercised under the terms of directions made by the Secretary of State or the court¹² or an agreement to transfer the shares on the making of an order¹³ by the court or by the Secretary of State approving the transfer¹⁴.

Where shares are subject to the restrictions under head (3) or head (4) above, an agreement to transfer any right to be issued with other shares in right of those shares, or to receive any payment on them, otherwise than in a liquidation, is void (except such agreement or right as may be made or exercised under the terms of directions made by the Secretary of State or the court¹⁵ or an agreement to transfer any such right on the transfer of the shares on the making of an order¹⁶ by the court or by the Secretary of State approving the transfer)¹⁷.

1 As to shares generally see PARA 1055.

2 le the Companies Act 1985 Pt XV (ss 454-457) (see also PARAS 1549-1550). The provisions of Pt XV have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. See also the Companies Act 2006 ss 797-802 (see PARAS 446-449), restating the Companies Act 1985 Pt XV, which apply for the purposes of the Companies Act 2006 Pt 22 (ss 791-828) (see PARA 436 et seq).

As to the power of the Secretary of State to make regulations amending the Companies Act 1985 Pt XV see PARA 1547 note 2. In exercise of the powers so conferred, the Secretary of State has made the Companies (Disclosure of Interests in Shares) (Orders imposing restrictions on shares) Regulations 1991, SI 1991/1646. As to the Secretary of State see PARA 6.

3 le pursuant to the Companies Act 1985 s 445(1A) (see PARA 1547) or s 456(1A) (see PARA 1550).

4 Companies Act 1985 s 454(1) (amended by SI 1991/1646; SI 2007/2194). The provisions of the Companies Act 1985 s 454 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 As to the meaning of 'unissued' (share capital) see PARA 1045.

6 Companies Act 1985 s 454(1)(a). See also note 4.

7 Companies Act 1985 s 454(1)(b). See also note 4.

8 Companies Act 1985 s 454(1)(c). See also note 4.

9 As to the meaning of 'company' see PARA 1.

10 This is not limited to payment of dividends or of capital on a reduction of capital or on redemption of shares but covers the proceeds of sale on a take-over: *Re Ashbourne Investments Ltd* [1978] 2 All ER 418, [1978] 1 WLR 1346.

11 Companies Act 1985 s 454(1)(d). See also note 4.

12 See note 3. As to the meaning of 'court' see PARA 212 note 1.

13 le an order under the Companies Act 1985 s 456(3)(b) (see PARA 1550).

14 Companies Act 1985 s 454(2) (amended by the Companies Act 1989 s 145, Sch 19 para 10(2); SI 1991/1646; SI 2007/2194). See also note 4.

15 See note 3.

16 See note 13.

17 Companies Act 1985 s 454(3) (amended by the Companies Act 1989 Sch 19 para 10(2); SI 1991/1646; SI 2007/2194). See also note 4.

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1549. Punishment for attempted evasion of restrictions.

Subject to the terms of any directions made by the Secretary of State¹ or the court², a person commits an offence³ if he⁴:

- 903 (1) exercises or purports to exercise any right to dispose of any shares⁵ which, to his knowledge, are for the time being subject to restrictions⁶ or of any right to be issued with any such shares⁷; or

- 904 (2) votes in respect of any such shares⁸, whether as holder or proxy⁹, or appoints
a proxy to vote in respect of them¹⁰; or
- 905 (3) being the holder of any such shares, fails to notify of their being subject to
those restrictions any person whom he does not know to be aware of that fact but
does know to be entitled, apart from the restrictions, to vote in respect of those
shares whether as holder or as proxy¹¹; or
- 906 (4) being the holder of any such shares, or being entitled to any right to be
issued with other shares in right of them, or to receive any payment on them,
otherwise than in a liquidation, enters into any agreement which is void¹² as a
consequence of an order imposing restrictions¹³.

Subject to the terms of any directions made by the Secretary of State or the court¹⁴, if shares in a company¹⁵ are issued in contravention of the restrictions, an offence is committed by the company, and every officer of it who is in default¹⁶.

1 As to the Secretary of State see PARA 6.

2 Ie under the Companies Act 1985 s 445(1A) (see PARA 1547) or s 456 (see PARA 1550). As to the meaning of 'court' see PARA 212 note 1. The provisions of the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1551 et seq) and Pt XV (ss 454-457) (see also PARAS 1548, 1550) have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16.

3 A person guilty of an offence under the Companies Act 1985 s 445 is liable on conviction on indictment, to a fine and, on summary conviction, to a fine not exceeding the statutory maximum: s 455(2A) (added by the Companies Act 2006 s 1124, Sch 3 para 7(3)). As to the statutory maximum see PARA 1622.

4 Companies Act 1985 s 455(1) (amended by the Companies Act 2006 Sch 3 para 7(1); SI 1991/1646; SI 2007/2194).

The provisions of the Companies Act 1985 s 455 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 As to shares generally see PARA 1055.

6 Ie the restrictions in the Companies Act 1985 Pt XV (see also PARAS 1548, 1550). As to the power of the Secretary of State to make regulations amending the Companies Act 1985 Pt XV see PARA 1547 note 2. In exercise of the powers so conferred, the Secretary of State has made the Companies (Disclosure of Interests in Shares) (Orders imposing restrictions on shares) Regulations 1991, SI 1991/1646.

7 Companies Act 1985 s 455(1)(a). See note 4.

8 As to voting at meetings see PARA 652 et seq.

9 As to voting by proxy see PARA 662.

10 Companies Act 1985 s 455(1)(b). See note 4.

11 Companies Act 1985 s 455(1)(c). See note 4.

12 Ie under the Companies Act 1985 s 454(2) or (3) (see PARA 1548).

13 Companies Act 1985 s 455(1)(d). See note 4.

14 See note 2.

15 As to the meaning of 'company' see PARA 1.

16 Companies Act 1985 s 455(2) (amended by the Companies Act 2006 Sch 3 para 7(2); SI 1991/1646; SI 2007/2194). See also note 4. As to the meaning of 'officer who is in default' see PARA 315.

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1550. Relaxation and removal of restrictions.

Where shares¹ in a company² are by order made subject to the restrictions of Part XV of the Companies Act 1985³, application⁴ may be made to the court⁵ for an order directing that the shares be no longer so subject⁶.

Where the court is satisfied that an order subjecting the shares to such restrictions unfairly affects the rights of third parties in respect of shares, then the court, for the purpose of protecting such rights and subject to such terms as it thinks fit and in addition to any order it may make⁷, may direct on an application⁸ so made that such acts by such persons or descriptions of persons and for such purposes as may be set out in the order, do not constitute a breach of the statutory restrictions⁹.

If the order applying the restrictions was made by the Secretary of State, or he has refused to make an order disapplying them, the application may be made by any person aggrieved¹⁰.

Subject to the provisions described below, an order of the court or the Secretary of State directing that shares are to cease to be subject to the restrictions may be made only if¹¹:

- 907 (1) the court or, as the case may be, the Secretary of State is satisfied that the relevant facts about the shares have been disclosed to the company and no unfair advantage has accrued to any person as a result of the earlier failure to make that disclosure¹²; or
- 908 (2) the shares are to be transferred for valuable consideration¹³ and the court, in any case, or the Secretary of State, if the order was made by him¹⁴, approves the transfer¹⁵.

Where shares in a company are subject to the restrictions, the court may¹⁶ on application¹⁷ order the shares to be sold¹⁸, subject to the court's approval as to the sale, and may also direct that the shares are to cease being subject to the restrictions; and an application to the court for this purpose may be made by the Secretary of State or by the company¹⁹. Where an order for sale has been so made, then, on application by the Secretary of State, or by the company, or by the person appointed by or in pursuance of the order to effect the sale, or by any person interested in the shares, the court may make such further order relating to the sale or to the transfer of the shares as it thinks fit²⁰.

Where shares are sold in pursuance of an order of the court, the proceeds of sale, less the costs of the sale, must be paid into court for the benefit of the persons who are beneficially interested in the shares; and any such person may apply to the court for the whole or any part of those proceeds to be paid to him²¹. On any such application, the court must order the payment to the applicant of the whole of the proceeds of sale together with any interest on them or, if any other person had a beneficial interest in the shares at the time of their sale, such proportion of those proceeds and interest as is equal to the proportion which the value of the applicant's interest in the shares bears to the total value of the shares²².

An order, whether of the Secretary of State or the court, directing that shares are to cease to be subject to the above restrictions²³, if it is expressed to be made with a view to permitting a transfer of the shares, or made under the power to approve a sale²⁴, may continue, either in

whole or in part, the following restrictions, so far as they relate to any right acquired or offer made before the transfer²⁵, namely that:

- 909 (a) no further shares may be issued in right of those shares or in pursuance of any offer made to their holder²⁶; and
- 910 (b) except in a liquidation, no payment may be made of any sums due from the company on the shares, whether in respect of capital or otherwise²⁷.

1 As to shares generally see PARA 1055.

2 As to the meaning of 'company' see PARA 1.

3 Ie the Companies Act 1985 Pt XV (ss 454-457) (see also PARAS 1548-1549). As to the power of the Secretary of State to make regulations amending Pt XV see PARA 1547 note 2. In exercise of the powers so conferred, the Secretary of State has made the Companies (Disclosure of Interests in Shares) (Orders imposing restrictions on shares) Regulations 1991, SI 1991/1646. As to the Secretary of State see PARA 6. The provisions of the Companies Act 1985 Pt XV have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16.

4 In the High Court such an application must be made by the issue of a CPR Pt 8 claim form (see **CIVIL PROCEDURE** vol 11 (2009) PARA 127 et seq): see *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 4.

5 As to the meaning of 'court' see PARA 212 note 1.

6 Companies Act 1985 s 456(1).

The provisions of the Companies Act 1985 ss 456, 457 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

7 Ie under the Companies Act 1985 s 456(1) (see the text and notes 1-6).

8 Ie on an application under the Companies Act 1985 s 456(1) (see the text and notes 1-6).

9 Companies Act 1985 s 456(1A) (added by SI 1991/1646). See also note 6. The Companies Act 1985 s 456(3) (see the text and notes 11-15) does not apply to an order made under s 456(1A): s 456(1A) (as so added). The power of the court to give a direction under s 456(1A) is exercisable in respect of any order made under s 210(5) (repealed), s 216(1) (repealed (see now the Companies Act 2006 s 794(1); and PARA 445)) or the Companies Act 1985 s 445(1) (see PARA 1547), including such orders as may be in force on 18 July 1991 (ie upon the commencement of the Companies (Disclosure of Interests in Shares) (Orders imposing restrictions on shares) Regulations 1991, SI 1991/1646): reg 9. For earlier cases illustrating the adverse effect restrictions can have on third parties see *Re Geers Gross plc* [1988] 1 All ER 224, [1987] 1 WLR 1649, CA; *Re Lonrho plc (No 3)* [1989] BCLC 480; *Re Lonrho plc (No 2)* [1990] Ch 695, sub nom *Re Lonrho plc (No 4)* [1990] BCLC 151.

10 Companies Act 1985 s 456(2) (amended by 2007/2194). See also note 6.

11 Companies Act 1985 s 456(3). See also note 6.

12 Companies Act 1985 s 456(3)(a). See also note 6. Once the information to which the company is entitled is supplied, the order imposing the restrictions should be discharged; a desire to produce evidence of new failures is no ground for adjournment of the hearing or continuation of the restrictions: *Re Ricardo Group plc* [1989] BCLC 566. Cf *Re Lonrho plc* [1988] BCLC 53 (the Companies Act 1985 s 456(3)(a) empowers the court to free shares subject to a restriction but does not require the court to do so, particularly where it appears that the applicant to have the restriction lifted has not disclosed information reasonably required in relation to other shares of the company). See also *Re Ricardo Group plc (No 3)* [1989] BCLC 771 (restrictions released without disclosure of information where their continuation would prevent a take-over bid from going ahead to the prejudice of those shareholders who wanted to accept the bid). See also note 15.

13 In the Companies Act 1985 s 456(3)(b) (as originally enacted), the word 'sold' was used instead of the words 'transferred for valuable consideration'. 'Sold' was held to denote an exchange of the shares for cash; a non-cash exchange was not then within the scope of the statutory provision: *Re Westminster Property Group plc* [1985] 2 All ER 426, [1985] 1 WLR 676, CA. As a result of the amendment of the Companies Act 1985 s 456(3) (b) (see note 15) the decision in *Re Westminster Property Group plc* has been reversed.

14 Ie under the Companies Act 1985 s 445 (see PARA 1547).

15 Companies Act 1985 s 456(3)(b) (amended by the Companies Act 1989 s 145, Sch 19 para 10(1)(a), (b); and SI 2007/2194). See also note 6. The Companies Act 1985 s 456(3) only applies to a final order of the court and does not apply to an order made at an interim stage, although the provision is nevertheless relevant as showing the type of circumstances requiring the maintenance of any restrictions: *Re TR Technology Investment Trust plc* [1988] BCLC 256. See also *Re Geers Gross plc* [1988] 1 All ER 224, [1987] 1 WLR 1649, CA. In exercising its discretion whether to approve a sale, the court is entitled to take into account the refusal to disclose relevant facts: *Re Geers Gross plc*.

16 *Ie* without prejudice to the power of the court to give directions under the Companies Act 1985 s 456(1A) (see the text and notes 7-9).

17 See note 4.

18 *Quaere* whether the court would exercise this power where it interfered with the rights of parties to a pre-existing contract for sale: see *Re Westminster Property Group plc* [1985] 2 All ER 426, [1985] 1 WLR 676, CA (where the court thought that the proper procedure for removing the restrictions where shares are subject to a pre-existing contract would be to seek an order under the Companies Act 1985 s 456(3)(b) (see the text and notes 13-15)).

19 Companies Act 1985 s 456(4) (amended by SI 1991/1646; SI 2007/2194). See also note 6. On granting an application for an order under the Companies Act 1985 s 456(4) or s 456(5) (see the text and note 20), the court may order that the applicant's costs be paid out of the proceeds of sale; and, if that order is made, the applicant is entitled to payment of his costs out of those proceeds before any person interested in the shares in question receives any part of those proceeds: s 457(3). See also note 21.

20 Companies Act 1985 s 456(5) (amended by SI 2007/2194). See also notes 6, 19.

21 Companies Act 1985 s 457(1).

22 Companies Act 1985 s 457(2). See also note 21.

23 *Ie* the restrictions of the Companies Act 1985 Pt XV.

24 *Ie* under the Companies Act 1985 s 456(4) (see the text and notes 16-19).

25 Companies Act 1985 s 456(6). See also note 6. Section 456(3) (see the text and notes 13-15) does not apply to an order directing that shares are to cease to be subject to any restrictions which have been continued in force in relation to those shares under s 456(6): s 456(7). See also *Re Ashbourne Investments Ltd* [1978] 2 All ER 418, [1978] 1 WLR 1346 (restrictions on transfer of shares lifted to enable take-over to proceed; restrictions on proceeds of sale continued).

26 Companies Act 1985 s 454(1)(c); applied by s 456(6).

27 Companies Act 1985 s 454(1)(d); applied by s 456(6).

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C. SECRETARY OF STATE'S POWERS REGARDING INVESTIGATIONS

1551. Secretary of State's power to give directions to inspectors.

In exercising his functions an inspector¹ is required to comply with any direction² given to him by the Secretary of State³. A direction may be given on an inspector's appointment, may vary or revoke a direction previously given, and may be given at the request of an inspector⁴.

The Secretary of State may give an inspector appointed to investigate a company's⁵ affairs or ownership⁶ a direction: (1) as to the subject matter of his investigation (whether by reference to

a specified area of a company's operation, a specified transaction, a period of time or otherwise); or (2) which requires the inspector to take or not to take a specified step in his investigation⁷.

The Secretary of State may give an inspector appointed under any provision of Part XIV of the Companies Act 1985⁸ a direction requiring him to secure that a specified inspectors' report⁹: (a) includes the inspector's views on a specified matter; (b) does not include any reference to a specified matter; (c) is made in a specified form or manner; or (d) is made by a specified date¹⁰.

The Secretary of State may direct an inspector to take no further steps in his investigation¹¹ and the inspector must comply¹². The Secretary of State may give such a direction to an inspector appointed following a court order¹³ or an application by members of the company¹⁴ only on the grounds that it appears to him that matters have come to light in the course of the inspector's investigation which suggest that a criminal offence has been committed, and those matters have been referred to the appropriate prosecuting authority¹⁵. Where the Secretary of State gives a direction to terminate the investigation, the inspector must not make a final report to the Secretary of State unless the direction was made on the grounds that a criminal offence has been committed and referred and the Secretary of State directs the inspector to make a final report to him, or the inspector was appointed in pursuance of an order¹⁶ of the court¹⁷.

1 As to the appointment and powers of inspectors see PARA 1545.

2 Ie any direction given under the Companies Act 1985 s 446A. The provisions of the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1552 et seq) have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies Act 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

3 Companies Act 1985 s 446A(1) (ss 446A, 446B added by the Companies Act 2006 s 1035(1)). As to the Secretary of State see PARA 6. As to the disclosure of information obtained under the Companies Act 1985 ss 446A, 446B see s 451A; and PARA 1563.

The provisions of the Companies Act 1985 ss 446A, 446B apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 1985 s 446A(4) (as added: see note 3).

5 As to the meaning of 'company' see PARA 1.

6 Ie an inspector appointed under the Companies Act 1985 s 431 (see PARA 1541), s 432(2) (see PARA 1542) or s 442(1) (see PARA 1545).

7 Companies Act 1985 s 446A(2) (as added: see note 3). For the purpose of s 446A, a reference to an inspector's investigation includes any investigation he undertakes, or could undertake, under s 433(1) (power to investigate affairs of holding company or subsidiary) (see PARA 1543); and 'specified' means specified in a direction under s 446A: s 446A(5) (as added: see note 3).

8 Ie the Companies Act 1985 Pt XIV (see also PARAS 1541 et seq, 1552 et seq).

9 Ie a report under the Companies Act 1985 s 437 (see PARA 1554).

10 Companies Act 1985 s 446A(3) (as added: see note 3).

11 Companies Act 1985 s 446B(1) (as added: see note 3). For the purposes of s 446B, a reference to an inspector's investigation includes any investigation he undertakes, or could undertake, under s 433(1) (power to investigate affairs of holding company or subsidiary) (see PARA 1543): s 446B(6) (as added: see note 3).

Where the Secretary of State gives a direction under s 446B, any direction already given to the inspector under s 437(1) to produce an interim report (see PARA 1554), and any direction given to him under s 446A(3) in relation to such a report (see the text and notes 8-10), cease to have effect: s 446B(3) (as added: see note 3).

12 Companies Act 1985 s 446B(5) (as added: see note 3).

13 Ie an inspector appointed under the Companies Act 1985 s 432(1) (see PARA 1542).

14 le an inspector appointed under the Companies Act 1985 s 442(3) (see PARA 1545).

15 Companies Act 1985 s 446B(2) (as added: see note 3).

16 le under the Companies Act 1985 s 432(1) (see PARA 1542).

17 Companies Act 1985 s 446B(4) (as added: see note 3).

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D. RESIGNATION, REMOVAL ETC OF INSPECTORS

1552. Resignation, removal and replacement of inspectors.

An inspector¹ may resign by notice in writing to the Secretary of State². The Secretary of State may revoke the appointment of an inspector by notice in writing to the inspector³.

Where an inspector resigns, an inspector's appointment is revoked, or an inspector dies, the Secretary of State may appoint one or more competent inspectors to continue the investigation⁴. The Secretary of State must exercise this power so as to secure that at least one inspector continues the investigation⁵.

1 As to the appointment and powers of inspectors see PARA 1545.

2 Companies Act 1985 s 446C(1) (ss 446C, 446D added by the Companies Act 2006 s 1036). As to the Secretary of State see PARA 6. As to the disclosure of information obtained under the Companies Act 1985 ss 446C, 446D see s 451A; and PARA 1563. The provisions of the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1553 et seq) have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

The provisions of the Companies Act 1985 ss 446C, 446D apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Companies Act 1985 s 446C(2) (as added: see note 2).

4 Companies Act 1985 s 446D(1) (as added: see note 2). An appointment under s 446D(1) is to be treated for the purposes of Pt XIV (see also PARAS 1541 et seq, 1553 et seq) (apart from s 446D) as an appointment under the provision of that Part under which the former inspector was appointed: s 446D(2) (as added: see note 2). For the purposes of s 446D, references to an investigation include any investigation the former inspector conducted under s 433(1) (power to investigate affairs of holding company or subsidiary) (see PARA 1543): s 446D(5) (as added: see note 2).

5 Companies Act 1985 s 446D(3) (as added: see note 2). The provisions of s 446D(3) do not apply if: (1) the Secretary of State could give any replacement inspector a direction under s 446B (termination of investigation) (see PARA 1551); and (2) such a direction would (under s 446B(4)) result in a final report not being made: s 446D(4) (as added: see note 2).

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DOCUMENTS/(i) Investigations/D. RESIGNATION, REMOVAL ETC OF INSPECTORS/1553. Power to obtain information from former inspectors etc.

1553. Power to obtain information from former inspectors etc.

The Secretary of State¹ may direct an inspector who has resigned or whose appointment has been revoked or an inspector to whom he has given a direction to terminate an investigation² to produce documents³ obtained or generated by that person during the course of his investigation to the Secretary of State, or to an inspector appointed under Part XIV of the Companies Act 1985⁴.

The power to require production of a document includes power, in the case of a document not in hard copy form, to require the production of a copy of the document in hard copy form, or in a form from which a hard copy can be readily obtained⁵. The Secretary of State may take copies of or extracts from a document produced⁶.

The Secretary of State may also direct an inspector who has resigned or whose appointment has been revoked or an inspector to whom he has given a direction to terminate an investigation to inform him of any matters that came to that person's knowledge as a result of his investigation⁷.

Any such direction given by the Secretary of State must be complied with⁸.

1 As to the Secretary of State see PARA 6.

2 I.e. a direction under the Companies Act 1985 s 446B (see PARA 1551).

3 'Document' includes information recorded in any form: Companies Act 1985 s 446E(8)(b) (s 446E added by the Companies Act 2006 s 1037(1)). As to the disclosure of information obtained under the Companies Act 1985 s 446E see s 451A; and PARA 1563.

The provisions of the Companies Act 1985 s 446E apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 1985 s 446E(1), (2), (3) (as added: see note 3). Pt XIV comprises ss 431-453D (see also PARAS 1541 et seq, 1554 et seq), which have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

5 Companies Act 1985 s 446E(4) (as added: see note 3). As to documents or information sent or supplied in hard copy form see PARA 678.

6 Companies Act 1985 s 446E(5) (as added: see note 3).

7 Companies Act 1985 s 446E(6) (as added: see note 3). References to the investigation of a former inspector or inspector include any investigation he conducted under s 433(1) (power to investigate affairs of holding company or subsidiary) (see PARA 1543): s 446E(8)(a) (as added: see note 3).

8 Companies Act 1985 s 446E(7) (as added: see note 3).

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E. INSPECTORS' REPORTS FOLLOWING INVESTIGATION

1554. Inspectors' reports.

The inspectors¹ may, and if so directed by the Secretary of State² must, make interim reports to the Secretary of State; and on the conclusion of their investigation they must make a final report to him³. Inspectors⁴ may at any time and must, if the Secretary of State directs them to do so, inform him of any matters coming to their knowledge as a result of their investigations⁵.

If the inspectors were appointed in pursuance of an order of the court⁶, the Secretary of State must furnish a copy of any report of theirs to the court⁷.

In any case the Secretary of State may, if he thinks fit⁸:

- 911 (1) forward a copy of any report made by the inspectors to the registered office⁹ of the company¹⁰;
- 912 (2) furnish a copy on request, and on payment of the prescribed fee¹¹, to any member¹² of the company or other body corporate¹³ which is the subject of the report¹⁴, any person whose conduct is referred to in the report, the auditors¹⁵ of that company or body corporate, the applicants for the investigation, and any other person whose financial interests appear to the Secretary of State to be affected by the matters dealt with in the report, whether as a creditor¹⁶ of the company or body corporate or otherwise¹⁷; and
- 913 (3) cause any such report to be printed and published¹⁸.

1 The inspectors appointed to investigate the affairs of a company under the Companies Act 1985 s 431 (see PARA 1541) or s 432 (see PARA 1542). As to the meaning of 'company' see PARA 1. As to what constitutes the affairs of a company see PARA 1541 note 2.

2 As to the Secretary of State see PARA 6.

3 Companies Act 1985 s 437(1) (amended by the Companies Act 2006 ss 1035(4)(a), 1295, Sch 16). The provisions of the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1555 et seq) have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the admissibility of a copy of the inspectors' report as evidence in any legal proceedings see PARA 1555. As to the disclosure of information obtained under s 437 see s 451A; and PARA 1563. As to the application of Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

The provisions of the Companies Act 1985 s 437 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 The any persons who have been appointed under the Companies Act 1985 s 431 (see PARA 1541) or s 432 (see PARA 1542).

5 Companies Act 1985 s 437(1A) (added by the Financial Services Act 1986 s 182, Sch 13 para 7). See also note 3.

6 The under the Companies Act 1985 s 432(1) (see PARA 1542).

7 Companies Act 1985 s 437(2). See also note 3. As to the meaning of 'court' see PARA 212 note 1.

8 Companies Act 1985 s 437(3). See also note 3.

9 As to the registered office of a company see PARA 129.

10 Companies Act 1985 s 437(3)(a). See also note 3.

11 As to the meaning of 'prescribed' see PARA 75 note 3. The fee prescribed is 10 pence for each page copied: see the Companies (Inspectors' Reports) (Fees) Regulations 1981, SI 1981/1686, reg 2.

12 As to who qualifies as a member of a company see PARA 321.

13 As to the meaning of 'body corporate' see PARA 1 note 5.

14 Ie by virtue of the Companies Act 1985 s 433(1) (see PARA 1543).

15 As to the appointment of auditors see PARA 912 et seq.

16 As to the meaning of 'creditor' see PARA 1427.

17 Companies Act 1985 s 437(3)(b). See also note 3.

18 Companies Act 1985 s 437(3). See also note 3. The provisions of s 437(3) do not apply where the inspectors are appointed under s 432(2A): see PARA 1542. The discretion to publish or withhold publication is exercisable by the Secretary of State in the public interest: see *Lonrho plc v Secretary of State for Trade and Industry* [1989] 2 All ER 609, sub nom *R v Secretary of State for Trade and Industry, ex p Lonrho plc* [1989] 1 WLR 525, HL (the Secretary of State was held not to have acted unlawfully in withholding publication on the ground that publication might inhibit further inquiries and possible criminal proceedings). The public interest justifies the publication of reports highly critical of named individuals and the fact that the individuals concerned are not necessarily allowed to vindicate their position in a court of law is not a breach of the due process provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6 (right to a fair trial: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134) as the procedure incorporates sufficient safeguards to ensure fairness: *Fayed v United Kingdom (Application 17101/90)* (1994) 18 EHRR 393, ECtHR. Any person who is aggrieved by adverse press coverage may invoke the law of defamation to vindicate their reputation: *WGS and MSLS v United Kingdom (Application 38172/97)* [2000] BCC 719, ECtHR.

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1555. Inspectors' report to be evidence.

A copy of any inspectors' report¹, certified by the Secretary of State² to be a true copy, is admissible in any legal proceedings as evidence of the inspectors' opinion in relation to any matter contained in the report and, in proceedings under the Company Directors Disqualification Act 1986 for disqualification after investigation of a company³, as evidence of any fact stated therein⁴, but this is restricted to winding up or alternative relief and disqualification proceedings, and does not render the contents admissible in ordinary litigation⁵. A document purporting to be such a certificate as is mentioned above must be received in evidence and is deemed to be such a certificate, unless the contrary is proved⁶.

1 Ie any report of inspectors appointed under the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1556 et seq). The provisions of the Companies Act 1985 Pt XIV have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

2 As to the Secretary of State see PARA 6.

3 Ie under the Company Directors Disqualification Act 1986 s 8 (see PARA 1584).

4 Companies Act 1985 s 441(1) (amended by the Insolvency Act 1985 ss 109, 235, Sch 6 para 3, Sch 9 Pt II; the Insolvency Act 1986 s 439(1), Sch 13 Pt I; the Companies Act 1989 s 61; and SI 2009/1941).

The provisions of the Companies Act 1985 s 441 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 *Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV* [1984] 1 All ER 296, [1984] 1 WLR 271. Cf *Deutsche Rückversicherung AG v Walbrook Insurance Co Ltd, Group Josi Re (formerly known as Group Josi Reassurance SA) v Walbrook Insurance Co Ltd* [1994] 4 All ER 181, [1995] 1 WLR 1017, DC (permissible to rely on an inspectors' report in affidavits in support of a claim for interlocutory relief), not following *Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV*. As to proceedings which may be founded on the reports see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 444. See also *Secretary of State for Business Enterprise and Regulatory Reform v Aaron* [2008] EWCA Civ 1146, [2009] 1 BCLC 55.

6 Companies Act 1985 s 441(2). See also note 4.

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F. EXPENSES OF INVESTIGATION

1556. Expenses of investigating a company's affairs.

The expenses¹ of an investigation of a company's affairs² must be defrayed in the first instance by the Secretary of State³, but he may recover those expenses from the persons liable in accordance with the following provisions⁴:

- 914 (1) a person who is convicted on a prosecution instituted as a result of the investigation may in the same proceedings be ordered to pay those expenses to such extent as may be specified in the order⁵;
- 915 (2) a body corporate dealt with by an inspectors' report, where the inspectors were appointed otherwise than of the Secretary of State's own motion⁶, is liable, except where it was the applicant for the investigation, and except so far as the Secretary of State otherwise directs⁷; and
- 916 (3) where the inspectors were appointed on the company's application or that of its members⁸, the applicant or applicants for the investigation is or are liable to such extent, if any, as the Secretary of State may direct⁹.

The report of inspectors appointed otherwise than of the Secretary of State's own motion¹⁰ may, if they think fit, and must, if the Secretary of State so directs, include a recommendation as to the directions, if any, which they think appropriate, in the light of their investigation, to be given under head (2) or head (3) above¹¹.

Subject to satisfaction of the Secretary of State's right to repayment, any liability to repay the Secretary of State imposed by head (1) above is a liability also to indemnify all persons against liability under heads (2) and (3) above¹². A person liable under any of heads (1) to (3) above is entitled to contribution from any other person liable under the same head according to the amount of their respective liabilities under it¹³.

The expenses to be defrayed by the Secretary of State under these provisions must, so far as not recovered under them, be paid out of money provided by Parliament¹⁴.

1 There is no limit to the amount of such expenses, provided that they are all of and incidental to the investigation: *Selangor United Rubber Estates Ltd v Cradock (No 4)* [1969] 3 All ER 965, [1969] 1 WLR 1773. In particular, such reasonable sums as the Secretary of State may determine in respect of general staff costs and overheads are to be treated as expenses of the investigation: Companies Act 1985 s 439(1) (substituted by the Companies Act 1989 s 59(1), (2)).

2 lie under any of the powers conferred by the Companies Act 1985 Pt XIV (ss 431-453D) (see PARAS 1541 et seq, 1557 et seq). As to what constitutes the affairs of a company see PARA 1541 note 2. As to the meaning of 'company' see PARA 1. The provisions of the Companies Act 1985 Pt XIV have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

3 As to the Secretary of State see PARA 6.

4 Companies Act 1985 s 439(1) (as substituted: see note 1). As to the disclosure of information obtained under the Companies Act 1985 s 439 see s 451A; and PARA 1563.

The provisions of the Companies Act 1985 s 439 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 Companies Act 1985 s 439(2) (amended by the Companies Act 2006 ss 1176(2)(a), 1295, Sch 16). See also note 4.

6 See PARAS 1541-1542.

7 Companies Act 1985 s 439(4) (amended by the Companies Act 1989 s 59(1), (3)). See also note 4.

8 lie under the Companies Act 1985 s 431 (see PARA 1541) or s 442(3) (see PARA 1545). As to who qualifies as a member of a company see PARA 321.

9 Companies Act 1985 s 439(5) (substituted by the Companies Act 1989 s 59(1), (4)). See also note 4.

10 See note 6.

11 Companies Act 1985 s 439(6). See also note 4.

12 Companies Act 1985 s 439(8) (amended by the Companies Act 2006 ss 1176(2)(c), 1295, Sch 16). See also note 4.

13 Companies Act 1985 s 439(9). See also note 4.

14 Companies Act 1985 s 439(10). See also note 4.

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G. PRIVILEGED INFORMATION

1557. Protection of privileged information.

Nothing in the statutory provisions relating to company investigations¹ compels the disclosure by any person to the Secretary of State² or to an inspector appointed by him³ of information in respect of which in an action in the High Court a claim to legal professional privilege⁴ could be maintained⁵.

Nothing in the statutory provisions relating to the production of documents and evidence to inspectors⁶, or the investigation into the ownership of a company⁷, requires a person to disclose information or produce documents in respect of which he owes an obligation of confidence by virtue of carrying on the business of banking⁸ unless⁹:

- 917 (1) the person to whom the obligation of confidence is owed is the company¹⁰ or
other body corporate¹¹ under investigation¹²;
918 (2) the person to whom the obligation of confidence is owed consents to the
disclosure or production¹³; or
919 (3) the making of the requirement is authorised by the Secretary of State¹⁴.

Despite the provisions set out above¹⁵ a person who is a lawyer may be compelled to disclose the name and address of his client¹⁶.

1 Ie the Companies Act 1985 ss 431-446E (see PARA 1541 et seq).

2 As to the Secretary of State see PARA 6.

3 Ie appointed under the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1558 et seq). The provisions of the Companies Act 1985 Pt XIV have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

4 As to legal professional privilege see **CIVIL PROCEDURE** vol 11 (2009) PARA 558 et seq; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1479. See also **LEGAL PROFESSIONS** vol 65 (2008) PARAS 740-741; **LEGAL PROFESSIONS** vol 66 (2009) PARA 1146.

5 Companies Act 1985 s 452(1) (substituted by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 25(1), Sch 2 paras 16, 21(a); and amended by the Companies Act 2006 s 1037(3)).

The provisions of the Companies Act 1985 s 452 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

6 Ie the Companies Act 1985 s 434 (see PARA 1544).

7 Ie the Companies Act 1985 s 443 (see PARA 1545).

8 As to obligations of confidence owed by bankers see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 920 et seq; **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 454.

9 Companies Act 1985 s 452(1A) (added by the Companies Act 1989 s 69(1), (3)). See also note 5.

10 As to the meaning of 'company' see PARA 1. The Companies Act 1985 s 452(1A) does not, however, apply where the person owing the obligation of confidence is the company under investigation under s 431 (see PARA 1541), s 432 (see PARA 1542) or s 433 (see PARA 1543): s 452(1B) (added by the Companies Act 1989 s 69(1), (3)). See also note 5.

11 As to the meaning of 'body corporate' see PARA 1 note 5. The Companies Act 1985 s 452(1A) does not, however, apply where the person owing the obligation of confidence is the other body corporate under investigation under s 431 (see PARA 1541), s 432 (see PARA 1542) or s 433 (see PARA 1543): s 452(1B) (as added: see note 10). See also note 5.

12 Companies Act 1985 s 452(1A)(a) (as added: see note 9). See also note 5.

13 Companies Act 1985 s 452(1A)(b) (as added: see note 9). See also note 5.

14 Companies Act 1985 s 452(1A)(c) (as added: see note 9). See also note 5.

15 Ie the Companies Act 1985 s 452(1) (see the text and notes 1-5).

16 Companies Act 1985 s 452(5) (added by the Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 2 paras 16, 21(b)).

DOCUMENTS/(ii) Requisition and Seizure of Books and Papers/1558. Secretary of State's power to require production of documents.

(ii) Requisition and Seizure of Books and Papers

1558. Secretary of State's power to require production of documents.

The Secretary of State¹ may give directions to a company² requiring it to produce such documents³ or information (or documents or information of such description) as may be specified in the directions⁴. The Secretary of State may also authorise a person (an investigator) to require the company or any other person to produce such documents or information (or documents or information of such description) as the investigator may specify⁵. Such a requirement must be complied with at such time and place as may be specified in the directions or by the investigator, as the case may be⁶. The production of a document in pursuance of these provisions does not affect any lien which a person has on the document⁷. The Secretary of State or the investigator (as the case may be) may take copies of or extracts from a document produced in pursuance of these provisions⁸.

A statement made by a person in compliance with a requirement to provide documents or information⁹ may be used in evidence against him¹⁰. However, in criminal proceedings in which the person is charged with furnishing false information¹¹ or making a false statement¹², no evidence relating to the statement may be adduced by or on behalf of the prosecution, and no question relating to it may be asked by or on behalf of the prosecution, unless evidence relating to it is adduced or a question relating to it is asked in the proceedings by or on behalf of that person¹³.

A person commits an offence if in purported compliance with a requirement¹⁴ to provide information he provides information which he knows to be false in a material particular or he recklessly provides information which is false in a material particular¹⁵.

If a person fails to comply with a requirement to produce documents or information imposed by the Secretary of State or an investigator, the Secretary of State or investigator (as the case may be) may certify the fact in writing to the court¹⁶. If, after hearing any witnesses who may be produced against or on behalf of the alleged offender and any statement which may be offered in defence, the court is satisfied that the offender failed without reasonable excuse to comply with the requirement, it may deal with him as if he had been guilty of contempt of the court¹⁷.

1 As to the Secretary of State see PARA 6.

2 As to the meaning of 'company' see PARA 1.

3 For these purposes, a 'document' includes information recorded in any form; and the power to require production of a document includes power, in the case of a document not in hard copy form, to require the production of a copy of the document in hard copy form, or in a form from which a hard copy can be readily obtained: Companies Act 1985 s 447(8), (9) (s 447 substituted by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 21; the Companies Act 1985 s 447(9) substituted by the Companies Act 2006 s 1038(2)). As to documents or information sent or supplied in hard copy form see PARA 678.

4 Companies Act 1985 s 447(1), (2) (as substituted: see note 3). As to the protection of privileged information see s 452; and PARA 1564. The provisions of the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1559 et seq) have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

The provisions of the Companies Act 1985 ss 447, 447A, 451, 453C apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 Companies Act 1985 s 447(3) (as substituted: see note 3). See note 4. A person on whom a requirement under s 447(3) is imposed may require the investigator to produce evidence of his authority: s 447(4) (as substituted: see note 3). An officer or other person must not abuse or misuse for any ulterior motive the discretions granted to him under the Companies Act 1985 s 447: *R v Secretary of State for Trade, ex p Perestrello* [1981] QB 19, [1980] 3 All ER 28.

6 Companies Act 1985 s 447(5) (as substituted: see note 3). See note 4.

7 Companies Act 1985 s 447(6) (as substituted: see note 3). See note 4. As to lien see **LIEN** vol 68 (2008) PARA 801 et seq.

8 Companies Act 1985 s 447(7) (as substituted: see note 3). See note 4.

9 Ie under the Companies Act 1985 s 447 (see the text and notes 1-8).

10 Companies Act 1985 s 447A(1) (s 447A added by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 25(1), Sch 2 paras 16, 17).

11 Ie under the Companies Act 1985 s 451 (see the text and notes 14-15).

12 Ie under the Perjury Act 1911 s 5 (false statement made otherwise than on oath) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 717).

13 Companies Act 1985 s 447A(2), (3) (as added (see note 10); s 447A(3) amended by SI 2009/1941).

14 Ie under the Companies Act 1985 s 447 (see the text and notes 1-8).

15 Companies Act 1985 s 451(1) (substituted by the Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 2 paras 16, 19). A person guilty of an offence under the Companies Act 1985 s 451 is liable: (1) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both; (2) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or both: s 451(2) (substituted by the Companies Act 2006 s 1124, Sch 3 para 5(1)). As to the statutory maximum see PARA 1622.

16 Companies Act 1985 s 453C(1), (2) (s 453C added by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 24).

17 Companies Act 1985 s 453C(3) (as added: see note 16). As to the powers of the court in cases of contempt see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 491 et seq.

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1559. Entry and search of premises.

A justice of the peace may issue a warrant¹ if satisfied on information on oath² given by or on behalf of the Secretary of State³, or by a person appointed or authorised⁴ to exercise powers under the Companies Act 1985⁵:

- 920 (1) that there are reasonable grounds for believing that there are on any premises documents⁶ whose production has been required⁷ and which have not been produced in compliance with the requirement⁸; or
- 921 (2) that there are reasonable grounds for believing that an offence has been committed for which the penalty on conviction on indictment is imprisonment for a term of not less than two years and that there are on any premises documents relating to whether the offence has been committed⁹; that the Secretary of State, or the person so appointed or authorised, has power to require the production of the

documents¹⁰; and that there are reasonable grounds for believing that, if production was so required, the documents would not be produced but would be removed from the premises, hidden, tampered with or destroyed¹¹.

A warrant so issued continues in force until the end of the period of one month¹² beginning with the day on which it is issued¹³; and the warrant authorises a constable, together with any other person named in it and any other constables¹⁴:

- 922 (a) to enter the premises specified in the information, using such force as is reasonably necessary for the purpose¹⁵;
- 923 (b) to search the premises and take possession of any documents appearing to be such documents as are mentioned in head (1) or head (2) above, as the case may be, or to take, in relation to any such documents, any other steps which may appear to be necessary for preserving them or preventing interference with them¹⁶;
- 924 (c) to take copies of any such documents¹⁷; and
- 925 (d) to require any person named in the warrant to provide an explanation of them or to state where they may be found¹⁸.

If, in the case of a warrant under head (2) above, the justice of the peace is satisfied on information on oath that there are reasonable grounds for believing that there are also on the premises other documents relevant to the investigation, the warrant also authorises the actions mentioned in heads (a) to (d) above to be taken in relation to such documents¹⁹.

Any person²⁰ who intentionally obstructs the exercise of any rights conferred by a warrant so issued, or fails without reasonable excuse to comply with any requirement imposed in accordance with head (d) above, is guilty of an offence²¹.

Any documents of which possession is taken under the provisions described above may be retained for a period of three months or, if within that period proceedings to which the documents are relevant are commenced against any person for any criminal offence, until the conclusion of those proceedings²².

1 As to the power of a justice of the peace to issue a warrant see **MAGISTRATES** vol 29(2) (Reissue) PARA 541. As to justices of the peace generally see **MAGISTRATES** vol 29(2) (Reissue) PARA 501 et seq.

2 As to the meaning of 'oath' see PARA 1544 note 14.

3 As to the Secretary of State see PARA 6.

4 I.e. appointed or authorised under the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1560 et seq). The provisions of the Companies Act 1985 Pt XIV have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

5 Companies Act 1985 s 448(1) (s 448 substituted by the Companies Act 1989 s 64(1)).

The provisions of the Companies Act 1985 s 448 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

6 For these purposes, 'document' includes information recorded in any form: Companies Act 1985 s 448(10) (as substituted: see note 5).

7 I.e. required under the Companies Act 1985 Pt XIV (see also PARAS 1541 et seq, 1560 et seq).

8 Companies Act 1985 s 448(1) (as substituted: see note 5). For the purposes of s 449 (see PARA 1561) and s 451A (see PARA 1563), documents obtained under s 448 are to be treated as if they had been obtained under the provision of Pt XIV (see also PARAS 1541 et seq, 1560 et seq) under which their production was or, as the case may be, could have been, required: s 448(8) (as so substituted). See also note 5.

- 9 Companies Act 1985 s 448(2)(a) (as substituted: see note 5). See also note 5.
- 10 Companies Act 1985 s 448(2)(b) (as substituted: see note 5). See also note 5. As to the production of documents see notes 6, 8.
- 11 Companies Act 1985 s 448(2)(c) (as substituted: see note 5). See also note 5.
- 12 As to the meaning of 'month' see PARA 1625 note 10.
- 13 Companies Act 1985 s 448(5) (as substituted: see note 5). See also note 5.
- 14 Companies Act 1985 s 448(3) (as substituted: see note 5). See also note 5. The Criminal Justice and Police Act 2001 s 50 (additional powers of seizure of material from premises: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 890) applies to the power of seizure under the Companies Act 1985 s 448(3): see the Criminal Justice and Police Act 2001 s 50(5), Sch 1 Pt 1 para 35. See also ss 52-54, 56-70, Sch 2 Pt 1 paras 11, 12; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 890 et seq. As to applications in respect of property seized in exercise of the power conferred by the Companies Act 1985 s 448(3) see *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 26.
- 15 Companies Act 1985 s 448(3)(a) (as substituted: see note 5). See also note 5.
- 16 Companies Act 1985 s 448(3)(b) (as substituted: see note 5). See also note 5.
- 17 Companies Act 1985 s 448(3)(c) (as substituted: see note 5). See also note 5.
- 18 Companies Act 1985 s 448(3)(d) (as substituted: see note 5). See also note 5.
- 19 Companies Act 1985 s 448(4) (as substituted: see note 5). See also note 5.
- 20 Where an offence under the Companies Act 1985 s 448 is committed by a body corporate, every officer of the body who is in default also commits the offence: s 453D (added by SI 2008/948). For this purpose: (1) any person who purports to act as director, manager or secretary of the body is treated as an officer of the body; and (2) if the body is a company, any shadow director is treated as an officer of the company: Companies Act 1985 s 453D (as so added). As to the meaning of 'body corporate' see PARA 1 note 5. As to the meaning of 'officer in default' see PARA 315.
- 21 Companies Act 1985 s 448(7) (as substituted (see note 5); and amended by the Companies Act 2006 ss 1124, 1295, Sch 3 para 2(1), Sch 16). A person guilty of such an offence is liable on conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum: Companies Act 1985 s 448(7A) (added by the Companies Act 2006 Sch 3 para 2(2)). As to the statutory maximum see PARA 1622.
- 22 Companies Act 1985 s 448(6) (as substituted: see note 5). See also note 5.

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1560. Protection for certain information provided to the Secretary of State.

A person who makes a disclosure which satisfies the following conditions is not liable by reason only of that disclosure in any proceedings relating to a breach of an obligation of confidence¹. The conditions are that:

- 926 (1) the disclosure is made to the Secretary of State² otherwise than in compliance with a requirement under Part XIV of the Companies Act 1985³;
- 927 (2) the disclosure is of a kind that the person making the disclosure could be required⁴ to make⁵;

- 928 (3) the person who makes the disclosure does so in good faith and in the reasonable belief that the disclosure is capable of assisting the Secretary of State for the purposes of the exercise of his functions⁶;
- 929 (4) the information disclosed is not more than is reasonably necessary for the purpose of assisting the Secretary of State for the purposes of the exercise of those functions⁷;
- 930 (5) the disclosure is not prohibited by virtue of any enactment, whenever passed or made⁸;
- 931 (6) the disclosure is not made by a person carrying on the business of banking or by a lawyer, and does not involve the disclosure of information in respect of which he owes an obligation of confidence in that capacity⁹.

1 Companies Act 1985 s 448A(1) (s 448A added by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 22).

The provisions of the Companies Act 1985 s 448A apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

2 As to the Secretary of State see PARA 6.

3 Companies Act 1985 s 448A(2)(a) (as added: see note 1). Part XIV comprises ss 431-453D (see also PARAS 1541 et seq, 1561 et seq), which have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16.

4 le in pursuance of Pt XIV (see also PARAS 1541 et seq, 1561 et seq).

5 Companies Act 1985 s 448A(2)(b) (as added: see note 1).

6 Companies Act 1985 s 448A(2)(c) (as added: see note 1). The functions of the Secretary of State are those under Pt XIV (see also PARAS 1541 et seq, 1561 et seq).

7 Companies Act 1985 s 448A(2)(d) (as added: see note 1).

8 Companies Act 1985 s 448A(2)(e), (3) (as added (see note 1); s 448A(3) amended by SI 2009/1941). For these purposes, 'enactment' has the meaning given by the Companies Act 2006 s 1293 (see PARA 17 note 2): s 448A(5) (as so added; s 448A(5) substituted by SI 2009/1941).

9 Companies Act 1985 s 448A(2)(e), (4) (as added: see note 1).

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(30) INVESTIGATION OF COMPANIES AND THEIR AFFAIRS; REQUISITION OF DOCUMENTS/(ii) Requisition and Seizure of Books and Papers/1561. Security of information.

1561. Security of information.

No information in whatever form which has been obtained in pursuance of a requirement to provide documents or information¹, by means of a relevant disclosure² or by an investigator in consequence of the exercise of his power to enter and remain on premises³ may be disclosed⁴, except to a specified person⁵, unless the disclosure is of one of the following descriptions⁶:

- 932 (1) a disclosure for the purpose of enabling or assisting a person authorised to apply to the court⁷ to exercise his functions⁸;
- 933 (2) a disclosure for the purpose of enabling or assisting an inspector appointed under Part XIV of the Companies Act 1985⁹ to exercise his functions¹⁰;

- 934 (3) a disclosure for the purpose of enabling or assisting any person authorised to exercise powers or appointed under certain provisions of the Companies Act 1985¹¹ or the Companies Act 1989¹² to exercise his functions¹³;
- 935 (4) a disclosure for the purposes of enabling or assisting a person appointed under certain provisions¹⁴ of the Financial Services and Markets Act 2000 or regulations made under them¹⁵ to conduct an investigation to discharge his functions¹⁶;
- 936 (5) a disclosure for the purpose of enabling or assisting the Secretary of State or the Treasury to exercise any of their functions under the Companies Acts, under insider dealing legislation¹⁷, under the Insolvency Act 1986, under the Company Directors Disqualification Act 1986, under certain provisions¹⁸ of the Companies Act 1989 or of the Companies Act 2006, or under the Financial Services and Markets Act 2000¹⁹;
- 937 (6) a disclosure for the purpose of enabling or assisting the Department of Enterprise, Trade and Investment for Northern Ireland to exercise any powers conferred on it by the enactments relating to companies or insolvency or for the purpose of enabling or assisting a person authorised or appointed by it under the enactments relating to companies to discharge his functions²⁰;
- 938 (7) a disclosure for the purpose of enabling or assisting the Pensions Regulator to exercise the functions conferred on it by or by virtue of the Pension Schemes Act 1993, the Pensions Act 1995, the Welfare Reform and Pensions Act 1999, the Pensions Act 2004 or any enactment in force in Northern Ireland corresponding to any of those enactments²¹;
- 939 (8) a disclosure for the purpose of enabling or assisting the Board of the Pension Protection Fund to exercise the functions conferred on it by or by virtue of Part 2 of the Pensions Act 2004²² or any enactment in force in Northern Ireland corresponding to that Part²³;
- 940 (9) a disclosure for the purpose of enabling or assisting the Bank of England to discharge its functions²⁴;
- 941 (10) a disclosure for the purpose of enabling or assisting the body known as the Panel on Takeovers and Mergers to exercise its functions²⁵;
- 942 (11) a disclosure for the purpose of enabling or assisting organs of the Society of Lloyd's (being organs constituted by or under the Lloyd's Act 1982) to exercise their functions under or by virtue of the Lloyd's Acts 1871 to 1982²⁶;
- 943 (12) a disclosure for the purpose of enabling or assisting the Office of Fair Trading to exercise its functions under the Fair Trading Act 1973, the Consumer Credit Act 1974, the Estate Agents Act 1979, the Competition Act 1980, the Competition Act 1998, the Financial Services and Markets Act 2000, the Enterprise Act 2002, the Unfair Terms in Consumer Contracts Regulations 1999²⁷, the Business Protection from Misleading Marketing Regulations 2008²⁸ and the Consumer Protection from Unfair Trading Regulations 2008²⁹;
- 944 (13) a disclosure for the purpose of enabling or assisting the Competition Commission to exercise its functions under the Fair Trading Act 1973, the Competition Act 1980, the Competition Act 1998 and the Enterprise Act 2002³⁰;
- 945 (14) a disclosure with a view to the institution of, or otherwise for the purposes of, proceedings before the Competition Appeal Tribunal³¹;
- 946 (15) a disclosure for the purpose of enabling or assisting an enforcer under Part 8 of the Enterprise Act 2002 to exercise its functions under that Part³²;
- 947 (16) a disclosure for the purpose of enabling or assisting the Charity Commission to exercise its functions³³;
- 948 (17) a disclosure for the purpose of enabling or assisting the Attorney General to exercise his functions in connection with charities³⁴;
- 949 (18) a disclosure for the purpose of enabling or assisting the National Lottery Commission to exercise its functions under the National Lottery etc Act 1993³⁵;

- 950 (19) a disclosure by the National Lottery Commission to the National Audit Office
for the purpose of enabling or assisting the Comptroller and Auditor General to
carry out an examination under Part 2 of the National Audit Act 1983³⁶ into the
economy, effectiveness and efficiency with which the National Lottery Commission
has used its resources in discharging its functions under the National Lottery etc
Act 1993³⁷;
- 951 (20) a disclosure for the purpose of enabling or assisting a qualifying body under
the Unfair Terms in Consumer Contracts Regulations 1999³⁸ to exercise its functions
under those Regulations³⁹;
- 952 (21) a disclosure for the purpose of enabling or assisting an enforcement
authority under the Consumer Protection (Distance Selling) Regulations 2000⁴⁰ to
exercise its functions under those Regulations⁴¹;
- 953 (22) a disclosure for the purpose of enabling or assisting a local weights and
measures authority in England and Wales to exercise its functions under the
Enterprise Act 2002⁴²;
- 954 (23) a disclosure for the purpose of enabling or assisting the Financial Services
Authority to exercise its functions under the legislation relating to friendly societies
or to industrial and provident societies, the Building Societies Act 1986, Part 7 of
the Companies Act 1989⁴³ and the Financial Services and Markets Act 2000⁴⁴;
- 955 (24) a disclosure for the purpose of enabling or assisting the competent authority
for the purposes of Part 6 of the Financial Services and Markets Act 2000⁴⁵ to
exercise its functions under that Part⁴⁶;
- 956 (25) a disclosure for the purpose of enabling or assisting a body corporate
established as a compensation scheme manager⁴⁷ to exercise its functions⁴⁸;
- 957 (26) a disclosure for the purpose of enabling or assisting a recognised
investment exchange or a recognised clearing house to exercise its functions as
such⁴⁹;
- 958 (27) a disclosure for the purpose of enabling or assisting a designated
professional body⁵⁰ to exercise its functions in its capacity as a body designated
under the Financial Services and Markets Act 2000⁵¹;
- 959 (28) a disclosure with a view to the institution of, or otherwise for the purposes
of, civil proceedings arising under or by virtue of the Financial Services and Markets
Act 2000⁵²;
- 960 (29) a disclosure for the purpose of enabling or assisting a body to which the
functions of the Secretary of State have been delegated⁵³ to exercise its functions⁵⁴;
- 961 (30) a disclosure for the purpose of enabling or assisting a recognised
supervisory or qualifying body to exercise its functions as such⁵⁵;
- 962 (31) a disclosure for the purpose of enabling or assisting an official receiver to
exercise his functions under the enactments relating to insolvency⁵⁶;
- 963 (32) a disclosure for the purpose of enabling or assisting the Insolvency
Practitioners Tribunal to exercise its functions under the Insolvency Act 1986⁵⁷;
- 964 (33) a disclosure for the purpose of enabling or assisting a body which is for the
time being a recognised professional body for the purposes of the Insolvency Act
1986⁵⁸ to exercise its functions as such⁵⁹;
- 965 (34) a disclosure for the purpose of enabling or assisting an overseas regulatory
authority to exercise its regulatory functions⁶⁰;
- 966 (35) a disclosure for the purpose of enabling or assisting the Regulator of
Community Interest Companies to exercise functions under the Companies (Audit,
Investigations and Community Enterprise) Act 2004⁶¹;
- 967 (36) a disclosure with a view to the institution of, or otherwise for the purposes
of, criminal proceedings⁶²;
- 968 (37) a disclosure with a view to the institution of, or otherwise for the purposes
of, proceedings on an application⁶³ under the Company Directors Disqualification
Act 1986⁶⁴;

- 969 (38) a disclosure with a view to the institution of, or otherwise for the purposes of, proceedings before the Financial Services and Markets Tribunal⁶⁵;
- 970 (39) a disclosure for the purposes of proceedings before the Financial Services Tribunal by virtue of the Financial Services and Markets Act 2000 (Transitional Provisions) (Partly Completed Procedures) Order 2001⁶⁶;
- 971 (40) a disclosure for the purposes of proceedings before the Pensions Regulator Tribunal⁶⁷;
- 972 (41) a disclosure for the purpose of enabling or assisting a body appointed under the Companies (Audit, Investigations and Community Enterprise) Act 2004 to supervise periodic accounts and reports of issuers of listed securities⁶⁸ to exercise its functions⁶⁹;
- 973 (42) a disclosure with a view to the institution of, or otherwise for the purposes of, disciplinary proceedings relating to the performance by a solicitor, barrister, auditor, accountant, valuer or actuary of his professional duties⁷⁰;
- 974 (43) a disclosure with a view to the institution of, or otherwise for the purposes of, disciplinary proceedings relating to the performance by a public servant of his duties⁷¹;
- 975 (44) a disclosure for the purpose of the provision of a summary or collection of information framed in such a way as not to enable the identity of any person to whom the information relates to be ascertained⁷²;
- 976 (45) a disclosure in pursuance of any Community obligation⁷³;
- 977 (46) a disclosure for the purpose of enabling or assisting the Gambling Commission to exercise its functions under the Gambling Act 2005⁷⁴.

The prohibition on disclosure of information⁷⁵ does not prohibit the disclosure of information if the information is or has been available to the public from any other source⁷⁶.

A person⁷⁷ who discloses any information in contravention of the prohibition on disclosure is guilty of an offence⁷⁸.

1 le under the Companies Act 1985 s 447 (see PARA 1558).

2 le within the meaning of the Companies Act 1985 s 448A(2) (see PARA 1560).

3 le under the Companies Act 1985 s 453A (see PARA 1565). For these purposes, information obtained by an investigator in consequence of the exercise of his powers under s 453A includes information obtained by a person accompanying the investigator in pursuance of s 453A(4) in consequence of that person's accompanying the investigator: s 449(10) (s 449 substituted by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 25(1), Sch 2 Pt 3 paras 16, 18). The provisions of the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1562 et seq) have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

The provisions of the Companies Act 1985 s 449 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 Companies Act 1985 s 449(1) (as substituted: see note 3).

5 For these purposes, each of the following is specified: (1) the Secretary of State; (2) the Department of Enterprise, Trade and Investment for Northern Ireland; (3) the Treasury; (4) the Lord Advocate; (5) the Director of Public Prosecutions; (6) the Director of Public Prosecutions for Northern Ireland; (7) the Financial Services Authority; (8) a constable; (9) a procurator fiscal; (10) the Scottish Ministers: Companies Act 1985 s 449, Sch 15C (added by the Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 2 Pt 3 paras 16, 25). As to the Secretary of State see PARA 6. As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517. As to the Bank of England see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 793 et seq. As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1066. As to the Financial Services Authority see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 4, 6 et seq. On 20 May 1999, the Lord Advocate ceased to be a Minister of the Crown and became a member of the Scottish Executive (see the Scotland Act 1998 s 44(1)(c); and the Scotland Act 1998

(Commencement) Order, SI 1998/3178, art 2(2), Sch 4); accordingly, certain functions of the Lord Advocate are transferred to the Secretary of State or, as the case may be, the Secretary of State for Scotland (see the Transfer of Functions (Lord Advocate and Secretary of State) Order 1999, SI 1999/678, art 2, Schedule) or to the Advocate General for Scotland (see the Transfer of Functions (Lord Advocate and Advocate General for Scotland) Order 1999, SI 1999/679, art 2, Schedule).

Any information which may be disclosed to a specified person under these provisions may be disclosed to any officer or employee of the person: Companies Act 1985 s 449(8) (as substituted: see note 3).

The Secretary of State may by order amend Schs 15C, 15D: s 449(3) (as substituted: see note 3). An order under s 449(3) must not: (a) amend Sch 15C by specifying a person unless the person exercises functions of a public nature (whether or not he exercises any other function); (b) amend Sch 15D by adding or modifying a description of disclosure unless the purpose for which the disclosure is permitted is likely to facilitate the exercise of a function of a public nature: s 449(4) (as substituted: see note 3). An order under s 449(3) must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 449(5) (as substituted: see note 3). In exercise of this power, the Companies (Disclosure of Information) (Designated Authorities) Order 2006, SI 2006/1644, has been made.

6 Companies Act 1985 s 449(2) (as substituted: see note 3). Nothing in s 449 authorises the making of a disclosure in contravention of the Data Protection Act 1998: Companies Act 1985 s 449(11) (as substituted: see note 3).

The Companies Act 1985 s 449 has effect in relation to the disclosure of information by or on behalf of a public authority as if the purposes for which the disclosure of information is authorised included the purposes mentioned in the Anti-terrorism, Crime and Security Act 2001 s 17(2) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**): see s 17(1), Sch 4 Pt 1 para 24 (amended by the Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 2 Pt 3 para 31).

7 Ie under the Companies Act 2006 s 457 (see PARA 902).

8 Companies Act 1985 s 449, Sch 15D para 1 (Sch 15 D added by the Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 2 Pt 3 paras 16, 25; the Companies Act 1985 Sch 15D para 1 amended by SI 2008/948).

9 Ie under the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1562 et seq).

10 Companies Act 1985 Sch 15D para 2 (as added: see note 8).

11 Ie under the Companies Act 1985 s 447 (see PARA 1558).

12 Ie under the Companies Act 1989 s 84 (see PARA 1570).

13 Companies Act 1985 Sch 15D para 3 (as added: see note 8).

14 Ie the Financial Services and Markets Act 2000 s 167 (general investigations: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 449), s 168 (investigations in particular cases: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 449), s 169(1)(b) (investigation in support of overseas regulator: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 450), s 284 (investigations into affairs of certain collective investment schemes: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 683).

15 Ie regulations made as a result of the Financial Services and Markets Act 2000 s 262(1), (2)(k) (investigations into open-ended investment companies: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 621).

16 Companies Act 1985 Sch 15D paras 4-8 (as added: see note 8).

17 Ie the Criminal Justice Act 1993 Pt V (ss 52-64) (see \, **EVIDENCE AND PROCEDURE**).

18 Ie the Companies Act 1989 Pt III (ss 55-91) (investigations and powers to obtain information: see PARA 1568 et seq) and Pt VII (ss 154-191) (financial markets and insolvency: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 509 et seq) or the Companies Act 2006 Pt 42 (ss 1209-1264) (statutory auditors) (see PARA 957 et seq).

19 Companies Act 1985 Sch 15D para 9 (as added (see note 8); amended by SI 2009/1941). The text refers to the Companies Acts as defined in the Companies Act 2006 s 2(1) (see PARA 16): see the Companies Act 1985 Sch 15D para 9 (as so added and amended).

20 Companies Act 1985 Sch 15D paras 11-12 (as added: see note 8).

- 21 Companies Act 1985 Sch 15D para 13 (as added (see note 8); and substituted by the Pensions Act 2004 s 319(1), Sch 12 para 5(1), (3)(a)). See **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 551 et seq.
- 22 Ie the Pensions Act 2004 Pt 2 (ss 107-220) (see **SOCIAL SECURITY AND PENSIONS**).
- 23 Companies Act 1985 Sch 15D para 13A (added by the Pensions Act 2004 Sch 12 para 5(1), (3)(b)).
- 24 Companies Act 1985 Sch 15D para 14 (as added: see note 8).
- 25 Companies Act 1985 Sch 15D para 15 (as added: see note 8). As to the Panel on Takeovers and Mergers see PARA 1480 et seq.
- 26 Companies Act 1985 Sch 15D para 16 (as added: see note 8). As to the Society of Lloyd's see **INSURANCE** vol 25 (2003 Reissue) PARA 24.
- 27 Ie the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (see **CONTRACT** vol 9(1) (Reissue) PARA 790 et seq).
- 28 Ie the Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 731 et seq).
- 29 Companies Act 1985 Sch 15D para 17 (as added (see note 8); and amended by SI 2008/1277). As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARAS 6-8.
- 30 Companies Act 1985 Sch 15D para 18 (as added: see note 8). As to the Competition Commission see **COMPETITION** vol 18 (2009) PARA 9 et seq.
- 31 Companies Act 1985 Sch 15D para 19 (as added: see note 8). As to the Competition Appeal Tribunal see **COMPETITION** vol 18 (2009) PARAS 13-17.
- 32 Companies Act 1985 Sch 15D para 20 (as added: see note 8). As to the functions of an enforcer under the Enterprise Act 2002 Pt 8 (ss 210-236) see **COMPETITION** vol 18 (2009) PARA 339 et seq.
- 33 Companies Act 1985 Sch 15D para 21 (as added (see note 8); and amended by the Charities Act 2006 s 75(1), Sch 8 paras 74, 76). As to the Charity Commission see **CHARITIES** vol 8 (2010) PARA 538 et seq.
- 34 Companies Act 1985 Sch 15D para 22 (as added: see note 8). See **CHARITIES** vol 8 (2010) PARA 583.
- 35 Companies Act 1985 Sch 15D para 23 (as added: see note 8). As to the functions of the National Lottery Commission under the National Lottery etc Act 1993 ss 5-10, 15 see **LICENSING AND GAMBLING** vol 68 (2008) PARA 688 et seq.
- 36 Ie the National Audit Act 1983 Pt 2 (ss 6-9) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 717).
- 37 Companies Act 1985 Sch 15D para 24 (as added: see note 8). See note 35.
- 38 Ie the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (see **CONTRACT** vol 9(1) (Reissue) PARA 790 et seq).
- 39 Companies Act 1985 Sch 15D para 25 (as added: see note 8).
- 40 Ie the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 673 et seq).
- 41 Companies Act 1985 Sch 15D para 26 (as added: see note 8). See **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 678.
- 42 Companies Act 1985 Sch 15D para 27 (as added: see note 8). As to the functions of a local weights and measures authority under the Enterprise Act 2002 s 230(2) see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 400.
- 43 Ie the Companies Act 1989 Pt VII (ss 154-191) (financial markets and insolvency) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 509 et seq).
- 44 Companies Act 1985 Sch 15D para 28 (as added: see note 8).

- 45 le the Financial Services and Markets Act 2000 Pt 6 (ss 72-103) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385 et seq).
- 46 Companies Act 1985 Sch 15D para 29 (as added: see note 8).
- 47 le in accordance with the Financial Services and Markets Act 2000 s 212(1) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 583).
- 48 Companies Act 1985 Sch 15D para 30 (as added: see note 8).
- 49 Companies Act 1985 Sch 15D para 31(1) (as added: see note 8). 'Recognised investment exchange' and 'recognised clearing house' have the same meanings as in the Financial Services and Markets Act 2000 s 285 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 684): Companies Act 1985 Sch 15D para 31(2) (as added: see note 8).
- 50 le a body designated under the Financial Services and Markets Act 2000 s 326(1) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 749).
- 51 Companies Act 1985 Sch 15D para 32 (as added: see note 8).
- 52 Companies Act 1985 Sch 15D para 33 (as added: see note 8).
- 53 le a body designated by order under the Companies Act 2006 s 1252 (see PARA 960) to exercise its functions under Pt 42 (statutory auditors) (see PARA 957 et seq).
- 54 Companies Act 1985 Sch 15D para 34 (as added (see note 8); amended by SI 2009/1941).
- 55 Companies Act 1985 Sch 15D para 35 (as added (see note 8); amended by SI 2009/1941).
- 56 Companies Act 1985 Sch 15D para 36 (as added: see note 8). As to the official receivers see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 31 et seq.
- 57 Companies Act 1985 Sch 15D para 37 (as added: see note 8). As to the Insolvency Practitioners Tribunal see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 60 et seq.
- 58 le for the purposes of the Insolvency Act 1986 s 391 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 48).
- 59 Companies Act 1985 Sch 15D para 38 (as added (see note 8); amended by SI 2009/1941).
- 60 Companies Act 1985 Sch 15D para 39(1) (as added: see note 8). 'Overseas regulatory authority' and 'regulatory functions' have the same meanings as in the Companies Act 1989 s 82 (see PARA 1568): Companies Act 1985 Sch 15D para 39(2) (as added: see note 8).
- 61 Companies Act 1985 Sch 15D para 40 (as added: see note 8). See PARA 82.
- 62 Companies Act 1985 Sch 15D para 41 (as added: see note 8).
- 63 le under the Company Directors Disqualification Act 1986 s 6, 7 or 8 (see PARAS 1584, 1592, 1599).
- 64 Companies Act 1985 Sch 15D para 42 (as added (see note 8); amended by SI 2009/1941).
- 65 Companies Act 1985 Sch 15D para 43 (as added: see note 8). As to the Financial Services and Markets Tribunal see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 43 et seq.
- 66 Companies Act 1985 Sch 15D para 44 (as added: see note 8). Proceedings are before the Financial Services Tribunal by virtue of the Financial Services and Markets Act 2000 (Transitional Provisions) (Partly Completed Procedures) Order 2001, SI 2001/3592.
- 67 Companies Act 1985 Sch 15D para 44A (added by the Pensions Act 2004 s 102(4), Sch 4 para 19). As to the Pensions Regulator see **SOCIAL SECURITY AND PENSIONS**.
- 68 le appointed under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 14 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 435).
- 69 Companies Act 1985 Sch 15D para 45 (as added: see note 8).

70 Companies Act 1985 Sch 15D para 46 (as added: see note 8). As from a day to be appointed Sch 15D para 46 is amended to include reference to a relevant lawyer by the Legal Services Act 2007 s 208(1), Sch 21 para 63. At the date at which this volume states the law no such day had been appointed.

71 Companies Act 1985 Sch 15D para 47(1) (as added: see note 8). 'Public servant' means an officer or employee of the Crown or of any public or other authority for the time being designated for these purposes by the Secretary of State by order: Sch 15D para 47(2) (as added: see note 8). Such an order must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Sch 15D para 47(3) (as added: see note 8). At the date at which this volume states the law no such order had been made.

72 Companies Act 1985 Sch 15D para 48 (as added: see note 8).

73 Companies Act 1985 Sch 15D para 49 (as added: see note 8).

74 Companies Act 1985 Sch 15D para 50 (added by SI 2006/1644). As to the Gambling Commission see **LICENSING AND GAMBLING** vol 67 (2008) PARAS 4, 5, 335 et seq.

75 le under the Companies Act 1985 s 449.

76 Companies Act 1985 s 449(9) (as substituted: see note 3).

77 Where an offence under the Companies Act 1985 s 449 is committed by a body corporate, every officer of the body who is in default also commits the offence: s 453D (added by SI 2008/948). For this purpose: (1) any person who purports to act as director, manager or secretary of the body is treated as an officer of the body; and (2) if the body is a company, any shadow director is treated as an officer of the company: Companies Act 1985 s 453D (as so added). As to the meaning of 'body corporate' see PARA 1 note 5. As to the meaning of 'officer in default' see PARA 315.

78 Companies Act 1985 s 449(6) (as substituted (see note 3); and amended by the Companies Act 2006 s 1124, Sch 3 para 3(1), (3)). A person guilty of such an offence is liable: (1) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both; (2) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or both: Companies Act 1985 s 449(6A) (added by the Companies Act 2006 Sch 3 para 3(1), (3)). As to the statutory maximum see PARA 1622.

UPDATE

1561 Security of information

NOTE 17--For **CRIMINAL LAW, EVIDENCE AND PROCEDURE** read **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 574A.

NOTE 70--Day appointed is 1 January 2010: SI 2009/3250.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(30) INVESTIGATION OF COMPANIES AND THEIR AFFAIRS; REQUISITION OF DOCUMENTS/(ii) Requisition and Seizure of Books and Papers/1562. Punishment for destroying, mutilating etc company documents.

1562. Punishment for destroying, mutilating etc company documents.

An officer of a company¹ who²:

- 978 (1) destroys, mutilates or falsifies, or is privy to the destruction, mutilation or falsification of a document³ affecting or relating to the company's property or affairs⁴; or
- 979 (2) makes, or is privy to the making of, a false entry in such a document⁵,

is guilty of an offence unless he proves that he had no intention to conceal the state of the company's affairs or to defeat the law⁶. Such a person is also guilty of an offence if he fraudulently parts with, alters or makes an omission in any such document or is privy to any such act⁷.

1 As to the meaning of 'officer' see PARA 607. As to the meaning of 'company' see PARA 1. The Companies Act 1985 s 450(1) applies to an officer of an authorised insurance company which is not a body corporate as it applies to an officer of a company: s 450(1A) (added by SI 2001/3649). As to the meaning of 'authorised insurance company' see PARA 701 note 4. As to the meaning of 'body corporate' see PARA 1 note 5.

Where an offence under the Companies Act 1985 s 450 is committed by a body corporate, every officer of the body who is in default also commits the offence: s 453D (added by SI 2008/948). For this purpose: (1) any person who purports to act as director, manager or secretary of the body is treated as an officer of the body; and (2) if the body is a company, any shadow director is treated as an officer of the company: Companies Act 1985 s 453D (as so added). As to the meaning of 'body corporate' see PARA 1 note 5. As to the meaning of 'officer in default' see PARA 315.

2 Companies Act 1985 s 450(1) (amended by the Companies Act 1989 s 66(1), (2); and SI 2001/3649). The provisions of the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1563 et seq) have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies Act 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

The provisions of the Companies Act 1985 ss 450, 453D apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 For these purposes, 'document' includes information recorded in any form: Companies Act 1985 s 450(5) (added by the Companies Act 1989 s 66(1), (4)).

4 Companies Act 1985 s 450(1)(a) (amended by the Companies Act 1989 s 66(1), (2)). See note 2.

5 Companies Act 1985 s 450(1)(b). See note 2.

6 Companies Act 1985 s 450(1) (amended by the Companies Act 1989 s 66(1), (2)). See note 2. A person guilty of an offence under the Companies Act 1985 s 450 is liable on conviction on indictment to imprisonment for a term not exceeding seven years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum, or to both: s 450(3) (substituted by the Companies Act 2006 s 1124, Sch 3 para 4(1)). As to the statutory maximum see PARA 1622.

As to the reversal of the burden of proof and the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6 (right to a fair trial) see *Sheldrake v DPP, A-G's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264, [2005] 1 All ER 237; *R (on the application of Griffin) v Richmond Magistrates' Court* [2008] EWHC 84 (Admin), [2008] 3 All ER 274, [2008] 1 WLR 1525.

See also **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134.

7 Companies Act 1985 s 450(2). See also note 2. As to the penalty see note 6.

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1563. Disclosure of information by the Secretary of State or inspector.

The Secretary of State¹ may, if he thinks fit: (1) disclose any information obtained in relation to investigations of companies² to any person to whom, or for any purpose for which, disclosure is

permitted³; or (2) authorise or require an inspector⁴ to disclose such information to any such person or for any such purpose⁵.

Such information may also be disclosed by an inspector to another inspector, to a person appointed under the Financial Services and Markets Act 2000 to carry out investigations⁶ or a person authorised to require documents of information under the Companies Act 1985⁷ or empowered⁸ to assist overseas regulatory authorities⁹.

The Secretary of State may, if he thinks fit, disclose any information obtained in relation to investigations into interests in shares and debentures¹⁰ to: (a) the company¹¹ whose ownership was the subject of the investigation; (b) any member¹² of the company; (c) any person whose conduct was investigated in the course of the investigation; (d) the auditors of the company¹³; or (e) any person whose financial interests appear to the Secretary of State to be affected by matters covered by the investigation¹⁴.

1 As to the Secretary of State see PARA 6.

2 The information obtained under the Companies Act 1985 ss 434-446E (see PARA 1544 et seq) or information obtained by an inspector in consequence of the exercise of his powers under s 453A (see PARA 1565): s 451A(1) (s 451A added by the Financial Services Act 1986 s 182, Sch 13 para 10 and substituted by the Companies Act 1989 s 68; the Companies Act 1985 s 451A(1) further substituted by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 25(1), Sch 2 paras 16, 20(1), (2) and amended by the Companies Act 2006 s 1037(2)). For these purposes, information obtained by an inspector in consequence of the exercise of his powers under the Companies Act 1985 s 453A includes information obtained by a person accompanying the inspector in pursuance of s 453A(4) (see PARA 1565) in consequence of that person's accompanying the inspector: s 451A(6) (added by the Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 2 paras 16, 20(1), (3)).

The provisions of the Companies Act 1985 s 451A apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

3 Disclosure is permitted under the Companies Act 1985 s 449 (see PARA 1561).

4 The inspector appointed under the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1564 et seq). The reference to an inspector includes a reference to a person accompanying an inspector in pursuance of s 453A(4) (see PARA 1565): s 451A(7) (added by the Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 2 paras 16, 20(1), (3)). The provisions of the Companies Act 1985 Pt XIV have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies Act 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

5 Companies Act 1985 s 451A(2) (as added and substituted: see note 2).

6 The person appointed to conduct an investigation under the Financial Services and Markets Act 2000 s 167 (general investigations) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 449), s 168 (investigations in particular cases) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 449), s 169(1)(b) (investigation in support of overseas regulator) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 450), s 284 (investigations into affairs of certain collective investment schemes) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 683), or regulations made as a result of s 262(2)(k) (investigations into open-ended investment companies) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 621).

7 The Companies Act 1985 s 447 (see PARA 1558).

8 The Companies Act 1989 s 84 (exercise of powers to assist overseas regulatory authorities) (see PARA 1570).

9 Companies Act 1985 s 451A(3) (as added (see note 2); and substituted by SI 2001/3649). Any information which may by virtue of the Companies Act 1985 s 451A(3) be disclosed to any person may be disclosed to any officer or servant of that person: s 451A(4) (as added and substituted: see note 2).

10 The information obtained under the Companies Act 1985 s 444 (see PARA 1546).

11 As to the meaning of 'company' see PARA 1.

- 12 As to who qualifies as a member of a company see PARA 321.
- 13 As to the appointment of auditors see PARA 912 et seq.
- 14 Companies Act 1985 s 451A(5) (as added and substituted: see note 2).

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1564. Protection of privileged information.

Nothing in the provisions relating to the requisition and seizure of documents¹ compels the production by any person of a document or the disclosure by any person of information in respect of which in an action in the High Court a claim to legal professional privilege² could be maintained, or authorises the taking of possession of any such document which is in the person's possession³.

The Secretary of State⁴ must not require⁵, or authorise a person to require the production by a person carrying on the business of banking of a document relating to the affairs of a customer of his, or the disclosure by him of information relating to those affairs, unless⁶:

- 980 (1) the Secretary of State thinks it is necessary to do so for the purpose of investigating the affairs of the person carrying on the business of banking⁷;
- 981 (2) the customer is a person on whom a requirement to produce information or documents⁸ has been imposed⁹;
- 982 (3) the customer is a person on whom a requirement to produce information or documents has been imposed by an investigator appointed by the Secretary of State under the Financial Services and Markets Act 2000¹⁰ to conduct an investigation¹¹.

Despite the provisions set out above¹² a person who is a lawyer may be compelled to disclose the name and address of his client¹³.

1 le the Companies Act 1985 ss 447-451 (see PARA 1558 et seq). The provisions of the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1565 et seq) have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

2 As to legal professional privilege see **CIVIL PROCEDURE** vol 11 (2009) PARA 558 et seq; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1479. See also **LEGAL PROFESSIONS** vol 65 (2008) PARAS 740-741; **LEGAL PROFESSIONS** vol 66 (2009) PARA 1146.

3 Companies Act 1985 s 452(2) (substituted by the Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 2 paras 16, 21(b)). See also note 6.

The provisions of the Companies Act 1985 s 452 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

4 As to the Secretary of State see PARA 6.

5 le under the Companies Act 1985 s 447 (see PARA 1558).

- 6 Companies Act 1985 s 452(3) (s 452(3)-(5) added by the Companies (Audit, Investigations and Community Enterprise) Act 2004 Sch 2 paras 16, 21(b)).
- 7 Companies Act 1985 s 452(4)(a) (as added: see note 6).
- 8 Ie under the Companies Act 1985 s 447 (see PARA 1558).
- 9 Companies Act 1985 s 452(4)(b) (as added: see note 6).
- 10 Ie in pursuance of the Financial Services and Markets Act 2000 s 171 or s 173 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 449).
- 11 Companies Act 1985 s 452(4)(c) (as added: see note 6).
- 12 Ie the Companies Act 1985 s 452(2) (see the text and notes 1-3).
- 13 Companies Act 1985 s 452(5) (as added: see note 6).

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(iii) Power to Enter and Remain on Premises

1565. Power to enter and remain on company premises.

An inspector¹ or investigator², in relation to a company³, may at all reasonable times require entry to premises which he believes are used, wholly or partly, for the purposes of the company's business, and remain there for such period as he thinks necessary, if he is authorised to do so by the Secretary of State⁴, and he thinks that to do so will materially assist him in the exercise of his functions⁵ in relation to the company⁶.

A person who intentionally obstructs a person lawfully acting in this way is guilty of an offence⁷.

If a person fails to comply with a requirement imposed by an inspector or an investigator in pursuance of either of his power to enter and remain on company premises⁸, the inspector or investigator, as the case may be, may certify the fact in writing to the court⁹. If, after hearing any witnesses who may be produced against or on behalf of the alleged offender and any statement which may be offered in defence, the court is satisfied that the offender failed without reasonable excuse to comply with the requirement, it may deal with him as if he had been guilty of contempt of the court¹⁰.

1 An inspector is a person appointed under the Companies Act 1985 s 431, s 432 or s 442 (see PARAS 1541, 1542, 1545): s 453A(7) (s 453A added by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 23). The provisions of the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1566 et seq) have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

The provisions of the Companies Act 1985 ss 453A, 453C apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

2 An investigator is a person authorised for the purposes of the Companies Act 1985 s 447 (see PARA 1558): s 453A(8) (as added: see note 1).

3 As to the meaning of 'company' see PARA 1.

4 As to the Secretary of State see PARA 6.

5 In his functions under the Companies Act 1985 Pt XIV (see also PARAS 1541 et seq, 1566 et seq).

6 Companies Act 1985 s 453A(1)-(3) (as added: see note 1). In exercising his powers, an inspector or investigator may be accompanied by such other persons as he thinks appropriate: s 453A(4) (as added: see note 1). As to the procedure in relation to the power to enter and remain on company premises see PARA 1566. As to the disclosure of information obtained in consequence of the exercise of powers under s 453A see PARA 1563.

7 Companies Act 1985 s 453A(5) (amended by the Companies Act 2006 s 1124, Sch 3 para 6(1), (2)). A person guilty of such an offence is liable on conviction on indictment, to a fine and, on summary conviction, to a fine not exceeding the statutory maximum: Companies Act 1985 s 453A(5A) (added by the Companies Act 2006 Sch 3 para 6(1), (3)).

8 In pursuance of the Companies Act 1985 s 453A (see the text and notes 1-7).

9 Companies Act 1985 s 453C(1)(b), (2) (s 453C added by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 24).

10 Companies Act 1985 s 453C(3) (as added: see note 9). As to the powers of the court in cases of contempt see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 491 et seq.

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1566. Procedure relating to power to enter and remain on company premises.

At the time an inspector¹ or investigator² seeks to enter premises which the inspector or investigator believes are used, wholly or partly, for the purposes of a company's³ business, in exercise of his power to enter and remain on company premises⁴, the inspector or investigator, and any person accompanying him, must produce evidence of his identity and evidence of his appointment or authorisation, as the case may be⁵. As soon as practicable after obtaining entry, the inspector or investigator must give to an appropriate recipient⁶ a written statement containing such information as to the powers of the investigator or inspector⁷, as the case may be, and the rights and obligations of the company, occupier and the persons present on the premises, as may be prescribed by regulations⁸. If during the time the inspector or investigator is on the premises there is no person present who appears to him to be an appropriate recipient, the inspector or investigator must as soon as reasonably practicable send to the company a notice of the fact and time that the visit took place, together with the written statement⁹.

As soon as reasonably practicable after exercising his powers to enter and remain on company premises, the inspector or investigator must prepare a written record¹⁰ of the visit¹¹. If requested to do so by the company the inspector or investigator must give it a copy of the record¹². In a case where the company is not the sole occupier of the premises, if requested to do so by an occupier, the inspector or investigator must give the occupier a copy of the record¹³.

1 See PARA 1565 note 1.

2 See PARA 1565 note 2.

3 As to the meaning of 'company' see PARA 1.

4 lie under the Companies Act 1985 s 453A(2) (see PARA 1565). The provisions of the Companies Act 1985 Pt XIV (ss 431-453D) (see also PARAS 1541 et seq, 1567) have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

5 Companies Act 1985 s 453B(1)-(3) (s 453B added by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 23).

The provisions of the Companies Act 1985 s 453B apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

6 If the inspector or investigator thinks that the company is the sole occupier of the premises, an appropriate recipient is a person who is present on the premises and who appears to the inspector or investigator to be an officer of the company, or a person otherwise engaged in the business of the company if the inspector or investigator thinks that no officer of the company is present on the premises: Companies Act 1985 s 453B(8) (as added: see note 5). If the inspector or investigator thinks that the company is not the occupier or sole occupier of the premises an appropriate recipient is: (1) a person who is an appropriate recipient for the purposes of s 453B(8); and (if different) (2) a person who is present on the premises and who appears to the inspector or investigator to be an occupier of the premises or otherwise in charge of them: s 453B(9) (as added: see note 5).

7 lie under the Companies Act 1985 s 453A (see PARA 1565).

8 Companies Act 1985 s 453B(4) (as added: see note 5). A statutory instrument containing regulations made under s 453B is subject to annulment in pursuance of a resolution of either House of Parliament: s 453B(10) (as added: see note 5).

The written statement which s 453B(4) requires the inspector or investigator to give to an appropriate recipient (or which s 453B(5), where it applies, requires him to send to the company (see the text and note 9)) must contain the following information (Companies Act 1985 (Power to Enter and Remain on Premises: Procedural) Regulations 2005, SI 2005/684, reg 2):

- 2231 (1) a statement that the inspector or investigator has been appointed or (as the case may be) authorised by the Secretary of State to carry out an investigation and a reference to the enactment under which that appointment or authorisation was made;
- 2232 (2) a statement that the inspector or investigator has been authorised by the Secretary of State under the Companies Act 1985 s 453A to exercise the powers in that provision (see PARA 1565);
- 2233 (3) a description of the conditions which are required by s 453A(1) to be satisfied before an inspector or investigator can act under s 453A(2) (see PARA 1565);
- 2234 (4) a description of the powers in s 453A(2) (see PARA 1565);
- 2235 (5) a statement that the inspector or investigator must, at the time he seeks to enter premises under s 453A, produce evidence of his identity and evidence of his appointment or authorisation (as the case may be);
- 2236 (6) a statement that any person accompanying the inspector or investigator when the inspector or investigator seeks to enter the premises must, at that time, produce evidence of his identity;
- 2237 (7) a statement that entry to premises under s 453A may be refused to an inspector, investigator or other person who fails to produce the evidence referred to (in the case of an inspector or investigator) in head (5) or (in the case of any other person) in head (6);
- 2238 (8) a statement that the company, occupier and the persons present on the premises may be required by the inspector or investigator, while he is on the premises, to comply with any powers the inspector or investigator may have by virtue of his appointment or authorisation (as the case may be) to require documents or information;
- 2239 (9) a statement that the inspector or investigator is not permitted to use any force in exercising his powers under s 453A and is not permitted during the course of his visit to search the premises or to seize any document or other thing on the premises;

- 2240 (10) a description of the effect of s 453C as it relates to a requirement imposed by an inspector or investigator under s 453A (see PARA 1565);
- 2241 (11) a statement that it is an offence under s 453A(5) intentionally to obstruct an inspector, investigator or other person lawfully acting under s 453A;
- 2242 (12) a description of the inspector's or investigator's obligations under s 453B(6), (7) (see PARA 1565) to prepare a written record of the visit and to give a copy of the record, when requested, to the company and any other occupier of the premises; and
- 2243 (13) information about how any person entitled under s 453B(6) (see the text and notes 11-13) to receive a copy of that record can request it.

9 Companies Act 1985 s 453B(5) (as added: see note 5).

10 The written record must contain such information as may be prescribed by regulations: Companies Act 1985 s 453B(7) (as added: see note 5). See note 8. The written record which s 453B(6) requires an inspector or investigator to prepare must contain the following information (Companies Act 1985 (Power to Enter and Remain on Premises: Procedural) Regulations 2005, SI 2005/684, reg 3):

- 2244 (1) the name by which the company in relation to which the powers under the Companies Act 1985 s 453A were exercised was registered at the time of the authorisation under s 453A(1) (a) (see PARA 1565);
- 2245 (2) the company's registered number at that time;
- 2246 (3) the postal address of the premises visited;
- 2247 (4) the name of the inspector or investigator who visited the premises and the name of any person accompanying him;
- 2248 (5) the date and time when the inspector or investigator entered the premises and the duration of his visit;
- 2249 (6) the name (if known by the inspector or investigator) of the person to whom the inspector or investigator and any person accompanying him produced evidence of their identity under s 453B(3) (see the text and notes 1-5);
- 2250 (7) the name (if known by the inspector or investigator) of the person to whom the inspector or investigator produced evidence of his appointment or authorisation (as the case may be) as required by s 453B(3);
- 2251 (8) if the inspector or investigator does not know the name of the person to whom he produced evidence of his identity and appointment or authorisation as required by s 453B(3), an account of how he produced that evidence under that provision;
- 2252 (9) if the inspector or investigator does not know the name of the person to whom any person accompanying the inspector or investigator produced evidence of his identity under s 453B(3), an account of how that evidence was produced under that provision;
- 2253 (10) the name (if known by the inspector or investigator) of the person who admitted the inspector or investigator to the premises or, if the inspector or investigator does not know that person's name, an account of how he was admitted to the premises;
- 2254 (11) the name (if known by the inspector or investigator) of every appropriate recipient to whom the inspector or investigator, while on the premises, gave a written statement of powers, rights and obligations as required by s 453B(4) (see note 8);
- 2255 (12) if the inspector or investigator does not know the name of a person referred to in head (11), an account of how the written statement was given to that person;
- 2256 (13) the name (if known by the inspector or investigator) of any person physically present on the premises (to the inspector's or investigator's knowledge) at any time during the

inspector's or investigator's visit (other than another inspector or investigator, a person accompanying the inspector or investigator or a person referred to in head (11)) and with whom the inspector or investigator communicated in relation to the inspector's or investigator's presence on the premises;

2257 (14) a record of any apparent failure by any person during the course of the inspector's or investigator's visit to the premises to comply with any requirement imposed by the inspector or investigator under Pt XIV (see also PARAS 1541 et seq, 1567); and

2258 (15) a record of any conduct by any person during the course of the inspector's or investigator's visit to the premises which the inspector or investigator believes amounted to the intentional obstruction of him, or anyone accompanying him, in the lawful exercise of the power to enter and remain on the premises under s 453A (see PARA 1565).

11 Companies Act 1985 s 453B(6) (as added: see note 5).

12 Companies Act 1985 s 453B(6)(a) (as added: see note 5).

13 Companies Act 1985 s 453B(6)(b) (as added: see note 5).

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(iv) Investigation of Overseas Companies

1567. Application of provisions to overseas companies.

The statutory provisions relating to the Secretary of State's powers of investigation¹ apply to bodies corporate² incorporated outside the United Kingdom³ which are carrying on business in the United Kingdom or which have at any time carried on business there, as they apply to companies under the Companies Acts, but subject to the following exceptions, adaptations and modifications⁴.

The statutory provisions relating to: (1) the investigation of a company on the application of the company or its members⁵; and (2) the investigation of the ownership of a company and the power to obtain information as to those interested in shares or debentures⁶, do not apply to such bodies⁷.

The other statutory provisions relating to the Secretary of State's powers of investigation apply to such bodies subject to such adaptations and modifications as may be specified by regulations made by the Secretary of State⁸.

1 I.e. the Companies 1985 Pt XIV (ss 431-453D) (see also PARA 1541 et seq). As to the Secretary of State see PARA 6. The provisions of the Companies Act 1985 Pt XIV have not been repealed and are included in the 'Companies Acts' as defined by the Companies Act 2006: see PARA 16. As to the application of the Companies 1985 Pt XIV to overseas companies see PARA 1567. As to the meaning of 'overseas company' see PARA 1824.

2 As to the meaning of 'body corporate' see PARA 1 note 5.

3 As to the meaning of 'United Kingdom' see PARA 1 note 5.

4 Companies Act 1985 s 453(1) (substituted by the Companies Act 1989 s 70; amended by SI 2009/1941).

The provisions of the Companies Act 1985 s 453 apply to unregistered companies by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 16: see PARA 1666. As to the meaning of 'unregistered company' see PARA 1665.

5 lie under the Companies Act 1985 s 431 (see PARA 1541). As to the meaning of 'company' see PARA 1. As to who qualifies as a member of a company see PARA 321.

6 lie under the Companies Act 1985 ss 442-445 (see PARAS 1545-1547). As to shares generally see PARA 1055. As to the meaning of 'debenture' see PARA 1299.

7 Companies Act 1985 s 453(1A) (added by the Companies Act 1989 s 70; and amended by the Companies Act 2006 ss 1176(3), 1295, Sch 16).

8 Companies Act 1985 s 453(1B) (added by the Companies Act 1989 s 70). Such regulations must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Companies Act 1985 s 453(2). At the date at which this volume states the law, no such regulations had been made.

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(v) Powers exercisable to Assist Overseas Regulatory Authorities

1568. Request for assistance by overseas regulatory authority.

Certain investigative powers¹ are exercisable by the Secretary of State² for the purpose of assisting an overseas regulatory authority³ which has requested his assistance in connection with inquiries being carried out by it or on its behalf⁴. The Secretary of State⁵ must not exercise these powers unless he and the Financial Services Authority are satisfied that the assistance requested by the overseas regulatory authority is for the purposes of its regulatory functions⁶.

In deciding whether to exercise such powers the Secretary of State may take into account, in particular⁷:

- 983 (1) whether corresponding assistance would be given in that country or territory to an authority exercising regulatory functions in the United Kingdom⁸;
- 984 (2) whether the inquiries relate to the possible breach of a law, or other requirement, which has no close parallel in the United Kingdom or involves the assertion of a jurisdiction not recognised by the United Kingdom⁹;
- 985 (3) the seriousness of the matter to which the inquiries relate, the importance to the inquiries of the information sought in the United Kingdom and whether the assistance could be obtained by other means¹⁰;
- 986 (4) whether it is otherwise appropriate in the public interest to give the assistance sought¹¹.

Before deciding whether to exercise these powers in a case where the overseas regulatory authority is a banking supervisor¹², the Secretary of State must consult the Financial Services Authority¹³.

The Secretary of State may decline to exercise these powers unless the overseas regulatory authority undertakes to make such contribution towards the costs of their exercise as the Secretary of State considers appropriate¹⁴.

1 lie those conferred by the Companies Act 1989 s 83 (see PARA 1569).

2 As to the Secretary of State see PARA 6.

3 For these purposes, an 'overseas regulatory authority' means an authority which in a country or territory outside the United Kingdom exercises:

2259 (1) any function corresponding to: (a) any function of the Secretary of State under the Companies Act 1985 or the Companies Act 2006; (b) any function of the Financial Services Authority under the Financial Services and Markets Act 2000 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 6 et seq); (c) any function exercised by the competent authority under the Financial Services and Markets Act 2000 Pt VI (ss 72-103) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385 et seq) (see the Companies Act 1989 s 82(2)(a) (substituted by SI 2001/3649; and amended by SI 2005/1433 and SI 2008/948)); or

2260 (2) any function in connection with the investigation of, or the enforcement of rules (whether or not having the force of law) relating to, conduct of the kind prohibited by the Criminal Justice Act 1993 Pt V (ss 52-64) (insider dealing: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**) (see the Companies Act 1989 s 82(2)(b) (amended by the Criminal Justice Act 1993 s 79(13), Sch 5 Pt I para 16)); or

2261 (3) any function prescribed for these purposes by order of the Secretary of State, being a function which in his opinion relates to companies or financial services (see the Companies Act 1989 s 82(2)(c)).

As to the meaning of 'United Kingdom' see PARA 1 note 5. Any order made under head (3) must be made by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 82(2). References to financial services include, in particular, investment business, insurance and banking: s 82(7).

4 Companies Act 1989 s 82(1).

5 The function of the Secretary of State under the Companies Act 1989 s 82(3) (ie that of being satisfied as to whether assistance requested by an overseas regulatory authority is for the purpose of its regulatory functions) is exercisable by the Secretary of State and the Treasury concurrently: Transfer of Functions (Financial Services) Order 1992, SI 1992/1315, art 5, Sch 3 para 3 (revoked, in relation to the designation of the Treasury in respect of measures relating to open-ended collective investment schemes, by SI 2002/2840). As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517. As to open-ended collective investment schemes see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 603 et seq.

6 Companies Act 1989 s 82(3) (amended by SI 2001/3649). For these purposes, an authority's 'regulatory functions' means any functions falling within the Companies Act 1989 s 82(2) (see note 3) and any other functions relating to companies or financial services: s 82(3).

7 Companies Act 1989 s 82(4).

8 Companies Act 1989 s 82(4)(a).

9 Companies Act 1989 s 82(4)(b).

10 Companies Act 1989 s 82(4)(c).

11 Companies Act 1989 s 82(4)(d).

12 For these purposes, a 'banking supervisor' means an overseas regulatory authority with respect to which the Financial Services Authority has notified the Secretary of State, for the purposes of the Companies Act 1989 s 82(5), that it exercises functions corresponding to those of the Authority in relation to authorised persons with permission under the Financial Services and Markets Act 2000 to accept deposits: Companies Act 1989 s 82(5) (amended by the Bank of England Act 1998 s 23(1), Sch 5 para 66(2)(b)(i), (ii); and by SI 2001/3649). In the Companies Act 1989 s 82(5), 'authorised person' has the meaning given in the Financial Services and Markets Act 2000 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 314); and the references to deposits and their acceptance must be read with s 22, any relevant order under s 22, and Sch 2 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 84); Companies Act 1989 s 82(5A) (added by SI 2001/3649).

13 Companies Act 1989 s 82(5) (amended by the Bank of England Act 1998 Sch 5 para 66(2)(b)(i)).

14 Companies Act 1989 s 82(6).

UPDATE

1568 Request for assistance by overseas regulatory authority

NOTE 3--For **CRIMINAL LAW, EVIDENCE AND PROCEDURE** read **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 574A.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(30) INVESTIGATION OF COMPANIES AND THEIR AFFAIRS; REQUISITION OF DOCUMENTS/(v) Powers exercisable to Assist Overseas Regulatory Authorities/1569. Power to require information, documents or other assistance.

1569. Power to require information, documents or other assistance.

The following powers may be exercised for the purpose of assisting an overseas regulatory authority¹ if the Secretary of State² considers there is good reason for their exercise³.

The Secretary of State may require any person⁴:

- 987 (1) to attend before him at a specified time and place and answer questions or otherwise furnish information with respect to any matter relevant to the inquiries⁵;
- 988 (2) to produce at a specified time and place any specified documents⁶ which appear to the Secretary of State to relate to any matter relevant to the inquiries⁷; and
- 989 (3) otherwise to give him such assistance in connection with the inquiries as he is reasonably able to give⁸.

Where documents are so produced, the Secretary of State may take copies or extracts from them⁹; and, where a person claims a lien on a document, its production under these provisions is without prejudice to his lien¹⁰.

The Secretary of State may examine a person on oath and may administer an oath accordingly¹¹; but a person cannot be required under these provisions to disclose information or produce a document which he would be entitled to refuse to disclose or produce on grounds of legal professional privilege in proceedings in the High Court¹², except that a lawyer may be required to furnish the name and address of his client¹³. A statement by a person in compliance with a requirement imposed by these provisions may be used in evidence against him¹⁴, except that, in criminal proceedings in which that person is charged with an offence¹⁵, no evidence relating to the statement may be adduced, and no question relating to it may be asked, by or on behalf of the prosecution, unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person¹⁶.

1 le in accordance with the Companies Act 1989 s 82 (see PARA 1568). As to the meaning of 'overseas regulatory authority' see PARA 1568 note 3.

2 As to the Secretary of State see PARA 6.

3 Companies Act 1989 s 83(1).

4 Companies Act 1989 s 83(2). See also PARA 1544.

5 Companies Act 1989 s 83(2)(a). See also PARA 1544.

6 For these purposes, 'documents' includes information recorded in any form; and, in relation to information recorded otherwise than in legible form, the power to require its production includes power to require the production of a copy of it in legible form: Companies Act 1989 s 83(8).

7 Companies Act 1989 s 83(2)(b). See also PARA 1544.

8 Companies Act 1989 s 83(2)(c). See also PARA 1544.

9 Companies Act 1989 s 83(4).

10 Companies Act 1989 s 83(7).

11 Companies Act 1989 s 83(3). See also PARA 1544 notes 14-15.

12 As to legal professional privilege see **CIVIL PROCEDURE** vol 11 (2009) PARA 558 et seq; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1479. See also **LEGAL PROFESSIONS** vol 65 (2008) PARAS 740-741; **LEGAL PROFESSIONS** vol 66 (2009) PARA 1146.

13 Companies Act 1989 s 83(5).

14 Companies Act 1989 s 83(6). See also PARA 1544.

15 In any offence to which the Companies Act 1989 s 83(6A) applies, being any offence other than an offence under s 85 (see PARA 1571), an offence under the Perjury Act 1911 ss 2, 5 (false statements made on oath otherwise than in judicial proceedings or made otherwise than on oath: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARAS 716-717), or an offence under the Perjury (Northern Ireland) Order 1979, SI 1979/1814, arts 7, 10: Companies Act 1989 s 83(6B) (added by the Youth Justice and Criminal Evidence Act 1999 s 59, Sch 3 para 21).

16 Companies Act 1989 s 83(6A) (added by the Youth Justice and Criminal Evidence Act 1999 Sch 3 para 21). The amendment was made to this provision as a consequence of the decision in *Saunders v United Kingdom (Application 19187/91)* (1997) 23 EHRR 313, ECtHR (evidence disclosed by applicant when questioned under compulsory powers not admissible in criminal proceedings). See also PARAS 1544 note 25, 1558 text and notes 15-16.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(30) INVESTIGATION OF COMPANIES AND THEIR AFFAIRS; REQUISITION OF DOCUMENTS/(v) Powers exercisable to Assist Overseas Regulatory Authorities/1570. Exercise of powers by officer etc.

1570. Exercise of powers by officer etc.

The Secretary of State¹ may authorise an officer of his or any other competent person² to exercise on his behalf all or any of the powers³ to require information, documents or other assistance⁴. No such authority may be granted except for the purpose of investigating⁵:

- 990 (1) the affairs, or any aspects of the affairs, of a person specified in the authority⁶; or
- 991 (2) a subject matter so specified⁷,

being a person who, or subject matter which, is the subject of the inquiries being carried out by or on behalf of an overseas regulatory authority⁸.

No person is bound to comply with a requirement imposed by a person exercising powers by virtue of an authority so granted unless he has, if required, produced evidence of his authority⁹; nor may a person by virtue of any such authority be required to disclose any information or produce any documents¹⁰ in respect of which he owes an obligation of confidence by virtue of carrying on the business of banking¹¹ unless¹²:

- 992 (a) the imposing on him of a requirement with respect to such information or documents has been specifically authorised by the Secretary of State¹³; or
- 993 (b) the person to whom the obligation of confidence is owed consents to the disclosure or production¹⁴.

1 As to the Secretary of State see PARA 6.

2 Where the Secretary of State authorises a person other than one of his officers to exercise any of these powers, that person must make a report to the Secretary of State in such manner as he may require on the exercise of those powers and the results of exercising them: Companies Act 1989 s 84(5).

3 le the powers conferred by the Companies Act 1989 s 83 (see PARA 1569).

4 Companies Act 1989 s 84(1). As to the disclosure of information to a person authorised to exercise powers under s 84 see the Companies Act 1985 s 451A(3); and PARA 1563.

Where a person authorised to require the production of documents under the Companies Act 1989 s 84 knows or suspects or has reasonable grounds for knowing or suspecting that a person is or has engaged in money laundering or terrorist financing, he must, as soon as reasonably practicable, inform the Serious Organised Crime Agency: Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(u). As to money laundering see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 539 et seq.

5 Companies Act 1989 s 84(2).

6 Companies Act 1989 s 84(2)(a).

7 Companies Act 1989 s 84(2)(b).

8 Companies Act 1989 s 84(2). As to the meaning of 'overseas regulatory authority' see PARA 1568 note 3.

9 Companies Act 1989 s 84(3).

10 For these purposes, 'documents' has the same meaning as in the Companies Act 1989 s 83 (see PARA 1569 note 6): s 84(4).

11 As to obligations of confidence owed by bankers see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 920 et seq; **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 454.

12 Companies Act 1989 s 84(4).

13 Companies Act 1989 s 84(4)(a).

14 Companies Act 1989 s 84(4)(b).

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(30) INVESTIGATION OF COMPANIES AND THEIR AFFAIRS; REQUISITION OF DOCUMENTS/(v) Powers exercisable to Assist Overseas Regulatory Authorities/1571. Penalty for failure to comply with the requirements.

1571. Penalty for failure to comply with the requirements.

A person who without reasonable excuse fails to comply with a requirement to assist an investigation¹ commits an offence².

A person who in purported compliance with any such requirement furnishes information which he knows to be false or misleading in a material particular, or recklessly furnishes information which is false or misleading in a material particular, also commits an offence³.

1 le a requirement imposed by the Companies Act 1989 s 83 (see PARA 1569).

2 Companies Act 1989 s 85(1). A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale, or to both: s 85(1). As to the standard scale see PARA 1622. For guidance on what constitutes 'reasonable excuse' see *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660, [1988] 1 All ER 203, HL. See also PARA 1544 note 8.

3 Companies Act 1989 s 85(2). A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both: s 85(2). As to the statutory maximum see PARA 1622. Summary proceedings for an offence under s 85 may, without prejudice to any jurisdiction otherwise exercisable, be taken against a body corporate or unincorporated association at any place at which it has a place of business and against an individual at any place where he is for the time being: s 91(1). As to the meaning of 'body corporate' see PARA 1 note 5. As to unincorporated bodies generally see PARA 2.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(30) INVESTIGATION OF COMPANIES AND THEIR AFFAIRS; REQUISITION OF DOCUMENTS/(v) Powers exercisable to Assist Overseas Regulatory Authorities/1572. Restrictions on disclosure of information.

1572. Restrictions on disclosure of information.

Information relating to the business or other affairs of a person which¹:

- 994 (1) is supplied by an overseas regulatory authority² in connection with a request for assistance³; or
- 995 (2) is obtained by virtue of the powers to require information, documents or other assistance⁴, whether or not any requirement to supply it is made under such powers⁵,

must not be disclosed, save as permitted below⁶, for any purpose⁷:

- 996 (a) by the primary recipient⁸; or
- 997 (b) by any person obtaining the information directly or indirectly from him⁹,

without the consent of the person from whom the primary recipient obtained the information and, if different, the person to whom it relates¹⁰.

Information is not, however, to be treated as information to which this restriction applies if the information has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purpose for which, disclosure is not precluded¹¹ by this restriction¹².

A person who contravenes the restriction on disclosure of information commits an offence¹³.

1 Companies Act 1989 s 86(1).

2 As to the meaning of 'overseas regulatory authority' see PARA 1568 note 3.

3 Companies Act 1989 s 86(1)(a).

4 le the powers conferred by Companies Act 1989 s 83 (see PARA 1569).

- 5 Companies Act 1989 s 86(1)(b).
- 6 le under Companies Act 1989 s 87 (see PARA 1573).
- 7 Companies Act 1989 s 86(2).
- 8 Companies Act 1989 s 86(2)(a). For these purposes, 'primary recipient' means, as the case may be: (1) the Secretary of State; (2) any person authorised under s 84 to exercise powers on his behalf (see PARA 1570); and (3) any officer or servant of any such person: s 86(3). As to the Secretary of State see PARA 6.
- 9 Companies Act 1989 s 86(2)(b).
- 10 Companies Act 1989 s 86(2).
- 11 le precluded by the Companies Act 1989 s 86(1), (2) (see the text and notes 1-10).
- 12 Companies Act 1989 s 86(4).
- 13 Companies Act 1989 s 86(5). A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding the statutory maximum, or to both: s 86(5). As to the statutory maximum see PARA 1622.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(30) INVESTIGATION OF COMPANIES AND THEIR AFFAIRS; REQUISITION OF DOCUMENTS/(v) Powers exercisable to Assist Overseas Regulatory Authorities/1573. Exceptions from restrictions on disclosure.

1573. Exceptions from restrictions on disclosure.

Information to which the restriction on disclosure applies¹ may be disclosed²:

- 998 (1) to any person with a view to the institution of, or otherwise for the purposes of, relevant proceedings³;
- 999 (2) for the purpose of enabling or assisting a relevant authority to discharge any relevant function⁴, including functions in relation to proceedings⁵;
- 1000 (3) to the Treasury, if the disclosure is made in the interests of investors or in the public interest⁶;
- 1001 (4) if the information is or has been available to the public from other sources⁷;
- 1002 (5) in a summary or collection of information framed in such a way as not to enable the identity of any person to whom the information relates to be ascertained⁸; or
- 1003 (6) in pursuance of any Community obligation⁹.

1 le information to which the Companies Act 1989 s 86 applies (see PARA 1572).

2 Companies Act 1989 s 87(1).

3 Companies Act 1989 s 87(1)(a). For these purposes, 'relevant proceedings' are: (1) any criminal proceedings; (2) civil proceedings arising under or by virtue of the Financial Services and Markets Act 2000 and proceedings before the Financial Services and Markets Tribunal; (3) disciplinary proceedings relating to: (a) the exercise by a solicitor, auditor, accountant, valuer or actuary of his professional duties; or (b) the discharge by a public servant of his duties; and (4) proceedings before the Pensions Regulator Tribunal: Companies Act 1989 s 87(2) (amended by the Pensions Act 2004 s 102(4), Sch 4 para 20; and SI 2001/3649). As from a day to be appointed, the Companies Act 1989 s 87(2) is further amended by the Legal Services Act 2007 s 208(1), Sch 21 para 82(a) so that the term 'solicitor' is replaced by 'relevant lawyer' as defined. At the date at which this volume states the law no such day had been appointed. 'Public servant' means an officer or servant of the

Crown or of any public or other authority for the time being designated for the purposes of the Companies Act 1989 s 87(2) by order of the Secretary of State: s 87(3). At the date at which this volume states the law no such order had been made. Any order under s 87 must be made by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 87(6). As to the Financial Services and Markets Tribunal see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 43 et seq. As to the Secretary of State see PARA 6.

4 The relevant authorities and the relevant functions in relation to each such authority are set out in the Companies Act 1989 s 87(4), Table (amended by the Friendly Societies Act 1992 s 120, Sch 21 para 11; the Pensions Act 1995 s 122, Sch 3 para 19; the Bank of England Act 1998 s 23(1), Sch 5 para 66(3); the National Lottery Act 1998 s 1(5), Sch 1 para 4; the Enterprise Act 2002 s 278(1), Sch 25 para 21(1), (3); the Pensions Act 2004 s 319(1), Sch 12 para 6; the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 25(1), Sch 2 para 29; SI 1993/1826; SI 1994/340; SI 1997/2781; SI 1992/1315; SI 1999/1820; SI 2001/1283; SI 2001/3649; SI 2002/1889; SI 2005/1967; SI 2006/1644; SI 2008/948). The Secretary of State may by order amend the Table so as: (1) to add any public or other authority to the Table and specify the relevant functions of that authority; (2) to remove any authority from the Table; or (3) to add functions to, or remove functions from, those which are relevant functions in relation to an authority specified in the Table, and the order may impose conditions subject to which, or otherwise restrict the circumstances in which, disclosure is permitted: s 87(5). In exercise of this power, the Financial Services (Disclosure of Information) (Designated Authorities) (No 7) Order 1993, SI 1993/1826, the Financial Services (Disclosure of Information) (Designated Authorities) (No 8) Order 1994, SI 1994/340, the Companies (Disclosure of Information) (Designated Authorities) (No 2) Order 2002, SI 2002/1889, and the Companies (Disclosure of Information) (Designated Authorities) Order 2006, SI 2006/1644 have been made.

The relevant authorities and the relevant functions in relation to each such authority are (see the Companies Act 1989 s 87(4), Table (as so amended)):

- 2262 (a) the Secretary of State, and his functions under the enactments relating to companies or insolvency, under Pt II (ss 24-54) (repealed; see now the Companies Act 2006 Pt 16 Ch 2 (ss 485-494)) (eligibility for appointment as company auditor: see PARA 912 et seq), the Companies Act 1989 Pt III (ss 55-91) (investigations and powers to obtain information: see PARA 1568 et seq) or Pt VII (ss 154-191) (financial markets and insolvency: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 509 et seq), or under the Financial Services and Markets Act 2000 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 3 et seq);
- 2263 (b) the Treasury (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517), and its functions under the Companies Act 1989 Pt III or Pt VII or under the Financial Services and Markets Act 2000 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 3 et seq);
- 2264 (c) an inspector appointed under the Companies Act 1985 Pt XIV (ss 431-453D), and his functions under that Part (see PARA 1541 et seq);
- 2265 (d) a person authorised to exercise powers under s 447 (see PARA 1558) or the Companies Act 1989 s 84 (see PARA 1570), and his functions thereunder;
- 2266 (e) a person appointed under the Financial Services and Markets Act 2000 s 167 (general investigations: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 449), s 168 (investigations in particular cases: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 449), s 169(1)(b) (investigation in support of overseas regulator: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 450), s 284 (investigations into affairs of certain collective investment schemes: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 683), or regulations made as a result of s 262(2)(k) (investigations into open-ended investment companies: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 621) to conduct an investigation, and his functions in relation to the investigation;
- 2267 (f) an overseas regulatory authority, and its regulatory functions within the meaning of the Companies Act 1989 s 82 (see PARA 1568);
- 2268 (g) the Department of Economic Development in Northern Ireland or a person appointed or authorised by that Department, and the functions conferred on it or him by the enactments relating to companies or insolvency;
- 2269 (h) the Bank of England (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 793 et seq), and any of its functions;

- 2270 (i) the Financial Services Authority, and its functions under the enactments relating to friendly societies (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2081 et seq), under the Building Societies Act 1986 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1856 et seq) and under the Financial Services and Markets Act 2000 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 4, 6 et seq);
- 2271 (j) a body corporate established in accordance with the Financial Services and Markets Act 2000 s 212(1) (compensation scheme manager: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 583), and its functions under the Financial Services Compensation Scheme, established in accordance with s 213 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 584);
- 2272 (k) a recognised investment exchange or a recognised clearing house (as defined by s 285: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 684), and its functions in its capacity as an exchange or clearing house so recognised;
- 2273 (l) a body designated under s 326(1) (designated professional bodies: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 749), and its functions in its capacity as a body so designated;
- 2274 (m) a body designated by order under the Companies Act 2006 s 1252 (see PARA 960), and its functions under Pt 42 (see PARA 957 et seq);
- 2275 (n) a recognised supervisory or qualifying body within the meaning of Pt 42 (see PARAS 975 et seq, 998 et seq), and its functions as such a body;
- 2276 (o) the official receiver (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 31 et seq) or, in Northern Ireland, the official assignee for company liquidations or for bankruptcy, and his functions under the enactments relating to insolvency;
- 2277 (p) the Pensions Regulator (see **SOCIAL SECURITY AND PENSIONS**), and its functions under the Pension Schemes Act 1993, the Pensions Act 1995, the Welfare Reform and Pensions Act 1999, the Pensions Act 2004 or any enactment in force in Northern Ireland corresponding to any of them;
- 2278 (q) the Board of the Pension Protection Fund (see **SOCIAL SECURITY AND PENSIONS**), and its functions conferred by or by virtue of the Pensions Act 2004 Pt 2 (ss 107-220) or any enactment in force in Northern Ireland corresponding to that Part;
- 2279 (r) the Office of Fair Trading (see **COMPETITION** vol 18 (2009) PARAS 6-8), and its functions under the Financial Services and Markets Act 2000;
- 2280 (s) a person authorised by the Secretary of State under the Companies Act 1985 s 245C (repealed: see now the Companies Act 2006 s 457) (rectification of defective accounts: see PARA 902), and his functions relating to the securing of compliance by companies with accounting requirements;
- 2281 (t) the Commission of the National Lottery, and its functions under the National Lottery etc Act 1993 ss 5-10, 15 (see **LICENSING AND GAMBLING** vol 68 (2008) PARA 686 et seq);
- 2282 (u) the Comptroller and Auditor General, and his functions under the National Audit Act 1983 Pt II (ss 6-9) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 717 et seq);
- 2283 (v) the Scottish Ministers, and their functions under the enactments relating to insolvency;
- 2284 (w) the Accountant in Bankruptcy (as to which office see the Bankruptcy (Scotland) Act 1985), and the functions he has under the enactments relating to insolvency;
- 2285 (x) the Regulator of Community Interest Companies, and his functions under the Companies (Audit, Investigations and Community Enterprise) Act 2004 (see PARA 83);
- 2286 (y) the Gambling Commission, and its functions under the Gambling Act 2005 (see **LICENSING AND GAMBLING** vol 67 (2008) PARAS 4, 5, 335 et seq);

- 2287 (z) the Regulator of Community Interest Companies for Northern Ireland, and his functions under the Companies (Audit, Investigations and Community Enterprise) (Northern Ireland) Order 2005.

The circumstances in which disclosure is permitted for the purpose of enabling or assisting the Comptroller and Auditor General to discharge his relevant functions (see head (u)) is restricted by the Companies (Disclosure of Information) (Designated Authorities) (No 2) Order 2002, SI 2002/1889, art 3(4), which states that disclosure is permitted only where the disclosure is made by the National Lottery Commission to the National Audit Office for the purpose of enabling or assisting the Comptroller and Auditor General to carry out an examination into the economy, efficiency and effectiveness with which the National Lottery Commission has used its resources in discharging its functions under the National Lottery etc Act 1993 ss 5-10 (see **LICENSING AND GAMBLING** vol 68 (2008) PARA 686 et seq): Companies Act 1989 s 87(4), Table Note (added by SI 2002/1889). As to the meaning of 'body corporate' see PARA 1 note 5.

5 Companies Act 1989 s 87(1)(b).

6 Companies Act 1989 s 87(1)(c).

7 Companies Act 1989 s 87(1)(d).

8 Companies Act 1989 s 87(1)(e).

9 Companies Act 1989 s 87(1)(f).

UPDATE

1573 Exceptions from restrictions on disclosure

NOTE 3--Day appointed is 1 January 2010: SI 2009/3250.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/2. COMPANIES REGULATED BY THE COMPANIES ACTS/(30) INVESTIGATION OF COMPANIES AND THEIR AFFAIRS; REQUISITION OF DOCUMENTS/(v) Powers exercisable to Assist Overseas Regulatory Authorities/1574. Prosecution of offences.

1574. Prosecution of offences.

Proceedings for a failure to assist an investigation¹ or for a breach of the restrictions on disclosure of information² may not be instituted except by or with the consent of the Secretary of State³ or the Director of Public Prosecutions⁴.

Where such an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly⁵.

Where such an offence committed by a partnership⁶ is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a partner, he as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly⁷.

Where such an offence committed by an unincorporated association⁸, other than a partnership, is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any officer of the association or any member of its governing body,

he as well as the association is guilty of the offence and liable to be proceeded against and punished accordingly⁹.

- 1 le under the Companies Act 1989 s 85 (see PARA 1571).
- 2 le under the Companies Act 1989 s 86 (see PARA 1572).
- 3 As to the Secretary of State see PARA 6.
- 4 Companies Act 1989 s 89(a). As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1066. As to consents to prosecution see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1071.
- 5 Companies Act 1989 s 90(1). Where the affairs of a body corporate are managed by its members, s 90(1) applies in relation to the acts and defaults of a member in connection with his functions of management as to a director of a body corporate: s 90(2). As to the meaning of 'body corporate' see PARA 1 note 5.
- 6 As to partnership generally see PARA 4; and **PARTNERSHIP**.
- 7 Companies Act 1989 s 90(3).
- 8 As to unincorporated bodies generally see PARA 2.
- 9 Companies Act 1989 s 90(4). Proceedings for an offence alleged to have been committed under s 85 or s 86 by an unincorporated association must be brought in the name of the association, and not in that of any of its members; and for the purpose of any such proceedings any rules of court relating to the service of documents apply as in relation to a body corporate: s 91(2). The Criminal Justice Act 1925 s 33 and the Magistrates' Courts Act 1980 s 46, Sch 3 (procedure on charge of offence against a corporation: see **MAGISTRATES** vol 29(2) (Reissue) PARA 666) apply in a case in which an unincorporated association is charged in England and Wales with an offence under the Companies Act 1989 s 85 or s 86 as they apply in the case of a corporation: s 91(3). A fine imposed on an unincorporated association on its conviction of such an offence must be paid out of the funds of the association: s 91(6). As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

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(31) DISQUALIFICATION ORDERS AND UNDERTAKINGS

(i) In general

1575. Meaning of 'director' under the Company Directors Disqualification Act 1986.

For the purposes of the Company Directors Disqualification Act 1986, unless the context otherwise requires, 'director' includes any person occupying the position of director, by whatever name called¹. Accordingly, a company which has been appointed as a director of another company can be made the subject of a disqualification order under the Company Directors Disqualification Act 1986².

Directors may be of three kinds: (1) de jure directors, that is to say, those who have been validly appointed to the office³; (2) de facto directors, that is to say, directors who assume to act as directors without having been appointed validly or at all⁴; and (3) shadow directors, a term which is defined by statute for the purposes of both companies and insolvency legislation⁵.

1 Company Directors Disqualification Act 1986 s 22(1), (4) (s 22(4) amended by the Insolvency Act 2000 ss 8, 15(1), Sch 4 Pt I paras 1, 15(1), (3), Sch 5). Subject to the provisions of the Company Directors Disqualification Act 1986 s 22, expressions that are defined for the purposes of the Companies Acts (see the Companies Act 2006 s 1174 and Sch 8) have the same meaning in the Company Directors Disqualification Act 1986: s 22(9) (substituted by SI 2008/948; amended by SI 2009/1941). With respect to the meaning of expressions used in the Company Directors Disqualification Act 1986, and unless the context otherwise requires, the 'Companies Acts' has the meaning given by the Companies Act 2006 s 2(1) (as to which see PARA 16): Company Directors Disqualification Act 1986 s 22(7) (substituted by SI 2009/1941). As to the meaning of 'director' for the purposes of the Companies Acts see PARA 478. As to the application of the Company Directors Disqualification Act 1986 to building societies, to incorporated friendly societies, and to NHS foundation trusts, see PARA 1578.

Any reference in the Company Directors Disqualification Act 1986 to provisions, or a particular provision, of the Companies Acts or the Insolvency Act includes the corresponding provisions or provision of corresponding earlier legislation: Company Directors Disqualification Act 1986 s 22(1), (8) (s 22(8) substituted by SI 2009/1941). As to the Insolvency Act 1985 see PARA 15. The Company Directors Disqualification Act 1986 s 1A (see PARA 1579), ss 6-10 (see PARAS 1584, 1589, 1592 et seq), ss 13-15 (see PARAS 1614-1616), s 19(c) (see PARAS 1583-1584), s 20 (see PARA 1607), Sch 1 (see PARAS 1593-1594) (and ss 1, 17 as they apply for the purposes of those provisions) are deemed included in the Insolvency Act 1986 Pts I-VII (ss 1-251) for the purposes of s 411 (power to make insolvency rules) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1041), s 414 (fees orders) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1106), s 420 (orders extending provisions about insolvent companies to insolvent partnerships) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1166), and s 422 (modification of such provisions in their application to authorised institutions) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 552): Company Directors Disqualification Act 1986 s 21(2) (amended by the Companies Act 1989 s 212, Sch 24; the Insolvency Act 2000 Sch 4 Pt I paras 1, 14(1), (2); and SI 2009/1941).

The term 'director' is defined in almost identical words for the purposes of the Company Directors Disqualification Act 1986 s 22, the Companies Act 2006 s 250 (see PARA 478), and the Insolvency Act 1986 s 251 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 5). The jurisprudence that has built up in relation to the term is often 'read across' in these different statutory contexts. It has been held, for instance, that there is no justification in giving that term a different construction for the purposes of the Company Directors Disqualification Act 1986 s 6 (see PARA 1592) than that which had been given in established authority for the purposes of the Insolvency Act 1986 s 214 (declaration of liability for wrongful trading) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 914): see *Secretary of State for Trade and Industry v Hall* [2006] EWHC 1995 (Ch), (2006) Times, 2 August, [2006] All ER (D) 432 (Jul).

2 *Official Receiver v Brady* [1999] BCC 258. Where a body corporate is a director of a company, it does not follow as a matter of course that any of its own directors are constituted as a director of any company of which their company is a director: *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180, [1994] BCC 161. (As to this case generally see note 5). However, it may be possible for an individual through his control of a corporate director to constitute himself a director of a subject company, depending on what that individual procures the corporate director to do: see *Secretary of State for Trade and Industry v Hall* [2006] EWHC 1995 (Ch), (2006) Times, 2 August, [2006] All ER (D) 432 (Jul). As to nominee directors see PARA 480. See also *Re London Citylink Ltd*, *Secretary of State for Trade and Industry v London Citylink Ltd* [2005] EWHC 2875 (Ch), [2005] All ER (D) 188 (Dec) (where a company is appointed as a director of a large number of other companies, it is open to the Secretary of State to apply under the Insolvency Act 1986 s 124A (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 444) to wind up the company on public interest grounds).

3 See *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 at 182, [1994] BCC 161 at 163. See note 5. As to the appointment of directors see PARA 483 et seq.

4 See *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 at 182, [1994] BCC 161 at 163. See note 5. See also *Re Lo-Line Electric Motors Ltd* [1988] Ch 477, [1988] 2 All ER 692 (the word 'director' is capable of including and, given the protective purpose of disqualification, does include de facto directors) (decided under the Companies Act 1985 s 300 (repealed), which was a predecessor of the Company Directors Disqualification Act 1986 but in more limited terms). As to de facto directors see PARA 1577.

5 See *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 at 182, [1994] BCC 161 at 163. *Re Hydrodam (Corby) Ltd* was decided under the Insolvency Act 1986 s 214 (declaration of liability for wrongful trading) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 914) in reliance upon the definition of 'shadow director' given in s 251 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 5) whose terms are identical to the definition of 'shadow director' given for the purposes of the Company Directors Disqualification Act 1986 s 22 (see PARA 1576) and that given for the purposes of the Companies Acts (see the Companies Act 2006 s 251; and PARA 479). The jurisprudence that has built up in relation to the term is often 'read across' in these different statutory contexts. See also note 1.

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1576. Meaning of 'shadow director' under the Company Directors Disqualification Act 1986.

For the purposes of the Company Directors Disqualification Act 1986, unless the context otherwise requires, 'shadow director', in relation to a company¹, means a person in accordance with whose directions or instructions the directors² of a company are accustomed to act³ (but so that a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity)⁴. This statutory definition of a shadow director must be construed in the normal way to give effect to the parliamentary intention ascertainable from the mischief to be dealt with and the words used⁵.

It is not necessary that the alleged shadow director should conceal the part he plays in the affairs of the company⁶. However, it is necessary to examine the facts, bearing in mind that the purpose of the legislation is to identify those, other than professional advisers, with real influence in the corporate affairs of the company, albeit that it is not necessary that such influence should be exercised over the whole field of the company's corporate activities⁷. The directors of a holding company who give directions to the directors of one or other of its subsidiaries render themselves personally liable as shadow directors of the subsidiary but if they act merely in their capacity as directors of the holding company the holding company is the shadow director⁸.

A 'shadow director' is to be distinguished from a de facto director⁹, and a person is unlikely to be a de facto director and a shadow director simultaneously, although he may be both in succession¹⁰.

1 For these purposes, unless the context otherwise requires, 'company' means a company registered under the Companies Act 2006 in Great Britain, or a company that may be wound up under the Insolvency Act 1986 Pt V (ss 220-229) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1147 et seq): Company Directors Disqualification Act 1986 s 22(1), (2) (s 22(2) substituted by SI 2009/1941). As to the meaning of 'Great Britain' see PARA 1 note 5. As to registration under the Companies Act 2006 see PARA 111 et seq. See also *Re Seagull Manufacturing Co Ltd (in liquidation) (No 2)* [1994] Ch 91, [1994] 2 All ER 767 (regarding director of a company in compulsory liquidation who was a British subject resident outside the jurisdiction). As to the application of the Company Directors Disqualification Act 1986 to building societies, to incorporated friendly societies, and to NHS foundation trusts, see PARA 1578. Subject to the provisions of the Company Directors Disqualification Act 1986 s 22, expressions that are defined for the purposes of the Companies Acts (see the Companies Act 2006 s 1174 and Sch 8) have the same meaning in the Company Directors Disqualification Act 1986: s 22(9) (substituted by SI 2008/948; amended by SI 2009/1941). As to the meaning of the 'Companies Acts' see PARA 1575 note 1.

2 As to the meaning of 'director' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1575. The definition of 'director' given for the purposes of the Company Directors Disqualification Act 1986 is stated in very similar terms to that given for the purposes of the Insolvency Act 1986 (see s 251; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 5) and for the purposes of the Companies Acts (see the Companies Act 2006 s 250; and PARA 478). The jurisprudence that has built up in relation to the term is often 'read across' in these different statutory contexts.

3 As to the use of the words 'direction' and 'instruction' in this definition see *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340 at 354, [2000] 2 All ER 365 at 376 per Morritt LJ (whether any particular communication from the alleged shadow director, whether by words or conduct, was to be classified as a direction or instruction had to be objectively ascertained by the court in the light of all the evidence and, in that connection, it was not necessary to prove the understanding of either the giver or the receiver; in many cases, it will suffice to prove the communication and the consequence); *Secretary of State for Trade and Industry v Becker* [2002] EWHC 2200 (Ch), [2003] 1 BCLC 555 (proof required of a pattern of conduct in which a de jure director of a company was accustomed to act on the instructions or directions of the alleged shadow director; test for shadow director not satisfied if all that could be shown was that a de jure director acted on the

instructions or directions of the alleged shadow director in relation to one event at the end of the company's life). Although it would doubtless be sufficient to show that in the face of 'directions or instructions' from the alleged shadow director the properly appointed directors or some of them had cast themselves in a subservient role or surrendered their respective discretions, it was not necessary to do so in all cases: *Secretary of State for Trade and Industry v Deverell*.

It is possible, though unlikely, that a company's bank might be a shadow director: *Re a Company (No 005009 of 1987), ex p Copp* [1989] BCLC 13, (1988) 4 BCC 424. See also *Re Tasbian Ltd (No 3)* [1993] BCLC 297, [1992] BCC 358, CA (outside investor).

4 Company Directors Disqualification Act 1986 s 22(1), (5). Non-professional advice might come within the statutory description; the proviso excepting advice given in a professional capacity appeared to assume that advice generally was or might be included: *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340, [2000] 2 All ER 365, CA (the concepts of 'direction' and 'instruction' do not exclude the concept of 'advice' for all three share the common feature of 'guidance').

The definition of 'shadow director' given for the purposes of the Company Directors Disqualification Act 1986 (ie in s 22(1), (5)) is stated in very similar terms to that given for the purposes of the Insolvency Act 1986 (see s 251; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 5) and for the purposes of the Companies Acts (see the Companies Act 2006 s 251; and PARA 479). The jurisprudence that has built up in relation to the term is often 'read across' in these different statutory contexts.

5 *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340, [2000] 2 All ER 365.

6 *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340, [2000] 2 All ER 365.

7 *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340, [2000] 2 All ER 365. See also *Re Mea Corp Ltd*, *Secretary of State for Trade and Industry v Aviss* [2006] EWHC 1846 (Ch), [2007] 1 BCLC 618 (persons found to have dictated company policy in the critical area of the application of trading income and the payment of trade creditors were 'shadow directors').

8 *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 at 183, [1994] BCC 161 at 162 per Millett J. See also *Secretary of State for Trade and Industry v Hall* [2006] EWHC 1995 (Ch), (2006) Times, 2 August, [2006] All ER (D) 432 (Jul).

9 As to de facto directors see PARA 1577.

10 See PARA 479; and see *Re Mea Corp Ltd*, *Secretary of State for Trade and Industry v Aviss* [2006] EWHC 1846 (Ch), [2007] 1 BCLC 618; *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180, [1994] BCC 161 ('shadow director' and 'de facto director' are alternatives and, in most and perhaps all cases, are mutually exclusive); *Secretary of State for Trade and Industry v Laing* [1996] 2 BCLC 324 at 346 per Evans-Lombe J. See also *Re Kaytech International plc*, *Secretary of State for Trade and Industry v Kaczer* [1999] 2 BCLC 351 at 424, CA, per Robert Walker LJ (concepts of 'shadow director' and 'de facto director' are alternatives in most cases, but they share the idea in common that an individual who was not a de jure director is alleged to have exercised real influence (otherwise than as a professional adviser) in the corporate governance of a company, whether this influence was concealed or open or something of a mixture); *Secretary of State for Trade and Industry v Becker* [2002] EWHC 2200 (Ch) at [24], [2003] 1 BCLC 555 at [24]; *Secretary of State for Trade and Industry v Hollier* [2006] EWHC 1804 (Ch), [2006] All ER (D) 232 (Jul) (de facto directorships and shadow directorships are alternatives, although there may be cases where it may not be entirely straightforward which of the two descriptions is most apposite).

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1577. De facto directors.

A de facto director (or a 'director in fact') is a person who assumes to act as a director¹; he is held out as a director by the company², and claims and purports to be a director, although he is never actually or validly appointed as such³.

In order to establish that a person is a de facto director of a company, it is necessary to plead and prove that he undertakes functions in relation to the company which could properly be discharged only by a director⁴. The touchstone is whether the alleged de facto director has been part of the corporate governing structure, and inherent in that touchstone was the distinction between someone who participated (or had the right to participate) in collective decision making on corporate policy and strategy and its implementation, on the one hand, and others who might advise or act on behalf of, or otherwise for the benefit of, the company, but did not participate in decision making as part of the corporate governance of the company; a director is not a de facto director if in his decision making he is always subordinate to the de jure directors⁵. The definition of a de facto director cannot be extended to include an individual who has taken none of the courses of action which would normally qualify him as such simply because he was in a position to take those actions⁶.

A director of a corporate de jure director, in order to be constituted a de facto director of a subject company, had to cause the corporate director to take actions with relation to the subject company as would have constituted it a de facto director of that company were it not already a director de jure⁷.

1 See *Re Lo-Line Electric Motors Ltd* [1988] Ch 477, [1988] 2 All ER 692 (the word 'director' is capable of including and, given the protective purpose of disqualification, does include de facto directors) (decided under the Companies Act 1985 s 300 (repealed), which was a predecessor of the Company Directors Disqualification Act 1986 but in more limited terms); and see PARA 1575. However, in an exclusively penal provision, the criminal liability of a de facto director has to be expressly referred to: see *Re Lo-Line Electric Motors Ltd* at 489, 699 per Browne-Wilkinson V-C. As to the meaning of 'director' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1575. As to the meaning of 'director' for the purposes of the Companies Acts see PARA 478.

A de facto director owes to the company the usual duties eg to act in good faith in its interests: see *Primlake Ltd (in liquidation) v Matthews Associates* [2006] EWHC 1227 (Ch), [2007] 1 BCLC 666 (de facto director liable for breach of duty by enriching himself at the claimant's expense in paying large sums to himself which he was not, and knew he was not, entitled).

2 As to the meaning of 'company' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576 note 1. As to the meaning of 'company' under the Companies Acts see PARA 24. As to the meaning of the 'Companies Acts' for these purposes see PARA 16. As to the application of the Company Directors Disqualification Act 1986 to incorporated friendly societies, and to NHS foundation trusts, see PARA 1578.

3 *Re Hydroadam (Corby) Ltd* [1994] 2 BCLC 180 at 182 per Millett J (decided under the Insolvency Act 1986 s 214 (declaration of liability for wrongful trading) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 914); and see PARA 1575 note 5). The formulation given in the text has been followed in subsequent cases under the Company Directors Disqualification Act 1986 but in that context the courts have been careful not to treat the formulation as exhaustive or to postulate any one decisive test, preferring the issue to be judged objectively in the light of all relevant factors: see *Re Moorgate Metals Ltd* [1995] 1 BCLC 503; *Re Richborough Furniture Ltd* [1996] 1 BCLC 507, [1996] BCC 155; *Secretary of State for Trade and Industry v Tjolle* [1998] 1 BCLC 333 at 343-344 per Jacob J (relevant factors include at least whether or not there was a holding out by the company of the individual as a director, whether the individual used the title, whether the individual had proper information (eg management accounts) on which to base decisions, and whether the individual had to make major decisions etc); *Re Kaytech International plc, Secretary of State for Trade and Industry v Kaczer* [1999] 2 BCLC 351 at 420-424, [1999] BCC 390 at 399-402, CA, per Robert Walker LJ (a person may be a de facto director where he has assumed the status and functions of a company director so as to make himself responsible as if he were a de jure director); *Secretary of State for Trade and Industry v Hollier* [2006] EWHC 1804 (Ch) at [81], [2006] All ER (D) 232 (Jul) at [81] per Etherton J (whether a person is held out by the company, or claimed or purported, to be a director, and whether that person had access or the ability to obtain access to relevant company information is likely to be highly relevant and may be decisive); *Re Mea Corpn Ltd, Secretary of State for Trade and Industry v Aviss* [2006] EWHC 1846 (Ch), [2007] 1 BCLC 618.

As to de facto directors and shadow directors see PARA 1576 note 10.

4 *Re Hydroadam (Corby) Ltd* [1994] 2 BCLC 180 at 183 per Millett J. See note 3. See also the following cases decided under the Company Directors Disqualification Act 1986 s 6 (see PARA 1592): *Re Moorgate Metals Ltd* [1995] 1 BCLC 503; *Re Richborough Furniture Ltd* [1996] 1 BCLC 507, [1996] BCC 155; *Secretary of State for Trade and Industry v Tjolle* [1998] 1 BCLC 333 at 343-344 per Jacob J ('sales and marketing director' or 'deputy managing director' not a de facto director); *Re Kaytech International plc, Secretary of State for Trade and Industry v Kaczer* [1999] 2 BCLC 351, CA (de facto director rather than 'consultant' or 'company secretary'); *Re*

Red Label Fashions Ltd, Secretary of State for Trade and Industry v Kullar [1999] BCC 308; *Secretary of State for Trade and Industry v Becker* [2002] EWHC 2200 (Ch), [2003] 1 BCLC 555; *Secretary of State for Trade and Industry v Hall* [2006] EWHC 1995 (Ch), (2006) Times, 2 August, [2006] All ER (D) 432 (Jul).

5 *Secretary of State for Trade and Industry v Tjolle* [1998] 1 BCLC 333 at 343-344 per Jacob J (one answers the question of 'was this individual part of the corporate governing structure?' as a kind of jury question); and see *Secretary of State for Trade and Industry v Hollier* [2006] EWHC 1804 (Ch), [2006] All ER (D) 232 (Jul) (critical issue is whether the individual is part of the 'corporate governing structure'); *Re Richborough Furniture Ltd* [1996] 1 BCLC 507, [1996] BCC 155. See also note 3. A de facto director need not be involved in day to day control and need not act as a director in relation to all company activities: *Secretary of State for Trade and Industry v Hollier*.

6 *Secretary of State for Trade and Industry v Hall* [2006] EWHC 1995 (Ch), (2006) Times, 2 August, [2006] All ER (D) 432 (Jul).

7 *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340, [2000] 2 All ER 365, CA; *Secretary of State for Trade and Industry v Hall* [2006] EWHC 1995 (Ch), (2006) Times, 2 August, [2006] All ER (D) 432 (Jul). The degree of control which the director of the corporate director exercised over that company would be of relevance but, equally, the shareholder control of the corporate director might be relevant: *Secretary of State for Trade and Industry v Hall* at [30] per Evans-Lombe J.

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1578. Disqualification order.

A disqualification order is an order made¹ against a person that for a period specified in the order² he must not be a director³ of a company⁴, act as receiver of a company's property⁵ or in any way, whether directly or indirectly, be concerned or take part in⁶ the promotion, formation or management⁷ of a company unless (in each case) he has the leave of the court⁸; nor may he act as an insolvency practitioner⁹.

Where a disqualification order is made against a person who is already subject to such an order or to a disqualification undertaking¹⁰, the periods specified in those orders or, as the case may be, in the order and the undertaking run concurrently¹¹.

A disqualification order may be made on grounds which are or include matters other than criminal convictions notwithstanding that the person in respect of whom it is to be made may be criminally liable in respect of those matters¹².

The Company Directors Disqualification Act 1986 applies to building societies¹³, to incorporated friendly societies¹⁴, to NHS foundation trusts¹⁵, and to open-ended investment companies¹⁶, as it applies to companies¹⁷.

A person who is subject to a disqualification order or disqualification undertaking is disqualified from being a charity trustee or trustee for a charity, unless leave has been granted by the court¹⁸.

Where an insolvent partnership is wound up as an unregistered company, certain of the provisions of the Company Directors Disqualification Act 1986 apply, subject to specified modifications¹⁹.

The Company Directors Disqualification Act 1986 is applied with modifications to limited liability partnerships²⁰.

1 In the circumstances specified in the Company Directors Disqualification Act 1986, a court may (and under s 6 (see PARA 1592) and s 9A (see PARA 1585) must) make a disqualification order: s 1(1) (amended by the

Enterprise Act 2002 s 204(1), (3)). For these purposes, 'court' has the meaning given by the Companies Acts (see PARA 212 note 1): see the Company Directors Disqualification Act 1986 s 22(9) (substituted by SI 2008/948). As to the meaning of the 'Companies Acts' see PARA 1575 note 1. See also notes 13-16.

2 Company Directors Disqualification Act 1986 s 1(1) (amended by the Insolvency Act 2000 s 5(1)). In each section of the Company Directors Disqualification Act 1986 which gives to a court power or, as the case may be, imposes on it the duty to make a disqualification order there is specified the maximum (and in s 6 (as to which see PARA 1592) the minimum) period of disqualification which may or (as the case may be) must be imposed by means of the order; and, unless the court otherwise orders, the period of disqualification so imposed begins at the end of the period of 21 days beginning with the date of the order: s 1(2) (amended by the Insolvency Act 2000 s 5(2)). As to the period of disqualification see PARA 1610.

3 As to the meaning of 'director' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1575.

4 As to the meaning of 'company' for these purposes see PARA 1576 note 1.

5 For these purposes, any references to acting as receiver includes acting as manager or as both receiver and manager, but does not include acting as administrative receiver; and 'receivership' is to be read accordingly: Company Directors Disqualification Act 1986 s 22(10) (added by the Insolvency Act 2000 s 5(3)). As to the construction of references to receivers and managers generally in the Companies Acts, and in the Insolvency Act 1986, see PARA 1336. As to administrative receivers generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 380 et seq.

6 This wording is intended to prevent persons, against whom an order of disqualification has been made, from taking part in the management of company affairs generally: *R v Campbell* [1984] BCLC 83, CA (decided under the Companies Act 1948 s 188(1) (now repealed) where the meaning of 'be concerned or take part in' was considered, and the conclusion drawn that 'be concerned in' should not be narrowly construed to mean 'take part in').

7 As to the meaning of 'management' see *Re Clasper Group Services Ltd* [1989] BCLC 143, (1988) 4 BCC 673 (decided under the Insolvency Act 1986 s 212(1)(c): see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688); *Comr for Corporate Affairs v Bracht* (1989) 7 ACLC 40 at 47-48 per Ormiston J; *Re Market Wizard Systems (UK) Ltd* [1998] 2 BCLC 282 at 299-300 per Carnwath J.

8 Company Directors Disqualification Act 1986 s 1(1)(a) (amended by the Insolvency Act 2000 s 5(1)). As to obtaining the court's leave to act despite being disqualified see PARA 1611. The Company Directors Disqualification Act 1986 s 1(1) envisages one disqualification with a number of different consequences and not several different categories of disqualification: *R v Cole* [1998] 2 BCLC 234, CA. An order disqualifying a person from acting as a director cannot be limited to a disqualification from holding directorships in public companies: *R v Ward, R v Howarth* [2001] EWCA Crim 1648, (2001) Times, 10 August.

9 Company Directors Disqualification Act 1986 s 1(1)(b) (amended by the Insolvency Act 2000 s 5(1)). References to acting as an insolvency practitioner are to be read in accordance with the Insolvency Act 1986 s 388 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 8): Company Directors Disqualification Act 1986 s 22(3) (amended by the Insolvency Act 2000 Sch 4 Pt I paras 1, 15(1), (2)).

10 As to disqualification undertakings see PARA 1579.

11 Company Directors Disqualification Act 1986 s 1(3) (amended by the Insolvency Act 2000 Sch 4 Pt I paras 1, 2).

12 Company Directors Disqualification Act 1986 s 1(4).

13 Company Directors Disqualification Act 1986 s 22A(1) (s 22A added by the Companies Act 1989 s 211(3)). References in the Company Directors Disqualification Act 1986 to a company, or to a director or an officer of a company include, respectively, references to a building society within the meaning of the Building Societies Act 1986 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1856) or to a director or officer, within the meaning of the Building Societies Act 1986 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1944), of a building society: Company Directors Disqualification Act 1986 s 22A(2) (as so added). In relation to a building society the definition of 'shadow director' in the Company Directors Disqualification Act 1986 s 22(5) (as to which see PARA 1575) applies with the substitution of 'building society' for 'company': s 22A(3) (as so added). In the application of the Company Directors Disqualification Act 1986 Sch 1 (see PARAS 1593-1594) to the directors of a building society, references to provisions of the Companies Act 2006 or the Insolvency Act 1986 include references to the corresponding provisions of the Building Societies Act 1986: Company Directors Disqualification Act 1986 s 22A(4) (as so added; amended by SI 2009/1941).

14 Company Directors Disqualification Act 1986 s 22B(1) (s 22B added by the Friendly Societies Act 1992 s 120(1), Sch 21 Pt I para 8). References in the Company Directors Disqualification Act 1986 to a company, or to a director or an officer of a company include, respectively, references to an incorporated friendly society within the meaning of the Friendly Societies Act 1992 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2028) or to a member of the committee of management or officer, within the meaning of that Act (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2115), of an incorporated friendly society: Company Directors Disqualification Act 1986 s 22B(2) (as so added). In relation to an incorporated friendly society every reference to a shadow director must be omitted: s 22B(3) (as so added). In the application of Sch 1 (see PARAS 1593-1594) to the members of the committee of management of an incorporated friendly society, references to provisions of the Companies Act 2006 or the Insolvency Act 1986 include references to the corresponding provisions of the Friendly Societies Act 1992: Company Directors Disqualification Act 1986 s 22B(4) (as so added; amended by SI 2009/1941).

15 Company Directors Disqualification Act 1986 s 22C(1) (s 22C added by the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 paras 67, 68). References in the Company Directors Disqualification Act 1986 to a company, or to a director or officer of a company, include, respectively, references to an NHS foundation trust or to a director or officer of the trust; but references to shadow directors are omitted: s 22C(2) (as so added). In the application of Sch 1 (see PARAS 1593-1594) to the directors of an NHS foundation trust, references to the provisions of the Companies Act 2006 or the Insolvency Act 1986 include references to the corresponding provisions of the National Health Service Act 2006 Pt 2 Ch 5 (ss 30-65) (NHS foundation trusts) (see **HEALTH SERVICES** vol 54 (2008) PARA 174 et seq): Company Directors Disqualification Act 1986 s 22C(3) (as so added; amended by the National Health Service (Consequential Provisions) Act 2006 s 2, Sch 1 para 92; and SI 2009/1941).

16 Company Directors Disqualification Act 1986 s 22D(1) (s 22D added by SI 2009/1941). For these purposes, 'open-ended investment company' has the meaning given by the Financial Services and Markets Act 2000 s 236 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 603): Company Directors Disqualification Act 1986 s 22D(4) (as so added). The Company Directors Disqualification Act 1986 applies to open-ended investment companies with the modifications set out in s 22D(2) (as so added) (see PARA 1584 note 2) and s 22D(3) (as so added) (see PARA 1593 note 5): see s 22D1 (as so added).

17 See the Company Directors Disqualification Act 1986 s 22A(1) (as added: see note 13), s 22B(1) (as added: see note 14), s 22C(1) (as added: see note 15), s 22D(1) (as added: see note 16).

18 See the Charities Act 1993 s 72(1)(f), (3)(a); and **CHARITIES** vol 8 (2010) PARA 273.

19 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1166.

20 See the Limited Liability Partnerships Regulations 2001, SI 2001/1090: see reg 4, Sch 2; and **PARTNERSHIP** vol 79 (2008) PARA 245.

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1579. Disqualification undertaking.

A disqualification undertaking is an undertaking accepted¹ by the Secretary of State² made by any person that, for a period specified³ in the undertaking, the person⁴ will not be a director⁵ of a company⁶, act as receiver of a company's property⁷ or in any way, whether directly or indirectly, be concerned or take part in⁸ the promotion, formation or management⁹ of a company unless, in each case, he has the leave of a court¹⁰; nor will he act as an insolvency practitioner¹¹.

Where a disqualification undertaking by a person who is already subject to such an undertaking or to a disqualification order¹² is accepted, the periods specified in those undertakings or, as the case may be, the undertaking and the order will run concurrently¹³.

In determining whether to accept a disqualification undertaking by any person, the Secretary of State may take account of matters other than criminal convictions, notwithstanding that the

person may be criminally liable in respect of those matters¹⁴; and he must, as respects the person's conduct as a director of any company concerned, have regard to the matters for determining unfitness of directors¹⁵.

1 He accepted in the circumstances specified in the Company Directors Disqualification Act 1986 ss 7, 8 (see PARAS 1584, 1596-1599).

2 As to the Secretary of State see PARA 6. See *Re Blackspur Group plc, Eastaway v Secretary of State for Trade and Industry* [2007] EWCA Civ 425, [2008] 1 BCLC 153 (affirming *Re Blackspur Group plc, Eastaway v Secretary of State for Trade and Industry* [2006] EWHC 299 (Ch), [2006] 2 BCLC 489) (acceptance of understanding does not impugn a director's entitlement under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6 to a fair trial (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134 et seq); there is no compulsion on a director to give an understanding but rather an option to dispose of proceedings on mutually agreed terms). The Secretary of State's discretion under the Company Directors Disqualification Act 1986 s 7(2A) (see PARA 1599) is unfettered and he is entitled to decide that it would be inexpedient in the public interest to accept an undertaking without a schedule of unfit conduct: *Re Blackspur Group plc, Secretary of State for Trade and Industry v Davies* [2001] EWCA Civ 1595, [2002] 2 BCLC 263.

3 The maximum period which may be specified in a disqualification undertaking is 15 years, and the minimum period which may be specified in a disqualification undertaking under the Company Directors Disqualification Act 1986 s 7 is two years: s 1A(2) (s 1A added by the Insolvency Act 2000 s 6(1), (2)). The court may, on the application of a person who is subject to a disqualification undertaking, reduce the period for which the undertaking is to be in force, or provide for it to cease to be in force: Company Directors Disqualification Act 1986 s 8A(1) (s 8A added by the Insolvency Act 2000 s 6(1), (5)). On the hearing of such an application, the Secretary of State must appear and call the attention of the court to any matters which seem to him to be relevant, and may himself give evidence or call witnesses: Company Directors Disqualification Act 1986 s 8A(2) (as so added). Section 8A(2) does not apply to an application in the case of an undertaking given under s 9B (see PARA 1586), and in such a case on the hearing of the application whichever of the Office of Fair Trading (see **COMPETITION** vol 18 (2009) PARAS 6-8) or a specified regulator (within the meaning of s 9E: see PARA 1585) accepted the undertaking must appear and call the attention of the court to any matters which appear to it or him (as the case may be) to be relevant, and may give evidence or call witnesses: s 8A(2A) (s 8A as so added; and s 8A(2A) added by the Enterprise Act 2002 s 204(1), (4)). For these purposes, 'court': (1) means, in the case of an undertaking given under the Company Directors Disqualification Act 1986 s 9B, the High Court; and (2) in any other case has the same meaning as in s 7(2) (see PARA 1599 note 6) or s 8 (see PARA 1584 note 7) (as the case may be): s 8A(3) (as so added; and substituted by the Enterprise Act 2002 s 204(1), (5)). As to the meaning of 'court' generally see PARA 212 note 1. As to exercise of the court's jurisdiction under the Company Directors Disqualification Act 1986 s 8A see *Re INS Realisations Ltd, Secretary of State for Trade and Industry v Jonkler* [2006] EWHC 135 (Ch), [2006] 2 All ER 902, [2006] 1 WLR 3433 (in particular, there is no power to annul an undertaking as if it never existed).

4 Company Directors Disqualification Act 1986 s 1A(1) (as added: see note 3).

5 As to the meaning of 'director' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1575.

6 As to the meaning of 'company' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576 note 1.

7 As to the meaning of references to acting as receiver for these purposes see PARA 1578 note 5.

8 See PARA 1578 note 6.

9 See PARA 1578 note 7.

10 Company Directors Disqualification Act 1986 s 1A(1)(a) (as added: see note 3). See PARA 1611.

11 Company Directors Disqualification Act 1986 s 1A(1)(b) (as added: see note 3). As to the meaning of 'act as an insolvency practitioner' see PARA 1578 note 9.

12 As to disqualification orders see PARA 1578.

13 Company Directors Disqualification Act 1986 s 1A(3) (as added: see note 3).

14 Company Directors Disqualification Act 1986 s 1A(4) (as added: see note 3).

15 Company Directors Disqualification Act 1986 s 9(1A) (added by the Insolvency Act 2000 s 6(1), (6)). As to determining the unfitness of directors see PARA 1593.

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(ii) Grounds for Disqualification

1580. Disqualification on conviction of indictable offence.

The court¹ may make a disqualification order² against a person where he is convicted of an indictable offence³, whether on indictment or summarily, in connection with the promotion, formation, management, liquidation or striking off of a company⁴, with the receivership of a company's property⁵ or with his being an administrative receiver⁶ of a company⁷.

The maximum period of disqualification which may be imposed under these provisions is, where the disqualification order is made by a court of summary jurisdiction, five years, and in any other case, 15 years⁸.

1 For these purposes, 'court' means: (1) any court having jurisdiction to wind up the company in relation to which the offence was committed; or (2) the court by or before which the person is convicted of the offence; or (3) in the case of a summary conviction in England and Wales, any other magistrates' court acting in the same local justice area: Company Directors Disqualification Act 1986 s 2(2) (amended by the Courts Act 2003 s 109(1), Sch 8 para 300(a)). As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

2 As to disqualification orders see PARA 1578.

3 For these purposes, the definition of 'indictable offence' in the Interpretation Act 1978 s 5, Sch 1 (see **STATUTES** vol 44(1) (Reissue) PARA 1386) applies: Company Directors Disqualification Act 1986 s 2(2). See also *Re Samuel Chandler Ltd, Secretary of State for Trade and Industry v Nimley* [2002] All ER (D) 283 (Jan) (an application for a disqualification order may be made under the Company Directors Disqualification Act 1986 s 2 even though the criminal court has refused to make such an order). As to the situation where a director is subject to both criminal and civil sanctions see also PARA 1599 note 2.

4 See *R v Georgiou* (1988) 4 BCC 322, CA; *R v Goodman* [1993] 2 All ER 789, [1994] 1 BCLC 349, CA (defendant convicted of insider dealing; the correct test to be applied was held to be whether the offence had some relevant factual connection with the management of the company). See also *R v Creggy* [2008] EWCA Crim 394, [2008] 3 All ER 91, [2008] 1 BCLC 625 (sheltering of criminal property did have a relevant factual connection with the 'management of the company'). As to the meaning of 'company' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576 note 1.

5 As to the meaning of references to acting as receiver for these purposes see PARA 1578 note 5.

6 As to administrative receivers generally see PARA 1337 et seq.

7 Company Directors Disqualification Act 1986 s 2(1) (amended by the Deregulation and Contracting Out Act 1994 s 39, Sch 11 para 6; and the Insolvency Act 2000 s 8, Sch 4 Pt I paras 1, 3). It is wrong in principle to make a compensation order against a person for fraudulent trading at the same time as to make a disqualification order: *R v Holmes* [1991] BCC 394. As to the correct approach where criminal and civil disqualification orders potentially overlap, ie by way of criminal proceedings under the Company Directors Disqualification Act 1986 s 2 and civil proceedings under s 6 (see PARA 1592), see *Re Cedarwood Productions Ltd, Re Inter City Print and Finishing Ltd, Secretary of State for Trade and Industry v Rayna* [2001] 2 BCLC 48 at 57-60 per Anthony Mann QC (disqualification is but one of a range of sentences available for conviction under the Company Directors Disqualification Act 1986 s 2; and the s 6 proceedings, if successful, will result in a civil finding of unfitness, and an appropriate disqualification order, rather than a conviction).

8 Company Directors Disqualification Act 1986 s 2(3).

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1581. Disqualification for persistent breaches of companies legislation.

The court¹ may make a disqualification order² against a person where it appears to it that he has been persistently in default in relation to provisions of the companies legislation³ requiring any return, account or other document to be filed with, delivered or sent to the registrar of companies, or notice of any matter to be given to the registrar of companies⁴.

On an application⁵ to the court for such an order to be made, the fact that a person has been persistently in default in relation to such provisions as are mentioned above may, without prejudice to its proof in any other manner, be conclusively proved by showing that in the five years ending with the date of the application he has been adjudged guilty⁶, whether or not on the same occasion, of three or more defaults in relation to those provisions⁷.

The maximum period of disqualification which may be imposed under these provisions is five years⁸.

1 For these purposes, 'court' means any court having jurisdiction to wind up any of the companies in relation to which the offence or other default has been or is alleged to have been committed: Company Directors Disqualification Act 1986 s 3(4).

2 As to disqualification orders see PARA 1578.

3 For these purposes, the 'companies legislation' means the Companies Acts and the Insolvency Act 1986 Pts I-VII (ss 1-251) (company insolvency and winding up): Company Directors Disqualification Act 1986 s 3(4A) (added by SI 2009/1941). As to the meaning of the 'Companies Acts' see PARA 1575 note 1.

4 Company Directors Disqualification Act 1986 s 3(1). For these purposes, no account is to be taken of any offence which was committed, or any default order which was made, before 1 June 1977 (ie the date on which the Companies Act 1976 s 28 (now repealed) came into force): Company Directors Disqualification Act 1986 s 19(b), Sch 2 para 5. As to the meaning of 'registrar of companies' see PARA 131 note 2. As to delivery to the registrar of documents see PARA 135 et seq.

5 See further PARA 1601 et seq.

6 A person is to be treated under the Company Directors Disqualification Act 1986 s 3(2) as being adjudged guilty of a default in relation to any provision of that legislation if:

2288 (1) he is convicted, whether on indictment or summarily, of an offence consisting of a contravention of or failure to comply with that provision, whether on his own part or on the part of any company (s 3(3)(a)); or

2289 (2) a default order is made against him under:

9. (a) the Companies Act 2006 s 452 (order requiring delivery of company accounts: see PARA 883);
9

10. (b) s 456 (order requiring preparation of revised accounts: see PARA 901);
10

11. (c) s 1113 (enforcement of company's filing obligations: see PARA 166);
11

12. (d) the Insolvency Act 1986 s 41 (enforcement of receiver's or manager's duty to make returns: see PARA 1353);
12

13. (e) s 170 (enforcement of liquidator's duty to make returns: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 570),
13

2290 in respect of any such contravention of or failure to comply with that provision, whether on his own part or on the part of any company (Company Directors Disqualification Act 1986 s 3(3)(b) (amended by the Companies Act 1989 s 23, Sch 10 para 35(1), (2)(a), (b); and SI 2008/948; SI 2009/1941)).

7 Company Directors Disqualification Act 1986 s 3(2). Under the Companies Act 1948 s 188 (repealed), it was not necessary to show that a person had been culpable, in the sense of evincing a deliberate disregard of the relevant provisions, in order to prove that he had been 'persistently in default'; but culpability could be taken into account in considering whether or not to disqualify and for how long: *Re Arctic Engineering Ltd (No 2)* [1986] 2 All ER 346, [1986] 1 WLR 686.

8 Company Directors Disqualification Act 1986 s 3(5).

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1582. Disqualification for fraud etc in a winding up.

The court¹ may make a disqualification order² against a person if, in the course of the winding up of a company³, it appears that he⁴:

- 1004 (1) has been guilty of an offence for which he is liable under the fraudulent trading provisions⁵, whether he has been convicted or not⁶; or
- 1005 (2) has otherwise been guilty, while an officer⁷ or liquidator of the company, receiver of the company's property⁸ or administrative receiver⁹ of the company, of any fraud in relation to the company or of any breach of his duty as such officer, liquidator, receiver or administrative receiver¹⁰.

The maximum period of disqualification which may be imposed under these provisions is 15 years¹¹.

1 For these purposes, 'court' means any court having jurisdiction to wind up any of the companies in relation to which the offence or other default has been or is alleged to have been committed: Company Directors Disqualification Act 1986 s 4(2).

2 As to disqualification orders see PARA 1578.

3 As to the meaning of 'company' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576 note 1.

4 Company Directors Disqualification Act 1986 s 4(1).

5 I.e the Companies Act 2006 s 993 (see PARA 316).

6 Company Directors Disqualification Act 1986 s 4(1)(a) (amended by SI 2007/2194). See *Re Denis Hilton Ltd* [2002] 1 BCLC 302 (a person could not complain of the fact that the civil proceedings followed in the train of criminal proceedings as the Company Directors Disqualification Act 1986 s 4 specifically envisages those events; and a suggestion that the Secretary of State was somehow represented at the criminal proceedings and in substance a party, so that he was to be treated as having refrained from seeking or as having failed to obtain a disqualification order, is wholly unrealistic and fanciful). See also note 8. As to the situation where a director is subject to both criminal and civil proceedings see also PARA 1599 note 2.

7 For these purposes, 'officer' includes a shadow director: Company Directors Disqualification Act 1986 s 4(2). As to the meaning of 'shadow director' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576. 'Officer' has the same meaning as in the Companies Acts (see the Companies Act 2006 s 1173(1); and PARA 607): Company Directors Disqualification Act 1986 s 22(1), (6) (s 22(6) substituted by SI 2009/1941). See also PARA 1578 notes 13-16.

8 As to the meaning of references to acting as receiver for these purposes see PARA 1578 note 5.

9 As to administrative receivers generally see PARA 1337 et seq.

10 Company Directors Disqualification Act 1986 s 4(1)(b) (amended by the Insolvency Act 2000 s 8, Sch 4 Pt I paras 1, 4).

11 Company Directors Disqualification Act 1986 s 4(3).

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1583. Disqualification on summary conviction.

Where a person is convicted of a summary offence¹, being for these purposes an offence of which a person is convicted, either on indictment or summarily, in consequence of a contravention of, or failure to comply with, any provision of the companies legislation² requiring a return, account or other document to be filed with, delivered or sent, or notice of any matter to be given, to the registrar of companies³, whether the contravention or failure is on the person's own part or on the part of any company⁴, the court by which he is convicted, or, in England or Wales⁵, any other magistrates' court acting in the same local justice area, may make a disqualification order⁶ against him⁷ if, during the five years ending with the date of the conviction, the person has had made against him, or has been convicted of, in total not less than three default orders⁸ and offences counting for the purposes of these provisions⁹.

The maximum period of disqualification which may be imposed under these provisions is five years¹⁰.

1 For these purposes, the definition of 'summary offence' in the Interpretation Act 1978 s 5, Sch 1 (see **STATUTES** vol 44(1) (Reissue) PARA 1386) applies: Company Directors Disqualification Act 1986 s 5(4)(a).

2 For these purposes, the 'companies legislation' means the Companies Acts and the Insolvency Act 1986 Pts I-VII (ss 1-251) (company insolvency and winding up): Company Directors Disqualification Act 1986 s 5(4A) (added by SI 2009/1941). As to the meaning of the 'Companies Acts' see PARA 1575 note 1.

3 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to delivery to the registrar of documents see PARA 135 et seq.

4 Company Directors Disqualification Act 1986 s 5(1). As to the meaning of 'company' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576 note 1.

5 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

6 As to disqualification orders see PARA 1578.

7 Company Directors Disqualification Act 1986 s 5(2) (amended by the Courts Act 2003 s 109(1), Sch 8 para 300(b)).

8 For these purposes, 'default order' means the same as in the Company Directors Disqualification Act 1986 s 3(3)(b) (see PARA 1581 note 6 head (2)): s 5(4)(b).

9 Company Directors Disqualification Act 1986 s 5(3). The offences counting for the purposes of these provisions may include that of which he is convicted as mentioned in s 5(2) (see the text and notes 1-7) and any other offence of which he is convicted on the same occasion: s 5(3).

10 Company Directors Disqualification Act 1986 s 5(5).

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1584. Application for disqualification order after investigation of company.

If it appears to the Secretary of State¹ from investigative material² that it is expedient in the public interest that a disqualification order³ should be made against any person who is or has been a director⁴ or shadow director⁵ of a company⁶, he may apply to the court⁷ for such an order⁸. The court may make a disqualification order against a person where, on an application under these provisions, it is satisfied that his conduct in relation to the company⁹ makes him unfit to be concerned in the management of a company¹⁰.

However, where it appears to the Secretary of State from such material¹¹ that, in the case of a person who has offered to give him a disqualification undertaking¹², the conduct of the person in relation to a company of which the person is or has been a director or shadow director makes him unfit to be concerned in the management of a company¹³, and it is expedient in the public interest that he should accept the undertaking, instead of applying, or proceeding with an application, for a disqualification order¹⁴, he may accept the undertaking¹⁵.

The maximum period of disqualification which may be imposed under these provisions is 15 years¹⁶.

1 As to the Secretary of State see PARA 6.

2 For this purpose, 'investigative material' means: (1) a report made by inspectors under the Companies Act 1985 s 437 (see PARA 1554) or the Financial Services and Markets Act 2000 ss 167-169 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARAS 449-450) or s 284 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 448); and (2) information or documents obtained under the Companies Act 1985 s 437 (see PARA 1554), s 446E (see PARA 1553), s 447 (see PARA 1558), s 448 (see PARA 1559), s 451A (see PARA 1563) or s 453A (see PARA 1565), the Criminal Justice Act 1987 s 2 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1090), the Criminal Law (Consolidation) (Scotland) Act 1995 s 28, the Companies Act 1989 s 83 (see PARA 1569) or the Financial Services and Markets Act 2000 s 165 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 447), ss 171-173 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 449) or s 175 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 453): Company Directors Disqualification Act 1986 s 8(1A) (added by SI 2001/3649; and amended by the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 25(1), Sch 2 Pt 3 para 28; the Companies Act 2006 s 1039(a), (b); and by SI 2009/1941). Where the company is an open-ended investment company, the reference to investigative material in the Company Directors Disqualification Act 1986 s 8(1) must be read as including a report made by inspectors under regulations made by virtue of the Financial Services and Markets Act 2000 s 262(2)(k) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 621): Company Directors Disqualification Act 1986 s 22D(2) (added by SI 2009/1941). As to the meaning of 'open-ended investment company' see PARA 1578 note 16.

3 As to disqualification orders see PARA 1578.

4 As to the meaning of 'director' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1575.

5 As to the meaning of 'shadow director' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576.

6 As to the meaning of 'company' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576 note 1.

7 For these purposes, 'court' means the High Court: Company Directors Disqualification Act 1986 s 8(3). As to the mode of application and the procedure see PARA 1600 et seq.

8 Company Directors Disqualification Act 1986 s 8(1) (substituted by SI 2001/3649). See *Re Queen's Moat Houses plc, Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321, [2004] Ch 1. As to the filing of evidence see PARA 1606.

9 See *Secretary of State for Business Enterprise and Regulatory Reform v Sullman* [2008] EWHC 3179 (Ch), [2009] 1 BCLC 397 (the words 'conduct in relation to [a] company' encompassed conduct as a director which bore upon the company's business or its affairs, whether that conduct occasioned prejudice to the company itself or its shareholders, or to its customers or funders or anyone else with whom it had commercial relationships; the phrase referred to the way the business was run).

10 Company Directors Disqualification Act 1986 s 8(2). As to determining unfitness see PARA 1593.

11 Ie from the report, information or documents mentioned in note 2.

12 Company Directors Disqualification Act 1986 s 8(2A) (s 8(2A) added by the Insolvency Act 2000 s 6(1), (4)). As to disqualification undertakings see PARA 1579.

13 Company Directors Disqualification Act 1986 s 8(2A)(a) (as added: see note 11).

14 Company Directors Disqualification Act 1986 s 8(2A)(b) (as added: see note 11). See *Re Blackspur Group plc, Re Atlantic Computer Systems plc* [1998] 1 WLR 422, CA (decided before the Company Directors Disqualification Act 1986 s 8 was amended by the Insolvency Act 2000 to provide for an effective regime of disqualification undertakings in lieu of court orders).

15 Company Directors Disqualification Act 1986 s 8(2A) (as added: see note 11).

16 Company Directors Disqualification Act 1986 s 8(4). See *Secretary of State for Trade and Industry v Carr* [2006] EWHC 2110 (Ch), [2007] 2 BCLC 495 (deliberate and dishonest conduct in the performance of duties as a director of a listed company were very serious matters which allowed the top bracket of disqualification, for ten to 15 years, to be invoked although, in all the circumstances of this case, a period of disqualification for nine and a half years was appropriate).

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1585. Competition disqualification order.

The court¹ must make a disqualification order² against a person if³:

- 1006 (1) an undertaking which is a company⁴ of which he is a director⁵ commits a breach of competition law⁶; and
- 1007 (2) the court considers that his conduct⁷ as a director makes him unfit to be concerned in the management of a company⁸.

The maximum period of disqualification under these provisions is 15 years⁹.

An application under these provisions for a disqualification order may be made by the Office of Fair Trading¹⁰ or by a specified regulator¹¹.

1 For these purposes, the court is the High Court: Company Directors Disqualification Act 1986 s 9E(1), (3) (s 9E added by the Enterprise Act 2002 s 204(1), (2)).

2 As to disqualification orders see PARA 1578.

3 Company Directors Disqualification Act 1986 s 9A(1) (s 9A added by the Enterprise Act 2002 s 204(1), (2)).

4 As to the meaning of 'company' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576 note 1.

5 For these purposes, 'director' includes shadow director: Company Directors Disqualification Act 1986 s 9E(1), (5) (as added: see note 1). As to the meaning of 'director' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1575. As to the meaning of 'shadow director' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576.

6 Company Directors Disqualification Act 1986 s 9A(2) (as added: see note 3). An undertaking commits a breach of competition law if it engages in conduct which infringes any of the following: (1) the 'Chapter 1 prohibition' within the meaning of the Competition Act 1998 (prohibition on agreements, etc preventing, restricting or distorting competition: see **COMPETITION** vol 18 (2009) PARA 116 et seq); (2) the 'Chapter 2 prohibition' within the meaning of the Competition Act 1998 (prohibition on abuse of a dominant position: see **COMPETITION** vol 18 (2009) PARA 125 et seq); (3) the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmd 5179) (the 'EC Treaty') art 81 (prohibition on agreements, etc preventing, restricting or distorting competition: see **COMPETITION** vol 18 (2009) PARA 61 et seq); or (4) the EC Treaty art 82 (prohibition on abuse of a dominant position: see **COMPETITION** vol 18 (2009) PARA 68 et seq); Company Directors Disqualification Act 1986 s 9A(4) (as added: see note 3). For the purposes of head (1) or head (3) references to the conduct of an undertaking are references to its conduct taken with the conduct of one or more other undertakings: s 9A(8) (as added: see note 3). The Competition Act 1998 s 60 (consistent treatment of questions arising under United Kingdom and Community law) applies in relation to any question arising by virtue of head (1) or head (2) as it applies in relation to any question arising under the Competition Act 1998 Pt 1 (ss 1-60) (see **COMPETITION** vol 18 (2009) PARA 150); Company Directors Disqualification Act 1986 s 9A(11) (as added: see note 3).

7 Conduct includes omission: Company Directors Disqualification Act 1986 s 9E(1), (4) (as added: see note 1).

8 Company Directors Disqualification Act 1986 s 9A(3) (as added: see note 3). For the purpose of deciding under s 9A(3) whether a person is unfit to be concerned in the management of a company, the court: (1) must have regard to whether s 9A(6) applies to him; (2) may have regard to his conduct as a director of a company in connection with any other breach of competition law; (3) must not have regard to the matters mentioned in Sch 1 (see PARA 1593); s 9A(5) (as added: see note 3). Section s 9A(6) applies to a person if as a director of the company: (a) his conduct contributed to the breach of competition law mentioned in s 9A(2) (see head (1) in the text); (b) his conduct did not contribute to the breach but he had reasonable grounds to suspect that the conduct of the undertaking constituted the breach and he took no steps to prevent it; (c) he did not know but ought to have known that the conduct of the undertaking constituted the breach: s 9A(6) (as added: see note 3). For the purposes of head (a), it is immaterial whether the person knew that the conduct of the undertaking constituted the breach: s 9A(7) (as added: see note 3).

9 Company Directors Disqualification Act 1986 s 9A(9) (as added: see note 3).

10 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARAS 6-8.

11 Company Directors Disqualification Act 1986 s 9A(10) (as added: see note 3). Each of the following is a specified regulator for the purposes of a breach of competition law in relation to a matter in respect of which he or it has a function: (1) the Office of Communications (see **TELECOMMUNICATIONS** vol 97 (2010) PARA 2 et seq); (2) the Gas and Electricity Markets Authority (see **FUEL AND ENERGY** vol 19(1) (2007 Reissue) PARA 708 et seq); (3) the Water Services Regulation Authority (see **WATER AND WATERWAYS**); (4) the Office of Rail Regulation (see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 49 et seq); and (5) the Civil Aviation Authority (see **AIR LAW** vol 2 (2008) PARA 50 et seq): s 9E(1), (2) (s 9E as added (see note 1); and s 9E(2) amended by the Communications Act 2003 s 406(1), Sch 17 para 83; the Railways and Transport Safety Act 2003 s 16(5), Sch 2 Pt 2 para 19(j); and the Water Act 2003 s 101(1), Sch 7 Pt 2 para 25).

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1586. Competition undertakings.

If:

- 1008 (1) the Office of Fair Trading¹ or a specified regulator² thinks that in relation to any person an undertaking which is a company³ of which he is a director⁴ has committed or is committing a breach of competition law⁵;
- 1009 (2) the Office of Fair Trading or the specified regulator thinks that the conduct of the person as a director⁶ makes him unfit⁷ to be concerned in the management of a company⁸; and
- 1010 (3) the person offers to give the Office of Fair Trading or the specified regulator, as the case may be, a disqualification undertaking⁹,

the Office of Fair Trading or the specified regulator, as the case may be, may accept a disqualification undertaking from the person instead of applying for or proceeding with an application for a disqualification order¹⁰.

The maximum period which may be specified in a disqualification undertaking is 15 years¹¹.

If a disqualification undertaking is accepted from a person who is already subject to a disqualification undertaking under the Company Directors Disqualification Act 1986 or to a disqualification order the periods specified in those undertakings or the undertaking and the order, as the case may be, run concurrently¹².

1 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARAS 6-8. The Company Directors Disqualification Act 1986 s 9A(4)-(8) (see PARA 1585) applies for the purposes of s 9B as it applies for the purposes of s 9A but in the application of s 9A(5) (factors to be taken into consideration by a court when deciding whether a person is unfit to be concerned in the management of a company: see PARA 1585 note 8), the reference to the court must be construed as a reference to the Office of Fair Trading or a specified regulator (as the case may be): s 9B(7) (s 9B added by Enterprise Act 2002 s 204(1), (2)).

2 As to specified regulators for the purposes of a breach of competition law see PARA 1585 note 11.

3 As to the meaning of 'company' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576 note 1.

4 As to the meaning of 'director' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1575.

5 Company Directors Disqualification Act 1986 s 9B(1)(a) (as added: see note 1). As to conduct by an undertaking which constitutes a breach of competition law see PARA 1585 note 6. See also note 1.

6 As to a person's conduct as a director see PARA 1592 note 9.

7 As to the factors to be taken into consideration by a court (see note 1) when deciding under the Company Directors Disqualification Act 1986 s 9A(3) whether a person is unfit to be concerned in the management of a company see PARA 1585 note 8.

8 Company Directors Disqualification Act 1986 s 9B(1)(b) (as added: see note 1).

9 Company Directors Disqualification Act 1986 s 9B(1)(c) (as added: see note 1). A disqualification undertaking is an undertaking by a person that for the period specified in the undertaking he will not: (1) be a director of a company; (2) act as receiver of a company's property; (3) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company; (4) act as an insolvency practitioner: s 9B(3) (as added: see note 1). However, a disqualification undertaking may provide that a prohibition falling within heads (1) to (3) does not apply if the person obtains the leave of the court: s 9B(4) (as added: see note 1). See PARA 1578 notes 3-9. As to the meaning of references to acting as receiver for these purposes see PARA 1578 note 5.

10 Company Directors Disqualification Act 1986 s 9B(2) (as added: see note 1). As to disqualification orders see PARA 1578.

- 11 Company Directors Disqualification Act 1986 s 9B(5) (as added: see note 1).
- 12 Company Directors Disqualification Act 1986 s 9B(6) (as added: see note 1).

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1587. Competition investigations.

If the Office of Fair Trading¹ or a specified regulator² has reasonable grounds for suspecting that a breach of competition law has occurred³ it or he (as the case may be) may carry out an investigation for the purpose of deciding whether to make an application⁴ for a disqualification order⁵. If as a result of such an investigation, the Office of Fair Trading or a specified regulator proposes to apply⁶ for a disqualification order⁷, before making the application the Office of Fair Trading or regulator (as the case may be) must⁸:

- 1011 (1) give notice to the person likely to be affected by the application⁹; and
- 1012 (2) give that person an opportunity to make representations¹⁰.

- 1 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARAS 6-8.
- 2 As to specified regulators for the purposes of a breach of competition law see PARA 1585 note 11.
- 3 As to conduct by an undertaking which constitutes a breach of competition law see PARA 1585 note 6.
- 4 Ie under the Company Directors Disqualification Act 1986 s 9A (see PARA 1585).
- 5 Company Directors Disqualification Act 1986 s 9C(1) (s 9C added by the Enterprise Act 2002 s 204(1), (2)). As to disqualification orders see PARA 1578. For the purposes of such an investigation the Competition Act 1998 ss 26-30 apply to the Office of Fair Trading and the specified regulators as they apply to the Office of Fair Trading for the purposes of an investigation under the Competition Act 1998 s 25 (see **COMPETITION** vol 18 (2009) PARA 129 et seq); Company Directors Disqualification Act 1986 s 9C(2) (as so added).
- 6 Ie under the Company Directors Disqualification Act 1986 s 9A (see PARA 1585).
- 7 Company Directors Disqualification Act 1986 s 9C(3) (as added: see note 5).
- 8 Company Directors Disqualification Act 1986 s 9C(4) (as added: see note 5).
- 9 Company Directors Disqualification Act 1986 s 9C(4)(a) (as added: see note 5).
- 10 Company Directors Disqualification Act 1986 s 9C(4)(b) (as added: see note 5).

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1588. Co-ordination.

The Secretary of State¹ may make regulations² for the purpose of co-ordinating the performance of functions connected with competition disqualification orders and undertakings³ which are exercisable concurrently by two or more persons⁴.

1 As to the Secretary of State see PARA 6.

2 The Competition Act 1998 s 54(5)-(7) applies to regulations made under the Company Directors Disqualification Act 1986 s 9D as it applies to regulations made under the Competition Act 1998 s 54 (see **COMPETITION** vol 18 (2009) PARA 147), and for that purpose in s 54: (1) references to 'Pt 1 functions' must be read as references to relevant functions (see note 3); (2) references to 'a regulator' must be read as references to a specified regulator; (3) 'a competent person' also includes any of the specified regulators: Company Directors Disqualification Act 1986 s 9D(2) (s 9D added by the Enterprise Act 2002 s 204(1), (2)). As to specified regulators for the purposes of a breach of competition law see PARA 1585 note 11. The power to make regulations under the Company Directors Disqualification Act 1986 s 9D must be exercised by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 9D(3) (as so added). Such a statutory instrument may contain such incidental, supplemental, consequential and transitional provision as the Secretary of State thinks appropriate and may make different provision for different cases: s 9D(4) (as so added). At the date at which this volume states the law no such regulations had been made.

3 I.e. functions under the Company Directors Disqualification Act 1986 ss 9A-9C ('relevant functions') (see PARAS 1585-1587).

4 Company Directors Disqualification Act 1986 s 9D(1) (as added: see note 2).

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1589. Disqualification for participation in fraudulent or wrongful trading.

Where the court¹ makes a declaration under the fraudulent trading provisions² or the wrongful trading provisions³ that a person is liable to make a contribution to a company's assets⁴, then, whether or not an application for such an order is made by any person, the court may, if it thinks fit, also make a disqualification order⁵ against the person to whom the declaration relates⁶.

The maximum period of disqualification which may be imposed under these provisions is 15 years⁷.

1 As to the meaning of 'court' for these purposes see PARA 1578 note 1.

2 I.e. under the Insolvency Act 1986 s 213 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 911).

3 I.e. under the Insolvency Act 1986 s 214 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 914).

4 As to a person's liability to contribute under these provisions see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 911 et seq. As to the meaning of 'company' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576 note 1.

5 As to disqualification orders see PARA 1578.

6 Company Directors Disqualification Act 1986 s 10(1) (amended by SI 2009/1941).

7 Company Directors Disqualification Act 1986 s 10(2).

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1590. Undischarged bankrupts.

A person who acts as director¹ of a company² or who directly or indirectly takes part in or is concerned in the promotion, formation or management of a company³, without the leave of the court⁴, at a time when⁵ he is an undischarged bankrupt⁶, a moratorium period under a debt relief order applies in relation to him⁷ or a bankruptcy restrictions order or a debt relief restrictions order is in force in respect of him⁸, commits an offence⁹. The offence is one of strict liability¹⁰.

A person who acts in contravention of these provisions is also personally responsible for all the relevant debts of the company incurred whilst he was involved in its management¹¹.

In England and Wales¹², the leave of the court may not be given unless notice of intention to apply for it has been served on the official receiver¹³; and it is the latter's duty, if he is of the opinion that it is contrary to the public interest that the application should be granted, to attend on the hearing of the application and oppose it¹⁴.

1 As to the meaning of 'director' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1575.

2 For these purposes, 'company' includes a company incorporated outside Great Britain that has an established place of business in Great Britain: Company Directors Disqualification Act 1986 s 11(4) (added by SI 2009/1941). As to the meaning of 'Great Britain' see PARA 1 note 5.

3 Under the Company Directors Disqualification Act 1986 s 11, the question of whether or not a defendant is concerned in the management of a company is an issue for the jury to determine, and any belief (including any positive belief) held by the defendant with regard to the nature and quality of his or her actions is irrelevant in relation to the necessary mental element: *R v Doring* [2002] EWCA Crim 1695, [2003] 1 Cr App Rep 143.

4 For these purposes, 'court' is the court by which the person was adjudged bankrupt: Company Directors Disqualification Act 1986 s 11(2).

5 Company Directors Disqualification Act 1986 s 11(1) (s 11(1) substituted by the Enterprise Act 2002 s 257(3), Sch 21 para 5).

6 Company Directors Disqualification Act 1986 s 11(1)(a) (as substituted: see note 5). As to discharge from bankruptcy see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 629 et seq.

7 Company Directors Disqualification Act 1986 s 11(1)(aa) (added by the Tribunals, Courts and Enforcement Act 2007 s 108(3), Sch 20 para 16(1), (2)).

8 Company Directors Disqualification Act 1986 s 11(1)(b) (as substituted (see note 5); and amended by the Tribunals, Courts and Enforcement Act 2007 Sch 20 para 16(1), (3)). As to bankruptcy orders see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 195 et seq.

9 Company Directors Disqualification Act 1986 s 11(1) (as substituted: see note 5). A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both: s 13. As to the statutory maximum see PARA 1622. See *Hill v Secretary of State for the Environment, Food and Rural Affairs* [2005] EWHC 696 (Ch), [2006] 1 BCLC 601 (claimant company, formed to carry on farming business for the benefit of person disqualified under the Company Directors Disqualification Act 1986 s 11, could enforce contracts entered into by it in the course of its being unlawfully managed; defence of illegality rejected on public policy grounds). As to void and illegal contracts see generally **CONTRACT** vol 9(1) (Reissue) PARA 836 et seq.

10 *R v Brockley* [1994] 1 BCLC 606, CA.

11 See the Company Directors Disqualification Act 1986 s 15(1)(a); and PARA 1616.

12 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

13 References in the Company Directors Disqualification Act 1986 to the official receiver, in relation to the winding up of a company or the bankruptcy of an individual, are to any person who, by virtue of the Insolvency Act 1986 s 399 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 503), is authorised to act as the official receiver in relation to that winding up or bankruptcy; and, in accordance with s 401(2) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 507), references in the Company Directors Disqualification Act 1986 to an official receiver include a person appointed as his deputy: s 21(1) (amended by SI 2009/1941).

14 Company Directors Disqualification Act 1986 s 11(3). As to the exercise of the discretion to grant leave to be a director under s 11 see *Re McQuillan* (1988) 5 BCC 137, NI CA.

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1591. Penalties on revocation of administration order.

Where a court¹ revokes an administration order² against an individual, it may order that that person may not, except with the leave of the court which made the order, act as director³ or liquidator⁴ of, or directly or indirectly take part or be concerned in the promotion, formation or management of, a company⁵, for such period not exceeding one year as may be specified in the order⁶.

If a person acts in contravention of these provisions, he is guilty of an offence⁷.

1 See under the Insolvency Act 1986 s 429 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 910).

2 See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 893 et seq.

3 As to the meaning of 'director' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1575.

4 As to liquidators generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 555 et seq.

5 As to the meaning of 'company' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576 note 1.

6 Company Directors Disqualification Act 1986 s 12(1), (2) (s 12(2) amended by SI 2009/1941); Insolvency Act 1986 s 429(2)(b) (amended by the Enterprise Act 2002 s 269, Sch 23 paras 1, 15). As from a day to be appointed, the Company Directors Disqualification Act 1986 s 12 and the Insolvency Act 1986 s 429(2) are amended by the Tribunals, Courts and Enforcement Act 2007 ss 106(2), 146, Sch 16 paras 3(1), (2), 5(1), (2), Sch 23 Pt 5. At the date at which this volume states the law no such day had been appointed.

As to Northern Irish disqualification orders see the Company Directors Disqualification Act 1986 s 12A (added by the Insolvency Act 2000 s 7(1)). As to Northern Irish disqualification undertakings see the Company Directors Disqualification Act 1986 s 12B (added by SI 2004/1941).

7 Company Directors Disqualification Act 1986 s 13; Insolvency Act 1986 s 429(5). A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both: Company Directors Disqualification Act 1986 s 13; Insolvency Act 1986 ss 429(5), 430, Sch 10. As to the statutory maximum see PARA 1622.

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1592. Duty of court to disqualify unfit directors of insolvent companies.

The court¹ must make a disqualification order² against a person in any case where, on an application for this purpose³, the court is satisfied⁴:

- 1013 (1) that he is or has been a director⁵ of a company⁶ which has at any time become insolvent⁷, whether while he was a director or subsequently⁸; and
- 1014 (2) that his conduct as a director⁹ of that company, either taken alone or taken together with his conduct as a director of any other company or other companies¹⁰, makes him unfit¹¹ to be concerned in the management of a company¹².

The minimum period of disqualification which may be imposed under these provisions is two years, and the maximum period which may be imposed is 15 years¹³.

These provisions apply both to foreigners outside the jurisdiction and to conduct which occurred outside the jurisdiction¹⁴.

1 For these purposes, and for the purposes of the Company Directors Disqualification Act 1986 s 7(2) (see PARA 1599 note 7), 'court' means: (1) where the company in question is being or has been wound up by the court (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 438 et seq), that court; (2) where the company in question is being or has been wound up voluntarily (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 939 et seq), any court which has or (as the case may be) had jurisdiction to wind it up; (3) where neither head (1) nor (2) applies but an administrator (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 146 et seq) or administrative receiver (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 380 et seq) has at any time been appointed in respect of the company in question, any court which has jurisdiction to wind it up: s 6(3) (substituted by the Insolvency Act 2000 s 8, Sch 4 Pt I paras 1, 5; and amended by the Enterprise Act 2002 s 248(3), Sch 17 paras 40, 41(b)). The Insolvency Act 1986 s 117 (jurisdiction (England and Wales): see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 438 et seq) and s 120 (jurisdiction (Scotland)) apply for these purposes as if the references in the definitions of 'registered office' to the presentation of the petition for winding up were references: (a) in a case within head (2), to the passing of the resolution for voluntary winding up; and (b) in a case within head (3), to the appointment of the administrator or (as the case may be) administrative receiver: Company Directors Disqualification Act 1986 s 6(3A) (added by the Insolvency Act 2000 Sch 4 Pt I paras 1, 5; and amended by the Enterprise Act 2002 Sch 17 paras 40, 41(c)). However, nothing in the Company Directors Disqualification Act 1986 s 6(3) invalidates any proceedings by reason of their being taken in the wrong court; and proceedings for or in connection with a disqualification order under s 6, or in connection with a disqualification undertaking accepted under s 7 (see PARA 1599), may be retained in the court in which the proceedings were commenced, although it may not be the court in which they ought to have been commenced: s 6(3B) (added by the Insolvency Act 2000 Sch 4 Pt I paras 1, 5). In head (2), the court having jurisdiction to wind up the company is the court having jurisdiction to wind up the company at the date when the disqualification proceedings are brought: *Re Lichfield Freight Terminal Ltd* [1997] 2 BCLC 109. The court continues to have jurisdiction to hear disqualification proceedings even after winding up is concluded: *Re Working Project Ltd*, *Re Fosterdown Ltd*, *Re Davies Flooring (Southern) Ltd* [1995] 1 BCLC 226. As to whether the definition of 'court' given in the Company Directors Disqualification Act 1986 s 6(3) allows the transfer of directors' disqualification proceedings brought under s 6 from one county court to another or to a specialist county court or to the Companies Court in London or to a Chancery District Registry see *Secretary of State for Trade and Industry v Shakespeare* [2005] 2 BCLC 471.

2 As to disqualification orders see PARA 1578.

3 As to the mode of application and the procedure see PARA 1584 et seq.

4 Company Directors Disqualification Act 1986 s 6(1).

5 For these purposes, and for the purposes of the Company Directors Disqualification Act 1986 s 7 (see PARAS 1596, 1598-1599), 'director' includes a shadow director: s 6(3C) (added by the Insolvency Act 2000 Sch 4 Pt I paras 1, 5). As to the meaning of 'director' for the purposes of the Company Directors Disqualification Act 1986 (which for these purposes includes a de facto director) see PARA 1575. As to the meaning of 'shadow director' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576. As to de facto directors see PARA 1577. See also *Re Promwalk Services Ltd, Frewen v Secretary of State for Trade and Industry* [2002] EWHC 2688 (Ch), [2003] 2 BCLC 305 (director believed himself to have resigned before the relevant period but his resignation was found by the court to be ineffective and the director was held to account).

6 As to the meaning of 'company' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576 note 1.

7 For these purposes, and for the purposes of the Company Directors Disqualification Act 1986 s 7, a company becomes insolvent if: (1) the company goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up; (2) the company enters administration; or (3) an administrative receiver of the company is appointed: s 6(2) (amended by the Enterprise Act 2002 Sch 17 paras 40, 41(a)).

The Insolvency Act 1986 s 247 applies as regards references to a company's insolvency and to its going into liquidation (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 9): Company Directors Disqualification Act 1986 s 22(1), (3).

A company which has entered compulsory liquidation becomes insolvent for these purposes when the winding-up order is made and not when the winding-up petition is presented: *Re Walter L Jacob & Co Ltd, Official Receiver v Jacob* [1993] BCC 512. Where a petition for an administration order has been presented against a company, and an interim order has been made under the Insolvency Act 1986 s 9(4) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 154), followed later by an administration order, the relevant date is the date of the latter order and not the interim order: *Secretary of State for Trade and Industry v Palmer* [1993] BCC 650, Ct of Sess. Note that the Insolvency Act 1986 Pt II (ss 8-27) has been replaced by s 8 except in relation to special administration regimes: see the Enterprise Act 2002 ss 248, 249; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 145). Where the company became insolvent by reason of more than one of the triggering events, namely liquidation, administration, or administrative receivership, the time ran from the first of those events; but, where a company has returned to solvency after one of the triggering events, and then returns to insolvency and a further triggering event occurs, then the two-year period may start to run again from the second triggering event: *Re Tasbian Ltd* [1991] BCLC 54, [1990] BCC 318, CA.

8 Company Directors Disqualification Act 1986 s 6(1)(a).

9 For these purposes, references to a person's conduct as a director of any company or companies include, where that company or any of those companies has become insolvent, that person's conduct in relation to any matter connected with or arising out of the insolvency of that company: Company Directors Disqualification Act 1986 s 6(2). The finding of the court on a person's conduct as a defendant in the proceedings, including as a witness, is capable of amounting to an additional ground of his unfitness: *Secretary of State for Trade and Industry v Reynard* [2002] EWCA Civ 497, [2002] 2 BCLC 625. There is no good reason for cutting down the width of the words 'matter connected with or arising out of the insolvency' so as to exclude the conduct of the director at the hearing of the disqualification proceedings: *Secretary of State for Trade and Industry v Reynard* at [10] per Mummery LJ.

10 See *Re Bath Glass Ltd* [1988] BCLC 329, 4 BCC 130. There is no limitation on the number of companies to which an application might refer: *Re Surrey Leisure Ltd, Official Receiver v Keam* [1999] 2 BCLC 457, CA (the Company Directors Disqualification Act 1986 s 6(1)(b) envisages a single 'lead' company and one or more collateral companies as sufficient to found the jurisdiction; but there may be more than one 'lead' company, and permitting a number of 'lead' companies would not give rise to any unfair procedure, nor would imposing a maximum on the number of 'lead' companies advance the cause of public protection). As to the relevance of a director's conduct with respect to his participation in the management of collateral companies other than the lead company see *Secretary of State for Trade and Industry v Ivens* [1997] 2 BCLC 334, CA. The conduct of a director whilst director of a foreign company may be taken into account: *Re Eurostem Maritime Ltd* [1987] PCC 190. The word 'companies' is not limited to companies of limited liability: *Re Polly Peck International plc (No 2), Secretary of State for Trade and Industry v Ellis (No 2)* [1994] 1 BCLC 574 at 579, [1993] BCC 890 at 895 per Lindsay J.

11 As to the matters to be taken into account for determining unfitness of directors see PARA 1593.

12 Company Directors Disqualification Act 1986 s 6(1)(b). Despite the use of the word 'makes' in the present tense in s 6(1)(b), the question which the court must ask itself is not whether the director is presently unfit to be a director, but whether the relevant conduct specified in s 6(1)(b) alone has fallen below the standards of probity and competence appropriate for persons to be directors of companies; the court does not need to be satisfied that a disqualification order is necessary in the public interest; and evidence tending to show that the

director is unlikely to re-offend is relevant to mitigation and any application for leave under s 17 (see PARA 1611) only: *Re Grayan Building Services Ltd (in liquidation)* [1995] Ch 241, sub nom *Secretary of State for Trade and Industry v Gray* [1995] 1 BCLC 276, CA; *Re Landhurst Leasing plc, Secretary of State for Trade and Industry v Ball* [1999] 1 BCLC 286 at 345 per Hart J (where the court has found that relevant misconduct has occurred, disqualification must follow even though the court is of the opinion that the director is not, at the date of the hearing, unfit). The burden of proof is upon the Secretary of State to establish that the requirements of the Company Directors Disqualification Act 1986 s 6(1)(a), (b) are satisfied: *Re Living Images Ltd* [1996] 1 BCLC 348; *Re Verby Print for Advertising Ltd, Fine v Secretary of State for Trade and Industry* [1998] 2 BCLC 23. See further PARA 1609. The more serious the allegation made against a director, the more the court will need the assistance of cogent evidence (*Re Living Images Ltd*) and the more important it is for the case against him to be set out clearly and with adequate particularity (*Secretary of State for Trade and Industry v Swan* [2003] EWHC 1780 (Ch), (2003) Times, 18 August, [2003] All ER (D) 372 (Jul)). See also *Re Deaduck Ltd, Baker v Secretary of State for Trade and Industry* [2000] 1 BCLC 148 (disqualification order reconsidered despite a finding of breach of duty because the latter conduct was not the subject of the charge). As to the admissibility of evidence in disqualification proceedings see PARA 1607. As to the Secretary of State see PARA 6.

As to the correct approach where criminal and civil disqualification orders potentially overlap, ie by way of criminal proceedings under the Company Directors Disqualification Act 1986 s 2 (see PARA 1580) and civil proceedings under s 6, see *Re Cedarwood Productions Ltd, Re Inter City Print and Finishing Ltd, Secretary of State for Trade and Industry v Rayna* [2001] 2 BCLC 48 at 57-60 per Anthony Mann QC (disqualification is but one of a range of sentences available for conviction under the Company Directors Disqualification Act 1986 s 2; and the s 6 proceedings, if successful, will result in a civil finding of unfitness, and an appropriate disqualification order, rather than a conviction).

It has been clearly established that in disqualification proceedings under the Company Directors Disqualification Act 1986, whether brought under s 8 (see PARA 1584) or under s 7 (see PARA 1599) for an order under s 6, that there is an implied exception to the strict rules of evidence on hearsay evidence, opinion evidence and the rule in *Hollington v Hewthorn* [1943] KB 587, [1943] 2 All ER 35 (as to which see **ESTOPPEL** vol 16(2) (Reissue) PARA 953), against admitting hearsay evidence: *Secretary of State for Business Enterprise and Regulatory Reform v Aaron* [2008] EWCA Civ 1146, [2009] 1 BCLC 55 (affg *Secretary of State for Business Enterprise and Regulatory Reform v Aaron* [2008] EWHC 2467 (Ch), [2009] 1 BCLC 55, [2008] All ER (D) 298 (Apr)) (the primary objective of the implied exception permitting admissibility was to enable the Secretary of State to put before the court material already obtained under the statutory scheme for investigation, thereby avoiding the considerable and unnecessary expense and delay of carrying out a second investigation covering the same ground). See also *Re David M Aaron (Personal Financial Planners) Ltd, Secretary of State for Trade and Industry v Aaron* [2007] NLJR 859, [2007] All ER (D) 32 (Jun), regarding the admission of expert evidence in directors' disqualification proceedings (the court might at times need expert assistance on fact from an expert or experts but, generally speaking, it was hard to see why a court should need expert evidence that was simply expert opinion evidence, when it came to applying 'the standard laid down by the courts'). As to hearsay evidence see **CIVIL PROCEDURE** vol 11 (2009) PARA 806 et seq. As to expert evidence see **CIVIL PROCEDURE** vol 11 (2009) PARA 835 et seq.

13 Company Directors Disqualification Act 1986 s 6(4). As to the period of disqualification see PARA 1610.

14 *Re Seagull Manufacturing Co Ltd (No 2)* [1994] Ch 91, [1994] 1 BCLC 273.

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1593. Matters for determining unfitness of directors.

Where it falls to a court¹ to determine whether a person's conduct as a director² of any particular company³ or companies makes him unfit to be concerned in the management of a company⁴, the court must, as respects his conduct as a director of that company or, as the case may be, each of those companies, have regard in particular to the matters specified⁵ below⁶.

In determining whether he may accept a disqualification undertaking⁷ from any person, the Secretary of State must, as respects the person's conduct as a director of any company concerned, have regard to the same matters⁸.

In all cases the court must have regard to:

- 1015 (1) any misfeasance or breach of any fiduciary or other duty⁹ by the director in relation to the company¹⁰;
- 1016 (2) any misapplication or retention by the director of, or any conduct by the director giving rise to an obligation¹¹ to account for, any money or other property of the company¹²;
- 1017 (3) the extent of the director's responsibility for the company entering into any transaction liable to be set aside under the provisions¹³ against debt avoidance¹⁴;
- 1018 (4) the extent of the director's responsibility for any failure by the company to comply with any of the provisions relating to:
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405. (a) the obligation¹⁵ to keep and enter up the register of members¹⁶;
406. (b) the obligation¹⁷ to keep the register of members available for inspection¹⁸;
407. (c) the register of directors and secretaries, and of directors' residential addresses¹⁹;
408. (d) the duty to notify the registrar of changes in relation to directors and secretaries²⁰;
409. (e) the company's duty²¹ to keep accounting records²²;
410. (f) where and for how long accounting records are to be kept²³;
411. (g) the company's duty²⁴ to make annual returns²⁵;
412. (h) the company's duty²⁶ to register charges it creates²⁷;
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- 1019 (5) the extent of the director's responsibility for any failure by the directors of the company to comply with the provisions relating to the duty to prepare annual accounts²⁸, the approval and signature of abbreviated accounts²⁹ or the name of the signatory to be stated³⁰ in the published copy of the accounts³¹.

1 As to the meaning of 'court' for these purposes see PARA 1578 note 1.

2 'Director' includes a shadow director: Company Directors Disqualification Act 1986 s 9(2) (amended by the Insolvency Act 2000 s 8, Sch 4 Pt I paras 1, 7(b)). As to the meaning of 'director' for the purposes of the Company Directors Disqualification Act 1986 (which for these purposes includes a de facto director) see PARA 1575. As to the meaning of 'shadow director' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576. As to de facto directors see PARA 1577.

3 As to the meaning of 'company' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576 note 1.

4 In every case, the function of the court in addressing the question of unfitness is to decide whether the conduct of which complaint is made by the Secretary of State, viewed cumulatively and taking into account any extenuating circumstances, has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies (as to which see PARA 1594); unfitness might be shown by conduct which is dishonest (including conduct showing a want of probity or integrity) or by conduct which is merely incompetent: *Re Barings plc (No 5)*, *Secretary of State for Trade and Industry v Baker (No 5)* [1999] 1 BCLC 433 at 483 per Jonathan Parker J; affd [2000] 1 BCLC 523 at 535, CA, per Morritt LJ. Where the Secretary of State's case is based solely on allegations of incompetence (no dishonesty of any kind being alleged), the burden is on the Secretary of State to satisfy the court that the conduct complained of demonstrates incompetence of a high degree: *Re Barings plc (No 5)*, *Secretary of State for Trade and Industry v Baker (No 5)* [1999] 1 BCLC 433 at 483 per Jonathan Parker J; affd [2000] 1 BCLC 523 at 535, CA, per Morritt LJ. The list of matters set out in the Company Directors Disqualification Act 1986 Sch 1 is not exhaustive and the matters to which the court might have regard are not limited to the matters listed there: *Re Barings plc (No 5)*, *Secretary of State for Trade and Industry v Baker (No 5)* [1999] 1 BCLC 433 at 483 per Jonathan Parker J (affd [2000] 1 BCLC 523 at 535, CA, per Morritt LJ); *Re Migration Services International Ltd, Official Receiver v Webster* [2000] 1 BCLC 666 at 677-678 per Neuberger J. In considering the question of unfitness, the respondent's conduct has to be evaluated in context, so that the only extenuating circumstances which might be taken into account in addressing the question of unfitness are those which accompanied the conduct in question: *Re Barings plc (No 5)*, *Secretary of State for Trade and Industry v Baker (No 5)* [1999] 1 BCLC 433 at 483 per Jonathan Parker J (affd [2000] 1 BCLC 523 at 535, CA, per Morritt LJ). See also *Secretary of State for Trade and Industry v Goldberg* [2003] EWHC 2843 (Ch), [2004] 1 BCLC 597. As to the Secretary of State see PARA 6.

The determination of unfitness under the Company Directors Disqualification Act 1986 s 6 (see PARA 1592) is a two-stage process: (1) the Secretary of State has to establish as facts, to the requisite standard of proof,

namely on a balance of probabilities, the matters on which the allegation of unfitness is based; (2) the court has to be satisfied that the conduct alleged is sufficiently serious to warrant disqualification: *Secretary of State for Trade and Industry v Swan* [2005] EWHC 603 (Ch), [2005] All ER (D) 102 (Apr). See also *Secretary of State for Trade and Industry v Swan* [2003] EWHC 1780 (Ch), (2003) Times, 18 August, [2003] All ER (D) 372 (Jul); and *Re AG (Manchester) Ltd (in liquidation), Official Receiver v Watson* [2008] EWHC 64 (Ch), [2008] 1 BCLC 321, [2008] All ER (D) 188 (Jan) (second defendant had been content to allow her husband and the first defendant to run the company and to take substantial dividends from it regardless of how and whether they should have been paid; an abdication of responsibility of that kind did amount to unfitness to be a director).

5 In the matters mentioned in the Company Directors Disqualification Act 1986 s 9(1)(a), Sch 1 Pt I (paras 1-5A) (see heads (1)-(5) in the text). References in Sch 1 to the director and the company are to be read accordingly: s 9(1). The Secretary of State may by order modify any of the provisions of Sch 1; and such an order may contain such transitional provisions as may appear to the Secretary of State necessary or expedient: s 9(4). The power to make such orders is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 9(5).

In the application of Sch 1 Pt I in relation to any person who is a director of an open-ended investment company, any reference to a provision of the Companies Act 2006 is to be taken to be a reference to the corresponding provision of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, or of any rules made under reg 6 (Financial Services Authority rules: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 621 et seq); Company Directors Disqualification Act 1986 s 22D(3) (added by SI 2009/1941). As to the meaning of 'open-ended investment company' see PARA 1578 note 16.

6 Company Directors Disqualification Act 1986 s 9(1)(a) (amended by the Insolvency Act 2000 s 15(1), Sch 4 Pt I paras 1, 7(a), Sch 5).

7 As to disqualification undertakings see PARA 1579.

8 Company Directors Disqualification Act 1986 s 9(1A)(a) (added by the Insolvency Act 2000 s 6(1), (6)). References in the Company Directors Disqualification Act 1986 Sch 1 to the director and the company are to be read accordingly: s 9(1A)(a) (as so added). See note 5.

9 Whether a director has been in breach of his duties to the company is commonly expressed in terms of a failure to meet the standards of competence and probity required: see *Re Grayan Building Services Ltd (in liquidation)* [1995] Ch 241, sub nom *Secretary of State for Trade and Industry v Gray* [1995] 1 BCLC 276, CA; *Re Landhurst Leasing plc, Secretary of State for Trade and Industry v Ball* [1999] 1 BCLC 286; *Re Barings plc (No 5), Secretary of State for Trade and Industry v Baker (No 5)* [1999] 1 BCLC 433 (affd [2000] 1 BCLC 523, CA); *Re Bradcrown Ltd, Official Receiver v Ireland* [2001] 1 BCLC 547; *Secretary of State for Trade and Industry v Goldberg* [2003] EWHC 2843 (Ch), [2004] 1 BCLC 597. However, a finding of breach of duty is neither necessary nor sufficient in itself to find a director unfit: *Re Barings plc (No 5), Secretary of State for Trade and Industry v Baker (No 5)* [1999] 1 BCLC 433 at 486 per Jonathan Parker J; affd [2000] 1 BCLC 523 at 535, CA, per Morritt LJ. See generally PARA 544 et seq; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 688 et seq. See also note 10.

10 Company Directors Disqualification Act 1986 Sch 1 Pt I para 1 (amended by SI 2009/1941). Head (1) in the text includes in particular any breach by the director of a duty under the Companies Act 2006 Pt 10 Ch 2 (ss 170-181) (general duties of directors) (as to which see PARA 532 et seq) owed to the company: see the Company Directors Disqualification Act 1986 Sch 1 Pt I para 1 (as so amended). See also note 9.

11 See PARA 539 et seq.

12 Company Directors Disqualification Act 1986 Sch 1 Pt I para 2.

13 In the Insolvency Act 1986 Pt XVI (ss 423-425) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 853 et seq).

14 Company Directors Disqualification Act 1986 Sch 1 Pt I para 3 (amended by SI 2009/1941).

15 In the Companies Act 2006 s 113 (see PARA 335).

16 Company Directors Disqualification Act 1986 Sch 1 Pt I para 4(a) (Sch 1 Pt I para 4 substituted by SI 2009/1941).

17 In the Companies Act 2006 s 114 (see PARA 347).

18 Company Directors Disqualification Act 1986 Sch 1 Pt I para 4(b) (as substituted: see note 16).

19 Company Directors Disqualification Act 1986 Sch 1 Pt I para 4(c), (d), (f) (as substituted: see note 16). As to the provisions concerning the register of directors and secretaries see the Companies Act 2006 ss 162, 275;

and PARAS 499, 605. As to the provisions concerning the register of directors' residential addresses see s 165; and PARA 500.

20 Company Directors Disqualification Act 1986 Sch 1 Pt I para 4(e), (g) (as substituted: see note 16). As to the provisions concerning the duty to notify the registrar of changes in relation to directors and secretaries see the Companies Act 2006 ss 167, 276; and PARAS 514, 606.

21 Ie under the Companies Act 2006 s 386 (see PARA 708).

22 Company Directors Disqualification Act 1986 Sch 1 Pt I para 4(h) (as substituted: see note 16). See *Secretary of State for Trade and Industry v Arif* [1997] 1 BCLC 34, [1996] BCC 586 (failure by directors to fulfil statutory obligations to keep accounting records).

23 Company Directors Disqualification Act 1986 Sch 1 Pt I para 4(i) (as substituted: see note 16). As to the provisions under which accounting records must be kept see the Companies Act 2006 s 388; and PARA 709.

24 Ie under the Companies Act 2006 s 854 (see PARA 1421).

25 Company Directors Disqualification Act 1986 Sch 1 Pt I para 4(j) (as substituted: see note 16).

26 Ie under the Companies Act 2006 s 860 (see PARA 1277).

27 Company Directors Disqualification Act 1986 Sch 1 Pt I para 4(k) (as substituted: see note 16).

28 Ie under the Companies Act 2006 s 394 (see PARA 716) or s 399 (see PARA 775).

29 Ie under the Companies Act 2006 s 414 (see PARA 815) or s 450 (see PARA 881).

30 Ie under the Companies Act 2006 s 433 (see PARA 861).

31 Company Directors Disqualification Act 1986 Sch 1 Pt I para 5 (substituted by SI 2008/948).

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1594. Standards of probity and competence required.

Where it falls to a court¹ to determine whether a person's conduct as a director² of any particular company³ or companies makes him unfit to be concerned in the management of a company⁴, the court must, as respects his conduct as a director of that company or, as the case may be, each of those companies⁵, have regard in particular, where the company has become insolvent⁶, to the matters specified⁷ below⁸.

In determining whether he may accept a disqualification undertaking⁹ from any person, the Secretary of State¹⁰ must, as respects the person's conduct as a director of any company concerned, have regard in particular, where the company has become insolvent, to the same matters¹¹.

The specified matters are:

- 1020 (1) the extent of the director's responsibility for the causes of the company becoming insolvent¹²;
- 1021 (2) the extent of the director's responsibility for any failure by the company to supply any goods or services which have been paid for, in whole or in part¹³;
- 1022 (3) the extent of the director's responsibility for the company entering into any transaction or giving any preference which is liable to be set aside¹⁴;

- 1023 (4) the extent of the director's responsibility for any failure by the directors of the company to comply with the provisions¹⁵ relating to the duty to call creditors' meetings in a creditors' voluntary winding up¹⁶;
- 1024 (5) any failure by the director to comply with any obligation imposed on him by or under the provisions relating to¹⁷:
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413. (a) the company's statement of affairs¹⁸ in administration¹⁹;
414. (b) the statement of affairs²⁰ to an administrative receiver²¹;
415. (c) the directors' duty²² to attend meetings and in respect of the statement of affairs in a creditors' voluntary winding up²³;
416. (d) the statement of affairs²⁴ in a winding up by the court²⁵;
417. (e) the duty²⁶ of anyone with company property to deliver it up²⁷; and
418. (f) the duty²⁸ to co-operate with office-holders²⁹.
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1 As to the meaning of 'court' for these purposes see PARA 1578 note 1.

2 As to the meaning of 'director' for the purposes of the Company Directors Disqualification Act 1986 (which for these purposes includes a de facto director) see PARA 1575. As to de facto directors see PARA 1577.

3 As to the meaning of 'company' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576 note 1.

4 See PARA 1593 note 4.

5 See PARA 1592 note 10.

6 For these purposes, the Company Directors Disqualification Act 1986 s 6(2) (meaning of a company 'becoming insolvent': see PARA 1592 note 7) applies as it applies for the purposes of s 6 (see PARA 1592) and s 7 (see PARAS 1596, 1598-1599): s 9(2).

7 Ie the matters mentioned in the Company Directors Disqualification Act 1986 s 9(1)(b), Sch 1 Pt II (paras 6-10) (see heads (1)-(5) in the text). References in Sch 1 to the director and the company are to be read accordingly: s 9(1). As to Sch 1 generally see also PARA 1593 note 5.

8 Company Directors Disqualification Act 1986 s 9(1)(b) (amended by the Insolvency Act 2000 ss 8, 15(1), Sch 4 Pt I paras 1, 7(a), Sch 5). The court should properly address the question of the director's personal responsibility for all relevant matters: *Secretary of State for Trade and Industry v Taylor* [1997] 1 WLR 407, sub nom *Secretary of State for Trade and Industry v Gash* [1997] 1 BCLC 341 (although the director would have been wiser to resign, he was entitled to remain on the board and to use such influence as he had to try to bring trading to an end in the belief that there was no reasonable prospect of avoiding insolvency).

9 As to disqualification undertakings see PARA 1579.

10 As to the Secretary of State see PARA 6.

11 Company Directors Disqualification Act 1986 s 9(1A)(b) (added by the Insolvency Act 2000 s 6(1), (6)). References in the Company Directors Disqualification Act 1986 Sch 1 to the director and the company are to be read accordingly: s 9(1A) (as so added).

12 Company Directors Disqualification Act 1986 Sch 1 Pt II para 6. The courts will take a broad approach to this issue: *Re Barings plc (No 5)*, *Secretary of State for Trade and Industry v Baker (No 5)* [1999] 1 BCLC 433; affd [2000] 1 BCLC 523, CA.

13 Company Directors Disqualification Act 1986 Sch 1 Pt II para 7.

14 Company Directors Disqualification Act 1986 Sch 1 Pt II para 8 (amended by SI 2009/1941). The transaction or preference mentioned in the text is liable to be set aside under the Insolvency Act 1986 s 127 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 700) or ss 238-240 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 843 et seq). A preference is given if: (1) in undertaking the transaction the company had a desire or wish to improve the creditor's position in the event of an insolvent liquidation; and (2) the company was influenced by that desire in deciding to make the alleged preference: *Re Living Images Ltd* [1996] 1 BCLC 348. Once it is shown that a preference has been given, it has to be shown that the director acted in a way which was blameworthy, ie that he was aware both of the desire and the fact

that that influenced the company to act for the benefit of the creditor, before he can be disqualified under the Company Directors Disqualification Act 1986 Sch 1 Pt I para 8: *Re Living Images Ltd*. See also *Re Sykes (Butchers) Ltd (in liquidation)*, *R v Secretary of State for Trade and Industry v Richardson* [1998] 1 BCLC 110.

15 le the Insolvency Act 1986 s 98 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 945).

16 Company Directors Disqualification Act 1986 Sch 1 Pt II para 9 (amended by SI 2009/1941).

17 Company Directors Disqualification Act 1986 Sch 1 Pt II para 10 (amended by SI 2009/1941). The court may have regard to any relevant breach of the Insolvency Act 1986 when deciding whether to make a disqualification order under the Company Directors Disqualification Act 1986 s 6 (see PARA 1592) and not just the provisions specified in Sch 1 Pt II para 10: *Re Migration Services International Ltd, Official Receiver v Webster* [2000] 1 BCLC 666. See also *Official Receiver v Dhaliwall* [2006] 1 BCLC 285 (it had long been established that non-payment of Crown debts was no more serious than a failure to pay other creditors and that it could not be treated as automatic grounds for disqualification, although it might be evidence of a policy of unfair discrimination between creditors which would merit disqualification).

18 le under the Insolvency Act 1986 Sch B1 para 47 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 267).

19 Company Directors Disqualification Act 1986 Sch 1 Pt II para 10(a) (amended by SI 2003/2096).

20 le under the Insolvency Act 1986 s 47 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 403).

21 Company Directors Disqualification Act 1986 Sch 1 Pt II para 10(b).

22 le under the Insolvency Act 1986 s 99 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 947).

23 Company Directors Disqualification Act 1986 Sch 1 Pt II para 10(d).

24 le under the Insolvency Act 1986 s 131 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 519 et seq).

25 Company Directors Disqualification Act 1986 Sch 1 Pt II para 10(e).

26 le under the Insolvency Act 1986 s 234 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 675).

27 Company Directors Disqualification Act 1986 Sch 1 Pt II para 10(f).

28 le under the Insolvency Act 1986 s 235 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 678).

29 Company Directors Disqualification Act 1986 Sch 1 Pt II para 10(g).

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1595. Examples of misconduct.

The court may consider matters of general conduct in addition to the more limited questions of whether specific statutory provisions have been breached, although a typical application for disqualification will include more than one complaint of misconduct¹.

The types of misconduct, and cases where such misconduct has been discussed, are numerous but include the following:

- 1025 (1) failure to keep adequate accounting records or file returns²;
- 1026 (2) trading with 'phoenix' companies³;
- 1027 (3) continuing to draw remuneration whilst insolvent and drawing excessive remuneration⁴;
- 1028 (4) inadequate capitalisation of a company⁵;
- 1029 (5) preferences⁶ and other breaches of duty⁷;
- 1030 (6) trading with no reasonable prospect of paying creditors⁸;
- 1031 (7) trading at the expense of the Crown⁹;
- 1032 (8) failure to co-operate with the official receiver¹⁰.

1 *Re Sykes (Butchers) Ltd (in liquidation), R v Secretary of State for Trade and Industry v Richardson* [1998] 1 BCLC 110. See also *Secretary of State for Trade and Industry v McTighe (No 2)* [1996] 2 BCLC 477, CA (the court is entitled to consider whether individual examples of misconduct alone demonstrate unfitness to be concerned in the management of a company and is not required only to consider the conduct of the directors 'in the round'). See also *Secretary of State for Trade and Industry v Reynard* [2002] EWCA Civ 497, [2002] 2 BCLC 625 (cited in PARA 1592 note 9).

2 *Re Bath Glass Ltd* [1988] BCLC 329, 4 BCC 130; *Re Rolus Properties Ltd* (1988) 4 BCC 446; *Re Chartmore Ltd* [1990] BCLC 673; *Re Pamstock Ltd* [1994] 1 BCLC 716; *Re Firedart Ltd, Official Receiver v Fairall* [1994] 2 BCLC 340; *Re Richborough Furniture Ltd* [1996] 1 BCLC 507, [1996] BCC 155; *Re Galeforce Pleating Co Ltd* [1999] 2 BCLC 704; *Re Promwalk Services Ltd, Frewen v Secretary of State for Trade and Industry* [2002] EWHC 2688 (Ch), [2003] 2 BCLC 305.

3 *Re Swift 736 Ltd, Secretary of State for Trade and Industry v Ettinger* [1993] BCLC 896, [1993] BCC 312, CA; *Re Douglas Construction Services Ltd* [1988] BCLC 397, 4 BCC 553; *Re Lo-Line Electric Motors Ltd* [1988] Ch 477, [1988] 2 All ER 692; *Re McNulty's Interchange Ltd* [1989] BCLC 709, 4 BCC 533; *Re Ipcon Fashions Ltd* (1989) 5 BCC 773; *Re Keypak Homecare Ltd (No 2)* [1990] BCLC 440, [1990] BCC 117; *Re Linvale Ltd* [1993] BCLC 654. A 'phoenix' company is one which carries on the same business as an old business, often on the same premises, but leaving behind the creditors of the old company: see eg *Re Linvale Ltd* at 659-660 per Mervyn Davies J.

4 *Re Stanford Services Ltd* [1987] BCLC 607, 3 BCC 326; *Re McNulty's Interchange Ltd* [1989] BCLC 709, 4 BCC 533; *Re Ipcon Fashions Ltd* (1989) 5 BCC 773; *Re Cargo Agency Ltd* [1992] BCLC 686, [1992] BCC 388; *Re Keypak Homecare Ltd (No 2)* [1990] BCLC 440, [1990] BCC 117; *Re ECM (Europe) Electronics Ltd* [1992] BCLC 814, [1991] BCC 268; *Re Travel Mondial (UK) Ltd* [1991] BCLC 120, [1991] BCC 224; *Secretary of State for Trade and Industry v Van Hengel* [1995] 1 BCLC 545, CA (a director in setting salaries of the board must keep in mind what the company could afford as well as what was the going rate for the job were the director to be employed elsewhere); *Re Amaron, Secretary of State for Trade and Industry v Lubrani (No 2)* [2001] 1 BCLC 562 (decision to carry on paying same levels of remuneration while the performance of the company sharply deteriorated was culpable); *Official Receiver v Stern* [2001] EWCA Civ 1787, [2002] 1 BCLC 119 (drawings made for director's own benefit in excess of the remuneration to which he was entitled).

5 *Re Pamstock Ltd* [1994] 1 BCLC 716; *Re Chartmore Ltd* [1990] BCLC 673; *Re Austinsuite Furniture Ltd* [1992] BCLC 1047.

6 *Re Living Images Ltd* [1996] 1 BCLC 348, [1996] BCC 112; *Re Grayan Building Services Ltd (in liquidation)* [1995] Ch 241, sub nom *Secretary of State for Trade and Industry v Gray* [1995] 1 BCLC 276, CA; *Re Austinsuite Furniture Ltd* [1992] BCLC 1047; *Re Sykes (Butchers) Ltd (in liquidation), R v Secretary of State for Trade and Industry v Richardson* [1998] 1 BCLC 110 (payments intended to produce a personal advantage for director himself, regardless of the interests of other creditors of the company, regarded as morally reprehensible and indicative of a lack of commercial probity and thus unfitness to be a director); *Re Funtime Ltd* [2000] 1 BCLC 247.

7 As to breaches of duty see also PARA 1593 note 9.

8 *Re Living Images Ltd* [1996] BCC 112; *Re Synthetic Technology Ltd, Secretary of State for Trade and Industry v Joiner* [1993] BCC 549; *Re Hitco 2000 Ltd* [1995] 2 BCLC 63 (evidence relating to the misuse of the company's bank account and continuing to trade at the creditors' risk); *Re Richborough Furniture Ltd* [1996] 1 BCLC 507, [1996] BCC 155; *Secretary of State for Trade and Industry v Laing* [1996] 2 BCLC 324; *Secretary of State for Trade and Industry v Collins* [2000] 2 BCLC 223, CA; *Re Vintage Hallmark plc, Secretary of State for Trade and Industry v Grove* [2006] EWHC 2761 (Ch), [2007] 1 BCLC 788; *Re Mea Corp Ltd, Secretary of State for Trade and Industry v Aviss* [2006] EWHC 1846 (Ch), [2007] 1 BCLC 618; *Official Receiver v Key* [2009] 1 BCLC 22. See, however, *Re Uno plc and World of Leather plc, Secretary of State for Trade and Industry v Gill* [2004] EWHC 933 (Ch), [2006] BCC 725 (continuing to accept customer deposits and using these to fund

ongoing trading did not necessarily amount to unfitness, given that at all material times there was a reasonable prospect of avoiding insolvency thereby).

Operating a policy of not paying creditors who do not press for payment, or of paying only those who are essential to the company being able to continue to trade, merits a finding of unfitness: *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164, [1991] 3 All ER 578, CA; *Secretary of State for Trade and Industry v McTighe (No 2)* [1996] 2 BCLC 477, CA; *Re Hopes (Heathrow) Ltd, Secretary of State for Trade and Industry v Dyer* [2001] 1 BCLC 575; *Re Amaron, Secretary of State for Trade and Industry v Lubrani (No 2)* [2001] 1 BCLC 562.

9 *Re Dawson Print Group Ltd* [1987] BCLC 601, 3 BCC 322; *Re Stanford Services Ltd* (1987) 3 BCC 326; *Re Lo-Line Electrical Motors Ltd* [1988] Ch 477, [1988] 2 All ER 692; *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164, [1991] 3 All ER 578, CA (not paying Crown debts one part of a deliberate policy of not paying creditors who do not press for payment); *Re Swift 736 Ltd, Secretary of State for Trade and Industry v Ettinger* [1993] BCLC 896, [1993] BCC 312, CA; *Re Verby Print for Advertising Ltd, Fine v Secretary of State for Trade and Industry* [1998] 2 BCLC 23 (non-payment of Crown debts whilst a company is trading constituted a policy of unfair discrimination against certain creditors in favour of other creditors, making a period of disqualification appropriate); *Re Structural Concrete Ltd* [2000] All ER (D) 848 (it was difficult to envisage the exceptional circumstances in which a company's policy of deliberate non-payment of a Crown debt would not necessarily result in a finding of unfitness of the directors); *Re Amaron, Secretary of State for Trade and Industry v Lubrani (No 2)* [2001] 1 BCLC 562 (directors caused company to trade unfairly at the expense of the Inland Revenue despite evidence of correspondence with the Inland Revenue and an arrangement made for monthly payments); *Official Receiver v Key* [2009] 1 BCLC 22 (applying *Re Verby Print for Advertising Ltd, Fine v Secretary of State for Trade and Industry*).

10 *Re Tansoft Ltd* [1991] BCLC 339; *Secretary of State for Trade and Industry v McTighe (No 2)* [1996] 2 BCLC 477, CA. As to the meaning of 'official receiver' see PARA 1590 note 13.

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1596. Reports to the Secretary of State.

If it appears to the official receiver¹, the liquidator², the administrator³, or the administrative receiver⁴, that the conditions which impose a duty on the court to make a disqualification order⁵ are satisfied as respects a person who is or has been a director⁶ of the company in question, the official receiver, the liquidator, the administrator or, as the case may be, the administrative receiver, must forthwith report the matter to the Secretary of State⁷.

1 Company Directors Disqualification Act 1986 s 7(3)(a). As to the meaning of 'official receiver' see PARA 1590 note 13. As to a company which is being wound up by the court in England and Wales see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 438 et seq. As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

2 Company Directors Disqualification Act 1986 s 7(3)(b). As to liquidators generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 555 et seq. As to a company which is being wound up otherwise than by the court see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 939 et seq.

3 Company Directors Disqualification Act 1986 s 7(3)(c) (substituted by the Enterprise Act 2002 s 248(3), Sch 17 paras 40, 42). As to a company which is in administration see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 146 et seq.

4 Company Directors Disqualification Act 1986 s 7(3)(d). This provision applies in the case of a company of which there is an administrative receiver (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 380 et seq.). For these purposes, 'administrative receiver' has the meaning given by the Insolvency Act 1986 s 251 (ie an administrative receiver as defined by s 29(2): see PARA 1337): Company Directors Disqualification Act 1986 s 22(1), (3).

5 Ie the conditions mentioned in the Company Directors Disqualification Act 1986 s 6(1) (see PARA 1592).

6 As to the meaning of 'director' for the purposes of the Company Directors Disqualification Act 1986 (which for these purposes includes a de facto director) see PARA 1575. As to de facto directors see PARA 1577.

7 Company Directors Disqualification Act 1986 s 7(3). As to the Secretary of State see PARA 6. The question whether statutory reports provided to the Secretary of State under s 7(3) are privileged depends on whether there is a public interest requiring protection from disclosure sufficient to override the concerns of the administration of justice reflected in the disclosure rights given to litigants: *Re Barings plc, Secretary of State for Trade and Industry v Baker* [1998] Ch 356, [1998] 1 All ER 673 (in the absence of a claim for public interest immunity, there was no public interest that required privilege to be accorded to the report and its disclosure to a respondent may be ordered).

Any report made to the Secretary of State under the Company Directors Disqualification Act 1986 s 7(3) by the liquidator of a company which the courts in England and Wales have jurisdiction to wind up and which passes a resolution for voluntary winding up on or after 30 September 1996, or by an administrative receiver of a company appointed otherwise than under the Insolvency Act 1986 s 51 (power to appoint receiver under the law of Scotland) on or after 30 September 1996, or by the administrator of a company which the courts in England and Wales have jurisdiction to wind up which enters administration on or after 30 September 1996, must be made in the form prescribed in the Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909, r 3(2), Schedule, Form D1 (substituted by SI 2001/764), or in a form which is substantially similar, and in the manner and to the extent required by the applicable form: Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909, rr 1(3), 3(1), (2) (r 3(1) amended by SI 2003/2096). The form referred to in the Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909, r 4(3) (see PARA 1597) may be used with such variations, if any, as the circumstances may require: r 5.

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1597. Returns by office-holders.

Where it appears to the liquidator of a company¹, to the administrative receiver², or to the administrator³ (each of whom for these purposes is referred to as the 'office-holder'), that the company has at any time become insolvent⁴, there may be furnished to the Secretary of State by the office-holder at any time during the period of six months from the relevant date⁵, a return with respect to every person who was, on the relevant date, a director⁶ or shadow director⁷ of the company, or had been a director or shadow director of the company at any time in the three years immediately preceding that date⁸.

It is, however, the duty of an office-holder to furnish a return complying with these provisions to the Secretary of State⁹:

- 1033 (1) where he is in office in relation to the company on the day one week before the expiry of the period of six months from the relevant date, not later than the expiry of such period¹⁰;
- 1034 (2) where he vacates office (otherwise than by death) before the day one week before the expiry of the period of six months from the relevant date, within 14 days after his vacation of office except where he has furnished such a return on or prior to the day one week before the expiry of such period¹¹.

If an office-holder without reasonable excuse fails to comply with this duty, he is guilty of an offence¹².

1 le the liquidator of a company which the courts in England and Wales have jurisdiction to wind up which passes a resolution for voluntary winding up on or after 30 September 1996: Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909, rr 1(3), 3(1)(a). As to liquidators generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 555 et seq.

2 le an administrative receiver of a company appointed, otherwise than under the Insolvency Act 1986 s 51 (power to appoint receiver under the law of Scotland), on or after 30 September 1996: Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909, rr 1(3), 3(1)(b). As to the meaning of 'administrative receiver' see PARA 1596 note 4.

3 le the administrator of a company which the courts in England and Wales have jurisdiction to wind up which enters administration on or after 30 September 1996: Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909, rr 1(3), 3(1)(c). As to administration orders see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 146 et seq.

4 Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909, r 4(1). As to the meaning of 'become insolvent' see the Company Directors Disqualification Act 1986 s 6(2); and PARA 1592 note 7.

5 For these purposes, 'relevant date' means:

2291 (1) in the case of a company in creditors' voluntary winding up, there having been no declaration of solvency by the directors under the Insolvency Act 1986 s 89 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 941), the date of the passing of the resolution for voluntary winding up;

2292 (2) in the case of a company in members' voluntary winding up, the date on which the liquidator forms the opinion that, at the time when the company went into liquidation, its assets were insufficient for the payment of its debts and other liabilities and the expenses of winding up;

2293 (3) in the case of the administrative receiver, the date of his appointment; and

2294 (4) in the case of the administrator, the date that the company enters administration,

and for the purpose of head (3), the only appointment of an administrative receiver to be taken into account in determining the relevant date is that appointment which is not that of a successor in office to an administrative receiver who has vacated office either by death or pursuant to s 45 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 429): Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909, r 4(4) (amended by SI 2003/2096).

6 As to the meaning of 'director' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1575.

7 As to the meaning of 'shadow director' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576.

8 Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909, r 4(2). The return must be made in the form prescribed in r 4(3), Schedule, Form D2 (substituted by SI 2001/764), or in a form which is substantially similar, and in the manner and to the extent required by the form: Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909, r 4(3). The form referred to in r 4(3) may be used with such variations, if any, as the circumstances may require: r 5.

9 Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909, r 4(5). A return need not be provided under these provisions by an office-holder if he has, whilst holding that office in relation to the company, since the relevant date, made a report under r 3 (see PARA 1596 note 7) with respect to all persons falling within r 4(2) (see the text and notes 1-8): r 4(6).

10 Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909, r 4(5)(a).

11 Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909, r 4(5)(b).

12 Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909, r 4(7). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, on conviction after continued contravention, is liable to a daily default fine instead, that is he is liable on a second or subsequent summary conviction of the offence to a fine of one-tenth of level 3 on the standard scale for each day on which the contravention is continued: r 4(7)(a), (b). As to the standard scale see PARA 1622. The Insolvency Act 1986 s 431 (summary proceedings: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 927), as it applies to England and Wales, has effect in relation to an offence under the Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909, r 4(7) as to offences under the Insolvency Act 1986 Pts I-VII (ss 1-251): Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909, r 4(8).

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1598. Request for information from office-holders.

The Secretary of State¹ or the official receiver² may require the liquidator³, administrator⁴ or administrative receiver⁵ of a company or the former liquidator, administrator or administrative receiver of a company to furnish him with such information with respect to any person's conduct as a director⁶ of the company, and to produce and permit inspection of such books, papers and other records relevant to that person's conduct as such a director, as the Secretary of State or the official receiver may reasonably require for the purpose of determining whether to exercise, or of exercising, any function⁷ of his under the provisions of the Company Directors Disqualification Act 1986⁸. In such a case, the court, on the application of the Secretary of State or, as the case may be, the official receiver, may make an order directing compliance within such period as may be specified⁹; and the court's order may provide that all costs of and incidental to the application are to be borne by the person to whom the order is directed¹⁰.

1 As to the Secretary of State see PARA 6.

2 As to the meaning of 'official receiver' see PARA 1590 note 13.

3 As to liquidators generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 555 et seq.

4 As to administration orders see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 146 et seq.

5 As to the meaning of 'administrative receiver' see PARA 1596 note 4.

6 See PARA 1599.

7 I.e. the functions of the Secretary of State and of the official receiver under the Company Directors Disqualification Act 1986 s 7 (see also PARA 1599).

8 Company Directors Disqualification Act 1986 s 7(4). Documents and transcripts which have been obtained by an administrator under the Insolvency Act 1986 ss 235, 236 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 678-679) may be disclosed to the Secretary of State: *Re Polly Peck International plc, ex p Joint Administrators* [1994] BCC 15; approved in *Re Pantmaenog Timber Co Ltd (in liquidation), Official Receiver v Meade-King (a firm)* [2003] UKHL 49, [2004] 1 AC 158, [2003] 4 All ER 18 (because the Company Directors Disqualification Act 1986 and the Insolvency Act 1986 form part of the same statutory scheme, the powers conferred by s 236 can lawfully be exercised for the purpose of obtaining evidence for use in disqualification proceedings).

9 Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909, r 6(1), (2).

10 Insolvent Companies (Reports on Conduct of Directors) Rules 1996, SI 1996/1909, r 6(3). Documents in the possession of a current or former liquidator, administrator, or administrative receiver of a company are not in the control of the Secretary of State or the official receiver for the purposes of disclosure under the regime now set out in CPR Pt 31 (see **CIVIL PROCEDURE** vol 11 (2009) PARAS 112, 538 et seq): *Re Lombard Shipping and Forwarding Ltd* [1993] BCLC 238.

COMPANIES ACTS/(31) DISQUALIFICATION ORDERS AND UNDERTAKINGS/(iii) Application for Disqualification/1599. Application by the Secretary of State: unfit directors of insolvent companies.

(iii) Application for Disqualification

1599. Application by the Secretary of State: unfit directors of insolvent companies.

If it appears to the Secretary of State¹ that it is expedient in the public interest² that a disqualification order³ should be made against any person, an application for the making of such an order against that person may be made by the Secretary of State or, if the Secretary of State so directs in the case of a person who is or has been a director⁴ of a company which is being or has been wound up by the court in England and Wales, by the official receiver⁵.

Except with the leave of the court⁶, such an application for the making of a disqualification order against any person may not be made after the end of the period of two years beginning with the day on which the company of which that person is or has been a director became insolvent⁷.

If the proceedings are prosecuted in a dilatory manner, the proceedings may be struck out for want of prosecution⁸.

Instead of applying, or proceeding with an application, for a disqualification order, the Secretary of State may, if it appears to him that the conditions regarding the court's duty to disqualify unfit directors of insolvent companies⁹ are satisfied as respects any person who has offered to give him a disqualification undertaking¹⁰, accept the undertaking if it appears to him that it is expedient in the public interest that he should do so¹¹.

1 As to the Secretary of State see PARA 6.

2 The question of expediency in the public interest is a matter for the Secretary of State rather than for the court: *Re Blackspur Group plc, Secretary of State for Trade and Industry v Davies* [1998] 1 WLR 422 at 426, [1998] 1 BCLC 676 at 680, CA, per Lord Woolf MR; *Re Barings plc (No 2), Secretary of State for Trade and Industry v Baker* [1999] 1 All ER 311 at 324 per Jonathan Parker J (affd [1999] 1 All ER 311 at 342, [1999] 1 WLR 1985 at 1989, CA, per Swinton Thomas LJ); *Re Blackspur Group plc (No 3), Secretary of State for Trade and Industry v Davies (No 2)* [2001] EWCA Civ 1595 at [10], [2002] 2 BCLC 263 at [10] per Chadwick LJ (the legislation must be taken to reflect Parliament's view that the Secretary of State is in a much better position than the court to gauge what the public interest requires in relation to the regulation of directors' conduct). However, the court may stay disqualification proceedings for abuse of process where to allow the proceedings to continue will bring the administration of justice into disrepute among right-thinking people: *Re Barings plc (No 2), Secretary of State for Trade and Industry v Baker* (no stay merely because a director had successfully resisted disciplinary proceedings from the regulatory authority, as the question to be answered in the different proceedings is materially different); *Re Launchexcept Ltd, Secretary of State for Trade and Industry v Tillman* [2000] 1 BCLC 36, CA (the fact that defendant's conduct as a director of one company and its named subsidiaries had been held not to be blameworthy did not prevent subsequent proceedings in respect of other companies where the issues before the court differed in the respective proceedings).

Where a director is subject to both criminal and civil proceedings, a balance must be struck between allowing a fair criminal trial and protecting the public against unfit directors: *Secretary of State for Trade and Industry v Crane* [2001] 2 BCLC 222 (refusal to stay proceedings pending outcome of possible criminal proceedings not breach of right to fair trial); and see *Secretary of State for Trade and Industry v Carr* [2006] EWHC 2110 (Ch), [2007] 2 BCLC 495 (notwithstanding the respondent's acquittal on criminal charges, the Secretary of State was entitled to bring disqualification proceedings against him under the Company Directors Disqualification Act 1986, because there were significant differences between the two sets of proceedings and their underlying purpose). See also *Re Cedarwood Productions Ltd, Re Inter City Print and Finishing Ltd, Secretary of State for Trade and Industry v Rayna* [2001] 2 BCLC 48 (application to restore proceedings following defendant's conviction not an abuse of process if founded on different basis to criminal proceedings); *Re Denis Hilton Ltd* [2002] 1 BCLC 302 (civil proceedings following criminal proceedings in which disqualification was not dealt with is not an abuse of process). The court has the power to intervene to prevent injustice where the continuation of one set of proceedings might prejudice the fairness of the trial of other proceedings: *Secretary of State for Trade and Industry v Crane*. See also PARA 1607. As to the Convention for the Protection of Human Rights and

Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6 (right to a fair trial) see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134.

3 lie under the Company Directors Disqualification Act 1986 s 6 (see PARA 1592).

4 As to the meaning of 'director' for these purposes see the Company Directors Disqualification Act 1986 s 6(3); and PARA 1592 note 5.

5 Company Directors Disqualification Act 1986 s 7(1) (amended by the Insolvency Act 2000 s 8, Sch 4 Pt I paras 1, 6(a)). As to the meaning of 'official receiver' see PARA 1590 note 13. Where the company is not yet being wound up by the court, the Secretary of State may still direct the official receiver to bring proceedings pursuant to the powers in the Insolvency Act 1986 s 400 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 504); but in such circumstances the proceedings must still be brought in the name of the Secretary of State, not the official receiver: *Re Probe Data Systems Ltd* (1989) 5 BCC 384; *Re NP Engineering and Security Products Ltd* [1995] 2 BCLC 585 (revsd on another point [1998] 1 BCLC 208, CA). Where the applicant relies on the appointment of a receiver, the disqualification proceedings may be stayed to allow the company to challenge the validity of the appointment; but, unless the appointment is set aside in validly constituted proceedings, the applicant may rely on it: *Secretary of State for Trade and Industry v Jabble* [1998] 1 BCLC 598, CA.

6 For these purposes, 'court' has the same meaning as in the Company Directors Disqualification Act 1986 s 6: see s 6(3); and PARA 1592 note 1.

7 Company Directors Disqualification Act 1986 s 7(2). As to the meaning of a company 'becoming insolvent' for these purposes see s 6(2); and PARA 1592 note 7. Where an application is made under s 7(2) to bring proceedings out of time, the test is whether the Secretary of State or the official receiver has shown a good reason for the extension of time: *Re Crestjoy Products Ltd* [1990] BCLC 677, [1990] BCC 23; *Secretary of State for Trade and Industry v McTighe, Re Copecrest Ltd* [1994] 2 BCLC 284, [1997] 2 BCLC 317, CA. The length of the delay, the reasons for the delay, the strength of the case against the director and the degree of prejudice caused by the delay are relevant factors to be taken into account by the court in determining whether to grant leave: *Re Probe Data Systems Ltd (No 3), Secretary of State for Trade and Industry v Desai* [1992] BCLC 405 at 416, [1992] BCC 110 at 118 per Scott LJ; *Secretary of State for Trade and Industry v McTighe, Re Copecrest Ltd; Secretary of State for Trade and Industry v Davies* [1996] 4 All ER 289, CA (the inadequacy of the reasons for the delay by the Secretary of State is merely one of the considerations that has to be taken into account); *Re Stormont Ltd, Secretary of State for Trade and Industry v Cleland* [1997] 1 BCLC 437 (for leave to be granted, the Secretary of State must show as a minimum that there is a fairly arguable case for saying that the respondent's conduct was such as to justify disqualification, and it is legitimate to examine the conduct of the relevant government department prior to the hearing of the application to see whether the department had acted with diligence). The list of factors is not exclusive of all other matters but in most cases it is likely to be so: *Re Polly Peck International plc, Secretary of State for Trade and Industry v Ellis (No 2)* [1994] 1 BCLC 574 at 578, [1993] BCC 890 at 894 per Lindsay J. Where it is sought to bring proceedings against a director of a company not originally joined as respondent, the correct procedure is to issue proceedings separate from the existing proceedings seeking leave to issue proceedings out of time: *Re Westmid Packaging Services Ltd* [1995] BCC 203. See also *Secretary of State for Trade and Industry v Vohora* [2007] EWHC 2656 (Ch), (2007) Times, 10 December (the Company Directors Disqualification Act 1986 s 7(2), being a limitation provision, came within the words 'any other relevant statute' in *Practice Direction--How to Start Proceedings--The Claim Form* PD 7 para 5.1 (see **LIMITATION PERIODS** vol 68 (2008) PARA 920)).

8 *Re Noble Trees Ltd* [1993] BCLC 1185; *Official Receiver v B Ltd* [1994] 2 BCLC 1; *Re Manlon Trading Ltd* [1996] Ch 136, [1995] 1 BCLC 578, CA. Where there has been a lengthy delay between the start of disqualification proceedings and their conclusion, the court must assess the events to make sure that there had been no contravention of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6 (right to a fair trial: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134): *Re Blackspur Group plc, Secretary of State for Trade and Industry v Eastaway* [2001] 1 BCLC 653 (delay attributable to respondent's attempt to avoid hearing). See also *EDC v United Kingdom* [1998] BCC 370, ECtHR (failure to proceed within reasonable time). Before a claim is struck out on the grounds of delay, some prejudice arising from the delay must be shown: *R v Abermeadow Ltd* [2000] 2 BCLC 824 (delay had no effect on ability of witnesses to give evidence).

9 lie the conditions mentioned in the Company Directors Disqualification Act 1986 s 6(1) (see PARA 1592).

10 As to disqualification undertakings see PARA 1579.

11 Company Directors Disqualification Act 1986 s 7(2A) (added by the Insolvency Act 2000 s 6(1), (3)). See also note 2. The Secretary of State's discretion under the Company Directors Disqualification Act 1986 s 7(2A) is unfettered and he is entitled to decide that it would be inexpedient in the public interest to accept an undertaking without a schedule of unfit conduct: *Re Blackspur Group plc, Secretary of State for Trade and Industry v Davies* [2001] EWCA Civ 1595, [2002] 2 BCLC 263.

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1600. Application on grounds of unfitness or following investigation into company's affairs.

The rules governing proceedings¹ apply to an application made under the Company Directors Disqualification Act 1986²:

- 1035 (1) for leave to commence proceedings for a disqualification order after the end of the two-year period³;
- 1036 (2) to enforce any duty⁴ to furnish the current or former liquidator⁵, administrator⁶ or administrative receiver⁷ of a company with information with respect to any person's conduct as a director of the company or to produce and permit inspection of books, papers and other records relevant to that person's conduct as a director;
- 1037 (3) for a disqualification order where made: (a) by the Secretary of State⁸ or the official receiver⁹ in relation to the disqualification of unfit directors of insolvent companies¹⁰; (b) by the Secretary of State in relation to disqualification after investigation of a company¹¹; or (c) a competition disqualification order¹² made by the Office of Fair Trading¹³ or a specified regulator¹⁴;
- 1038 (4) for the variation of a disqualification undertaking¹⁵; or
- 1039 (5) for leave to act under certain specified provisions of the Company Directors Disqualification Act 1986¹⁶.

Any such application must be made by claim form or application notice¹⁷.

1 Ie the provisions described in PARA 1603 et seq. Those provisions apply to an application made under the Company Directors Disqualification Act 1986 on or after 6 August 2007: Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 1(3) (substituted by SI 2007/1906). Any application made before 6 August 2007 is governed by the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, as originally enacted: Insolvent Companies (Disqualification of Unfit Directors) Proceedings (Amendment) Rules 2007, SI 2007/1906, r 1(3). Any applications made before 11 January 1988 are governed by the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1986, SI 1986/612 (revoked): see the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 11(2).

Rules 3 to 8 only apply to the types of application referred to in r 1(3)(c) (see head (3) in the text): r 2A (added by SI 2007/1906).

2 See PARA 1578. The provisions of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 1(3) extend to applications by disqualified directors for leave to continue to act as a director (see PARA 1611) since leave is part and parcel of the disqualification process: *Re Britannia Homes Centres Ltd, Official Receiver v McCahill* [2001] 2 BCLC 63.

3 Ie the period mentioned in the Company Directors Disqualification Act 1986 s 7(2) (see PARA 1599).

4 Ie any duty arising under the Company Directors Disqualification Act 1986 s 7(4) (see PARA 1598).

5 As to liquidators generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 555 et seq.

- 6 As to administration orders see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 146 et seq.
- 7 As to the meaning of 'administrative receiver' see PARA 1596 note 4.
- 8 As to the Secretary of State see PARA 6.
- 9 As to the meaning of 'official receiver' see PARA 1590 note 13.
- 10 le under the Company Directors Disqualification Act 1986 s 7(1) (see PARA 1599).
- 11 le under the Company Directors Disqualification Act 1986 s 8 (see PARA 1584).
- 12 le under the Company Directors Disqualification Act 1986 s 9A (see PARA 1585).
- 13 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARAS 6-8.
- 14 As to specified regulators for the purpose of breaches of competition law see PARA 1585 note 11.
- 15 le under the Company Directors Disqualification Act 1986 s 8A (see PARA 1579).
- 16 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 1(3) (substituted by SI 2007/1906). Head (5) in the text refers to leave to act under the Company Directors Disqualification Act 1986 s 1A(1) (see PARA 1579) or s 9B(4) (see PARA 1586), or under s 1 (see PARA 1578) or s 17 (see PARA 1611), as those sections apply for the purposes of s 6 (see PARA 1592), s 7(1) (see PARA 1599), s 8 (see PARA 1584), s 9A (see PARA 1585) or s 10 (see PARA 1589): see the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 1(3) (as so substituted). As to applications for leave under the Company Directors Disqualification Act 1986 see s 17; and PARA 1611. See also note 1.
- 17 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 2(2) (substituted by SI 2007/1906). The application must be made by the claim form provided by the relevant practice direction (ie *Practice Direction--Directors Disqualification Proceedings*) and the claimant must use the alternative procedure for starting claims (ie CPR Pt 8: see **CIVIL PROCEDURE** vol 11 (2009) PARA 127 et seq) or the application must be made by application notice as provided for by the relevant practice direction: Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 2(2) (as so substituted). The Civil Procedure Rules ('CPR') 1998, SI 1998/3132, and any relevant practice direction, apply in respect of any application to which the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, apply, except where those rules make provision to inconsistent effect: r 2(1) (substituted by SI 1999/1023). CPR 8.1(3) (power of court to order claim to continue as if claimant had not used CPR Pt 8: see **CIVIL PROCEDURE** vol 11 (2009) PARA 127), CPR 8.2 (contents of the claim form: see **CIVIL PROCEDURE** vol 11 (2009) PARA 128) and CPR 8.7 (CPR Pt 20 claims: see **CIVIL PROCEDURE** vol 11 (2009) PARA 134) do not apply, but the Insolvency Rules 1986, SI 1986/1925, rr 7.47, 7.49 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1030-1031) do apply: Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, rr 2(3), (4) (substituted by SI 1999/1023).

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1601. Notice of intention to apply for disqualification order.

A person intending to apply for the making of a disqualification order¹ by the court having jurisdiction to wind up a company² must give not less than ten days' notice of his intention to the person against whom the order is sought³; and on the hearing of the application the last-mentioned person may appear and himself give evidence or call witnesses⁴. On the hearing of any application⁵ made by the Secretary of State⁶ or the official receiver⁷ or the Office of Fair Trading⁸ or the liquidator⁹ or a specified regulator¹⁰, the applicant must appear and call the attention of the court to any matters which seem to him to be relevant, and may himself give evidence or call witnesses¹¹.

1 See PARA 1578.

2 See PARA 1578 note 1.

3 Failure to give proper notice is a procedural irregularity only which does not on its own invalidate the application: *Secretary of State for Trade and Industry v Langridge* [1991] Ch 402, [1991] 3 All ER 591, CA. However, taken with other factors, shortness of notice may be borne in mind by the court in determining whether the procedure adopted by the Secretary of State as a whole has been unfair to the director and an abuse of process: *Secretary of State for Trade and Industry v Swan* [2003] EWHC 1780 (Ch), (2003) Times, 18 August, [2003] All ER (D) 372 (Jul) (director suffered harm because lack of notice prevented him from responding to irrelevant evidence relied upon by the Secretary of State but an appropriate remedy would focus on the evidence rather than on the proceedings themselves). See also *Re Uno plc and World of Leather plc*, *Secretary of State for Trade and Industry v Gill* [2004] EWHC 933 (Ch) at [166]-[171], [2006] BCC 725 at [166]-[171], obiter, per Blackburne J (in a matter as grave to the professional reputation of a person as the prospect of a disqualification order, the courtesy of an interview or, at the very least, some kind of early warning of what is afoot should be afforded to the director in question if only to enable the director to take steps to preserve any relevant material and keep alive in his memory his recollection of relevant events); and *Re Finelist Group Ltd*, *Secretary of State for Trade and Industry v Swan (No 2)* [2005] EWHC 603 (Ch), [2005] BCC 596, [2005] All ER (D) 105 (Apr) (it was unacceptable for serious allegations, involving the finance director of a listed company, to be disposed of in a meeting lasting only 30 to 40 minutes, without any of steps having been taken beforehand in relation to information received).

Where the court can of its own motion make a disqualification order, there is no statutory requirement of notice, though the rules of natural justice require that a person should be given some notice that the court is contemplating making a disqualification order: *Secretary of State for Trade and Industry v Langridge* at 414 and 598 per Balcombe LJ.

4 Company Directors Disqualification Act 1986 s 16(1).

5 I.e. under the Company Directors Disqualification Act 1986.

6 As to the Secretary of State see PARA 6.

7 As to the meaning of 'official receiver' see PARA 1590 note 13.

8 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARAS 6-8.

9 As to liquidators generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 555 et seq.

10 I.e. within the meaning of the Company Directors Disqualification Act 1986 s 9E (breach of competition law) (see PARA 1585 note 11).

11 Company Directors Disqualification Act 1986 s 16(3), (4) (s 16(3) amended, and s 16(4) added, by the Enterprise Act 2002 s 204(1), (6), (7)).

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1602. Persons entitled to apply on grounds of general misconduct in connection with companies.

An application to a court with jurisdiction to wind up companies for the making of a disqualification order¹ against any person on the grounds that that person has been convicted of an indictable offence², has been in persistent breach of companies legislation³, or has been guilty of fraud in the winding up⁴, may be made by the Secretary of State⁵ or the official receiver⁶ or the liquidator⁷ or any past or present member⁸ or creditor⁹ of any company in

relation to which that person has committed or is alleged to have committed an offence or other default¹⁰.

1 See PARA 1578.

2 le under the Company Directors Disqualification Act 1986 s 2 (see PARA 1580).

3 le under the Company Directors Disqualification Act 1986 s 3 (see PARA 1581).

4 le under the Company Directors Disqualification Act 1986 s 4 (see PARA 1582).

5 As to the Secretary of State see PARA 6.

6 As to the meaning of 'official receiver' see PARA 1590 note 13.

7 As to liquidators generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 555 et seq.

8 As to who qualifies as a member of a company see PARA 321.

9 As to the meaning of 'creditor' see PARA 1427.

10 Company Directors Disqualification Act 1986 s 16(2) (amended by the Insolvency Act 2000 s 8, Sch 4 Pt I paras 1, 11). As to the mode of application and the procedure see PARA 1601.

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1603. The case against the defendant.

There must, at the time when the claim form¹ is issued, be filed in court² evidence in support of the application for a disqualification order³; and copies of the evidence must be served with the claim form on the defendant⁴.

The evidence must be by one or more affidavits, except where the claimant is the official receiver⁵, in which case it may be in the form of a written report, with or without affidavits by other persons, which is treated as if it had been verified by affidavit by him and is prima facie evidence of any matter contained in it⁶.

There must in the affidavit or affidavits or, as the case may be, the official receiver's report, be included a statement of the matters by reference to which the defendant is alleged to be unfit⁷ to be concerned in the management of a company⁸.

1 See PARA 1600.

2 For these purposes, 'file in court' means deliver to the court for filing: Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 1(2)(f) (substituted by SI 1999/1023).

3 See PARA 1578.

4 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 3(1) (amended by SI 1999/1023). The Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 3 applies only to applications for disqualification orders (see r 1(2)(c); and PARA 1600 head (3)); r 2A (added by SI 2007/1906). Non-compliance with the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 3(1) is a mere irregularity; non-compliance does not nullify the proceedings and the court has power to waive any irregularity: *Secretary of State for Trade and Industry v*

McTighe [1994] 2 BCLC 284 at 287, CA, per Hoffmann LJ; *Re Jazzgold Ltd* [1994] 1 BCLC 38 at 42 per Micklethorp J. A defendant may apply to strike out the claim and, on the hearing of the application for striking out, the court may consider further evidence filed by the applicant: *Re Jazzgold Ltd*.

5 As to the meaning of 'official receiver' see PARA 1590 note 13.

6 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 3(2) (amended by SI 1999/1023). The report may be made by a deputy official receiver: *Re Homes Assured Corp plc, Official Receiver v Dobson* [1994] 2 BCLC 71. Exhibits and annexures are also treated as prima facie evidence: *Re City Investment Centres Ltd* [1992] BCLC 956; *Re Moonbeam Cards Ltd* [1993] BCLC 1099. Statements obtained under the Companies Act 1985 s 447 (see PARA 1558) are admissible even though hearsay; this affects weight but not admissibility: *Re Rex Williams Leisure plc (in administration)* [1994] Ch 350, [1994] 4 All ER 27, CA; *Secretary of State for Trade and Industry v Ashcroft* [1998] Ch 71, [1997] 3 All ER 86, CA (no discernible distinction between an application for a disqualification order by the Secretary of State based on information gathered for him by his own officials and one based on information supplied to him by an 'office-holder'). See also *Secretary of State for Trade and Industry v Baker (No 2)*, *Re Barings plc (in administration) (No 2)* [1998] 1 BCLC 590 (the Secretary of State is entitled to put before the court all the information upon which his decision to commence proceedings is based regardless of whether such information may be in whole or in part hearsay or double hearsay). Although the judge has a residual discretion to refuse to receive an administrator's affidavit containing evidence, the inability of an administrator to attend for cross-examination does not exclude the affidavit and the judge is not entitled to disregard the availability of an alternative suitable witness: *Secretary of State for Trade and Industry v Moffatt* [1996] 2 BCLC 16.

7 See PARAS 1584, 1592-1593.

8 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 3(3) (amended by SI 1999/1023).

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1604. Indorsement on claim form.

On the issue of the claim form¹, the following information to the defendant must be indorsed on it²:

- 1040 (1) that the application is made in accordance with the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987³;
- 1041 (2) the periods of disqualification which, in accordance with the relevant enactments, the court has power to impose⁴;
- 1042 (3) that the application for a disqualification order may⁵ be heard and determined summarily, without further or other notice to the defendant, and that, if it is so heard and determined, the court may impose disqualification for a period of up to five years⁶;
- 1043 (4) that if at the hearing of the application the court, on the evidence then before it, is minded to impose, in the defendant's case, disqualification for any period longer than five years, it will not make a disqualification order on that occasion but will adjourn the application to be heard, with further evidence, if any, at a later date to be notified⁷; and
- 1044 (5) that any evidence which the defendant wishes to be taken into consideration by the court must be filed in court⁸ in accordance with the time limits⁹ for the filing in court of evidence¹⁰.

¹ See PARA 1600.

2 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 4 (amended by SI 1999/1023). The Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 4 applies only to applications for disqualification orders (see r 1(2)(c); and PARA 1600 head (3)): r 2A (added by SI 2007/1906).

3 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 4(a).

4 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 4(b). The court has power to impose disqualifications as follows: (1) where the application is made under the Company Directors Disqualification Act 1986 s 7 (see PARAS 1598-1599), for a period of not less than two, and up to 15, years; and (2) where the application is under s 8 (see PARA 1584) or s 9A (see PARA 1585), for a period of up to 15 years: Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 4(b) (amended by SI 2003/1367).

5 le in accordance with the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023.

6 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 4(c) (amended by SI 1999/1023).

7 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 4(d) (amended by SI 1999/1023).

8 As to the meaning of 'file in court' see PARA 1603 note 2.

9 le imposed under the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 6 (see PARA 1606).

10 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 4(e) (amended by SI 1999/1023). The time limits must be set out on the claim form: see the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 4(e) (as so amended).

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1605. Service and acknowledgment of claim form.

The claim form¹ must be served on the defendant by sending it by first class post to his last-known address; and the date of service is, unless the contrary is shown, deemed to be the seventh day next following that on which the claim form was posted².

Where any process or order of the court or other document is required³ to be served on any person who is not in England and Wales⁴, the court may order service on him of that process or order or other document to be effected within such time and in such manner as it thinks fit, and may also require such proof of service as it thinks fit⁵.

The claim form served on the defendant must be accompanied by a form⁶ of acknowledgment of service⁷.

The acknowledgment of service must state that the defendant should indicate⁸:

1045 (1) whether he contests the application on the grounds that, in the case of any particular company⁹:

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419. (a) he was not a director¹⁰ or shadow director¹¹ of the company at a time when conduct of his, or of other persons, in relation to that company is in question¹²; or

420. (b) his conduct as a director or shadow director of that company was not as alleged in support of the application for a disqualification order¹³;

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- 1046 (2) whether, in the case of any conduct of his, he disputes the allegation that it makes him unfit to be concerned in the management of a company¹⁴; and
- 1047 (3) whether he, while not resisting the application for a disqualification order, intends to adduce mitigating factors with a view to justifying only a short period of disqualification¹⁵.

1 See PARA 1600.

2 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 5(1) (amended by SI 1999/1023). The Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 5 applies only to applications for disqualification orders (see r 1(2)(c); and PARA 1600 head (3)); r 2A (added by SI 2007/1906).

3 le under proceedings subject to the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023.

4 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

5 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 5(2).

6 le as provided for by practice direction (see *Practice Direction--Directors Disqualification Proceedings*).

7 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 5(3) (substituted by SI 1999/1023). The provisions of CPR 8.3(2) (contents of an acknowledgment of service: see **CIVIL PROCEDURE** vol 11 (2009) PARA 130) do not apply: Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 5(3) (as so substituted).

8 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 5(4) (amended by SI 1999/1023).

9 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 5(4)(a).

10 As to the meaning of 'director' see PARA 1575.

11 As to the meaning of 'shadow director' see PARA 1576.

12 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 5(4)(a) (i).

13 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 5(4)(a) (ii).

14 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 5(4)(b). See PARAS 1584-1586, 1592-1594.

15 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 5(4)(c).

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1606. Evidence.

The defendant must, within 28 days from the date of service of the claim form¹, file in court² any affidavit evidence in opposition to the application he wishes the court to take into consideration, and must forthwith serve upon the claimant a copy of such evidence³. The claimant must, within 14 days from receiving the copy of the defendant's evidence, file in court

any further evidence in reply he wishes the court to take into consideration and must forthwith serve a copy of that evidence upon the defendant⁴. A defendant has no right to disclosure from the claimant where the claimant is the Secretary of State⁵ or the official receiver⁶ where he is not also the liquidator⁷, but he does have such a right where the claimant is the official receiver who is also the liquidator⁸.

1 See PARA 1600.

2 As to the meaning of 'file in court' see PARA 1603 note 2.

3 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 6(1) (amended by SI 1999/1023). The Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 6 applies only to applications for disqualification orders (see r 1(2)(c); and PARA 1600 head (3)): r 2A (added by SI 2007/1906). The provisions of CPR 8.5 (filing and serving written evidence: see **CIVIL PROCEDURE** vol 11 (2009) PARA 132) and CPR 8.6(1) (evidence under CPR Pt 8: see **CIVIL PROCEDURE** vol 11 (2009) PARA 133) do not apply to the requirements of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 6: r 6(3) (added by SI 1999/1023). A defendant does not have the option of omitting to file affidavit evidence and giving evidence orally at the trial: *Re Rex Williams Leisure plc (in administration)* [1994] Ch 350, [1994] 4 All ER 27, CA. If an applicant were able to satisfy the court that a requirement to file his evidence in disqualification proceedings before the start of a criminal trial would materially prejudice the preparation of his defence or carry a real risk of doing so, it would be oppressive and unfair to require him to file his evidence at that stage, as there was an overriding interest in the fair trial of criminal charges: see *Re TransTec plc, Secretary of State for Trade and Industry v Carr* [2005] EWHC 1723 (Ch), [2007] 1 BCLC 93.

4 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 6(2) (amended by SI 1999/1023).

5 See, however, *Re Astra Holdings plc, Secretary of State for Trade and Industry v Anderson* [1998] 2 BCLC 44 (letter from inspectors appointed by the Secretary of State expressing the view that the defendant ought not to be disqualified held to be clearly relevant and disclosable). As to the Secretary of State see PARA 6.

6 As to the meaning of 'official receiver' see PARA 1590 note 13.

7 As to liquidators generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 555 et seq.

8 *Re Lombard Shipping and Forwarding Ltd* [1993] BCLC 238. In practice a defendant will normally receive full disclosure of relevant documents whoever has made the application. See *Re Barings plc, Secretary of State for Trade and Industry v Baker* [1998] Ch 356, [1998] 1 All ER 673. An order for disclosure may be made under CPR 31.17 (court's powers to order disclosure: see **CIVIL PROCEDURE** vol 11 (2009) PARA 550) where the claimant has demonstrated that the documents sought are relevant to the allegations faced: *Re Skyward Builders plc* [2002] EWHC 1788 (Ch), [2002] 2 BCLC 750 (disqualified director's fraudulent conduct might be a defence to the allegations facing the defendant and communications conducted largely between the disqualified director and a firm of accountants might help to explain a number of features).

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1607. Admissibility in evidence of statements.

In any proceedings, whether or not under the Company Directors Disqualification Act 1986, any statement made in pursuance of a requirement imposed by or under the provisions of that Act¹, or by or under rules made for the purposes of that Act under the Insolvency Act 1986², may be used in evidence against any person making or concurring in making that statement³.

However, in criminal proceedings in which any such person is charged with an offence⁴, no evidence relating to the statement may be adduced and no question relating to it may be

asked, by or on behalf of the prosecution⁵, unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person⁶.

1 le the Company Directors Disqualification Act 1986 s 6 (see PARA 1592), s 7 (see PARAS 1596, 1598-1599), s 8 (see PARA 1584), s 9 (see PARAS 1593-1594), s 10 (see PARA 1589), s 15 (see PARA 1616), s 19(c) (which relates to precluding any applications for a disqualification order under s 6 or s 8 where the relevant company went into liquidation before 28 April 1986: see PARAS 1584, 1592), and Sch 1 (see PARAS 1593-1594).

2 See the Insolvency Act 1986 s 411; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1041 et seq. Evidence obtained by the official receiver by legal compulsion under the Insolvency Act 1986 s 235 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 678) is admissible in disqualification proceedings: *Official Receiver v Stern* [2001] 1 All ER 633, [2000] 1 WLR 2230, CA. See also PARAS 1594, 1598.

3 Company Directors Disqualification Act 1986 s 20(1) (renumbered by the Youth Justice and Criminal Evidence Act 1999 s 59, Sch 3 para 8(1), (2); amended by SI 2009/1941). But see *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321, [2004] Ch 1, [2003] 1 BCLC 696 (factual findings and conclusions of the judge in wrongful dismissal proceedings were not admissible in disqualification proceedings as evidence of the facts so found).

4 le an offence to which the Company Directors Disqualification Act 1986 s 20 applies, being any offence other than: (1) an offence which is created by rules made under the Insolvency Act 1986 for the purposes of the Company Directors Disqualification Act 1986, and designated for the purposes of s 20(3) by such rules or by regulations made by the Secretary of State; (2) an offence which is created by regulations made under any such rules, and designated for the purposes of s 20(3) by such regulations; or (3) an offence under the Perjury Act 1911 s 5 (false statements made on oath otherwise than in judicial proceedings or made otherwise than on oath: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARAS 716-717); Company Directors Disqualification Act 1986 s 20(3) (added by the Youth Justice and Criminal Evidence Act 1999 Sch 3 para 8(1), (3); amended by SI 2009/1941). Regulations under head (1) must be made by statutory instrument and, after being made, must be laid before each House of Parliament: Company Directors Disqualification Act 1986 s 20(4) (added by the Youth Justice and Criminal Evidence Act 1999 Sch 3 para 8(1), (3)).

5 Although the Company Directors Disqualification Act 1986 s 20(2) precludes only the use of statements made in disqualification proceedings 'by or on behalf of the prosecution', the responsibility for doing justice in criminal proceedings lies primarily with the criminal court: *Secretary of State for Trade and Industry v Crane* [2001] 2 BCLC 222.

6 Company Directors Disqualification Act 1986 s 20(2) (added by the Youth Justice and Criminal Evidence Act 1999 Sch 3 para 8(1), (3)). The amendment was made to this provision as a consequence of the decision in *Saunders v United Kingdom (Application 19187/91)* (1996) 23 EHRR 313, ECtHR (evidence disclosed by applicant when questioned under compulsory powers not admissible in criminal proceedings). However, the prohibition on the use of such evidence does not extend to disqualification proceedings: *EDC v United Kingdom (Application 24433/94)* [1998] BCC 370, EComHR; *R v Secretary of State for Trade and Industry, ex p McCormick* [1998] BCC 379; *DC, HS and AD v United Kingdom (Application 39031/97)* [2000] BCC 710, ECtHR. The issue of whether the conduct of disqualification proceedings has infringed a director's right to a fair trial as it is guaranteed under the Human Rights Act 1998 must be considered by the trial judge on the basis of all relevant factors including the degrees of coercion involved: *R v Secretary of State for Trade and Industry, ex p McCormick*; *WGS and MSLs v United Kingdom (Application 38172/97)* [2000] BCC 719, ECtHR; *Official Receiver v Stern* [2001] 1 All ER 633, [2000] 1 WLR 2230, CA. As to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6 (right to a fair trial), which is incorporated into English law by the Human Rights Act 1998, see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134. There is nothing in the general law or in the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6 which makes it objectionable for a prosecuting authority to obtain helpful ideas from what was said in other proceedings concerning the same subject matter: *Secretary of State for Trade and Industry v Crane* [2001] 2 BCLC 222. As to the admissibility of evidence in other proceedings see PARAS 1544, 1558, 1569.

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1608. Hearing of application; making and setting aside of disqualification orders.

Where a claim form is issued¹, the date fixed by the court for the first hearing of the claim must be not less than eight weeks from the date of issue of the claim form². The hearing must in the first instance be before the registrar³ in open court⁴; and the registrar must either determine the case on the date fixed or adjourn it⁵. The registrar must adjourn the case for further consideration⁶ if:

- 1048 (1) he forms the provisional opinion that a disqualification order ought to be made, and that a period of disqualification longer than five years is appropriate⁷; or
- 1049 (2) he is of the opinion that questions of law or fact arise which are not suitable for summary determination⁸.

If the registrar adjourns the case for further consideration, he must⁹:

- 1050 (a) direct whether the case is to be heard by a registrar, or, if he thinks it appropriate, by a judge, for determination by him¹⁰;
 - 1051 (b) state the reasons for the adjournment¹¹; and
 - 1052 (c) give directions as to the following matters¹²:
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- 421. (i) the manner in which and the time within which notice of the adjournment and the reasons for it are to be given to the defendant¹³;
 - 422. (ii) the filing in court and the service of further evidence, if any, by the parties¹⁴;
 - 423. (iii) such other matters as the registrar thinks necessary or expedient with a view to an expeditious disposal of the application¹⁵; and
 - 424. (iv) the time and place of the adjourned hearing¹⁶.
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Where a case is adjourned other than to a judge, it may be heard by the registrar who originally dealt with the case or by another registrar¹⁷.

In all disqualification applications, the court may direct a pre-trial review, a case management conference or pre-trial checklists¹⁸ and will fix a trial date or trial period¹⁹.

The court may make a disqualification order against the defendant, whether or not the latter appears, and whether or not he has completed and returned the acknowledgment of service of the claim form²⁰, or filed²¹ evidence²²; any disqualification order made in the absence of the defendant may be set aside or varied by the court on such terms as it thinks just²³.

Official receivers and deputy official receivers have right of audience in any proceedings to which the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987 apply, whether the application is made by the Secretary of State²⁴ or by the official receiver²⁵ at his direction, and whether made in the High Court or a county court²⁶.

No specific provision is made for appeals from disqualification orders, but it has been held that the provisions relating to appeals in winding-up proceedings apply to proceedings under the Company Directors Disqualification Act 1986²⁷.

The costs of disqualification proceedings are in the discretion of the court, but the usual rules on costs will apply, so that the claimant will normally be liable to pay the costs of an unsuccessful application or if proceedings are discontinued, and the defendant will pay the costs on the standard basis if the application is successful²⁸.

Although on an application for a disqualification order it is not permissible for the parties merely to seek a consent order, the court has jurisdiction to deal with an application for a

disqualification order by a summary procedure where the court is satisfied that the undisputed evidence is sufficient to establish unfitness, and that the potential impact of disputed evidence would not substantially affect the seriousness of that unfitness²⁹.

1 See PARA 1600.

2 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 7(1) (substituted by SI 1999/1023). The Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 7 applies only to applications for disqualification orders (see r 1(2)(c); and PARA 1600 head (3)): r 2A (added by SI 2007/1906).

3 For these purposes, 'registrar' has the same meaning as in the Insolvency Rules 1986, SI 1986/1925, r 13.2(4), (5) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1055): Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 1(2)(e) (substituted by SI 1999/1023).

4 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 7(2). All evidence should be filed before the first hearing of the disqualification application: *Practice Direction--Directors Disqualification Proceedings* para 9.8. Prior to the first hearing of the disqualification application, the time for serving evidence may be extended by written agreement between the parties: *Practice Direction--Directors Disqualification Proceedings* para 9.7. After the first hearing, the extension of time for serving evidence is governed by CPR 2.11 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 248) and CPR 29.5 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 297): *Practice Direction--Directors Disqualification Proceedings* para 9.7.

5 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 7(3).

6 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 7(4).

7 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 7(4)(a).

8 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 7(4)(b).

9 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 7(5).

10 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 7(5)(a). An application which is likely to be long and complex and to engage the public interest in its outcome should be heard by a judge unless, in the interests of justice, it is preferable that it is heard sooner before a registrar: *Lewis v Secretary of State for Trade and Industry* [2001] 2 BCLC 597. The registrar's direction as to whether the matter should be heard by a judge or a registrar may at any time be varied by the court either on application or of its own initiative; if the direction is varied in the absence of any the parties, notice will be given to the parties: *Practice Direction--Directors Disqualification Proceedings* para 10.6(1).

11 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 7(5)(b).

12 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 7(5)(c). All interim directions should in so far as possible be sought at the first hearing of the disqualification application so that the disqualification application can be determined at the earliest possible date; and the parties should take all such steps as they respectively can to avoid successive directions hearings: *Practice Direction--Directors Disqualification Proceedings* para 10.4.

13 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 7(5)(c) (i) (amended by SI 1999/1023).

14 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 7(5)(c) (ii).

15 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 7(5)(c) (iii).

16 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 7(5)(c) (iv).

17 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 7(6). Where a hearing is partly heard and then adjourned for a year, a registrar would be expected to have sufficient recollection of the witnesses and evidence heard before the adjournment to be able fairly to balance that evidence against the evidence presented on the resumption of the hearing, such that the fairness of the trial

would not be affected: *Re Rocksteady Services Ltd, Secretary of State for Trade and Industry v Staton* [2001] 1 BCLC 84.

18 See the listing questionnaire in the form annexed to *Practice Direction--Directors Disqualification Proceedings*.

19 *Practice Direction--Directors Disqualification Proceedings* para 11.4. The trial date or period is fixed in accordance with CPR Pt 29 (the 'multi-track': see **CIVIL PROCEDURE** vol 11 (2009) PARA 293 et seq).

20 See PARA 1605.

21 In accordance with the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 6 (see PARA 1606).

22 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 8(1) (amended by SI 1999/1023). The Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 8 applies only to applications for disqualification orders (see r 1(2)(c); and PARA 1600 head (3)); r 2A (added by SI 2007/1906).

23 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 8(2) (amended by SI 1999/1023).

24 As to the Secretary of State see PARA 6.

25 As to the meaning of 'official receiver' see PARA 1590 note 13.

26 Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, r 10.

27 *Re Tasbian Ltd (No 2)* [1991] BCLC 59, [1990] BCC 322, CA; *Re Probe Data Systems Ltd (No 3), Secretary of State for Trade and Industry v Desai* [1992] BCLC 405, CA; *Secretary of State for Trade and Industry v Langley* [1993] BCLC 1340. As to the basis on which the appellate court will interfere with the decision of the trial court see *Grayan Building Services Ltd (in liquidation)* [1995] Ch 241, sub nom *Secretary of State for Trade and Industry v Gray* [1995] 1 BCLC 276, CA.

28 *Re Southbourne Sheet Metal Co Ltd* [1993] 1 WLR 244, [1993] BCLC 135, CA; *Re Godwin Warren Control Systems plc* [1993] BCLC 80; *Secretary of State for Trade and Industry v Worth* [1994] 2 BCLC 113, CA; *Secretary of State for Trade and Industry v Blake* [1997] 1 BCLC 728; *Re Sykes (Butchers) Ltd (in liquidation)*, *Secretary of State for Trade and Industry v Richardson* [1998] 1 BCLC 110; *Re Tech Textiles Ltd, Secretary of State for Trade and Industry v Vane* [1998] 1 BCLC 259. As to the costs of an application for leave under the Company Directors Disqualification Act 1986 s 17 (see PARA 1611) see *Secretary of State for Trade and Industry v Worth, Secretary of State for Trade and Industry v Collins* [2000] 2 BCLC 223, CA.

29 This summary procedure derives from *Re Carecraft Construction Co Ltd* [1993] 4 All ER 499, [1994] 1 WLR 172, but it has been superseded by the provision of disqualification undertakings which may be accepted by the Secretary of State without the need for court proceedings (see PARA 1579).

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1609. Proceedings are civil not criminal.

Director disqualification proceedings are civil regulatory proceedings and not criminal proceedings¹. The burden of proof is upon the Secretary of State to establish that the requirements of the Company Directors Disqualification Act 1986 are satisfied; and the appropriate standard of proof upon the Secretary of State to establish those requirements is the balance of probabilities, notwithstanding the serious consequences of a disqualification order². However, the cogency of the evidence required to discharge the burden of proof to the requisite standard must be such as reflects the seriousness of the allegations and of the consequence³.

1 *Official Receiver v Stern* [2001] 1 All ER 633, [2000] 1 WLR 2230, CA. As to the bringing of disqualification proceedings and their conduct see PARA 1592 et seq.

2 *Re Living Images Ltd* [1996] 1 BCLC 348; *Re Verby Print for Advertising Ltd, Fine v Secretary of State for Trade and Industry* [1998] 2 BCLC 23. In the absence of dishonesty, the burden is on the Secretary of State to satisfy the court that the conduct complained of is incompetence of a high degree: *Re Barings plc (No 5)*, *Secretary of State for Trade and Industry v Baker (No 5)* [1999] 1 BCLC 433; affd [2000] 1 BCLC 523, CA. As to the admissibility of evidence in disqualification proceedings see PARA 1607. As to the Secretary of State see PARA 6.

3 See *Secretary of State for Trade and Industry v Hollier* [2006] EWHC 1804 (Ch) at [83], [2006] All ER (D) 232 (Jul) at [83] per Etherton J.

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(iv) Effect of Disqualification Order or Disqualification Undertaking; Consequences of Contravention

1610. Period of disqualification.

The fixing of the period of disqualification¹ is little different from any other sentencing exercise². The period of disqualification has been categorised in the follow manner:

- 1053 (1) the top bracket of disqualification for periods of ten to 15 years, is reserved for particularly serious cases, such as where a director had previously been disqualified³;
- 1054 (2) the middle bracket of six to ten years, is reserved for serious cases which do not merit the top bracket⁴; and
- 1055 (3) the bottom bracket of two to five years is applied where, although disqualification is mandatory, the conduct complained of is relatively not very serious⁵.

In determining the appropriate period of disqualification, the court should start with an assessment of the correct period to fit the gravity of the offence, bearing in mind that the period of disqualification has to contain deterrent elements, and then allow for mitigating factors, such factors not being restricted to the facts of the offence⁶.

1 Ie under the Company Directors Disqualification Act 1986 s 6 (see PARA 1592). As to the period of disqualification to be imposed see also PARA 1578 note 2.

2 *Re Westmid Packing Services Ltd, Secretary of State for Trade and Industry v Griffiths* [1998] 2 All ER 124, [1998] 2 BCLC 646. See also *Re Sykes (Butchers) Ltd (in liquidation)*, *R v Secretary of State for Trade and Industry v Richardson* [1998] 1 BCLC 110; and see the text and note 6.

3 See eg *Official Receiver v Stern* [2001] EWCA Civ 1787, [2002] 1 BCLC 119.

4 See eg *Re JA Chapman & Co Ltd, Secretary of State for Trade and Industry v Amiss* [2003] EWHC 532 (Ch), [2003] 2 BCLC 206.

5 *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164 at 174, [1991] 3 All ER 578 at 581, CA, per Dillon LJ. These principles were followed in *Secretary of State for Trade and Industry v Hollier* [2006] EWHC 1804 (Ch), [2006] All ER (D) 232 (Jul) (see at [58] per Etherton J) and the tendency has been to apply them to all disqualification orders (see eg *R v Youell* [2007] EWCA Crim 225, [2007] 2 Cr App Rep (S) 274, considering a period of disqualification for 10 years under the Company Directors Disqualification Act 1986 s 2 (disqualification on conviction of indictable offence) (see PARA 1580)).

6 *Re Westmid Packing Services Ltd, Secretary of State for Trade and Industry v Griffiths* [1998] 2 All ER 124, [1998] 2 BCLC 646, CA (relevant matters included the director's general reputation and conduct in discharge of the office of director, his age and state of health, the length of time he had been in jeopardy, whether he had admitted the offence, his general conduct before and after the offence and periods of disqualification of any co-directors that might have been ordered by other courts). See also *Re Bradcrown Ltd, Official Receiver v Ireland* [2001] 1 BCLC 547 (reliance on professional advisers rejected as a mitigating factor); *Secretary of State for Trade and Industry v Reynard* [2002] EWCA Civ 497, [2002] 2 BCLC 625 (cited in PARA 1592 note 9). The likelihood of granting an application under the Company Directors Disqualification Act 1986 s 17 (see PARA 1611) is irrelevant to the determination of the period of disqualification and the fact that the court is minded to grant such leave is no reason for deciding to impose the minimum period of disqualification: *Re Westmid Packing Services Ltd, Secretary of State for Trade and Industry v Griffiths*. An appellate court may adjust a period of disqualification which has been imposed where it is satisfied that the period is too great to a significant extent or where appropriate factors were not or could not have been taken into account: *Re Deaduck Ltd (in liquidation), Baker v Secretary of State for Trade and Industry* [2000] 1 BCLC 148, [1999] All ER (D) 562. See also *Re Verby Print for Advertising Ltd, Fine v Secretary of State for Trade and Industry* [1998] 2 BCLC 23 (period of disqualification reduced to the minimum); *Re Migration Services International, Official Receiver v Webster* [2000] 1 BCLC 666 (judge had wrongly equated the position of two directors so one director had his period of disqualification reduced to the middle bracket from the upper bracket).

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1611. Application for leave under a disqualification order or disqualification undertaking.

As regards the court to which application must be made for leave under a disqualification order¹:

- 1056 (1) where a person is subject to a disqualification order made by a court having jurisdiction to wind up companies, any application for leave under that order² must be made to that court³; and
- 1057 (2) where a person is subject to a disqualification order made on conviction of an indictable offence⁴ by a court other than a court having jurisdiction to wind up companies, or a person is subject to a disqualification order made on summary conviction⁵, any application for leave⁶ must be made to any court which, when the order was made, had jurisdiction to wind up the company (or, if there is more than one such company, any of the companies) to which the offence (or any of the offences) in question related⁷.

As regards the court to which application must be made for leave under a disqualification undertaking⁸:

- 1058 (a) where a person is subject to a disqualification undertaking accepted at any time⁹, any application for leave¹⁰ must be made to any court to which, if the Secretary of State¹¹ had applied for a disqualification order at that time, his application could have been made¹²; and

- 1059 (b) where a person is subject to a disqualification undertaking accepted at any time under the Company Directors Disqualification Act 1986 in relation to breaches of competition law¹³, any application for leave allowed under those provisions¹⁴ must be made to the High Court¹⁵; but
- 1060 (c) where a person is subject to two or more disqualification orders or undertakings (or to one or more disqualification orders and to one or more disqualification undertakings) any application for leave¹⁶ must be made to any court to which any such application relating to the latest order to be made, or undertaking to be accepted, could be made¹⁷.

On the hearing of an application for leave¹⁸, the Secretary of State must appear and call the attention of the court to any matters which seem to him to be relevant, and may himself give evidence or call witnesses¹⁹. However, where the application for leave pertains to a disqualification order made in relation to breaches of competition law²⁰, and also where an application for leave is made by a person seeking to disapply one of the statutory prohibitions²¹, on the hearing of the application whichever of the Office of Fair Trading²² or a specified regulator²³ applied for the order or accepted the undertaking (as the case may be) must appear and draw the attention of the court to any matters which appear to it or him (as the case may be) to be relevant and may give evidence or call witnesses²⁴.

It is desirable that, if proceedings to disqualify a director are outstanding, and the director wishes to apply for leave to continue as a director notwithstanding any disqualification order, that application should be heard at the same time as the disqualification proceedings²⁵. Leave will be granted under a disqualification order only where the director shows that there is a need for such an order to be granted, and where the court can be satisfied that there is adequate protection for the public²⁶. When considering whether to grant leave the court's discretion is unfettered by any consideration of the needs and interests of the applicant, either personal or business related²⁷, or by any statutory condition or criterion²⁸.

Where leave is granted, it may be subject to conditions or to suitable safeguards designed to protect the public²⁹.

It is open to the Secretary of State to appeal against any decision to grant leave where he considers that the court erred by so doing³⁰.

1 As to disqualification orders see PARA 1578.

2 Ie for the purposes of the Company Directors Disqualification Act 1986 s 1(1)(a) (see PARA 1578).

3 Company Directors Disqualification Act 1986 s 17(1) (s 17 substituted by the Insolvency Act 2000 s 8, Sch 4 Pt I paras 1, 12).

4 Ie under the Company Directors Disqualification Act 1986 s 2 (see PARA 1580).

5 Ie under the Company Directors Disqualification Act 1986 s 5 (see PARA 1583).

6 Ie for the purposes of the Company Directors Disqualification Act 1986 s 1(1)(a) (see PARA 1578).

7 Company Directors Disqualification Act 1986 s 17(2) (as substituted: see note 3).

8 As to disqualification undertakings see PARA 1579.

9 Ie under the Company Directors Disqualification Act 1986 s 7 (see PARAS 1598-1599) or s 8 (see PARA 1584).

10 Ie for the purposes of the Company Directors Disqualification Act 1986 s 1A(1)(a) (see PARA 1579).

11 As to the Secretary of State see PARA 6.

12 Company Directors Disqualification Act 1986 s 17(3) (as substituted: see note 3).

- 13 le under the Company Directors Disqualification Act 1986 s 9B (see PARA 1586).
- 14 le for the purposes of the Company Directors Disqualification Act 1986 s 9B(4) (see PARA 1586).
- 15 Company Directors Disqualification Act 1986 s 17(3A) (s 17 as substituted (see note 3); and s 17(3A) added by the Enterprise Act 2002 s 204(1), (8)).
- 16 le for the purposes of the Company Directors Disqualification Act 1986 s 1(1)(a) (see PARA 1578), s 1A(1)(a) (see PARA 1579) or s 9B(4) (see PARA 1586).
- 17 Company Directors Disqualification Act 1986 s 17(4) (as substituted (see note 3); and amended by the Enterprise Act 2002 s 204(1), (9)).
- 18 le for the purposes of the Company Directors Disqualification Act 1986 s 1(1)(a) (see PARA 1578) or s 1A(1)(a) (see PARA 1579).
- 19 Company Directors Disqualification Act 1986 s 17(5) (as substituted: see note 3).
- 20 Company Directors Disqualification Act 1986 s 17(6) (s 17 as substituted (see note 3); and s 17(6) added by the Enterprise Act 2002 s 204(1), (10)). The application referred to in the text is an application made under the Company Directors Disqualification Act 1986 s 9B (see PARA 1586).
- 21 le an application made under Company Directors Disqualification Act 1986 s 9B(4), seeking to disapply a prohibition falling within s 9B(3)(a)-(c) (see PARA 1586).
- 22 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARAS 6-8.
- 23 le a specified regulator within the meaning of the Company Directors Disqualification Act 1986 s 9E (see PARA 1585).
- 24 Company Directors Disqualification Act 1986 s 17(7) (s 17 as substituted (see note 3); and s 17(7) added by the Enterprise Act 2002 s 204(1), (10)).
- 25 *Secretary of State for Trade and Industry v Worth* [1994] 2 BCLC 113, CA. The application ought to be supported by evidence of the role the applicant intends to play in the company and up to date information about the company: *Secretary of State for Trade and Industry v Collins* [2000] 2 BCLC 223, CA.
- 26 *Re Gibson Davies Ltd* [1995] BCC 11. The public for this purpose is defined widely: *Re Tech Textiles Ltd, Secretary of State for Trade and Industry v Vane* [1998] 1 BCLC 259 at 268 per Arden J (the public included all relevant interest groups, such as shareholders, employees, lenders, customers and other creditors). See also *Re Barings plc (No 3)*, *Secretary of State for Trade and Industry v Baker (No 3)* [1999] 1 All ER 1017, [2000] 1 WLR 634, sub nom *Re Barings plc (No 4)* [1999] 1 BCLC 262 (the court should, in particular, pay attention to the nature of the defects in company management that led to the disqualification order and ask itself whether, if leave were granted, a situation might arise in which there would be a risk of recurrence of those defects); *Re Britannia Homes Centres Ltd, Official Receiver v Cahill* [2001] 2 BCLC 63 (it would only be in the most extreme and unusual cases that a court would contemplate making an order that a disqualified director should be the sole proprietor and sole moving and controlling spirit of another company). Where a director appeals against a disqualification order and wishes to continue as a director pending the appeal, the correct method is normally to apply for leave under the Company Directors Disqualification Act 1986 s 17, although the Court of Appeal has jurisdiction to grant a stay of the order in exceptional cases: *Secretary of State for Trade and Industry v Bannister* [1996] 1 All ER 993, [1995] BCC 1027, CA. See also *Re Servacomm Redhall Ltd, Cunningham v Secretary of State for Trade and Industry* [2004] EWHC 760 (Ch), [2006] 1 BCLC 1 (court was satisfied that it was appropriate to grant the applicant permission to act as a director of the companies as there was no risk to the public of the applicant defaulting in the same manner as he had previously defaulted).
- 27 *Re Dawes & Henderson (Agencies) Ltd (No 2), Shuttleworth v Secretary of State for Trade and Industry* [1999] 2 BCLC 317. See also *Secretary of State for Trade and Industry v Barnett* [1998] 2 BCLC 64 (the needs of a company run entirely by the director and his wife could not be distinguished from those of the claimant so the proper question to ask was whether it was necessary for the claimant to be director of a company in order to protect some legitimate interest of his own or that of any third party, and whether that need could be met without infringing the protection of the public); *Re Barings plc (No 3)*, *Secretary of State for Trade and Industry v Baker (No 3)* [1999] 1 All ER 1017, [2000] 1 WLR 634, sub nom *Re Barings plc (No 4)* [1999] 1 BCLC 262 (the fact that a need for the claimant to continue as director of the companies had not been established was not a sufficient reason for withholding the leave, which was granted subject to certain safeguards intended to ensure that he did not assume any substantive executive responsibilities).
- 28 *Re Dawes & Henderson (Agencies) Ltd (No 2), Shuttleworth v Secretary of State for Trade and Industry* [1999] 2 BCLC 317.

29 See eg *Re Gibson Davies Ltd* [1995] BCC 11 at 17-18 per Sir Mervyn Davies; *Re Lo-Line Electric Motors Ltd* [1988] Ch 477, [1988] 2 All ER 692; *Re Chartmore Ltd* [1990] BCLC 673; *Re Tech Textiles Ltd, Secretary of State for Trade and Industry v Vane* [1998] 1 BCLC 259; *Re Dawes & Henderson (Agencies) Ltd (No 2), Shuttleworth v Secretary of State for Trade and Industry* [1999] 2 BCLC 317; *Secretary of State for Trade and Industry v Collins* [2000] 2 BCLC 223, CA (great caution required because conditions difficult to police). A failure by a director to observe any terms imposed means that he is thereby not acting pursuant to the leave granted to him and is contravening the Company Directors Disqualification Act 1986, which renders him liable under ss 13, 15 to criminal penalties and personal liability for the company's debts (see PARAS 1614, 1616): *Re Sheridan Brian Cars Ltd, Official Receiver v Sheridan* [1996] 1 BCLC 327.

30 *Secretary of State for Trade and Industry v Collins* [2000] 2 BCLC 223, CA (per curiam).

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1612. Information to be provided to the Secretary of State in relation to disqualification orders and disqualification undertakings.

Where a disqualification order¹ or grant of leave² (as the case may be) is made by a specified court³, the specified officer of that court⁴ must furnish to the Secretary of State certain specified particulars in the specified form and manner⁵.

1 For these purposes, 'disqualification order' means an order of the court under any of the Company Directors Disqualification Act 1986 ss 2-6, 8, 9A, 10 (see PARA 1578 et seq): Companies (Disqualification Orders) Regulations 2009, SI 2009/2471, reg 2(1).

2 For these purposes, 'grant of leave' means a grant by the court of leave under the Company Directors Disqualification Act 1986 s 17 (see PARA 1611) to any person in relation to a disqualification order or a disqualification undertaking: Companies (Disqualification Orders) Regulations 2009, SI 2009/2471, reg 2(1). For these purposes, 'disqualification undertaking' means an undertaking accepted by the Secretary of State under the Company Directors Disqualification Act 1986 s 7 (see PARAS 1598-1599) or s 8 (see PARA 1584) or s 9B (see PARA 1586): Companies (Disqualification Orders) Regulations 2009, SI 2009/2471, reg 2(1). As to the Secretary of State see PARA 6.

3 As to the specified courts see note 4. The Companies (Disqualification Orders) Regulations 2009, SI 2009/2471, apply in relation to a disqualification order made after 1 October 2009, and they apply in relation to a grant of leave made after that date, or in relation to any action taken by a court after that date in consequence of which a disqualification order or a disqualification undertaking is varied or ceases to be in force, whether the disqualification order or disqualification undertaking to which the grant of leave or the action relates was made by the court or accepted by the Secretary of State before or after 1 October 2009: reg 4.

The Companies (Disqualification Orders) Regulations 2009, SI 2009/2471, have been made in pursuance of powers which provide that the Secretary of State may make regulations requiring officers of courts to furnish him with such particulars as the regulations may specify of cases in which:

2295 (1) a disqualification order is made;

2296 (2) any action is taken by a court in consequence of which such an order or a disqualification undertaking is varied or ceases to be in force;

2297 (3) leave is granted by a court for a person subject to such an order to do anything which otherwise the order prohibits him from doing; or

2298 (4) leave is granted by a court for a person subject to such an undertaking to do anything which otherwise the undertaking prohibits him from doing,

and the regulations may specify the time within which, and the form and manner in which, such particulars are to be furnished: Company Directors Disqualification Act 1986 s 18(1) (amended by the Insolvency Act 2000 s 8, Sch 4 Pt I paras 1, 13(1), (2)(a), (b)). Regulations under the Company Directors Disqualification Act 1986 s 18 must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 18(5). Regulations under s 18 may extend s 18(1)-(4) (see further PARA 1613), to such extent and with such modifications as may be specified in the regulations, to disqualification orders or disqualification undertakings made under the Company Directors Disqualification (Northern Ireland) Order 2002, SI 2002/3150 (NI 4); Company Directors Disqualification Act 1986 s 18(4A) (added by the Insolvency Act 2000 Sch 4 Pt I paras 1, 13(1), (5); and amended by SI 2004/1941; SI 2009/1941). See also the Company Directors Disqualification Act 1986 s 12A (added by the Insolvency Act 2000 s 7(1)); the Company Directors Disqualification Act 1986 s 12B (added by SI 2004/1941); and the Companies (Disqualification Orders) Regulations 2009, SI 2009/2471, regs 2(2), 5, 9. As to the geographical extent of the Companies Acts, and issues arising, see PARA 29 et seq.

4 The specified officers of the specified courts are: (1) where a disqualification order is made by the Crown Court, the court manager (Companies (Disqualification Orders) Regulations 2009, SI 2009/2471, reg 6(1)(a)); (2) where a disqualification order or grant of leave is made by the High Court, the court manager (reg 6(1)(b)); (3) where a disqualification order or grant of leave is made by a county court, the court manager (reg 6(1)(c)); (4) where a disqualification order is made by a magistrates' court, the designated officer for a magistrates' court (reg 6(1)(d)); (5) where a disqualification order is made by the High Court of Justiciary, the deputy principal clerk of justiciary (reg 6(1)(e)); (6) where a disqualification order or grant of leave is made by a sheriff court, the sheriff clerk (reg 6(1)(f)); (7) where a disqualification order or grant of leave is made by the Court of Session, the deputy principal clerk of session (reg 6(1)(g)); (8) where a disqualification order or grant of leave is made by the Court of Appeal, the court manager (reg 6(1)(h)); and (9) where a disqualification order or grant of leave is made by the Supreme Court, the registrar of the Supreme Court (reg 6(1)(i)).

Where a disqualification order is made by any of the courts mentioned in heads (1)-(9), or where a disqualification undertaking has been accepted by the Secretary of State, and subsequently any action is taken by a court in consequence of which that order or that undertaking is varied or ceases to be in force, the officer specified in heads (1)-(9) of the court which takes such action must furnish to the Secretary of State the particulars specified in reg 7(d) (see note 5 head (4)), in the form and manner there specified: reg 6(2).

5 Companies (Disqualification Orders) Regulations 2009, SI 2009/2471, reg 6(1). The form in which the particulars are to be furnished is:

2299 (1) that set out in reg 7(a), Sch 1 with such variations as circumstances require when the person against whom the disqualification order is made is an individual, and the particulars contained therein are the particulars specified for that purpose (reg 7(a));

2300 (2) that set out in reg 7(b), Sch 2 with such variations as circumstances require when the person against whom the disqualification order is made is a body corporate, and the particulars contained therein are the particulars specified for that purpose (reg 7(b));

2301 (3) that set out in reg 7(c), Sch 3 with such variations as circumstances require when a grant of leave is made by the court in relation to a disqualification order or a disqualification undertaking, and the particulars contained therein are the particulars specified for that purpose (reg 7(c));

2302 (4) that set out in reg 7(d), Sch 4 with such variations as circumstances require when any action is taken by a court in consequence of which a disqualification order or a disqualification undertaking is varied or ceases to be in force, and the particulars contained therein are the particulars specified for that purpose (reg 7(d)).

The time within which the officer specified in reg 6(1) (see note 4) is to furnish the Secretary of State with such particulars is a period of 14 days beginning with the day on which the disqualification order or grant of leave is made, or any action is taken by a court in consequence of which the disqualification order or disqualification undertaking is varied or ceases to be in force: reg 8.

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1613. Register of disqualification orders and disqualification undertakings.

The Secretary of State¹ must, from the particulars furnished² in accordance with the statutory provisions³, continue to maintain the register of orders⁴ and of cases in which leave has been granted⁵. When an order or undertaking of which entry is made in the register ceases to be in force, the Secretary of State must delete the entry from the register and all particulars relating to it which have been furnished to him under these provisions or any previous corresponding provision and, in the case of a disqualification undertaking, any other particulars he has included in the register⁶.

The register must be open to inspection on payment of such fee as may be specified by the Secretary of State⁷.

1 As to the Secretary of State see PARA 6.

2 le pursuant to the Company Directors Disqualification Act 1986 s 18(1) and the regulations made thereunder (see PARA 1612).

3 See note 2.

4 The Secretary of State must include in the register such particulars as he considers appropriate of: (1) disqualification undertakings accepted by him under the Company Directors Disqualification Act 1986 s 7 (see PARAS 1596, 1598-1599) or s 8 (see PARA 1584); (2) disqualification undertakings accepted by the Office of Fair Trading or a specified regulator under s 9B (see PARA 1586); and (3) cases in which leave has been granted (see PARA 1611): s 18(2A) (added by the Enterprise Act 2002 s 204(1), (11)). As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARAS 6-8. As to the meaning of 'specified regulator' see PARA 1585 note 11.

5 Company Directors Disqualification Act 1986 s 18(2) (amended by SI 2009/1941).

6 Company Directors Disqualification Act 1986 s 18(3) (amended by the Insolvency Act 2000 s 8, Sch 4 Pt I paras 1, 13(4)).

7 Company Directors Disqualification Act 1986 s 18(4). No fee is payable for inspecting the register.

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1614. Consequences of contravention of disqualification order or disqualification undertaking; criminal penalties.

If a person¹ acts in contravention of a disqualification order or disqualification undertaking², or in contravention of an order made following his failure to pay under a county court administration order³, or is guilty of an offence under the provisions relating to undischarged bankrupts⁴, he is liable to a penalty⁵.

1 As to the meaning of 'person' see PARA 311 note 2.

2 As to disqualification orders see PARA 1578; and as to disqualification undertakings see PARA 1579.

3 le under the Company Directors Disqualification Act 1986 s 12(2) (see PARA 1591). These provisions apply also to contraventions of ss 12A, 12B (Northern Irish disqualification orders and undertakings: see PARA 1612 note 5) in relation to disqualification undertakings under the Company Directors Disqualification (Northern Ireland) Order 2002 accepted on or after 1 September 2004: Company Directors Disqualification Act 1986 s 13

(amended by SI 2004/1941); Insolvency Act 2000 (Company Directors Disqualification Undertakings) Order 2004, SI 2004/1941, art 1. As to the geographical extent of the Companies Acts, and issues arising, see PARA 29 et seq.

4 lie under the Company Directors Disqualification Act 1986 s 11 (see PARA 1590).

5 Company Directors Disqualification Act 1986 s 13 (amended by the Insolvency Act 2000 s 8, Sch 4 Pt I paras 1, 8(a), (b)). A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both: Company Directors Disqualification Act 1986 s 13. As to the statutory maximum see PARA 1622.

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1615. Offences by body corporate; disqualification orders or disqualification undertakings.

Where a body corporate¹ is guilty of an offence of acting in contravention of a disqualification order or disqualification undertaking², and it is proved that the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of the offence and liable to be proceeded against and punished accordingly³.

Where the affairs of a body corporate are managed by its members, these provisions apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate⁴.

1 For these purposes, 'body corporate' has the same meaning as in the Companies Acts (see the Companies Act 2006 s 1173(1); and PARA 1 note 5): Company Directors Disqualification Act 1986 s 22(1), (6) (s 22(6) substituted by SI 2009/1941).

2 See PARA 1612. These provisions apply also to contraventions of the Company Directors Disqualification Act 1986 s 12A (Northern Irish disqualification orders: see PARA 1612 note 3) except in relation to a person subject to a disqualification order under the Companies (Northern Ireland) Order 1989, SI 1989/2404, Pt II made before 2 April 2001: Company Directors Disqualification Act 1986 s 14(1) (amended by the Insolvency Act 2000 s 8, Sch 4 Pt I paras 1, 9); Insolvency Act 2000 (Commencement No 1 and Transitional Provisions) Order 2001, SI 2001/766, art 3(3). They also apply to contraventions of the Company Directors Disqualification Act 1986 s 12B (Northern Irish disqualification undertakings: see PARA 1612 note 3) in relation to disqualification undertakings under the Company Directors Disqualification (Northern Ireland) Order 2002 accepted on or after 1 September 2004: Company Directors Disqualification Act 1986 s 14(1) (amended by SI 2004/1941); Insolvency Act 2000 (Company Directors Disqualification Undertakings) Order 2004, SI 2004/1941, art 1.

3 Company Directors Disqualification Act 1986 s 14(1) (amended by the Insolvency Act 2000 s 8, Sch 4 Pt I paras 1, 9; and SI 2004/1941). As to the penalties see PARA 1614.

4 Company Directors Disqualification Act 1986 s 14(2).

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Disqualification Order or Disqualification Undertaking; Consequences of Contravention/1616.
Consequences of contravention; personal liability of persons acting while disqualified.

1616. Consequences of contravention; personal liability of persons acting while disqualified.

A person is personally responsible for all the relevant debts¹ of a company² if at any time:

- 1061 (1) in contravention of a disqualification order³ or disqualification undertaking⁴, or of the provisions relating to undischarged bankrupts⁵, he is involved in the management of a company⁶; or
- 1062 (2) as a person who is involved in the management of the company, he acts or is willing to act on instructions given without the leave of the court by a person whom he knows at that time either to be the subject of a disqualification order made or disqualification undertaking accepted under the Company Directors Disqualification Act 1986, or to be an undischarged bankrupt⁷.

Where a person is personally responsible under these provisions for the relevant debts of a company, he is jointly and severally liable in respect of those debts with the company and any other person who, whether under these provisions or otherwise, is so liable⁸.

1 For these purposes, the relevant debts of a company are: (1) in relation to a person who is personally responsible under the Company Directors Disqualification Act 1986 s 15(1)(a) (see head (1) in the text), such debts and other liabilities of the company as are incurred at a time when that person was involved in the management of the company; and (2) in relation to a person who is personally responsible under s 15(1)(b) (see head (2) in the text), such debts and other liabilities of the company as are incurred at a time when that person was acting or was willing to act on instructions given as mentioned in s 15(1)(b): s 15(3).

2 As to the meaning of 'company' for the purposes of the Company Directors Disqualification Act 1986 see PARA 1576 note 1.

3 See PARA 1578.

4 See PARA 1579.

5 In the Company Directors Disqualification Act 1986 s 11 (see PARA 1590). See *Re Prestige Grindings Ltd, Sharma (as liquidator of Prestige Grindings Ltd) v Yardley* [2005] EWHC 3076 (Ch), [2006] 1 BCLC 440. The subsequent annulment of a bankruptcy order does not remove the criminal liability of acting as a director while an undischarged bankrupt: see *IRC v McEntaggart* [2004] EWHC 3431 (Ch), [2006] 1 BCLC 476.

The provisions of the Company Directors Disqualification Act 1986 s 15 apply also to contraventions of ss 12A, 12B (Northern Irish disqualification orders and undertakings: see PARA 1612 note 3) in relation to disqualification undertakings under the Company Directors Disqualification (Northern Ireland) Order 2002 accepted on or after 1 September 2004: Company Directors Disqualification Act 1986 s 15(1)(a) (amended by SI 2004/1941); Insolvency Act 2000 (Company Directors Disqualification Undertakings) Order 2004, SI 2004/1941, art 1.

6 Company Directors Disqualification Act 1986 s 15(1)(a) (amended by the Insolvency Act 2000 s 8, Sch 4 Pt I paras 1, 10(1), (2)(a); and SI 2004/1941). For these purposes, a person is involved in the management of a company if he is a director of the company or if he is concerned, whether directly or indirectly, or takes part in the management of the company: Company Directors Disqualification Act 1986 s 15(4). See also note 5. As to 'management' of a company see PARA 1578 note 7.

7 Company Directors Disqualification Act 1986 s 15(1)(b) (substituted by SI 2009/1941). For these purposes, a person who, as a person involved in the management of a company, has at any time acted on instructions given without the leave of the court by a person whom he knew at that time either to be the subject of a disqualification order made or disqualification undertaking accepted under the Company Directors Disqualification Act 1986, or to be an undischarged bankrupt, is presumed, unless the contrary is shown, to have been willing at any time thereafter to act on any instructions given by that person.: Company Directors Disqualification Act 1986 s 15(5) (substituted by SI 2009/1941). See also note 5.

8 Company Directors Disqualification Act 1986 s 15(2). Aside from the company's right of contribution from the director, s 15 does not enable an order to be made that the disqualified director pay the 'relevant debts' to the company as co-debtor and does not give the company, or its liquidator, the right to sue the disqualified director for the debts owed to creditors: see *Re Prestige Grindings Ltd, Sharma (as liquidator of Prestige Grindings Ltd) v Yardley* [2005] EWHC 3076 (Ch), [2006] 1 BCLC 440.

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(v) Company Directors subject to Foreign Restrictions

1617. Meaning of 'persons subject to foreign restrictions'.

A person is subject to foreign restrictions if under the law of a country or territory outside the United Kingdom¹:

- 1063 (1) he is, by reason of misconduct or unfitness, disqualified to any extent from acting in connection with the affairs of a company²;
- 1064 (2) he is, by reason of misconduct or unfitness, required to obtain permission from a court³ or other authority, or to meet any other condition, before acting in connection with the affairs of a company⁴; or
- 1065 (3) he has, by reason of misconduct or unfitness, given undertakings to a court or other authority of a country or territory outside the United Kingdom not to act in connection with the affairs of a company, or restricting the extent to which, or the way in which, he may do so⁵.

1 Companies Act 2006 s 1182(1), (2). As to the meaning of 'United Kingdom' see PARA 1 note 5.

2 Companies Act 2006 s 1182(1)(a). The references in s 1182(2) to acting in connection with the affairs of a company are to doing any of the following: (1) being a director of a company; (2) acting as receiver of a company's property; or (3) being concerned or taking part in the promotion, formation or management of a company: s 1182(3). For this purpose, 'company' means a company incorporated or formed under the law of the country or territory in question; and, in relation to such a company 'director' means the holder of an office corresponding to that of director of a UK company; and 'receiver' includes any corresponding officer under the law of that country or territory: s 1182(4). 'UK company' means a company registered under the Companies Act 2006 (see PARA 111 et seq): s 1183.

3 For this purpose, 'court' means the High Court or a county court: Companies Act 2006 s 1183.

4 Companies Act 2006 s 1182(1)(b). See note 2.

5 Companies Act 2006 s 1182(1)(c). See note 2.

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1618. Power to disqualify persons subject to foreign restrictions.

The Secretary of State¹ may make provision by regulations disqualifying a person subject to foreign restrictions² from being a director of a UK company³, acting as receiver of a UK company's property⁴, or in any way, whether directly or indirectly, being concerned or taking part in the promotion, formation or management of a UK company⁵. The regulations may provide that a person subject to foreign restrictions: (1) is disqualified automatically by virtue of the regulations; or (2) may be disqualified by order of the court⁶ on the application of the Secretary of State⁷. The regulations may provide that the Secretary of State may accept a disqualification undertaking from a person subject to foreign restrictions that he will not do anything which would be in breach of a disqualification⁸. The regulations may also provide for applications to the court by disqualified persons⁹ for permission to act in a way which would otherwise be in breach of the disqualification¹⁰. The regulations must provide that a person ceases to be disqualified¹¹ on his ceasing to be subject to foreign restrictions¹².

1 As to the Secretary of State see PARA 6.

2 As to the meaning of 'persons subject to foreign restrictions' see PARA 1617.

3 As to the meaning of 'UK Company' see PARA 1617 note 2. As to directors see PARA 478.

4 As to receivers see PARA 1337.

5 Companies Act 2006 s 1184(1). Regulations under s 1184 may make different provision for different cases and may in particular distinguish between cases by reference to: (1) the conduct on the basis of which the person became subject to foreign restrictions; (2) the nature of the foreign restrictions; (3) the country or territory under whose law the foreign restrictions were imposed: s 1185(1). At the date at which this volume states the law no such regulations had been made. Regulations under s 1184 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): ss 1184(7), 1290.

6 As to the meaning of 'court' for this purpose see PARA 1617 note 3.

7 Companies Act 2006 s 1184(2). In Pt 40 (ss 1182-1191), a 'person disqualified under Pt 40' is a person disqualified as mentioned in head (1) or head (2) in the text, or who has given and is subject to a disqualification undertaking; and references to a breach of a disqualification include a breach of a disqualification undertaking: s 1184(4).

Regulations under s 1184(2)(b) or s 1184(5) (see the text to notes 9-10) (provision for applications to the court): (1) must specify the grounds on which an application may be made; (2) may specify factors to which the court is to have regard in determining an application: s 1185(2). The regulations may, in particular, require the court to have regard to the following factors: (a) whether the conduct on the basis of which the person became subject to foreign restrictions would, if done in relation to a UK company, have led a court to make a disqualification order on an application under the Company Directors Disqualification Act 1986 (see PARA 1578 et seq) or the Company Directors Disqualification (Northern Ireland) Order 2002, SI 2002/3150 (NI 4); (b) in a case in which the conduct on the basis of which the person became subject to foreign restrictions would not be unlawful if done in relation to a UK company, the fact that the person acted unlawfully under foreign law; (c) whether the person's activities in relation to UK companies began after he became subject to foreign restrictions; (d) whether the person's activities (or proposed activities) in relation to UK companies are undertaken (or are proposed to be undertaken) outside the United Kingdom: Companies Act 2006 s 1185(3).

8 Companies Act 2006 s 1184(3). Regulations under s 1184(3) may include provision allowing the Secretary of State, in determining whether to accept an undertaking, to take into account matters other than criminal convictions notwithstanding that the person may be criminally liable in respect of those matters: s 1185(4).

9 Ie a person disqualified under Pt 40 (see note 7).

10 Companies Act 2006 s 1184(5). See note 7. Regulations under s 1184(5) may include provision: (1) entitling the Secretary of State to be represented at the hearing of the application; and (2) as to the giving of evidence or the calling of witnesses by the Secretary of State at the hearing of the application: s 1185(5).

11 Ie under Pt 40.

12 Companies Act 2006 s 1184(6).

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1619. Offence of breach of disqualification.

Regulations¹ may provide that a person subject to foreign restrictions² who acts in breach of a disqualification³ commits an offence⁴.

1 The regulations made under the Companies Act 2006 s 1184 (see PARA 1618). At the date at which this volume states the law no such regulations had been made.

2 See PARA 1617.

3 The disqualification under the Companies Act 2006 Pt 40 (ss 1182-1191).

4 Companies Act 2006 s 1186(1). The regulations may provide that a person guilty of such an offence is liable: (1) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine (or both); (2) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or both): s 1186(2). As to the statutory maximum see PARA 1622. In relation to an offence committed before the commencement of the Criminal Justice Act 2003 s 154(1) (not yet in force), the maximum term of imprisonment on summary conviction is six months: Companies Act 2006 s 1186(3).

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1620. Power to make persons liable for company's debts.

The Secretary of State¹ may provide by regulations that a person who, at a time when he is subject to foreign restrictions² is a director of a UK company³, or is involved in the management of a UK company⁴, is personally responsible for all debts and other liabilities of the company incurred during that time⁵.

A person who is personally responsible for debts and other liabilities of a company is jointly and severally liable in respect of those debts and liabilities with the company, and any other person who (whether by virtue of these provisions or otherwise) is so liable⁶.

1 As to the Secretary of State see PARA 6.

2 As to the meaning of 'persons subject to foreign restrictions' see PARA 1617.

3 As to the meaning of 'UK Company' see PARA 1617 note 2. As to directors see PARA 478.

4 For these purposes, a person is involved in the management of a company if he is concerned, whether directly or indirectly, or takes part, in the management of the company: Companies Act 2006 s 1187(3).

5 Companies Act 2006 s 1187(1). The regulations may make different provision for different cases and may in particular distinguish between cases by reference to: (1) the conduct on the basis of which the person became subject to foreign restrictions; (2) the nature of the foreign restrictions; (3) the country or territory under whose law the foreign restrictions were imposed: s 1187(4). Regulations under s 1187 are subject to

affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): ss 1187(5), 1290. At the date at which this volume states the law no such regulations had been made.

6 Companies Act 2006 s 1187(2).

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1621. Power to require statements to be sent to the registrar of companies.

The Secretary of State¹ may make provision by regulations requiring a person who is subject to foreign restrictions², and is not disqualified³, to send a statement to the registrar⁴ if he does anything that, if done by a disqualified person⁵, would be in breach of the disqualification⁶. The statement must include such information as may be specified in the regulations relating to the person's activities in relation to UK companies⁷ and the foreign restrictions to which the person is subject⁸. The statement must be sent to the registrar within such period as may be specified in the regulations⁹.

The Secretary of State may make provision by regulations requiring a statement or notice sent to the registrar of companies¹⁰ that relates (wholly or partly) to a disqualified person¹¹ to be accompanied by an additional statement¹² stating that the person has obtained permission from a court¹³ to act in the capacity in question¹⁴.

Regulations relating to statements required to be sent to the registrar¹⁵ may provide that a statement sent to the registrar of companies under the regulations is to be treated¹⁶ as a record relating to a company¹⁷. The regulations may also make provision as to the circumstances in which such a statement is to be, or may be withheld from public inspection, or removed from the register¹⁸. The regulations may, in particular, provide that a statement is not to be withheld from public inspection or removed from the register unless the person to whom it relates provides such information, and satisfies such other conditions, as may be specified¹⁹. The regulations may provide that the statutory provision relating to note of removal of material from the register²⁰ does not apply, or applies with such modifications as may be specified, in the case of material removed from the register under the regulations²¹.

Regulations²² may provide that it is an offence for a person: (1) to fail to comply with a requirement under the regulations to send a statement to the registrar; or (2) knowingly or recklessly to send a statement under the regulations to the registrar that is misleading, false or deceptive in a material particular²³.

1 As to the Secretary of State see PARA 6.

2 As to the meaning of 'persons subject to foreign restrictions' see PARA 1617.

3 Ie is not disqualified under the Companies Act 2006 Pt 40 (ss 1182-1191) (see PARA 1618).

4 As to the registrar see PARA 131 et seq.

5 Ie a person disqualified under the Companies Act 2006 Pt 40 (ss 1182-1191) (see PARA 1618).

6 Companies Act 2006 s 1188(1). The regulations may make different provision for different cases and may in particular distinguish between cases by reference to: (1) the conduct on the basis of which the person became subject to foreign restrictions; (2) the nature of the foreign restrictions; (3) the country or territory under whose law the foreign restrictions were imposed: s 1188(4). Regulations under s 1188 are subject to

affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): ss 1188(5), 1290. At the date at which this volume states the law no such regulations had been made.

7 As to the meaning of 'UK Company' see PARA 1617 note 2.

8 Companies Act 2006 s 1188(2).

9 Companies Act 2006 s 1188(3).

10 Ie sent to the registrar of companies under the Companies Act 2006 s 12 (statement of a company's proposed officers: see PARA 112), s 167(2) (notice of person having become director: see PARA 514), and s 276 (notice of a person having become secretary or one of joint secretaries: see PARA 606): s 1189(2).

11 Ie a person disqualified under Pt 40 (see PARA 1618) or a person who is subject to a disqualification order or disqualification undertaking under the Company Directors Disqualification Act 1986 (see PARA 1578 et seq) or the Company Directors Disqualification (Northern Ireland) Order 2002, SI 2002/3150 (NI 4).

12 Companies Act 2006 s 1189(1). Regulations under this section are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): ss 1189(4), 1290. At the date at which this volume states the law no such regulations had been made.

13 Ie on an application under the Companies Act 2006 s 1184(5) (see PARA 1618) or (as the case may be) for the purposes of the Company Directors Disqualification Act 1986 s 1(1)(a) (see PARA 1578) or the Company Directors Disqualification (Northern Ireland) Order 2002, SI 2002/3150 (NI 4), art 3(1). As to the meaning of 'court' see PARA 1617 note 3.

14 Companies Act 2006 s 1189(3).

15 Ie under the Companies Act 2006 ss 1188, 1189 (see the text and notes 1-14).

16 Ie for the purposes of the Companies Act 2006 s 1080 (the companies register: see PARA 146).

17 Companies Act 2006 s 1190(1).

18 Companies Act 2006 s 1190(2).

19 Companies Act 2006 s 1190(3). For this purpose, 'specified' means specified in the regulations: s 1190(5).

20 Ie the Companies Act 2006 s 1081 (see PARA 147).

21 Companies Act 2006 s 1190(4).

22 Ie under the Companies Act 2006 ss 1188, 1189 (see the text and notes 1-14).

23 Companies Act 2006 s 1191(1). The regulations may provide that a person guilty of such an offence is liable: (1) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine (or both); (2) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or both): s 1191(2). As to the statutory maximum see PARA 1622. In relation to an offence committed before the commencement of the Criminal Justice Act 2003 s 154(1) (not yet in force), the maximum term of imprisonment on summary conviction is six months: Companies Act 2006 s 1191(3).

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(32) CRIMINAL OFFENCES UNDER THE COMPANIES LEGISLATION

1622. Meaning of 'daily default fine', and other definitions.

Where it is provided in the Companies Acts¹ that a person² guilty of an offence is liable on summary conviction to a fine not exceeding a specified amount 'and, for continued contravention, a daily default fine' not exceeding a specified amount³, this means that the person is liable on a second or subsequent summary conviction of the offence to a fine not exceeding the latter amount for each day on which the contravention is continued (instead of being liable to a fine not exceeding the former amount)⁴.

'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982⁵. The 'statutory maximum', with reference to a fine or penalty on summary conviction for an offence, is the prescribed sum⁶; and the 'prescribed sum' means £5,000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980⁷.

1 As to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'person' see PARA 311 note 2.

3 See the Companies Act 2006 s 1125(1). The provisions of the Companies Act 2006 Pt 36 (ss 1121-1133) do not apply to offences committed before the commencement of the relevant provision: see s 1133. Section 1125 was brought into force for certain purposes on 20 January 2007 (see Companies Act 2006 (Commencement No 1, Transitional Provisions and Savings) Order 2006, SI 2006/3428, art 3) 6 April 2007 (see the Companies Act 2006 (Commencement No 2, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/1093, art 2), 1 October 2007 (see the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, art 2), 6 April 2008 and 1 October 2008 (see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, art s 3, 5); and for the remaining purposes on 1 October 2009 (see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3).

4 Companies Act 2006 s 1125(2). See also note 3.

5 'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37: see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Criminal Justice Act 2003 s 164; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 144.

⁶ The 'statutory maximum', with reference to a fine or penalty on summary conviction for an offence, is the prescribed sum within the meaning of the Magistrates' Courts Act 1980 s 32: see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 140.

⁷ The 'prescribed sum' means £5,000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980 s 143(1): see s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 141.

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1623. Savings and transitional provisions relating to offences.

The repeal of any provision of the Companies Act 1985 Act¹ creating an offence does not affect the continued operation of that provision in relation to an offence committed before 1 October 2009².

Where a provision creating an offence is repealed and re-enacted without modification by or under the Companies Act 2006³:

- 1066 (1) an offence committed before the commencement of the new law is to be charged under the old law⁴;
- 1067 (2) an offence committed after the commencement of the new law is to be charged under the new law⁵, and
- 1068 (3) an offence committed partly before and partly after the commencement of the new law is to be charged under the new law and not under the old⁶.

1 The Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 116 also applies to the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6): see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 116(1)-(3). References in Schedule 2 para 116 to provisions of the Companies Act 1985 or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), include provisions of regulations or orders made under that Act or Order: Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 116(3).

2 Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 116(1). Any saving in Schedule 2 for the effect of a provision of the Companies Act 1985 or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), that creates an offence extends to the entry relating to that provision in the Companies Act 1985 Sch 24 (repealed) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), Sch 23 (revoked): Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, Sch 2 para 116(2).

3 The Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 7 is without prejudice to the Companies Act 2006 s 1297(2) (continuity of the law: see PARA 17): Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 7(4).

4 Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 7(1)(a).

5 Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 7(1)(b).

6 Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 7(1)(c). For this purpose an offence is committed partly before and partly after the commencement of the new law if a relevant event occurs before commencement and another relevant event occurs after commencement: art 7(2). A 'relevant event' means an act, omission or other event (including any result of one or more acts or omissions) proof of which is required for conviction of the offence: art 7(3).

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1624. Consents required for certain prosecutions.

In respect of proceedings for an offence under any of certain provisions relating to unauthorised disclosure of information¹, failure to comply with rules about takeover bid documents² or in connection with company investigations³, no such proceedings are to be brought in England and Wales⁴ except by or with the consent of the Secretary of State⁵ or the Director of Public Prosecutions⁶.

In respect of proceedings for an offence of attempting to evade restrictions on shares⁷, no such proceedings are to be brought in England and Wales except by or with the consent of the Secretary of State⁸.

1 le an offence under any of the Companies Act 2006 s 458 (see PARA 903), s 460 (see PARA 904) or s 949 (see PARA 1486): see s 1126(1). The provisions of the Companies Act 2006 Pt 36 (ss 1121-1133) do not apply to offences committed before the commencement of the relevant provision: see s 1133. Section 1126 was brought into force for certain purposes on 20 January 2007 (see Companies Act 2006 (Commencement No 1, Transitional Provisions and Savings) Order 2006, SI 2006/3428, art 3), 6 April 2007 (see the Companies Act 2006 (Commencement No 2, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/1093, art 2), 1 October 2007 (see the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, art 2); and for the remaining purposes on 6 April 2008 (see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, art 3).

2 le an offence under the Companies Act 2006 s 953: see s 1126(1).

3 le an offence under any of the Companies Act 1985 s 448 (see PARA 1559), s 449 (see PARA 1561), s 450 (see PARA 1562), s 451 (see PARA 1158) or s 453A (see PARA 1565): see the Companies Act 2006 s 1126(1).

4 As to the meanings of 'England' and 'Wales' see PARA 1 note 5. Similar provision is made in respect of proceedings to be brought in Northern Ireland: see the Companies Act 2006 s 1126(3).

5 As to the Secretary of State see PARA 6.

6 See the Companies Act 2006 s 1126(2)(a). See also note 1. As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1066.

7 le an offence under the Companies Act 2006 s 798 (see PARA 447) or the Companies Act 1985 s 455 (see PARA 1549): see the Companies Act 2006 s 1126(1).

8 See the Companies Act 2006 s 1126(2)(b). See also note 1.

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1625. Summary proceedings.

Without prejudice to any jurisdiction otherwise¹ exercisable², summary proceedings for any offence under the Companies Acts³ may be taken:

- 1069 (1) against a body corporate⁴, at any place at which the body has a place of business⁵; and
- 1070 (2) against any other person⁶, at any place at which he is for the time being⁷.

An information relating to an offence under the Companies Acts that is triable by a magistrates' court in England and Wales⁸ may be so tried if it is laid (a) at any time within three years after the commission of the offence⁹; and (b) within 12 months¹⁰ after the date on which evidence sufficient in the opinion of the Director of Public Prosecutions¹¹ or the Secretary of State¹² (as the case may be) to justify the proceedings comes to his knowledge¹³. For these purposes a certificate of the Director of Public Prosecutions or the Secretary of State (as the case may be) as to the date on which such evidence as is referred to above came to his notice is conclusive evidence¹⁴.

Where any provision of the Companies Acts provides that a person guilty of an offence is liable on summary conviction in England and Wales to imprisonment for a term not exceeding 12 months¹⁵, in relation to an offence committed before the commencement of the Criminal Justice Act 2003¹⁶ for '12 months' there is substituted 'six months'¹⁷.

- 1 le apart from the Companies Act 2006 s 1127.
- 2 Companies Act 2006 s 1127(2). The provisions of the Companies Act 2006 Pt 36 (ss 1121-1133) do not apply to offences committed before the commencement of the relevant provision: see s 1133. Sections 1127, 1128, 1131 were brought into force for certain purposes on 20 January 2007 (see Companies Act 2006 (Commencement No 1, Transitional Provisions and Savings) Order 2006, SI 2006/3428, art 3), 6 April 2007 (see the Companies Act 2006 (Commencement No 2, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/1093, art 2), 1 October 2007 (see the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, art 2), 6 April 2008 and 1 October 2008 (see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, arts 3, 5); and for the remaining purposes on 1 October 2009 (see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3).
- 3 As to the meaning of the 'Companies Acts' see PARA 16.
- 4 As to the meaning of 'body corporate' see PARA 1 note 5.
- 5 Companies Act 2006 s 1127(1)(a). See also note 2.
- 6 As to the meaning of 'person' see PARA 311 note 2.
- 7 Companies Act 2006 s 1127(1)(b). See also note 2.
- 8 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.
- 9 Companies Act 2006 s 1128(1)(a). See also note 2.
- 10 'Month' means calendar month: Interpretation Act 1978 s 5, Sch 1.
- 11 As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1066.
- 12 As to the Secretary of State see PARA 6.
- 13 Companies Act 2006 s 1128(1)(b). Equivalent provision is made in relation to Scotland and Northern Ireland: see s 1128(2), (3). See also note 2. As to consent required for certain prosecutions see PARA 1624.
- 14 See the Companies Act 2006 s 1128(4). See also note 2.
- 15 Companies Act 2006 s 1131(1). See also note 2.
- 16 le the Criminal Justice Act 2003 s 154: see **MAGISTRATES**. At the date at which this volume states the law s 154 is not yet in force.
- 17 Companies Act 2006 s 1131(2). See also note 2.

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1626. Saving for privileged communications.

In proceedings against a person¹ for an offence under the Companies Acts², nothing in those Acts is to be taken to require any person to disclose any information that he is entitled to refuse to disclose on grounds of legal professional privilege³.

1 As to the meaning of 'person' see PARA 311 note 2.

2 As to the meaning of the 'Companies Acts' see PARA 16.

3 Companies Act 2006 s 1129. The provisions of the Companies Act 2006 Pt 36 (ss 1121-1133) do not apply to offences committed before the commencement of the relevant provision: see s 1133. Section 1129 was brought into force for certain purposes on 20 January 2007 (see Companies Act 2006 (Commencement No 1, Transitional Provisions and Savings) Order 2006, SI 2006/3428, art 3), 6 April 2007 (see the Companies Act 2006 (Commencement No 2, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/1093, art 2), 1 October 2007 (see the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, art 2), 6 April 2008 and 1 October 2008 (see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, arts 3, 5); and for the remaining purposes on 1 October 2009 (see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3). As to legal professional privilege see **CIVIL PROCEDURE** vol 11 (2009) PARA 558 et seq; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1479.

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1627. Criminal proceedings against unincorporated bodies.

Proceedings for an offence under the Companies Acts¹ alleged to have been committed by an unincorporated body² must be brought in the name of the body (and not in that of any of its members)³. For the purposes of such proceedings: (1) any rules of court relating to the service of documents have effect as if the body were a body corporate⁴; and (2) certain provisions relating to proceedings against corporations⁵ apply as they apply in relation to a body corporate⁶.

A fine imposed on an unincorporated body on its conviction of an offence under the Companies Acts must be paid out of the funds of the body⁷.

The provisions of the Companies Acts relating to offences have effect in relation to unregistered companies⁸ so far as necessary for the purposes of the application and enforcement of those provisions as they are applied to unregistered companies⁹.

1 As to the meaning of the 'Companies Acts' see PARA 16.

2 As to unincorporated bodies generally see PARA 2.

3 Companies Act 2006 s 1130(1). The provisions of the Companies Act 2006 Pt 36 (ss 1121-1133) do not apply to offences committed before the commencement of the relevant provision: see s 1133. Section 1130 was brought into force for certain purposes on 20 January 2007 (see Companies Act 2006 (Commencement No 1, Transitional Provisions and Savings) Order 2006, SI 2006/3428, art 3), 6 April 2007 (see the Companies Act 2006 (Commencement No 2, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/1093, art 2), 1 October 2007 (see the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194, art 2), 6 April 2008 and 1 October 2008 (see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, arts 3, 5); and for the remaining purposes on 1 October 2009 (see the Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 3).

4 Companies Act 2006 s 1130(2)(a). As to the meaning of 'body corporate' see PARA 1 note 5.

5 I.e. the Criminal Justice Act 1925 s 33 and the Magistrates' Courts Act 1980 Sch 3 (see **MAGISTRATES** vol 29(2) (Reissue) PARA 666): Companies Act 2006 s 1130(2)(b)(i).

6 See the Companies Act 2006 s 1130(2)(b).

7 Companies Act 2006 s 1130(3).

8 As to the meaning of 'unregistered company' see PARA 1665.

9 See the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1 para 21. The text refers to the provisions of the Companies Acts applied to unregistered companies by the Unregistered Companies Regulations 2009, SI 2009/2436 (see PARA 1666): Sch 1 para 21.

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1628. Production and inspection of documents where offence suspected.

An application may be made, in England and Wales¹, to a judge of the High Court² by the Director of Public Prosecutions³, the Secretary of State⁴ or a chief officer of police⁵. If on such an application there is shown to be reasonable cause to believe:

- 1071 (1) that any person⁶ has, while an officer⁷ of a company⁸, committed an offence in connection with the management of the company's affairs⁹; and
- 1072 (2) that evidence of the commission of the offence is to be found in any documents¹⁰ in the possession or control of the company¹¹,

an order may be made¹². The order may: (a) authorise any person named in it to inspect the documents in question, or any of them, for the purpose of investigating and obtaining evidence of the offence¹³; or (b) require the secretary¹⁴ of the company, or such other officer of it as may be named in the order, to produce the documents (or any of them) to a person named in the order at a place so named¹⁵.

These provisions apply also in relation to documents in the possession or control of a person carrying on the business of banking, so far as they relate to the company's affairs, as it applies to documents in the possession or control of the company, except that no such order as is referred to in head (b) above may be made by virtue thereof¹⁶.

The decision under these provisions of a judge of the High Court is not appealable¹⁷.

1 As to the meanings of 'England' and 'Wales' see PARA 1 note 5.

2 As to the High Court of Justice in England and Wales see **COURTS** vol 10 (Reissue) PARA 602 et seq.

3 As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1066.

4 As to the Secretary of State see PARA 6.

5 Companies Act 2006 s 1132(1). In relation to an application for an order under s 1132, no notice need be given to any person against whom the order is sought: *Practice Direction-Applications under the Companies Acts and Related Legislation* PD 49 para 18. The restriction on the provisions of the Companies Act 2006 Pt 36 (ss 1121-1133) applying only to offences committed before the commencement of the relevant provision does not apply in the case of s 1132: see s 1133. As to chief officers of police see **POLICE** vol 36(1) (2007 Reissue) PARA 178 et seq.

6 As to the meaning of 'person' see PARA 311 note 2.

7 As to the meaning of 'officer' see PARA 607.

8 As to the meaning of 'company' see PARA 24.

- 9 Companies Act 2006 s 1132(2)(a).
- 10 'Document' includes information recorded in any form: Companies Act 2006 s 1132(6).
- 11 Companies Act 2006 s 1132(2)(b).
- 12 Companies Act 2006 s 1132(2).
- 13 Companies Act 2006 s 1132(3)(a).
- 14 As to the secretary of a company see PARA 601 et seq.
- 15 Companies Act 2006 s 1132(3)(b).
- 16 Companies Act 2006 s 1132(4).
- 17 Companies Act 2006 s 1132(5).

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1629. Admissibility of evidence.

In any proceedings (whether or not under the Insolvency Act 1986):

- 1073 (1) a statement of affairs prepared for the purposes of any provision of that Act which is derived from the Insolvency Act 1985¹;
- 1074 (2) a statement made in pursuance of a requirement imposed by or under the provisions of the Banking Act 2009² relating to bank insolvency³;
- 1075 (3) a statement made in pursuance of a requirement imposed by or under the provisions of the Banking Act 2009⁴ relating to bank administration⁵; and
- 1076 (4) any other statement made in pursuance of a requirement imposed by or under any such provision or by or under rules made under the Insolvency Act 1986⁶,

may be used in evidence against any person⁷ making or concurring in making the statement⁸.

However, in criminal proceedings in which any such person is charged with a relevant offence⁹ no evidence relating to the statement may be adduced¹⁰, and no question relating to it may be asked¹¹, by or on behalf of the prosecution, unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person¹².

1 Insolvency Act 1986 s 433(1)(a) (s 433(1) numbered as such by the Youth Justice and Criminal Evidence Act 1999 s 59, Sch 3 para 7(1), (2)). As to the Insolvency Act 1986 see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY**.

2 Ie the Banking Act 2009 Pt 2 (ss 90-135): see **FINANCIAL SERVICES AND INSTITUTIONS**.

3 See the Insolvency Act 1986 s 433(1)(aa) (s 433(1) as so numbered (see note 1); s 433(1)(aa) added by the Banking Act 2009 s 128).

4 Ie the Banking Act 2009 Pt 3 (ss 136-168): see **FINANCIAL SERVICES AND INSTITUTIONS**.

5 See the Insolvency Act 1986 s 433(1)(ab) (s 433(1) as so numbered (see note 1); s 433(1)(ab) added by the Banking Act 2009 s 162).

6 Insolvency Act 1986 s 433(1)(b) (s 433(1) as so numbered: see note 1).

7 As to the meaning of 'person' see PARA 311 note 2.

8 Insolvency Act 1986 s 433(1) (as so numbered: see note 1).

9 The Insolvency Act 1986 s 433(2) applies to any offence other than:

2303 (1) an offence under s 22(6) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 169), s 47(6) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 403), s 48(8) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 409), ss 66(6), 67(8) (Scotland), s 95(8) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 942), s 98(6) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 945), s 99(3)(a) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 947), s 131(7) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 526), s 192(2) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 602), s 208(1)(a), (d), (2) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 906), s 210 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 909), s 235(5) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 678), s 353(1) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 708), s 354(1)(b) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 709), s 354(3) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 711), s 356(1) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 715), s 356(2)(a), (b) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 716) or Sch 7 para 4(3)(a) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 65) (s 433(3)(a) (s 433(2)-(4) added by the Youth Justice and Criminal Evidence Act 1999 s 48, Sch 3 para 7(1), (3)));

2304 (2) an offence which is:

14. (a) created by rules made under the Insolvency Act 1986 (s 433(3)(b)(i) (as so added)); and
14

15. (b) designated for these purposes by such rules or by regulations made by the Secretary of State (s 433(3)(b)(ii) (as so added));
15

2305 (3) an offence which is:

16. (a) created by regulations made under any such rules (s 433(3)(c)(i) (as so added)); and
16

17. (b) designated for these purposes by such regulations (s 433(3)(c)(ii) (as so added));
17

2306 (4) an offence under the Perjury Act 1911 ss 1, 2, 5 (false statements made on oath or made otherwise than on oath: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARAS 712, 716, 717) (Insolvency Act 1986 s 433(3)(d) (as so added)); or

2307 (5) an offence under the Criminal Law (Consolidation) (Scotland) Act 1995 s 44(1), (2) (false statements made on oath or otherwise than on oath) (Insolvency Act 1986 s 433(3)(e) (as so added)).

Regulations under head (2)(b) above must be made by statutory instrument and, after being made, must be laid before each House of Parliament: s 433(4) (as so added). As to the Secretary of State see PARA 6. As to the laying of documents before Parliament see **PARLIAMENT** vol 34 (Reissue) PARA 941. At the date at which this volume states the law no such regulations had been made.

10 Insolvency Act 1986 s 433(2)(a) (as added: see note 9).

11 Insolvency Act 1986 s 433(2)(b) (as added: see note 9).

12 Insolvency Act 1986 s 433(2) (as added: see note 9).

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3. EUROPEAN FORMS OF COMPANY, ETC

(1) INTRODUCTION

1630. Treaty basis for provisions regarding European company forms.

As has been stated earlier in this title, the EC Treaty contains various provisions relating to the establishment and operation of companies in the European Community¹. The Treaty also contains provision that if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and the Treaty has not provided the necessary powers, the Council must, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures². It is this provision which forms the legal basis for provisions and proposals relating to European company forms³.

1 See PARAS 19-21.

2 See the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 308.

3 As to such provisions and proposals see PARA 1631 et seq.

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(2) EUROPEAN ECONOMIC INTEREST GROUPINGS

1631. EC Council Regulation on the European Economic Interest Grouping.

The Regulation on the European Economic Interest Grouping (EEIG)¹ creates a legal framework to enable natural persons, companies, firms and other legal bodies² to form groupings so as to co-operate effectively across frontiers for the purpose of facilitating the adaptation of their activities to the economic conditions of the Community³. The purpose of a grouping is to facilitate or develop the economic activities of its members and to improve or increase the results of those activities; its purpose is not to make profits⁴ for itself and its activity must be related to the economic activities of its members and must not be more than ancillary to those activities⁵.

EEIGs must be formed upon the terms, in the manner and with the effects laid down in the Regulation⁶. Accordingly, parties intending to form a grouping must conclude a contract⁷ which must be registered⁸, and from the date of its registration the grouping has the capacity, in its own name, to have rights and obligations of all kinds, to make contracts or accomplish other legal acts, and to sue and be sued⁹. It is for member states to determine whether or not registered groupings have legal personality¹⁰. Provision is made as to the management of groupings¹¹ and as to the manner in which decisions are to be made¹². Members may assign

their interest in a grouping¹³. No grouping may invite investment by the public¹⁴. Provision is also made as to members leaving¹⁵, the acceptance of new members¹⁶, and winding up¹⁷.

1 See EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) on the European Economic Interest Grouping (EEIG).

2 As to the persons who may be members of a grouping see EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) art 4.

3 See EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) preamble. EC Regulations are of direct effect in the law of member states. As to the principle of direct effect see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 24. However, certain provisions of EC Council Regulation 2137/85 left matters to be subject to the national law of member states. As to the implementation of such matters in the UK see PARA 1632.

4 However, provision is made as to the sharing of any profits made (see EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) art 21) and for the bearing of liabilities (see arts 21, 24).

5 See EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) art 3(1). As a result certain restrictions are placed on the activities of groupings: see art 3(2).

6 EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) art 1(1).

7 As to the matters which a contract for the formation of a grouping must include see EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) art 5.

8 See EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) art 1(1), (6). The law applicable to the contract for the formation of a grouping is the internal law of the state in which the official address is situated, as laid down in the contract for the formation of the grouping: see art 2. Certain documents must be filed with the contract on registration (see art 7) and provision is made as to the publication of information regarding the contract and its registration (see art 8). Provision is made as to the official address of a grouping: see arts 12-14.

9 See EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) art 1(2). Letters, order forms and similar documents must contain certain information as to the grouping: see art 25.

10 See EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) art 1(3). As to the provision made in respect of groupings registered in Great Britain see PARA 1632.

11 See EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) arts 16, 18-20.

12 See EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) art 17.

13 See EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) art 22.

14 See EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) art 23.

15 See EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) arts 27-30, 34.

16 See EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) art 26.

17 See EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) arts 31, 32, 35.

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1632. Implementation of the Regulation.

The Regulation on the European Economic Interest Grouping (EEIG)¹ is directly applicable in UK law² but certain provisions of the Regulation left matters to be subject to the national law of member states and for this, and certain other purposes, it was necessary for domestic regulations to be made³.

The European Economic Interest Grouping Regulations 1989⁴ extend to the whole of the United Kingdom⁵, and provide that from the date of registration of an EEIG⁶ in the United Kingdom the EEIG is a body corporate by the name contained in the contract⁷. The registrar for the purposes of registration of an EEIG in the United Kingdom, where its official address is in the United Kingdom, is the registrar⁸. Provision is made as to the procedure on registration⁹, and for the filing, inspection and publication of documents¹⁰. It is an offence for an EEIG, or an officer or person acting on its behalf, to fail to comply with the provisions¹¹ relating to the inclusion of certain information in letters, order forms and similar documents¹². The regulations make supplemental provision as to the transfer of official address¹³, managers¹⁴, cessation of membership¹⁵, the competent authority¹⁶, and winding up and conclusion of liquidation¹⁷. Various statutory provisions are applied to EEIGs¹⁸.

1 Ie EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) on the European Economic Interest Grouping (EEIG): see PARA 1631.

2 As to the direct applicability of EC Regulations see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 24.

3 See the Explanatory Note to the European Economic Interest Grouping Regulations 1989, SI 1989/638.

4 Ie the European Economic Interest Grouping Regulations 1989, SI 1989/638.

5 See the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 1 (amended by SI 2009/2399). As to the meaning of 'United Kingdom' see para 1 note 5.

6 'EEIG' means a European Economic Interest Grouping being a grouping formed in pursuance of EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) art 1 (see para 1631): European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 2(1).

7 European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 3 (amended by SI 2009/2399). 'Contract' means the contract for the formation of an EEIG: see the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 2(1). As to such contracts see para 1631.

8 See the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 9(1) (amended by SI 2009/2399). As to the meaning of 'registrar' see PARA 131 note 2; definition applied by the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 2(1) (amended by SI 2009/2399). As to the registration of establishment of an EEIG whose official address is outside the United Kingdom see reg 12 (amended by SI 2009/2399). As to registration under an alternative name, where an EEIG has an official address which is outside the United Kingdom, and has an establishment that is registered or is in the process of being registered under the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 12, see reg 12A (added by SI 2009/2399).

9 See the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 9 (amended by SI 2009/2399). As to the prohibition on the use of certain names see the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 10 (amended by SI 2009/2399); and as to change of name see the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 11 (amended by SI 2009/2399). As to fees payable on registration, change of name and other occasions see the Registrar of Companies (Fees) (European Economic Interest Grouping and European Public Limited-Liability Company) Regulations 2009, SI 2009/2403.

10 See the European Economic Interest Grouping Regulations 1989, SI 1989/638, regs 13-15 (reg 13 amended by SI 2009/2399).

11 Ie EC Council Regulation 2137/85 (OJ L199, 31.07.1985, p 1) art 25: see PARA 1631.

12 See the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 16.

13 See the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 4 (amended by SI 2009/2399).

14 See the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 5 (amended by SI 2009/2399).

15 See the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 6 (amended by SI 2009/2399).

16 See the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 7 (amended by SI 2009/2399).

17 See the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 8 (amended by SI 2009/2399).

18 See the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 18 (amended by SI 2009/2399) (application of provisions of the Companies Acts), the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 19 (amended by SI 2009/2399) (application of Insolvency Act 1986), and the European Economic Interest Grouping Regulations 1989, SI 1989/638, reg 20 (amended by SI 2009/2399) (application of Company Directors Disqualification Act 1986).

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(3) EUROPEAN COMPANY (SOCIETAS EUROPAEA)

(i) In general

1633. The nature of a European Company.

The Regulation on the Statute for a European Company¹ makes provision, in the context of the completion of the internal market and for the purpose of enabling companies whose business is not limited to satisfying purely local needs to be able to plan and carry out the reorganisation of their business on a Community scale, for the creation and management of companies with a European dimension free from the obstacles arising from the disparity and the limited territorial application of national company law². The Regulation is directly applicable in the law of member states³ but leaves a number of matters to be subject to the national law of member states and for this purpose it was necessary for domestic regulations to be made⁴.

A company may be set up within the territory of the European Community in the form of a European public limited liability company (known as a Societas Europaea or SE)⁵ on the conditions and in the manner laid down in the Regulation⁶. Such a company has legal personality⁷. Its capital⁸ must be divided into shares with no shareholder being liable for more than the amount he has subscribed⁹. Employee involvement in a European Company is governed by the provisions of the Directive¹⁰ supplementing the Statute for a European Company with regard to the involvement of employees¹¹.

Certain public limited liability companies, formed under the law of a member state¹², with registered offices and head offices within the Community may form a European Company by means of a merger provided that at least two of them are governed by the law of different member states¹³.

Certain public and private limited liability companies¹⁴, formed under the law of a member state, with registered offices and head offices within the Community may promote the formation of a holding European Company¹⁵ provided that each of at least two of them:

2308 (1) is governed by the law of a different member state¹⁶; or

2309 (2) has for at least two years had a subsidiary company governed by the law of another member state or a branch situated in another member state¹⁷.

Companies and firms¹⁸ and other legal bodies governed by public or private law, formed under the law of a member state, with registered offices and head offices within the Community may form a subsidiary European Company¹⁹ by subscribing for its shares, provided that each of at least two of them²⁰:

2310 (a) is governed by the law of a different member state²¹; or

2311 (b) has for at least two years had a subsidiary company governed by the law of another member state or a branch situated in another member state²².

A public limited liability company, formed under the law of a member state, which has its registered office and head office within the Community may be transformed into a European Company²³ if for at least two years it has had a subsidiary company governed by the law of another member state²⁴.

A member state may provide that a company the head office of which is not in the Community may participate in the formation of a European Company provided that company is formed under the law of a member state, has its registered office in that member state and has a real and continuous link with a member state's economy²⁵.

A European Company may itself set up one or more subsidiaries in the form of European Companies²⁶. The provisions of the law of the member state in which a subsidiary European Company has its registered office that require a public limited liability company to have more than one shareholder do not apply in the case of the subsidiary European Company²⁷.

1 le EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) on the Statute for a European Company.

2 See EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) preamble.

3 As to the direct applicability of EC Regulations see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 24.

4 As to such regulations see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326; and the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009, SI 2009/2401. These regulations are referred to where appropriate in the footnotes to this and the following paragraphs.

5 For the purposes of this work such a company is referred to as a 'European Company'.

6 See EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 1(1).

7 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 1(3).

8 As to capital see PARA 1634.

9 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 1(2).

10 le EC Council Directive 2001/86 (OJ L294, 10.11.2001, p 22) supplementing the Statute for a European Company with regard to the involvement of employees. For the purposes of implementing the Directive, the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009, SI 2009/2401, have been made. See also PARA 1638.

11 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 1(4).

12 In the case of the United Kingdom, the public limited liability companies are: (1) public companies limited by shares (see PARA 78); and (2) public companies limited by guarantee having a share capital (see PARAS 79-80): see EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) Annex I.

13 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 2(1). For this purpose, a European Company is regarded as a public limited liability company governed by the law of the member state in which it has its registered office: art 3(1). As to the formation of a European Company by merger see PARAS 1640-1645.

14 In the case of the United Kingdom, the public and private limited liability companies are: (1) public companies limited by shares (see PARA 78); (2) public companies limited by guarantee having a share capital (see PARAS 79-80); (3) private companies limited by shares (see PARAS 72, 78); and (4) private companies limited by guarantee having a share capital (see PARAS 72, 79-80): EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) Annex II.

15 As to the formation of a holding European Company see PARAS 1646-1648.

16 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 2(2)(a). For this purpose, a European Company is regarded as a public limited liability company governed by the law of the member state in which it has its registered office: art 3(1).

17 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 2(2)(b).

18 The companies and firms within the meaning of the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmd 5179) art 48 second paragraph (see PARA 19 note 1): EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 2(3).

19 As to the formation of a subsidiary European Company see PARAS 1649-1650.

20 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 2(3).

21 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 2(3)(a). For this purpose, a European Company is regarded as a public limited liability company governed by the law of the member state in which it has its registered office: art 3(1).

22 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 2(3)(b).

23 As to the transformation of a company into a European Company see PARA 1651.

24 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 2(4).

25 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 2(5). As to the provision made in this respect see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 55.

26 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 3(2).

27 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 3(2). The provisions of national law implementing EC Council Directive 89/667 (OJ L395, 30.12.1989, p 40) on single-member private limited liability companies (see PARA 23) apply to European Companies mutatis mutandis: EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 3(2). The United Kingdom no longer requires any company to have more than one member; a company is duly formed under the Companies Act 2006 by one or more persons: see s 7; and PARA 102.

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1634. Capital.

The capital of a European Company¹ must be expressed in euro², and the subscribed capital must not be less than 120,000 euro³. The laws of a member state requiring a greater subscribed capital for companies carrying on certain types of activity apply to European Companies with registered offices in that member state⁴.

Subject to the provisions regarding subscribed capital⁵, the capital of a European Company, its maintenance and changes to it, together with the European Company's shares, bonds and other similar securities are governed by the provisions which would apply to a public limited

liability company with a registered office in the member state in which the European Company is registered⁶.

1 As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

2 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 4(1). If and so long as the third phase of economic and monetary union ('EMU') does not apply to it each member state may make European Companies with registered offices within its territory subject to the same provisions as apply to public limited liability companies covered by its legislation as regards the expression of their capital: art 67(1). A European Company may, in any case, express its capital in euro as well and, in that event, the national currency or euro conversion rate must be that for the last day of the month preceding that of the formation of the European Company: art 67(1). As to the provision made in this respect see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 67.

3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 4(2).

4 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 4(3).

5 le subject to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 4(1), (2): see the text to notes 1-3.

6 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 5.

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1635. Registered office.

The registered office of a European Company¹ must be located within the European Community, in the same member state as its head office². A member state may in addition impose on European Companies registered in its territory the obligation of locating their head office and their registered office in the same place³. The registered office of a European Company may be transferred to another member state⁴.

1 As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

2 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 7.

3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 7.

4 See PARA 1661.

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1636. Applicable law.

A European Company¹ is governed:

2312 (1) by the Regulation on the Statute for a European Company²;

2313 (2) where expressly authorised by the Regulation, by the provisions of its statutes³; or

2314 (3) in the case of matters not regulated by the Regulation or, where matters are partly regulated by it, of those aspects not covered by it, by:

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1. (a) the provisions of laws adopted by member states in implementation of Community measures relating specifically to European Companies⁴;
2. (b) the provisions of member states' laws which would apply to a public limited liability company formed in accordance with the law of the member state in which the European Company has its registered office⁵;
3. (c) the provisions of its statutes, in the same way as for a public limited liability company formed in accordance with the law of the member state in which the European Company has its registered office⁶.

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Subject to the provisions of the Regulation on the Statute for a European Company, a European Company must be treated in every member state as if it were a public limited liability company formed in accordance with the law of the member state in which it has its registered office⁷.

1 As to the meaning of 'European Company' see PARA 1633 note 5.

2 Ie by EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1): art 9(1)(a). As to EC Council Regulation 2157/2001 see PARA 1633.

3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 9(1)(b). 'Statutes of the European Company' means both the instrument of incorporation and, where they are the subject of a separate document, the statutes of the European Company: see art 6.

4 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 9(1)(c)(i). The provisions of laws adopted by member states specifically for the European Company must be in accordance with Directives applicable to: (1) public companies limited by shares (see PARA 78); and (2) public companies limited by guarantee having a share capital (see PARAS 79-80): art 9(2), Annex I.

5 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 9(1)(c)(ii). As to the registered office of a European Company see PARA 1635. If the nature of the business carried out by a European Company is regulated by specific provisions of national laws, those laws apply in full to the European Company: art 9(3).

6 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 9(1)(c)(iii).

7 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 10.

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1637. Name and registration; publicity.

The name of a European Company¹ must be preceded or followed by the abbreviation 'SE'²; and only European Companies may include the abbreviation 'SE' in their name³. Nevertheless, companies, firms and other legal entities registered in a member state before 8 October 2004⁴ in the names of which the abbreviation 'SE' appears are not required to alter their names⁵.

Every European Company must be registered in the member state in which it has its registered office in a register designated by the law of that member state in accordance with the First Council Directive on co-ordination of safeguards⁶ which, for the protection of the interests of

members and others, are required by member states of companies with a view to making such safeguards equivalent throughout the Community⁷. A European Company must make arrangements (or must have attempted to make arrangements) for employee involvement prior to registration⁸.

Publication of the documents and particulars concerning a European Company which must be publicised under the Regulation on the Statute for a European Company must be effected in the manner laid down in the laws of the member state in which the European Company has its registered office in accordance with the First Council Directive on co-ordination of safeguards⁹. After such publication, notice of a European Company's registration and of the deletion of such a registration must be published for information purposes in the Official Journal of the European Communities¹⁰. That notice must state the name, number, date and place of registration of the European Company, the date and place of publication and the title of publication, the registered office of the European Company and its sector of activity¹¹. Where the registered office of a European Company is transferred¹², notice must be published giving the same information¹³, together with that relating to the new registration¹⁴.

1 As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

2 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 11(1). As to the penalties for failure to comply with art 11(1) or 11(2) (see the text to note 3) see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 84.

3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 11(2). See also note 2.

4 Ie before the date of entry into force of EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1): see art 70.

5 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 11(3).

6 Ie EC Council Directive 68/151 (OJ L65, 14.3.1968, p 8) art 3: see PARA 23.

7 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 12(1). As to the provision made in relation to the registration of European Companies see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, regs 4-15 (regs 5-14 amended by, reg 13A added by, SI 2009/2400). As to fees payable on registration see the Registrar of Companies (Fees) (European Economic Interest Grouping and European Public Limited-Liability Company) Regulations 2009, SI 2009/2403.

8 See EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 12(2)-(4); and PARA 1638.

9 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 13.

10 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 14(1). The particulars must be forwarded to the Office for Official Publications of the European Communities within one month of the publication referred to in art 13 (see the text to note 9): art 14(3).

11 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 14(1).

12 Ie in accordance with EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8: see PARA 1661.

13 Ie the information provided for in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 14(1): see the text to note 11.

14 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 14(2).

1638. Employee involvement.

A European Company¹ may not be registered² unless an agreement on arrangements for employee involvement has been concluded³, or a decision has been taken⁴, or the period for negotiations⁵ has expired without an agreement having been concluded⁶.

In order for a European Company to be registered in a member state which has made use of the option referred to in the Directive supplementing the Statute for a European Company with regard to the involvement of employees⁷, it must be the case that either an agreement⁸ has been concluded on the arrangements for employee involvement, including participation, or none of the participating companies has been governed by participation rules prior to the registration of the European Company⁹.

The statutes of the European Company¹⁰ must not conflict at any time with the arrangements for employee involvement¹¹. Where new arrangements determined pursuant to the Directive conflict with the existing statutes, the statutes must to the extent necessary be amended¹²; and, in this case, a member state may provide that the management organ or the administrative organ of the European Company¹³ is entitled to proceed to amend the statutes without any further decision from the general shareholders meeting¹⁴.

1 As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

2 As to registration see PARA 1637.

3 I.e. an agreement made pursuant to EC Council Directive 2001/86 (OJ L294, 10.11.2001, p 22) supplementing the Statute for a European Company with regard to the involvement of employees. As to the provision made for the purposes of implementing the Directive see the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009, SI 2009/2401.

4 I.e. a decision has been taken pursuant to EC Council Directive 2001/86 (OJ L294, 10.11.2001, p 22) art 3(6).

5 I.e. the period allowed pursuant to EC Council Directive 2001/86 (OJ L294, 10.11.2001, p 22) art 5.

6 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 12(2).

7 I.e. the option referred to in EC Council Directive 2001/86 (OJ L294, 10.11.2001, p 22) art 7(3).

8 I.e. an agreement made pursuant to EC Council Directive 2001/86 (OJ L294, 10.11.2001, p 22) art 4.

9 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 12(3).

10 As to the meaning of 'statutes of the European Company' see PARA 1636 note 3.

11 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 12(4).

12 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 12(4).

13 As to the management and administrative organs see PARAS 1656-1659.

14 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 12(4). As to the provision made in this respect see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 59. As to the general meeting of shareholders see PARA 1653 et seq.

(ii) Formation

A. IN GENERAL

1639. Registration.

Subject to the Regulation on the Statute for a European Company¹, the formation of a European Company² is governed by the law applicable to public limited liability companies in the member state in which the European Company establishes its registered office³. The registration must be publicised⁴.

A European Company acquires legal personality on the date on which it is registered in the register⁵. If acts have been performed in the name of a European Company before such registration⁶ and the European Company does not assume the obligations arising out of such acts after its registration, the natural persons, companies, firms or other legal entities which performed those acts are jointly and severally liable for them, without limit, in the absence of agreement to the contrary⁷.

1 le subject to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) on the Statute for a European Company. As to EC Council Regulation 2157/2001 see PARA 1633.

2 As to the meaning of 'European Company' see PARA 1633 note 5.

3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 15(1). As to the provision made with regard to registration see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, regs 4-15 (regs 5-14 amended by, reg 13A added by, SI 2009/2400). As to fees payable on registration see the Registrar of Companies (Fees) (European Economic Interest Grouping and European Public Limited-Liability Company) Regulations 2009, SI 2009/2403.

4 See EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 15(2). Such publicity must be in accordance with art 13 (see PARA 1637): art 15(2).

5 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 16(1). The register is that referred to in art 12 (see PARA 1637): art 16(1).

6 le before registration in accordance with EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 12: see PARA 1637.

7 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 16(2).

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B. FORMATION BY MERGER

1640. The law governing merger.

A European Company¹ may be formed² by means of a merger³. Such a merger may be carried out in accordance with:

2315 (1) the procedure for merger by acquisition laid down in the Third Council Directive⁴ relating to particular types of mergers of public limited liability companies⁵; or

2316 (2) the procedure for merger by the formation of a new company laid down⁶ in that Directive⁷.

In the case of a merger by acquisition, the acquiring company must take the form of a European Company when the merger takes place⁸; and in the case of a merger by the formation of a new company, the European Company must be the newly formed company⁹.

The laws of a member state may provide that a company governed by the law of that member state may not take part in the formation of a European Company by merger if any of that member state's competent authorities¹⁰ opposes it before the issue of a certificate¹¹ conclusively attesting to the completion of the pre-merger acts and formalities¹². Such opposition may be based only on grounds of public interest and review by a judicial authority must be possible¹³.

1 As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

2 Ie in accordance with EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 2(1): see PARA 1633.

3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 17(1). For matters not covered by Section 2 (arts 17-31) (see this paragraph and PARAS 1641-1645) or, where a matter is partly covered by it, for aspects not covered by it, each company involved in the formation of a European Company by merger is governed by the provisions of the law of the member state to which it is subject that apply to mergers of public limited liability companies in accordance with EC Council Directive 78/855 (OJ L295, 20.10.1978, p 36): EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 18.

4 Ie EC Council Directive 78/855 (OJ L295, 20.10.1978, p 36) art 3(1), based on the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 54 para 3(g) (art 54 (formerly art 65) renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ). See further the Companies Act 2006 Pt 27 (ss 902-941) (mergers and divisions of public companies); and PARA 1449 et seq.

5 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 17(2)(a).

6 Ie in EC Council Directive 78/855 (OJ L295, 20.10.1978, p 36) art 4(1).

7 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 17(2)(b).

8 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 17(2).

9 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 17(2).

10 As to the competent authority see PARA 1643.

11 Ie a certificate issued under EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 25(2): see PARA 1643.

12 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 19.

13 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 19. As to the provision made for the review of decisions see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 74 (amended by SI 2009/2400).

1641. Draft terms of merger.

The management¹ or administrative organs² of merging companies must draw up draft terms of merger, which must include the following particulars³:

- 2317 (1) the name and registered office of each of the merging companies together with those proposed for the European Company⁴;
- 2318 (2) the share-exchange ratio and the amount of any compensation⁵;
- 2319 (3) the terms for the allotment of shares in the European Company⁶;
- 2320 (4) the date from which the holding of shares in the European Company will entitle the holders to share in profits and any special conditions affecting that entitlement⁷;
- 2321 (5) the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the European Company⁸;
- 2322 (6) the rights conferred by the European Company on the holders of shares to which special rights are attached and on the holders of securities other than shares, or the measures proposed concerning them⁹;
- 2323 (7) any special advantage granted to the experts who examine the draft terms of merger or to members of the administrative, management, supervisory or controlling organs of the merging companies¹⁰;
- 2324 (8) the statutes of the European Company¹¹; and
- 2325 (9) information on the procedures by which arrangements for employee involvement are determined¹².

The merging companies may include further items in the draft terms of merger¹³.

1 As to the management organ (of a company with a two-tier management structure) see PARA 1656.

2 As to the administrative organ (of a company with a one-tier management structure) see PARA 1658.

3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 20(1). As to mergers see PARA 1640.

4 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 20(1)(a). As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

5 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 20(1)(b).

6 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 20(1)(c).

7 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 20(1)(d).

8 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 20(1)(e).

9 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 20(1)(f).

10 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 20(1)(g).

11 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 20(1)(h). As to the meaning of 'statutes of the European Company' see PARA 1636 note 3.

12 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 20(1)(i). The arrangements for employee involvement are determined pursuant to EC Council Directive 2001/86 (OJ L294, 10.11.2001, p 22) (see PARA 1638); see EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 20(1)(i).

13 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 20(2).

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1642. Disclosure requirements.

For each of the merging companies¹ and subject to the additional requirements imposed by the member state to which the company concerned is subject, the following particulars must be published in the national gazette of that member state:

- 2326 (1) the type, name and registered office of every merging company²;
- 2327 (2) the register in which the documents³ are filed in respect of each merging company, and the number of the entry in that register⁴;
- 2328 (3) an indication of the arrangements⁵ made for the exercise of the rights of the creditors of the company in question and the address at which complete information on those arrangements may be obtained free of charge⁶;
- 2329 (4) an indication of the arrangements⁷ made for the exercise of the rights of minority shareholders of the company in question and the address at which complete information on those arrangements may be obtained free of charge⁸;
- 2330 (5) the name and registered office proposed for the European Company⁹.

1 As to mergers see PARA 1640.

2 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 21(a). As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

3 I.e. the documents referred to in EC Council Directive 68/151 (OJ L65, 14.3.1968, p 8) art 3(2).

4 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 21(b).

5 I.e. the arrangements made in accordance with EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 24: see PARA 1643.

6 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 21(c).

7 I.e. the arrangements made in accordance with EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 24: see PARA 1643.

8 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 21(d).

9 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 21(e). As to the meaning of 'European Company' see PARA 1633 note 5.

UPDATE

1642 Disclosure requirements

NOTE 3--Directive 68/151 art 3 replaced: European Parliament and EC Council Directive 2009/101 (OJ L258, 1.10.2009, p 11) art 3.

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ETC/(3) EUROPEAN COMPANY (SOCIETAS EUROPAEA)/(ii) Formation/B. FORMATION BY MERGER/1643. Scrutiny of the draft terms and approval.

1643. Scrutiny of the draft terms and approval.

As an alternative to experts operating on behalf of each of the merging companies, one or more independent experts¹, appointed for those purposes at the joint request of the companies by a judicial or administrative authority in the member state of one of the merging companies or of the proposed European Company², may examine the draft terms of merger³ and draw up a single report to all the shareholders⁴. The experts have the right to request from each of the merging companies any information they consider necessary to enable them to complete their function⁵.

The general meeting of each of the merging companies must approve the draft terms of merger⁶. The general meetings of each of the merging companies may reserve the right to make registration of the European Company⁷ conditional upon its express ratification of the arrangements decided for employee involvement in the European Company⁸.

The law of the member state governing each merging company applies as in the case of a merger of public limited liability companies, taking into account the cross-border nature of the merger, with regard to the protection of the interests of: (1) creditors of the merging companies⁹; (2) holders of bonds of the merging companies¹⁰; (3) holders of securities (other than shares) which carry special rights in the merging companies¹¹. A member state may, in the case of the merging companies governed by its law, adopt provisions designed to ensure appropriate protection for minority shareholders who have opposed the merger¹².

The legality of a merger must be scrutinised, as regards the part of the procedure concerning each merging company, in accordance with the law on mergers of public limited liability companies of the member state to which the merging company is subject¹³. In each member state concerned, the court, notary or other competent authority¹⁴ must issue a certificate conclusively attesting to the completion of the pre-merger acts and formalities¹⁵. If the law of a member state to which a merging company is subject provides for a procedure to scrutinise and amend the share-exchange ratio, or a procedure to compensate minority shareholders, without preventing the registration of the merger, such procedures only apply if the other merging companies situated in member states which do not provide for such procedure explicitly accept, when approving the draft terms of the merger¹⁶, the possibility for the shareholders of that merging company to have recourse to such procedure¹⁷. In such cases, the court, notary or other competent authorities may issue the certificate¹⁸ even if such a procedure has been commenced¹⁹. The certificate must, however, indicate that the procedure is pending²⁰. The decision in the procedure is binding on the acquiring company and all its shareholders²¹.

The legality of a merger must be scrutinised, as regards the part of the procedure concerning the completion of the merger and the formation of the European Company, by the court, notary or other authority competent in the member state of the proposed registered office of the European Company to scrutinise that aspect of the legality of mergers of public limited liability companies²². To that end each merging company must submit to the competent authority the certificate²³ within six months of its issue together with a copy of the draft terms of merger approved by that company²⁴. The scrutinising authority²⁵ must in particular:

- 2331 (a) ensure that the merging companies have approved draft terms of merger in the same terms and that arrangements for employee involvement have been determined²⁶; and
- 2332 (b) satisfy itself that the European Company has been formed in accordance with the requirements of the law of the member state in which it has²⁷ its registered office²⁸.

- 1 le independent experts as defined in EC Council Directive 78/855 (OJ L295, 20.10.1978, p 36) art 10. As to independent experts see now the Companies Act 2006 s 909; and PARA 1458.
- 2 As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.
- 3 As to the draft terms of merger see PARA 1641. As to mergers see PARA 1640.
- 4 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 22. As to applications for the appointment of joint experts see CPR 49 and *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 20.
- 5 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 22.
- 6 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 23(1). As to general meetings see PARA 1653 et seq.
- 7 As to registration of the European Company see PARA 1639.
- 8 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 23(2). Employee involvement in the European Company must be decided pursuant to EC Council Directive 2001/86 (OJ L294, 10.11.2001, p 22) (see PARA 1638): EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 23(2).
- 9 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 24(1)(a).
- 10 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 24(1)(b).
- 11 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 24(1)(c).
- 12 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 24(2).
- 13 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 25(1).
- 14 Each member state must designate the competent authorities within the meaning of EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) arts 25, 26 (see the text to note 22) and must inform the Commission and the other member states accordingly: see art 68(2). The competent authority designated for the purpose of art 25 is the High Court in England and Wales, in relation to a public company whose registered office is in England and Wales: see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 75(b) (substituted by SI 2009/2400). As to the meaning of 'England' see PARA 1 note 5. As to the meaning of 'Wales' see PARA 1 note 5.
- 15 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 25(2). As to the procedure in relation to the issue of such a certificate see CPR 49 and *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 19.
- 16 le when approving the draft terms of the merger in accordance with EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 23(1): see the text to note 6.
- 17 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 25(3).
- 18 le the certificate referred to in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 25(2): see the text to notes 14-15.
- 19 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 25(3).
- 20 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 25(3).
- 21 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 25(3).
- 22 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 26(1). The competent authority designated for the purpose of art 26 is the High Court in England and Wales, in relation to an SE where the registered office is proposed to be in England and Wales: see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 75(c) (substituted by SI 2009/2400).
- 23 le the certificate referred to in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 25(2): see the text to notes 14-15.

24 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 26(2). As to the procedure on such applications see CPR 49 and *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49 para 21.

25 Ie the authority mentioned in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 26(1): see the text to note 22.

26 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 26(3). Arrangements for employee involvement must have been determined pursuant to EC Council Directive 2001/86 (OJ L294, 10.11.2001, p 22) (see PARA 1638): EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 26(3).

27 Ie in accordance with EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 15: see PARA 1639.

28 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 26(4).

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1644. Completion of the merger.

A merger and simultaneous formation of a European Company¹ takes effect on the date on which the European Company² is registered³. The European Company may not be registered until the formalities relating to the scrutiny and approval of terms⁴ have been completed⁵.

For each of the merging companies, the completion of the merger must be publicised as laid down⁶ by the law of each member state⁷.

1 As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

2 Ie in accordance with EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 12: see PARA 1637.

3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 27(1).

4 Ie the formalities provided for in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) arts 25-26: see PARA 1643.

5 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 27(2).

6 Ie in accordance with EC Council Directive 68/151 (OJ L65, 14.3.1968, p 8) art 3.

7 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 28. As to the provision made in this respect see European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 69 (amended by SI 2009/2400).

UPDATE

1644 Completion of the merger

NOTE 6--Directive 68/151 art 3 replaced: European Parliament and EC Council Directive 2009/101 (OJ L258, 1.10.2009, p 11) art 3.

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1645. Effects of the merger.

A merger by acquisition¹ has the following consequences ipso jure and simultaneously:

- 2333 (1) all the assets and liabilities of each company being acquired are transferred to the acquiring company²;
- 2334 (2) the shareholders of the company being acquired become shareholders of the acquiring company³;
- 2335 (3) the company being acquired ceases to exist⁴;
- 2336 (4) the acquiring company adopts the form of a European Company⁵.

A merger by the formation of a new company⁶ has the following consequences ipso jure and simultaneously:

- 2337 (a) all the assets and liabilities of the merging companies are transferred to the European Company⁷;
- 2338 (b) the shareholders of the merging companies become shareholders of the European Company⁸;
- 2339 (c) the merging companies cease to exist⁹.

Where, in the case of a merger of public limited liability companies, the law of a member state requires the completion of any special formalities before the transfer of certain assets, rights and obligations by the merging companies becomes effective against third parties, those formalities apply and must be carried out either by the merging companies or by the European Company following its registration¹⁰.

The rights and obligations of the participating companies on terms and conditions of employment arising from national law, practice and individual employment contracts or employment relationships, and existing at the date of the registration, must, by reason of such registration, be transferred to the European Company upon its registration¹¹.

A merger of public companies limited by shares or public companies limited by guarantee having a share capital¹² may not be declared null and void once the European Company has been registered¹³. The absence of scrutiny of the legality of the merger¹⁴ may be included among the grounds for the winding up of the European Company¹⁵.

1 I.e. a merger carried out as laid down in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 17(2)(a): see PARA 1640. Where such a merger is carried out by a company which holds all the shares and other securities conferring the right to vote at general meetings of another company, the provisions of art 20(1)(b)-(d) (see PARA 1641), art 22 (see PARA 1643), and art 29(1)(b) (see the text to note 3) do not apply: art 31(1). National law governing each merging company and mergers of public limited liability companies in accordance with EC Council Directive 78/855 (OJ L295, 20.10.1978, p 36) art 24 nevertheless apply: EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 31(1). Where a merger by acquisition is carried out by a company which holds 90% or more (but not all) of the shares and other securities conferring the right to vote at general meetings of another company, reports by the management or administrative body, reports by an independent expert or experts and the documents necessary for scrutiny are required only to the extent that the national law governing either the acquiring company or the company being acquired so requires: art 31(2). Member states may, however, provide that art 31(2) applies where a company holds shares conferring 90% or more (but not all) of the voting rights: art 31(2). As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

- 2 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 29(1)(a).
- 3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 29(1)(b).
- 4 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 29(1)(c).
- 5 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 29(1)(d). As to the meaning of 'European Company' see PARA 1633 note 5.
- 6 le a merger carried out as laid down in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 17(2)(b): see PARA 1640.
- 7 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 29(2)(a).
- 8 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 29(2)(b).
- 9 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 29(2)(c).
- 10 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 29(3). As to registration see PARA 1639.
- 11 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 29(4).
- 12 le as provided for in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 2(1): see PARA 1633.
- 13 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 30.
- 14 le pursuant to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) arts 25-26: see PARA 1643.
- 15 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 30. As to winding up see PARA 1662.

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C. FORMATION OF A HOLDING COMPANY

1646. In general.

A holding European Company¹ may be formed² in accordance with the Regulation on the Statute for a European Company³.

The management⁴ or administrative organs⁵ of the companies which promote such an operation must draw up, in the same terms, draft terms for the formation of the holding European Company⁶. The draft terms must include a report explaining and justifying the legal and economic aspects of the formation and indicating the implications for the shareholders and for the employees of the adoption of the form of a holding European Company⁷. The draft terms must also set out certain of the standard particulars provided for⁸ and must fix the minimum proportion of the shares⁹ in each of the companies promoting the operation which the shareholders must contribute to the formation of the holding European Company¹⁰.

For each of the companies promoting the operation, the draft terms for the formation of the holding European Company must be publicised in the manner laid down in each member state's national law¹¹ at least one month before the date of the general meeting called to decide upon them¹².

1 As to the meaning of 'European Company' see PARA 1633 note 5.

2 le in accordance with EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 2(2): see PARA 1633.

3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 32(1). A company promoting the formation of a holding European Company in accordance with art 2(2) continues to exist: art 32(1). Article 32 (see this paragraph and PARA 1647) applies mutatis mutandis to private limited liability companies: art 32(7). As to EC Council Regulation 2157/2001 on the Statute for a European Company see PARA 1633.

4 As to the management organ (of a company with a two-tier management structure) see PARA 1656.

5 As to the administrative organ (of a company with a one-tier management structure) see PARA 1658.

6 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 32(2). As to the scrutiny and approval of the draft terms see PARA 1647.

7 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 32(2).

8 le those particulars provided for in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 20(1) (a)-(c), (f)-(i): see PARA 1641.

9 That proportion must be shares conferring more than 50% of the permanent voting rights: EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 32(2).

10 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 32(2).

11 Such publicity must be in accordance with EC Council Directive 68/151 (OJ L65, 14.3.1968, p 8) art 3: EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 32(3). As to the provision made in this respect see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 68 (amended by SI 2009/2400).

12 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 32(3).

UPDATE

1646 In general

NOTE 11--Directive 68/151 art 3 replaced: European Parliament and EC Council Directive 2009/101 (OJ L258, 1.10.2009, p 11) art 3.

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1647. Scrutiny of the draft terms and approval.

One or more experts independent of the companies promoting the formation of a holding European Company¹, appointed or approved by a judicial or administrative authority in the member state² to which each company is subject, must examine the draft terms of formation³ and draw up a written report for the shareholders of each company⁴. By agreement between the companies promoting the operation, a single written report may be drawn up for the shareholders of all the companies by one or more independent experts, appointed or approved by a judicial or administrative authority in the member state⁵ to which one of the companies promoting the operation or the proposed European Company is subject⁶. The report must indicate any particular difficulties of valuation and state whether the proposed share-exchange ratio is fair and reasonable, indicating the methods used to arrive at it and whether such methods are adequate in the case in question⁷.

The general meeting of each company promoting the operation must approve the draft terms of formation of the holding European Company⁸. The general meetings of each company

promoting the operation may reserve the right to make registration of the holding European Company conditional upon its express ratification of the arrangements for employee involvement in the holding European Company⁹.

1 As to the promotion of the formation of a holding European Company see PARA 1646. As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633. As to independent experts see the Companies Act 2006 s 909; and PARA 1458.

2 In accordance with national provisions adopted in implementation of EC Council Directive 78/855 (OJ L295, 20.10.1978, p 36).

3 In the draft terms drawn up in accordance with EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 32(2): see PARA 1646.

4 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 32(4). Article 32 (see this paragraph and PARA 1646) applies mutatis mutandis to private limited liability companies: art 32(7).

5 In accordance with national provisions adopted in implementation of EC Council Directive 78/855 (OJ L295, 20.10.1978, p 36). See note 2.

6 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 32(4).

7 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 32(5).

8 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 32(6).

9 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 32(6). Employee involvement in the European Company must be decided pursuant to EC Council Directive 2001/86 (OJ L294, 10.11.2001, p 22) (see PARA 1638): EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 32(6).

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1648. Completion.

The shareholders of the companies promoting the formation of a holding European Company¹ have a period of three months in which to inform the promoting companies whether they intend to contribute their shares to the formation of the holding European Company². That period begins on the date upon which the terms for the formation of the holding European Company have been³ finally determined⁴. The holding European Company is formed only if, within this period, the shareholders of the companies promoting the operation have assigned the minimum proportion of shares in each company in accordance with the draft terms of formation and if all the other conditions are fulfilled⁵.

If the conditions for the formation of the holding European Company are all so fulfilled⁶, that fact must, in respect of each of the promoting companies, be publicised in the manner laid down in the national law⁷ governing each of those companies⁸. Shareholders of the companies promoting the operation who have not indicated whether they intend to make their shares available to the promoting companies for the purpose of forming the holding European Company within the specified period⁹ have a further month in which to do so¹⁰.

Shareholders who have contributed their securities to the formation of the European Company must receive shares in the holding European Company¹¹. The holding European Company may not be registered until it is shown that the necessary formalities have been completed¹² and that the necessary conditions¹³ have been fulfilled¹⁴.

A member state may, in the case of companies promoting such an operation, adopt provisions designed to ensure protection for minority shareholders who oppose the operation, creditors and employees¹⁵.

- 1 As to the promotion of the formation of a holding European Company see PARAS 1646-1647. As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.
- 2 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 33(1).
- 3 Ie in accordance with EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 32: see PARA 1647.
- 4 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 33(1).
- 5 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 33(2).
- 6 Ie if the conditions are fulfilled in accordance with EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 33(2): see the text to note 5.
- 7 Ie in the manner adopted in implementation of EC Council Directive 68/151 (OJ L65, 14.3.1968, p 8) art 3. As to the provision made in this respect see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 70 (amended by SI 2009/2400).
- 8 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 33(3).
- 9 Ie within the period referred to in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 33(1): see the text to notes 1-2.
- 10 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 33(3).
- 11 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 33(4).
- 12 Ie the formalities referred to in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 32: see PARA 1647.
- 13 Ie the conditions referred to in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 33(2): see the text to note 5.
- 14 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 33(5).
- 15 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 34.

UPDATE

1648 Completion

NOTE 7--Directive 68/151 art 3 replaced: European Parliament and EC Council Directive 2009/101 (OJ L258, 1.10.2009, p 11) art 3.

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D. FORMATION OF A SUBSIDIARY EUROPEAN COMPANY

1649. Formation of a subsidiary European Company.

A subsidiary European Company¹ may be formed² in accordance with the Regulation on the Statute for a European Company³. Companies, firms and other legal entities participating in such an operation are subject to the provisions governing their participation in the formation of a subsidiary in the form of a public limited liability company under national law⁴.

1 As to the meaning of 'European Company' see PARA 1633 note 5.

2 In accordance with EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 2(3): see PARA 1633. As to EC Council Regulation 2157/2001 see PARA 1633.

3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 35.

4 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 36.

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E. FORMATION OF A SUBSIDIARY BY A EUROPEAN COMPANY

1650. Establishing a subsidiary of a European Company.

A European Company¹ may itself set up one or more subsidiaries in the form of European Companies². The provisions of the law of the member state in which a subsidiary European Company has its registered office³ that require a public limited liability company to have more than one shareholder do not apply in the case of the subsidiary European Company⁴.

1 As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

2 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 3(2).

3 As to the registered office of a European Company see PARA 1635.

4 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 3(2). The provisions of national law implementing EC Council Directive 89/667 (OJ L395, 30.12.1989, p 40) on single-member private limited liability companies (see PARA 23) apply to European Companies mutatis mutandis: EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 3(2). The United Kingdom no longer requires any company to have more than one member; a company is duly formed under the Companies Act 2006 by one or more persons: see s 7; and PARA 102.

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(iii) Conversion from an Existing Public Limited Liability Company

1651. Conversion of a public limited liability company.

A European Company¹ may be formed² by transforming a public limited liability company³. The conversion of a public limited liability company into a European Company does not result in the winding up of the company or in the creation of a new legal person⁴.

The management⁵ or administrative organ⁶ of the company in question must draw up draft terms of conversion and a report explaining and justifying the legal and economic aspects of the conversion and indicating the implications for the shareholders and for the employees of the adoption of the form of a European Company⁷. The draft terms of conversion must be publicised in the manner laid down in each member state's law⁸ at least one month before the general meeting called upon to decide upon them⁹. Before the general meeting is called to approve the draft terms¹⁰, one or more independent experts appointed or approved¹¹ by a judicial or administrative authority in the member state to which the company being converted into a European Company is subject must certify¹² that the company has net assets at least equivalent to its capital plus those reserves which must not be distributed under the law or the statutes of the company¹³.

The general meeting of the company in question must approve the draft terms of conversion together with the statutes of the European Company¹⁴. The decision of the general meeting must be passed as laid down in provisions of national law¹⁵. Member states may condition a conversion to a favourable vote of a qualified majority or unanimity in the organ of the company to be converted within which employee participation is organised¹⁶.

The rights and obligations of the company to be converted on terms and conditions of employment arising from national law, practice and individual employment contracts or employment relationships and existing at the date of the registration must, by reason of such registration, be transferred to the European Company¹⁷.

1 As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

2 In accordance with EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 2(4): see PARA 1633.

3 See EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 37(1).

4 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 37(2). This is without prejudice to art 12 (see PARA 1637): art 37(2). The registered office may not be transferred from one member state to another pursuant to art 8 (see PARA 1661) at the same time as the conversion is effected: art 37(3).

5 As to the management organ (of a company with a two-tier management structure) see PARA 1656.

6 As to the administrative organ (of a company with a one-tier management structure) see PARA 1658.

7 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 37(4).

8 Such publicity must be in accordance with EC Council Directive 68/151 (OJ L65, 14.3.1968, p 8) art 3. As to the provision made in this respect see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 68 (amended by SI 2009/2400).

9 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 37(5).

10 In before the general meeting referred to in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 37(7): see the text to note 14.

11 In accordance with the national provisions adopted in implementation of EC Council Directive 78/855 (OJ L295, 20.10.1978, p 36) art 10: EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 37(6). As to independent experts see now the Companies Act 2006 s 909; and PARA 1458.

12 In compliance with EC Council Directive 77/91 (OJ L26, 31.1.1977, p 1) *mutatis mutandis*.

13 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 37(6). As to the meaning of 'statutes of the European Company' see PARA 1636 note 3.

14 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 37(7).

15 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 37(7). The provisions of national law referred to in the text are those adopted in implementation of EC Council Directive 78/855 (OJ L295, 20.10.1978, p 36) art 7. See further the Companies Act 2006 Pt 27 (ss 902-941) (mergers and divisions of public companies); and PARA 1449 et seq.

16 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 37(8).

17 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 37(9).

UPDATE

1651 Conversion of a public limited liability company

NOTE 8--Directive 68/151 art 3 replaced: European Parliament and EC Council Directive 2009/101 (OJ L258, 1.10.2009, p 11) art 3.

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(iv) Structure

A. IN GENERAL

1652. Structure.

Under the conditions laid down by the Regulation on the Statute for a European Company¹, a European Company comprises:

- 2340 (1) a general meeting of shareholders²; and
- 2341 (2) either a supervisory organ and a management organ (a 'two-tier' system) or an administrative organ (a 'one-tier' system) depending on the form adopted in the statutes³.

1 Ie EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) on the Statute for a European Company. As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 see PARA 1633.

2 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 38(a). As to the general meeting of shareholders see PARAS 1653-1655.

3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 38(b). As to the meaning of 'statutes of the European Company' see PARA 1636 note 3. As to the one-tier and two-tier management structures see PARAS 1656-1659.

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B. THE GENERAL MEETING OF SHAREHOLDERS

1653. General matters.

The general meeting decides on matters for which it is given sole responsibility by:

- 2342 (1) the EC Council Regulation on the Statute for a European Company¹; or
- 2343 (2) the legislation of the member state² in which the European Company's registered office is situated³.

Furthermore, the general meeting must decide on matters for which responsibility is given to the general meeting of a public limited liability company governed by the law of the member state in which the European Company's registered office is situated, either by the law of that member state or by the European Company's statutes in accordance with that law⁴.

Without prejudice to the rules laid down in relation to the general meeting⁵, the organisation and conduct of general meetings together with voting procedures are governed by the law applicable to public limited liability companies in the member state in which the European Company's registered office is situated⁶.

Amendment of a European Company's statutes requires a decision by the general meeting taken by a majority which may not be less than two thirds of the votes cast, unless the law applicable to public limited liability companies in the member state in which the European Company's registered office is situated requires or permits a larger majority⁷. A member state may, however, provide that where at least half of a European Company's subscribed capital is represented, a simple majority of the votes⁸ suffice⁹. Amendments to a European Company's statutes must be publicised in accordance with the appropriate provisions¹⁰.

1 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 52(a). As to EC Council Regulation 2157/2001 see PARA 1633. As to the meaning of 'European Company' see PARA 1633 note 5.

2 Ie adopted in implementation of EC Council Directive 2001/86 (OJ L294, 10.11.2001, p 22) supplementing the Statute for a European Company with regard to the involvement of employees. As to the regulations made for the purpose of implementing the Directive see PARA 1633 note 10.

3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 52(b). As to the location of the European Company's registered office see PARA 1635.

4 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 52. As to the meaning of 'statutes of the European Company' see PARA 1636 note 3.

5 Ie the rules laid down in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) Section 4 (arts 52-60): see this paragraph and PARAS 1654-1655.

6 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 53.

7 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 59(1). Where a decision by the general meeting requires the majority of votes specified in art 59(1), that majority is also required for the separate vote by each class of shareholders whose class rights are affected by the decision: art 60(2).

8 Ie the votes referred to in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 59(1): see the text to note 7.

9 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 59(2). Where a decision by the general meeting requires the majority of votes specified in art 59(2), that majority is also required for the separate vote by each class of shareholders whose class rights are affected by the decision: art 60(2).

10 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 59(3). The appropriate provisions are those of art 13 (see PARA 1637): see art 59(3). Provision as to such publicity has been made: see the European

Public Limited-Liability Company Regulations 2004, SI 2004/2326, regs 71, 82 (reg 82 amended by SI 2009/2400).

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1654. Holding of meetings.

A European Company¹ must hold a general meeting² at least once each calendar year, within six months of the end of its financial year, unless the law of the member state in which the European Company's registered office is situated³ applicable to public limited liability companies carrying on the same type of activity as the European Company provides for more frequent meetings⁴. A member state may, however, provide that the first general meeting may be held at any time in the 18 months following a European Company's incorporation⁵.

General meetings may be convened at any time by the management organ⁶, the administrative organ⁷, the supervisory organ⁸ or any other organ or competent authority⁹ in accordance with the national law applicable to public limited liability companies in the member state in which the European Company's registered office is situated¹⁰.

One or more shareholders who together hold at least 10 per cent of a European Company's subscribed capital may request the European Company to convene a general meeting and draw up the agenda for the meeting; the European Company's statutes¹¹ or national legislation may provide for a smaller proportion under the same conditions as those applicable to public limited liability companies¹². The request that a general meeting be convened must state the items to be put on the agenda¹³. If, following a request to convene a general meeting¹⁴, the meeting is not held in due time and, in any event, within two months, the competent judicial or administrative authority¹⁵ within the jurisdiction of which the European Company's registered office is situated may order that a general meeting be convened within a given period or authorise either the shareholders who have requested it or their representatives to convene a general meeting¹⁶. This is without prejudice to any national provisions which allow the shareholders themselves to convene general meetings¹⁷.

1 As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

2 As to the general meeting see PARA 1653.

3 As to the location of a European Company's registered office see PARA 1635.

4 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 54(1).

5 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 54(1). As to the provision made see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 65. As to the date of incorporation of a European Company see PARA 1639.

6 As to the management organ (of a company with a two-tier management structure) see PARA 1656.

7 As to the administrative organ (of a company with a one-tier management structure) see PARA 1658.

8 As to the supervisory organ (of a company with a two-tier management structure) see PARA 1657.

9 Each member state must designate the competent authorities within the meaning of EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) arts 54 and 55 (see the text to notes 11-17) and must inform the Commission and the other member states accordingly: see art 68(2). The competent authority designated is the

Secretary of State: see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 75(a). As to the Secretary of State see PARAS 6-8.

- 10 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 54(2).
- 11 As to the meaning of 'statutes of the European Company' see PARA 1636 note 3.
- 12 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 55(1).
- 13 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 55(2).
- 14 I.e. a request made under EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 55(1): see the text to notes 11-12.
- 15 See note 9.
- 16 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 55(3).
- 17 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 55(3).

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1655. Conduct of meetings.

One or more shareholders who together hold at least 10 per cent of a European Company's¹ subscribed capital may request that one or more additional items be put on the agenda of any general meeting². The procedures and time limits applicable to such requests must be laid down by the national law of the member state in which the European Company's registered office is situated³ or, failing that, by the European Company's statutes⁴. The above proportion may be reduced by the statutes or by the law of the member state in which the European Company's registered office is situated under the same conditions as are applicable to public limited liability companies⁵.

Except where the Regulation on the Statute for a European Company⁶ or, failing that, the law applicable to public limited liability companies in the member state in which a European Company's registered office is situated requires a larger majority, the general meeting's decisions must be taken by a majority of the votes validly cast⁷. Where a European Company has two or more classes of shares, every decision by the general meeting must be subject to a separate vote by each class of shareholders whose class rights are affected thereby⁸.

¹ As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

² EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 56. As to the general meeting see PARA 1653. As to the holding of meetings see PARA 1654.

³ As to the location of the European Company's registered office see PARA 1635.

⁴ EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 56. As to the meaning of 'statutes of the European Company' see PARA 1636 note 3.

⁵ EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 56. As to the provision made in this respect see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 66.

⁶ I.e. EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) on the Statute for a European Company.

7 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 57. The votes cast must not include votes attaching to shares in respect of which the shareholder has not taken part in the vote or has abstained or has returned a blank or spoilt ballot paper: art 58.

8 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 60(1).

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C. THE ONE-TIER OR TWO-TIER MANAGEMENT STRUCTURE

1656. The two-tier system: the management organ.

The management organ¹ is responsible for managing a European Company² with a two-tier system³. A member state may provide that a managing director or managing directors are responsible for the current management under the same conditions as for public limited liability companies that have registered offices within that member state's territory⁴. The member or members of the management organ must be appointed and removed by the supervisory organ⁵. A member state may, however, require or permit the statutes⁶ to provide that the member or members of the management organ must be appointed and removed by the general meeting⁷ under the same conditions as for public limited liability companies that have registered offices within its territory⁸.

No person may at the same time be a member of both the management organ and the supervisory organ of the same European Company⁹. The supervisory organ may, however, nominate one of its members to act as a member of the management organ in the event of a vacancy¹⁰. During such a period the functions of the person concerned as a member of the supervisory organ must be suspended¹¹. A member state may impose a time limit on such a period¹².

The number of members of the management organ or the rules for determining it must be laid down in the European Company's statutes¹³. A member state may, however, fix a minimum number or a maximum number (or both)¹⁴.

Where no provision is made for a two-tier system in relation to public limited liability companies with registered offices within its territory, a member state may adopt the appropriate measures in relation to European Companies¹⁵.

1 As to the structure of European Companies see PARA 1652.

2 As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 39(1).

4 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 39(1). As to the provision made in respect of the application of enactments to management organs see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 78.

5 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 39(2). As to the supervisory organ see PARA 1657.

6 As to the meaning of 'statutes of the European Company' see PARA 1636 note 3.

7 As to the general meeting see PARAS 1653-1655.

- 8 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 39(2).
- 9 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 39(3).
- 10 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 39(3).
- 11 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 39(3).
- 12 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 39(3).
- 13 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 39(4).
- 14 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 39(4). As to the provision made in this respect see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 61.
- 15 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 39(5).

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1657. The two-tier system: the supervisory organ.

The supervisory organ of a European Company with a two-tier system¹ supervises the work of the management organ². It may not itself exercise the power to manage the European Company³.

The members of the supervisory organ must be appointed by the general meeting⁴. The members of the first supervisory organ may, however, be appointed by the statutes⁵. The number of members of the supervisory organ or the rules for determining it must be laid down in the statutes⁶. A member state may, however, stipulate the number of members of the supervisory organ for European Companies registered within its territory⁷ or a minimum number or a maximum number (or both)⁸.

The management organ must report to the supervisory organ at least once every three months on the progress and foreseeable development of the European Company's business⁹. In addition to this regular information, the management organ must promptly pass the supervisory organ any information on events likely to have an appreciable effect on the European Company¹⁰. The supervisory organ may require the management organ to provide information of any kind which it needs to exercise supervision¹¹; and a member state may provide that each member of the supervisory organ also be entitled to this facility¹². The supervisory organ may undertake or arrange for any investigations necessary for the performance of its duties¹³. Each member of the supervisory organ is entitled to examine all information submitted to it¹⁴.

The supervisory organ must elect a chairman from among its members¹⁵. If half of the members are appointed by employees, only a member appointed by the general meeting of shareholders may be elected chairman¹⁶.

1 As to the structure of European Companies see PARA 1652. As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

2 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 40(1). As to the management organ see PARA 1656.

3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 40(1).

4 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 40(2). As to the general meeting see PARAS 1653-1655.

5 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 40(2). As to the meaning of 'statutes of the European Company' see PARA 1636 note 3. Article 40(2) applies without prejudice to art 47(4) (see PARA 1659) or to any employee participation arrangements determined pursuant to EC Council Directive 2001/86 (OJ L294, 10.11.2001, p 22) supplementing the Statute for a European Company with regard to the involvement of employees (see PARA 1638): art 40(2).

6 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 40(3).

7 As to the location of the European Company's registered office see PARA 1635.

8 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 40(3). As to the provision made in this respect see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 62. See also regs 78-80E (regs 79, 80 substituted by, regs 80A-80E added by, SI 2009/2400).

9 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 41(1).

10 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 41(2).

11 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 41(3). The supervision referred to is that in accordance with art 40(1) (see the text to notes 1-2): see art 41(3).

12 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 41(3). As to the provision made in this respect see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 63.

13 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 41(4).

14 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 41(5).

15 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 42.

16 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 42.

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1658. The one-tier system.

In the case of a European Company with a one-tier system¹, the administrative organ manages the European Company². A member state may provide that a managing director is or managing directors are responsible for the day-to-day management under the same conditions as for public limited liability companies that have registered offices within that member state's territory³. Where no provision is made for a one-tier system in relation to public limited liability companies with registered offices within its territory, a member state may adopt the appropriate measures in relation to European Companies⁴.

The number of members of the administrative organ or the rules for determining it must be laid down in the European Company's statutes⁵. A member state may, however, set a minimum and, where necessary, a maximum number of members⁶. The administrative organ must, however, consist of at least three members where employee participation is regulated in accordance with the Directive⁷ supplementing the Statute for a European Company with regard to the involvement of employees⁸.

The member or members of the administrative organ must be appointed by the general meeting⁹. The members of the first administrative organ may, however, be appointed by the statutes¹⁰.

The administrative organ must meet at least once every three months at intervals laid down by the statutes to discuss the progress and foreseeable development of the European Company's business¹¹. Each member of the administrative organ is entitled to examine all information submitted to it¹². The administrative organ must elect a chairman from among its members¹³. If half of the members are appointed by employees, only a member appointed by the general meeting of shareholders may be elected chairman¹⁴.

1 As to the structure of European Companies see PARA 1652. As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

2 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 43(1).

3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 43(1). As to the application of enactments to members of the administrative organ see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 78.

4 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 43(4).

5 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 43(2). As to the meaning of 'statutes of the European Company' see PARA 1636 note 3.

6 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 43(2). As to the provision made in this respect see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 64.

7 ie EC Council Directive 2001/86 (OJ L294, 10.11.2001, p 22): see PARA 1638.

8 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 43(2).

9 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 43(3). As to the general meeting see PARAS 1653-1655.

10 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 43(3). Article 43(3) applies without prejudice to art 47(4) (see PARA 1659) or to any employee participation arrangements determined pursuant to EC Council Directive 2001/86 (OJ L294, 10.11.2001, p 22) supplementing the Statute for a European Company with regard to the involvement of employees (see PARA 1638): EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 43(3).

11 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 44(1).

12 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 44(2).

13 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 45.

14 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 45.

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1659. Rules common to both systems.

Members of the organs of a European Company¹ must be appointed for a period laid down in the statutes² not exceeding six years³. Members may be reappointed once or more than once for the period so determined, subject to any restrictions laid down in the statutes⁴.

A European Company's statutes may permit a company or other legal entity to be a member of one of its organs, provided that the law applicable to public limited liability companies in the member state in which the European Company's registered office is situated⁵ does not provide otherwise⁶. That company or other legal entity must designate a natural person to exercise its functions on the organ in question⁷.

No person may be a member of any European Company organ or a representative of a member⁸ who:

- 2344 (1) is disqualified, under the law of the member state in which the European Company's registered office is situated, from serving on the corresponding organ of a public limited liability company governed by the law of that member state⁹; or
- 2345 (2) is disqualified from serving on the corresponding organ of a public limited liability company governed by the law of a member state owing to a judicial or administrative decision delivered in a member state¹⁰.

The statutes of a European Company may, in accordance with the law applicable to public limited liability companies in the member state in which the European Company's registered office is situated, lay down special conditions of eligibility for members representing the shareholders¹¹. The Regulation on the Statute for a European Company¹² does not affect national law permitting a minority of shareholders or other persons or authorities to appoint some of the members of a company organ¹³.

A European Company's statutes must list the categories of transactions which require authorisation of the management organ by the supervisory organ in the two-tier system¹⁴ or an express decision by the administrative organ in the one-tier system¹⁵. A member state may determine the categories of transactions which must at least be indicated in the statutes of European Companies registered within its territory¹⁶.

The members of a European Company's organs are under a duty, even after they have ceased to hold office, not to divulge any information which they have concerning the European Company, the disclosure of which might be prejudicial to the company's interests, except where such disclosure is required or permitted under national law provisions applicable to public limited liability companies or is in the public interest¹⁷.

Unless otherwise provided by the Regulation on the Statute for a European Company or the statutes of the company, the internal rules relating to quorums and decision-taking in European Company organs must be as follows:

- 2346 (a) for a quorum, at least half of the members must be present or represented¹⁸;
- 2347 (b) for decision-taking, a majority of the members must be present or represented¹⁹.

Where there is no relevant provision in the statutes, the chairman of each organ has a casting vote in the event of a tie²⁰. There must be no provision to the contrary in the statutes, however, where half of the supervisory organ consists of employees' representatives²¹. Where employee participation is provided for in accordance with the Directive supplementing the Statute for a European Company with regard to the involvement of employees²², a member state may provide that the supervisory organ's quorum and decision-making must, by way of derogation from these provisions²³, be subject to the rules applicable, under the same conditions, to public limited liability companies governed by the law of the member state concerned²⁴.

Members of a European Company's management, supervisory and administrative organs are liable, in accordance with the provisions applicable to public limited liability companies in the member state in which the European Company's registered office is situated, for loss or

damage sustained by the European Company following any breach on their part of the legal, statutory or other obligations inherent in their duties²⁵.

- 1 As to the structure of European Companies see PARA 1652. As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.
- 2 As to the meaning of 'statutes of the European Company' see PARA 1636 note 3.
- 3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 46(1).
- 4 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 46(2).
- 5 As to the location of the European Company's registered office see PARA 1635.
- 6 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 47(1).
- 7 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 47(1).
- 8 Ie within the meaning of EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 47(1): see the text to notes 5-7.
- 9 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 47(2)(a).
- 10 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 47(2)(b).
- 11 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 47(3).
- 12 Ie EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) on the Statute for a European Company.
- 13 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 47(4).
- 14 A member state may, however, provide that in the two-tier system the supervisory organ may itself make certain categories of transactions subject to authorisation: EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 48(1). As to the two-tier system see PARAS 1656-1657.
- 15 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 48(1). As to the one-tier system see PARA 1658.
- 16 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 48(2).
- 17 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 49.
- 18 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 50(1)(a).
- 19 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 50(1)(b).
- 20 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 50(2).
- 21 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 50(2).
- 22 Ie EC Council Directive 2001/86 (OJ L294, 10.11.2001, p 22): see PARA 1638.
- 23 Ie by way of derogation from the provisions referred to in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 50(1) and (2): see the text to notes 18-21.
- 24 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 50(3).
- 25 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 51.

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(v) Accounting Matters

1660. Annual accounts and consolidated accounts.

Subject to the Regulation on the Statute for a European Company¹, a European Company is governed by the rules applicable to public limited liability companies under the law of the member state in which its registered office is situated² as regards the preparation of its annual and, where appropriate, consolidated accounts including the accompanying annual report and the auditing and publication of those accounts³.

A European Company which is a credit or financial institution is governed by the rules laid down in the national law of the member state in which its registered office is situated in implementation of the Directive relating to the taking up and pursuit of the business of credit institutions⁴ as regards the preparation of its annual and, where appropriate, consolidated accounts, including the accompanying annual report and the auditing and publication of those accounts⁵.

A European Company which is an insurance undertaking is governed by the rules laid down in the national law of the member state in which its registered office is situated in implementation of the Directive on the annual accounts and consolidated accounts of insurance undertakings⁶ as regards the preparation of its annual and, where appropriate, consolidated accounts, including the accompanying annual report and the auditing and publication of those accounts⁷.

1 Ie subject to the EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 62: see the text to notes 4-7. As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

2 As to the location of the European Company's registered office see PARA 1635.

3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 61. If and so long as the third phase of European monetary union ('EMU') does not apply to the member state in which a European Company has its registered office, the European Company may, however, prepare and publish its annual and, where appropriate, consolidated accounts in euro: art 67(2). The member state may require that the European Company's annual and, where appropriate, consolidated accounts be prepared and published in the national currency under the same conditions as those laid down for public limited liability companies governed by the law of that member state: art 67(2). These provisions do not prejudice the additional possibility for a European Company of publishing its annual and, where appropriate, consolidated accounts in euro in accordance with EC Council Directive 90/604 (OJ L317, 16.11.1990, p 57) (see PARA 23): art 67(2).

4 Ie EC Council Directive 2000/12 (OJ L126, 26.5.2000, p 1) relating to the taking up and pursuit of the business of credit institutions. The Financial Services and Markets Act 2000 and related legislation has been made for the purpose of implementing the Directive: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 88.

5 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 62(1).

6 Ie EC Council Directive 91/674 (OJ L374, 31.12.1991, p 7). For the purpose of implementing the Directive the Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 2008, SI 2008/565, have been made: see **INSURANCE**.

7 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 62(2).

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(vi) Transfer to another Member State

1661. Transfer of the registered office to another member state.

The registered office of a European Company¹ may be transferred to another member state in accordance with the following provisions². Such a transfer does not result in the winding up of the European Company or in the creation of a new legal person³.

The management or administrative organ⁴ must draw up a transfer proposal and publicise it in accordance with the appropriate provisions⁵, without prejudice to any additional forms of publication provided for by the member state of the registered office⁶. The proposal must state the current name, registered office and number of the European Company and must cover:

- 2348 (1) the proposed registered office of the European Company⁷;
- 2349 (2) the proposed statutes of the European Company including, where appropriate, its new name⁸;
- 2350 (3) any implication the transfer may have for employees' involvement⁹;
- 2351 (4) the proposed transfer timetable¹⁰;
- 2352 (5) any rights provided for the protection of shareholders or creditors or both¹¹.

The management or administrative organ must draw up a report explaining and justifying the legal and economic aspects of the transfer and explaining the implications of the transfer for shareholders, creditors and employees¹². A European Company's shareholders and creditors are entitled, at least one month before the general meeting called upon to decide on the transfer, to examine at the European Company's registered office the transfer proposal and the report¹³ and, on request, to obtain copies of those documents free of charge¹⁴. A member state may, in the case of European Companies registered within its territory, adopt provisions designed to ensure appropriate protection for minority shareholders who oppose a transfer¹⁵. No decision to transfer may be taken for two months after publication of the proposal¹⁶.

In the member state in which a European Company has its registered office, the court, notary or other competent authority¹⁷ must issue a certificate attesting to the completion of the acts and formalities to be accomplished before the transfer¹⁸. The new registration may not be effected until such a certificate has been submitted, and evidence produced that the formalities required for registration in the country of the new registered office have been completed¹⁹.

The transfer of a European Company's registered office and the consequent amendment of its statutes take effect on the date on which the European Company is registered²⁰ in the register for its new registered office²¹. When the European Company's new registration has been effected, the registry for its new registration must notify the registry for its old registration²²; and deletion of the old registration must be effected on receipt of that notification, but not before²³. The new registration and the deletion of the old registration must be publicised in the member states concerned in accordance with the appropriate provisions²⁴.

On publication of a European Company's new registration, the new registered office may be relied on as against third parties²⁵. However, as long as the deletion of the European Company's registration from the register for its previous registered office has not been publicised, third parties may continue to rely on the previous registered office unless the European Company proves that such third parties were aware of the new registered office²⁶.

The laws of a member state may provide that, as regards European Companies registered in that member state, the transfer of a registered office which would result in a change of the law applicable does not take effect if any of that member state's competent authorities opposes it within the two-month period allowed²⁷. Such opposition may be based only on grounds of public interest²⁸. Where a European Company is supervised by a national financial supervisory

authority according to Community Directives, the right to oppose the change of registered office applies to this authority as well²⁹. Review by a judicial authority must be possible³⁰.

A European Company may not transfer its registered office if proceedings for winding up, liquidation, insolvency or suspension of payments or other similar proceedings have been brought against it³¹.

A European Company which has transferred its registered office to another member state must be considered, in respect of any cause of action arising prior to the transfer³², as having its registered office in the member states where the European Company was registered prior to the transfer, even if the European Company is sued after the transfer³³.

1 As to the registered office of a European Company see PARA 1635. As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

2 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(1).

3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(1). As to termination of a European Company see PARA 1662 et seq.

4 As to the structure of a European Company see PARA 1652. As to the management organ see PARA 1656. As to the administrative organ see PARA 1658.

5 Ie EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 13: see PARA 1637.

6 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(2). As to the provision made in this respect see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, regs 56, 68 (both amended by SI 2009/2400).

7 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(2)(a).

8 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(2)(b). As to the meaning of 'statutes of the European Company' see PARA 1636 note 3.

9 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(2)(c). As to employee involvement see PARA 1638.

10 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(2)(d).

11 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(2)(e).

12 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(3).

13 Ie the report drawn up pursuant to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(3): see the text to note 12.

14 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(4). As to the general meeting see PARA 1653.

15 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(5).

16 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(6). Such a decision must be taken as laid down in art 59 (approving amendments to a European Company's statutes) (see PARA 1653): art 8(6).

17 Each member state must designate the competent authorities within the meaning of EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8, and inform the Commission and the other member states accordingly: art 68(2). The Secretary of State is designated the competent authority for these purposes: see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 75(a). As to the Secretary of State see PARAS 6-8.

18 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(8). Before the competent authority issues such a certificate, the European Company must satisfy it that, in respect of any liabilities arising prior to the publication of the transfer proposal, the interests of creditors and holders of other rights in respect of the European Company (including those of public bodies) have been adequately protected in accordance with requirements laid down by the member state where the European Company has its registered office prior to the

transfer: art 8(7). A member state may extend this provision so that it applies to liabilities that arise (or may arise) prior to the transfer; and in either case these provisions are without prejudice to the application to European Companies of the national legislation of member states concerning the satisfaction or securing of payments to public bodies: art 8(7). As to the provision made in this respect see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, regs 57, 72 (reg 72 amended by SI 2009/2400).

- 19 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(9).
- 20 le registered in accordance with EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 12: see PARA 1637.
- 21 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(10).
- 22 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(11).
- 23 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(11). As to the retention of records see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 77.
- 24 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(12). The appropriate provisions referred to in the text are those of art 13: see PARA 1637. As to the provision made in this respect see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 71.
- 25 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(13).
- 26 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(13).
- 27 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(14). The two-month period is that allowed for in art 8(6) (see the text to note 16): see art 8(14).
- 28 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(14). As to the provision made in this respect see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 58.
- 29 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(14).
- 30 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(14). As to the provision made in this respect see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 74 (amended by SI 2009/2400).
- 31 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(15). As to such proceedings see PARA 1662.
- 32 le prior to the transfer as determined in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(10): see the text to notes 20-21.
- 33 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 8(16).

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(vii) Termination of the Company

1662. Winding up, liquidation, insolvency and cessation of payments.

As regards winding up, liquidation, insolvency, cessation of payments and similar procedures, a European Company¹ is governed by the legal provisions which would apply to a public limited liability company formed in accordance with the law of the member state in which its registered office is situated², including provisions relating to decision-making by the general meeting³.

When a European Company no longer complies with the requirement to have its registered office in the same member state as its head office⁴, the member state in which the European Company's registered office is situated must take appropriate measures to oblige the European Company to regularise its position within a specified period:

- 2353 (1) by re-establishing its head office in the member state in which its registered office is situated⁵; or
- 2354 (2) by transferring the registered office by means of the procedure laid down⁶.

Where a European Company fails to regularise its position in this way, the member state in which the European Company's registered office is situated must put in place the measures necessary to ensure that the European Company is liquidated⁷. The member state in which the European Company's registered office is situated must set up a judicial remedy with regard to any established infringement of the requirement for a European Company to have its registered office in the same member state as its head office⁸; and that remedy has a suspensory effect on these procedures⁹.

Where it is established on the initiative of either the authorities or any interested party that a European Company has its head office within the territory of a member state in breach of the requirement for a European Company to have its registered office in the same member state as its head office¹⁰, the authorities of that member state must immediately inform the member state in which the European Company's registered office is situated¹¹.

Without prejudice to provisions of national law requiring additional publication, the initiation and termination of winding up, liquidation, insolvency or cessation of payment procedures and any decision to continue operating must be publicised in accordance with the appropriate requirements¹².

1 As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

2 As to the location of the European Company's registered office see PARA 1635.

3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 63. As to the general meeting see PARAS 1653-1655.

4 I.e. as laid down in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 7: see PARA 1635.

5 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 64(1)(a).

6 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 64(1)(b). The procedure laid down is that in art 8 (see PARA 1661): see art 64(1)(b).

7 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 64(2).

8 I.e. the requirement laid down in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 7: see PARA 1635.

9 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 64(3). As to the provision made in this respect see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 73 (amended by SI 2009/2400).

10 I.e. in breach of the requirement laid down in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 7: see PARA 1635.

11 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 64(4).

12 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 65. The appropriate requirements are those contained in art 13 (see PARA 1637): see art 65. As to the provision made in this respect see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, regs 71, 82 (reg 82 amended by SI 2009/2400).

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1663. Conversion from a European Company into a public limited liability company.

A European Company¹ may be converted into a public limited liability company governed by the law of the member state in which its registered office² is situated³. However, no decision on conversion may be taken before two years have elapsed since its registration or before the first two sets of annual accounts have been approved⁴. The conversion of a European Company into a public limited liability company does not result in the winding up of the company or in the creation of a new legal person⁵.

The management⁶ or administrative⁷ organ of the European Company must draw up draft terms of conversion and a report explaining and justifying the legal and economic aspects of the conversion and indicating the implications of the adoption of the public limited liability company for the shareholders and for the employees⁸. The draft terms of conversion must be publicised in the manner laid down in each member state's law⁹ at least one month before the general meeting¹⁰ called to decide upon them¹¹.

Before the general meeting called to approve the draft terms of conversion together with the statutes¹², one or more independent experts appointed or approved¹³ by a judicial or administrative authority in the member state to which the European Company being converted into a public limited liability company is subject must certify that the company has assets at least equivalent to its capital¹⁴.

The general meeting of the European Company must approve the draft terms of conversion together with the statutes of the public limited liability company¹⁵. The decision of the general meeting must be passed as laid down in the appropriate provisions¹⁶.

1 As to the meaning of 'European Company' see PARA 1633 note 5. As to EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) see PARA 1633.

2 As to the location of the European Company's registered office see PARA 1635.

3 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 66(1). As to the provisions made in respect of the conversion of a European Company into a public limited liability company see the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, Pt 7 (regs 85-89) (regs 85-88 amended by SI 2009/2400).

4 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 66(1). As to registration see PARA 1639. As to accounts see PARA 1660.

5 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 66(2).

6 As to the management organ (of a company with a two-tier management structure) see PARA 1656.

7 As to the administrative organ (of a company with a one-tier management structure) see PARA 1658.

8 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 66(3).

9 In accordance with national measures implementing EC Council Directive 68/151 (OJ L65, 14.3.1968, p 8) art 3. As to the provision made see note 3.

10 As to the general meeting see PARAS 1653-1655.

11 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 66(4).

12 Ie before the meeting referred to in EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 66(6) is called: see the text to notes 15-16. As to the meaning of 'statutes of the European Company' see PARA 1636 note 3.

13 Ie such experts appointed or approved in accordance with the national provisions adopted in implementation of EC Council Directive 78/855 (OJ L295, 20.10.1978, p 36) art 10. As to the provision made see note 3.

14 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 66(5).

15 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 66(6).

16 EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 66(6). The appropriate provisions are the provisions of national law adopted in implementation of EC Council Directive 78/855 (OJ L295, 20.10.1978, p 36) art 7: see EC Council Regulation 2157/2001 (OJ L294, 10.11.2001, p 1) art 66(6). As to the provision made see note 3.

UPDATE

1663 Conversion from a European Company into a public limited liability company

NOTE 9--Directive 68/151 art 3 replaced: European Parliament and EC Council Directive 2009/101 (OJ L258, 1.10.2009, p 11) art 3.

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(4) PRIVATE EUROPEAN COMPANY (SOCIETAS PRIVATA EUROPAEA)

1664. Proposal for a Private European Company (Societas Privata Europaea).

The proposal for a Council Regulation on the Statute for a European private company¹ has as its objective the creation of a new European legal form intended to enhance the competitiveness of small and medium-sized enterprises (SMEs) by facilitating their establishment and operation in the single market². The proposal is adapted to the specific needs of SMEs and aims to allow entrepreneurs to set up a European private company following the same, simple, flexible company law provisions across the member states³. The proposal also aims to reduce compliance costs on the creation and operation of businesses arising from the disparities between national rules both on the formation and on the operation of companies⁴. The proposal does not regulate matters related to labour law, tax law, accounting, or the insolvency of the European private company; nor does it deal with the contractual rights and obligations of the European private company or those of its shareholders other than those deriving from the articles of association of the company. These matters will continue to be governed by national law and existing Community law instruments, where relevant⁵.

1 Ie the Proposal for a Council Regulation on the Statute for a European private company (Brussels, COM(2008) 396/3) presented by the Commission. The European Private Company Statute (Societas Privata Europaea) forms part of a package of measures designed to assist small and medium-sized enterprises (SMEs), referred to as the Small Business Act for Europe (SBA). The objective of the SBA is to make it easier for SMEs to do business in the single market and consequently to improve their market performance: see para 1.

2 See Proposal for a Council Regulation on the Statute for a European private company (Brussels, COM(2008) 396/3) para 2.

3 See Proposal for a Council Regulation on the Statute for a European private company (Brussels, COM(2008) 396/3) para 2.

4 See Proposal for a Council Regulation on the Statute for a European private company (Brussels, COM(2008) 396/3) para 2.

5 See Proposal for a Council Regulation on the Statute for a European private company (Brussels, COM(2008) 396/3) para 2.

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4. UNREGISTERED COMPANIES

1665. Unregistered companies and the Companies Acts etc.

Certain provisions of the Companies Act 2006 may be applied to unregistered companies¹, being bodies corporate² incorporated in and having a principal place of business in the United Kingdom³, other than⁴:

- 2355 (1) bodies incorporated by, or registered under, any public general Act of Parliament⁵;
- 2356 (2) bodies not formed for the purpose of carrying on a business that has for its object the acquisition of gain by the body or its individual members⁶;
- 2357 (3) bodies for the time being exempted for these purposes⁷ by direction of the Secretary of State⁸; and
- 2358 (4) open-ended investment companies⁹.

Notwithstanding the repeal of the Chartered Companies Act 1837 and the Chartered Companies Act 1884¹⁰, the power of Her Majesty to grant a charter of incorporation of limited duration or to extend or renew such a charter or privileges of such a charter is not affected¹¹.

For the purposes of those provisions of the Insolvency Act 1986 that govern the winding up of unregistered companies¹², the meaning of 'unregistered company' is defined separately (and distinctly)¹³. Where an insolvent partnership is wound up as an unregistered company¹⁴, certain of the provisions of the Company Directors Disqualification Act 1986 also apply, subject to specified modifications¹⁵.

1 See the Companies Act 2006 s 1043, which applies to the bodies described in the text and notes 2-9: see s 1043(1). The provisions are applied by means of regulations made by the Secretary of State: see s 1043(2), (3), (5), (6); and PARA 1666. It should be noted that companies incorporated by special Act are not customarily registered under the Companies Acts but that certain provisions of the Companies Act 2006, by means of regulations made under s 1043, are specified to apply to them as unregistered companies: see PARA 1666 et seq.

2 As to the meaning of 'body corporate' for the purposes of the Companies Acts see PARA 1 note 5; and as to the meaning of the 'Companies Acts' see PARA 16. See also PARAS 2, 3.

3 As to the meaning of 'United Kingdom' see PARA 1 note 5.

4 Companies Act 2006 s 1043(1).

5 Companies Act 2006 s 1043(1)(a). The exception in head (1) in the text will not except a company incorporated under a special Act. As to the distinction between public and general Acts and local and personal Acts see **STATUTES** vol 44(1) (Reissue) PARA 1206 et seq.

6 Companies Act 2006 s 1043(1)(b).

7 It is exempted from the Companies Act 2006 s 1043: see s 1043(1)(c).

8 Companies Act 2006 s 1043(1)(c). As to the Secretary of State see PARAS 6-8.

9 Companies Act 2006 s 1043(1)(d) As to open-ended investment companies authorised in the United Kingdom see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 621 et seq.

10 As to the repeal of the Chartered Companies Act 1837, and the repeal of the Chartered Companies Act 1884, see PARA 3.

11 Statute Law (Repeals) Act 1993 s 1(2), Sch 2 para 11.

12 It is for the purposes of the Insolvency Act 1986 Pt V (ss 220-229): see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1147 et seq.

13 See the Insolvency Act 1986 s 220; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1147.

14 The definition given in the Insolvency Act 1986 s 220 (see the text and notes 12-13) is applied by the Financial Services and Markets Act 2000 s 367(7) for the purposes of a petition presented by the Financial Services Authority under s 367(1), (3)(b), (6), (7) for the winding up of a partnership on the 'just and equitable' ground: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 497.

15 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1166. For the purposes of the Company Directors Disqualification Act 1986 s 11 (undischarged bankrupts), 'company' includes an unregistered company or a company incorporated outside Great Britain which has an established place of business in Great Britain: see s 22(1), (2)(a); and PARA 1590.

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1666. Application of Companies Acts provisions to unregistered companies.

The Secretary of State¹ may make provision by regulations² applying specified provisions³ of the Companies Acts⁴ to all, or any specified description of, the bodies which fall within the unregistered companies provisions of the Companies Act 2006⁵. The regulations may provide that the specified provisions of the Companies Acts apply subject to any specified limitations and to such adaptations and modifications (if any) as may be specified⁶.

In this way, certain provisions of the Companies Act 1985⁷ and of the Companies Act 2006⁸ have been applied⁹ to an unregistered company¹⁰ as to a company within the meaning of the 2006 Act¹¹, subject to certain limitations, adaptations or modifications that have also been specified¹².

For the purposes of the application to an unregistered company of the provisions of the Companies Acts applying to it¹³, any reference to:

2359 (1) the company's registered office¹⁴ must be read as a reference to the company's principal office in the United Kingdom¹⁵;

2360 (2) the part of the United Kingdom in which a company is registered must be read as a reference to the part of the United Kingdom in which the company's principal office is situated; and references to the 'registrar of companies' must be read accordingly¹⁶;

2361 (3) the company's registered number¹⁷ must be read as a reference to the reference number allocated to the company by the registrar¹⁸.

In the application of any provision of the Companies Acts¹⁹, any reference to:

2362 (a) a public company²⁰ must be read, in relation to an unregistered company, as a reference to a company that has power under its constitution to offer its shares or debentures to the public²¹;

2363 (b) a private company²² must be read, in relation to an unregistered company, as a reference to a company that does not have power to offer its shares or debentures to the public²³;

2364 (c) a company's constitution, or to its articles of association²⁴, must be read, in relation to an unregistered company, as a reference to any instrument constituting or regulating the company²⁵;

2365 (d) the common seal of the company²⁶ must be read, in relation to an unregistered company, as a reference to the common or authorised seal of the company²⁷.

General provision is made for the adaptation of any expression defined, or otherwise having a particular meaning or effect, in relation to a company within the meaning of the Companies Act 2006²⁸, for the purposes of applying any provision of the Companies Acts to an unregistered company by virtue of the regulations²⁹.

The application of Companies Acts provisions to unregistered companies³⁰ does not:

2366 (i) repeal or revoke in whole or in part any enactment³¹, royal charter or other instrument constituting or regulating any body in relation to which provisions of the Companies Acts are applied by regulations³²; or

2367 (ii) restrict the power of Her Majesty to grant a charter in lieu or supplementary to any such charter³³;

but, in relation to any such body, the operation of any such enactment, charter or instrument is suspended in so far as it is inconsistent with any of those provisions as they apply for the time being to that body³⁴.

1 As to the Secretary of State see PARAS 6-8.

2 Regulations under the Companies Act 2006 s 1043 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1043(6), 1289. As to the making of regulations under the Companies Act 2006 generally see ss 1288-1292. In exercise of the powers conferred by s 1043, the Secretary of State has made the Unregistered Companies Regulations 2009, SI 2009/2436.

3 For these purposes, 'specified' means specified in the regulations (see note 2): Companies Act 2006 s 1043(5).

4 As to the meaning of the 'Companies Acts' see PARA 16.

5 Companies Act 2006 s 1043(2). The text refers to the bodies to which s 1043 applies: see s 1043(2). As to the bodies to which s 1043 applies see PARA 1665.

6 Companies Act 2006 s 1043(3).

7 Ie the Companies Act 1985 Pt XIV (ss 431-453D) (investigation of companies and their affairs) (see PARA 1541 et seq); and Pt XV (ss 454-457) (orders imposing restrictions on shares) (see PARA 1548 et seq): see the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1.

8 Ie the Companies Act 2006 ss 26, 27 (alteration of articles) (see PARAS 236, 237); ss 34, 35 (notice to registrar where constitution is altered) (see PARAS 238, 239); ss 39-51 (a company's capacity and related matters), except s 47 (see PARAS 263, 265); ss 82-85 (trading disclosures) (see PARA 220 et seq); ss 86, 87 (a company's registered office) (see PARA 129); ss 162-167 (register of directors and register of directors' residential addresses) (see PARA 499); ss 240-246 (directors' residential addresses: protection from disclosure) (see PARA 501 et seq); ss 275-279 (register of company secretaries) (see PARA 601 et seq); ss 362-379 (control of political donations and expenditure) (see PARA 688 et seq); ss 380-474 (accounts and reports), except ss 417, 470 (see PARA 693 et seq); ss 475-539 (audit) (see PARA 905 et seq), except ss 482, 483; s 768 (issue of share certificates on allotment) (see PARA 381); s 778 (issue of share certificates on a transfer) (see PARA 406); ss 854-859 (a company's annual return) (see PARA 1421 et seq); ss 966-973 (impediments to takeovers) (see PARA 1507 et seq); ss 974-991 ('squeeze-out' and 'sell-out') (see PARA 1511 et seq); s 993 (fraudulent trading) (see PARA 316); and certain provisions of Pt 35 (ss 1060-1120) (the Registrar), namely ss 1060-1063, 1066, 1068-1080, 1083, 1085-1092, 1108-1119 (see PARA 131 et seq): see the Unregistered Companies Regulations 2009, SI 2009/2436, Sch 1. The provisions of the Companies Acts relating to offences, interpretation and other supplementary matters have effect in relation to unregistered companies so far as necessary for the purposes of the application and enforcement of the provisions applied to unregistered companies by the Unregistered Companies Regulations 2009, SI 2009/2436: see Sch 1.

9 See the provisions of the Companies Acts listed in the Unregistered Companies Regulations 2009, SI 2009/2436; and see notes 7, 8.

10 For these purposes, 'unregistered company' means a body corporate incorporated in and having a principal place of business in the United Kingdom, other than: (1) a body incorporated by, or registered under, a public general enactment; (2) a body not formed for the purpose of carrying on a business that has for its object the acquisition of gain by the body or its individual members; (3) a body for the time being exempted from the Companies Act 2006 s 1043 (see PARA 1665) by direction of the Secretary of State under s 1043(1)(c); and (4) an open-ended investment company: see the Unregistered Companies Regulations 2009, SI 2009/2436, reg 2(a). As to the meanings of 'body corporate' and 'United Kingdom' see PARA 1 note 5. As to the Secretary of State see PARAS 6-8. As to the distinction between public and general Acts and local and personal Acts see **STATUTES** vol 44(1) (Reissue) PARA 1206 et seq. As to open-ended investment companies authorised in the United Kingdom see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 621 et seq.

11 Ie within the meaning of the Companies Act 2006 s 1 (see PARA 24).

12 See the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3. The limitations, adaptations and modifications referred to in the text are those specified in Sch 1: see reg 3.

13 Ie by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436: see reg 4.

14 As to the company's registered office see PARA 129.

15 See the Unregistered Companies Regulations 2009, SI 2009/2436, reg 4(a).

16 See the Unregistered Companies Regulations 2009, SI 2009/2436, reg 4(b). As to the registrar of companies generally see PARA 131 et seq.

17 As to a company's registered number see PARAS 139, 140.

18 See the Unregistered Companies Regulations 2009, SI 2009/2436, reg 4(c).

19 Ie by virtue of the Unregistered Companies Regulations 2009, SI 2009/2436: see reg 5(1). Regulation 5(1) is subject to any specific adaptation or modification provided for in the regulations: see reg 5(3).

20 As to the meaning of 'public company' see PARA 102.

21 See the Unregistered Companies Regulations 2009, SI 2009/2436, reg 5(1)(a). See note 19. As to the meaning of references to a company's constitution see PARA 227.

22 As to the meaning of 'private company' see PARA 102.

23 See the Unregistered Companies Regulations 2009, SI 2009/2436, reg 5(1)(b). See note 19.

24 As to a company's articles of association see PARA 228 et seq.

25 See the Unregistered Companies Regulations 2009, SI 2009/2436, reg 5(1)(c). See note 19. For these purposes, 'instrument constituting or regulating the company', in relation to an unregistered company, means any enactment, royal charter, letters patent, deed of settlement, contract of partnership, or other instrument constituting or regulating the company: see reg 2(b).

26 A company may have a common seal, but need not have one: see the Companies Act 2006 s 45; and PARA 283.

27 See the Unregistered Companies Regulations 2009, SI 2009/2436, reg 5(1)(d). See note 19.

28 Ie within the meaning of the Companies Act 2006 s 1 (see PARA 24): see the Unregistered Companies Regulations 2009, SI 2009/2436, reg 5(2).

29 See the Unregistered Companies Regulations 2009, SI 2009/2436, reg 5(2). Regulation 5(2) is subject to any specific adaptation or modification provided for in the regulations: see reg 5(3).

30 Ie by virtue of regulations made under the Companies Act 2006 s 1043(2) (see the text and notes 1-5): see s 1043(4). As to the bodies to which s 1043 applies see PARA 1665.

31 As to the meaning of 'enactment' see PARA 17 note 2.

32 Companies Act 2006 s 1043(4)(a). See note 30.

33 Companies Act 2006 s 1043(4)(b).

34 Companies Act 2006 s 1043(4).

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5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS

(1) IN GENERAL

1667. Object of the Companies Clauses Acts.

The Companies Clauses Acts 1845 to 1889¹ are:

2368 (1) the Companies Clauses Consolidation Act 1845 as amended by the Companies Clauses Consolidation Act 1888 and the Companies Clauses Consolidation Act 1889²; and

2369 (2) the Companies Clauses Act 1863 as amended by the Companies Clauses Act 1869.

The Companies Clauses Consolidation Act 1845 was passed in order to comprise in one general Act the provisions relating to the constitution and management of companies which were at that time usually introduced into special Acts of Parliament incorporating a company; and the Companies Clauses Act 1863 was passed with the same object. By passing these general Acts the legislature has to a great extent avoided the necessity for repeating in each special Act incorporating a company provisions with regard to its constitution and management which are common to all such companies³.

Many companies have been and are from time to time incorporated by special Act of Parliament for the purpose of carrying on undertakings of a public nature. In some cases, the special Act incorporating the company provides for the dissolution of a company previously incorporated, either by a special Act or pursuant to the Companies Act 2006 or the Acts which it replaces, and also for the transfer to the new company of the undertaking and assets of the dissolved company⁴.

However, the Companies Clauses Acts are of declining importance as more and more companies are incorporated under the Companies Acts⁵ and the class of companies incorporated by special Act is thereby diminished⁶.

1 This collective title is given by the Short Titles Act 1896 s 2, Sch 2.

2 This Act was repealed by the Statute Law Revision Act 1908.

3 Companies Clauses Consolidation Act 1845 preamble (repealed by the Statute Law Revision Act 1891). The Companies Act 2006, following the precedent set out in the Joint Stock Companies Act 1856, the Companies Act 1862, the Companies (Consolidation) Act 1908, the Companies Act 1929, the Companies Act 1948 and the Companies Act 1985, allows the tables referred to in those Acts to be adopted as standard forms of the regulations governing companies registered under that Act. As to the continuance of the former Tables A etc see PARA 18. For a comparison between the Acts mentioned and the Companies Clauses Consolidation Act 1845 see *Barton v London and North Western Rly Co* (1889) 24 QBD 77 at 87, CA.

4 Stamp duty is chargeable on the special Act as a conveyance on sale (see **STAMP DUTIES AND STAMP DUTY RESERVE TAX** vol 44(1) (Reissue) PARA 1050; and see also *A-G v Felixstowe Gas Light Co* [1907] 2 KB 984), subject to exemptions from duty on certain transactions by way of reconstruction and amalgamation.

5 On the registration of a company, the registrar of companies must give a certificate that the company is incorporated: see the Companies Act 2006 s 15(1); and PARA 119. As to the registrar of companies see PARA 131 et seq. As from the date of incorporation (ie the date mentioned in the certificate of incorporation), the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, are a body corporate by the name stated in the certificate of incorporation: see s 16(1), (2); and PARA 120.

6 See PARA 1 et seq.

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1668. Application of the Companies Clauses Acts.

All the clauses and provisions of the Companies Clauses Consolidation Act 1845 apply to every joint stock company incorporated by any special Act of Parliament passed after 8 May 1845 for the purpose of carrying on any undertaking¹ whatsoever, unless they are expressly varied or excepted by the special Act²; and the special Act and the Companies Clauses Consolidation Act 1845, and any other Act incorporated with the special Act are, save as mentioned above, to be construed together as forming one Act³.

Part III of the Companies Clauses Act 1863⁴, which provides for the creation and issue of debenture stock, applies to every company having power to raise money on mortgage or bond by virtue of any Act of Parliament and is deemed to be incorporated with the special Act of every such company⁵. None of the other provisions of the Companies Clauses Act 1863 applies to a company unless made expressly applicable by its special Act⁶.

1 As to the meaning of 'undertaking' see PARA 1738.

2 Companies Clauses Consolidation Act 1845 s 1. To the extent that companies incorporated by special Act are unregistered companies falling within the Companies Act 2006 s 1043 (see PARA 1666), certain provisions of the 2006 Act, by means of regulations made under s 1043, are specified to apply to them as unregistered companies (see PARAS 1665-1666); and the operation of any provision contained in other Acts, charters or instruments is suspended in so far as it is inconsistent with any of the Companies Act 2006 provisions as they apply for the time being to such a body (see s 1043(4); and PARA 1666).

3 Companies Clauses Consolidation Act 1845 s 1.

4 le the Companies Clauses Act 1863 Pt III (ss 22-35) (debenture stock) (see PARA 1753 et seq).

5 See PARA 1753.

6 See the Companies Clauses Act 1863 s 3 (which provides for the application of Pt I (ss 3-11) (cancellation and surrender of shares): see PARAS 1727-1731); s 12 (which provides for the application of Pt II (ss 12-21) (additional capital): see PARA 1687); s 22 (which provides for the application of Pt III (debenture stock): see PARA 1753); and s 36 (which provides for the application of Pt IV (ss 36-39) (change of name): see PARA 1675).

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1669. Differences between companies incorporated under special Acts and under the Companies Act 2006.

The process of incorporating a company by special Act¹ is to be distinguished from the quite different method, lately from time to time adopted by Parliament, of conferring by statute special powers for special purposes on a company, incorporated or to be incorporated, in the ordinary way by registration under the Companies Act 2006².

Except where the provisions of the Companies Act 2006 have been specifically applied to companies incorporated by special Acts as unregistered companies³, such companies differ in many important respects of constitution, powers and management from companies regulated by the Companies Acts⁴.

1 See PARAS 1667, 1668.

2 See PARA 1667.

3 As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 See PARA 1670 et seq.

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1670. Statutory definitions.

In the Companies Clauses Consolidation Act 1845¹ and in the special Act² certain words³ and expressions have special meanings unless there is something in the subject or the context repugnant to such a construction⁴. Thus 'lands' extends to messuages, lands, tenements and hereditaments of any tenure; and 'lease' includes an agreement for a lease⁵.

The 'company' is the company constituted by the special Act⁶; and the 'directors' are the directors of the company and include all persons having the direction of the undertaking⁷, whether under the name of directors, managers, committee of management or under any other name⁸. The 'secretary' means the secretary of the company and includes a clerk⁹.

'Shareholder' means a shareholder, proprietor or member of the company; and in referring to any such shareholder, expressions properly applicable to a person are to apply to a corporation¹⁰.

1 The Companies Clauses Consolidation Act 1845 and the Companies Clauses Consolidation Act 1888 are to be construed together as one Act: s 1. As to the application of the Companies Clauses Acts see PARA 1668 note 2. These statutory definitions are, therefore, also relevant to the construction of the 1888 Act: see eg *Phillips v Parnaby* [1934] 2 KB 299, DC.

2 In the Companies Clauses Consolidation Act 1845 (and in the Companies Clauses Consolidation Act 1888), the 'special Act' must be construed to mean any Act incorporating a joint stock company for the purpose of carrying on any undertaking which incorporates the Companies Clauses Consolidation Act 1845: s 2. As to the meaning of 'undertaking' see PARA 1738.

3 The singular includes the plural, the masculine gender includes the feminine, and 'month' is a calendar month: Companies Clauses Consolidation Act 1845 s 3.

4 Companies Clauses Consolidation Act 1845 s 3. 'Prescribed' as used in the Companies Clauses Consolidation Act 1845 is to be construed to refer to such matter as the same is prescribed or provided for in the special Act; and the sentence in which that word occurs is to be construed as if, instead of the expression 'prescribed', the expression 'prescribed for that purpose in the special Act' had been used: s 2.

5 Companies Clauses Consolidation Act 1845 s 3.

6 Companies Clauses Consolidation Act 1845 s 3.

7 Companies Clauses Consolidation Act 1845 s 3.

8 Companies Clauses Consolidation Act 1845 s 3.

9 Companies Clauses Consolidation Act 1845 s 3.

10 Companies Clauses Consolidation Act 1845 s 3.

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1671. Inspection of special Acts.

The company¹ must at all times after the expiration of six months² after the passing of its special Act³ keep in its principal office of business a copy of the special Act, printed by the Queen's printers⁴. If it fails to do so, it is liable to a penalty not exceeding level 2 on the standard scale for every such offence and also, in the case of a continuing offence, to a penalty of £5 a day⁵. It must permit persons interested to inspect its Act and make extracts and copies from it at all reasonable hours on payment⁶.

1 As to the meaning of 'company' see PARA 1670.

2 As to the meaning of 'month' see PARA 1670 note 3.

3 As to the meaning of 'special Act' see PARA 1670 note 2.

4 Companies Clauses Consolidation Act 1845 s 161. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

5 Companies Clauses Consolidation Act 1845 s 162 (amended by the Criminal Law Act 1977 s 31(6); and the Criminal Justice Act 1982 s 46). As to the standard scale see PARA 1622.

6 Companies Clauses Consolidation Act 1845 s 161. Section 161 also requires the deposit in the offices of local authorities of copies of special Acts by railway, canal and similar undertakings operating in more than one place, and the same provisions as to inspection apply. As to the meaning of 'undertaking' see PARA 1738.

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(2) POWERS AND LIABILITIES OF COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS

1672. Powers conferred by statute.

The powers of a company to which the Companies Clauses Acts apply are limited and circumscribed by the special Act creating it and any Act altering its powers. They extend no further than is therein expressly stated or is necessarily required for carrying into effect the purposes of its incorporation. It does not have power to deal with its property and incur liabilities in the same way as an ordinary individual, as is the case with a corporation created by charter¹. Such a company, therefore, has only the powers expressly or by inference given to it by its special Act or Acts, with the extra powers given to it by the Companies Clauses Acts or such of those Acts as are applicable.

Even with the consent of all its shareholders, the company cannot do or contract to do anything outside the scope of its powers, however advantageous it may appear to be; and any act purported to be done by the company which exceeds these powers is *ultra vires*². Such companies, being bodies corporate, may acquire and hold real or personal property in joint tenancy in the same manner as if they were individuals; but this acquisition and holding is subject to the same restrictions as attach to the acquisition and holding of property by a body corporate in severalty³.

1 *Baroness Wenlock v River Dee Co* (1883) 36 ChD 675n at 685n, CA; *Eastern Counties Rly Co v Hawkes* (1855) 5 HL Cas 331; *A-G v Great Eastern Rly Co* (1880) 5 App Cas 473 at 486, HL. See **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1230.

2 *Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653, the principle of which applied to companies incorporated by Act of Parliament: see *A-G v Great Eastern Rly Co* (1880) 5 App Cas 473 at 486, HL, per Lord Watson; and PARA 125 et seq. However, for companies under the Companies Act 2006, the validity of an act done by the company cannot be called into question on the ground of a lack of capacity by reason of anything in the company's constitution: see s 39; and PARA 265. As to the meaning of references to a company's constitution see PARA 227. As to the extension of the provisions of ss 39, 40 (power of directors to bind company) (see PARAS 256, 265) to companies incorporated by Act of Parliament, to the extent that such companies are unregistered companies falling within s 1043 (as to which see PARA 1668 note 2), see PARA 1666.

3 Bodies Corporate (Joint Tenancy) Act 1899 s 1.

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1673. Form of contracts.

The former general rule that contracts entered into by a corporation aggregate had, with certain exceptions, to be made under seal¹ never applied to companies governed by the Companies Clauses Consolidation Act 1845, which have always been subject to the special provision in that Act with respect to the making of contracts², not radically different from those contained in the Corporate Bodies' Contracts Act 1960³.

1 See eg *Ludlow Corpn v Charlton* (1840) 6 M & W 815; and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1272 et seq.

2 See the Companies Clauses Consolidation Act 1845 s 97; and PARA 1775.

3 The Corporate Bodies' Contracts Act 1960 (see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1272 et seq) does not apply to a company registered under the Companies Act 2006, to a company incorporated outside the United Kingdom, or to a limited liability partnership: Corporate Bodies' Contracts Act 1960 s 2 (substituted by SI 2009/1941). As to the meaning of 'United Kingdom' see PARA 1 note 5. As to formation and registration under the Companies Act 2006 see PARA 102 et seq. As to companies incorporated outside the United Kingdom ('overseas companies') see PARA 1824 et seq. As to limited liability partnerships incorporated in the United Kingdom see **PARTNERSHIP** vol 79 (2008) PARA 234 et seq.

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1674. Liability for torts and crimes.

The rule that a corporation aggregate is liable to be sued for its torts¹ applies to companies governed by the Companies Clauses Acts², as also does the rule that in certain cases corporations may be indicted or fined in respect of criminal or quasi-criminal offences³.

1 As to the liability of a corporation aggregate to be sued for torts see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1275 et seq.

2 *Poulton v London and South Western Rly Co* (1867) LR 2 QB 534; *Maund v Monmouthshire Canal Co* (1842) Car & M 606; *Cooke v Midland Great Western Rly of Ireland* [1909] AC 229, HL; *Goff v Great Northern Rly Co* (1861) 3 E & E 672; *Moore v Metropolitan Rly Co* (1872) LR 8 QB 36.

3 *R v Birmingham and Gloucester Rly Co* (1842) 3 QB 223; *Whitfield v South Eastern Rly Co* (1858) EB & E 115. See also PARA 311. As to corporate liability for criminal acts generally see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1280; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 38 et seq.

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(3) NAME, OFFICE AND SERVICE

1675. Manner and effect of change of name.

The name given to the company¹ by its special Act² cannot be changed except by another Act³. If the special Act incorporates the statutory provisions relating to change of name⁴, the provisions described below apply. The change of name does not affect the powers vested in the

company by its original name, and any reference in any statute to the company by its original name is interpreted as if a reference to the company by its new name was substituted⁵.

No proceeding, whether civil or criminal, which is pending at the passing of the special Act either at the instance of or against the company, by its original name, is affected in any way by its change of name⁶. Nor is any document or instrument whatever discharged or affected by reason of the company or its undertaking⁷ being called in it by the original name of the company or undertaking⁸. It is not necessary in any such proceeding, document or instrument to aver that the company or its undertaking had been known by its original name, and that by the special Act the name of the company and its undertaking were changed, and that the company had since been known by its new name, and its undertaking by its new name: but it is sufficient to describe the company by its new name and its undertaking by its new name⁹.

The change of name does not invalidate anything done before the passing of the special Act effecting the change under or by virtue of any other Act¹⁰; nor does it affect any deeds, instruments, purchases, sales, securities and contracts made before the passing of the special Act under any other Act or with reference to its purposes¹¹.

1 As to the meaning of 'company' see PARA 1670.

2 As to the meaning of 'special Act' see PARA 1670 note 2.

3 Cf the Companies Act 2006 provisions which apply to the change of a company's name: see PARAS 217-219.

4 I.e the Companies Clauses Act 1863 Pt IV (ss 36-39) (change of name). The company may have been incorporated either before or after 28 July 1863, the date of the passing of the Act: s 36. As to the application of the Companies Clauses Acts see PARA 1668 note 2. As to the prohibition of the use of certain business names see PARA 224.

5 Companies Clauses Act 1863 s 36.

6 Companies Clauses Act 1863 s 37.

7 As to the meaning of 'undertaking' see PARA 1738.

8 Companies Clauses Act 1863 s 37.

9 Companies Clauses Act 1863 s 37.

10 Companies Clauses Act 1863 s 38.

11 Companies Clauses Act 1863 s 39.

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1676. Service on company.

Any proceeding requiring to be served upon the company¹ may be served by being left at or transmitted through the post² directed to its principal office, or one of its principal offices where there are more than one, or by being given personally to the secretary³ or, in case there is no secretary, then by being given to any one director of the company⁴. Where there is a secretary, service on a director is not sufficient⁵. The principal office of the company is the office where the general superintendence and management of its business are carried on⁶.

1 As to the meaning of 'company' see PARA 1670.

2 As to the service of documents on a company generally see PARA 671.

3 As to the meaning of 'secretary' see PARA 1670.

4 Companies Clauses Consolidation Act 1845 s 135. As to the meaning of 'directors' see PARA 1670. As to the application of the Companies Clauses Acts see PARA 1668 note 2. The provisions of the Companies Clauses Consolidation Act 1845 s 135 are not affected by CPR Pt 6 (which provides for the service of documents, except where any other enactment makes a different provision, and applies to any company). As to the service of process generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 138 et seq. Notice to a secretary received in another capacity has been held to be a good notice: *Re Sketchley, ex p Boulton* (1857) 1 De G & J 163. As to the effect of non-receipt on a default judgment see PARA 671 note 3.

5 *Lawrenson v Dublin Metropolitan Junction Rly Co* (1877) 37 LT 32, CA (where the plaintiff was secretary).

6 *Garton v Great Western Rly Co* (1858) EB & E 837 (revsd (1859) EB & E 846); *Palmer v Caledonian Rly Co* [1892] 1 QB 823, CA. Cf *Wilson v Caledonian Rly Co* (1850) 5 Exch 822.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(3) NAME, OFFICE AND SERVICE/1677. Service on members.

1677. Service on members.

A notice requiring to be served by the company¹ upon a person holding its shares or stock may, unless expressly required to be served personally, be served by being sent by post to his registered or other known address within such period as to admit of its being delivered in the due course of delivery within the period, if any, prescribed for the giving of the notice². In proving such service it is sufficient to prove that the notice was properly directed and put into the post office³.

With respect to any share or stock to which two or more persons are jointly entitled, notice must be given to the person named first in the appropriate register, and notice so given is sufficient notice to all the proprietors of the share or stock⁴.

1 As to the meaning of 'company' see PARA 1670.

2 Companies Clauses Consolidation Act 1845 s 136. As to the meaning of 'prescribed' see PARA 1670 note 4. As to the application of the Companies Clauses Acts see PARA 1668 note 2. Cf the provision that may be made in a company's articles of association: see PARA 324 note 2.

3 Companies Clauses Consolidation Act 1845 s 136.

4 Companies Clauses Consolidation Act 1845 s 137. Cf the provision that may be made in a company's articles of association: see PARA 324 note 2. As to the register of shareholders that must be kept under the Companies Clauses Consolidation Act 1845 see s 9; and PARA 1699.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(3) NAME, OFFICE AND SERVICE/1678. Advertisement of notices.

1678. Advertisement of notices.

All notices required to be given by advertisement must be advertised in the prescribed¹ newspaper or, if no newspaper is prescribed, or if the prescribed newspaper has ceased to be

published, in a newspaper circulating in the district within which the company's principal place of business is situated². In the absence of evidence that the newspaper in which notice of a meeting is advertised circulates in the district, the proceedings at the meeting are a nullity³.

1 As to the meaning of 'prescribed' see PARA 1670 note 4.

2 Companies Clauses Consolidation Act 1845 s 138. As to the meaning of 'company' see PARA 1670. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

3 *Swansea Dock Co v Levien* (1851) 20 LJ Ex 447.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(3) NAME, OFFICE AND SERVICE/1679. Authentication of documents.

1679. Authentication of documents.

Every document requiring authentication by the company¹ may be signed by two directors², or by the treasurer or secretary³ of the company, and need not be under the common seal⁴. It may be in writing or in print, or partly in writing and partly in print⁵.

1 As to the meaning of 'company' see PARA 1670.

2 As to the meaning of 'directors' see PARA 1670.

3 As to the meaning of 'secretary' see PARA 1670.

4 Companies Clauses Consolidation Act 1845 s 139. As to the company's seal see PARA 1673. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

5 Companies Clauses Consolidation Act 1845 s 139.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(4) CAPITAL/(i) Amount and Description of Capital/1680. Authorised capital.

(4) CAPITAL

(i) Amount and Description of Capital

1680. Authorised capital.

The amount of the capital which the company¹ is authorised to raise is prescribed² by the special Act³, and the company is precluded from raising capital in excess of that amount.

The special Act also prescribes how the authorised capital is to be raised, whether by way of subscriptions for shares or stock⁴, or whether partly by way of such subscriptions and partly by way of loan⁵.

- 1 As to the meaning of 'company' see PARA 1670.
- 2 As to the meaning of 'prescribed' see PARA 1670 note 4.
- 3 As to the meaning of 'special Act' see PARA 1670 note 2.
- 4 See PARA 1681.
- 5 See PARA 1682.

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1681. Subscribed capital.

The special Act¹ may provide for the division of the subscribed capital² into shares of prescribed³ number and amount, or it may provide that the subscribed capital is to be in the form of a general capital stock, each subscriber being entitled to an aliquot part of the stock proportionate to the amount subscribed by him. It may also confer upon the company⁴ power to issue different classes of shares and different classes of stock with preferential or other rights attached to them.

The Companies Clauses Consolidation Act 1845 contains provisions with regard to shares and shareholders⁵, and provides for the conversion of fully paid shares into stock⁶; but it does not contain any provisions with regard to preference shares, nor does it provide for the issue of stock. The Companies Clauses Act 1863, however, remedies this deficiency⁷.

- 1 As to the meaning of 'special Act' see PARA 1670 note 2.
- 2 I.e. the capital to be raised by way of subscription.
- 3 As to the meaning of 'prescribed' see PARA 1670 note 4.
- 4 As to the meaning of 'company' see PARA 1670.
- 5 See PARA 1693 et seq. As to the meaning of 'shareholder' see PARA 1670.
- 6 See PARA 1732.
- 7 See PARA 1687 et seq.

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1682. Loan capital.

In the case of a company¹ authorised by a special Act² to raise capital by way of loan, the special Act may prescribe how the capital may be obtained, whether by the creation of mortgages or the issue of bonds³ or debentures or debenture stock⁴ or in any other form. In certain cases, a company may issue redeemable debenture stock⁵. Mortgages or bonds must

be carefully distinguished from debenture stock. The principal distinction is that the holder of debenture stock, instead of being a lender entitled to repayment of his capital at the time fixed by the instrument, obtains a charge on the company's undertaking for the interest on the money paid by him, which is in the nature of a perpetual annuity⁶.

1 As to the meaning of 'company' see PARA 1670.

2 As to the meaning of 'special Act' see PARA 1670 note 2.

3 See PARA 1736 et seq.

4 See PARA 1753 et seq.

5 See the Statutory Companies (Redeemable Stock) Act 1915; and PARA 1684.

6 *Re Burry Port and Gwendreath Valley Rly Co* (1885) 54 LJ Ch 710 at 713. As to the misdescription of bonds as 'debentures' and mortgages as 'mortgage debentures' see also PARA 1736 note 6.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(4) CAPITAL/(i) Amount and Description of Capital/1683. Excess borrowing.

1683. Excess borrowing.

A limit on the amount of the capital which may be raised by way of loan is usually prescribed by the special Act, and borrowing in excess of the amount so prescribed is ultra vires and creates no debt¹. Directors are in the position of special agents, having authority to affix the company's seal² to mortgage and other deeds which are intra vires the company, but having no power to affix the seal so as to bind the company in any case where the deed is one the execution of which the legislature has expressly or impliedly forbidden³.

Prohibition against borrowing more than a specified sum is, in substance, disobeyed only when and so far as an obligation to pay more than that sum is contracted. So far as money borrowed has been applied in discharging debts or liabilities which could be enforced against the company, the lender is entitled to have the loan treated as valid⁴.

Money borrowed to pay off bonds or mortgages given or made under the statutory powers and so applied is deemed to be borrowed within the statutory powers⁵.

1 *Fountaine v Carmarthen Rly Co* (1868) LR 5 Eq 316 at 325. The issue of debenture stock extinguishes the powers of borrowing or reborrowing to the extent of the money so raised: see PARA 1757.

2 As to the company's seal see PARA 1673.

3 *Chambers v Manchester and Milford Rly Co* (1864) 5 B & S 588 at 605-608; *Landowners West of England and South Wales Land Drainage and Inclosure Co v Ashford* (1880) 16 ChD 411; *Re Cork and Youghal Rly Co* (1869) 4 Ch App 748 at 757-758.

4 Cf *Re Wrexham, Mold and Connah's Quay Rly Co* [1899] 1 Ch 440 at 446-447, CA; *Fountaine v Carmarthen Rly Co* (1868) LR 5 Eq 316 at 325; *Re Cork and Youghal Rly Co* (1869) 4 Ch App 748 at 759; *Yorkshire Railway Wagon Co v Maclure* (1882) 21 ChD 309, CA.

5 Companies Clauses Act 1869 s 4. As to the statutory powers of borrowing money see the Companies Clauses Consolidation Act 1845 ss 38-55; and PARAS 1736-1752. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

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1684. Redeemable capital.

Certain statutory companies¹ are empowered by statute², where preference or debenture stock³ was authorised to be created or issued before 19 May 1915⁴, to create and issue that stock so as to be redeemable on terms and conditions specified in a resolution⁵ passed at a special company meeting⁶. If the resolution so provides, the company may call in and pay off the stock or any part of it at any time before the fixed redemption date⁷ and redeem it either by paying it off or by issuing to any consenting stockholder any other stock in substitution⁸. Further, such companies may, for the purpose of providing money for paying off the stock or providing substituted stock, create and issue new stock, either redeemable or irredeemable, or reissue stock originally created and issued in pursuance of these provisions⁹. The creation and issue of stock of any particular class must not make the total nominal amount of that stock issued exceed the amount of that class of stock which the company is for the time being authorised to create¹⁰.

1 For these purposes, 'statutory company' means any railway, canal, dock, water or other company incorporated by special Act which is for the time being authorised under an Act to construct, work, own or carry on any railway, canal, dock, water or other public undertaking, and includes any person or body of persons so authorised: Statutory Companies (Redeemable Stock) Act 1915 s 2(1).

2 Ie by the Statutory Companies (Redeemable Stock) Act 1915.

3 The provisions apply equally to preference shares and debentures: Statutory Companies (Redeemable Stock) Act 1915 s 2(2). As to preference stock see the Companies Clauses Act 1863 ss 13-15; and PARA 1688. As to debenture stock see the Companies Clauses Act 1863 ss 22-35; and PARAS 1753-1759.

4 Ie the date of the commencement of the Statutory Companies (Redeemable Stock) Act 1915: s 1(5). Except with Treasury consent redeemable stock was not to be created or issued in pursuance of these powers during the continuance of the 1914-18 war and for a period of 12 months thereafter: s 1(5). As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517.

5 For the purposes of the Act, a resolution passed before the commencement of the Act (ie 19 May 1915: see the text and note 4) and after the outbreak of the 1914-18 war for the creation or issue of redeemable stock has the same effect as if the Act had been in operation when the resolution was passed: Statutory Companies (Redeemable Stock) Act 1915 s 1(4).

6 Statutory Companies (Redeemable Stock) Act 1915 s 1(1).

7 Statutory Companies (Redeemable Stock) Act 1915 s 1(2)(a).

8 Statutory Companies (Redeemable Stock) Act 1915 s 1(2)(b). Companies coming under these provisions may set aside out of revenue, after provision has been made for the various payments mentioned in the Act, a fund for the purpose of redeeming the stock at maturity, and may invest that fund and apply it either in redeeming the stock or in purchasing any of the stock, in which case the stock purchased is to be cancelled: s 1(3).

9 Statutory Companies (Redeemable Stock) Act 1915 s 1(2)(b).

10 Statutory Companies (Redeemable Stock) Act 1915 s 1(2)(b).

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(ii) Increase of Subscribed Capital under the Companies Clauses Consolidation Act 1845

1685. Creation of new shares.

Unless the special Act¹ otherwise provides, the whole or part of the additional sum authorised to be borrowed by the special Act may be raised, with the previous authority of a general meeting², by creating new shares³; and new shares may be issued to pay off part of an existing loan⁴. The capital so raised must be considered as part of the general share capital and is subject to the same provisions as if it had been part of the original share capital, except as to the times of making and the amount of calls, which the company⁵ may fix as it thinks fit⁶.

1 As to the meaning of 'special Act' see PARA 1670 note 2.

2 As to the general meeting see the Companies Clauses Consolidation Act 1845 ss 66-80; and PARAS 1793-1801.

3 See the Companies Clauses Consolidation Act 1845 ss 38-55 (power to borrow money); and PARAS 1736-1752.

4 Companies Clauses Consolidation Act 1845 s 56. Cf the Companies Clauses Act 1863 ss 12-21 (see PARAS 1687-1690). As to the application of the Companies Clauses Acts see PARA 1668 note 2.

5 As to the meaning of 'company' see PARA 1670.

6 Companies Clauses Consolidation Act 1845 s 57.

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1686. Issue of new shares.

If, when any increase of the subscribed capital takes place by the creation of new shares, the existing shares are at a premium, the sum to be raised must, unless it is otherwise provided by the special Act¹, be divided into shares of such an amount as will conveniently allow them to be apportioned among the shareholders² in proportion to their holding³. The new shares must be offered by letter under the hand of the secretary⁴ to the shareholders, in proportion to their holding⁵.

The new shares vest in and belong to the shareholders who accept them and pay for them at the time and by the instalments fixed by the company⁶. If any shareholder fails for one month⁷ after the offer of new shares to accept them and pay the required instalments, the company may dispose of them in such manner as it deems most for its advantage⁸.

If the existing shares are not at a premium, the new shares may be of such amount and may be issued in such manner and on such terms as the company thinks fit⁹. They may be issued at a discount¹⁰.

- 1 As to the meaning of 'special Act' see PARA 1670 note 2.
- 2 As to the meaning of 'shareholder' see PARA 1670.
- 3 Companies Clauses Consolidation Act 1845 s 58. Cf the Companies Clauses Act 1863 s 17; and PARA 1690. As to the application of the Companies Clauses Acts see PARA 1668 note 2.
- 4 As to the meaning of 'secretary' see PARA 1670.
- 5 Companies Clauses Consolidation Act 1845 s 58. The letter may be given to the shareholder or sent by post to his registered address, or left at his usual or last place of abode: s 58.
- 6 Companies Clauses Consolidation Act 1845 s 59. As to the meaning of 'company' see PARA 1670. The time prescribed is of the essence of this transaction and the shareholder will lose his right to the new shares if he fails to accept within the prescribed time: cf *Pearson v London and Croydon Rly Co* (1845) 14 Sim 541; *Campbell v London and Brighton Rly Co* (1846) 5 Hare 519. Cf also the Companies Clauses Act 1863 s 20 proviso, which permits the time for acceptances to be extended: see PARA 1690.
- 7 As to the meaning of 'month' see PARA 1670 note 3.
- 8 Companies Clauses Consolidation Act 1845 s 59.
- 9 Companies Clauses Consolidation Act 1845 s 60. Cf the Companies Clauses Act 1863 s 21; and PARA 1690.
- 10 *Statham v Brighton Marine Palace and Pier Co* [1899] 1 Ch 199. See also PARA 1695.

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(iii) Increase of Subscribed Capital under the Companies Clauses Act 1863

1687. Increase of share capital.

Where a company is authorised by a special Act¹ to raise any additional sum or sums by the issue of new ordinary shares or new ordinary stock, the company, with the sanction of the proportion prescribed by that Act² of the votes of the shareholders and stockholders entitled to vote in that behalf at meetings of the company, present (personally or by proxy) at a specially convened meeting, may from time to time create and issue, according to the authority given by that Act, such new ordinary shares of such nominal amount and subject to the payment of calls of such amounts and at such times as the company thinks fit, or such new ordinary stock as the company thinks fit³.

- 1 The Companies Clauses Act 1863 Pt II (ss 12-21) (additional capital) will apply only if incorporated by the special Act: s 12. See PARA 1668. The company may have been incorporated either before or after 28 July 1863, the date of the passing of the Companies Clauses Act 1863: s 12. As to the application of the Companies Clauses Acts see PARA 1668 note 2.
- 2 If no proportion is prescribed, the proportion is three-fifths: Companies Clauses Act 1863 s 12.
- 3 Companies Clauses Act 1863 s 12.

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1688. Preference shares.

There was no general provision in the Companies Clauses Consolidation Act 1845 authorising the creation of preference shares or regulating, as to companies empowered by special Act to create such shares, the exercise of that power. Before the passing of the Companies Clauses Act 1863, however, certain companies had been empowered by special Acts to issue preference shares and, in effect, to attach to them the right to a dividend, not only of a preferential but also of a cumulative character¹.

The Companies Clauses Act 1863 provides that a company authorised by a special Act² to raise any additional sum or sums by the issue of new preference shares or new preference stock or, at the company's option, by either of these modes, may from time to time with the same sanction as for the issue of new ordinary shares, create and issue, according to the authority given by the special Act, such new shares or new stock, either ordinary or preference, and either of one class and with the same privileges, or of several classes and with different privileges, and of the same or different amounts, and respectively with any fixed, fluctuating, contingent, preferential, perpetual, terminable, deferred or other dividend or interest, not exceeding the rate prescribed by the special Act, or, if no rate is so prescribed, 5 per cent³, and subject to the payment of calls of such amounts and at such times as the company thinks fit⁴. Any preference assigned to any shares or stock so issued does not affect any guarantee, preference or priority in the payment of dividend or interest on any shares or stock that may have been granted by the company under or confirmed by any previous Act, or that may be otherwise lawfully subsisting⁵.

The preference shares or stock so issued are entitled to the preferential dividend or interest assigned to them out of the annual profits in priority to the company's ordinary shares and stock, but they are non-cumulative⁶.

In the absence of special provision, the preference shareholders have no priority over ordinary shareholders as to repayment of capital, but the assets must be distributed rateably among all the shareholders in proportion to their capital⁷.

The terms and conditions to which any preference share or preference stock is subject must be clearly stated on the certificate of that preference share or portion of preference stock⁸.

¹ In such special Acts, the so-called preference 'dividend' was in the nature of interest chargeable upon profits generally, and therefore in effect cumulative: see *Henry v Great Northern Rly Co* (1857) 1 De G & J 606 at 636, 648; *Matthews v Great Northern Rly Co* (1859) 28 LJ Ch 375 at 378; *Corry v Londonderry and Enniskillen Rly Co* (1860) 29 Beav 263; *Staples v Eastman Photographic Materials Co* [1896] 2 Ch 303 at 309-310, CA, per Kay LJ; *Lamplough v Kent Waterworks (Company of Proprietors)* [1903] 1 Ch 575, CA (affd sub nom *Kent Waterworks (Company of Proprietors) v Lamplough* [1904] AC 27, HL).

² See PARA 1687 note 1.

³ Companies Clauses Act 1863 s 13. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

⁴ Companies Clauses Act 1863 s 13. Section 13 and s 14 (see the text and notes 3-6) limit a company to which this part of the Act applies in respect of its power to attach rights of dividend to its preference shares, but not in respect of its power to attach other privileges: *Windermere District Gas and Water Co v Whitehead* [1931] 1 Ch 558.

⁵ Companies Clauses Act 1863 s 13 proviso.

6 Companies Clauses Act 1863 s 14. Cf *Staples v Eastman Photographic Materials Co* [1896] 2 Ch 303, CA.

7 *Re Accrington Corpn Steam Tramways Co* [1909] 2 Ch 40.

8 Companies Clauses Act 1863 s 15. As to share certificates see the Companies Clauses Consolidation Act 1845 ss 11-13; and PARAS 1701-1702.

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1689. Cancellation of unissued shares.

If, after having created new shares or new stock, the company determines not to issue the whole, it may cancel the unissued shares or stock¹.

1 Companies Clauses Act 1863 s 16. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

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1690. Disposal of new shares.

If, at the time of the issue of new shares or new stock, the ordinary shares are or ordinary stock is at a premium, then, unless before the issue of the new shares or stock the company otherwise determines, the new shares or stock must be of such amount as will conveniently allow the same to be apportioned among the holders of the ordinary stock and ordinary shares in proportion, as nearly as conveniently may be, to their holding, and must be offered to them at par in that proportion¹. It is not obligatory on the company so to apportion or offer any new shares or stock unless the amount of every new share or portion of new stock to be so offered would, if so apportioned, be at least the sum prescribed in the special Act, and, if no such sum is prescribed, then at least £10².

The offer must be made by letter under the hand of the company treasurer or secretary, given to every holder of ordinary shares or stock or sent by post addressed to him according to his address in the shareholders' or stockholders' address book, or left for him at his usual or then last known place of abode in England, Scotland or Northern Ireland³, as the case may require; and every such offer made by letter sent by post is considered as made on the day on which the letter in due course of delivery ought to be delivered at the place to which it is addressed⁴.

The new shares or portions of new stock so offered vest in and belong to the shareholders or stockholders who accept them, or their nominees⁵.

Any shareholder or stockholder failing to signify his acceptance of the whole or part of the new shares or stock offered him within the time prescribed by the special Act or, if no time is so prescribed, within one month⁶ is deemed to have declined the offer either wholly or in part⁷; but, where, from absence abroad or other cause satisfactory to the directors, he omits to

signify his acceptance within the time prescribed, the directors may permit him to accept them⁸.

Subject to the above right of pre-emption, the company may from time to time dispose of new shares and new stock at such times, to such persons, on such terms and conditions, and in such manner as the directors think advantageous to the company⁹.

1 Companies Clauses Act 1863 s 17. Cf the Companies Clauses Consolidation Act 1845 s 58 (see PARA 1686). As to the application of the Companies Clauses Acts see PARA 1668 note 2.

2 Companies Clauses Act 1863 s 17 proviso. As to the meaning of 'England' see PARA 1 note 5.

3 Ireland was specified in the original Act but see the Irish Free State (Consequential Adaptation of Enactments) Order 1923, SR & O 1923/405.

4 Companies Clauses Act 1863 s 18.

5 Companies Clauses Act 1863 s 19. Cf the Companies Clauses Consolidation Act 1845 s 59 (see PARA 1686).

6 Companies Clauses Act 1863 s 20.

7 Companies Clauses Act 1863 s 20. The corresponding section of the Companies Clauses Consolidation Act 1845 does not contain any such provision in favour of shareholders not signifying acceptance within the prescribed time: see s 59; and PARA 1686.

8 Companies Clauses Act 1863 s 20 proviso.

9 Companies Clauses Act 1863 s 21 (amended by the Companies Clauses Act 1869 s 5; and the Statute Law Revision Act 1875), whereby it was made clear that the legislature contemplated and authorised new shares or stock of companies governed by these Acts being thereafter issued at a discount: see *Statham v Brighton Marine Palace and Pier Co* [1899] 1 Ch 199; *Webb v Shropshire Rlys Co* [1893] 3 Ch 307 at 329, CA.

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(iv) Application of Capital

1691. Application of share and loan capital.

All the money raised by the company¹, whether by subscriptions of the shareholders² or by loan or otherwise, must be applied:

2370 (1) in paying the costs and expenses incurred in obtaining the special Act³ and all expenses incident to it; and

2371 (2) in carrying the purposes of the company into execution⁴.

1 As to the meaning of 'company' see PARA 1670.

2 As to the meaning of 'shareholder' see PARA 1670.

3 As to the meaning of 'special Act' see PARA 1670 note 2. These expenses are recoverable against the company as a statutory debt: *Hitchins v Kilkenny Rly Co* (1850) 9 CB 536.

4 Companies Clauses Consolidation Act 1845 s 65. As to the limits on companies' powers generally, and as to ultra vires acts, see PARAS 1672-1674. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

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1692. Promotion expenses.

The only persons entitled to require and, if necessary, sue for, payment out of the proposed company's funds of the costs they have incurred are those who have acted directly for the company contemplated by the Bill, without being employed to do the work by any other person for hire or reward; those who have been employed by some other person for hire or reward to do the work must look for payment to the person who employed them¹.

These costs and expenses include money advanced for the purpose of paying parliamentary fees². A promise by promoters of a railway company to pay a sum of money to an influential landowner for his countenance and support does not constitute an expense incident to obtaining the special Act which the company is liable to or lawfully can pay³.

The period of limitation⁴ does not begin to run against a person who is entitled to sue a company for costs and expenses until the company has assets with which to pay him⁵.

1 *Re Skegness and St Leonard's Tramways Co, ex p Hanly* (1888) 41 ChD 215 at 233, 239, CA; *Re Kent Tramways Co* (1879) 12 ChD 312, CA; *Wyatt v Metropolitan Board of Works* (1862) 11 CBNS 744. Where the company's Act sanctioned two only out of six lines of railway originally projected by the Bill, the company's solicitor was held entitled to be paid out of the company's funds the costs incurred in relation to the four unsanctioned lines, but the special Act expressly provided that the costs incidental and preparatory to obtaining the Act should be paid by the company: *Re Tilleard* (1863) 3 De GJ & Sm 519. As to the rights of a solicitor employed in promoting a company see further PARA 1790.

2 *Scott v Lord Ebury* (1867) LR 2 CP 255 at 263 per Bovill CJ. As to fees and charges payable by promoters of a private bill see **PARLIAMENT** vol 34 (Reissue) PARA 870 et seq.

3 *Earl of Shrewsbury v North Staffordshire Rly Co* (1865) LR 1 Eq 593 at 619; and see *Cutbill v Shropshire Rly Co* (1891) 7 TLR 381 (where promoters had advanced the parliamentary deposit). Funds of a company may probably be lawfully applied in opposing in Parliament the passing of an Act calculated to prejudice the company's undertaking: *A-G v Andrews* (1850) 2 Mac & G 225 at 230.

4 *le* under the Limitation Act 1980 s 5 (time limit for actions founded on simple contract): see **LIMITATION PERIODS** vol 68 (2008) PARA 956.

5 *Re Kensington Station Act* (1875) LR 20 Eq 197 at 206, 207.

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1693. Division of capital into shares.

The Companies Clauses Consolidation Act 1845 makes provision for the division of the capital of the company¹ into shares² of a prescribed³ number and amount, numbered in arithmetical progression beginning with the number one, each share being distinguished by its appropriate number⁴.

1 As to the meaning of 'company' see PARA 1670.

2 'Share' indicates simply a right to participate in the profits of a particular joint stock undertaking (*Morrice v Aylmer* (1874) 10 Ch App 148 at 155 per James LJ; affd (1875) LR 7 HL 717), and to attend and vote at the general meetings of the company (*Nanney v Morgan* (1887) 37 ChD 346 at 352, CA, per Cotton LJ). As to the general meeting see the Companies Clauses Consolidation Act 1845 ss 66-80; and PARAS 1793-1801.

3 As to the meaning of 'prescribed' see PARA 1670 note 4.

4 Companies Clauses Consolidation Act 1845 s 6. As to the application of the Companies Clauses Acts see PARA 1668 note 2. A person may become a member even though the particular shares in respect of which he is a member may not be capable of identification by numbers: *Portal v Emmens* (1876) 1 CPD 201 at 210-211 (affd 1 CPD 664, CA); *Irish Peat Co v Phillips* (1861) 1 B & S 598 at 626-627, 638; *East Gloucestershire Rly Co v Bartholomew* (1867) LR 3 Exch 15.

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(5) SUBSCRIBED CAPITAL

(i) Shares

1694. Nature of shares.

All shares in the company's undertaking are personal estate, and transmissible as such, rather than being in the nature of real estate¹. Even if the undertaking comprises land, they are not an interest in land within the statutory provisions² requiring a contract for the sale or other disposition to be in writing, incorporating all the expressly agreed terms of the contract in one document or, where contracts are exchanged, in each and signed by or on behalf of each party to the contract³. They are choses or things in action⁴ and not goods⁵. Certificates for shares or for the stock into which they have been converted are not goods or documents of title to goods⁶.

1 Companies Clauses Consolidation Act 1845 s 7. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

2 The Law of Property (Miscellaneous Provisions) Act 1989 s 2: see **SALE OF LAND** vol 42 (Reissue) PARA 29.

3 *Bradley v Holdsworth* (1838) 3 M & W 422; *Bligh v Brent* (1837) 2 Y & C Ex 268 at 294.

4 *Colonial Bank v Whinney* (1886) 11 App Cas 426, HL. See **CHOSSES IN ACTION** vol 13 (2009) PARAS 4, 8. As to charging orders see CPR Pt 73 s 1 (CPR 73.2-73.10); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1472 et seq. As to vesting orders of shares or stock see **MENTAL HEALTH; TRUSTS** vol 48 (2007 Reissue) PARA 884 et seq.

5 See *Humble v Mitchell* (1839) 11 Ad & El 205 at 208. See also the definition of 'goods' in the Sale of Goods Act 1979 s 61(1) (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 30).

6 *Freeman v Appleyard* (1862) 32 LJ Ex 175; *Williams v Colonial Bank* (1888) 38 ChD 388 at 408, CA (affd sub nom *Colonial Bank v Cady and Williams* (1890) 15 App Cas 267, HL).

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COMPANIES CLAUSES ACTS/(5) SUBSCRIBED CAPITAL/(i) Shares/1695. Issue of shares at a discount.

1695. Issue of shares at a discount.

New shares issued under the Companies Clauses Consolidation Act 1845¹ and new shares or stock to which the Companies Clauses Act 1863² applies³ may be issued at a discount⁴.

The Companies Clauses Act 1863⁵ regulates the issue of any shares forming part of the capital, whether original or additional, authorised to be raised by any special Act of a company passed before the parliamentary session of 1869⁶. Any shares the creation of which has been authorised by a company, but which have not been issued before the passing of the Companies Clauses Act 1869, must not be issued on any terms other than those on which they might have been issued if that Act had not been passed, except where the company has authorised the issue on other terms in the proper manner⁷. The Companies Clauses Act 1869 does not alter or extend the provisions of any Act relating to share capital in respect of which the amount of profits to be divided is limited to a fixed rate per cent upon the company's paid up capital⁸.

1 See the Companies Clauses Consolidation Act 1845 ss 56-60; and PARAS 1685-1686. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

2 See the Companies Clauses Act 1863 Pt II (ss 12-21) (additional capital); and PARAS 1687-1690.

3 *Statham v Brighton Marine Palace and Pier Co* [1899] 1 Ch 199; *Webb v Shropshire Rlys Co* [1893] 3 Ch 307, CA.

4 *Statham v Brighton Marine Palace and Pier Co* [1899] 1 Ch 199.

5 See the Companies Clauses Act 1863 ss 12-21 (see PARAS 1687-1690); and the Companies Clauses Act 1869 ss 5, 6. It is clear that, in the particular cases to which those statutory provisions refer, companies may issue their unissued original shares, as well as new shares, at a discount. The question whether, in other cases and in the absence of power in the special Act, original as opposed to new shares or stock may be issued at a discount was left open in *Webb v Shropshire Rlys Co* [1893] 3 Ch 307, CA (decided upon the terms of the special Act). In *Statham v Brighton Marine Palace and Pier Co* [1899] 1 Ch 199, Romer J held that original shares not subscribed for may be issued at a discount. See the discussion of these two cases in *Newburgh and North Fife Rly Co v North British Rly Co* 1913 SC 1166, Ct of Sess.

6 Companies Clauses Act 1869 s 6.

7 Companies Clauses Act 1869 s 7. The authorisation referred to in the text probably means that, in the case postulated by s 7, there must, before the issue of shares, be a resolution passed by the company in the manner prescribed by the Companies Clauses Act 1863 s 12 (see PARA 1687), expressly authorising the particular terms of issue intended. Cf the Companies Clauses Act 1869 s 2; and PARA 1753 note 5.

8 Companies Clauses Act 1869 s 8.

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1696. Allotment of shares.

There are no special provisions in the Companies Clauses Acts with reference to the allotment of shares in companies regulated by those Acts¹, but in general² certain provisions of the Companies Act 2006 respecting allotment³ apply⁴.

1 See PARA 1667 et seq.

2 As to the exceptions, ie the bodies corporate to which the unregistered companies' legislation does not apply, see the Companies Act 2006 1043(2), (5); and PARA 1666.

3 Ie the Companies Act 2006 s 558 (when shares are allotted) (see PARA 1091). See also PARA 1760.

4 See the Companies Act 2006 1043(2), (5); and PARA 1666.

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(ii) Shareholders

A. DESCRIPTION OF SHAREHOLDER

1697. How shareholders are constituted.

Every person who has subscribed¹ the prescribed² sum or more to the capital of the company³ or has otherwise become entitled to a share in the company and whose name has been entered on the register of shareholders⁴ is deemed to be a shareholder of the company⁵.

A scrip holder may be entitled, in certain events and on certain terms, to come in and take shares without being liable to be registered against his will as a shareholder⁶. Generally a person becomes entitled to shares by sending the company a signed application form and receiving notice of an allotment pursuant to the application, and consequently a binding contract, by offer and acceptance, is constituted, as in the cases of companies under the Companies Act 2006⁷. Although there cannot be a register in the strict sense of the term until the book containing it is sealed at the first ordinary meeting of a company⁸, there are shareholders before that time, inasmuch as the first ordinary meeting is a meeting of shareholders⁹. A transferee whose name is on the register of transfers¹⁰ may be a shareholder without his name being on the register of shareholders¹¹.

Where the special Act contains the usual provision that the company must not issue any share and that no share will vest in the person accepting it unless and until a sum not being less than one-fifth part of the amount of the share has been paid up in respect of it, anyone who has subscribed for shares and whose name is entered on the register is deemed to be a shareholder, and accordingly is liable for calls, notwithstanding that, when the call is made, the prescribed one-fifth has not been paid up on the shares¹². Where, however, there is a provision as to the issue and vesting of shares, and a person who has agreed to take shares but has paid nothing on them executes a transfer which is registered by the company, the transfer operates as a new contract between the transferor, the transferee and the company, whereby the transferee becomes the taker of the shares and the transferor is discharged from his agreement to take them¹³.

1 'Subscribed' primarily referred to the signing of the subscription or parliamentary contracts (formerly in vogue when application was made for a special Act to incorporate a company for the execution of some public undertaking), whereby a number of signatories bound themselves to contribute specified sums for the purpose of the undertaking: *Porter v Emmens* (1876) 1 CPD 664 at 669, CA. For forms of subscription contracts and of the subscribers' agreements which usually accompanied them see *Cork and Youghal Rly Co v Paterson* (1856) 18 CB 414 at 415, 422, 433; *Burke v Lechmere* (1871) LR 6 QB 297 at 303. A subscription contract is now neither necessary nor usual, and signing such a contract is not the only way of subscribing; anyone who has

agreed in writing to take shares is for this purpose a subscriber: *Portal v Emmens* (1876) 1 CPD 664 at 669, CA; *Re Littlehampton Steamship Co Ltd, Gregg's Case* (1866) 15 WR 82.

2 As to the meaning of 'prescribed' see PARA 1670 note 4.

3 As to the meaning of 'company' see PARA 1670.

4 As to the register of shareholders see the Companies Clauses Consolidation Act 1845 s 9; and PARA 1699.

5 Companies Clauses Consolidation Act 1845 s 8. As to the meaning of 'shareholder' in the Companies Clauses Consolidation Act 1845 generally see s 3; and PARA 1670. As to the application of the Companies Clauses Acts see PARA 1668 note 2. Taking s 8 in conjunction with the definition of shareholder in s 3, a person who has become entitled to a share, even though he has paid no subscription and no register has been formed, may be a shareholder: *Portal v Emmens* (1876) 1 CPD 664, CA.

6 *Mcllwraith v Dublin Trunk Connecting Rly Co* (1871) 7 Ch App 134 at 140; cf *Ormerod's Case* (1867) LR 5 Eq 110. Where the conditions of the issue of scrip certificates merely entitle the scripholder at some future time to an allotment of shares, a scripholder who sells his scrip before registration or whose scrip is forfeited for non-payment of instalments is not liable for shares: *Eustace v Dublin Trunk Connecting Rly Co* (1868) LR 6 Eq 182; *Re Asiatic Banking Corpn, ex p Collum* (1869) LR 9 Eq 236.

7 See *Nicol's Case, Tufnell and Ponsonby's Case* (1885) 29 ChD 421 at 426, CA; and PARA 1088. See also PARAS 325 et seq, 1056.

8 See PARA 1699.

9 See the Companies Clauses Consolidation Act 1845 s 66; and PARA 1793.

10 As to the register of transfers see PARA 1717.

11 *Portal v Emmens* (1876) 1 CPD 664, CA; cf *Kipling v Todd* (1878) 3 CPD 350, CA.

12 *East Gloucestershire Rly Co v Bartholomew* (1867) LR 3 Exch 15 at 18, 24; *McEuen v West London Wharves and Warehouses Co* (1871) 6 Ch App 655.

13 *Morton's Case* (1873) LR 16 Eq 104.

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1698. Non-recognition of trust affecting shares.

The company is not bound to see to the execution of any trust, whether express, implied or constructive, to which any shares are subject¹. The receipt of the party in whose name any share stands in the company's books or, if it stands in the names of more persons than one, the receipt of one of the persons named in the register of shareholders, is a sufficient discharge to the company for any dividend or other sum payable in respect of the share, notwithstanding any trusts to which the share may then be subject, and whether or not the company has had notice of them; and the company is not bound to see to the application of the money paid upon such receipt². Therefore, as between themselves and the company, executors or trustees registered as the holders of shares have and are subject to precisely the same rights and liabilities as other joint holders; they are joint holders in their individual capacity, and any transfer of the shares must be executed by all of them; the company has nothing to do with the character in which they hold the shares³.

Where, however, directors make an illegal application of the company's funds by investing them in the purchase, in the name of the chairman of the board, of shares in another company,

notwithstanding the illegality of the transaction, the chairman is a trustee of the shares for his company and may be compelled to transfer them as it directs⁴.

1 Companies Clauses Consolidation Act 1845 s 20. Cf the Companies Act 2006 s 126 (see PARA 343). As to the application of the Companies Clauses Acts see PARA 1668 note 2.

2 Companies Clauses Consolidation Act 1845 s 20.

3 *Barton v North Staffordshire Rly Co* (1888) 38 ChD 458 at 464-465 per Kay J; *Barton v London and North Western Rly Co* (1889) 24 QBD 77 at 89, CA, per Lindley LJ. See also *Muir v City of Glasgow Bank* (1879) 4 App Cas 337, HL; *Re City of Glasgow Bank, Bell's Case* (1879) 4 App Cas 547, HL; *Cunninghame v City of Glasgow Bank* (1879) 4 App Cas 607, HL. Cf *Re Shelley, ex p Stewart* (1864) 4 De GJ & Sm 543 at 547-548.

4 *Great Eastern Rly Co v Turner* (1872) 8 Ch App 149; cf *Murray v Pinkett* (1846) 12 Cl & Fin 764, HL.

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1699. Register of shareholders.

The company¹ must keep a book, called the 'register of shareholders', in which must be entered in alphabetical order the names of the corporations, and the names and additions² of the persons entitled to shares in the company, with the number of shares to which each shareholder³ is entitled, distinguishing each share by its number and the amount of the subscriptions paid on the shares⁴. This book must be authenticated by the company's common seal⁵ being affixed to it at the first ordinary meeting⁶, or at the next subsequent meeting, and so from time to time at each ordinary meeting of the company⁷. The provision as to distinguishing each share by its number is directory only, and the insertion of the distinguishing numbers in the register is not essential⁸. Nor is the direction as to the time at which the register is to be made up an essential condition to its validity, and a register made up later may be valid⁹. The register need not necessarily consist of a single volume; where it is contained in several volumes, and only the last one of the series is sealed, the whole of the register is admissible in evidence¹⁰.

1 As to the meaning of 'company' see PARA 1670.

2 ie the persons' occupations, residences etc.

3 As to the meaning of 'shareholder' see PARA 1670.

4 Companies Clauses Consolidation Act 1845 s 9. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

5 As to the company's seal see PARA 1673.

6 As to the ordinary meeting see the Companies Clauses Consolidation Act 1845 s 66; and PARA 1793.

7 Companies Clauses Consolidation Act 1845 s 9. An unsatisfied judgment creditor is entitled to inspect the register without fee: see s 36; and PARA 1712. The register is prima facie evidence against a shareholder sued for calls: see s 28; and PARA 1709.

8 *East Gloucestershire Rly Co v Bartholomew* (1867) LR 3 Exch 15. Cf the position where the register is being relied upon as sole evidence in a claim: see PARA 1709.

9 *Burke v Lechmere* (1871) LR 6 QB 297 at 304; *Wolverhampton New Waterworks Co v Hawksford* (1861) 11 CBNS 456, Ex Ch.

10 *Inglis v Great Northern Rly Co* (1852) 19 LTOS 149, HL; *Bain v Whitehaven and Furness Junction Rly Co* (1850) 3 HL Cas 1. Cf *London Grand Junction Rly Co v Freeman* (1841) 2 Man & G 606 at 637 (a case before the Act).

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1700. Shareholders' address book.

In addition to the register of shareholders¹, the company² must provide a book called the 'shareholders' address book', in which the secretary³ must from time to time enter in alphabetical order the corporate names and places of business of the shareholders⁴ who are corporations, and the surnames of the other shareholders with their respective christian names, places of abode and descriptions, so far as these are known to the company⁵.

Every shareholder or, if a corporation, its clerk or agent may at all convenient times examine this book without charge, and may require a copy of the whole or of any part of it⁶. This right to have a copy is a private right conferred on a person as a member of the company and not as a member of the public⁷. The remedy to enforce the right is by an injunction to restrain the company from continuing to refuse to supply him, or a mandatory injunction directing the company to supply him; and the court cannot inquire into the applicant's motives⁸.

1 See PARA 1699.

2 As to the meaning of 'company' see PARA 1670.

3 As to the meaning of 'secretary' see PARA 1670.

4 As to the meaning of 'shareholder' see PARA 1670.

5 Companies Clauses Consolidation Act 1845 s 10. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

6 Companies Clauses Consolidation Act 1845 s 10. For every 100 words so required to be copied the company may demand a sum not exceeding two pence: s 10 (amended by the Decimal Currency Act 1969 s 10(1)). The figure has been rounded down in consequence of the withdrawal of the halfpenny from 31 December 1984.

7 *Davies v Gas Light and Coke Co* [1909] 1 Ch 708, CA.

8 *Davies v Gas Light and Coke Co* [1909] 1 Ch 708, CA.

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B. SHARE CERTIFICATES

1701. Delivery and effect of certificates.

On the demand of the holder of any share¹, a company² must cause to be delivered to him a certificate of the proprietorship of the share under its common seal³, specifying the share in the undertaking⁴ to which he is entitled⁵. The certificate may be according to the statutory form or to the like effect⁶; and for the certificate the company may demand any sum not exceeding the amount prescribed in the special Act or, if no amount is prescribed, a sum not exceeding 12 pence⁷. The certificate is a solemn affirmation under the company's seal that a certain amount of shares or stock stands in the name of the holder named in the certificate⁸, and is a representation, binding on the company by way of estoppel, that the amount stated in the certificate to have been paid on the shares has been paid⁹.

The certificate is admissible in all courts as prima facie evidence of the title of the shareholder, his executors, administrators, successors or assigns to the share specified in it¹⁰, but it is not conclusive evidence of title¹¹; and the want of it does not prevent the holder of any share from disposing of it¹².

1 As to the meaning of 'shareholder' see PARA 1670.

2 As to the meaning of 'company' see PARA 1670.

3 As to the company's seal see PARA 1673.

4 As to the meaning of 'undertaking' see PARA 1738.

5 Companies Clauses Consolidation Act 1845 s 11. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

6 Companies Clauses Consolidation Act 1845 s 11. For the form of certificate see s 11, Sch (A).

7 Companies Clauses Consolidation Act 1845 ss 2, 11 (s 11 amended by the Decimal Currency Act 1969 ss 9, 10(1), Sch 1). The figure has been rounded down in consequence of the withdrawal of the halfpenny from 31 December 1984.

8 *Shropshire Union Railways and Canal Co v R* (1875) LR 7 HL 496 at 509.

9 Cf *Bloomenthal v Ford* [1897] AC 156, HL. As to the estoppel created by the issue of a share certificate see PARA 387.

10 Companies Clauses Consolidation Act 1845 s 12.

11 *Powell v London and Provincial Bank* [1893] 1 Ch 610 at 617 (affd [1893] 2 Ch 555, CA); *Société Générale de Paris v Walker* (1885) 11 App Cas 20 at 35, HL (certificate is the only documentary evidence of title in the shareholder's possession); *Longman v Bath Electric Tramways Ltd* [1905] 1 Ch 646, CA. Cf *Burkinshaw v Nicholls* (1878) 3 App Cas 1004, HL. As to the effect of a share certificate under the Companies Act 2006 see PARA 381.

12 Companies Clauses Consolidation Act 1845 s 12. See also *Shropshire Union Railways and Canal Co v R* (1875) LR 7 HL 496 (certificate is evidence of legal title but not of equitable title to the shares).

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1702. New certificates.

If a share certificate¹ is worn out or damaged, it may be produced at some meeting of the directors² and they may order it to be cancelled, and thereupon another similar certificate must

be given to the person in whom the property of the certificate, and of the share mentioned in it, is at the time vested³. If the certificate is lost or destroyed and the loss is proved to the satisfaction of the directors, a similar certificate must be given to the person entitled to it⁴. In either case the secretary⁵ must make a due entry of the substituted certificate in the register of shareholders⁶. For every certificate so given or exchanged the company⁷ may demand any sum not exceeding the amount prescribed⁸ by the special Act⁹ or, if no amount is prescribed, a sum not exceeding 12 pence¹⁰.

1 le the certificate of the proprietorship of the share (see PARA 1701).

2 As to the meaning of 'directors' see PARA 1670.

3 Companies Clauses Consolidation Act 1845 s 13. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 Companies Clauses Consolidation Act 1845 s 13.

5 As to the meaning of 'secretary' see PARA 1670.

6 Companies Clauses Consolidation Act 1845 s 13. As to the register of shareholders see s 9; and PARA 1699. As to the meaning of 'shareholder' see PARA 1670.

7 As to the meaning of 'company' see PARA 1670.

8 As to the meaning of 'prescribed' see PARA 1670 note 4.

9 As to the meaning of 'special Act' see PARA 1670 note 2.

10 Companies Clauses Consolidation Act 1845 ss 2, 13 (s 13 amended by the Decimal Currency Act 1969 s 10(1)). The figure has been rounded down in consequence of the withdrawal of the halfpenny from 31 December 1984.

The note at the foot of a share certificate, requiring its production prior to the registration of a transfer, is not a representation that a transfer will not be registered without its production: *Rainford v James Keith and Blackman Co Ltd* [1905] 1 Ch 296 (revsd on another ground [1905] 2 Ch 147, CA). As to the effect of a note on a certificate generally see PARA 388.

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C. SHAREHOLDERS' LIABILITY FOR CALLS OR CAPITAL NOT PAID UP

1703. Shareholders' liability in general.

The persons who have subscribed¹ any money towards an undertaking², or their legal representatives³, must pay the sums subscribed or those portions as are from time to time called for by the company⁴ at the times and places it appoints⁵. The company's remedy by making a claim for recovery of calls is enforceable only against persons who were shareholders⁶ when the calls were made⁷.

1 'Subscribed' is used with reference primarily to subscription of the parliamentary contract and subscribers' agreement which, in 1845, were required by the standing orders of both Houses of Parliament in the case of companies to which the Companies Clauses Consolidation Act 1845 applies: see PARA 1697 note 1. As to the application of the Companies Clauses Acts see PARA 1668 note 2. See also *Cromford Rly Co v Lacey* (1829) 3 Y & J 80 at 86, 90. The provision also applies to the modern method of subscription by application for shares in a company after its incorporation. Liability to pay calls is incurred by so subscribing as to become entitled to

shares: *Waterford, Wexford, Wicklow and Dublin Rly Co v Pidcock* (1853) 8 Exch 279 at 283, 285; *Edwards v Kilkenny and Great Southern and Western Rly Co* (1863) 14 CBNS 526.

2 As to the meaning of 'undertaking' see PARA 1738.

3 'Legal representatives' applies to executors who are in the possession of shares and renders them liable for calls upon those shares; but an executor cannot be sued personally in the form indicated by the Companies Clauses Consolidation Act 1845 s 26 (see PARA 1708) for a call made in his testator's lifetime: *Birkenhead, Lancashire and Cheshire Junction Rly Co v Cotesworth* (1850) 5 Exch 226 at 228. See also PARA 1708.

4 As to the meaning of 'company' see PARA 1670.

5 Companies Clauses Consolidation Act 1845 s 21.

6 As to the meaning of 'shareholder' generally see PARA 1670; but see note 7.

7 *Wolverhampton New Waterworks Co v Hawksford* (1859) 6 CBNS 336 at 353, 357. For the purposes of enforcing the payment of calls (see the Companies Clauses Consolidation Act 1845 ss 22-28; and PARAS 1704-1709), 'shareholder' extends to and includes the legal personal representatives of the shareholder: Companies Clauses Consolidation Act 1845 s 21.

In a claim for calls under the Companies Clauses Consolidation Act 1845 the form of remedy given by s 25 (see PARA 1708) must be followed: *Wolverhampton New Waterworks Co v Hawksford* at 356-357.

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1704. Power to make calls.

A company¹ may from time to time make calls upon the shareholders² in respect of the amount of capital subscribed or owing by them, as it thinks fit, provided that at least 21 days' notice is given of each call, that no call exceeds the amount, if any, prescribed³ by the special Act⁴, that successive calls are not made at less than the interval, if any, prescribed, and that the aggregate amount of calls made in any one year does not exceed the prescribed amount, if any⁵. Every shareholder is liable to pay the amount of the calls so made in respect of the shares held by him to the persons and at the times and places from time to time appointed by the company⁶.

1 As to the meaning of 'company' see PARA 1670.

2 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

3 As to the meaning of 'prescribed' see PARA 1670 note 4.

4 As to the meaning of 'special Act' see PARA 1670 note 2.

5 Companies Clauses Consolidation Act 1845 ss 2, 22. As to the application of the Companies Clauses Acts see PARA 1668 note 2. Cf the provision that may be made in a company's articles of association: see PARA 1134.

6 Companies Clauses Consolidation Act 1845 s 22. The particulars as to the persons to whom and the times and places at which payment is to be made must be specified in the notice of the call, but may be decided by the directors subsequent to the board's actual resolution to make the call: *Great North of England Rly Co v Biddulph* (1840) 7 M & W 243 at 262; *London and Brighton Rly Co v Fairclough* (1841) 2 Man & G 674 at 703; *Sheffield, Ashton-under-Lyne and Manchester Rly Co v Woodcock* (1841) 7 M & W 574.

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1705. How calls are made.

The power to make calls upon the shareholders¹ may be, and usually is, exercised by the directors². A call is generally deemed to have been made when the resolution to call for the money is passed; the resolution need not specify either the time or the place for payment, it being only a determination that an application is to be made to each shareholder for a portion of the amount of his shares³. The resolution is not invalid merely because it is prospective. Thus a resolution may be passed on 13 March that a call be made on 30 March, payable on 1 May following⁴. A call may validly be made payable by instalments⁵; but probably, in that case, the company⁶ cannot maintain a claim for any part of the call until the last instalment is due, the day appointed for payment of the last instalment being, in that case, the day appointed for the payment of the call within the meaning of the statute⁷.

If the directors make a call which is for any reason invalid, they must before proceeding to make a valid call rescind the resolution for the invalid call⁸.

1 See PARA 1704.

2 *Ambergate, Nottingham and Boston and Eastern Junction Rly Co v Mitchell* (1849) 4 Exch 540. As to the meaning of 'directors' see PARA 1670.

3 *R v Londonderry and Coleraine Rly Co* (1849) 13 QB 998 at 1005; *Newry and Enniskillen Rly Co v Edmunds* (1848) 2 Exch 118 at 122. As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

4 *Sheffield, Ashton-under-Lyne and Manchester Rly Co v Woodcock* (1841) 7 M & W 574 at 589.

5 As to the meaning of 'company' see PARA 1670.

6 *Ambergate, Nottingham, Boston and Eastern Junction Rly Co v Norcliffe* (1851) 6 Exch 629.

7 *Ambergate, Nottingham and Boston and Eastern Junction Rly Co v Coulthard* (1850) 5 Exch 459; *Birkenhead, Lancashire and Cheshire Junction Rly Co v Webster* (1851) 6 Exch 277 at 278; *Re Jennings, ex p Belfast and County Down Rly Co* (1851) 11 Ch R 654 at 656.

8 *Welland Rly Co v Berrie* (1861) 6 H & N 416 at 422.

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1706. Liability for calls.

The making of the call upon the shareholders¹ and notice of its having been made are two distinct things². Consequently a shareholder who transfers his shares after a call has been made on them continues liable to pay the call, as between himself and the company³, even if at the time of the transfer he has not received the notice⁴. This right of the company against a transferor does not, however, affect any right of his against the transferee under the contract of transfer⁵.

The person whose name appears on the register⁶ is alone personally liable to the company for calls⁷. The company cannot, therefore, compel an equitable mortgagee or other owner of shares to pay calls on them⁸; nor can it sue a transferee for calls until his name has been entered on a duly sealed register⁹.

1 See PARAS 1704-1705. As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

2 *R v Londonderry and Coleraine Rly Co* (1849) 13 QB 998.

3 As to the meaning of 'company' see PARA 1670.

4 See the Companies Clauses Consolidation Act 1845 s 16; and PARA 1718.

5 *R v Londonderry and Coleraine Rly Co* (1849) 13 QB 998. The purchaser of a share with an uncalled liability is bound to indemnify his vendor against calls made after the date of the contract of sale: *Spencer v Ashworth, Partington & Co* [1925] 1 KB 589, CA. See PARA 390.

6 As to the register of shareholders see the Companies Clauses Consolidation Act 1845 s 9; and PARA 1699.

7 *Newry and Enniskillen Rly Co v Moss* (1851) 14 Beav 64.

8 *Newry and Enniskillen Rly Co v Moss* (1851) 14 Beav 64.

9 *Newry and Enniskillen Rly Co v Edmunds* (1848) 2 Exch 118 at 127. Cf *McEuen v West London Wharves and Warehouses Co* (1871) 6 Ch App 655. See PARA 1697.

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1707. Minor's liability.

A minor¹ is capable of becoming a shareholder² in a company³ governed by the Companies Clauses Consolidation Act 1845, and it seems that a claim for calls may be maintained against him even during his minority⁴. If, having been registered while a minor, he attains his majority and then permits his name to continue registered, he is liable to be sued for calls, whether made during or since his minority⁵. Where, however, he has become a shareholder by contract, he may repudiate the contract either during his minority or when he comes of age, and after that repudiation cannot be sued for calls⁶.

1 As to minority and the attainment of full age see the Family Law Reform Act 1969 s 1; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 1-3.

2 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

3 As to the meaning of 'company' see PARA 1670.

4 *Leeds and Thirsk Rly Co v Fearnley* (1849) 4 Exch 26; cf *Re Royal Naval School, Seymour v Royal Naval School* [1910] 1 Ch 806.

5 *Cork and Bandon Rly Co v Cazenove* (1847) 10 QB 935 at 939.

6 *Newry and Enniskillen Rly Co v Coombe* (1849) 3 Exch 565 at 574-575. A minor may repudiate a contract to take shares but cannot recover sums paid on allotment and on call unless there has been a total failure of consideration: *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452, CA. See further PARA 330.

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1708. Recovery of payment and interest.

If, before or on the day appointed for payment, a shareholder¹ does not pay the amount of any call to which he is liable², he is liable to pay interest at the rate allowed by law from the day appointed for payment to the time of the actual payment³. The company⁴ may sue him in any court having competent jurisdiction and recover the amount, with lawful interest, from the day on which the call was payable⁵.

In a claim for calls it is sufficient for the company to allege that the defendant is the holder of one share or more in the company, stating the number of shares, and is indebted to it in the sum to which the calls in arrear amount in respect of one call or more upon one share or more (stating the number and amount of each of those calls), by which a claim has accrued to the company by virtue of the Companies Clauses Consolidation Act 1845 and the special Act⁶. An allegation in the pleading that the defendant is a holder may be supported by proof that he was so when the call was made⁷. A claim in this statutory form cannot be maintained against the executors of a deceased shareholder personally, where the call was made in his lifetime⁸. The limitation period in a claim in the statutory form is six years⁹.

1 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

2 As to the liability of shareholders when calls are made for payment see PARA 1706.

3 Companies Clauses Consolidation Act 1845 s 23. As to the application of the Companies Clauses Acts see PARA 1668 note 2. Interest on a judgment debt is at 8% per annum: Judgments Act 1838 s 17 (amended by the Judgments Debts (Rate of Interest) Order 1993, SI 1993/564, art 2) and probably the current rate of interest for the time being is the rate demandable by a company under the Companies Clauses Consolidation Act 1845 s 23: see *London, Chatham and Dover Rly Co v South Eastern Rly Co* [1892] 1 Ch 120 at 133, 136-137, CA (affd [1893] AC 429, HL); *Maine and New Brunswick Electrical Power Co v Hart* [1929] AC 631, PC. As to the right to interest on money generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1303 et seq.

4 As to the meaning of 'company' see PARA 1670.

5 Companies Clauses Consolidation Act 1845 s 25. As to forfeiture in case of non-payment see PARA 1721 et seq.

6 Companies Clauses Consolidation Act 1845 s 26. As to the meaning of 'special Act' see PARA 1670 note 2. Where the statement of claim is framed in strict accordance with s 26, interest may be recovered, even though not expressly claimed: cf *Southampton Dock Co v Richards* (1840) 1 Man & G 448 at 464. As to the court's general power to award interest see the Senior Courts Act 1981 s 35A; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1149.

7 *Belfast and County Down Rly Co v Strange* (1848) 1 Exch 739 at 742; *Wilson v Birkenhead, Lancashire and Cheshire Junction Rly Co* (1851) 6 Exch 626 at 628; *Inglis v Great Northern Rly Co* (1852) 19 LTOS 149, HL.

8 *Birkenhead, Lancashire and Cheshire Junction Rly Co v Cotesworth* (1850) 5 Exch 226 at 228.

9 See the Limitation Act 1980 s 9(1) (time limit for actions for sums recoverable by statute); and **LIMITATION PERIODS** vol 68 (2008) PARA 1005.

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1709. Evidence.

At the trial of a claim for calls¹ it is sufficient to prove that, at the time of making the call, the defendant was a holder of one share or more in the undertaking² and that the call was in fact made, and notice of the making of the call given as directed by the Companies Clauses Consolidation Act 1845 or the special Act³. It is not necessary to prove the appointment of the directors⁴ who made the call, or any other matter⁵. The company⁶ is thereupon entitled to recover what is due upon the call, with interest⁷, unless it appears that the call exceeds the prescribed⁸ amount, that due notice was not given⁹, that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within that period¹⁰.

The production of the register of shareholders¹¹ is prima facie evidence of the defendant being a shareholder, and of the number and amount of his shares¹², without proof that the company's seal has been duly affixed at a meeting¹³. If the company relies on this provision, the register must contain within itself all the particulars necessary to charge the defendant with liability in the claim¹⁴, and all the provisions of the enactment as to how the register is to be kept must be scrupulously observed¹⁵. In addition, if it is proved that such person has become, by subscribing the prescribed sum or otherwise, entitled to a share in the company, the evidence that he is a shareholder is conclusive.

If there is no register or if the register is so defective as to be inadmissible in evidence, other evidence must be adduced to prove that a person is a shareholder¹⁶.

The defendant may disprove the prima facie liability arising from his name being on the register by showing that the company had no authority to put, and ought not to have put, his name there¹⁷. He may, however, be precluded by his own conduct from denying, as against the company, that he is a shareholder; and, if he has so acted as, in effect, to claim the position of a shareholder, he may be estopped from raising some objection which he might otherwise have raised to his liability for calls¹⁸.

1 See PARA 1708.

2 As to the meaning of 'undertaking' see PARA 1738.

3 Companies Clauses Consolidation Act 1845 s 27. As to the meaning of 'special Act' see PARA 1670 note 2. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 As to the meaning of 'directors' see PARA 1670.

5 Companies Clauses Consolidation Act 1845 s 27.

6 As to the meaning of 'company' see PARA 1670.

7 As the recovery of payment and interest see PARA 1708.

8 As to the meaning of 'prescribed' see PARA 1670 note 4.

9 As to the formalities to be observed when making calls see PARA 1704.

10 Companies Clauses Consolidation Act 1845 s 27; *R v Londonderry and Coleraine Rly Co* (1849) 13 QB 998 at 1006.

11 As to the register of shareholders see the Companies Clauses Consolidation Act 1845 s 9; and PARA 1699. As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

12 Companies Clauses Consolidation Act 1845 s 28. However, where B, acting professedly on behalf of himself and his co-trustees, T and another, accepted an allotment of shares which in the sealed register were entered as held by 'B and others', the entry was held to be no evidence against T: *Birkenhead, Lancashire and Cheshire Junction Rly Co v Brownrigg* (1849) 4 Exch 426.

13 *Derbyshire Rly Co v Tomlinson* (1848) 12 LTOS 124; *North Western Rly Co v M'Michael* (1850) 20 LJEx 6, 5 Exch 855. As to the company's seal see PARA 1673.

14 *East Gloucestershire Rly Co v Bartholomew* (1867) LR 3 Exch 15 at 22.

15 *Bain v Whitehaven and Furness Junction Rly Co* (1850) 3 HL Cas 1 at 22 per Lord Brougham; *East Gloucestershire Rly Co v Bartholomew* (1867) LR 3 Exch 15 at 20, 27. Cf *Waterford, Wexford, Wicklow and Dublin Rly Co v Pidcock* (1853) 8 Exch 279 at 283. As to how the register is to be kept see PARA 1699.

16 *Portal v Emmens* (1876) 1 CPD 201 at 212 (affd 1 CPD 664, CA); *Wolverhampton New Waterworks Co v Hawksford* (1861) 11 CBNS 456 at 470-471, Ex Ch.

17 *Waterford, Wexford, Wicklow and Dublin Rly Co v Pidcock* (1853) 8 Exch 279; *Newry and Enniskillen Rly Co v Edmunds* (1848) 2 Exch 118 at 126; cf *Guest v Worcester, Bromyard and Leominster Rly Co* (1868) LR 4 CP 9.

18 See eg *Cromford Rly Co v Lacey* (1829) 3 Y & J 80; *Cheltenham and Great Western Union Rly Co v Daniel* (1841) 2 QB 281 at 292; *Sheffield, Ashton-under-Lyne and Manchester Rly Co v Woodcock* (1841) 7 M & W 574 at 580, 582.

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1710. Proceedings in Scotland to recover calls.

Although in general the Companies Clauses Consolidation Act 1845 does not extend to Scotland¹, if any shareholder² residing in Scotland fails to pay the amount of any call made upon him by the company³, the company may proceed against him in Scotland and sue for and recover the amount of the call, or declare his share forfeited, in the manner provided by the Companies Clauses Consolidation (Scotland) Act 1845 in regard to shareholders of any company in Scotland⁴.

1 Companies Clauses Consolidation Act 1845 s 163. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

2 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

3 As to the making of calls see PARAS 1704-1705. As to the meaning of 'company' see PARA 1670.

4 Companies Clauses Consolidation Act 1845 s 164 (amended by the Statute Law Revision Act 1875). For an instance of the exercise of this power see *Inglis v Great Northern Rly Co* (1852) 19 LTOS 149, HL.

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1711. Execution against shareholders for company's debts.

If any execution has been issued against the property or effects of a company¹, and there cannot be found sufficient on which to levy that execution, then execution may be issued against any of the shareholders² to the extent of their shares respectively in the company's capital not then paid up, upon an order of the court in which the claim or other proceeding has been brought or instituted made upon application in open court after notice to the persons sought to be charged or in chambers³.

Execution against shareholders will be granted only after proof of total⁴ or partial⁵ failure of execution against the company, and only against persons who were shareholders at the time of the failure of that execution, whether they were so at the date of the judgment or not⁶.

The court may grant permission in accordance with the application or may order that any issue or question necessary to determine the rights of the parties be tried in any of the ways in which any question in a claim may be tried, and in either case such terms as to costs or otherwise as are just may be imposed⁷.

1 As to the meaning of 'company' see PARA 1670.

2 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

3 Companies Clauses Consolidation Act 1845 s 36; CPR Sch 1 RSC Ord 46 rr 2, 4; and see **CIVIL PROCEDURE** vol 12 (2009) PARA 1275. As to the application of the Companies Clauses Acts see PARA 1668 note 2. The court may order execution so to issue against a shareholder who has not in fact taken up any shares if he is liable to do so: *Portal v Emmens* (1876) 1 CPD 664, CA. A director who by a resignation in good faith has surrendered his inchoate right to take shares is treated as being thereby divested of any liability in respect of the holding of shares, and execution will not be ordered against him: *Kipling v Todd* (1878) 3 CPD 350, CA; *Mammatt v Brett* (1886) 54 LT 165.

4 A mere statement by a solicitor's clerk that abortive writs of fieri facias have issued against the company is insufficient: *Re Emery, Hitchins v Kilkenny and Great Southern and Western Rly Co* (1850) 10 CB 160. Returns of nulla bona to writs of fieri facias coupled with an unanswered affidavit of no effects have been held sufficient evidence: *Rastrick v Derbyshire, Staffordshire and Worcestershire Junction Rly Co* (1853) 9 Exch 149; *Ridgway v Security Mutual Life Assurance Society* (1856) 18 CB 686. The return of nulla bona need not have been filed before the application is made: *Ilfracombe Rly Co v Devon and Somerset Rly Co* (1866) LR 2 CP 15.

5 *Rigby v Dublin Trunk Rly Co* (1867) LR 2 CP 586 at 588; *Ilfracombe Rly Co v Poltimore* (1868) LR 3 CP 288.

6 *Nixon v Brownlow, Nixon v Green* (1858) 3 H & N 686.

7 See CPR Sch 1 RSC Ord 46 r 4(3); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1275. This supersedes, but does not abolish, the old remedy by scire facias. As to the circumstances in which writs of scire facias might be issued see eg *Re Emery, Hitchins v Kilkenny and Great Southern and Western Rly Co* (1850) 10 CB 160; *Hitchins v Kilkenny and Great Southern and Western Rly Co* (1854) 15 CB 459. Cf *Healey v Chichester and Midhurst Rly Co* (1870) LR 9 Eq 148.

CPR Sch 1 RSC Ord 46 r 2 (see the text and note 3) refers generally to relief being subject to the fulfilment of a condition.

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1712. Inspection of and evidence by register.

For the purpose of ascertaining the names of the shareholders¹ and the amount of capital remaining to be paid upon their respective shares, any person entitled to execution² may at all

reasonable times inspect the register of shareholders³ without fee⁴. The right to inspect is enforceable by application to the court in the proceedings in which the judgment against the company⁵ was recovered⁶, and includes a right to take a copy of the material part or parts of the register⁷.

The register is prima facie evidence that any particular person is or is not a shareholder, but is not conclusive⁸. A shareholder who is registered in respect of partly paid shares may show that, as between himself and the company, he is not liable for calls⁹.

1 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

2 As to execution against shareholders for the company's debts see PARA 1711.

3 As to the register of shareholders see the Companies Clauses Consolidation Act 1845 s 9; and PARA 1699.

4 Companies Clauses Consolidation Act 1845 s 36. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

5 As to the meaning of 'company' see PARA 1670.

6 *Meador v Isle of Wight Ferry Co* (1861) 9 WR 750.

7 *Mutter v Eastern and Midlands Rly Co* (1888) 38 ChD 92 at 106, CA, approved in *Re Balaghât Gold Mining Co* [1901] 2 KB 665 at 667, CA; *Ormerod, Grierson & Co v St George's Ironworks Ltd* [1905] 1 Ch 505, CA; *Davies v Gas Light and Coke Co* [1909] 1 Ch 708, CA.

8 *Rastrick v Derbyshire, Staffordshire and Worcestershire Junction Rly Co* (1853) 9 Exch 149 at 151; *Edwards v Kilkenny and Great Southern and Western Rly Co* (1863) 14 CBNS 526 at 531; *Portal v Emmens* (1876) 1 CPD 664 at 668, CA; *Kipling v Todd* (1878) 3 CPD 350 at 357, CA. As to evidence by register see further PARA 1709.

9 *Guest v Worcester, Bromyard and Leominster Rly Co* (1868) LR 4 CP 9.

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1713. Reimbursement of shareholder.

If by means of the execution¹ any shareholder² has paid any sum of money beyond the amount then due from him in respect of calls³, he must forthwith be reimbursed that additional sum by the directors⁴ out of the company's funds⁵.

If proceedings to enforce the creditor's judgment have been commenced against a shareholder, a payment by him in good faith under those proceedings, at whatever stage they may be, is a good answer against another creditor⁶.

1 As to execution for the company's debts see PARA 1711.

2 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

3 As to the making of calls see PARAS 1704-1705.

4 As to the meaning of 'directors' see PARA 1670.

5 Companies Clauses Consolidation Act 1845 s 37. As to the application of the Companies Clauses Acts see PARA 1668 note 2. The right to reimbursement under the Companies Clauses Consolidation Act 1845 does not arise unless the shareholder submits to execution, but payment under threat of execution would by the general

law confer a right of reimbursement under an implied contract of indemnity: see eg *North v Walthamstow Urban Council* (1898) 67 LJQB 972.

6 *Kernaghan v Dublin Trunk Connecting Rly Co, James' Case* (1867) LR 3 QB 47 at 49.

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1714. Payment of subscriptions in advance of calls.

If it thinks fit, a company¹ may receive from any of its shareholders² payment in advance of all or any part of the money due upon their shares, beyond the sums actually called for³. Upon the principal money so paid in advance, or so much of it as from time to time exceeds the amount of the calls then made upon the shares in respect of which the advance is made, the company may pay interest at such rate as the shareholder paying that sum in advance and the company agree upon, but not exceeding the legal rate of interest for the time being⁴.

1 As to the meaning of 'company' see PARA 1670.

2 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

3 Companies Clauses Consolidation Act 1845 s 24. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 Companies Clauses Consolidation Act 1845 s 24. As to the legal rate of interest see PARA 1708 note 3.

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D. TRANSFER AND TRANSMISSION OF SHARES

1715. Obligations of seller and buyer of shares.

In ordinary cases, the mutual obligations of the seller and the buyer of shares are briefly as follows. The seller must at the time fixed by the contract or, if no time is fixed, within a reasonable time¹, deliver to the buyer, against payment of the agreed price, a duly executed transfer of, and the certificate for, the shares agreed to be sold, and must do nothing to prevent the registration of the buyer as transferee. Where the contract is subject to the rules and regulations of the Stock Exchange, there is no implied term that, if the company refuses to register the transfer, the price is to be refunded². The buyer must:

- 2372 (1) prepare a proper instrument of transfer and send it to the seller for execution, although in practice the seller's broker prepares and procures the seller's execution of the transfer and then sends it to the buyer³;
- 2373 (2) on receipt of a transfer duly executed by the seller and of the relative certificates, pay the agreed price;

- 2374 (3) procure the registration of the transfer⁴; and
 2375 (4) pay and indemnify the seller against all liability for calls made subsequently to the contract of sale⁵.

In the absence of any stipulation in the contract to the contrary, a purchaser of shares is entitled to all dividends on them declared after the date of the contract⁶ but not to dividends declared before the date of the contract the payment of which is postponed⁷.

A contract for the sale of shares may be enforced by a claim for specific performance⁸.

Where a company acting on a forged transfer alters its register of shareholders by striking out the name of the true owner and inserting that of the transferee, the true owner is in general entitled to obtain rectification of the register⁹. Statutory provision is made by which a company may form a compensation fund in respect of losses arising from forged transfers¹⁰.

1 *De Waal v Adler* (1886) 12 App Cas 141, PC.

2 *London Founders Association v Clarke Ltd and Palmer* (1888) 20 QBD 576 at 579, 585, CA; *Maxted v Paine* (1871) LR 6 Exch 132 at 150, Ex Ch. As to the law governing contracts and securities and contractually based investments see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 781. As to the London Stock Exchange see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 75; and as to stock exchanges generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 76; **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 684 et seq.

3 *Stephens v De Medina* (1843) 4 QB 422 at 429; *Bowlby v Bell* (1846) 3 CB 284 at 294.

4 *Sayles v Blane* (1849) 14 QB 205; *Wynne v Price* (1849) 3 De G & Sm 310. The seller is not entitled to rescind the contract if registration of the purchaser is refused by the company, but he may rely on his right to be indemnified against calls: *Casey v Bentley* [1902] 1 IR 376, CA.

5 *Wynne v Price* (1849) 3 De G & Sm 310; *Maxted v Paine* (1871) LR 6 Exch 132, Ex Ch. As to this liability to indemnify the seller against calls see further PARA 391.

6 *Black v Homersham* (1878) 4 Ex D 24. As to the need for registration of the transfer to entitle the purchaser to receive dividends see PARA 1717.

7 *Re Kidner, Kidner v Kidner* [1929] 2 Ch 121.

8 *Duncuft v Albrecht* (1841) 12 Sim 189, LC; *Cheale v Kenward* (1858) 3 De G & J 27; *Woodlands v Hind* [1955] 2 All ER 604, [1955] 1 WLR 688. See PARA 389.

9 See PARA 431.

10 See PARA 433.

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1716. How shares are transferred.

The statutory provisions¹ relating to the transfer and transmission of shares govern all cases in which the property in shares or stock passes from the proprietor to another person². They are not restricted to transfers by actual sale and purchase for money, and apply to a transfer for a nominal consideration by way of voluntary settlement³.

Subject to the regulations in the Companies Clauses Consolidation Act 1845⁴ or in the special Act⁵, every shareholder⁶ may sell and transfer all or any of his shares or stock⁷. Every transfer must be by duly stamped deed in which the consideration must be truly stated; the deed may be according to the statutory form or to the like effect⁸. A deed executed by the transferor and duly registered is essential to pass the legal title⁹. The company¹⁰ is not bound to register a deed differing materially from the statutory form¹¹, which requires execution by the transferee as well as by the transferor¹².

When duly executed, the transfer deed must be delivered to the secretary¹³, and must be kept by him¹⁴. This delivery is essential to the legal efficacy of a transfer¹⁵.

1 le the Companies Clauses Consolidation Act 1845 ss 14-19 (see also PARA 1717 et seq).

2 *Copeland v North Eastern Rly Co* (1856) 6 E & B 277 at 283.

3 *Copeland v North Eastern Rly Co* (1856) 6 E & B 277.

4 See the Companies Clauses Consolidation Act 1845 ss 15-17; and PARAS 1717-1719. See also *Nanney v Morgan* (1887) 37 ChD 346 at 353, CA.

5 As to the meaning of 'special Act' see PARA 1670 note 2.

6 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

7 Companies Clauses Consolidation Act 1845 s 14. As to the amounts in which stock may be transferred see the Decimal Currency Act 1969 s 8; and PARA 1163. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

8 Companies Clauses Consolidation Act 1845 s 14. For a form of transfer see s 14, Sch (B). However, the Stock Transfer Act 1963, which applies (*inter alia*) to securities which are fully paid-up registered securities issued by any body incorporated in Great Britain by or under any enactment or by royal charter, allows for such securities to be transferred by means of an instrument under hand in the statutory form known as a 'stock transfer', the transfer to be executed by the transferor only: see s 1(1), (4); and PARA 400.

9 *McEuen v West London Wharves and Warehouses Co* (1871) 6 Ch App 655; *Powell v London and Provincial Bank* [1893] 2 Ch 555 at 560, CA.

10 As to the meaning of 'company' see PARA 1670.

11 *R v General Cemetery Co* (1856) 6 E & B 415 at 419-420; *Roots v Williamson* (1888) 38 ChD 485.

12 See the Companies Clauses Consolidation Act 1845 s 14, Sch (B).

13 As to the meaning of 'secretary' see PARA 1670.

14 Companies Clauses Consolidation Act 1845 s 15.

15 *Nanney v Morgan* (1887) 37 ChD 346, CA. If there is no company secretary, the steps prescribed by the Companies Clauses Consolidation Act 1845 s 15 cannot be taken: *Re Welsh Highland Railway Light Railway Co* [1993] BCLC 338.

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1717. Registration of transfers.

The secretary¹ must enter a memorial of the transfer in a book called the 'register of transfers', indorsing the entry on the transfer deed and, on demand, delivering a new certificate to the

purchaser². For every entry, indorsement and certificate, the company³ may demand any sum not exceeding the prescribed⁴ amount or, if no amount is prescribed, a sum not exceeding 12 pence⁵. On the request of the purchaser of any share, an indorsement of the transfer must be made on the certificate⁶ instead of a new certificate being granted, and this indorsement, signed by the secretary, is considered in every respect the same as a new certificate⁷. Until the transfer has been delivered to the secretary, the seller of the share continues liable to the company for any calls that may be made upon the share, and the purchaser is not entitled to receive any share of the profits of the undertaking or to vote in respect of the share⁸.

Where a valid and duly executed deed of transfer of shares has been left with the secretary for registration, mere neglect on the company's part to register the transfer does not affect the transferee's right to be treated as the legal owner of the shares⁹. Registration, unless preceded by a valid transfer, does not, however, give the transferee a good title¹⁰. In the absence of a power provided for in the articles of association to reject a transferee, a company cannot refuse to register a real and absolute transfer merely because it is made to a person without means with the object of escaping from liability to calls¹¹.

Registration of a transfer may be enforced by mandatory order¹².

1 As to the meaning of 'secretary' see PARA 1670.

2 Companies Clauses Consolidation Act 1845 s 15.

3 As to the meaning of 'company' see PARA 1670.

4 As to the meaning of 'prescribed' see PARA 1670 note 4.

5 Companies Clauses Consolidation Act 1845 s 15 (amended by the Decimal Currency Act 1969 s 10(1)). The figure has been rounded down in consequence of the withdrawal of the halfpenny from 31 December 1984. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

6 As to share certificates see PARAS 1701-1702.

7 Companies Clauses Consolidation Act 1845 s 15.

8 Companies Clauses Consolidation Act 1845 s 15.

9 *Nanney v Morgan* (1887) 37 ChD 346 at 354, CA.

10 *Powell v London and Provincial Bank* [1893] 2 Ch 555 at 560, CA.

11 *R v Lambourn Valley Rly Co* (1888) 22 QBD 463 at 465. See *Re Discoverers' Finance Corpn Ltd, Lindlar's Case* [1910] 1 Ch 312, CA.

12 *R v Carnatic Rly Co* (1873) LR 8 QB 299; *R v Lambourn Valley Rly Co* (1888) 22 QBD 463; *R v London and North Western Rly Co* [1894] 2 QB 512. As to mandatory orders see **JUDICIAL REVIEW** vol 61 (2010) PARA 703 et seq.

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1718. Transfer when calls unpaid.

A shareholder¹ is not entitled to transfer any share after a call has been made² until he has paid the call or until he has paid all calls for the time being due on every share held by him³. Neglect to do so, if waived, as it may be, by the company, does not make the transfer void; and, if

directors consent to and register a transfer of shares on which there is a call in arrear, the property in the shares passes, and the transferor ceases to be a shareholder in respect of them, though he may remain liable to the company for the amount of the call⁴. Where a shareholder executes a transfer after the directors have passed a resolution to make a call but before he has received notice of it, the company is not bound to register the transfer and a mandatory order to compel registration will be refused⁵. The company's right in such a case to compel the transferor to pay a call does not, however, affect any right which he in his turn may have against the transferee under the contract between them⁶.

The company cannot refuse to register a transfer of fully paid shares or stock on the ground that the transferor holds other shares on which a call is in arrear⁷.

1 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

2 As to the making of calls see PARAS 1704-1705.

3 Companies Clauses Consolidation Act 1845 s 16; *R v Wing* (1851) 17 QB 645 at 650-651. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 *Re Hoylake Rly Co, ex p Littledale* (1874) 9 Ch App 257 at 259, 262.

5 *R v Londonderry and Coleraine Rly Co* (1849) 13 QB 998 at 1005.

6 *R v Londonderry and Coleraine Rly Co* (1849) 13 QB 998. See PARAS 403, 1706.

7 *Hubbersty v Manchester, Sheffield and Lincolnshire Rly Co* (1867) LR 2 QB 471, Ex Ch.

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1719. Closing register of transfers.

The directors¹ may close the register of transfers² for the prescribed³ period or, if no period be prescribed, then for a period not exceeding 14 days previous to each ordinary meeting⁴, and may fix a day for the closing, of which seven days' notice must be given by advertisement⁵. As between the company⁶ and the party claiming under it, but not otherwise, any transfer made during the time when the transfer books are so closed is to be considered as made subsequently to the ordinary meeting⁷.

1 As to the meaning of 'directors' see PARA 1670.

2 As to the register of transfers see PARA 1717.

3 As to the meaning of 'prescribed' see PARA 1670 note 4.

4 As to the ordinary meeting see the Companies Clauses Consolidation Act 1845 s 66; and PARA 1793.

5 Companies Clauses Consolidation Act 1845 s 17. As to notice by advertisement see s 138; and PARA 1678. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

6 As to the meaning of 'company' see PARA 1670.

7 Companies Clauses Consolidation Act 1845 s 17. Section 17 does not imply that a transfer immediately on execution is effectual as between transferor and transferee though not as between them and the company: *Nanney v Morgan* (1887) 35 ChD 598 at 604-605; affd 37 ChD 346, CA.

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1720. Transmission of shares.

If the interest in any share becomes transmitted in consequence of the death, bankruptcy or insolvency¹ of any holder, or by any lawful means² other than by a transfer under the Companies Clauses Consolidation Act 1845 or the special Act³, the transmission must be authenticated by a declaration in writing⁴ or in such other manner as the directors⁵ require⁶. The declaration must state the manner in which and the person to whom the share has been so transmitted, and must be made and signed by some credible person before a justice or a person authorised to administer oaths⁷. It must be left with the secretary⁸, who must thereupon enter the name of the person entitled under the transmission in the register of shareholders⁹. For every entry, the company¹⁰ may demand a sum not exceeding the prescribed¹¹ amount and, where no amount is prescribed, a sum not exceeding 25 pence; until the transmission has been so authenticated, no person claiming by virtue of it is entitled to receive any share of the profits of the undertaking, or to vote as a shareholder in respect of any such share¹².

If the transmission has taken place by virtue of any testamentary instrument or by intestacy¹³, the probate or letters of administration, or an official extract, together with the declaration, must be produced to the secretary, who must then enter the declaration in the register of transfers¹⁴.

The personal representative of a deceased shareholder may, however, leave the shares standing in the deceased's name, in which case he cannot transfer or vote in respect of them, or receive dividends on them and, though he may be liable for calls, will be so only in his representative capacity. If he wishes to deal with the shares or to vote or receive dividends in respect of them, he may procure himself to be registered as a shareholder in the manner described above, in which case he will become a shareholder in the company, with and subject to the ordinary rights and liabilities of a shareholder¹⁵. If two or more personal representatives are so registered as joint holders, a transfer by one only is invalid¹⁶.

1 See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**.

2 These words do not cover a transfer by conveyance: *Copeland v North Eastern Rly Co* (1856) 6 E & B 277 at 284.

3 As to the meaning of 'special Act' see PARA 1670 note 2.

4 As to the meaning of 'writing' see PARA 35 note 13.

5 As to the meaning of 'directors' see PARA 1670.

6 Companies Clauses Consolidation Act 1845 s 18 (amended by the Statute Law (Repeals) Act 1993). As to the application of the Companies Clauses Acts see PARA 1668 note 2.

7 Companies Clauses Consolidation Act 1845 s 18 (amended by the Courts Act 2003 s 109(1), Sch 8 para 16).

8 As to the meaning of 'secretary' see PARA 1670.

9 Companies Clauses Consolidation Act 1845 s 18 (as amended: see note 6). As to the register of shareholders see s 9; and PARA 1699. As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7. If there is

no company secretary, the steps prescribed by the Companies Clauses Consolidation Act 1845 s 18 (as so amended) cannot be taken: *Re Welsh Highland Railway Light Railway Co* [1993] BCLC 338.

10 As to the meaning of 'company' see PARA 1670.

11 As to the meaning of 'prescribed' see PARA 1670 note 4.

12 Companies Clauses Consolidation Act 1845 s 18 (amended by the Decimal Currency Act 1969 s 10(1)). When the transmission is to persons as executors, it must be stated in the declaration that that is so, and their names must be given: *Barton v London and North Western Rly Co* (1889) 24 QBD 77 at 88, CA. The provision as to leaving the declaration is not obligatory in the sense that the person entitled must leave the declaration with the secretary, but it is obligatory in the sense that such declaration can only be effective against the company if it is so left. The company cannot compel a person entitled by transmission to have his name put on the register, but, if he wishes to make his claim to the transmitted shares effective against the company, he must follow the course prescribed by the Companies Clauses Consolidation Act 1845 ss 18, 19: *Barton v London and North Western Rly Co*.

13 The transmission here referred to is the transmission in consequence of death mentioned in the Companies Clauses Consolidation Act 1845 s 18: *Copeland v North Eastern Rly Co* (1856) 6 E & B 277 at 284.

14 Companies Clauses Consolidation Act 1845 s 19 (amended by the Statute Law (Repeals) Act 1993). As to the register of transfers see the Companies Clauses Consolidation Act 1845 s 15; and PARA 1717.

15 *Barton v London and North Western Rly Co* (1889) 24 QBD 77 at 88-89, CA.

16 *Barton v London and North Western Rly Co* (1889) 24 QBD 77, CA; *Barton v North Staffordshire Rly Co* (1888) 38 ChD 458 at 464.

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E. FORFEITURE, CANCELLATION AND SURRENDER OF SHARES

1721. When shares may be forfeited.

If a shareholder¹ fails to pay any call payable by him, together with interest, if any², then, at any time after the expiration of two months³ from the day appointed for payment, the directors⁴ may declare forfeited the share in respect of which the call was payable, whether the company⁵ has sued for the amount of the call or not⁶.

The remedy of forfeiture is additional to the power to make a claim⁷, and is a further security for unpaid calls, in the nature of a mortgage or pledge. Hence, until the company has finally disposed of the shares and the debts and the costs have been satisfied, it may go on with its claim for calls in arrear⁸. When it has sold the forfeited shares and converted them into money, the defendant is entitled to credit to the extent of the net proceeds of the sale. If the forfeited shares are cancelled and converted into other shares, he is entitled to the benefit of the value of the new shares, in satisfaction wholly or pro tanto of his liability⁹.

1 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

2 As to the recovery of payment for calls and interest see PARA 1708.

3 As to the meaning of 'month' see PARA 1670 note 3.

4 As to the meaning of 'directors' see PARA 1670.

5 As to the meaning of 'company' see PARA 1670.

6 Companies Clauses Consolidation Act 1845 s 29. Cf the Companies Clauses Act 1863 s 7 (see PARA 1727); and the provision that may be made in a company's articles of association (see PARA 1213 et seq). As to the application of the Companies Clauses Acts see PARA 1668 note 2.

7 See PARA 1708.

8 *Great Northern Rly Co v Kennedy* (1849) 4 Exch 417 at 425; *Inglis v Great Northern Rly Co* (1852) 19 LTOS 149, HL. Cf *Birmingham, Bristol and Thames Junction Rly Co v Locke* (1841) 1 QB 256. As to the position where the shares are sold for more than sufficient to pay the debt and the costs see PARA 1724.

9 *Great Northern Rly Co v Kennedy* (1849) 4 Exch 417 at 425; *Inglis v Great Northern Rly Co* (1852) 19 LTOS 149, HL.

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1722. Notice of intention to forfeit shares.

Before declaring any share forfeited, the directors¹ must cause notice of their intention to be left at or transmitted by post to the usual or last place of abode of the person appearing by the register of shareholders² to be the proprietor of the share³. If the shareholder is abroad, or if his usual or last place of abode is not known to the directors, by reason of its being imperfectly described in the shareholders' address book⁴ or otherwise, or if the interest in the share is known by the directors to have become transmitted otherwise than by transfer⁵, but a declaration of the transmission has not been registered, and so the address of the parties to whom the share may have been transmitted, or may for the time being belong, is not known to the directors, they must give public notice of their intention in the London Gazette, if the company's⁶ principal place of business is situated in England, and also in some newspapers⁷. These notices must be given 21 days at least before the directors make a declaration of forfeiture⁸.

1 As to the meaning of 'directors' see PARA 1670.

2 As to the register of shareholders see the Companies Clauses Consolidation Act 1845 s 9; and PARA 1699. As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

3 Companies Clauses Consolidation Act 1845 s 30. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 As to the shareholders' address book see the Companies Clauses Consolidation Act 1845 s 10; and PARA 1700.

5 See the Companies Clauses Consolidation Act 1845 s 18; and PARA 1720.

6 As to the meaning of 'company' see PARA 1670.

7 Companies Clauses Consolidation Act 1845 s 30. As to the giving of notice by advertisement in newspapers see s 138; and PARA 1678. As to the meaning of 'England' see PARA 1 note 5.

8 Companies Clauses Consolidation Act 1845 s 30. A notice does not, however, excuse a shareholder from payment of calls in arrear: see *Birmingham, Bristol and Thames Junction Rly Co v Locke* (1841) 1 QB 256.

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1723. Confirmation of declaration of forfeiture.

The declaration of forfeiture does not take effect so as to authorise the sale or other disposition of any share until it has been confirmed at a general meeting¹ of the company² to be held after the expiration of two months at least from the day on which the notice of intention to make the declaration has been given³. At that meeting the company may confirm the forfeiture, and by an order at that meeting or at any subsequent general meeting may direct the forfeited share to be sold or otherwise disposed of⁴.

1 As to the general meeting see the Companies Clauses Consolidation Act 1845 ss 66-80; and PARAS 1793-1801. Cf the provision that may be made in a company's articles of association: see PARA 1213.

2 As to the meaning of 'company' see PARA 1670.

3 Companies Clauses Consolidation Act 1845 s 31. As to the notice of intention to forfeit shares see PARA 1722. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 Companies Clauses Consolidation Act 1845 s 31.

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1724. Sale of forfeited shares.

After confirmation¹, the directors² of the company³ may sell the forfeited share⁴ either by public auction or by private contract and, if there is more than one forfeited share, then either separately or together⁵. Any shareholder⁶ may purchase any share so sold⁷.

The company must not sell or transfer more of a defaulter's shares than will be sufficient, as nearly as can be ascertained at the time of the sale, to pay the arrears then due from him on account of any calls, together with interest and the expenses attending the sale and declaration of forfeiture⁸. If the money produced by the sale of any forfeited shares is more than sufficient, the surplus must, on demand, be paid to the defaulter⁹. A company which has wrongfully forfeited and sold shares is liable in damages to the person wronged¹⁰.

1 See PARA 1723.

2 As to the meaning of 'directors' see PARA 1670.

3 As to the meaning of 'company' see PARA 1670.

4 As to forfeiture of shares see PARA 1721.

5 Companies Clauses Consolidation Act 1845 s 32. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

6 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

7 Companies Clauses Consolidation Act 1845 s 32.

8 Companies Clauses Consolidation Act 1845 s 34.

9 Companies Clauses Consolidation Act 1845 s 34. See also the Companies Clauses Act 1863 s 4, which (if incorporated) allows a company to cancel shares when the price obtainable is less than the arrears of calls (see PARA 1727).

10 *Catchpole v Ambergate, Nottingham and Boston and Eastern Junction Rly Co* (1852) 1 E & B 111.

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1725. Evidence of forfeiture; protection of purchaser.

A declaration in writing by some credible person not interested in the matter, made before any justice or a person authorised to administer oaths, that the call in respect of a share was made, that due notice was given, that default was made in payment of the call, and that the forfeiture of the share was declared and confirmed in the proper manner¹, is sufficient evidence of the facts stated in it².

This declaration, and the receipt of the treasurer of the company³ for the price of the share, constitute a good title to the share, and a certificate of proprietorship must be delivered to the purchaser⁴. He is then deemed the holder of the share and discharged from all calls due prior to the purchase⁵. He is not bound to see to the application of the purchase money, nor is his title to the share affected by any irregularity in the proceeding in reference to the sale⁶.

1 In accordance with the Companies Clauses Consolidation Act 1845 ss 29-31 (see PARAS 1721-1723).

2 Companies Clauses Consolidation Act 1845 s 33 (amended by the Courts Act 2003 s 109(1), Sch 8 para 17). See also **COURTS** vol 10 (Reissue) PARA 607. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

3 As to the meaning of 'company' see PARA 1670.

4 Companies Clauses Consolidation Act 1845 s 33.

5 Companies Clauses Consolidation Act 1845 s 33. Although this provision affords protection to the purchaser of forfeited shares, a company which has wrongfully forfeited and sold shares is liable in damages to the person wronged: *Catchpole v Ambergate, Nottingham and Boston and Eastern Junction Rly Co* (1852) 1 E & B 111.

6 Companies Clauses Consolidation Act 1845 s 33.

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1726. Effect of paying arrears before sale.

If the arrears of calls, interest and expenses are paid before any share forfeited and vested in the company has been sold¹, the share reverts to the person to whom it belonged before the forfeiture, as if the calls had been duly paid². Where a forfeiture has been regularly effected, the defaulter may recover the ownership of his share on this ground only; the court will not relieve against the forfeiture on the ground that by accident he never received the notice of forfeiture³.

1 As to when shares may be forfeited and sold for non-payment see PARAS 1721, 1724.

2 Companies Clauses Consolidation Act 1845 s 35. As to the application of the Companies Clauses Acts see PARA 1668 note 2. The fact that the defaulter has a right to redeem until and at the last moment before sale shows that the forfeited shares are, during the period between forfeiture and sale, a security only: *Great Northern Ry Co v Kennedy* (1849) 4 Exch 417 at 426.

3 Cf *Sparks v Liverpool Waterworks Co* (1807) 13 Ves 428.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(5) SUBSCRIBED CAPITAL/(ii) Shareholders/E. FORFEITURE, CANCELLATION AND SURRENDER OF SHARES/1727. Cancellation of forfeited shares.

1727. Cancellation of forfeited shares.

Where any share of the capital of a company¹ whose special Act² incorporates the statutory provisions as to cancellation³ is declared forfeited⁴, and the forfeiture is confirmed by a meeting, and notice of the forfeiture has been given, then, if the directors⁵ are unable to sell the share for a sum equal to the arrears of calls, interest and expenses, the company may, at any general meeting⁶ held not less than two months after the notice is given, in case payment of the arrears of calls, interest and expenses is not made by the registered holder of the share before the meeting is held, resolve that the share be cancelled instead of being sold, and the share is then cancelled accordingly⁷. If payment is made before the meeting is held, the share reverts to the shareholder⁸ and must be re-entered in the company's register⁹.

A declaration in writing made by some credible person before a justice stating that a sum of money sufficient to pay the arrears of calls, interest and expenses due in respect of the share could not, at the time of the cancellation of the share, be obtained for the same upon the stock exchange prescribed¹⁰ in the special Act, or if no stock exchange is prescribed, the Stock Exchange¹¹, is sufficient evidence of the fact so declared¹².

1 As to the meaning of 'company' see PARA 1670.

2 As to the meaning of 'special Act' see PARA 1670 note 2.

3 Ie the Companies Clauses Act 1863 Pt I (ss 3-11), which applies only where incorporated: see s 3. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 Ie under the provisions contained in the Companies Clauses Consolidation Act 1845 ss 29-35: see PARAS 1721-1726.

5 As to the meaning of 'directors' see PARA 1670.

6 As to the general meeting see the Companies Clauses Consolidation Act 1845 ss 66-80; and PARAS 1793-1801.

7 Companies Clauses Act 1863 s 4.

8 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

9 Companies Clauses Act 1863 s 7. As to the register of shareholders see the Companies Clauses Consolidation Act 1845 s 9; and PARA 1699.

10 As to the meaning of 'prescribed' see PARA 1670 note 4. As to stock exchanges generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 76; **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 684 et seq.

11 As to the London Stock Exchange see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 75.

12 Companies Clauses Act 1863 s 5.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(5) SUBSCRIBED CAPITAL/(ii) Shareholders/E. FORFEITURE, CANCELLATION AND SURRENDER OF SHARES/1728. Effect of cancelling shares.

1728. Effect of cancelling shares.

Where it is resolved that any share must be cancelled¹, then from and after the passing of the resolution the holder is precluded from all right and interest in and in respect of the share². The cancellation does not, however, affect the liability of the last registered holder to pay the company³ all arrears of calls, interest and expenses due in respect of the share at the time of the cancellation, or the company's power to enforce payment by making a claim or otherwise⁴. If the company enforces payment of arrears, the value of the share at the time of the cancellation must be deducted from the amount due⁵.

1 As to the cancellation of forfeited shares see PARA 1727.

2 Companies Clauses Act 1863 s 6. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

3 As to the meaning of 'company' see PARA 1670.

4 Companies Clauses Act 1863 s 6.

5 Companies Clauses Act 1863 s 7.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(5) SUBSCRIBED CAPITAL/(ii) Shareholders/E. FORFEITURE, CANCELLATION AND SURRENDER OF SHARES/1729. Cancellation with shareholder's consent.

1729. Cancellation with shareholder's consent.

Where any share is declared forfeited, or where any sum payable on any share remains unpaid, the company may, with the registered holder's written¹ consent and with the sanction of a general meeting, resolve that the share be cancelled². The share is then immediately cancelled and all liabilities and rights with respect to it absolutely extinguished³. A company must not pay or refund to the shareholder any sum of money for or in respect of the cancellation of any share⁴.

- 1 As to the meaning of 'writing' see PARA 35 note 13.
- 2 Companies Clauses Act 1863 s 8. As to the application of the Companies Clauses Acts see PARA 1668 note 2.
- 3 Companies Clauses Act 1863 s 8.
- 4 Companies Clauses Act 1863 s 10.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(5) SUBSCRIBED CAPITAL/(ii) Shareholders/E. FORFEITURE, CANCELLATION AND SURRENDER OF SHARES/1730. Surrender of shares.

1730. Surrender of shares.

A company whose special Act incorporates the statutory provisions as to surrender¹ may, on such terms as it thinks fit, from time to time accept surrenders of any shares which have not been fully paid up².

A company must not pay or refund to any shareholder any sum of money for or in respect of the surrender of any share³.

- 1 I.e. the Companies Clauses Act 1863 ss 9-11: see s 3. As to the application of the Companies Clauses Acts see PARA 1668 note 2.
- 2 Companies Clauses Act 1863 s 9.
- 3 Companies Clauses Act 1863 s 10.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(5) SUBSCRIBED CAPITAL/(ii) Shareholders/E. FORFEITURE, CANCELLATION AND SURRENDER OF SHARES/1731. Issue of new shares.

1731. Issue of new shares.

In lieu of any shares that have been cancelled or surrendered, a company may from time to time issue new shares of amounts which will allow them to be conveniently apportioned or disposed of according to the resolution of any ordinary or extraordinary meeting of the company, fixing the amounts and times of payment of the calls on them, and disposing of them on such terms and conditions as may be so resolved upon¹. The aggregate nominal amount of the new shares must not exceed the aggregate nominal amount of the shares in lieu of which they are issued, after deducting the amount actually paid up in respect of the shares cancelled or surrendered².

- 1 Companies Clauses Act 1863 s 11. Cf the Companies Act 2006 ss 617, 618; and any like provision that may be made in a company's articles of association (see PARA 1159 et seq). As to the application of the Companies Clauses Acts see PARA 1668 note 2.
- 2 Companies Clauses Act 1863 s 11 proviso.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(5) SUBSCRIBED CAPITAL/(iii) Stock and Stockholders/1732. Issue of stock and conversion of shares.

(iii) Stock and Stockholders

1732. Issue of stock and conversion of shares.

The special Act¹ may authorise the company² to issue stock instead of shares, and the Companies Clauses Consolidation Act 1845 provides for the conversion of fully paid shares into stock. Under that Act, with the consent of three-fifths of the votes of the shareholders³ present in person or by proxy at any general meeting⁴, when due notice for that purpose has been given, the company may from time to time convert or consolidate all or any part of the shares then existing in the capital and in respect of which the whole money subscribed has been paid up, into a general capital stock to be divided amongst the shareholders according to their respective interests in it⁵.

After the conversion, all the provisions of the Companies Clauses Consolidation Act 1845 or the special Act which require or imply that the capital must be divided into shares of any fixed amount and distinguished by numbers cease to have effect as to so much of the capital as is converted into stock⁶. The stock is transferable in the same manner and subject to the same regulations and provisions as the original shares⁷.

The company must keep a register of transfers⁸, and for every entry may demand any sum not exceeding the amount prescribed⁹ in the special Act or, if no amount is prescribed, a sum not exceeding 12 pence¹⁰.

1 As to the meaning of 'special Act' see PARA 1670 note 2.

2 As to the meaning of 'company' see PARA 1670.

3 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

4 As to the general meeting see the Companies Clauses Consolidation Act 1845 ss 66-80; and PARAS 1793-1801. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

5 Companies Clauses Consolidation Act 1845 s 61. See the provisions as to new stock contained in the Companies Clauses Act 1863 Pt II (ss 12-21) (additional capital) (see PARAS 1687-1690). Cf the Companies Act 2006 ss 617, 618 (see PARA 1159 et seq).

6 Companies Clauses Consolidation Act 1845 s 62. As to the division of capital into shares see s 6; and PARA 1693.

7 For the provisions as to the transfer of shares see PARA 1715 et seq.

8 As to the register of transfers see PARA 1717.

9 As to the meaning of 'prescribed' see PARA 1670 note 4.

10 Companies Clauses Consolidation Act 1845 ss 2, 62 (s 62 amended by the Decimal Currency Act 1969 s 10(1)). The figure has been rounded down in consequence of the withdrawal of the halfpenny from 31 December 1984. There is no distinction between stock and shares as regards the requisites of a valid and effectual transfer: *Nanney v Morgan* (1887) 37 ChD 346 at 353, CA.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(5) SUBSCRIBED CAPITAL/(iii) Stock and Stockholders/1733. Register of stockholders.

1733. Register of stockholders.

The company¹ must from time to time cause the names of the stockholders² with the amounts of their interests to be entered in a book to be kept for the purpose called the 'register of holders of consolidated stock'³. This book must be accessible at all reasonable times to the holders of shares or stock in the undertaking⁴.

1 As to the meaning of 'company' see PARA 1670.

2 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

3 Companies Clauses Consolidation Act 1845 s 63. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 Companies Clauses Consolidation Act 1845 s 63. The right of inspection given under s 63 may be exercised without assigning any reason for it, and may be enforced by an injunction restraining interference or by a mandatory injunction: *Holland v Dickson* (1888) 37 ChD 669. The right includes a right to take copies: *Mutter v Eastern and Midlands Rly Co* (1888) 38 ChD 92 at 105, CA. Cf the Companies Clauses Act 1863 s 28 (the requirement to register debenture stock); and see PARA 1755.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(5) SUBSCRIBED CAPITAL/(iii) Stock and Stockholders/1734. Participation in dividends.

1734. Participation in dividends.

A stockholder¹ is entitled to participate in the dividends and profits of the company² according to the amount of his holding³. For the purpose of voting at meetings⁴, qualification for the office of director⁵ and other purposes, he has the same rights in proportion to his holding as would have been conferred by shares of equal amount in the capital but, except for the right to the participation in dividends and profits, no rights are conferred by any aliquot part of that amount of consolidated stock which would have been conferred by a corresponding holding in shares⁶.

1 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

2 As to the meaning of 'company' see PARA 1670.

3 Companies Clauses Consolidation Act 1845 s 64. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 As to voting at meetings see the Companies Clauses Consolidation Act 1845 ss 75-80; and PARAS 1799-1801.

5 As to qualification for the office of director see the Companies Clauses Consolidation Act 1845 s 85; and PARA 1770. As to the meaning of 'directors' see PARA 1670.

6 Companies Clauses Consolidation Act 1845 s 64.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(5) SUBSCRIBED CAPITAL/(iii) Stock and Stockholders/1735. Preference stock.

1735. Preference stock.

The statutory provisions relating to the issue of preference shares, the cancellation of unissued shares and the apportionment of new shares¹, and as to the issue of redeemable preference shares², apply to stock as well as to shares.

1 See the Companies Clauses Act 1863 ss 13-21; and PARAS 1688-1690.

2 See the Statutory Companies (Redeemable Stock) Act 1915; and PARA 1684.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(6) LOAN CAPITAL/(i) Borrowing on Mortgage or Bond/1736. Power to borrow on mortgage or bond.

(6) LOAN CAPITAL

(i) Borrowing on Mortgage or Bond

1736. Power to borrow on mortgage or bond.

If so authorised by its special Act¹, the company² may, subject to the restrictions contained in that Act, borrow on mortgage or bond such sums of money as are from time to time authorised by a general meeting³, not exceeding in the whole the sum prescribed⁴; and, for securing the repayment of the money so borrowed, with interest, the company may mortgage the undertaking and the future calls on the shareholders⁵ or give bonds⁶. The giving of a power to borrow on mortgage or bond, without more, impliedly prohibits any other mode of borrowing, for example on Lloyd's bonds⁷ or by overdrawing a bank account⁸.

Mortgages and bonds under the Companies Clauses Consolidation Act 1845 may validly be issued at a discount⁹. They are not bills of sale¹⁰ within the meaning of the Bills of Sale Acts 1878 and 1882¹¹.

1 The power to borrow money is not conferred on a company by the Companies Clauses Consolidation Act 1845, but the Act nevertheless regulates the exercise of any such power that might be conferred by the special Act. As to the meaning of 'special Act' see PARA 1670 note 2. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

2 As to the meaning of 'company' see PARA 1670.

3 As to the general meeting see the Companies Clauses Consolidation Act 1845 ss 66-80; and PARAS 1793-1801. The provision as to a general meeting is directory, and as against the company a lender need not show that it has been observed: *Landowners West of England and South Wales Land Drainage and Inclosure Co v Ashford* (1880) 16 ChD 411 at 438 (decided on an analogous clause in a special Act).

4 As to the meaning of 'prescribed' see PARA 1670 note 4. Where there is a limit to the amount that may be borrowed, that limit must not be exceeded: *Fountaine v Carmarthen Rly Co* (1868) LR 5 Eq 316 at 324 per Page Wood V-C.

5 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

6 Companies Clauses Consolidation Act 1845 s 38. The bonds given by a statutory company pursuant to the Companies Clauses Acts are not infrequently described as 'debentures' and the mortgages as 'mortgage debentures': *Edmonds v Blaina Furnaces Co* (1887) 36 ChD 215 at 219 per Chitty J.

7 *Chambers v Manchester and Milford Rly Co* (1864) 5 B & S 588. As to Lloyd's bonds see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 98.

8 *Landowners West of England and South Wales Land Drainage and Inclosure Co v Ashford* (1880) 16 ChD 411 at 437.

9 *Webb v Shropshire Rlys Co* [1893] 3 Ch 307 at 320, 330, CA.

10 *Re Standard Manufacturing Co* [1891] 1 Ch 627 at 644, 648, CA. See **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1684.

11 As to the nature and meaning of a bill of sale see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 1620, 1638.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(6) LOAN CAPITAL/(i) Borrowing on Mortgage or Bond/1737. Borrowing again.

1737. Borrowing again.

If, after having borrowed any part of the money authorised by its special Act¹ to be borrowed on mortgage or bond, the company² pays it off, it may again borrow the amount paid off, and so from time to time³. This power of reborrowing may not be exercised without the authority of a general meeting⁴ of the company unless the money is reborrowed in order to pay off any existing mortgage or bond⁵. A mortgage or bond issued for cash by way of reborrowing to a lender who has no notice of any irregularity may, however, be valid even though the reborrowing was not authorised by a general meeting⁶.

If a company's goods are sold under a judgment obtained by a mortgagee or a bondholder who obtains payment of his debt out of the proceeds of sale, the transaction is equivalent to payment off by the company⁷.

1 As to the meaning of 'special Act' see PARA 1670 note 2.

2 As to the meaning of 'company' see PARA 1670.

3 Companies Clauses Consolidation Act 1845 s 39. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 As to the general meeting see the Companies Clauses Consolidation Act 1845 ss 66-80; and PARAS 1793-1801. The provision as to a general meeting is directory: see PARA 1736 note 3.

5 Companies Clauses Consolidation Act 1845 s 39.

6 *Fountaine v Carmarthen Rly Co* (1868) LR 5 Eq 316 at 323-325; *Landowners West of England and South Wales Land Drainage and Inclosure Co v Ashford* (1880) 16 ChD 411 at 438; *Re Romford Canal Co, Pocock's Claim, Trickett's Claim, Carew's Claim* (1883) 24 ChD 85 at 92.

7 *Fountaine v Carmarthen Rly Co* (1868) LR 5 Eq 316.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(6) LOAN CAPITAL/(i) Borrowing on Mortgage or Bond/1738. Meaning of 'undertaking'.

1738. Meaning of 'undertaking'.

In the Companies Clauses Consolidation Act 1845, the 'undertaking' means the undertaking or works of whatever nature which by the special Act¹ is or are authorised to be executed².

Although various ingredients go to make up an undertaking, the term describes not the ingredients but the complete work³ from which the earnings arise. So far as mortgage contracts are concerned, the undertaking is made over as a thing complete or to be completed, as a going concern, with internal and parliamentary powers of management not to be interfered with; and under a contract pledging it as security the undertaking cannot be destroyed, broken up or annihilated⁴. The undertaking's tolls and other earnings are available to satisfy the mortgage, but the mortgagees cannot, by seizing the company's assets or calling on the court to seize them, either prevent its completion or reduce it into its original elements when it has been completed⁵.

1 As to the meaning of 'special Act' see PARA 1670 note 2.

2 Companies Clauses Consolidation Act 1845 s 2. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

In the case of a railway company, the undertaking included the land actually used for the railway, with the stations and other buildings and the rails, and, under a mortgage in the statutory form, the mortgagee had a title to them paramount to that of a judgment creditor of the company who had issued an *elegit*. The court would interfere by injunction, at the instance of a mortgagee, to restrain a subsequent judgment creditor from impairing the subject matter of the mortgage by *elegit* proceedings: *Legg v Mathieson* (1860) 2 Giff 71 at 78-79; *Gardiner v London, Chatham and Dover Rly Co*, *Drawbridge v Same*, *ex p Grissell* (1866) 15 LT 494; *Wildy v Mid-Hants Rly Co* (1868) 18 LT 73 (where the money secured by the mortgage had not become due at the date when the proceedings were commenced but the security was in jeopardy).

3 A company with powers to mortgage its undertaking may mortgage surplus land not required for the purposes of the undertaking (*Stagg v Upper Medway Navigation Co* [1903] 1 Ch 169, CA), or chattels, such as barges, which it has a statutory power to own and use (*Reeve v Upper Medway Navigation Co* (1905) 21 TLR 400).

4 *Gardner v London, Chatham and Dover Rly Co*, *Drawbridge v Same*, *Gardner v Same* (No 2), *Imperial Mercantile Credit Association v Same* (1867) 2 Ch App 201; *Legg v Mathieson* (1860) 2 Giff 71; *Re Salisbury Railway and Market House Co Ltd* [1969] 1 Ch 349, [1967] 1 All ER 813.

5 *Hart v Eastern Union Rly Co* (1852) 7 Exch 246 at 265-266 (affd sub nom *Eastern Union Rly Co v Hart* (1852) 8 Exch 116); *Wickham v New Brunswick and Canada Rly Co* (1865) LR 1 PC 64 at 78; *Re Portsmouth Borough (Kingston, Fratton and Southsea) Tramways Co* [1892] 2 Ch 362 at 366.

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1739. Evidence of authority to borrow.

Where the special Act¹ restricts the company² from borrowing any money on mortgage or bond until a definite portion of its capital has been subscribed or paid up, or where by the Companies Clauses Consolidation Act 1845 or the special Act the authority of a general meeting³ is

required for such borrowing, the certificate of a justice that that definite portion of the capital has been subscribed or paid up, and a copy of the order of a general meeting authorising the borrowing, certified by a director⁴ or by the secretary⁵, are sufficient evidence of the fact of the capital having been subscribed or paid up, and of the order having been made⁶. Upon production to a justice of the company's books and of such other evidence as he thinks sufficient, he must grant the certificate⁷. A copy of an order of a general meeting is not conclusive evidence as between the directors and the company, if no such order has in fact been made, but it is evidence on which a lender may reasonably act⁸.

1 As to the meaning of 'special Act' see PARA 1670 note 2.

2 As to the meaning of 'company' see PARA 1670.

3 As to the general meeting see the Companies Clauses Consolidation Act 1845 ss 66-80; and PARAS 1793-1801.

4 As to the meaning of 'directors' see PARA 1670.

5 As to the meaning of 'secretary' see PARA 1670.

6 Companies Clauses Consolidation Act 1845 s 40. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

7 Companies Clauses Consolidation Act 1845 s 40.

8 *Fountaine v Carmarthen Rly Co* (1868) LR 5 Eq 316 at 322-323.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(6) LOAN CAPITAL/(i) Borrowing on Mortgage or Bond/1740. Form of mortgage.

1740. Form of mortgage.

Every mortgage or bond securing money borrowed by the company¹ must be by deed under its common seal², duly stamped and truly stating the consideration, and it may be either according to the statutory form or to the like effect³. Where the seal has been affixed without due authority, the company is not bound by the instrument⁴, except as against a lender who takes the security without notice, actual or imputed, of the irregularity⁵. The mortgage or bond is not invalid if the true consideration is not disclosed in express terms in it⁶. The consideration is required to be stated for the purpose of enabling the document to be properly stamped⁷.

1 As to the meaning of 'company' see PARA 1670.

2 As to the company's seal see PARA 1673.

3 Companies Clauses Consolidation Act 1845 s 41. The statutory form is given in Schs (C), (D). As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 *D'Arcy v Tamar, Kit Hill and Callington Rly Co* (1867) LR 2 Exch 158.

5 *County of Gloucester Bank v Rudry Merthyr Steam and House Coal Colliery Co* [1895] 1 Ch 629 at 632, CA. As to how far a person dealing with a company is entitled to assume that the company's rules of internal management have been complied with see PARA 267 et seq. As to the lender's duty to acquaint himself with the company's 'external position' by reason of having constructive notice of its powers see PARA 266. As to the extension of the provisions of ss 39, 40 (power of directors to bind company) (see PARAS 256, 265) to companies incorporated by Act of Parliament, to the extent that such companies are unregistered companies falling within

s 1043 (as to which see PARA 1668 note 2), see PARA 1666. As to the effect of such extension on borrowing powers see PARA 1256.

6 *Landowners West of England and South Wales Land Drainage and Inclosure Co v Ashford* (1880) 16 ChD 411 at 438.

7 *Landowners West of England and South Wales Land Drainage and Inclosure Co v Ashford* (1880) 16 ChD 411 at 438.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(6) LOAN CAPITAL/(i) Borrowing on Mortgage or Bond/1741. Effect of mortgages in statutory form.

1741. Effect of mortgages in statutory form.

Although the statutory form of mortgage purports to assign the whole undertaking to each mortgagee as if he were the sole and first incumbrancer, the respective mortgagees are entitled only to the property comprised in the mortgages in proportion to the sums advanced by them¹. The sums advanced must be repaid with interest, without any preference by reason of priority of the date of any mortgage or of the meeting at which it was authorised². Whatever the property charged by the mortgage may be, every mortgagee must bring that property into hotchpot with all the other mortgagees. All the mortgage claims and all the subject matters of the mortgages are consolidated, the whole charge being made upon the whole subject matter, and the whole proceeds being distributed *pari passu*³. The mortgagees are entitled rateably to the tolls, sums and premises comprised in their mortgages, and, further, to be repaid their advances, with interest generally, and not merely out of tolls and the like⁴; but they are not entitled to any specific lien on any of the company's property or effects⁵.

A mortgage in the statutory form does not entitle the mortgagee to bring a claim to recover the company's land⁶, or for sale or foreclosure of it⁷. Where, however, a railway has been sold under a special Act and the proceeds paid into court, a holder of a mortgage in the statutory form is entitled to payment out of the fund in court in priority to a subsequent judgment creditor⁸.

1 Companies Clauses Consolidation Act 1845 s 42. See also s 41, Sch (C). As to the application of the Companies Clauses Acts see PARA 1668 note 2.

2 Companies Clauses Consolidation Act 1845 s 42.

3 *Landowners West of England and South Wales Land Drainage and Inclosure Co v Ashford* (1880) 16 ChD 411 at 439.

4 *Bowen v Brecon Rly Co, ex p Howell* (1867) LR 3 Eq 541.

5 *Russell v East Anglian Rly Co* (1850) 3 Mac & G 125. See also note 8.

6 *Doe d Myatt v St Helen's and Runcorn Gap Rly Co* (1841) 2 QB 364 (a decision on a mortgage in form similar to that set out in the Companies Clauses Consolidation Act 1845 Sch (C)).

7 *Furness v Caterham Rly Co* (1858) 25 Beav 614.

8 *Furness v Caterham Rly Co* (1859) 27 Beav 358 at 361-362. The lien of the mortgagees of a railway company on its undertaking under the Railway Companies Act 1867 s 23 (now repealed) was not a specific charge upon or claim against the sale proceeds of its surplus land: *Re Hull, Barnsley and West Riding Junction Rly Co* (1888) 40 ChD 119 at 127, CA.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(6) LOAN CAPITAL/(i) Borrowing on Mortgage or Bond/1742. Effect of mortgage on uncalled capital.

1742. Effect of mortgage on uncalled capital.

Even though it comprises future calls on shareholders¹, no mortgage, unless it expressly so provides, precludes the company² from receiving any calls to be made by it and applying them to the purposes of the company³. A mortgagee of unpaid capital, it seems, prevails against a judgment creditor of the company, who is entitled to proceed by way, in effect, of execution against a shareholder whose shares are not fully paid up, and against a liquidator making calls in the winding up of the company⁴.

1 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

2 As to the meaning of 'company' see PARA 1670.

3 Companies Clauses Consolidation Act 1845 s 43. As to the application of the Companies Clauses Acts see PARA 1668 note 2. The Companies Clauses Consolidation Act 1845 s 43 has no application where the undertaking has been in effect abandoned: *Re Glyn Valley Tramway Co Ltd* [1937] Ch 465 at 472, [1937] 3 All ER 15 at 19. As to mortgages of uncalled capital by companies governed by the Companies Act 2006 see PARA 1265.

4 *Re Pyle Works* (1890) 44 ChD 534 at 587, CA, per Lindley LJ, the decision in which (but not specifically the dictum of Lindley LJ) was approved in *Newton v Anglo-Australian Investment Co's Debenture Holders* [1895] AC 244, PC. The remedy by scire facias referred to in the former of these cases has been superseded: see PARA 1711 note 7.

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1743. Bondholders' rights.

According to the amount of the money secured, the obligees in bonds given by the company¹ are proportionally entitled to be paid, out of its tolls or other property, the sums secured, without any preference one above another by reason of priority of date of any bond or of the meeting at which it was authorised².

Bondholders are not assignees of the undertaking or tolls³; nor are they entitled to any specific equitable lien on any of the company's property or effects⁴. Their only remedy appears to be the obtaining of a judgment⁵ and, as against them, any judgment creditor of the company may seize its goods and chattels under a writ of fieri facias⁶.

1 As to the meaning of 'company' see PARA 1670.

2 Companies Clauses Consolidation Act 1845 s 44. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

3 *Bowen v Brecon Rly Co, ex p Howell* (1867) LR 3 Eq 541 at 548.

4 *Russell v East Anglian Rly Co* (1850) 3 Mac & G 125 at 141, 143. As to bondholder's liens in the case of railway companies see PARA 1741 note 8.

5 *Bowen v Brecon Rly Co, ex p Howell* (1867) LR 3 Eq 541.

6 *Russell v East Anglian Rly Co* (1850) 3 Mac & G 125. As to writs of fieri facias see **CIVIL PROCEDURE** vol 12 (2009) PARAS 1266, 1273 et seq.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(6) LOAN CAPITAL/(i) Borrowing on Mortgage or Bond/1744. Register of mortgages and bonds.

1744. Register of mortgages and bonds.

A register of mortgages and bonds must be kept by the secretary¹, and, within 14 days after the date of the mortgage or bond, an entry or memorial, specifying its number and date, the sums secured and the names of the parties, with their proper additions², must be made in the register³. The register may be perused, without payment, at all reasonable times by any of the shareholders, by any mortgagee or bond creditor or by any person interested in any mortgage or bond⁴. The right to inspect includes the right to take copies or extracts⁵. An applicant for inspection is not bound to state the grounds of his application, and his right, if disputed, may be enforced by injunction⁶.

1 As to the meaning of 'secretary' see PARA 1670.

2 As to the meaning of 'additions' see PARA 1699 note 2.

3 Companies Clauses Consolidation Act 1845 s 45. Cf the Companies Act 2006 s 876; and PARA 1296. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 Companies Clauses Consolidation Act 1845 s 45.

5 *Mutter v Eastern and Midlands Rly Co* (1888) 38 ChD 92, CA. See PARA 1700. As to the employment of agents to make inspections see PARA 1297 note 12.

6 *Holland v Dickson* (1888) 37 ChD 669. Cf *Davies v Gas Light and Coke Co* [1909] 1 Ch 708, CA.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(6) LOAN CAPITAL/(i) Borrowing on Mortgage or Bond/1745. Fixing time for repayment of principal.

1745. Fixing time for repayment of principal.

The company¹ may, if it thinks proper, fix a period for the repayment of the principal money borrowed, with interest, in which case it must cause the period to be inserted in the mortgage or bond². Upon its expiration, the principal sum, together with arrears of interest, must, on demand, be paid to the party entitled to the mortgage or bond³. If no other place of payment is inserted in the instrument, the principal and interest are payable at the company's principal office or place of business⁴.

1 As to the meaning of 'company' see PARA 1670.

2 Companies Clauses Consolidation Act 1845 s 50. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

3 Companies Clauses Consolidation Act 1845 s 50.

4 Companies Clauses Consolidation Act 1845 s 50.

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1746. Repayment of principal where no time fixed.

If no time is fixed in the mortgage or bond for the repayment of the money borrowed, the person entitled to the mortgage or bond may, at the expiration or at any time after the expiration of 12 months from the date of the instrument, demand payment of the principal money secured, with all arrears of interest, upon giving six months' previous notice for that purpose¹. Similarly, the company² may at any time, on giving like notice, pay off the money borrowed³. If given by a mortgagee or bond creditor, the notice must be delivered to the secretary⁴ or left at the company's principal office⁵. If given by the company, it must be given either personally to the mortgagee or bond creditor or left at his residence or, if he is unknown to the directors⁶ or cannot after inquiry be found, must be given by advertisement in the London Gazette, and in some newspaper⁷.

1 Companies Clauses Consolidation Act 1845 s 51. Every notice must be in writing, or print, or both: s 51. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

2 As to the meaning of 'company' see PARA 1670.

3 Companies Clauses Consolidation Act 1845 s 51.

4 As to the meaning of 'secretary' see PARA 1670.

5 Companies Clauses Consolidation Act 1845 s 51.

6 As to the meaning of 'directors' see PARA 1670.

7 Companies Clauses Consolidation Act 1845 s 51. As to newspaper advertisements see PARA 1678.

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1747. Mortgagees' and bondholders' remedies.

In default of payment, a right of action arises on the mortgage or bond¹. A mortgagee or a bondholder, as the case may be, may sue on behalf of himself and all other holders of the same issue of mortgages or bonds and, after obtaining on application the appointment of a receiver of the undertaking, may obtain a judgment declaring that he and those on whose behalf he sues are entitled to stand in the position of judgment creditors of the company for the principal and interest due upon their securities, and appointing the existing receiver to be receiver of all

property of the company not included in the interim order². With the permission of the court, the claimant may then issue execution³, and, if he fails to obtain satisfaction of his debt, he may obtain an order on petition for the company to be wound up⁴ as an unregistered company⁵. If, by means of an execution, an individual holder has obtained satisfaction of his debt, he cannot afterwards be made to refund, for the benefit of other holders, any part of what he has received⁶.

1 *Hart v Eastern Union Rly Co* (1852) 7 Exch 246 at 265-266, 268 (affd sub nom *Eastern Union Rly Co v Hart* (1852) 8 Exch 116); *Bowen v Brecon Rly Co, ex p Howell* (1867) LR 3 Eq 541. See also *Concord Trust v Law Debenture Trust Corpn plc* [2005] UKHL 27, [2005] 1 WLR 1591, [2006] 1 BCLC 616 (structure of trust deed meant that, where a materially prejudicial event of default had occurred, and the bondholders had made the requisite written request, the trustee came under a mandatory obligation, owed to the bondholders, to give the company notice of acceleration).

2 *Russell v East Anglian Rly Co* (1850) 3 Mac & G 104; *Bowen v Brecon Rly Co, ex p Howell* (1867) LR 3 Eq 541; *Hope v Croydon and Norwood Tramways Co* (1887) 34 ChD 730.

3 *Bowen v Brecon Rly Co, ex p Howell* (1867) LR 3 Eq 541; *Re Potteries, Shrewsbury and North Wales Rly Co* (1869) 5 Ch App 67 (decided under the Railway Companies Act 1867 s 9 (repealed)).

4 *Re Portsmouth Borough (Kingston, Fratton and Southsea) Tramways Co* [1892] 2 Ch 362, not following *Re Herne Bay Waterworks Co* (1878) 10 ChD 42 (where a judgment had not been first obtained), and disapproving *Re Exmouth Docks Co* (1873) LR 17 Eq 181 on this point.

5 See under the Insolvency Act 1986 s 221: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1148.

6 *Fountaine v Carmarthen Rly Co* (1868) LR 5 Eq 316 at 324.

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1748. Interest on mortgages and bonds.

The interest on money borrowed upon a mortgage or bond must be paid at the periods appointed in it or, if no period is appointed, half-yearly, and in preference to any dividends payable to the company's shareholders¹. Where a company gives a bond for a principal sum to be paid on a specified day with interest in the meantime, and does not pay or offer to pay the principal at the date fixed, the bondholder is entitled to interest from the date fixed for payment until actual payment of the principal sum². If a bondholder sues the company on its covenant to pay and recovers judgment, the original debt merges in the judgment debt, which carries interest at the appropriate statutory rate³ unless the parties have agreed that any judgment should carry a different rate of interest⁴.

Where the company has given notice of its intention to pay off a mortgage or bond at a time when it may lawfully be paid off, all further interest ceases to be payable on the mortgage or bond at the expiration of the notice unless, on demand of payment made pursuant to the notice or at any time afterwards, the company fails to pay the principal and interest due at the expiration of the notice⁵.

1 Companies Clauses Consolidation Act 1845 s 48. As to the meaning of 'company' see PARA 1670. As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

2 *Price v Great Western Rly Co* (1847) 16 M & W 244. The rate of interest allowed as from the date specified to that of actual payment is not necessarily the same as that payable up to the time specified for payment: see *Cook v Fowler* (1874) LR 7 HL 27; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1310.

3 Interest on a judgment debt is at 8% per annum: Judgments Act 1838 s 17 (amended by SI 1993/564); and see *Re European Central Rly Co, ex p Oriental Financial Corpn* (1876) 4 ChD 33, CA.

4 *Economic Life Assurance Society v Usborne* [1902] AC 147, HL.

5 Companies Clauses Consolidation Act 1845 s 52. As to the time when repayment of the principal sum borrowed may be made by the company see ss 50-51; and PARAS 1745-1746.

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1749. Appointment of receiver by justices.

Where the mortgagees of a company¹ are empowered by the special Act² to enforce the payment of arrears of interest, or arrears of principal and interest, due on the mortgages by the appointment of a receiver, a mortgagee may, without prejudice to his right to sue for the sum in the High Court, require the appointment of a receiver by application to justices³:

2376 (1) if the interest accruing upon any mortgage is not paid within 30 days after it has become payable, and after a demand in writing⁴; or

2377 (2) if the principal money owing upon any mortgage is not paid within six months⁵ after it has become payable, and after a demand in writing, provided his debt amounts to the sum prescribed⁶ by the special Act; if it does not, he may combine with other mortgagees entitled to make the application whose debts, together with his debt, amount to the prescribed sum⁷.

The application must be made to two justices who may, on the application, after hearing the parties, by order in writing appoint some person to receive the whole or part of the tolls or sums liable to the payment of the amount due until that amount and all costs, including the charges of receiving the tolls or sums, are fully paid⁸. On the appointment being made, all such tolls and sums must be paid to the person appointed⁹. The money received is so much money received by or to the use of the party to whom the interest, or principal and interest, as the case may be, is then due, and on whose behalf the receiver has been appointed; and, after the interest and costs, or principal, interest and costs, have been so received, the power of the receiver ceases¹⁰.

1 As to the meaning of 'company' see PARA 1670.

2 As to the meaning of 'special Act' see PARA 1670 note 2.

3 Companies Clauses Consolidation Act 1845 s 53. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 Companies Clauses Consolidation Act 1845 s 53. As to the meaning of 'writing' see PARA 35 note 13.

5 As to the meaning of 'month' see PARA 1670 note 3.

6 As to the meaning of 'prescribed' see PARA 1670 note 4.

7 Companies Clauses Consolidation Act 1845 s 53.

- 8 Companies Clauses Consolidation Act 1845 s 54.
- 9 Companies Clauses Consolidation Act 1845 s 54.
- 10 Companies Clauses Consolidation Act 1845 s 54.

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1750. Appointment of receiver by High Court.

The statutory provisions for the appointment of a receiver¹ do not oust or exclude the ordinary jurisdiction of the High Court to appoint a receiver²; and a mortgagee may either bring a claim to recover his interest and principal or apply for the appointment of a receiver of tolls or sums liable to the payment of such principal and interest³. Where the security is in jeopardy, a receiver may be appointed before the money secured has become payable⁴. As a general rule, mortgagees or bondholders cannot have a manager of the undertaking appointed by the court, nor can they have it sold⁵, though, if such a company is ordered to be wound up, its undertaking may be sold by the liquidator⁶.

¹ See PARA 1749.

² *Fripp v Chard Rly Co*, *Fripp v Bridgewater and Taunton Canal and Stolford Railway and Harbour Co* (1853) 11 Hare 241 at 259; *Russell v East Anglian Rly Co* (1850) 3 Mac & G 125 at 144. As to the statutory jurisdiction of the High Court to appoint a receiver see **RECEIVERS** vol 39(2) (Reissue) PARA 313 et seq.

³ *Gardner v London, Chatham and Dover Rly Co*, *Drawbridge v Same*, *Gardner v Same (No 2)*, *Imperial Mercantile Credit Association v Same* (1867) 2 Ch App 201 at 213; *Hart v Eastern Union Rly Co* (1852) 7 Exch 246 at 265-266, 268 (affd 8 Exch 116); and see the cases cited in PARA 1372 note 10.

⁴ *Wildy v Mid-Hants Rly Co* (1868) 18 LT 73; and see PARAS 1362, 1372.

⁵ This rule applies to all companies incorporated for carrying on a public undertaking: *Gardner v London, Chatham and Dover Rly Co* (1867) 2 Ch App 201 at 212; *Blaker v Herts and Essex Waterworks Co* (1889) 41 ChD 399; *Marshall v South Staffordshire Tramways Co* [1895] 2 Ch 36, CA, disapproving *Bartlett v West Metropolitan Tramways Co* [1893] 3 Ch 437, [1894] 2 Ch 286; cf *Re Crystal Palace Co*, *Fox v Crystal Palace Co* (1911) 104 LT 898, CA (affd sub nom *Saunders v Bevan* (1912) 107 LT 70, HL). A judgment creditor could obtain the appointment of a manager in the case of a railway company: see the Railway Companies Act 1867; and **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 15. When the company has ceased to exist as a going concern, debenture holders are entitled to a charge on the assets in priority to unsecured creditors: *Re Glyn Valley Tramway Co Ltd* [1937] Ch 465, [1937] 3 All ER 15. As to the law relating to the appointment of a receiver or manager of companies governed by the Companies Act 2006 see PARA 1340 et seq.

⁶ *Marshall v South Staffordshire Tramways Co* [1895] 2 Ch 36 at 53, CA; *Pegge v Neath District Tramways Co Ltd* [1895] 2 Ch 508 at 511.

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1751. Transfer of mortgage or bond and interest.

A person entitled to a mortgage or bond may from time to time transfer his interest to any other person; the transfer must be by deed¹ duly stamped, truly stating the consideration, and it may be in the statutory form² or to the like effect³. If a mortgage or bond has been transferred in accordance with these provisions, a claim on the mortgage or bond must be brought in the transferee's name⁴.

Interest on a mortgage or bond is transferable only by deed duly stamped⁵.

1 *Powell v London and Provincial Bank* [1893] 2 Ch 555 at 560, CA.

2 For the statutory form of transfer see the Companies Clauses Consolidation Act 1845 s 46, Sch (E). As to the application of the Companies Clauses Acts see PARA 1668 note 2.

3 Companies Clauses Consolidation Act 1845 s 46.

4 *Vertue v East Anglian Rlys Co* (1850) 5 Exch 280 at 285-286. As to the rights of a transferee when there have been irregularities in the issue of a mortgage or bond see PARA 1264. See also *Dickson v Swansea Vale Rly Co* (1868) LR 4 QB 44; *Re South Essex Estuary Co, ex p Chorley* (1870) LR 11 Eq 157; *Re Romford Canal Co, Pocock's Claim, Trickett's Claim, Carew's Claim* (1883) 24 ChD 85.

5 Companies Clauses Consolidation Act 1845 s 49.

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1752. Registration of transfer.

A transfer must be produced to the secretary¹ within 30 days after its date if it is executed within the United Kingdom², or otherwise within 30 days after its arrival in the United Kingdom, and he must thereupon enter it in the register of mortgages and bonds³. For such entry, the company⁴ may demand a sum not exceeding the prescribed⁵ sum or, where no sum is prescribed, the sum of 12 pence⁶.

Until registration of the transfer, the company is not in any manner responsible to the transferee in respect of a mortgage, but after such entry the transfer entitles him to the full benefit of the original mortgage or bond, and no party, having made a transfer, can release or discharge the mortgage or bond transferred or any money secured by it⁷.

1 As to the meaning of 'secretary' see PARA 1670.

2 As to the meaning of 'United Kingdom' see PARA 1 note 5.

3 Companies Clauses Consolidation Act 1845 s 47. As to the application of the Companies Clauses Acts see PARA 1668 note 2. As to the register of mortgages and bonds see PARA 1744.

4 As to the meaning of 'company' see PARA 1670.

5 As to the meaning of 'prescribed' see PARA 1670 note 4.

6 Companies Clauses Consolidation Act 1845 s 47 (amended by the Decimal Currency Act 1969 s 10(1)). The figure has been rounded down in consequence of the withdrawal of the halfpenny from 31 December 1984.

7 Companies Clauses Consolidation Act 1845 s 47.

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(ii) Debenture Stock

1753. Power to issue debenture stock.

A company having power to raise money on mortgage or bond by virtue of an Act of Parliament, or authorised by any special Act to create and issue debenture stock¹, may create and issue debenture stock subject to the provisions of the Companies Clauses Act 1863².

In either case, with the sanction of such proportion of the votes of the shareholders and stockholders, entitled to vote in that behalf present personally or by proxy at a meeting of the company specially convened for the purpose, as is prescribed in its special Act and, if no proportion is prescribed, then of three-fifths of such votes, a company may from time to time raise all or any part of the money which for the time being it has raised or is authorised to raise on mortgage or bond, by the creation and issue, at such times, in such amounts and manner, on such terms, subject to such conditions and with such rights and privileges, as it thinks fit, of debenture stock³, instead of and to the same amount as the whole or any part of the money which may for the time being be owing by the company on mortgage or bond, or which it may from time to time have power to raise on mortgage or bond⁴. To the stock so created it may attach such fixed and perpetual preferential interest, payable half-yearly or otherwise, and commencing at once or at any future time or times, when and as the debenture stock is issued, or otherwise, as it thinks fit⁵.

The creation of the stock, as distinguished from its issue, is effected by the resolution authorising the issue, fixing the rate of interest and prescribing the other conditions on which the stock is to be held⁶. In certain cases, debenture stock may be created or issued so as to be redeemable⁷.

1 Wherever 'debenture stock' is mentioned in the Companies Clauses Act 1863 Pt III (ss 22-35), the provisions of Pt III are deemed to apply to mortgage preference stock, and to funded debt, as the case may require, in all respects as if mortgage preference stock or funded debt were debenture stock: s 35. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

2 The provisions of the Companies Clauses Act 1863 Pt III are deemed to be incorporated with the company's special Act: Companies Clauses Act 1869 s 3. As to the application of Pt III to every company having power to raise money on mortgage or bond by virtue of any Act of Parliament see PARA 1668.

The provisions of Pt III were also applied with modifications to the power of railway companies to create and issue debenture stock by the Railway Companies Act 1867 s 24 (repealed): see *Re Mersey Rly Co* [1895] 2 Ch 287.

No such corresponding limitations on the creation and issue of debentures and debenture stock are contained in the Companies Act 2006.

3 See note 1.

4 Companies Clauses Act 1863 s 22 (amended by the Companies Clauses Act 1869 s 1).

5 Companies Clauses Act 1863 s 22. Since the passing of the Companies Clauses Act 1869 a company entitled to issue debenture stock may attach to it any rate of interest which the exigencies of its financial position at the time of the creation of the stock may require; and any special Act of a company passed before the passing of the Companies Clauses Act 1869 prescribing any rate, is to be read as if no rate had been prescribed in it: see s 1. Debenture stock, authorised but not issued before the Companies Clauses Act 1869,

could not be issued on any terms other than those on which it might have been issued before that Act without further authority of the company: see s 2.

6 *Re Burry Port and Gwendreath Valley Rly Co* (1885) 54 LJ Ch 710 at 713.

7 See PARA 1684.

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1754. Priority of charge created by debenture stock.

A company's debenture stock¹, with the interest on it, ranks prior to all its shares or stock, and is transmissible and transferable in the same manner and according to the same regulations and provisions as its other stock², and in all other respects has the incidents of personal estate³.

The issue of debenture stock does not in any way affect any mortgage or bond at any time legally granted by the company before the creation of such stock, or any power of the company to raise money on mortgage or bond, except in so far as its borrowing powers are extinguished by such issue⁴, the holders of all such mortgages and bonds being entitled to the same priorities, rights and privileges in all respects as they would have been entitled to if the special Act authorising the issue of debenture stock had not been passed⁵, with the result that the priority of mortgages and bonds granted before the creation of the debenture stock is saved, as also are the company's existing borrowing powers⁶.

The interest on debenture stock has priority of payment over all dividends or interest on any shares or stock of the company, whether ordinary, preference or guaranteed, and ranks next to the interest payable on its mortgages or bonds for the time being legally granted before the creation of the debenture stock; but the holders of debenture stock created and issued under the same special Act are not, as among themselves, entitled to any preference or priority⁷.

1 Debenture stock is not a charge in the ordinary sense of the word; owing to its nature it confers only a limited right to enforce the interest payable on it: see PARA 1756. Cf the Companies Clauses Consolidation Act 1845 s 38 (see PARA 1736). As to the application of the Companies Clauses Acts see PARA 1668 note 2.

2 As to the provisions governing the transfer and transmission of shares see the Companies Clauses Consolidation Act 1845 ss 14-20 (see PARAS 1716-1720). See also *Re Welsh Highland Railway Light Railway Co* [1993] BCLC 338.

3 Companies Clauses Act 1863 s 23. See PARAS 1694, 1716.

4 See the Companies Clauses Act 1863 s 34; and PARA 1757.

5 Companies Clauses Act 1863 s 30.

6 *Re Burry Port and Gwendreath Valley Rly Co* (1885) 54 LJ Ch 710 at 713. See *Harrison v Cornwall Minerals Rly Co* (1881) 18 ChD 334, CA; affd sub nom *Fenton v Harrison* (1883) 8 App Cas 780, HL.

7 Companies Clauses Act 1863 s 24; *Re Mersey Rly Co* [1895] 2 Ch 287 at 296-297, CA.

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COMPANIES CLAUSES ACTS/(6) LOAN CAPITAL/(ii) Debenture Stock/1755. Certificates and register of holders.

1755. Certificates and register of holders.

The company must deliver to every holder of debenture stock a certificate stating the amount of stock held by him, and all regulations or provisions for the time being applicable to certificates of shares in the company apply, with any necessary changes in points of detail, to certificates of debenture stock¹.

The company must enter in a register to be kept for the purpose the names and addresses of the persons and corporations entitled to the debenture stock, and the amounts of the stock to which they are entitled². The register must be accessible for inspection at all reasonable times to every mortgagee, bondholder, debenture stockholder, shareholder and stockholder of the company, without payment³; and every such person is entitled to see the whole register and make such copies as he thinks fit, for this provision is aimed (inter alia) at enabling any such person to communicate with the whole body of people interested on some matter which concerns them all⁴.

1 Companies Clauses Act 1863 s 29. As to the regulations or provisions applicable to certificates of shares see ss 11-13; and PARAS 1687-1688, 1731. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

2 Companies Clauses Act 1863 s 28.

3 Companies Clauses Act 1863 s 28.

4 *Mutter v Eastern and Midlands Rly Co* (1888) 38 ChD 92 at 107, CA; *Holland v Dickson* (1888) 37 ChD 669. See PARA 1733. As to the remedies for enforcing the right see *Davies v Gas Light and Coke Co* [1909] 1 Ch 708, CA (decided under the Companies Clauses Consolidation Act 1845 s 10 (see PARA 1700)).

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1756. Nature of security.

The holder of debenture stock is not a creditor of a company except as to the annual interest; he has only a right to a perpetual annuity, payable out of the concern. Unless expressly issued as redeemable in the cases where that is permissible¹, the capital cannot be called in or paid off. There is a charge², but no conveyance or assignment to the stockholder, or to any trustee for him; but there is an entry in the books of the concern that there is so much debenture stock on which there is so much to be paid half-yearly to each holder.

The shareholder has a security of a special and limited kind on the company's assets and, if the interest on the stock is in arrear, with a right to obtain or join with other holders in obtaining the appointment of a receiver, but with no right to take possession of a single item of the company's property in specie³. He is not a member of the company, and is not entitled to vote or be present at any of its meetings⁴, although he has the rights and powers of a mortgagee of the undertaking, other than the right to require repayment of the principal money paid up on the stock⁵.

1 See PARA 1684.

2 See PARA 1754.

3 *Attree v Hawe* (1878) 9 ChD 337 at 349, CA; *Lawrence v West Somerset Mineral Rly Co* [1918] 2 Ch 250; *Cross v Imperial Continental Gas Association* [1923] 2 Ch 553. A debenture stockholder having no enforceable charge is not entitled, if his annuity is not in arrear, to interfere with the ownership, possession or dominion of the company as the statutory owners and managers: *Lawrence v West Somerset Mineral Rly Co*; *Cross v Imperial Continental Gas Association*.

4 Companies Clauses Act 1863 s 31; *Re Bodman, Bodman v Bodman* [1891] 3 Ch 135 at 137-138. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

5 Companies Clauses Act 1863 s 31. See PARA 1745 et seq.

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1757. Effect of issue of debenture stock at a discount.

The powers of borrowing and reborrowing by a company are extinguished to the extent of the money raised by the issue of debenture stock¹.

A company empowered to create debenture stock and governed by the Companies Clauses Acts may issue such stock at a discount or, within the limits of its borrowing powers, by way of collateral security for a loan, and, in the last-mentioned case, with reservation of a right of redemption².

1 Companies Clauses Act 1863 s 34. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

2 *Webb v Shropshire Railways Co* [1893] 3 Ch 307 at 330, CA; *Whitehaven Joint Stock Banking Co v Reed* (1886) 54 LT 360, CA; cf *Re Anglo-Danubian Steam Navigation and Colliery Co* (1875) LR 20 Eq 339.

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1758. Application of proceeds; accounts.

The money raised by debenture stock must be applied exclusively either in paying off money due by the company on mortgage or bond, or for the purposes to which the money would be applicable if it were raised on mortgage or bond instead of on debenture stock¹.

Separate and distinct accounts must be kept by the company showing how much money has been received on account of debenture stock, and how much money, borrowed or owing on mortgage or bond or which it has power so to borrow, has been paid off by debenture stock, or raised by it instead of being so borrowed².

1 Companies Clauses Act 1863 s 32. As to the application of money raised on mortgage or bond see the Companies Clauses Consolidation Act 1845 s 65 (see PARA 1691). As to the application of the Companies Clauses Acts see PARA 1668 note 2.

2 Companies Clauses Act 1863 s 33.

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1759. Recovery of interest in arrears.

If the interest on debenture stock is not paid within 30 days after it is payable, any one or more of the stockholders holding, individually or collectively, the nominal amount prescribed in the special Act and, if no sum is prescribed, a sum equal to one-tenth of the aggregate amount which the company is for the time being authorised to raise by mortgage, by bond and by debenture stock, or the sum of £10,000, whichever of the two last-mentioned sums is the smaller sum, may, without prejudice to the right to sue in any court of competent jurisdiction for the interest in arrear, require the appointment of a receiver¹.

The application for a receiver must be made to two justices of the peace, who may by order in writing appoint some person to receive the whole or part of the tolls or sums liable to the payment of the interest until all the arrears of interest then due on the debenture stock, with all costs, including the charges of receiving the tolls or sums, are fully paid². On the appointment being made, all such tolls or sums must be paid to and received by the person appointed³. All money so received is deemed so much money received to the use of the several persons interested in the same, according to their several priorities; and the receiver must distribute it rateably, and without priority, among all the proprietors of debenture stock to whom interest is in arrear, after satisfying the interest on the company's mortgages and bonds⁴. When the full amount of interest and costs has been so received, the receiver's power ceases, and he is bound to account to the company, and to pay it any balance in his hands⁵.

If the interest on debenture stock is in arrear for 30 days after any of the days on which the same is payable, the stockholder for the time being may, without prejudice to his power to apply for the appointment of a receiver, recover the arrears, with costs, by a claim against the company in any court of competent jurisdiction⁶.

1 Companies Clauses Act 1863 s 25. As to the application of the Companies Clauses Acts see PARA 1668 note
2. The High Court has jurisdiction to appoint a receiver in a proper case: see the cases regarding mortgagees and bondholders cited in PARA 1747.

2 Companies Clauses Act 1863 s 26.

3 Companies Clauses Act 1863 s 26.

4 Companies Clauses Act 1863 s 26.

5 Companies Clauses Act 1863 s 26.

6 Companies Clauses Act 1863 s 27. At a time when periods of limitation in respect of specialties and statutory causes of action were the same, it was held that the cause of action was statutory: see *Re Cornwall Minerals Rly Co* [1897] 2 Ch 74. If this is correct, the period of limitation is now six years (see the Limitation Act 1980 s 9(1) (time limit for actions for sums recoverable by statute); and **LIMITATION PERIODS** vol 68 (2008) PARA 1005); *sed quaere*, as the statute merely authorises the issue. If the cause of action is in respect of a specialty, the period will be 12 years: see s 8(1) (time limit for actions on a specialty); and **LIMITATION PERIODS** vol 68 (2008) PARA 975.

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(7) PROSPECTUS AND OFFER FOR SALE

1760. Statutory provisions.

There are no special provisions in the Companies Clauses Acts concerning prospectuses and offer documents of companies regulated by those Acts¹. However, the provisions of the Financial Services and Markets Act 2000 apply².

¹ See PARA 1667 et seq.

² See the Financial Services and Markets Act 2000 Pt VI (ss 72-103) (Official Listing); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 385 et seq. See also PARA 1066 et seq.

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1761. Misrepresentation.

The common law remedy by a claim for damages for deceit¹, the equitable remedy by a claim for rescission² of a contract to take shares or debentures on the ground of misrepresentation, and the statutory provision for damages for innocent misrepresentation³, apply to companies regulated by the Companies Clauses Acts⁴ equally with companies subject to the provisions of the Companies Acts.

¹ See PARA 1081 et seq. As to claims for deceit generally see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 789 et seq; **TORT** vol 45(2) (Reissue) PARA 391.

² See PARA 1071 et seq. As to claims for rescission see **CONTRACT** vol 9(1) (Reissue) PARA 986 et seq; **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 812 et seq.

³ See the Misrepresentation Act 1967; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 762-764, 834.

⁴ See PARA 1667 et seq.

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(8) REGULATION AND MANAGEMENT

(i) In general

1762. How company's powers are exercised.

The directors¹ are invested with the management and superintendence of the affairs of the company², and they may lawfully exercise all its powers, except as to such matters as are directed by the Companies Clauses Consolidation Act 1845 or the special Act³ to be transacted by a general meeting⁴. The exercise of these powers is subject to the provisions of the Companies Clauses Consolidation Act 1845 and the special Act, and also to the control and regulation of any general meeting specially convened for the purpose, but not so as to render invalid any act done by the directors prior to any resolution passed by such a general meeting⁵.

The principles applicable to litigation in the company's name or by shareholders suing on behalf of their class, and those relating to interference of the court in the company's internal management, are in substance the same as those which apply to companies subject to the Companies Act 2006⁶.

1 As to the meaning of 'directors' see PARA 1670.

2 As to the meaning of 'company' see PARA 1670.

3 As to the meaning of 'special Act' see PARA 1670 note 2.

4 As to the general meeting see the Companies Clauses Consolidation Act 1845 ss 66-80; and PARAS 1793-1801. The powers specified by s 91 (see PARA 1792) to be exercised only at a general meeting include the power to issue new ordinary or preference shares or stock (see PARAS 1687-1688), to cancel forfeited shares (see PARA 1729), and to borrow on mortgage or bond (see PARAS 1736-1737) or by issuing debenture stock (see PARA 1753). As to the application of the Companies Clauses Acts see PARA 1668 note 2.

5 Companies Clauses Consolidation Act 1845 s 90. For examples of directors' powers see *Hutton v West Cork Rly Co* (1883) 23 ChD 654, CA (gratuity out of company's funds to its employees); *Exeter and Crediton Rly Co v Buller* (1847) 5 Ry & Can Cas 211 at 217 (power to use the company's name in proceedings); *Peel v London and North Western Rly Co* [1907] 1 Ch 5, CA (paying for the postage and stamping of proxy papers), followed in *Wilson v London, Midland and Scottish Rly Co* [1940] Ch 393, [1940] 2 All ER 92, CA; *Ambergate, Nottingham and Boston and Eastern Junction Rly Co v Mitchell* (1849) 4 Exch 540 (making calls without the special authority of a general meeting); *Thairlwall v Great Northern Rly Co* [1910] 2 KB 509 (deciding within reasonable limits when and how dividends declared by a general meeting shall be paid); *Re Galway and Salthill Tramway Co* [1918] 1 IR 62 (no power to present petition to wind up). Cf the provision that may be made in a company's articles of association: see PARA 541.

6 See *Hoole v Great Western Rly Co* (1867) 3 Ch App 262; *Wilson v London, Midland and Scottish Rly Co* [1940] Ch 393, [1940] 2 All ER 92, CA; and PARA 301 et seq.

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1763. Annual returns.

There are no provisions in the Companies Clauses Acts with reference to annual returns in respect of companies¹ regulated by those Acts² but, in general³, with one modification⁴, the provisions of the Companies Act 2006 relating to them⁵ apply⁶.

1 As to the meaning of 'company' see PARA 1670.

2 See PARA 1667 et seq.

3 For the exceptions, namely the bodies corporate to which the unregistered companies legislation does not apply, see PARA 1665.

4 The references in the relevant provisions to the company's registered office are to be taken as references to its principal office in the United Kingdom: see the Unregistered Companies Regulations 2009, SI 2009/2436, reg 4(a); and PARA 1666. As to the meaning of 'United Kingdom' see PARA 1 note 5.

5 The Companies Act 2006 Pt 24 (ss 854-859) (a company's annual return) (see PARA 1421 et seq). As to the application of administrative provisions in relation to provisions so applied see PARA 1765.

6 See the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1; and PARA 1666.

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1764. Investigations.

There are no special provisions in the Companies Clauses Acts with reference to the investigation of the affairs of companies regulated by those Acts¹ but, in general², the relevant provisions of the Companies Act 1985³ apply⁴.

1 See PARA 1667 et seq.

2 For the exceptions, namely the bodies corporate to which the unregistered companies legislation does not apply, see PARA 1665.

3 The Companies Act 1985 Pt XIV (ss 431-453D) (investigation of companies and their affairs) (see PARA 1541 et seq) and Pt XV (ss 454-457) (orders imposing restrictions on shares) (see PARA 1548 et seq): see the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1; and PARA 1666.

4 See the Unregistered Companies Regulations 2009, SI 2009/2436, Sch 1; and PARA 1666.

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1765. Administrative provisions of the Companies Act 2006.

In relation to the provisions of the Companies Act 2006, which apply to companies regulated by the Companies Clauses Acts¹, miscellaneous administrative provisions² of the Companies Act 2006 in general³ apply⁴.

1 See PARAS 1696, 1760, 1763-1764, 1785, 1802.

2 See the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1; and PARA 1666.

3 For the exceptions, namely the bodies corporate to which the unregistered companies legislation does not apply, see PARA 1665.

4 See the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1; and PARA 1666.

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(ii) Directors

1766. Appointment and number of directors.

The number of directors¹ is the number prescribed² in the special Act³, which usually also appoints the first directors⁴. If that Act does not contain negative words, such as 'not less than' a specified number, a provision as to the number of directors may be directory only, as when it is provided elsewhere in that Act that directors are not bound to fill a vacancy on the board⁵.

Where the company⁶ is authorised by its special Act to increase or reduce the number of directors, it may from time to time, in general meeting⁷, after due notice for that purpose, increase or reduce their number within the prescribed limits, if any, and determine the order of rotation in which they are to go out of office, and what number is to be a quorum at their meetings⁸.

1 As to the meaning of 'directors' see PARA 1670.

2 As to the meaning of 'prescribed' see PARA 1670 note 4.

3 Companies Clauses Consolidation Act 1845 ss 2, 81. As to the meaning of 'special Act' see PARA 1670 note 2. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 The special Act appointing the first directors may oblige them to continue in office until the first ordinary meeting held after the passing of the Act: *Re South London Fish Market Co* (1888) 39 ChD 324, CA. Generally it should be noted that guidance may be obtained from decisions with regard to directors of companies registered under the Companies Act 2006 or the Acts which it replaces: see further PARA 478 et seq.

5 See *Thames Haven Dock and Rly Co v Rose* (1842) 4 Man & G 552 at 559. Cf the cases cited in PARA 529 note 11, which go to show that a provision in the articles of a company that the directors shall not be less than a given number is imperative.

6 As to the meaning of 'company' see PARA 1670.

7 As to the general meeting see the Companies Clauses Consolidation Act 1845 ss 66-80; and PARAS 1793-1801.

8 Companies Clauses Consolidation Act 1845 s 82.

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1767. Tenure of office.

Unless the special Act¹ provides otherwise, the directors² appointed by it hold office until the first ordinary meeting³ to be held in the year next after that in which the special Act was passed⁴. At this meeting the shareholders⁵ present, personally or by proxy, may either re-elect the directors appointed by the special Act, or any number of them, or may elect a new body of directors, or directors to supply the places of those not re-elected⁶. At the first ordinary meeting to be held every year afterwards, directors to replace those then retiring from office in

accordance with the statutory provisions⁷ must be elected by the shareholders present, personally or by proxy⁸. Unless they are removed or disqualified or resign, the persons elected at any such meeting continue to be directors until others are elected in their stead⁹. The directors cannot legally agree to an arrangement with contractors or others which would have the effect of depriving the shareholders of their power of appointing their own directors¹⁰.

1 As to the meaning of 'special Act' see PARA 1670 note 2.

2 As to the meaning of 'directors' see PARA 1670.

3 As to the meaning of 'ordinary meeting' see PARA 1793.

4 Companies Clauses Consolidation Act 1845 s 83. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

5 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

6 Companies Clauses Consolidation Act 1845 s 83.

7 In the Companies Clauses Consolidation Act 1845 s 88 (retirement of directors in rotation): see PARA 1783.

8 Companies Clauses Consolidation Act 1845 s 83.

9 Companies Clauses Consolidation Act 1845 s 83.

10 *James v Eve* (1873) LR 6 HL 335 at 342.

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1768. Quorum to elect directors.

If, at any meeting at which an election of directors¹ ought to take place², the prescribed³ quorum⁴ is not present within one hour from the time appointed for the meeting, no election of directors can be made, but the meeting stands adjourned to the following day at the same time and place⁵. If the prescribed quorum is not present within one hour from the time appointed for the adjourned meeting, the existing directors continue to act, and retain their powers until new directors are appointed at the first ordinary meeting of the following year⁶.

1 As to the meaning of 'directors' see PARA 1670. As to meetings for the election of directors see the Companies Clauses Consolidation Act 1845 s 83; and PARA 1767. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

2 These words are merely another way of saying 'if at the first ordinary meeting to be held in the year': see *Grundt v Great Boulder Pty Gold Mines Ltd* [1948] Ch 145, [1948] 1 All ER 21, CA. See also the Companies Clauses Consolidation Act 1845 s 83; and PARA 1767.

3 As to the meaning of 'prescribed' see PARA 1670 note 4.

4 As to what constitutes a quorum see the Companies Clauses Consolidation Act 1845 s 72; and PARA 1796.

5 Companies Clauses Consolidation Act 1845 s 84.

6 Companies Clauses Consolidation Act 1845 s 84.

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1769. Casual vacancy in office of director.

If a director¹ dies or resigns or becomes disqualified or incompetent to act as such, or ceases to be a director by any other cause than that of going out of office by rotation², the remaining directors³, if they think proper to do so, may elect in his place some other shareholder⁴, duly qualified, to be a director⁵. The director so elected continues in office so long only as the person in whose place he has been elected would have been entitled to continue if he had remained in office⁶.

1 As to the meaning of 'directors' see PARA 1670.

2 See the Companies Clauses Consolidation Act 1845 s 88 (retirement in rotation of directors); and PARA 1783. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

3 'Remaining directors' includes a sole continuing director: *Channel Collieries Trust Ltd v Dover, St Margaret's and Martin Mill Light Rly Co* [1914] 2 Ch 506, CA.

4 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7. As to shareholders who are duly qualified to be directors see PARA 1770.

5 Companies Clauses Consolidation Act 1845 s 89.

6 Companies Clauses Consolidation Act 1845 s 89.

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1770. Qualification to be director.

No person is capable of being a director¹ unless he is a shareholder² and possesses the prescribed number, if any, of shares³; and a person holding an office or place of trust or profit under the company⁴, or interested in any contract with the company, cannot be a director⁵. A director must not accept any other office or place of trust or profit under the company, or be interested in any contract with it, during the time he is a director⁶. If the special Act⁷ prescribes a certain share qualification for the directors and names a person as one of the first directors, he is in effect constituted by the Act a shareholder to the extent of the prescribed share qualification; and if, in neglect of his duty, he fails to take up that number of shares and to procure himself to be registered in respect of them, he is liable in respect of that number of shares⁸.

1 As to the meaning of 'directors' see PARA 1670.

2 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

3 As to the meaning of 'prescribed' see PARA 1670 note 4. The holding of the prescribed number of shares is a condition precedent to qualify for election as a director: *Channel Collieries Trust Ltd v Dover, St Margaret's and Martin Mill Light Rly Co* [1914] 2 Ch 506, CA.

4 As to the meaning of 'company' see PARA 1670.

5 Companies Clauses Consolidation Act 1845 s 85. Section 85 applies only to elected directors and not to directors named in the special Act: *Portal v Emmens* (1876) 1 CPD 664 at 667, CA. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

Notwithstanding anything in the Companies Clauses Consolidation Act 1845, as applied to any company, but subject to any provision of a memorandum and articles having effect by virtue of an order under the Statutory Water Companies Act 1991 s 12 (adoption of articles of association: see **WATER AND WATERWAYS** vol 100 (2009) PARA 135) and to any modification of any such memorandum and articles, the provisions of s 10 have effect in relation to any statutory water company: see s 10; and **WATER AND WATERWAYS** vol 100 (2009) PARA 134.

6 Companies Clauses Consolidation Act 1845 s 85.

7 As to the meaning of 'special Act' see PARA 1670 note 2.

8 *Portal v Emmens* (1876) 1 CPD 664, CA. See also *Kincaid's Case* (1870) LR 11 Eq 192; *Forbes' Case* (1875) LR 19 Eq 353.

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1771. Consequences of director's interest in company's contract.

If a director¹ at any time after his election accepts or continues to hold any other office or place of trust or profit under the company², or is either directly or indirectly concerned in any contract with it or participates in any manner in the profits of any work to be done for it, his office of director becomes vacant, and thenceforth he must cease from voting or acting as such³. A member of any incorporated joint stock company⁴ is not, however, disqualified or prevented from acting as a director of a company subject to the Companies Clauses Consolidation Act 1845 by reason of any contract entered into between the two companies, although he must not vote on any question as to any contract with the joint stock company⁵. A director cannot validly deal, on behalf of the company, with himself or with a firm in which he is a partner; as a fiduciary agent of the company, he cannot enter into engagements in which his personal interest may possibly conflict with his duty to the company⁶. The disqualification applies only to contracts with the company in the execution of its enterprise; hence a director may be a partner in a banking company which is the company's bank⁷.

The consequences of a director being interested in a contract with his company are:

- 2378 (1) the statutory consequence that he ceases to hold office⁸; and
- 2379 (2) the legal consequence that the contract is voidable at the instance of the company⁹.

A contract between two companies sanctioned by both in general meeting is not, however, to be treated as invalid and ultra vires one of the companies merely because the directors of that company are so interested in the contract¹⁰.

1 As to the meaning of 'directors' see PARA 1670.

2 As to the meaning of 'company' see PARA 1670.

3 Companies Clauses Consolidation Act 1845 s 86; *Portal v Emmens* (1876) 1 CPD 664, CA. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 As to the meaning of 'joint stock company' under the Companies Act 2006 see PARA 33 note 16.

5 Companies Clauses Consolidation Act 1845 s 87. It is, however, immaterial that the director is also a director of other joint stock companies: *Wilson v London, Midland and Scottish Rly Co* [1940] Ch 393, [1940] 2 All ER 92, CA.

6 *Aberdeen Rly Co v Blaikie Bros* (1854) 1 Macq 461 at 471, HL; *Great Luxembourg Rly Co v Magnay (No 2)* (1858) 25 Beav 586. See PARA 550 et seq.

7 *Sheffield, Ashton-under-Lyne and Manchester Rly Co v Woodcock* (1841) 7 M & W 574.

8 Companies Clauses Consolidation Act 1845 s 86.

9 *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549, [1967] 3 All ER 98, CA (not following *Kaye v Croydon Tramways Co* [1898] 1 Ch 358 at 368, CA, where Lindley MR said that the director could not enforce the contract); *Flanagan v Great Western Rly Co* (1868) LR 7 Eq 116 at 123 (same point).

10 *Kaye v Croydon Tramways Co* [1898] 1 Ch 358, CA; *Foster v Oxford, Worcester and Wolverhampton Rly Co* (1853) 13 CB 200.

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1772. Director ceasing to hold shares.

The office of a director¹ becomes vacant if at any time he ceases to be a holder of the prescribed number of shares² in the company³. If he executes an equitable mortgage of his qualifying shares and the mortgagee gives notice of the mortgage to the company, the mortgagor's position as a director is at once determined⁴. Where he creates, in favour of his creditor, a mere equitable lien on his qualifying shares, his ownership of the shares is probably not so affected by notice to the company's secretary not to register any transfer of them without the creditor's consent as to deprive him of his office⁵.

1 As to the meaning of 'directors' see PARA 1670.

2 As to the meaning of 'prescribed' see PARA 1670 note 4.

3 Companies Clauses Consolidation Act 1845 s 86. As to the meaning of 'company' see PARA 1670. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 *Re Pearse, ex p Littledale* (1855) 6 De GM & G 714 at 724, 733.

5 *Cumming v Prescott* (1837) 2 Y & C Ex 488 at 496.

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1773. Directors' remuneration.

Except as otherwise provided by the special Act¹, the powers of the company² to determine what remuneration is to be paid to the directors³ must be exercised at a general meeting⁴ of the company⁵. A general meeting, if duly called, may vote the remuneration of directors, even for past services⁶.

1 As to the meaning of 'special Act' see PARA 1670 note 2.

2 As to the meaning of 'company' see PARA 1670.

3 As to the meaning of 'directors' see PARA 1670.

4 As to the general meeting see the Companies Clauses Consolidation Act 1845 ss 66-80; and PARAS 1793-1801. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

5 See the Companies Clauses Consolidation Act 1845 s 91; and PARA 1792.

6 *Hutton v West Cork Rly Co* (1883) 23 ChD 654 at 658, 672, CA. Cf *Kaye v Croydon Tramways Co* [1898] 1 Ch 358, CA.

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1774. Appointment of committees.

The directors¹ may appoint one or more committees, consisting of such number of directors as they think fit, within the limits, if any, prescribed² in the special Act³, and they may grant to such committees power to do any acts relating to the affairs of the company⁴ which the directors could lawfully do, and which they from time to time think proper to entrust to them⁵.

A committee may meet from time to time and adjourn from place to place, as it thinks proper, for carrying into effect the purposes of its appointment⁶. No committee can exercise the powers entrusted to it except at a meeting at which there is present the prescribed quorum or, if no quorum is prescribed, a quorum to be fixed for that purpose by the general body of directors⁷. At all committee meetings one of the members present must be appointed chairman⁸. All questions at any committee meeting must be determined by a majority of votes of the members present and in case of an equal division of votes the chairman has a casting vote in addition to his vote as a committee member⁹.

1 As to the meaning of 'directors' see PARA 1670.

2 As to the meaning of 'prescribed' see PARA 1670 note 4.

3 As to the meaning of 'special Act' see PARA 1670 note 2.

4 As to the meaning of 'company' see PARA 1670.

5 Companies Clauses Consolidation Act 1845 ss 2, 95. See *D'Arcy v Tamar, Kit Hill and Callington Rly Co* (1867) LR 2 Exch 158, explained in *Re Bonelli's Telegraph Co, Collie's Claim* (1871) LR 12 Eq 246 at 259. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

6 Companies Clauses Consolidation Act 1845 s 96.

7 Companies Clauses Consolidation Act 1845 s 96.

8 Companies Clauses Consolidation Act 1845 s 96.

9 Companies Clauses Consolidation Act 1845 s 96.

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1775. How contracts may be made.

The power which may be granted to a committee¹ to make contracts, as well as the power of the directors² to make contracts³, on behalf of the company⁴, is exercisable as follows:

- 2380 (1) any contract which, if made between private persons, would by law be required to be in writing and under seal may be made by the committee or the directors on behalf of the company in writing, and under the company's common seal, and may be varied or discharged in the same manner⁵;
- 2381 (2) any contract which, if made between private persons, would by law be required to be in writing and signed by the parties to be charged may be made by the committee or the directors or any person acting under the company's express or implied authority on behalf of the company in writing, signed by the committee or any two of them, or any two of the directors, or by such authorised person, and may be varied or discharged in the same manner⁶;
- 2382 (3) any contract which, if made between private persons, would by law be valid even though made by parol only, and not reduced into writing, may be made by the committee or the directors or any person acting under the company's express or implied authority on behalf of the company by parol only, without writing, and may be varied or discharged in the same manner⁷.

Any contract so made is effectual in law⁸ and binds the company and its successors, and all other parties to it and their personal representatives⁹; and on any default in the execution of any such contract, either by the company or by any other party to it, such claims may be brought, either by or against the company, as might be brought had the same contract been made between private persons only¹⁰.

Contracts binding on the company may be made in other ways if there is power so to make them¹¹. Thus a company established for the purpose of trading may, independently of the statutory provision, validly make all contracts which are of ordinary occurrence in its trade and all contracts, not expressly regulated by any statute, which relate to objects or purposes for which it was incorporated, without the formality of a seal¹².

A company's rights and obligations under its contracts, when once validly made, are in all respects the same as those of individuals¹³.

1 As to the appointment of committees see PARA 1774.

2 As to the meaning of 'directors' see PARA 1670.

3 As to minutes and copies of contracts see PARA 1781.

4 As to the meaning of 'company' see PARA 1670.

- 5 Companies Clauses Consolidation Act 1845 s 97. As to contracts under seal which are binding on a company see PARA 1776. As to the application of the Companies Clauses Acts see PARA 1668 note 2.
- 6 Companies Clauses Consolidation Act 1845 s 97; Corporate Bodies' Contracts Act 1960 s 1(1)(a), (3).
- 7 Companies Clauses Consolidation Act 1845 s 97; Corporate Bodies' Contracts Act 1960 s 1(1)(b), (3).
- 8 This does not of course apply where there is a valid defence, eg on the ground that the contract was ultra vires the company. However, even in such a case, the provisions of the Companies Act 2006 ss 39, 40 (power of directors to bind company) (see PARAS 256, 265) apply to companies incorporated by Act of Parliament, to the extent that such companies are unregistered companies falling within s 1043 (as to which see PARA 1668 note 2): see PARA 1666. As to ultra vires acts see PARA 1672.
- 9 Companies Clauses Consolidation Act 1845 s 97; Corporate Bodies' Contracts Act 1960 s 1(2).
- 10 Companies Clauses Consolidation Act 1845 s 97.
- 11 *Wilson v West Hartlepool Rly Co* (1865) 2 De GJ & Sm 475 at 496.
- 12 *South of Ireland Colliery Co v Waddle* (1869) LR 4 CP 617 at 618, Ex Ch. Cf *Cope v Thames Haven Dock and Rly Co* (1849) 3 Exch 841. As to the making of contracts not under seal see further **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1122 et seq.
- 13 *Greene v West Cheshire Rly Co* (1871) LR 13 Eq 44 at 49; *London and Birmingham Rly Co v Winter* (1840) Cr & Ph 57 at 63.

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1776. Contracts under seal.

In order to bind a company by a bond, the seal must be affixed by or by the authority of the directors or a committee of the directors, acting together at a properly constituted meeting¹.

Where directors have only the power of affixing the company's seal under certain prescribed rules, a person dealing with them is taken to have notice of those rules; and, if there is something which may only be done by them under limited powers, the person so dealing must at his peril see that those powers are not being exceeded². If, however, they have power to bind the company, but certain preliminaries are required to be gone through on the part of the company before their power may be duly exercised, the person so dealing is not bound to see that all those preliminaries have been observed, but is entitled to presume that the directors are acting regularly³.

1 *D'Arcy v Tamar, Kit Hill and Callington Rly Co* (1867) LR 2 Exch 158. Cf *Clarke v Imperial Gas Light and Coke Co* (1832) 4 B & Ad 315 (company incorporated under a private Act which made specific provision as to affixing the seal).

2 *Fountaine v Carmarthen Rly Co* (1868) LR 5 Eq 316 at 322; *Re Romford Canal Co, Pocock's Claim, Trickett's Claim, Carew's Claim* (1883) 24 ChD 85; *County of Gloucester Bank v Rudry Merthyr Steam and House Coal Colliery Co* [1895] 1 Ch 629, CA; *Williams v Chester and Holyhead Rly Co* (1851) 15 Jur 828 at 830; *Webb v Herne Bay Comrs* (1870) LR 5 QB 642. See PARA 266 et seq; and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1236.

3 *Royal British Bank v Turquand* (1856) 6 E & B 327, Ex Ch. See PARA 266 et seq; and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1236. Cf *Duck v Tower Galvanizing Co* [1901] 2 KB 314 at 318.

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1777. Other circumstances in which contracts bind the company.

A company may make a parole contract for the temporary occupation of land required for carrying out its undertaking and may be sued on such a contract in respect of the occupation; and, even though no evidence other than the occupation of the land by the company is adduced, the court will, in the absence of evidence to negative a parole contract, assume that it had been made¹. The directors may ratify a written contract made by the company's manager without authority, and, if they do so, it becomes in effect the company's contract². It has, however, been held that, in the absence of an order of the directors or of a duly authorised committee or of something from which authority in the company's engineer to make a parole contract may be inferred, the mere fact of work having been done, as for example by a contractor on the order of the company's engineer, is not enough to render the company liable³.

1 *Lowe v London and North Western Rly Co* (1852) 18 QB 632 at 638. Where a company has had the use of goods ordered by its clerk, sufficient evidence exists for the court to find that the company, by its directors, entered into a binding contract to buy: *Pauling v London and North Western Rly Co* (1853) 8 Exch 867. In some cases a corporation has not been allowed to take the benefit of a misapprehension on the faith of which some person has expended money on the corporation's land, but a contract in favour of such persons has been implied: *Crampton v Varna Rly Co* (1872) 7 Ch App 562 at 568; *Laird v Birkenhead Rly Co* (1859) John 500 at 510.

2 *Wilson v West Hartlepool Rly Co* (1865) 2 De GJ & Sm 475. See also *Leominster Canal Navigation Co v Shrewsbury and Hereford Rly Co* (1857) 3 K & J 654 (purchase of undertaking authorised to be purchased); *Serrell v Derbyshire, Staffordshire and Worcestershire Junction Rly Co* (1850) 9 CB 811 at 828 (cheque dishonestly drawn). Since the passing of the Corporate Bodies' Contracts Act 1960, the ostensible authority of the person purporting to make the contract on behalf of the company would be sufficient: see s 1(1); and PARA 1775.

3 *Homersham v Wolverhampton Waterworks Co* (1851) 6 Exch 137 at 141. As to the effect of the Corporate Bodies' Contracts Act 1960 s 1(1) see note 2.

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1778. Directors' liability.

No director¹, by being party to or executing as director any contract or instrument on behalf of the company², or lawfully executing any of the powers given to the directors, incurs any personal liability³. The directors are entitled to be indemnified out of the company's capital for all payments made or liability, losses, costs and damages incurred in the due execution of their powers, and for the purposes of such indemnity may apply the company's funds and, if necessary, make calls on unpaid capital⁴.

A director indorsing a certificate for debenture stock⁵ with a warranty, contrary to the fact, that the amount of stock represented by the certificate is within the amount which the company has power to issue, is personally liable for breach of warranty, if money is lent to the company on the faith of the warranty⁶.

Promoters of a company who afterwards become its first directors and who obtain an advance of money on their personal credit will not escape from their personal liability to the lender merely by showing that the money was applied in payment of expenses incidental to the passing of the special Act⁷, and that the company has purported to ratify their act in obtaining the advances⁸.

1 As to the meaning of 'directors' see PARA 1670.

2 As to the meaning of 'company' see PARA 1670.

3 Companies Clauses Consolidation Act 1845 s 100. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

Where acts have been honestly done by directors within their authority, they cannot generally be made personally liable 'even though bad consequences may ensue': *Charitable Corpn v Sutton* (1742) 2 Atk 400 at 405. However, if, being agents of the company, they exercise its functions for the purpose of improperly alienating its property or otherwise injuring its interests, the company is entitled to sue them, and to obtain redress from them: *A-G v Wilson* (1840) Cr & Ph 1 at 24-25. As to claims for deceit made against directors see PARA 1081 et seq.

4 Companies Clauses Consolidation Act 1845 s 100.

5 As to debenture stock see PARA 1753 et seq.

6 *Whitehaven Joint Stock Banking Co v Reed* (1886) 54 LT 360, CA; and see **AGENCY**.

7 As to the meaning of 'special Act' see PARA 1670 note 2.

8 *Scott v Lord Ebury* (1867) LR 2 CP 255 at 264, 270.

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1779. Meetings of directors.

The directors¹ must hold meetings at such times as they appoint for the purpose, and may meet and adjourn from time to time and from place to place as they think proper². Any two of them may at any time require the secretary³ to call a meeting of the directors⁴. In order to constitute a meeting of directors there must be present at least the quorum prescribed⁵ in the special Act⁶ or, where no quorum is prescribed, one-third of the directors⁷.

All questions at any such meeting must be determined by the majority of votes of the directors present; and, in case of an equal division of votes, the chairman⁸ has a casting vote in addition to his vote as a director⁹. In order to do effectually such an act as authorising the affixing of the company's seal¹⁰ to a bond, the directors, or at least a quorum of them, must act jointly and as a board at a meeting¹¹.

1 As to the meaning of 'directors' see PARA 1670.

2 Companies Clauses Consolidation Act 1845 s 92. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

3 As to the meaning of 'secretary' see PARA 1670.

4 Companies Clauses Consolidation Act 1845 s 92.

5 As to the meaning of 'prescribed' see PARA 1670 note 4.

6 As to the meaning of 'special Act' see PARA 1670 note 2.

7 A quorum of directors means a quorum competent to transact the business before the meeting: see PARA 529. Cf *Re Greymouth-Point Elizabeth Rly and Coal Co Ltd*, *Yuill v Greymouth-Point Elizabeth Rly and Coal Co Ltd* [1904] 1 Ch 32.

8 As to the chairman of directors see PARA 1780.

9 Companies Clauses Consolidation Act 1845 s 92. In general, although the majority can bind the minority, the minority have a right to be heard: *Great Western Rly Co v Rushout* (1852) 5 De G & Sm 290.

10 As to the company's seal see PARA 1673.

11 *D'Arcy v Tamar, Kit Hill and Callington Rly Co* (1867) LR 2 Exch 158 (explained in *Re Bonelli's Telegraph Co, Collie's Claim* (1871) LR 12 Eq 246 at 259-260); *County of Gloucester Bank v Rudry Merthyr Steam and House Coal Colliery Co* [1895] 1 Ch 629 at 632, 635, CA (followed in *Re Haycraft Gold Reduction and Mining Co* [1900] 2 Ch 230 at 235).

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1780. Chairman of directors.

At the first meeting of directors¹ held after the passing of the special Act², and at the first meeting of the directors held after each annual appointment of directors³, the directors must choose one of themselves to act as chairman for the following year, and may also, if they think fit, choose another director to act as deputy chairman for the same period⁴. If the chairman or deputy chairman dies or resigns, or ceases to be a director or otherwise becomes disqualified to act, the directors must fill the vacancy at the next meeting; every chairman or deputy chairman elected to fill a vacancy continues in office so long only as the person in whose place he may be so elected would have been entitled to continue if the vacancy had not occurred⁵.

If at any meeting neither the chairman nor deputy chairman is present, the directors present must choose one of their number to be chairman of the meeting⁶.

1 As to the meaning of 'directors' see PARA 1670.

2 As to the meaning of 'special Act' see PARA 1670 note 2.

3 As to the annual appointment of directors see PARA 1767.

4 Companies Clauses Consolidation Act 1845 s 93. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

5 Companies Clauses Consolidation Act 1845 s 93.

6 Companies Clauses Consolidation Act 1845 s 94.

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1781. Minutes of meetings etc.

The directors¹ must cause notes, minutes or copies of all appointments made or contracts entered into by the directors, and of the orders and proceedings of all meetings of the company² and of the directors and committees of directors³ to be entered in books which must be kept under the directors' superintendence⁴. Every entry must be signed by the chairman of the meeting⁵, and, if so signed, is to be received as evidence in all courts without proof of the meeting having been duly convened or held, of the persons making or entering the orders or proceedings being shareholders⁶ or directors or members of committee, of the signature of the chairman, or of the fact of his having been chairman, all of which matters are presumed until the contrary is proved⁷. The signature required to authenticate the minutes is that of the director who has presided at the particular meeting, but the signature need not be attached at the time of that meeting; it may be given at a subsequent meeting⁸.

1 As to the meaning of 'directors' see PARA 1670.

2 As to the meaning of 'company' see PARA 1670.

3 As to the committees of directors see the Companies Clauses Consolidation Act 1845 s 95; and PARA 1774.

4 Companies Clauses Consolidation Act 1845 s 98. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

5 As to chairman of the meeting see PARA 1780.

6 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

7 Companies Clauses Consolidation Act 1845 s 98. Cf *Sheffield, Ashton-under-Lyne and Manchester Rly Co v Woodcock* (1841) 7 M & W 574; *Miles v Bough* (1842) 3 QB 845 at 866.

8 *Southampton Dock Co v Richards* (1840) 1 Man & G 448 at 463, 467; *West London Rly Co v Bernard* (1843) 3 QB 873 at 877. Where a meeting was held on one day and adjourned until the next, and the director who was in the chair on both occasions signed the minutes of the adjourned meeting only, the minutes of both meetings were admitted in evidence: *Inglis v Great Northern Rly Co* (1852) 19 LTOS 149 at 150, HL. A fact stated in minutes may, if necessary, be proved by other evidence: *Inglis v Great Northern Rly Co*. Minutes, though duly signed, are not admissible in evidence for the purpose of establishing, in favour of the company, the facts stated in the minutes, eg against a bondholder suing the company: *Hill v Manchester and Salford Waterworks Co* (1833) 5 B & Ad 866 at 875-876.

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1782. Effect of informalities in appointment of directors.

All acts done by any meeting of the directors¹, or of a committee of directors², or by any person acting as a director, are as valid as if every such person had been duly appointed and qualified, notwithstanding that it is afterwards discovered that there was some defect in the appointment of any of them or that any of them was disqualified³.

1 As to meetings of the directors see PARAS 1779-1781. As to the meaning of 'directors' see PARA 1670.

2 As to committees of directors see PARA 1774.

³ Companies Clauses Consolidation Act 1845 s 99. See *Channel Collieries Trust Ltd v Dover, St Margaret's and Martin Mill Light Rly Co* [1914] 2 Ch 506, at 514-515, CA. As to the application of the Companies Clauses Acts see PARA 1668 note 2. Cf the Companies Act 2006 s 161 (see PARA 486).

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1783. Retirement of directors by rotation.

Subject to the provision under which a company¹ may determine the order of rotation in which directors go out of office², directors³ must retire at the times and in the proportions laid down in the Companies Clauses Consolidation Act 1845 as follows⁴:

- 2383 (1) in the case of the first elected directors⁵, the number prescribed⁶ in the special Act⁷ and, if no number is prescribed, one-third of the directors, to be determined by ballot among themselves unless they otherwise agree, must go out of office at the end of the first year⁸;
- 2384 (2) at the end of the second year the prescribed number and, if no number is prescribed, one-half of the remaining number of the directors to be determined in like manner, must go out of office⁹; and
- 2385 (3) at the end of the third year the prescribed number and, if no number is prescribed, the remainder of the directors, must go out of office¹⁰.

At the first ordinary meeting in every subsequent year the prescribed number and, if no number is prescribed, one-third of the directors, being those who have been longest in office, must go out of office¹¹.

If the prescribed number of directors is some number not divisible by three, and the number of directors to retire is not prescribed, the directors must in each case determine what number of directors, as nearly one-third as may be, are to go out of office, so that the whole number must go out of office in three years¹².

In each instance the places of the retiring directors must be filled by an equal number of qualified shareholders¹³. A retiring director may be re-elected immediately or at any future time¹⁴.

¹ As to the meaning of 'company' see PARA 1670.

² See the Companies Clauses Consolidation Act 1845 s 82; and PARA 1766. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

³ As to the meaning of 'directors' see PARA 1670.

⁴ Companies Clauses Consolidation Act 1845 s 88.

⁵ I.e. those elected at the first ordinary meeting held in the year next after that in which the special Act was passed: see the Companies Clauses Consolidation Act 1845 s 83; and PARA 1767. As to the qualification of directors see PARA 1770.

⁶ As to the meaning of 'prescribed' see PARA 1670 note 4.

⁷ As to the meaning of 'special Act' see PARA 1670 note 2.

⁸ Companies Clauses Consolidation Act 1845 s 88.

- 9 Companies Clauses Consolidation Act 1845 s 88.
- 10 Companies Clauses Consolidation Act 1845 s 88.
- 11 Companies Clauses Consolidation Act 1845 s 88.
- 12 Companies Clauses Consolidation Act 1845 s 88 proviso.
- 13 Companies Clauses Consolidation Act 1845 s 88. As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.
- 14 Companies Clauses Consolidation Act 1845 s 88.

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1784. Power to choose and remove directors.

Except as otherwise provided by the special Act¹ and subject to the power of directors² to fill casual vacancies in the office of director³, the company's powers to choose and remove directors can be exercised only at a general meeting⁴. A general meeting has power to remove directors provided proper notice as to the object of the meeting is given, and may fill vacancies if all the directors are removed or if the directors decline to exercise the power of filling casual vacancies⁵.

- 1 As to the meaning of 'special Act' see PARA 1670 note 2.
- 2 As to the meaning of 'directors' see PARA 1670.
- 3 See the Companies Clauses Consolidation Act 1845 s 89; and PARA 1769. As to the application of the Companies Clauses Acts see PARA 1668 note 2.
- 4 See the Companies Clauses Consolidation Act 1845 s 91; and PARA 1792. As to the general meeting see ss 66-80; and PARAS 1793-1801.
- 5 *Isle of Wight Rly Co v Tahourdin* (1883) 25 ChD 320, CA; *West Somerset Mineral Rly Co v Robinson* (1917) 34 TLR 132.

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1785. Registers of directors and secretaries.

There are no special requirements in the Companies Clauses Acts with reference to the keeping of a register of directors¹ and secretaries² of companies³ regulated by those Acts⁴; but, in general⁵, the provisions of the Companies Act 2006 relating to registers⁶ apply⁷.

- 1 As to the meaning of 'directors' see PARA 1670.

- 2 As to the meaning of 'secretary' see PARA 1670.
- 3 As to the meaning of 'company' see PARA 1670.
- 4 See PARA 1667 et seq. As to the application of the Companies Clauses Acts see PARA 1668 note 2.
- 5 For the exceptions, namely the bodies corporate to which the unregistered companies legislation does not apply, see PARA 1665.
- 6 In the Companies Act 2006 ss 162-167, 275-279 (see PARAS 499, 605). As to the application of certain administrative provisions of that Act see PARA 1765.
- 7 See the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1; and PARA 1666.

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(iii) Other Officers

1786. Statutory requirements.

Besides the directors¹, the company² is required by statute to appoint a secretary³, auditors⁴, and a book-keeper⁵, and it may have other officers such as treasurer and collector⁶.

Except as otherwise provided by the special Act⁷, the company's powers as to the choice of auditors, and the remuneration of the auditors, treasurer and secretary, can be exercised only at a general meeting of the company⁸. A person employed by the directors as secretary may, however, maintain a claim against the company to recover remuneration for his services even though there has been no determination of a general meeting on the subject, but directors agreeing, without authority, to pay a salary to a secretary may, as between themselves and the general body of shareholders, have been guilty of a breach of trust⁹.

- 1 As to the statutory requirements with regard to directors see PARA 1766 et seq. As to the meaning of 'directors' see PARA 1670.
- 2 As to the meaning of 'company' see PARA 1670.
- 3 See the Companies Clauses Consolidation Act 1845 ss 3, 10, 15, 18, 40, 45. As to the application of the Companies Clauses Acts see PARA 1668 note 2. As to the meaning of 'secretary' see PARA 1670. As to his position and duties see PARA 601 et seq. There are no special requirements as to keeping a register of secretaries: see PARA 1785.
- 4 See the Companies Clauses Consolidation Act 1845 s 101; and PARA 1806.
- 5 See the Companies Clauses Consolidation Act 1845 s 119; and PARA 1803.
- 6 See PARA 1787.
- 7 As to the meaning of 'special Act' see PARA 1670 note 2.
- 8 See the Companies Clauses Consolidation Act 1845 s 91; and PARA 1792. As to the general meeting see ss 66-80; and PARAS 1793-1801.
- 9 *Bill v Darenth Valley Rly Co* (1856) 1 H & N 305 at 306.

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1787. Security by officers.

Before any person entrusted with the custody or control of money, whether as treasurer, collector or other officer of the company¹, enters upon his office, the directors² must take sufficient security from him for the faithful execution of his office³.

1 A book-keeper also must be appointed: see PARA 1803. As to the meaning of 'company' see PARA 1670.

2 As to the meaning of 'directors' see PARA 1670.

3 Companies Clauses Consolidation Act 1845 s 109. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

Where the security of a surety is taken, any variation of the agreement to which he has subscribed, which is made without his consent or knowledge, or may prejudice him (*North Western Rly Co v Whinray* (1854) 10 Exch 77 at 82), or may amount to the substitution of a new agreement for the original agreement, will discharge the surety, even though the original agreement might, notwithstanding that variation, be substantially performed (*Bonar v Macdonald* (1850) 3 HL Cas 226 at 238-239; *Phillips v Foxall* (1872) LR 7 QB 666 at 672, 680). Where by statute the nature of a principal's office is so changed that its duties are materially altered so as to affect the surety's risk, the surety is discharged: *Pybus v Gibb* (1856) 6 E & B 902 at 911. The amalgamation of two companies by statute impliedly or expressly preserving rights against a surety does not so alter the position of an officer of one of the companies who continues to hold that office under the amalgamated companies as to discharge his surety: *London, Brighton and South Coast Rly Co v Goodwin* (1849) 3 Exch 320 at 332; *Eastern Union Rly Co v Cochrane* (1853) 9 Exch 197. As to fidelity guarantees see further **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1111.

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1788. Officers' duty to account.

When required by the directors¹, every officer must make out and deliver to them or to any person appointed by them a true and perfect written² account under his hand of all money received by him on behalf of the company³, stating how, to whom and for what purpose that money has been disposed of, together with vouchers and receipts⁴. He must also pay to the directors or to any person appointed by them all money which appears to be owing from him upon the balance of those accounts⁵.

Any officer failing to render that account, to produce and deliver up all the vouchers and receipts in his possession or power, to pay the balance when required, or, for three days after being required, failing to deliver up to the directors or to any person appointed by them all papers and writings, property, effects, matters and things in his possession or power relating to the execution of the Companies Clauses Consolidation Act 1845, or the special Act⁶, or any Act incorporated with it, or belonging to the company, may be summoned before two or more justices who may determine the matter in a summary way and may adjust and declare the balance owing by him⁷. If it appears, either upon his confession, or upon evidence, or upon inspection of the account, that any of the company's money is in his hands or owing by him to the company, the justices may order him to pay the amount⁸.

- 1 As to the meaning of 'directors' see PARA 1670.
- 2 As to the meaning of 'writing' see PARA 35 note 13.
- 3 As to the meaning of 'company' see PARA 1670.
- 4 Companies Clauses Consolidation Act 1845 s 110. As to the application of the Companies Clauses Acts see PARA 1668 note 2.
- 5 Companies Clauses Consolidation Act 1845 s 110.
- 6 As to the meaning of 'special Act' see PARA 1670 note 2.
- 7 Companies Clauses Consolidation Act 1845 s 111.
- 8 Companies Clauses Consolidation Act 1845 s 111 (amended by the Statute Law (Repeals) Act 1993).

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1789. Officers' refusal to account.

If an officer refuses to make out his written account, or to produce and deliver to the justices his vouchers and receipts, or to deliver up any property in his possession or power belonging to the company¹, they may commit him to prison until he has delivered up all the vouchers and receipts, if any, in his possession or power, and all property, if any, in his possession or power, belonging to the company². Further, if any director³ or other person acting on behalf of the company makes oath⁴ that he has good reason to believe, upon stated grounds, and does believe, that the officer intends to abscond, the justice before whom the complaint is made, instead of issuing his summons, may issue his warrant to bring the officer before two justices⁵. However, no person executing the warrant may keep the officer in custody longer than 24 hours without bringing him before some justice⁶. The justice before whom the officer may be brought may either discharge him, if he thinks there is no sufficient ground for his detention, or order him to be detained in custody so as to be brought before two justices unless the officer gives satisfactory bail for his appearance before them⁷.

No such proceeding against an officer will deprive the company of any remedy which it might otherwise have against him or his surety⁸.

- 1 As to the meaning of 'company' see PARA 1670. As to the officers' duty to account see PARA 1788.
- 2 Companies Clauses Consolidation Act 1845 s 112. As to the application of the Companies Clauses Acts see PARA 1668 note 2.
- 3 As to the meaning of 'directors' see PARA 1670.
- 4 As to the meaning of 'oath' see PARA 1544 note 14.
- 5 Companies Clauses Consolidation Act 1845 s 113.
- 6 Companies Clauses Consolidation Act 1845 s 113.
- 7 Companies Clauses Consolidation Act 1845 s 113.
- 8 Companies Clauses Consolidation Act 1845 s 114.

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1790. Solicitor.

A solicitor is not ordinarily, but may be, an officer of a company¹. The mere fact that a solicitor has been employed in bringing out a new company does not entitle him to claim payment from it², but in the case of companies formed under private Acts provision is usually made by the Act incorporating the company for the costs, charges and expenses incident to obtaining the Act and forming the company to be paid out of the company's assets when formed. Such a provision, being intended to benefit the promoters, does not entitle a solicitor employed under a retainer from the promoters to obtain payment of his costs directly from the company³. To enable him to do so, he must establish either that the company has, after its formation, entered into a new contract with himself to pay him⁴ or, perhaps, that he has no claim against the promoters, being in fact a promoter himself and having only the company to look to for payment⁵.

¹ See PARA 611.

² *Re English and Colonial Produce Co Ltd* [1906] 2 Ch 435, CA.

³ *Wyatt v Metropolitan Board of Works* (1862) 11 CBNS 744 (distinguishing *Tilson v Warwick Gas Light Co* (1825) 4 B & C 962, and *Carden v General Cemetery Co* (1839) 5 Bing NC 253, which had been followed in *Hitchins v Kilkenny Rly Co* (1850) 9 CB 536); *Re Kent Tramways Co* (1879) 12 ChD 312, CA; *Re Skegness and St Leonard's Tramways Co, ex p Hanly* (1888) 41 ChD 215, CA; *Re Manchester, Middleton and District Tramways Co* [1893] 2 Ch 638 at 644-652. It has been suggested that, to prevent circuity of action, the solicitor might claim directly against the company: *Re Manchester, Middleton and District Tramways Co* at 651 per Kekewich J. Cf *Terrell v Hutton* (1854) 4 HL Cas 1091. See also PARA 1692.

⁴ *Nichols v Regent's Canal Co* (1894) 63 LJQB 641 (revsd on the facts, without affecting the proposition in the text, sub nom *Nichols v North Metropolitan Rly and Canal Co* 71 LT 836, CA; affd (1896) 74 LT 744, HL); *Terrell v Hutton* (1854) 4 HL Cas 1091.

⁵ *Re Brompton and Longtown Rly Co, Shaw's Claim* (1875) 10 Ch App 177; *Re Skegness and St Leonard's Tramways Co, ex p Hanly* (1888) 41 ChD 215 at 241, CA, per Bowen LJ; cf *Savin v Hoylake Rly Co* (1865) LR 1 Exch 9; *Muir v Forman's Trustee* (1903) 5 F 546, Ct of Sess. It is difficult to see how this can happen in the case of a solicitor acting as such, who necessarily acts on instructions and who, therefore, looks to the person instructing him for his costs: see *Re Skegness and St Leonard's Tramways Co, ex p Hanly* at 241 per Lindley LJ, followed in *Re Manchester, Middleton and District Tramways Co* [1893] 2 Ch 638 at 650 per Kekewich J. Under the Parliamentary Deposits and Bonds Act 1892, where the undertaking was abandoned, the solicitor was entitled to claim against the parliamentary depositors as a creditor: see s 1(2) (repealed).

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(iv) Byelaws

1791. Power to make byelaws.

The company¹ may from time to time make such byelaws as it thinks fit for the purpose of regulating the conduct of its officers and employees and for providing for the due management of its affairs², and may alter or repeal them and make others³. The byelaws must not be repugnant to the general law, or to the provisions of the Companies Clauses Consolidation Act 1845, or the special Act⁴. They must be in writing, sealed with the company's common seal⁵, and a copy must be given to each of its officers and employees affected by them⁶.

By its byelaws the company may impose reasonable penalties upon all its officers or employees offending against them as it thinks fit, not exceeding level 1 on the standard scale or not exceeding a lesser amount for any one offence⁷.

The production of a written or printed copy of the byelaws, with the company's common seal affixed, is sufficient evidence of them in all prosecutions under them⁸.

1 As to the meaning of 'company' see PARA 1670.

2 A byelaw to the effect that a company's canal must not be used on Sundays is void, as an attempt to deal with a matter outside the cognisance of the company: *Calder and Hebble Navigation Co v Pilling* (1845) 14 M & W 76.

3 Companies Clauses Consolidation Act 1845 s 124. As to the application of the Companies Clauses Acts see PARA 1668 note 2. As to the making of byelaws by companies generally and the validity of those byelaws see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1187 et seq.

4 Companies Clauses Consolidation Act 1845 s 124. As to the meaning of 'special Act' see PARA 1670 note 2.

5 As to the company's seal see PARA 1673.

6 Companies Clauses Consolidation Act 1845 s 124.

7 Companies Clauses Consolidation Act 1845 s 125 (amended by the Criminal Law Act 1977 s 31(6); and the Criminal Justice Act 1982 ss 37, 46). As to the standard scale see PARA 1622.

8 Companies Clauses Consolidation Act 1845 s 127.

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(v) General Meetings

1792. Powers exercisable only in general meeting.

Except as otherwise provided by the special Act, the following powers of the company may be exercised only at a general meeting of the company¹:

- 2386 (1) with certain exceptions², the choice and removal of the directors, and the increasing or reducing of their number where authorised by the special Act³;
- 2387 (2) the choice of auditors⁴;
- 2388 (3) the determination as to the remuneration of the directors, auditors, treasurer and secretary;
- 2389 (4) the determination as to the amount of money to be borrowed on mortgage⁵;
- 2390 (5) the determination as to the augmentation of capital⁶; and
- 2391 (6) the declaration of dividends⁷.

- 1 Companies Clauses Consolidation Act 1845 s 91. As to the application of the Companies Clauses Acts see PARA 1668 note 2.
- 2 See the Companies Clauses Consolidation Act 1845 ss 83, 89; and PARAS 1767, 1769, 1784.
- 3 See the Companies Clauses Consolidation Act 1845 s 82; and PARA 1766.
- 4 See the Companies Clauses Consolidation Act 1845 ss 101, 104; and PARAS 1806, 1808.
- 5 See the Companies Clauses Consolidation Act 1845 ss 38-39; and PARAS 1736-1737.
- 6 See the Companies Clauses Consolidation Act 1845 s 56; and PARAS 1685-1686. See also the Companies Clauses Act 1863 Pt II (ss 12-21); and PARAS 1687-1690.
- 7 See the Companies Clauses Consolidation Act 1845 s 120; and PARA 1810.

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1793. Ordinary and extraordinary meetings.

The first general meeting¹ of the shareholders² of the company³ must be held within the time prescribed⁴ by the special Act⁵ or, if no time is so prescribed, within one month of the passing of that Act⁶. Subsequent general meetings must be held at the periods prescribed by that Act or, if no periods are prescribed, in February and August each year or at such other stated periods as are appointed for that purpose by an order of a general meeting⁷. These meetings are called 'ordinary meetings'⁸.

Every general meeting of the shareholders other than an ordinary meeting is called an 'extraordinary meeting'⁹.

- 1 As to the general meeting see the Companies Clauses Consolidation Act 1845 ss 66-80; and PARAS 1794-1801.
- 2 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.
- 3 As to the meaning of 'company' see PARA 1670.
- 4 As to the meaning of 'prescribed' see PARA 1670 note 4.
- 5 As to the meaning of 'special Act' see PARA 1670 note 2.
- 6 Companies Clauses Consolidation Act 1845 ss 2, 66. As to the application of the Companies Clauses Acts see PARA 1668 note 2.
- 7 Companies Clauses Consolidation Act 1845 s 66.
- 8 Companies Clauses Consolidation Act 1845 s 66.
- 9 Companies Clauses Consolidation Act 1845 s 68.

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COMPANIES CLAUSES ACTS/(8) REGULATION AND MANAGEMENT/(v) General Meetings/1794.
Notice and place of meeting.

1794. Notice and place of meeting.

At least 14 clear days' public notice of all meetings, whether ordinary or extraordinary¹, must be given by advertisement², specifying the place, day and hour of the meeting³. No business except that which may be appointed by the Companies Clauses Consolidation Act 1845 or the special Act⁴ to be done at an ordinary meeting⁵ can be transacted at any ordinary meeting unless special notice of that business has been given in the advertisement convening the meeting⁶. Thus the voting of remuneration to directors⁷ is a matter requiring special notice⁸. In the case of an extraordinary meeting, the notice must always specify the purpose for which the meeting is called⁹, and the meeting cannot enter upon any business not set forth in the notice upon which it has been convened¹⁰.

The whole purpose, as distinguished from the details, must be fairly stated in the notice, which must not be so framed as to mislead those to whom it is addressed; if there are several purposes, the notice will not be sufficient in respect of any purpose not indicated in it¹¹.

All meetings, whether ordinary or extraordinary, must be held in the place prescribed¹² by the special Act and, if no place is so prescribed, at some place appointed by the directors¹³.

1 As to the meanings of 'ordinary meeting' and 'extraordinary meeting' see PARA 1793.

2 For the method of giving notice by advertisement and the effect of non-compliance with the statutory requirements see PARA 1678.

3 Companies Clauses Consolidation Act 1845 s 71. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 As to the meaning of 'special Act' see PARA 1670 note 2.

5 Eg the election of directors (see the Companies Clauses Consolidation Act 1845 s 83; and PARA 1767) or of auditors (see s 101; and PARA 1806).

6 Companies Clauses Consolidation Act 1845 s 67.

7 As to the meaning of 'directors' see PARA 1670.

8 *Hutton v West Cork Rly Co* (1883) 23 ChD 654 at 659, CA.

9 Companies Clauses Consolidation Act 1845 s 71.

10 Companies Clauses Consolidation Act 1845 s 69.

11 *Kaye v Croydon Tramways Co* [1898] 1 Ch 358 at 369-370, 373, CA; *Tiessen v Henderson* [1899] 1 Ch 861.

12 As to the meaning of 'prescribed' see PARA 1670 note 4.

13 Companies Clauses Consolidation Act 1845 ss 2, 66.

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1795. Convening extraordinary meetings.

Extraordinary meetings¹ may be convened by the directors² at such times as they think fit³.

The number of shareholders⁴ prescribed⁵ by the special Act⁶, holding in the aggregate shares to the amount prescribed by that Act or, where the number of shareholders or the amount of shares is not prescribed, 20 or more shareholders, holding in the aggregate not less than one-tenth of the company's capital, may by writing under their hands at any time require the directors to call an extraordinary meeting⁷. The requisition must fully express the object of the meeting required to be called, and must be left at the office of the company⁸ or given to at least three directors or left at their last or usual places of abode⁹. Upon the receipt of the requisition the directors must forthwith convene a meeting of the shareholders, and, if they fail to do so within 21 days, the shareholders signing the requisition may call it by giving 14 days' public notice¹⁰.

If the object of the requisition is such that in no manner and by no machinery can it be legally carried into effect, the directors are justified in refusing to act upon it; but, if the object stated can be carried into effect, it is the directors' duty to call the meeting¹¹. If, upon receiving a requisition, the directors issue a notice convening a meeting so worded as not to be a proper compliance with the requisition, the requisitionists are justified in calling the meeting, as upon a failure by the directors to do so¹².

1 As to the meaning of 'extraordinary meeting' see PARA 1793.

2 As to the meaning of 'directors' see PARA 1670.

3 Companies Clauses Consolidation Act 1845 s 68. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

5 As to the meaning of 'prescribed' see PARA 1670 note 4.

6 As to the meaning of 'special Act' see PARA 1670 note 2.

7 Companies Clauses Consolidation Act 1845 ss 2, 70.

8 As to the meaning of 'company' see PARA 1670.

9 Companies Clauses Consolidation Act 1845 s 70.

10 Companies Clauses Consolidation Act 1845 s 70.

11 *Isle of Wight Rly Co v Tahourdin* (1883) 25 ChD 320 at 334, CA.

12 *Isle of Wight Rly Co v Tahourdin* (1883) 25 ChD 320 at 333, CA.

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1796. Quorum at general meeting.

In order to constitute a meeting, whether ordinary or extraordinary¹, there must be present, either personally or by proxy², the quorum prescribed³ by the special Act⁴, and, if no quorum is prescribed, then shareholders⁵ holding in the aggregate not less than one-twentieth of the capital of the company⁶, and being in number not less than one for every £500 of that required

proportion of capital, unless that number would be more than 20, in which case 20 shareholders, holding not less than one-twentieth of the capital, form a quorum⁷.

If within one hour from the time appointed for the meeting a quorum is not present, no business can be transacted at the meeting other than the declaring of a dividend, in case that is one of the objects of the meeting; and, except in the case of a meeting for the election of directors⁸, the meeting must be adjourned indefinitely⁹. If and so long as the total number of shares issued represents less than the amount of capital required to be represented at a general meeting, no valid meeting can be held¹⁰.

1 As to the meanings of 'ordinary meeting' and 'extraordinary meeting' see PARA 1793.

2 As to voting by proxy see the Companies Clauses Consolidation Act 1845 ss 76-77; and PARA 1800. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

3 As to the meaning of 'prescribed' see PARA 1670 note 4.

4 As to the meaning of 'special Act' see PARA 1670 note 2.

5 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

6 As to the meaning of 'company' see PARA 1670.

7 Companies Clauses Consolidation Act 1845 ss 2, 72.

8 As to the election of directors see PARA 1767.

9 Companies Clauses Consolidation Act 1845 s 72.

10 *Re Skegness and St Leonard's Tramways Co, ex p Hanly* (1888) 41 ChD 215 at 225, 231, 237, CA. Cf *Channel Collieries Trust Ltd v Dover, St Margaret's and Martin Mill Light Rly Co* [1914] 1 Ch 568 at 576 (where Sargant J interpreted the phrase 'one-twentieth of the share capital of the company' as used in the order incorporating the railway company as meaning one-twentieth of its issued share capital); affd on other grounds [1914] 2 Ch 506, CA.

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1797. Chairman.

At every meeting of the company¹ one or other of the following persons is to preside as chairman, either²:

2392 (1) the chairman of the directors³; or

2393 (2) in his absence, the deputy chairman, if any⁴; or

2394 (3) in their absence, some one of the directors chosen for that purpose by the meeting⁵; or

2395 (4) in the absence of the chairman, deputy chairman and all the directors, any shareholder⁶ chosen for that purpose by a majority of the shareholders present at the meeting⁷.

1 As to the meaning of 'company' see PARA 1670.

2 Companies Clauses Consolidation Act 1845 s 73. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

3 Companies Clauses Consolidation Act 1845 s 73. As to the chairman of directors see PARA 1780. As to the meaning of 'directors' see PARA 1670.

4 Companies Clauses Consolidation Act 1845 s 73.

5 Companies Clauses Consolidation Act 1845 s 73.

6 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

7 Companies Clauses Consolidation Act 1845 s 73.

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1798. Business at meetings; adjournment.

The shareholders¹ present at any meeting must proceed in the execution of the powers of the company² with respect to the matters for which the meeting has been convened, and those only³. Any meeting may be adjourned from time to time and from place to place⁴. No business can, however, be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place⁵.

1 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

2 As to the meaning of 'company' see PARA 1670.

3 Companies Clauses Consolidation Act 1845 s 74. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 Companies Clauses Consolidation Act 1845 s 74.

5 Companies Clauses Consolidation Act 1845 s 74.

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1799. Voting rights.

At all general meetings¹ every shareholder² is entitled to vote according to the scale of voting prescribed³ by the special Act⁴; and, where no scale is prescribed, every shareholder has one vote for every share up to ten, and an additional vote for every five shares beyond the first ten shares up to 100, and an additional vote for every ten shares beyond the first 100 shares; but a shareholder is not entitled to vote at any meeting unless he has paid all calls then due upon his shares⁵.

Where several persons are jointly entitled to a share, the person whose name stands first in the register of shareholders⁶ is, for the purpose of voting⁷, deemed the sole proprietor, and on all occasions his vote, either in person or by proxy⁸, must be allowed as the vote in respect of the share without proof of the concurrence of the other holders⁹.

A shareholder who is a minor¹⁰ may vote by his guardian or any one of his guardians¹¹; and every such vote may be given either in person or by proxy¹².

1 As to the general meeting see the Companies Clauses Consolidation Act 1845 ss 66-80; and PARAS 1793 et seq, 1800-1801. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

2 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

3 As to the meaning of 'prescribed' see PARA 1670 note 4.

4 As to the meaning of 'special Act' see PARA 1670 note 2.

5 Companies Clauses Consolidation Act 1845 ss 2, 75.

6 As to the register of shareholders see the Companies Clauses Consolidation Act 1845 s 9; and PARA 1699.

7 But presumably not for the purpose of calculating voting rights in accordance with this provision.

8 As to a proxy vote see the Companies Clauses Consolidation Act 1845 ss 76-77; and PARA 1800.

9 Companies Clauses Consolidation Act 1845 s 78.

10 As to minority and the attainment of full age see the Family Law Reform Act 1969 s 1; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 1-3.

11 Companies Clauses Consolidation Act 1845 s 79. As to shareholders with mental incapacity also see s 79.

12 Companies Clauses Consolidation Act 1845 s 79.

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1800. Manner of voting; proxies.

The votes may be given either personally or by proxies who are shareholders¹, by written authorisation according to the statutory form² or in a form to the like effect under the hand of the shareholder nominating the proxy or, if the shareholder is a corporation, then under its common seal³. Every proposition at a meeting must be determined by the majority of votes of the parties present, including proxies, the chairman of the meeting⁴ being entitled not only to vote as a principal and proxy but to have a casting vote if there is an equality of votes⁵.

Where the shareholder is a body corporate, the proxy may be any member of that body, even though not personally a shareholder in the company⁶. During the continuance of his appointment, the proxy is to be taken to be a shareholder in the company to which his appointment relates, holding the number of shares held by the corporation by whom he is appointed, for all purposes except the transfer of any share or the giving of receipts for any dividend⁷. His appointment may be made and revoked by the corporation in the statutory forms⁸.

No person is entitled to vote as a proxy unless the instrument appointing him has been transmitted to the secretary⁹ of the company¹⁰ within the period prescribed¹¹ by the special Act¹² or, if no period is prescribed, not less than 48 hours before the time appointed for holding the meeting at which the proxy is to be used¹³.

1 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

2 As to the statutory form see the Companies Clauses Consolidation Act 1845 s 76, Sch (F). As to the application of the Companies Clauses Acts see PARA 1668 note 2.

3 Companies Clauses Consolidation Act 1845 Sch (F). As to stamps on and the insertion of the date of the meeting in proxies see PARA 662. As to payment by directors for the stamps (if any) and postage on proxies see PARAS 663, 1762 note 5. Proxy forms in the directors' names may be sent to some only of the shareholders at the expense of the company without contravening the Act, and the court will not interfere if the motive in so acting is honest, eg to ensure the presence of a quorum at the meeting, and not improper, eg to ensure a favourable vote: see *Wilson v London, Midland and Scottish Rly Co* [1940] Ch 393, [1940] 2 All ER 92, CA. However, as to the sending out of invitations to appoint named persons as proxies to some only of the shareholders in the case of companies regulated by the Companies Act 2006 see s 326; and PARA 663.

4 As to the chairman of the meeting see PARA 1797.

5 Companies Clauses Consolidation Act 1845 s 76.

6 Companies Clauses Consolidation Act 1845 s 76 proviso (amended by the Companies Clauses Consolidation Act 1888 s 2; and the Companies Clauses Consolidation Act 1889 s 2).

7 Companies Clauses Consolidation Act 1888 s 3.

8 As to the statutory form see the Companies Clauses Consolidation Act 1888 s 4.

9 As to the meaning of 'secretary' see PARA 1670.

10 As to the meaning of 'company' see PARA 1670.

11 As to the meaning of 'prescribed' see PARA 1670 note 4.

12 As to the meaning of 'special Act' see PARA 1670 note 2.

13 Companies Clauses Consolidation Act 1845 ss 2, 77.

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1801. Evidence of resolutions.

Whenever in the Companies Clauses Consolidation Act 1845 or the special Act¹ the consent of any particular majority of votes at any meeting of the company² is required in order to authorise any proceeding of the company, that particular majority is required to be proved only in the event of a poll being demanded at the meeting³. If a poll is not demanded, a declaration by the chairman⁴ that the resolution authorising that proceeding has been carried and an entry to that effect in the book of the company's proceedings is sufficient authority for the proceeding, without proof of the number or proportion of votes recorded in favour of or against it⁵.

1 As to the meaning of 'special Act' see PARA 1670 note 2.

2 As to the meaning of 'company' see PARA 1670.

3 Companies Clauses Consolidation Act 1845 s 80. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 As to the chairman of the meeting see PARA 1797.

5 Companies Clauses Consolidation Act 1845 s 80. As to the functions of the chairman with respect to a poll see further PARA 655.

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(vi) Accounts and Audit

1802. Application of certain provisions of the Companies Act 2006.

In general¹ the accounts of the company and their audit, and the qualifications, appointment and removal of the company's auditors are governed with one modification² by certain provisions of the Companies Act 2006³ which are applied⁴. To the extent to which and in any case where the provisions of the Companies Act 2006 do not apply, the provisions of the Companies Clauses Acts⁵ still apply.

1 For the exceptions, namely the bodies corporate to which the unregistered companies legislation does not apply, see PARA 1665.

2 I.e. references in the relevant provisions to the company's registered office are to be taken as references to its principal office in the United Kingdom: see the Unregistered Companies Regulations 2009, SI 2009/2436, reg 4(a); and PARA 1666. As to the meaning of 'United Kingdom' see PARA 1 note 5.

3 I.e. the Companies Act 2006 ss 380-416, 418-469, 471-474 (accounts and reports) (see PARA 693 et seq) and ss 475-539 (audit) (see PARA 905 et seq).

4 See the Unregistered Companies Regulations 2009, SI 2009/2436, reg 3, Sch 1; and PARA 1666. See also PARA 1668 note 2.

5 I.e. the Companies Clauses Consolidation Act 1845 ss 91, 101-108, 115-119: see PARAS 1803-1808.

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1803. Accounts to be kept.

The directors¹ must cause full and true accounts to be kept of all sums of money received or expended on account of the company² by the directors and all persons employed by or under them, and of the matters and things for which those sums of money have been received or disbursed and paid³, and must appoint a book-keeper to enter those accounts in books to be provided for the purpose⁴.

1 As to the meaning of 'directors' see PARA 1670.

2 As to the meaning of 'company' see PARA 1670.

3 Companies Clauses Consolidation Act 1845 s 115. Separate and distinct accounts must also be kept by the company as regards money raised by issuing debenture stock: see the Companies Clauses Act 1863 s 33; and PARA 1758. Cf the duty to keep accounting records imposed by the Companies Act 2006 ss 386, 387 (see PARA

708). As to the application of the Companies Act 2006 provisions in lieu of the Companies Clauses Acts provision stated in the text see PARA 1802.

4 Companies Clauses Consolidation Act 1845 s 119.

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1804. Balance sheets.

The books of the company¹ must be balanced at the periods prescribed² by the special Act³ and, if no periods are prescribed, 14 days at least before each ordinary meeting⁴. On the books being balanced, an exact balance sheet must forthwith be made up, exhibiting a true statement of the capital stock, credits and property of every description belonging to the company, and the debts due by it at the date of making the balance sheet, and a distinct view of the profit or loss which has arisen on the company's transactions⁵ in the course of the preceding half-year⁶. Before each ordinary meeting, the balance sheet must be examined by the directors⁷, or any three of them, and be signed by the chairman or deputy chairman⁸.

At the ordinary meeting, the directors must produce to the shareholders⁹ the balance sheet applicable to the period immediately preceding the meeting, together with the auditors' report¹⁰.

1 As to the meaning of 'company' see PARA 1670.

2 As to the meaning of 'prescribed' see PARA 1670 note 4.

3 As to the meaning of 'special Act' see PARA 1670 note 2.

4 Companies Clauses Consolidation Act 1845 ss 2, 116. As to the meaning of 'ordinary meeting' see PARA 1793.

5 A transaction resulting in a realised profit from a capital asset must be brought within the scope of the distinct view: *Cross v Imperial Continental Gas Association* [1923] 2 Ch 553.

6 Companies Clauses Consolidation Act 1845 s 116.

7 As to the meaning of 'directors' see PARA 1670.

8 Companies Clauses Consolidation Act 1845 s 116. As to the chairman or deputy chairman of the meeting see PARA 1797. As to the application of the Companies Act 2006 provisions in lieu of the Companies Clauses Acts provision stated in the text see PARA 1802.

9 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

10 Companies Clauses Consolidation Act 1845 s 118. As to the auditors' duties under the Companies Clauses Consolidation Act 1845 see PARA 1807.

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1805. Inspection of books and balance sheets.

The books duly balanced¹, together with the balance sheet, must for the periods prescribed² by the special Act³ and, if no periods are prescribed, for 14 days previous to each ordinary meeting⁴, and for one month afterwards, be open for the inspection of the shareholders⁵ at the principal office of the company⁶ or place of business⁷. Shareholders are not, however, entitled at any time, except during these periods, to demand the inspection of the books⁸, unless in virtue of a written order signed by three directors⁹.

Every book-keeper must permit any shareholder to inspect the books and to take copies or extracts at any reasonable time during the periods when the books are so open for inspection¹⁰. Failure to comply with these requirements involves forfeiture to the shareholder, for every offence, of a sum not exceeding £5¹¹.

The account books must also be open at all reasonable times to the inspection of the company's respective mortgagees and bond creditors with liberty to take extracts without fee or reward¹².

1 See PARA 1804.

2 As to the meaning of 'prescribed' see PARA 1670 note 4.

3 As to the meaning of 'special Act' see PARA 1670 note 2.

4 As to the meaning of 'ordinary meeting' see PARA 1793.

5 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

6 As to the meaning of 'company' see PARA 1670.

7 Companies Clauses Consolidation Act 1845 ss 2, 117. As to the application of the Companies Act 2006 provisions in lieu of the Companies Clauses Acts provision stated in the text see PARA 1802.

8 See the Companies Clauses Consolidation Act 1845 s 45; and PARA 1744.

9 Companies Clauses Consolidation Act 1845 s 117. As to the meaning of 'directors' see PARA 1670. A shareholder is not entitled to a mandatory order calling on the directors to permit him to inspect the books which are to be kept under ss 115, 119 (see PARA 1803) unless he can prove some genuine motive for the inspection, and not merely idle curiosity: *R v Directors of London and St Katharine Docks Co* (1874) 44 LJQB 4. Cf the provisions as to balance sheets in the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409; and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410 (see PARA 714 et seq).

10 Companies Clauses Consolidation Act 1845 s 119.

11 Companies Clauses Consolidation Act 1845 s 119.

12 Companies Clauses Consolidation Act 1845 s 55. Entries in these books are not, however, admissible in evidence in favour of the company, for the purpose of establishing the matters there mentioned, as against a creditor suing it: *Hill v Manchester and Salford Waterworks Co* (1833) 5 B & Ad 866 at 876.

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1806. Appointment and qualification of auditors.

Except as otherwise provided by the special Act¹, the powers of the company² as regards the choice of auditors and their remuneration can be exercised only at a general meeting of the company³. Except where the special Act directs them to be appointed otherwise than by the company, the company must at the first ordinary meeting⁴ after the passing of the special Act elect the number of auditors prescribed⁵ by that Act or, if no number is prescribed, two auditors, in the manner provided for the election of directors⁶. At the first ordinary meeting in each year afterwards the company must in the same manner elect an auditor to supply the place of the retiring auditor⁷. Every auditor so elected, if he has not been removed or become disqualified, and has not resigned, continues to be an auditor until another is elected in his stead⁸.

Where no other qualification is prescribed by the special Act, every auditor must have at least one share in the undertaking⁹. He must not hold any office in the company or be in any other manner interested in its concerns except as a shareholder¹⁰.

1 As to the meaning of 'special Act' see PARA 1670 note 2.

2 As to the meaning of 'company' see PARA 1670.

3 See the Companies Clauses Consolidation Act 1845 s 91; and PARA 1792. As to the general meeting see ss 66-80; and PARAS 1793-1801.

4 As to the meaning of 'ordinary meeting' see PARA 1793.

5 As to the meaning of 'prescribed' see PARA 1670 note 4.

6 Companies Clauses Consolidation Act 1845 ss 2, 101. As to the meaning of 'directors' see PARA 1670. As to the application of the Companies Act 2006 provisions in lieu of the Companies Clauses Acts provision stated in the text see PARA 1802.

7 Companies Clauses Consolidation Act 1845 s 101. As to the retirement of auditors see PARA 1808.

8 Companies Clauses Consolidation Act 1845 s 101.

9 Companies Clauses Consolidation Act 1845 s 102.

10 Companies Clauses Consolidation Act 1845 s 102. As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

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1807. Auditors' duties.

The directors¹ must deliver to the auditors the half-yearly or other periodical accounts and balance sheet at least 14 days before the ensuing ordinary meeting² at which they are required to be produced to the shareholders³. It is the auditors' duty to receive from the directors the accounts and balance sheet and to examine them⁴, but they may employ accountants and other persons as they think proper at the company's expense⁵. They must either make a special report on the accounts or simply confirm them⁶. Their report or confirmation must be read, together with the directors' report, at the ordinary meeting⁷. If the auditors differ, they may make separate reports, and each of them may separately employ an accountant⁸.

1 As to the meaning of 'directors' see PARA 1670.

- 2 As to the meaning of 'ordinary meeting' see PARA 1793.
- 3 Companies Clauses Consolidation Act 1845 s 106. As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7. As to the application of the Companies Act 2006 provisions in lieu of the Companies Clauses Acts provision stated in the text see PARA 1802.
- 4 Companies Clauses Consolidation Act 1845 s 107.
- 5 Companies Clauses Consolidation Act 1845 s 108. As to the meaning of 'company' see PARA 1670.
- 6 Companies Clauses Consolidation Act 1845 s 108.
- 7 Companies Clauses Consolidation Act 1845 s 108.
- 8 *Steele v Sutton Gas Co* (1883) 12 QBD 68 at 69.

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1808. Retirement of auditors.

One of the auditors (to be determined in the first instance by ballot between themselves, unless they otherwise agree, and afterwards by seniority) must go out of office at the first ordinary meeting¹ in each year, but the auditor going out is immediately eligible for re-election². Any vacancy which takes place among the auditors in the course of the current year may be supplied at any general meeting³, if the company⁴ thinks fit, by election of the shareholders⁵.

The statutory provisions⁶ respecting the failure of an ordinary meeting at which directors⁷ ought to be chosen apply, with any necessary changes in points of detail, to any ordinary meeting at which an auditor ought to be appointed⁸.

- 1 As to the meaning of 'ordinary meeting' see PARA 1793.
- 2 Companies Clauses Consolidation Act 1845 s 103. A re-elected auditor is, with respect to the going out of office by rotation, deemed a new auditor: s 103. As to the application of the Companies Act 2006 provisions in lieu of the Companies Clauses Acts provision stated in the text see PARA 1802.
- 3 As to the general meeting see the Companies Clauses Consolidation Act 1845 ss 66-80; and PARAS 1793-1801.
- 4 As to the meaning of 'company' see PARA 1670.
- 5 Companies Clauses Consolidation Act 1845 s 104. As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.
- 6 In the Companies Clauses Consolidation Act 1845 s 84: see PARA 1768.
- 7 As to the meaning of 'directors' see PARA 1670.
- 8 Companies Clauses Consolidation Act 1845 s 105.

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COMPANIES CLAUSES ACTS/(8) REGULATION AND MANAGEMENT/(vii) Dividends/1809. Power to pay dividends.

(vii) Dividends

1809. Power to pay dividends.

Subject as mentioned below, a company¹ incorporated by special Act² may, like a company regulated by the Companies Act 2006, pay dividends on its shares³. Certain provisions relating to the dividends on preference shares are imposed by statute⁴. The rate of dividend on ordinary shares is in nearly every case limited either by the special Act itself or by the provisions of a general Act; and, where a limit is imposed, it is usual to provide that arrears of dividend may only be paid out of profits earned in subsequent years. Where there are two cases of ordinary shares entitled to a dividend at different rates, and the dividend on both classes is in arrear, the ratio existing between the respective rates of dividend must be preserved in paying off arrears of dividend in subsequent years⁵.

No dividend can be paid in respect of any share until all calls then due in respect of that and every other share held by the person to whom the dividend may be payable have been paid⁶.

1 As to the meaning of 'company' see PARA 1670.

2 As to the meaning of 'special Act' see PARA 1670 note 2.

3 See PARA 1408 et seq.

4 See the Companies Clauses Act 1863 ss 13, 14; and PARA 1688. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

5 *Weymouth Waterworks Co v Coode and Hasell* [1911] 2 Ch 520.

6 Companies Clauses Consolidation Act 1845 s 123. As to the payment of calls see ss 21-28; and PARAS 1703-1709.

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1810. Declaration of dividend.

Before every ordinary meeting¹ at which a dividend is intended to be declared, the directors² must cause a scheme to be prepared showing the profits, if any, of the company³ for the period current since the preceding ordinary meeting at which a dividend was declared, and apportioning them, or as much as they may consider applicable to the purposes of dividend, among the shareholders⁴ according to the shares held by them, the amount paid on them and the periods during which those amounts have been paid⁵. The scheme must be exhibited at the meeting, at which a dividend may be declared according to the scheme⁶.

Except as otherwise provided by the special Act⁷, the company's powers as to the declaration of dividends can be exercised only at a general meeting⁸.

1 As to the meaning of 'ordinary meeting' see PARA 1793.

- 2 As to the meaning of 'directors' see PARA 1670.
- 3 As to the meaning of 'company' see PARA 1670.
- 4 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.
- 5 Companies Clauses Consolidation Act 1845 s 120. As to the application of the Companies Clauses Acts see PARA 1668 note 2.
It is the directors' duty to act strictly in accordance with the Companies Clauses Consolidation Act 1845 s 120: *Henry v Great Northern Rly Co* (1857) 1 De G & J 606. As to dividends generally see PARA 1408 et seq.
- 6 Companies Clauses Consolidation Act 1845 s 120.
- 7 As to the meaning of 'special Act' see PARA 1670 note 2.
- 8 See the Companies Clauses Consolidation Act 1845 s 91; and PARA 1792. As to the general meeting see ss 66-80; and PARAS 1793-1801.

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1811. Reserve fund.

Before apportioning the profits to be divided among the shareholders¹, the directors² may, if they think fit, set aside such sum as they think proper to meet contingencies, or for enlarging, repairing or improving the works connected with the undertaking³ or any part of it, and may divide the balance only among the shareholders⁴.

- 1 As to the declaration of dividend see PARA 1810. As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.
- 2 As to the meaning of 'directors' see PARA 1670.
- 3 As to the meaning of 'undertaking' see PARA 1738.
- 4 Companies Clauses Consolidation Act 1845 s 122 (repealed in relation to water companies by the Water Act 1945 s 62, Sch 5). As to the application of the Companies Clauses Acts see PARA 1668 note 2.

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1812. No dividend out of capital.

The company¹ must not pay any dividend by which its capital stock will be in any way reduced². However, a return of any portion of the capital stock, with the consent of all the mortgagees and bond creditors of the company, after due notice being given for that purpose at an extraordinary meeting to be convened for that object³, is not a payment of dividend⁴.

- 1 As to the meaning of 'company' see PARA 1670.

2 Companies Clauses Consolidation Act 1845 s 121. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

The Companies Clauses Consolidation Act 1845 s 121 relates to the company's paid up capital and not to its capital assets generally, and so a company may pay a dividend out of a realised profit on its capital assets: *Cross v Imperial Continental Gas Association* [1923] 2 Ch 553. A payment by a company of dividends on shares out of surplus revenue arising from an annuity from another company is not a payment of dividends out of capital: *Lawrence v West Somerset Mineral Rly Co* [1918] 2 Ch 250. As to paid up capital see PARA 1048. As to dividends generally see PARA 1408 et seq.

3 As to the meaning of 'extraordinary meeting' see PARA 1793.

4 Companies Clauses Consolidation Act 1845 s 121 proviso.

As the claim for dividends is equivalent to a claim on a simple contract, the period of limitation is six years: see the Limitation Act 1980 s 5 (time limit for actions founded on simple contract); and **LIMITATION PERIODS** vol 68 (2008) PARA 956. See *Re Compania de Electricidad de la Provincia de Buenos Aires Ltd* [1980] Ch 146, [1978] 3 All ER 668 (not following *Re Artisans' Land and Mortgage Corp'n* [1904] 1 Ch 796). Time begins to run in favour of a company from the date when a dividend becomes payable: *Re Severn and Wye and Severn Bridge Rly Co* [1896] 1 Ch 559 at 565.

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(9) SETTLEMENT OF DISPUTES

1813. Application of the Arbitration Act 1996.

With some exceptions and adaptations¹, certain provisions of the Arbitration Act 1996² apply to every arbitration under an enactment (a 'statutory arbitration')³, whether the enactment was passed or made before or after the commencement of the Arbitration Act 1996, and accordingly those provisions apply to arbitrations under the Companies Clauses Consolidation Act 1845, or the special Act⁴, or any Act incorporated with it⁵, except in so far as the Arbitration Act 1996 is inconsistent with that other Act or with any rules or procedure authorised or recognised by that Act or is excluded by any other enactment⁶.

1 See the Arbitration Act 1996 ss 94(1), 95-98; and **ARBITRATION** vol 2 (2008) PARA 1209.

2 Ie the Arbitration Act 1996 Pt I (ss 1-84) (see further **ARBITRATION** vol 2 (2008) PARA 1209 et seq).

3 Ie every arbitration under an enactment, including an enactment contained in subordinate legislation: see the Arbitration Act 1996 s 94(3)(a); and **ARBITRATION** vol 2 (2008) PARA 1209.

4 As to the meaning of 'special Act' under the Companies Clauses Acts see PARA 1670 note 2.

5 See the Arbitration Act 1996 s 94(1); and **ARBITRATION** vol 2 (2008) PARA 1209.

6 See the Arbitration Act 1996 s 94(2); and **ARBITRATION** vol 2 (2008) PARA 1209. The effect appears to be that the provisions of Pt I, unless a provision is expressly excluded, apply to arbitrations (inter alia) under the Companies Clauses Consolidation Act 1845 except in so far as such arbitrations are conducted pursuant to provisions inconsistent with the provisions of the Arbitration Act 1996. The provisions for arbitration contained in the Companies Clauses Consolidation Act 1845 ss 128-134 (see PARAS 1814-1816) are not introduced into arbitrations under the Arbitration Act 1996. The submission to arbitration under the Companies Clauses Consolidation Act 1845 may be made a rule of any of the superior courts, on the application of either of the parties: s 134. As to the application of the Companies Clauses Acts see PARA 1668 note 2. As to enforcing arbitration awards see the Arbitration Act 1996 s 66; and **ARBITRATION** vol 2 (2008) PARA 1274.

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1814. Appointment of arbitrators.

When any dispute has arisen, authorised or directed by the Companies Clauses Consolidation Act 1845, or the special Act¹, or any Act incorporated with it, to be settled by arbitration², then, unless both parties concur in the appointment of a single arbitrator, each party, on the request of the other by written³ nomination under his hand, must appoint an arbitrator to whom the dispute is to be referred⁴. After the appointment has been made, neither party can revoke it without the other's consent, nor does the death of either operate as a revocation⁵.

If for the space of 14 days after a dispute has arisen, and after a written request has been served by one party on the other to appoint an arbitrator, the latter fails to appoint an arbitrator, the party making the request, and having himself appointed an arbitrator, may appoint that arbitrator to act on behalf of both parties, and that arbitrator may proceed to hear and determine the matters in dispute, in which case the award or determination of the single arbitrator is final⁶.

If before the matters referred are determined an arbitrator appointed by either party dies, or becomes incapable or refuses or for seven days neglects to act as arbitrator, the party by whom he was appointed may by written nomination appoint some other person to act in his place; and if, for seven days after written notice from the other party, he fails to do so, the remaining or other arbitrator may proceed in the absence of the other party⁷. Every arbitrator so substituted has the same powers and authorities as were vested in the former arbitrator at the time of his death, refusal or disability⁸.

1 As to the meaning of 'special Act' see PARA 1670 note 2.

2 Certain provisions of the Arbitration Act 1996 apply, with some exceptions and adaptations, to an arbitration under the Companies Clauses Consolidation Act 1845: see PARA 1813. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

The Companies Clauses Consolidation Act 1845 ss 128-134 (see the text and notes 4-8; and PARAS 1815-1816) are incorporated, with adaptations, with the Insolvency Act 1986 for the purposes of any arbitration under s 111: see s 111(4); and PARA 1446.

3 As to the meaning of 'writing' see PARA 35 note 13.

4 Companies Clauses Consolidation Act 1845 s 128.

5 Companies Clauses Consolidation Act 1845 s 128.

6 Companies Clauses Consolidation Act 1845 s 128.

7 Companies Clauses Consolidation Act 1845 s 129.

8 Companies Clauses Consolidation Act 1845 s 129.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(9) SETTLEMENT OF DISPUTES/1815. Appointment of umpire.

1815. Appointment of umpire.

Where more than one arbitrator has been appointed¹, they must, before entering on the matters referred to them, by written appointment under their hands appoint an umpire to decide any matters on which they differ². If the umpire dies, or refuses or for seven days neglects to act, they must forthwith appoint another umpire in his place³. The decision of the umpire on the matters so referred to him is final⁴.

If in either case the arbitrators refuse or for seven days after request of either party to the arbitration neglect to appoint an umpire, the Secretary of State⁵ may, in any case in which a railway company is one party to the arbitration, on the application of either party to that arbitration, appoint an umpire whose decision on the matter on which the arbitrators differ is to be final⁶.

1 As to the appointment of arbitrators see PARA 1814.

2 Companies Clauses Consolidation Act 1845 s 130. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

3 Companies Clauses Consolidation Act 1845 s 130.

4 Companies Clauses Consolidation Act 1845 s 130.

5 As to the Secretary of State see PARAS 6-8 et seq.

6 Companies Clauses Consolidation Act 1845 s 131.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(9) SETTLEMENT OF DISPUTES/1816. Conduct of arbitration; costs.

1816. Conduct of arbitration; costs.

The arbitrators or their umpire¹ may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath², and administer the oaths necessary for that purpose³.

Except where it is otherwise provided by the Companies Clauses Consolidation Act 1845 or the special Act⁴ or any Act incorporated with it, the costs of and attending an arbitration are in the discretion of the arbitrators or their umpires, as the case may be⁵.

1 As to the appointment of arbitrators or their umpire see PARAS 1814-1815.

2 As to the meaning of 'oath' see PARA 1544 note 14.

3 Companies Clauses Consolidation Act 1845 s 132. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

4 As to the meaning of 'special Act' see PARA 1670 note 2.

5 Companies Clauses Consolidation Act 1845 s 133.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE

COMPANIES CLAUSES ACTS/(10) RECOVERY OF CLAIMS, DAMAGES AND PENALTIES/1817.
Bankruptcy claims.

(10) RECOVERY OF CLAIMS, DAMAGES AND PENALTIES

1817. Bankruptcy claims.

If any person against whom the company¹ has any claim becomes bankrupt or insolvent, then in all proceedings against his estate the company's secretary² or treasurer may represent the company, and act in its behalf, as if that claim had been his own claim³.

1 As to the meaning of 'company' see PARA 1670.

2 As to the meaning of 'secretary' see PARA 1670.

3 Companies Clauses Consolidation Act 1845 s 140. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(10) RECOVERY OF CLAIMS, DAMAGES AND PENALTIES/1818.
Recovery of amounts ascertained by justices.

1818. Recovery of amounts ascertained by justices.

Where any damages, costs or expenses are directed to be paid by the Companies Clauses Consolidation Act 1845 or the special Act¹ or any Act incorporated with it, and the method of ascertaining the amount or enforcing payment is not provided for, that amount, in case of dispute, must be ascertained by two justices².

1 As to the meaning of 'special Act' see PARA 1670 note 2.

2 Companies Clauses Consolidation Act 1845 s 142 (amended by the Statute Law (Repeals) Act 1993). Cf the Companies Clauses Consolidation Act 1845 ss 142, 144-147, 156 (see PARA 1819 et seq); and the Lands Clauses Consolidation Act 1845 s 136 (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 644). As to the application of the Companies Clauses Acts see PARA 1668 note 2.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(10) RECOVERY OF CLAIMS, DAMAGES AND PENALTIES/1819.
Procedure before justices.

1819. Procedure before justices.

Where any question of compensation, expenses, charges or damages is referred to the determination of any one justice or more¹, any justice may on the application of either party summon the other party to appear before one justice or before two justices as the case may require, at a time and place so named². Upon the appearance of the parties, or in the absence of any of them, upon proof of due service of the summons, the question may be determined

and the parties and their witnesses may be examined on oath³, the costs being in the discretion of the justices⁴.

1 As to the recovery of amounts ascertained by justices see PARA 1818.

2 Companies Clauses Consolidation Act 1845 s 144. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

3 As to the meaning of 'oath' see PARA 1544 note 14.

4 Companies Clauses Consolidation Act 1845 s 144.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/5. COMPANIES REGULATED BY THE COMPANIES CLAUSES ACTS/(10) RECOVERY OF CLAIMS, DAMAGES AND PENALTIES/1820. Publication of particulars of offences.

1820. Publication of particulars of offences.

The company¹ must publish short particulars of the several offences for which any penalty is imposed by the Companies Clauses Consolidation Act 1845 or the special Act² or any Act incorporated with it, or by any byelaw of the company³, affecting other persons than its shareholders⁴, officers or employees, and of the amount of every such penalty, and must cause such particulars to be painted or printed upon paper and pasted on a board to be hung up on some conspicuous part of its principal place of business⁵. Where the penalties are of local application, it must cause the boards to be affixed in some conspicuous place in the immediate neighbourhood to which the penalties are applicable, and no such penalty is recoverable unless it has been so published and kept published⁶.

If any person pulls down any board put up or affixed for the purpose of publishing any byelaw or penalty, or obliterates any of the letters or figures on it, he must forfeit for every such offence a sum not exceeding level 1 on the standard scale and must defray the expenses attending the restoration of such board⁷.

1 As to the meaning of 'company' see PARA 1670.

2 As to the meaning of 'special Act' see PARA 1670 note 2.

3 As to byelaws see PARA 1791.

4 As to the meaning of 'shareholder' see PARAS 1670, 1703 note 7.

5 Companies Clauses Consolidation Act 1845 s 145. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

6 Companies Clauses Consolidation Act 1845 s 145.

7 Companies Clauses Consolidation Act 1845 s 146 (amended by the Criminal Damage Act 1971 s 11(8), Schedule Pt I; the Criminal Law Act 1977 s 31(6); and the Criminal Justice Act 1982 ss 37, 46). As to the standard scale see PARA 1622.

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COMPANIES CLAUSES ACTS/(10) RECOVERY OF CLAIMS, DAMAGES AND PENALTIES/1821.
Recovery of penalties.

1821. Recovery of penalties.

Every penalty or forfeiture imposed by the Companies Clauses Consolidation Act 1845 or the special Act¹ or any Act incorporated with it, or by any byelaw of the company made in pursuance thereof², the recovery of which is not otherwise provided for, may be recovered by summary proceeding before two justices³.

1 As to the meaning of 'special Act' see PARA 1670 note 2.

2 As to byelaws see PARA 1791. As to the meaning of 'company' see PARA 1670.

3 Companies Clauses Consolidation Act 1845 s 147 (amended by the Summary Jurisdiction Act 1884 s 4, Schedule; and the Statute Law Revision Act 1892). As to the application of the Companies Clauses Acts see PARA 1668 note 2.

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Arrest of offenders.

1822. Arrest of offenders.

Any officer or agent of the company¹ may seize and detain any person who has committed any offence² against the provisions of the Companies Clauses Consolidation Act 1845 or the special Act³ or any Act incorporated with it⁴, and whose name and residence are unknown to him, and convey him before some justice without warrant⁵. The justice must proceed with all convenient despatch to the hearing and determining of the complaint⁶.

1 As to the meaning of 'company' see PARA 1670.

2 As to particulars of offences see PARA 1820.

3 As to the meaning of 'special Act' see PARA 1670 note 2.

4 Infringement of byelaws is an offence against the Companies Clauses Consolidation Act 1845: see s 125; and PARA 1791. As to the application of the Companies Clauses Acts see PARA 1668 note 2.

5 Companies Clauses Consolidation Act 1845 s 156 (amended by the Serious Organised Crime and Police Act 2005 Sch 7 para 4, Sch 17 Pt 2).

6 Companies Clauses Consolidation Act 1845 s 156.

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Appeals.

1823. Appeals.

Any party aggrieved by any determination or adjudication of any justice with respect to any penalty or forfeiture¹ may appeal to the Crown Court².

1 See PARA 1818 et seq.

2 Companies Clauses Consolidation Act 1845 s 159 (amended by the Summary Jurisdiction Act 1884 s 4, Schedule; and the Courts Act 1971 s 56(2), Sch 9 Pt I). As to the application of the Companies Clauses Acts see PARA 1668 note 2. As to appeals to the Crown Court see the Senior Courts Act 1981 ss 45-48; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 1980 et seq.

Halsbury's Laws of England/COMPANIES (VOLUME 14 (2009) 5TH EDITION, PARAS 1-692; VOLUME 15 (2009) 5TH EDITION, PARAS 693-1841)/6. OVERSEAS COMPANIES/(1) IN GENERAL/1824. General provision regarding overseas companies.

6. OVERSEAS COMPANIES

(1) IN GENERAL

1824. General provision regarding overseas companies.

In the Companies Acts¹, an 'overseas company' means a company² incorporated outside the United Kingdom³.

An overseas company that has complied with the statutory duty to register specified particulars under the Companies Act 2006⁴ does not fall within the Companies Acts definition of a 'UK-registered company' (which, for these purposes, means a company registered under the Companies Act 2006)⁵.

1 As to the meaning of the 'Companies Acts' see PARA 16.

2 As to the meaning of 'company' under the Companies Acts see PARA 24.

3 Companies Act 2006 s 1044. As to the meaning of 'United Kingdom' see PARA 1 note 5. See also s 1066; and PARA 139 (registered numbers).

4 In accordance with regulations made under the Companies Act 2006 s 1046 (see PARA 1826); see s 1158; and PARA 24.

5 See the Companies Act 2006 s 1158; and PARA 24.

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1825. Company contracts and execution of documents by overseas companies.

The Secretary of State¹ may make provision by regulations² applying those provisions of the Companies Act 2006³ that govern the formalities of doing business, and other related matters, to overseas companies⁴, subject to such exceptions, adaptations or modifications as may be specified in the regulations⁵.

1 As to the Secretary of State see PARA 6.

2 Regulations under the Companies Act 2006 s 1045 are subject to the negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1045(2), 1289. As to the making of regulations under the 2006 Act generally see ss 1288-1292. In exercise of the power conferred under s 1045, the Secretary of State has made the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, SI 2009/1917. Accordingly, the Companies Act 2006 s 43 (see PARA 282), s 44 (see PARA 288), s 46 (see PARA 288), s 48 (execution of documents: Scotland) and s 51 (see PARA 66) are applied to overseas companies, but modified to read as set out in the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, SI 2009/1917, regs 4, 6. As to the provision that may be made in regulations in order to specify the person or persons responsible for compliance with any requirements imposed on overseas companies, and as to provision for related offences, see PARA 1835.

3 In applying the Companies Act 2006 ss 43-52 (see PARA 282 et seq): see s 1045(1).

4 As to the meaning of 'overseas company' see PARA 1824.

5 Companies Act 2006 s 1045(1).

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(2) REGISTRATION OF PARTICULARS

1826. Duty to register particulars of overseas company.

The Secretary of State¹ may make provision by regulations² requiring an overseas company³:

- 1 (1) to deliver to the registrar of companies⁴ for registration a return containing specified particulars⁵; and
- 2 (2) to deliver to the registrar with the return specified documents⁶.

The regulations: (a) must, in the case of a company other than a Gibraltar company⁷, require the company to register particulars if the company opens a branch in the United Kingdom⁸; and (b) may, in the case of a Gibraltar company, require the company to register particulars if the company opens a branch in the United Kingdom⁹; and (c) may, in any case, require the registration of particulars in such other circumstances as may be specified¹⁰.

The regulations may provide that where a company has registered particulars in this way¹¹ and any alteration is made, either in the specified particulars¹², or in any document delivered with the return¹³, the company must deliver to the registrar for registration a return containing specified particulars of the alteration¹⁴.

The regulations may make provision requiring such a return¹⁵ to be delivered for registration to the registrar for a specified part of the United Kingdom¹⁶, and requiring it to be so delivered before the end of a specified period¹⁷.

The regulations may make different provision according to the place where the company is incorporated¹⁸, and the activities carried on (or proposed to be carried on) by it¹⁹. This is without prejudice to the general power to make different provision for different cases²⁰.

Such regulations²¹ must require an overseas company to register particulars identifying every person resident in the United Kingdom authorised to accept service of documents on behalf of the company²², or to register a statement that there is no such person²³.

Such particulars, returns and other documents that are required, in the case of an overseas company, to be delivered to the registrar²⁴ are documents subject to the 'Directive disclosure requirements'²⁵.

1 As to the Secretary of State see PARA 6.

2 Regulations under the Companies Act 2006 s 1046 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): ss 1046(8), 1290. As to the making of regulations under the 2006 Act generally see ss 1288-1292. In exercise of the power conferred under s 1046(1), (2), (4)-(6) (see also the text and notes 3-20), and under s 1056 (see the text and notes 21-23), the Secretary of State has made the Overseas Companies Regulations 2009, SI 2009/1801. As to transitional provisions see reg 80, Sch 8. As to the provision that may be made in regulations in order to specify the person or persons responsible for compliance with any requirements imposed on overseas companies, and as to provision for related offences, see PARA 1835.

3 Companies Act 2006 s 1046(1). As to the meaning of 'overseas company' see PARA 1824.

4 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to provision made for the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to delivery to the registrar where an overseas company is registered in more than one part of the United Kingdom see PARA 1828.

5 Companies Act 2006 s 1046(1)(a). For these purposes, 'specified' means specified in the regulations: s 1046(7). As to the provision so made see the Overseas Companies Regulations 2009, SI 2009/1801, Pt 2 (regs 3-11) (initial registration of particulars). In respect of the performance by the registrar of his functions in relation to the registration of documents required to be delivered to him under Pt 2, the fees payable on the registration of the documents so delivered are those specified in the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 10(a).

A certified copy of the constitution that is required to be delivered under the Overseas Companies Regulations 2009, SI 2009/1801, reg 8, and copies of accounting documents that are required to be delivered under reg 9, are documents specified for the purposes of the Companies Act 2006 s 1105(2)(d) (see PARA 164) as documents that may be drawn up and delivered to the registrar in a language other than English, but which must, when delivered to the registrar, be accompanied by a certified translation into English: see the Overseas Companies Regulations 2009, SI 2009/1801, reg 78; and PARA 164. As to transitional provisions and savings which applied to existing overseas companies see reg 80, Sch 8.

Where regulations under the Companies Act 2006 s 1046 require an overseas company to register particulars of an individual's usual residential address, they must contain provision corresponding to that made by Pt 10 Ch 8 (ss 240-246) (directors' residential addresses: protection from disclosure) (see PARA 501 et seq): s 1055. In exercise of the power conferred under s 1055, the Secretary of State has made the Overseas Companies Regulations 2009, SI 2009/1801, Pt 4 (regs 18-29, Schs 1-3).

6 Companies Act 2006 s 1046(1)(b). As to the provisions so made see note 5.

7 For the purposes of the Companies Act 2006 s 1046(2), 'Gibraltar company' means a company incorporated in Gibraltar: s 1046(3).

8 Companies Act 2006 s 1046(2)(a). As to the meaning of 'United Kingdom' see PARA 1 note 5. For the purposes of s 1046(2), 'branch' means a branch within the meaning of the Eleventh Company Law Directive (ie EC Council Directive 89/666 (OJ L395, 30.12.89, p 36) of 21 December 1989, concerning disclosure requirements in respect of branches opened in a member state by certain types of company governed by the law of another state): s 1046(3). As to the Eleventh Company Law Directive see PARA 23. As to the provisions so made see note 5. As to the duty to give notice of an overseas company, which has registered particulars under s 1046(2)(a), ceasing to have a registrable presence in the United Kingdom see PARA 1829.

9 Companies Act 2006 s 1046(2)(b). As to the provisions so made see note 5. As to the duty to give notice of an overseas company, which has registered particulars under s 1046(2)(b), ceasing to have a registrable presence in the United Kingdom see PARA 1829.

10 Companies Act 2006 s 1046(2)(c). As to the provisions so made see note 5. As to the duty to give notice of an overseas company, which has registered particulars under s 1046(2)(c), ceasing to have a registrable presence in the United Kingdom see PARA 1829.

11 Ie under the Companies Act 2006 s 1046: see s 1046(4).

- 12 Companies Act 2006 s 1046(4)(a). As to the provisions so made see note 14.
- 13 Companies Act 2006 s 1046(4)(b). As to the provisions so made see note 14.
- 14 Companies Act 2006 s 1046(4). As to the provision so made see the Overseas Companies Regulations 2009, SI 2009/1801, Pt 3 (regs 12-17) (alteration in registered particulars). In respect of the performance by the registrar of his functions in relation to the registration of an alteration to the registered particulars of an overseas company under Pt 3, the fees payable are those specified in the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, Sch 1 para 10(b).
- A certified copy of the constitution that is required to be delivered under the Overseas Companies Regulations 2009, SI 2009/1801, regs 14 or 15 is a document specified for the purposes of the Companies Act 2006 s 1105(2)(d) (see PARA 164) as a document that may be drawn up and delivered to the registrar in a language other than English, but which must, when delivered to the registrar, be accompanied by a certified translation into English: see the Overseas Companies Regulations 2009, SI 2009/1801, reg 78; and PARA 164. As to transitional provisions and savings which applied to existing overseas companies see reg 80, Sch 8.
- 15 Ie the return under the Companies Act 2006 s 1046: see s 1046(5).
- 16 Companies Act 2006 s 1046(5)(a). See note 2.
- 17 Companies Act 2006 s 1046(5)(b). See note 2.
- 18 Companies Act 2006 s 1046(6)(a). See note 2.
- 19 Companies Act 2006 s 1046(6)(b). See note 2.
- 20 Companies Act 2006 s 1046(6). See note 2.
- 21 Ie regulations under the Companies Act 2006 s 1046: see s 1056.
- 22 Companies Act 2006 s 1056(a). As to the provision made under s 1056 see note 2.
- 23 Companies Act 2006 s 1056(b). As to the provision made under s 1056 see note 2.
- 24 Ie under the Companies Act 2006 Pt 34 (ss 1044-1059) (see PARAS 1824 et seq, 1827 et seq): see s 1078(5); and PARA 144.
- 25 See the Companies Act 2006 s 1078(5); and PARA 144.

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1827. Registration of overseas company under corporate name or alternative name.

Regulations made by the Secretary of State¹, for the purpose of requiring an overseas company² to register specified particulars under the Companies Act 2006³, must require such a company⁴ to register its name⁵. This may be the company's corporate name (that is, its name under the law of the country or territory in which it is incorporated)⁶ or an alternative name that is duly specified⁷, being a name, other than its corporate name, under which it proposes to carry on business in the United Kingdom⁸.

An overseas company that has registered an alternative name may at any time deliver to the registrar of companies for registration a statement specifying a different name under which it proposes to carry on business in the United Kingdom (which may be its corporate name or a further alternative) in substitution for the name previously registered⁹. The alternative name which is for the time being registered in this way¹⁰ is treated for all purposes of the law applying

in the United Kingdom as the company's corporate name¹¹. This does not affect references¹² to the company's corporate name¹³, or affect any rights or obligation of the company¹⁴, or render defective any legal proceedings by or against the company¹⁵.

An EEA company¹⁶ may always register its corporate name¹⁷; in any other case, certain provisions of the Companies Act 2006 which govern a company's name¹⁸ apply in relation to the registration of the name of an overseas company¹⁹. However, the Companies Act 2006 provisions which govern the use of permitted characters etc in a company's name²⁰ apply in every case²¹.

1 As to the Secretary of State see PARA 6.

2 As to the meaning of 'overseas company' see PARA 1824.

3 I.e. regulations under the Companies Act 2006 s 1046 (see PARA 1826): see s 1047(1).

4 I.e. an overseas company that is required to register particulars (see PARA 1826): see s 1047(1).

5 Companies Act 2006 s 1047(1). As to the general provision so made under s 1046 see the Overseas Companies Regulations 2009, SI 2009/1801; and PARA 1826. As to the provision so made for the purposes of s 1047(1) in particular see the Overseas Companies Regulations 2009, SI 2009/1801, regs 6, 7, 13. In respect of the performance by the registrar of his functions in relation to the registration of documents required to be delivered to him under Pt 2 (regs 3-11), or in relation to the registration of an alteration to the registered particulars of an overseas company under Pt 3 (regs 12-17), the fees payable are those specified in the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 10(a), (b).

6 Companies Act 2006 s 1047(2)(a).

7 Companies Act 2006 s 1047(2)(b). The text refers to an alternative name specified in accordance with s 1048 (see the text and notes 8-15): see s 1047(2)(b).

8 Companies Act 2006 s 1048(1). In respect of the performance by the registrar of his functions in relation to the registration of an alternative name in accordance with s 1048, the fees payable are those specified in the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, Sch 1 para 10(c). As to the meaning of 'United Kingdom' see PARA 1 note 5. An overseas company that is required to register particulars under the Companies Act 2006 s 1046 (see PARA 1826) may at any time deliver to the registrar of companies for registration a statement specifying a name, other than its corporate name, under which it proposes to carry on business in the United Kingdom: see s 1048(1). As to the meaning of 'registrar of companies' see PARA 131 note 2. As to provision made for the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to delivery to the registrar where an overseas company is registered in more than one part of the United Kingdom see PARA 1828.

9 Companies Act 2006 s 1048(2).

10 I.e. registered under the Companies Act 2006 s 1048 (see the text and notes 8-9): see s 1048(3).

11 Companies Act 2006 s 1048(3).

12 I.e. in the Companies Act 2006 s 1047 or in s 1048 (see the text and notes 1-11): see s 1048(4)(a).

13 Companies Act 2006 s 1048(4)(a).

14 Companies Act 2006 s 1048(4)(b).

15 Companies Act 2006 s 1048(4)(c). Any legal proceedings that might have been continued or commenced against the company by its corporate name, or any name previously registered under s 1048, may be continued or commenced against it by its name for the time being so registered: s 1048(5).

16 As to the meaning of 'EEA company' see PARA 29.

17 Companies Act 2006 s 1047(3). This is subject only to s 1047(5) (see the text and notes 20-21): see s 1047(3).

18 le the following provisions of the Companies Act 2006 Pt 5 (ss 53-85) (a company's name) (see PARA 196 et seq): s 53 (prohibited names) (see PARA 196); ss 54-56 (sensitive words and expressions) (see PARA 196); s 65 (inappropriate use of indications of company type or legal form) (see PARA 204); ss 66-74 (similarity to other names) (see PARA 205 et seq); s 75 (provision of misleading information etc) (see PARA 215); and s 76 (misleading indication of activities) (see PARA 216): see s 1047(4). Any reference in the provisions mentioned in s 1047(4) to a change of name must be read as a reference to registration of a different name under s 1048 (see the text and notes 8-15): s 1047(6). See also the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, Pt 3 (regs 9-12), which apply Pts 1, 2 (regs 1-8) to overseas companies as they apply to the Companies Act 2006 ss 57, 60, 65, 66; and PARA 204 et seq.

19 Companies Act 2006 s 1047(4).

20 le the Companies Act 2006 s 57 (permitted characters etc) (see PARA 197): see s 1047(5). Any reference in the provisions mentioned in s 1047(5) to a change of name must be read as a reference to registration of a different name under s 1048 (see the text and notes 8-15): s 1047(6).

21 Companies Act 2006 s 1047(5). See also note 18.

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1828. Delivery to registrar where overseas company is registered in more than one part of the United Kingdom.

Where an overseas company¹ is required to register or has registered particulars under the Companies Act 2006² in more than one part of the United Kingdom³, the Secretary of State⁴ may provide by regulations⁵ that, in the case of such a company, anything authorised or required to be delivered to the registrar of companies⁶, under the provisions of the Companies Act 2006 that govern overseas companies⁷, is to be delivered: (1) to the registrar for each part of the United Kingdom in which the company is required to register or has registered particulars⁸; or (2) to the registrar for such part or parts of the United Kingdom as may be specified in or determined in accordance with the regulations⁹.

1 As to the meaning of 'overseas company' see PARA 1824.

2 le under the Companies Act 2006 s 1046 (see PARA 1826): see s 1057(1).

3 Companies Act 2006 s 1057(1). The provisions of s 1057 apply to an overseas company that is required to register or has registered particulars under s 1046 (see PARA 1826) in more than one part of the United Kingdom: see s 1057(1). As to the meaning of 'United Kingdom' see PARA 1 note 5.

4 As to the Secretary of State see PARA 6.

5 Regulations under the Companies Act 2006 s 1057 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1057(3), 1289. As to the making of regulations under the 2006 Act generally see ss 1288-1292. At the date at which this volume states the law, no such regulations had been made under s 1057. As to the provision that may be made in regulations in order to specify the person or persons responsible for compliance with any requirements imposed on overseas companies, and as to provision for related offences, see PARA 1835.

6 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to provision made for the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

7 le under the Companies Act 2006 Pt 34 (ss 1044-1059) (see PARAS 1824 et seq, 1829 et seq): see s 1057(2).

8 Companies Act 2006 s 1057(2)(a). Cf the Overseas Companies Regulations 2009, SI 2009/1801, reg 4, which refers simply to delivery to 'the registrar' each time a company opens an establishment in the United Kingdom (ie rather than requiring delivery in different parts of the United Kingdom).

9 Companies Act 2006 s 1057(2)(b). See note 8.

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1829. Duty to give notice of overseas company ceasing to have registrable presence.

The Secretary of State¹ may make provision by regulations² requiring an overseas company³:

- 3 (1) if it has registered particulars following the opening of a branch⁴, to give notice to the registrar of companies⁵ if it closes that branch⁶;
- 4 (2) if it has registered particulars in other circumstances⁷, to give notice to the registrar if the circumstances that gave rise to the obligation to register particulars cease to obtain⁸.

The regulations must provide for the notice to be given to the registrar for the part of the United Kingdom⁹ to which the original return of particulars was delivered¹⁰; and the regulations may specify the period within which notice must be given¹¹.

For the purposes of the Companies Act 2006 provisions that relate to overseas companies¹², the relocation of a branch from one part of the United Kingdom to another counts as the closing of one branch and the opening of another¹³; but the relocation of a branch within the same part of the United Kingdom does not¹⁴.

1 As to the Secretary of State see PARA 6.

2 Regulations under the Companies Act 2006 s 1058 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1058(4), 1289. As to the making of regulations under the 2006 Act generally see ss 1288-1292. In exercise of the power conferred under s 1058(1)-(3) (see also the text and notes 3-11), the Secretary of State has made the Overseas Companies Regulations 2009, SI 2009/1801, reg 77. As to the provision that may be made in regulations in order to specify the person or persons responsible for compliance with any requirements imposed on overseas companies, and as to provision for related offences, see PARA 1835.

3 Companies Act 2006 s 1058(1). As to the meaning of 'overseas company' see PARA 1824.

4 Ie in accordance with regulations under the Companies Act 2006 s 1046(2)(a) or s 1046(2)(b) (see PARA 1826): see s 1058(1)(a).

5 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to provision made for the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142.

6 Companies Act 2006 s 1058(1)(a). As to the provision so made see note 2.

7 Ie in accordance with regulations under the Companies Act 2006 s 1046(2)(c) (see PARA 1826): see s 1058(1)(b).

8 Companies Act 2006 s 1058(1)(b). As to the provision so made see note 2.

9 As to the meaning of 'United Kingdom' see PARA 1 note 5. As to delivery to the registrar where an overseas company is registered in more than one part of the United Kingdom see PARA 1828.

10 Companies Act 2006 s 1058(2). Cf the Overseas Companies Regulations 2009, SI 2009/1801, reg 77 (see note 2), which refers simply to notice being given to 'the registrar' each time a company closes a UK establishment in respect of which it has registered particulars (ie rather than requiring notice to be given in different parts of the United Kingdom).

11 Companies Act 2006 s 1058(3). The Overseas Companies Regulations 2009, SI 2009/1801, specifies merely that, if an overseas company closes a UK establishment in respect of which it has registered particulars, it must give notice of that fact to the registrar 'forthwith': see reg 77; and note 2.

12 Ie for the purposes of the Companies Act 2006 Pt 34 (ss 1044-1059) (see PARAS 1824 et seq, 1830 et seq): see s 1059.

13 Companies Act 2006 s 1059(a).

14 Companies Act 2006 s 1059(b).

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(3) ACCOUNTS AND OTHER REQUIREMENTS

1830. Accounts and reports: overseas companies in general.

The Secretary of State¹ may make provision by regulations² requiring an overseas company³ that is required to register specified particulars under the Companies Act 2006⁴: (1) to prepare the like accounts and directors' report⁵; and (2) to cause to be prepared such an auditor's report⁶, as would be required if the company were formed and registered under the Companies Act 2006⁷. The regulations may for this purpose apply, with or without modifications, all or any of the provisions of the Companies Act 2006 that govern accounts and reports⁸, and audit⁹.

The Secretary of State may make provision by regulations requiring an overseas company to deliver to the registrar of companies¹⁰ copies of: (a) the accounts and reports prepared in accordance with the regulations¹¹; or (b) the accounts and reports that it is required to prepare and have audited under the law of the country in which it is incorporated¹².

1 As to the Secretary of State see PARA 6.

2 Regulations under the Companies Act 2006 s 1049 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1049(4), 1289. As to the making of regulations under the 2006 Act generally see ss 1288-1292. In exercise of the power conferred under s 1049(1)-(3) (see also the text and notes 3-12), the Secretary of State has made the Overseas Companies Regulations 2009, SI 2009/1801. As to transitional provisions see reg 80, Sch 8. As to the provision that may be made in regulations in order to specify the person or persons responsible for compliance with any requirements imposed on overseas companies, and as to provision for related offences, see PARA 1835.

3 As to the meaning of 'overseas company' see PARA 1824.

4 Ie an overseas company that is required to register particulars under the Companies Act 2006 s 1046 (see PARA 1826): see s 1049(1).

5 Companies Act 2006 s 1049(1)(a). As to the provision so made see the Overseas Companies Regulations 2009, SI 2009/1801, Pt 5 (regs 30-42, Schs 4, 5) (delivery of accounting documents: general). In respect of the performance by the registrar of his functions in relation to the registration of all relevant documents in respect of an overseas company delivered during a relevant period payable at the end of that period on registration of the accounting documents or, as the case may be, the annual accounts of the overseas company required to be

delivered to the registrar under Pt 5, the fees payable on the registration of the documents so delivered are those specified in the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 10(e). As to the meanings of 'relevant documents' and 'relevant period' for these purposes see Sch 1 paras 2, 3.

Copies of accounting documents that are required to be delivered under the Overseas Companies Regulations 2009, SI 2009/1801, reg 32, and copies of accounts required to be delivered under the Companies Act 2006 s 441 (see PARA 869) as modified by the Overseas Companies Regulations 2009, SI 2009/1801, reg 40, are documents specified for the purposes of the Companies Act 2006 s 1105(2)(d) (see PARA 164) as documents that may be drawn up and delivered to the registrar in a language other than English, but which must, when delivered to the registrar, be accompanied by a certified translation into English: see the Overseas Companies Regulations 2009, SI 2009/1801, reg 78; and PARA 164. As to transitional provisions and savings which applied to existing overseas companies see reg 80, Sch 8. As to the general duty to prepare a company's accounts and reports see PARA 693 et seq; and as to the general duty imposed on the directors of a company to prepare a directors' report for each financial year of the company see PARA 816 et seq.

6 Companies Act 2006 s 1049(1)(b). As to the auditor's report on a company's accounts and the directors' report see PARA 905 et seq.

7 Companies Act 2006 s 1049(1). As to companies formed and registered under the Companies Act 2006 see PARA 102 et seq.

8 In the Companies Act 2006 Pt 15 (ss 380-474) (see PARA 693 et seq): see s 1049(2). As to the provision so made see note 5.

9 Companies Act 2006 s 1049(2). The text refers to the provisions of Pt 16 (ss 475-539) (see PARA 905 et seq): see s 1049(2).

10 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to provision made for the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to delivery to the registrar where an overseas company is registered in more than one part of the United Kingdom see PARA 1828.

11 Companies Act 2006 s 1049(3)(a). As to the provision so made see note 5.

12 Companies Act 2006 s 1049(3)(b). As to the provision so made see note 5. As to documents that are specified for the purposes of the Companies Act 2006 s 1105(2)(d) (see PARA 164) as documents that may be drawn up and delivered to the registrar in a language other than English, but which must, when delivered to the registrar, be accompanied by a certified translation into English, see the Overseas Companies Regulations 2009, SI 2009/1801, reg 78; and PARA 164.

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1831. Accounts and reports: credit or financial institutions.

The Secretary of State¹ may make provision by regulations² requiring a credit or financial institution³ that is incorporated or otherwise formed outside the United Kingdom and Gibraltar⁴, whose head office is outside the United Kingdom and Gibraltar⁵, and that has a branch in the United Kingdom⁶: (1) to prepare the like accounts and directors' report⁷; and (2) to cause to be prepared such an auditor's report⁸, as would be required if the institution were a company formed and registered under the Companies Act 2006⁹. The regulations may for this purpose apply, with or without modifications, all or any of the provisions of the Companies Act 2006 that govern accounts and reports¹⁰, and audit¹¹.

The Secretary of State may make provision by regulations requiring such an institution¹² to deliver to the registrar of companies¹³ copies of: (a) accounts and reports prepared in accordance with the regulations¹⁴; or (b) accounts and reports that it is required to prepare and have audited under the law of the country in which it has its head office¹⁵.

1 As to the Secretary of State see PARA 6.

2 Regulations under the Companies Act 2006 s 1050 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1050(6), 1289. As to the making of regulations under the 2006 Act generally see ss 1288-1292. In exercise of the power conferred under s 1050(3)-(5) (see the text and notes 3, 7-15), the Secretary of State has made the Overseas Companies Regulations 2009, SI 2009/1801. As to transitional provisions see reg 80, Sch 8. As to the provision that may be made in regulations in order to specify the person or persons responsible for compliance with any requirements imposed on overseas companies, and as to provision for related offences, see PARA 1835.

3 Ie an institution to which the Companies Act 2006 s 1050 applies: see s 1050(3). The institutions to which s 1050 applies are specified in s 1050(1): see the text and notes 4-6. As to the meaning of 'credit institution' in the Companies Acts see PARA 146 note 21; and as to the meaning of 'financial institution' in the Companies Acts see PARA 146 note 22.

4 Companies Act 2006 s 1050(1)(a). As to the meaning of 'United Kingdom' see PARA 1 note 5.

5 Companies Act 2006 s 1050(1)(b).

6 Companies Act 2006 s 1050(1)(c). For the purposes of s 1050(1), 'branch' means a place of business that forms a legally dependent part of the institution and conducts directly all or some of the operations inherent in its business: s 1050(2).

7 Companies Act 2006 s 1050(3)(a). As to the provision so made see the Overseas Companies Regulations 2009, SI 2009/1801, Pt 6 (regs 43-57, Schs 6, 7) (delivery of accounting documents: credit or financial institutions). In respect of the performance by the registrar of his functions in relation to the registration of all relevant documents in respect of an overseas company delivered during a relevant period payable at the end of that period on registration of the accounting documents or, as the case may be, the annual accounts of the overseas company required to be delivered to the registrar under Pt 6, the fees payable on the registration of the documents so delivered are those specified in the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 10(e). As to the meanings of 'relevant documents' and 'relevant period' for these purposes see Sch 1 paras 2, 3.

Copies of accounting documents that are required to be delivered under the Overseas Companies Regulations 2009, SI 2009/1801, regs 45 or 46, and copies of accounts required to be delivered under the Companies Act 2006 s 441 (see PARA 869) as modified by the Overseas Companies Regulations 2009, SI 2009/1801, reg 55, are documents specified for the purposes of the Companies Act 2006 s 1105(2)(d) (see PARA 164) as documents that may be drawn up and delivered to the registrar in a language other than English, but which must, when delivered to the registrar, be accompanied by a certified translation into English: see the Overseas Companies Regulations 2009, SI 2009/1801, reg 78; and PARA 164. As to transitional provisions and savings which applied to existing overseas companies see reg 80, Sch 8. As to the general duty to prepare a company's accounts and reports see PARA 693 et seq; and as to the general duty imposed on the directors of a company to prepare a directors' report for each financial year of the company see PARA 816 et seq.

8 Companies Act 2006 s 1050(3)(b). As to the auditor's report on a company's accounts see PARA 905 et seq.

9 Companies Act 2006 s 1050(3). As to companies formed and registered under the Companies Act 2006 see PARA 102 et seq.

10 Ie the Companies Act 2006 Pt 15 (ss 380-474) (see PARA 693 et seq): see s 1050(4). As to the provision so made see note 7.

11 Companies Act 2006 s 1050(4). The text refers to the provisions of Pt 16 (ss 475-539) (see PARA 905 et seq): see s 1050(4).

12 Ie an institution to which the Companies Act 2006 s 1050 applies: see s 1050(5). The institutions to which s 1050 applies are specified in s 1050(1): see the text and notes 4-6.

13 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to provision made for the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of documents to the registrar see PARA 142. As to delivery to the registrar where an overseas company is registered in more than one part of the United Kingdom see PARA 1828.

14 Companies Act 2006 s 1050(5)(a). As to the provision so made see note 7.

15 Companies Act 2006 s 1050(5)(b). As to the provision so made see note 7.

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1832. Trading disclosures by overseas companies.

The Secretary of State¹ may by regulations² make provision requiring overseas companies³ carrying on business in the United Kingdom⁴:

- 5 (1) to display specified information in specified locations⁵;
- 6 (2) to state specified information in specified descriptions of document or communication⁶; and
- 7 (3) to provide specified information on request to those they deal with in the course of their business⁷.

The regulations: (a) must in every case require a company that has registered particulars under the Companies Act 2006⁸ to disclose the name also registered by it under the Companies Act 2006⁹; and (b) may make provision as to the manner in which any specified information is to be displayed, stated or provided¹⁰; and (c) may make provision corresponding to that made by the Companies Act 2006 in relation to the civil consequences¹¹, and the criminal consequences¹², of a failure to make the required disclosure¹³.

1 As to the Secretary of State see PARA 6.

2 Regulations under the Companies Act 2006 s 1051 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): ss 1051(5), 1290. As to the making of regulations under the 2006 Act generally see ss 1288-1292. In exercise of the power conferred under s 1051(1)-(3) (see also the text and notes 3-13), the Secretary of State has made the Overseas Companies Regulations 2009, SI 2009/1801. As to transitional provisions see reg 80, Sch 8. As to the provision that may be made in regulations in order to specify the person or persons responsible for compliance with any requirements imposed on overseas companies, and as to provision for related offences, see PARA 1835.

3 As to the meaning of 'overseas company' see PARA 1824.

4 Companies Act 2006 s 1051(1). As to the meaning of 'United Kingdom' see PARA 1 note 5.

5 Companies Act 2006 s 1051(1)(a). For these purposes, 'specified' means specified in the regulations: s 1051(4). As to the provision so made see the Overseas Companies Regulations 2009, SI 2009/1801, Pt 7 (regs 58-67) (trading disclosures).

6 Companies Act 2006 s 1051(1)(b). As to the provision so made see note 5.

7 Companies Act 2006 s 1051(1)(c). As to the provision so made see note 5.

8 Ie a company that has registered particulars under the Companies Act 2006 s 1046 (see PARA 1826): see s 1051(2)(a).

9 Companies Act 2006 s 1051(2)(a). As to the provision so made see note 5.

10 Companies Act 2006 s 1051(2)(b). The text refers to the name registered by a company under s 1047 (see PARA 1827): see s 1051(2)(b). As to the provision so made see note 5.

11 Ie the provision made by the Companies Act 2006 s 83 (see PARA 222): see s 1051(3). Accordingly, see the Overseas Companies Regulations 2009, SI 2009/1801, reg 66.

12 Ie the provision made by the Companies Act 2006 s 84 (see PARA 220): see s 1051(3). Accordingly, see the Overseas Companies Regulations 2009, SI 2009/1801, reg 67.

13 Companies Act 2006 s 1051(3). As to the provision so made see note 5.

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1833. Charges over property in the United Kingdom to be registered.

The Secretary of State¹ may by regulations² make provision about the registration of specified³ charges over property in the United Kingdom⁴ of a registered overseas company⁵. This power⁶ includes power to make provision about⁷:

- 8 (1) a registered overseas company that has particulars registered in more than one part of the United Kingdom⁸ or has property in more than one part of the United Kingdom⁹;
- 9 (2) the circumstances in which property is to be regarded, for the purposes of the regulations, as being, or not being, in the United Kingdom or in a particular part of the United Kingdom¹⁰;
- 10 (3) the keeping by a registered overseas company of records and registers about specified charges and their inspection¹¹;
- 11 (4) the consequences of a failure to register a charge in accordance with the regulations¹²;
- 12 (5) the circumstances in which a registered overseas company ceases to be subject to the regulations¹³.

The regulations may for this purpose apply, with or without modifications, any of the provisions of the Companies Act 2006 that govern company charges¹⁴; and may modify any reference in an enactment¹⁵ to those provisions (or to a particular provision)¹⁶, so as to include a reference to the regulations or to a specified provision of the regulations¹⁷.

1 As to the Secretary of State see PARA 6.

2 Regulations under the Companies Act 2006 s 1052 are subject to negative resolution procedure (ie the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament): ss 1052(5), 1289. As to the making of regulations under the 2006 Act generally see ss 1288-1292. In exercise of the power conferred under s 1052, the Secretary of State has made the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, SI 2009/1917. See also the text and notes 3-17. As to the provision that may be made in regulations in order to specify the person or persons responsible for compliance with any requirements imposed on overseas companies, and as to provision for related offences, see PARA 1835.

3 For these purposes, 'specified' means specified in the regulations: Companies Act 2006 s 1052(6).

4 As to the meaning of 'United Kingdom' see PARA 1 note 5.

5 Companies Act 2006 s 1052(1). For these purposes, 'registered overseas company' means an overseas company that has registered particulars under s 1046(1) (see PARA 1826): see s 1052(6). As to the meaning of 'overseas company' see PARA 1824. As to the provision in regulations so made see the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, SI 2009/1917, regs 8-28, Schedule. In respect of the performance by the registrar of his functions in relation to the registration of a charge under Pt 3 (regs 8-28), the fees payable are those specified in the Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101, reg 3, Sch 1 para 10(d).

6 Ie the power in the Companies Act 2006 s 1052(1) (see the text and notes 1-5): see s 1052(2).

- 7 Companies Act 2006 s 1052(2).
- 8 Companies Act 2006 s 1052(2)(a)(i). As to the provision so made see note 5.
- 9 Companies Act 2006 s 1052(2)(a)(ii). As to the provision so made see note 5.
- 10 Companies Act 2006 s 1052(2)(b). As to the provision so made see note 5.
- 11 Companies Act 2006 s 1052(2)(c). As to the provision so made see note 5.
- 12 Companies Act 2006 s 1052(2)(d). As to the provision so made see note 5.
- 13 Companies Act 2006 s 1052(2)(e). As to the provision so made see note 5.
- 14 Companies Act 2006 s 1052(3). The text refers to applying, with or without modifications, any of the provisions of Pt 25 (ss 860-894) (company charges) (see PARA 1277 et seq): see s 1052(3). As to the provision so made see note 5.
- 15 As to the meaning of 'enactment' see PARA 17 note 2.
- 16 As to the Companies Act 2006 Pt 25 (company charges) (see PARA 1277 et seq), or to a particular provision of Pt 25: see s 1052(4).
- 17 Companies Act 2006 s 1052(4). As to the provision so made see note 5.

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1834. Other returns etc required of overseas companies.

In relation to overseas companies¹ that are required to register particulars under the Companies Act 2006², the Secretary of State³ may make provision by regulations⁴ requiring the delivery to the registrar of companies⁵ of returns⁶: (1) by such a company⁷ that either is being wound up⁸, or becomes or ceases to be subject to insolvency proceedings, or an arrangement or composition or any analogous proceedings⁹; (2) by the liquidator of such a company¹⁰.

The regulations may specify the circumstances in which a return is to be made¹¹, the particulars to be given in it¹², and the period within which it is to be made¹³; and the regulations may include provision corresponding to any provision made by the Companies Act 2006¹⁴ which imposes a duty to notify the registrar of certain appointments¹⁵.

- 1 As to the meaning of 'overseas company' see PARA 1824.
- 2 See the Companies Act 2006 s 1053(1). The provisions of s 1053 apply to overseas companies that are required to register particulars under s 1046(1) (see PARA 1826): see s 1053(1).
- 3 As to the Secretary of State see PARA 6.
- 4 Regulations under the Companies Act 2006 s 1053 are subject to affirmative resolution procedure (ie the regulations must not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament): ss 1053(6), 1290. As to the making of regulations under the 2006 Act generally see ss 1288-1292. In exercise of the power conferred under s 1053(2)-(5) (see also the text and notes 5-15), the Secretary of State has made the Overseas Companies Regulations 2009, SI 2009/1801. As to transitional provisions see reg 80, Sch 8. As to the provision that may be made in regulations in order to specify the person or persons responsible for compliance with any requirements imposed on overseas companies, and as to provision for related offences, see PARA 1835.
- 5 As to the meaning of 'registrar of companies' see PARA 131 note 2. As to provision made for the delivery of documents to the registrar see PARA 141; and as to the requirements generally for the proper delivery of

documents to the registrar see PARA 142. As to delivery to the registrar where an overseas company is registered in more than one part of the United Kingdom see PARA 1828.

6 See the Companies Act 2006 s 1053(2). As to the provision so made see the Overseas Companies Regulations 2009, SI 2009/1801, Pt 8 (regs 68-74).

7 Ie a company to which the Companies Act 2006 s 1053 applies (see note 2): see s 1053(2)(a).

8 Companies Act 2006 s 1053(2)(a)(i). As to the provision so made see note 6. As to winding up in general see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

9 Companies Act 2006 s 1053(2)(a)(ii). As to the provision so made see note 6.

10 Companies Act 2006 s 1053(2)(b). The text refers to a company to which s 1053 applies (see note 2): see s 1053(2)(b). As to the provision so made see note 6. As to the appointment of a liquidator see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 950.

11 Companies Act 2006 s 1053(3)(a). As to the provision so made see note 6.

12 Companies Act 2006 s 1053(3)(b). As to the provision so made see note 6.

13 Companies Act 2006 s 1053(3)(c). As to the provision so made see note 6.

14 Ie by the Companies Act 2006 s 1154 (see PARA 97 note 3): see s 1053(5).

15 Companies Act 2006 s 1053(5). As to the provision so made see note 6.

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(4) SUPPLEMENTARY PROVISION

1835. Offences for failure to comply with requirements imposed on overseas companies.

Regulations made in relation to overseas companies¹ may specify the person or persons responsible for complying with any specified requirement of the regulations².

Such regulations³ may make provision for offences, including provision as to the person or persons liable in the case of any specified contravention of the regulations⁴, and including provision as to circumstances that are, or are not, to be a defence on a charge of such an offence⁵; but the regulations must not provide for imprisonment⁶, or for the imposition (on summary conviction) of a fine exceeding level 5 on the standard scale⁷ and (for continued contravention) a daily default fine⁸ not exceeding one-tenth of level 5 on the standard scale⁹.

1 Ie regulations under the Companies Act 2006 Pt 34 (ss 1044-1059) (see PARA 1824 et seq): see s 1054(1). As to the meaning of 'overseas company' see PARA 1824.

2 Companies Act 2006 s 1054(1). For these purposes, 'specified' means specified in the regulations: s 1054(4). As to the provision so made see the Overseas Companies Regulations 2009, SI 2009/1801; and see PARAS 1826, 1827, 1830, 1831, 1832, 1834.

3 Ie regulations under the Companies Act 2006 Pt 34 (see PARA 1824 et seq): see s 1054(2).

4 Companies Act 2006 s 1054(2)(a). As to the provision so made see note 2.

5 Companies Act 2006 s 1054(2)(b). As to the provision so made see note 2.

- 6 Companies Act 2006 s 1054(3)(a).
- 7 As to the meaning of the 'standard scale' see PARA 1622.
- 8 As to the meaning of 'daily default fine' see PARA 1622.
- 9 Companies Act 2006 s 1054(3)(b).

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1836. Service of documents on overseas companies.

A document may be served on an overseas company¹ whose particulars are registered under the Companies Act 2006²:

- 13 (1) by leaving it at, or sending it by post³ to, the registered address⁴ of any person resident in the United Kingdom⁵ who is authorised to accept service of documents on the company's behalf⁶; or
- 14 (2) if there is no such person (or if any such person refuses service or service cannot for any other reason be effected⁷) by leaving it at or sending by post to any place of business of the company in the United Kingdom⁸.

A document also may be served on such a person holding any such position, in the case of an overseas company whose particulars are registered under the Companies Act 2006, as may be specified for the purpose⁹.

In civil proceedings generally, a company may be served by any method permitted under the CPR Pt 6, or by any of the methods of service set out in the Companies Act 2006¹⁰.

- 1 As to the meaning of 'overseas company' see PARA 1824.
- 2 Companies Act 2006 s 1139(2). The text refers to an overseas company whose particulars are registered under s 1046 (see PARA 1826): see s 1139(2).
- 3 Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post: see the Interpretation Act 1978 s 7; and **STATUTES** vol 44(1) (Reissue) PARA 1388. As to proof of posting and proof of delivery see **CIVIL PROCEDURE** vol 11 (2009) PARAS 945, 946. A requirement to send a document by post is not confined to sending it by the Post Office postal system: see the Postal Services Act 2000 s 127(4), Sch 8 Pt 1; and **POST OFFICE**.
- 4 For these purposes, a person's 'registered address' means any address for the time being shown as a current address in relation to that person in the part of the register available for public inspection: Companies Act 2006 s 1139(3). As to the meaning of the 'register' see PARA 146.
- 5 As to the meaning of 'United Kingdom' see PARA 1 note 5.
- 6 Companies Act 2006 s 1139(2)(a). As to persons whose names have been delivered to the registrar of companies as authorised to accept on behalf of the company service of process or notices see PARA 1826.
- 7 Under the Companies (Consolidation) Act 1908 (repealed), it was held that service on a person whose name and address had been given was good service, even where he refused to accept it on the ground that his authority to do so had ceased: *Employers' Liability Assurance Corpn v Sedgwick, Collins & Co* [1927] AC 95, HL.

However, in view of the wording of the Companies Act 2006 s 1139(2), it is doubtful to what extent this case remains good law.

8 Companies Act 2006 s 1139(2)(b). The place of business contemplated here is one which is established at the time of service rather than a former place of business: *Deverall v Grant Advertising Inc* [1955] Ch 111, [1954] 3 All ER 389, CA. What has to be shown in every case is that the business which is carried on at the relevant location is the business of the company itself; it is possible for a company to carry on business in the United Kingdom without having a place of business here: *Rakusens Ltd v Baser Ambalaj Plastik Sanayi Ticaret AS* [2001] EWCA Civ 1820, [2002] 1 BCLC 104, CA (address of agent not an established place of business for the company). See also *Matchnet plc v William Blair & Co LLC* [2002] EWHC 2128 (Ch), [2003] 2 BCLC 195 (claimant company not entitled to rely upon the service of the claim form at an address where the evidence was not conclusive as to whether the defendant company had established a place of business there).

A company establishes a place of business within Great Britain if it carries on part of its business activities within the jurisdiction and it is not necessary for those activities to be either a substantial part of or more than incidental to the main objects of the company: *South India Shipping Corpn Ltd v Export-Import Bank of Korea* [1985] 2 All ER 219, [1985] 1 WLR 585, CA, distinguished in *O'Hara v McDougal* [2005] EWCA Civ 1623, [2005] All ER (D) 275 (Nov) (it cannot be right that the mere fact that a person is the landlord of a large piece of land, with many properties, would enable him to be served at any one of those properties under CPR 6.5). As to service on overseas companies see also *O'Hara v McDougal* at [14] per Neuberger LJ (it may well be that the court should adopt a more generous approach, so far as the server of a document is concerned, in relation to an overseas company in respect of which there may be no other means of service other than in accordance with the Companies Acts, than when considering services for the purposes of CPR 6.5 at a place of business); and *Lakah Group v Al Jazeera Satellite Channel* [2003] EWHC 1297 (QB), [2003] All ER (D) 141 (Jun) (requirement of service was very important, particularly in cases concerning non-resident defendants, and it might be open to the claimants to seek redress in another jurisdiction). As to CPR Pt 6 see **CIVIL PROCEDURE** vol 11 (2009) PARA 138 et seq.

9 See the Companies Act 2006 s 1140(2)(b); and PARA 672. The positions specified for the purposes of s 1140(2)(b) are director, secretary, and permanent representative: see the Overseas Companies Regulations 2009, SI 2009/1801, reg 75; and PARA 672.

10 See CPR 6.3(2); and PARA 1838. As to service of documents in civil proceedings generally see CPR Pt 6; and **CIVIL PROCEDURE** vol 11 (2009) PARA 138 et seq. As to the rules for service out of the jurisdiction see **CIVIL PROCEDURE** vol 11 (2009) PARA 156 et seq.

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(5) RECOGNITION OF FOREIGN COMPANIES AND CORPORATIONS

1837. Recognition of foreign company.

A company which purports to have been incorporated in a foreign country may be recognised as a corporation in England¹ and, as such, English law will allow it to sue and be sued in England in its corporate capacity². The universal succession of one foreign corporate body to another will also be recognised³.

1 As to recognition under the Foreign Corporations Act 1991 see PARA 1841. It is generally accepted as a matter of private international law that the law of the place of incorporation determines the capacity of the company, the composition and powers of the various organs of the company, the formalities and procedures laid down for them, the extent of an individual member's liability for the debts and liabilities of the company, and other matters of that kind: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 465 et seq. As to EC requirements relating to recognition see PARA 22. As to the meaning of 'England' see PARA 1 note 5.

2 *Henriques v General Privileged Dutch Co Trading to West Indies* (1728) 2 Ld Raym 1532; *Newby v von Oppen and Colt's Patent Firearms Manufacturing Co* (1872) LR 7 QB 293; *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289 at 297, HL.

3 *National Bank of Greece and Athens SA v Metliss* [1958] AC 509, [1957] 3 All ER 608, HL (creditor's action against successor to foreign guarantor company). See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 467.

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1838. Proceedings by and against foreign companies.

A foreign company may sue or be sued in an English court¹. The lex fori regulates the procedure and the parties to be joined².

In civil proceedings, a company may be served by any method permitted under the Civil Procedure Rules³, or by any of the methods of service permitted under the Companies Act 2006⁴.

1 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 465. As to the effect of misnomer see PARA 301.

2 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 11 et seq. However, all matters which are part of the internal management of the corporation are in principle governed by the law of the place of incorporation: see eg *Pergamon Press Ltd v Maxwell* [1970] 2 All ER 809, [1970] 1 WLR 1167; *Sierra Leone Telecommunications Co Ltd v Barclays Bank plc* [1998] 2 All ER 821; *Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316, [2005] 1 All ER (Comm) 17, [2005] 1 WLR 1157; *Reeves v Sprecher* [2007] EWHC 117 (Ch), [2007] 2 BCLC 614.

3 See under CPR Pt 6 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 138 et seq): see CPR 6.3(2) (Pt 6 substituted by SI 2008/2178; CPR 6.3.2 amended by SI 2009/2092).

4 CPR 6.3(2) (as substituted and amended: see note 3). The Companies Act 1985 has been largely repealed. As to service of documents on overseas companies under the Companies Act 2006 see PARA 1836. As to the civil procedure rules for service out of the jurisdiction see **CIVIL PROCEDURE** vol 11 (2009) PARA 156 et seq.

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1839. Proceedings by shareholders on behalf of the company.

A minority of the shareholders of a foreign company may sue the directors or managing body in England and the foreign company to restrain the foreign company from acting ultra vires its constitution¹.

However, the courts of the place of incorporation will almost invariably be the most appropriate forum for the resolution of issues that relate to the right of shareholders to sue on behalf of the company².

1 *Pickering v Stephenson* (1872) LR 14 Eq 322. See PARA 262. The possibility of the applicable foreign law having provisions comparable to the Companies Act 2006 ss 39-40 (which give statutory protection against limitations arising under the company's constitution to third parties dealing with a company) (see PARAS 256, 265 et seq) must be borne in mind.

2 *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 All ER 979, [2002] 1 BCLC 336; *Reeves v Sprecher* [2007] EWHC 117 (Ch), [2007] 2 BCLC 614. As to derivative claims by members see PARA 455 et seq.

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1840. Security for costs of proceedings initiated by foreign company.

When starting proceedings or applying to the court, a foreign company may be ordered to give security for costs of the proceedings¹.

1 See CPR 25.12, 25.13; and **CIVIL PROCEDURE** vol 11 (2009) PARA 745 et seq. See also PARA 308.

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1841. Recognition under the Foreign Corporations Act 1991.

If at any time:

- 15 (1) any question arises whether a body which purports to have (or, as the case may be, which appears to have) lost corporate status under the laws of a territory which is not at that time a recognised state¹ should or should not be regarded as having legal personality as a body corporate under the law of any part of the United Kingdom²; and
- 16 (2) it appears that the laws of that territory are at that time applied by a settled court system in that territory³,

that question and any other material question⁴ relating to that body must be determined (and account taken of those laws) as if that territory were a recognised state⁵.

Any registration or other thing done before 25 September 1991⁶ is valid if it would have been valid before that date had the provisions described above then been in force⁷.

1 For these purposes, a 'recognised state' means a territory which is recognised by Her Majesty's government in the United Kingdom as a state (Foreign Corporations Act 1991 s 1(2)(a)); and the laws of a territory which is so recognised are taken to include the laws of any part of the territory which are acknowledged by the federal or other central government of the territory as a whole (s 1(2)(b)). As to the meaning of 'United Kingdom' see PARA 1 note 5. As to the recognition of foreign states see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 997-998; and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 41.

2 Foreign Corporations Act 1991 s 1(1)(a).

3 Foreign Corporations Act 1991 s 1(1)(b).

4 For these purposes, a material question is a question (whether as to capacity, construction or otherwise) which, in the case of a body corporate, falls to be determined by reference to the laws of the territory under which the body is incorporated: Foreign Corporations Act 1991 s 1(2)(c).

Under the 'Brussels I' Regulation (and the Lugano Convention, to the extent that this continues to apply), apart from proceedings concerning immovable property, the other cases in which exclusive jurisdiction, regardless of domicile, is conferred on the courts of a particular Regulation (or contracting) state, include proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the decisions of their organs, in which cases exclusive jurisdiction is conferred upon the courts of the Regulation (or contracting) state in which the company, legal person or association has its seat: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 76. See also *Newtherapeutics Ltd v Katz* [1991] Ch 226, [1991] 2 All ER 151 (the validity of the decisions of organs, as distinct from the decisions themselves, must be the object of the proceedings); *Grupo Torras SA v Sheikh Fahad Mohammed Al-Sabeh* [1996] 1 Lloyd's Rep 7, CA (claims alleging abuse of authority are not concerned with the acts of the organs of a company, but with wrongful acts of individuals). The mere fact that there appears to be no live issue of English company law at stake does not have a bearing upon whether the English court has jurisdiction: see *Speed Investments Ltd v Formula One Holdings Ltd* [2004] EWCA Civ 1512, [2005] 1 WLR 1936, [2005] 1 BCLC 455 (decision as to jurisdiction accorded with practical convenience and with the reasonable expectations of those involved, ie that such issues of internal management as did arise should be decided in the courts in which the company had its seat), applied in *Choudhary v Bhattar* [2009] EWHC 314 (Ch), [2009] 2 BCLC 108, [2009] All ER (D) 163 (Feb) (case sought the determination of the composition of the board of directors and of the general body of shareholders and their entitlement to vote at a general meeting).

5 Foreign Corporations Act 1991 s 1(1).

6 Ie before the day on which the Foreign Corporations Act 1991 came into force (see s 2(3)): see s 1(3).

7 Foreign Corporations Act 1991 s 1(3).